IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1043

Filed: 3 September 2019

Iredell County, No. 17 CVS 1941

BILLIE CRESS SHERRILL BRAWLEY, as Executrix of the Estate of Zoie S. Deaton a/k/a Zoe Lee Spears Deaton, Plaintiff,

v.

BOBBY VANCE SHERRILL, BRADLEY BRAWLEY, and REBECCA BRAWLEY THOMPSON, Defendants.

Appeal by defendant Rebecca Brawley Thompson from order entered 20 June 2018 by Judge Mark E. Klass in Iredell County Superior Court. Heard in the Court of Appeals 13 March 2019.

Homesley, Gaines, Dudley & Clodfelter, LLP, by T.C. Homesley, Jr., and Christina E. Clodfelter, for defendant-appellee Bobby Vance Sherrill.

Jones, Childers, Donaldson & Webb, PLLC, by Mark L. Childers, for defendant-appellant Rebecca Brawley Thompson.

No brief filed for plaintiff-appellee Billie Cress Sherrill Brawley as Executrix of the Estate of Zoie S. Deaton a/k/a Zoe Lee Spears Deaton.

No brief filed for defendant-appellee Bradley Brawley.

ZACHARY, Judge.

This appeal concerns application of the Latin term "*per stirpes*," which has been employed as a term of art in wills and estates for more than a century in America and adopted from English common law. A will may provide for the distribution of the interest of a beneficiary who does not survive the testator. The use of the term *per*

stirpes directs a specific manner of distribution to the survivors of the predeceased beneficiary.

On 20 June 2018, the trial court issued a declaratory judgment order interpreting provisions of the testatrix's will, pursuant to which the testatrix conveyed her entire estate to her two children provided that, if either of them predeceased her, that deceased child's interest would be devised to "my grandchildren, *per stirpes*." Defendant-Appellant Rebecca Brawley Thompson ("Rebecca") argues on appeal that, because the will is clear and unambiguous, the trial court erred in construing the testatrix's intent as to this provision. After careful review of the will and applicable law, we reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

On 30 April 1968, Zoie S. Deaton ("Testatrix") executed her last written will and testament, which provides, in relevant part:

> ITEM I: I give devise and bequeath all of my estate and property . . . to my children, Billie Cress Sherrill Brawley and Bobby Ray Sherrill, if they are living at the time of my demise, to be theirs absolutely and in fee simple, share and share alike.
>
> ITEM II: If either of my children shall predecease me, I direct that either his or her share shall go to my grandchildren, *per stirpes*.

At the time of Testatrix's death, her son Bobby Ray Sherrill ("Bobby Ray") was no longer living, but was survived by one child, Defendant-Appellee Bobby Vance

Sherrill ("Bobby Vance"). Testatrix's daughter Billie Cress Sherrill Brawley ("Billie Cress") survived her, and her two children, Rebecca and Bradley Brawley ("Bradley"), also survived Testatrix. In sum, at the time of her death, Testatrix had one living child and three living grandchildren.

Billie Cress was named executrix of the estate. She filed an action for declaratory judgment, requesting that the trial court construe the terms of the will. Specifically, Billie Cress asked the trial court to determine whether Bobby Ray's share under Item II of the will vested solely in his son, Bobby Vance, or in all three of Testatrix's grandchildren. The parties did not dispute Billie Cress's share in the estate.

The trial court entered judgment determining[1] that Testatrix's intent under Item II was to "create two branches for distribution purposes," one branch going to Billie Cress and the other to Bobby Ray. Consistent with this intent, the trial court concluded that Bobby Ray's one-half share in the estate vested solely in his son Bobby Vance, to the exclusion of the other two grandchildren, Rebecca and Bradley.

Rebecca appeals.

II. ANALYSIS

[1] Although the trial court characterized this determination as a finding of fact, it is a conclusion of law. *See Halstead v. Plymale*, 231 N.C. App. 253, 256, 750 S.E.2d 894, 897 (2013) (holding that the trial court's interpretation of a will based solely on its language is a conclusion of law).

Rebecca argues that the trial court erroneously interpreted the will by prematurely considering Testatrix's intent, rather than first determining whether the will itself was unequivocal on its face. Rebecca contends that the will unambiguously directs that Bobby Ray's one-half share be divided equally among all of the grandchildren.

A. Standard of Review

"The interpretation of a will's language is a matter of law. When the parties place nothing before the court to prove the intention of the testator, other than the will itself, they are simply disputing the interpretation of the language which is a question of law." *Cummings v. Snyder*, 91 N.C. App. 565, 568, 372 S.E.2d 724, 725 (1988) (citations omitted). We review questions of law *de novo*. *Simmons v. Waddell*, 241 N.C. App. 512, 526, 775 S.E.2d 661, 676 (2015).

Here, the will was the only relevant evidence introduced at trial and the only evidence included in the record on appeal, and the parties cite only the will's language in their respective arguments. As a result, we apply the *de novo* standard to the entirety of this appeal.

