STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of ALICE J. RAYMOND, Deceased.

CLAIR MORSE,

Petitioner-Appellee,

v

VALERIE SHARKEY, GAIL THOMAS, GARY ZEIGLER, DEANNA CONANT, CARYN NUZHET, JAY CURRY, MARY JEAN MANDELA, JOHN PACKARD, FRANK PACKARD, LISA MORSE, ELLIOT GUILLORY, ROBERT MCCLELLAND, BEVERLY CLEMENT, DAVID MORSE, JUDITH FROELICK, PHILLIP MORSE, JOAN SUMMERS, JANICE FELKEY, DONALD MORSE, MARVIN STULL, ERIC STULL, FRANK BRIGGS, JOANNE CARTER, and MARILYN RIGEL,

Respondents-Appellants.

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No. 267364
Lenawee Probate Court
LC No. 05-044839-DE

Official Reported Version

Before: Whitbeck, C.J., and Murphy and Cooper, JJ.

MURPHY, J. (*dissenting*).

Because I conclude that the plain language of the will indicates that the estate would be shared by surviving siblings and the surviving descendants of siblings who had predeceased the testator, Alice J. Raymond, I respectfully dissent.

Respondents appeal as of right the probate court's order denying them a share of the residue of the testator's estate. Respondents argue that the probate court erred in construing the testator's will. Contrary to the majority opinion, I agree.

The testator and her husband, Claude C. Raymond (Raymond), prepared mirror-image wills that bequeathed, after the payment of funeral and administration costs and taxes, the residue and remainder of the estate to the other spouse should he or she still be living. Raymond

predeceased the testator, and, under these circumstances, the testator's will provided that the residue and remainder of the estate was to be divided as follows:

> A. Fifty (50%) per cent thereof to my brother [sic] and sisters that survive me share and share alike or to the survivor or survivors thereof.
>
> B. Fifty (50%) per cent thereof to the brothers and sisters of my husband that survive me, share and share alike or to the survivor or survivors thereof.

When the testator died, two of her brothers and three of Raymond's siblings were living. Respondents are descendants of those siblings of the testator and Raymond who were deceased when the testator died. The testator's brother, petitioner Clair A. Morse, filed the probate petition and subsequently requested construction of the testator's will. He argued that the probate court should construe the residuary clause to mean that only the siblings of the testator and Raymond who survived the testator's death would share in the estate, with no share going to the surviving descendants of siblings who had predeceased the testator. The trial court agreed, concluding that the clause "or to the survivor or survivors thereof" referred only to siblings who survived the testator and not the descendants of predeceased siblings.

A probate court's construction of a will is a legal question that we review de novo. *In re Reisman Estate*, 266 Mich App 522, 526; 702 NW2d 658 (2005). The probate court's role is to ascertain and give effect to the testator's intent, which it gleans solely from the plain language of the will unless there is an ambiguity. *Id.* at 527. If possible, each word of a will should be given meaning. *Id.*

I conclude that the plain language of the will indicates that the estate would be shared by the surviving siblings and the surviving descendants of siblings who had predeceased the testator. The probate court's construction of the will would render the clause "or to the survivor or survivors thereof" redundant and without meaning.

In *In re Burruss Estate*, 152 Mich App 660, 662; 394 NW2d 466 (1986), this Court interpreted the following will provision:

> ". . . I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, wheresoever situated, in equal amounts, share and share alike, to my daughters, Anna Mary Vollick of Redford Township, Wayne County, Michigan, Jeanne Glaeser of Detroit, Michigan and Audrey Larson of Detroit, Michigan, or to the survivor or survivors of them."

Two of the daughters survived their decedent mother and claimed that, under the will, they alone should share in the estate, with no share being distributed to the children of the third daughter, who had predeceased her decedent mother. This Court, relying on *In re Holtforth's Estate*, 298 Mich 708; 299 NW 776 (1941), agreed and held that the clear language of the will showed the decedent's intent that only her surviving daughters, not their descendants, inherit under her will. *Burruss, supra* at 664-665.

In *Holtforth's Estate, supra* at 709, the language in the will devised and bequeathed part of the decedent's estate to "the seven children of my brother, John Holtforth, and the survivor of them . . . ." The Michigan Supreme Court held:

> We conclude it clearly appears from the context of the will itself the testator by the terms of this second paragraph [quoted above] intended and provided that in the event one or more of the children of John Holtforth predeceased the testator, the portion of the estate that passed under this second paragraph of the will should go to the survivors of the John Holtforth children. [*Id.* at 711.]

I find that *Burruss* and *Holtforth's Estate* are distinguishable because of a significant difference in the language of the wills. Before the clause "or to the survivor or survivors thereof," the will in this case specifically defines the brothers and sisters inheriting under the will as those "that survive me," with "me" being the testator. No such defining language is found in the wills at issue in *Burruss* and *Holtforth's Estate*. Reading the subsequent clause "or to the survivor or survivors thereof" to likewise narrow the field of devisees to the testator's and Raymond's surviving siblings is illogical because that point had already been established. Clearly, the concluding clause was meant to refer to a group other than the surviving siblings, and the only logical conclusion is that this group consisted of the descendants of predeceased siblings, i.e., their survivors. To construe the clause otherwise would render it meaningless, and every word in a will should be given meaning. *Reisman Estate, supra* at 527. In both *Burruss* and *Holtforth's Estate*, there was no redundancy in the interpretations rendered by the courts, but such a redundancy would exist in the case at bar were we to agree with the probate court's construction. Under the probate court's and the majority's interpretation of the will, the testator was essentially stating that she wished to leave her brothers and sisters part of the estate if they were alive when the testator died *or* she wished to leave her brothers and sisters part of the estate if they were alive when the testator died. Clearly, this is an unsound and duplicative construction of the will. In general, the "disjunctive term 'or' refers to a choice or alternative between two or more things." *Yankee Springs Twp v Fox*, 264 Mich App 604, 608; 692 NW2d 728 (2004); see also *Auto-Owners Ins Co v Stenberg Bros, Inc*, 227 Mich App 45, 50; 575 NW2d 79 (1997); *Root v Ins Co of North America*, 214 Mich App 106, 109; 542 NW2d 318 (1995). In looking at the result reached by the majority, it is evident that the majority basically interprets the first and second clauses in the same manner instead of properly treating the second clause as an alternate devise should a sibling not survive the testator.

In my opinion, the majority's reliance on the phrase "share and share alike" does not bolster a construction that limits the class solely to surviving siblings because the analysis ignores the second clause that makes an alternate gift if a sibling predeceased the testator. The phrase "share and share alike" simply indicates an intent that any surviving siblings be treated equally. With respect to the majority's reliance on the definition of "survivor," words must be read and understood in their grammatical context, see *Shinholster v Annapolis Hosp*, 471 Mich 540, 549; 685 NW2d 275 (2004), and the majority fails to read the term in the context of the second clause as affected by the first clause. A "survivor" is "[o]ne who outlives another." Black's Law Dictionary (7th ed). Read in context, "survivor," as used in the second clause, refers to an alternate devisee should a sibling have predeceased the testator, and there can be no dispute that a deceased sibling's descendant "outlived" the deceased sibling.

The majority states, "We therefore conclude that the phrase 'or to the survivor or survivors thereof ' in paragraph A modifies the phrase 'my brother[s] and sisters that survive me,' thereby referring to those of testators' siblings who survived testator . . . ." *Ante* at ___. The problem with this analysis is again the redundancy and the majority's disregard of survivor-type language in both clauses. In the first clause, brothers and sisters as a class taking under the will are limited to surviving brothers and sisters because the words "that survive me" define or describe the class. And thus the second clause's reference to "survivor or survivors thereof" necessarily speaks of survivors of those already surviving, that is if one accepts the majority's analysis that the second clause modifies the first clause. But I cannot conceive of how a living individual survives himself or herself. The proper approach to examining the language at issue is to view the first clause as creating a potential class that will not take under the will, i.e., the deceased siblings, and then read the second clause as an alternate clause used when a sibling has indeed predeceased the testator. I would hold that the plain language of the will indicates that the estate would be shared by surviving siblings and the surviving descendants of the siblings who had predeceased the testator.

Furthermore, the 50-percent family-division language found in the will supports my interpretation. This language indicates a clear intent that the two families share equally. This intent would not be honored were one to interpret the will as done by the majority and the probate court. For example, if none of Raymond's siblings had outlived the testator, there would be no gift whatsoever to Raymond's side of the family because the prospective 50-percent gift would presumptively be awarded to the testator's side of the family under intestate succession. By way of another example, had Raymond outlived the testator and, at Raymond's death, had none of the testator's siblings remained alive, the entire estate would go to Raymond's side of the family. This was clearly not the intent of Raymond or the testator, and her intent can only be honored by allowing the descendants of predeceased siblings to share in the residue of the estate.

I would reverse and remand for entry of a judgment in favor of respondents. Accordingly, I respectfully dissent.

/s/ William B. Murphy