B. Intent and Interpretation

> It is an elementary rule in this jurisdiction that the intention of the testator is the polar star which is to guide in the interpretation of all wills, and, when ascertained, effect will be given to it unless it violates some rule of law, or is contrary to public policy. In attempting to determine the testator's intention, the language used, and the sense

> in which it is used by the testator, is the primary source of information, as it is the expressed intention of the testator which is sought.

Pittman v. Thomas, 307 N.C. 485, 492, 299 S.E.2d 207, 211 (1983) (quotation marks and citations omitted).

The interpretation of any will is as simple, or complicated, as its language. "Where the language employed by the testator is plain and its import is obvious, the judicial chore is light work; for in such event, the words of the testator must be taken to mean exactly what they say." *McCain v. Womble*, 265 N.C. 640, 644, 144 S.E.2d 857, 860 (1965). Resort to canons of construction is warranted only when the provisions of a will are set forth in unclear, equivocal, or ambiguous language. *Buchanan v. Buchanan*, 207 N.C. App. 112, 116, 698 S.E.2d 485, 488 (2010).

As recounted *supra*, Item I of the will bequeaths Testatrix's estate to Billie Cress and Bobby Ray, "if they are living at the time of [Testatrix's] demise, to be theirs absolutely and in fee simple, share and share alike." Neither party disputes that this devise, by its plain language, and consistent with North Carolina law, provides for an equal *per capita* distribution to Testatrix's children as individuals. *See, e.g.*, *Wooten v. Outland*, 226 N.C. 245, 248, 37 S.E.2d 682, 684 (1946) ("[W]hen [beneficiaries] take directly under a bequest or devise as individuals and not in a representative capacity, and the testator provides that the division or distribution shall be in equal proportions, they take per capita.").

What the parties *do* dispute is the meaning of Item II's language: "If either of my children shall predecease me, I direct that either his or her share shall go to my grandchildren, *per stirpes*." Contrary to a *per capita* devise, a *per stirpes* distribution "denotes the division of an estate by representation, a class taking the share to which the deceased whom they represent would have been entitled had he been living." *Wachovia Bank & Tr. Co. v. Bryant*, 258 N.C. 482, 485, 128 S.E.2d 758, 761 (1963). We conclude that our Supreme Court's decision in *Bryant* controls, and compels a reversal of the trial court's interpretation of the will.

The devise at issue in *Bryant* was as follows: "to my nephews and nieces, the child or children of any deceased nephew and niece to receive the share the parent would have taken, the said distribution to be per stirpes and not per capita." *Id.* at 484, 128 S.E.2d at 761. The appellant contended that the last clause, which included the *per stirpes* language, operated to modify the class of "nephews and nieces," rather than "the child or children of any deceased nephew and niece," such that the nephews and nieces, and not their issue, would take *per stirpes* according to the respective representations of their fathers, that is, the testator's unnamed siblings. *Id.* The Supreme Court disagreed, holding that the testator had clearly "recognized the *nephews and nieces as the stirpes and not their fathers*." *Id.* at 485, 128 S.E.2d at 761 (emphasis added).

The Court explained:

> *Stirp* or *stirps* means the root or trunk, a person from whom a branch of a family is descended. The term "per stirpes" denotes the division of an estate by representation, a class taking the share to which the deceased whom they represent would have been entitled had he been living.
>
> We think the last clause in the provision under consideration modifies the one immediately preceding it . . . . The testator's gift was to a class, nephews and nieces. He made them the primary legatees after the life estate of his wife—not because they represented a particular brother of his but because they were his nephews and nieces. Not once did he refer to them as children of his deceased brothers . . . . No suggestion that they were to take according to stock or root immediately followed the designation of the nephews and nieces as beneficiaries. That direction followed the designation of those who would take if a nephew or niece died before the date for distribution.

Id. (citation omitted).

In the instant case, the will provides that Testatrix's children, Bobby Ray and Billie Cress, would share equally in her estate. Item II then provides that "if either of [her] children" should predecease Testatrix, "either his or her share shall go to my grandchildren, *per stirpes*." The class identified in Item II is quite explicitly "*my grandchildren*," and not "the issue of the predeceased beneficiary." The addition of the term "*per stirpes*" indicates that the share or shares of any predeceased beneficiary shall then be distributed amongst the grandchildren by representation

"according to stock or root."[2] *Id.* In other words, the predeceased beneficiary's share must be distributed amongst all of Testatrix's grandchildren, with the percentages varying based not upon the total headcount of surviving grandchildren (*per capita*), but upon the root from which the particular grandchild descends (*per stirpes*).

Thus, the plain language of the will directs that Bobby Ray's one-half share of the estate must be distributed to the class of Testatrix's grandchildren as follows:

> Bobby Vance: One-half of his father's one-half share, or one-fourth of the estate.
>
> Rebecca and Bradley: The remaining one-half of their uncle's one-half share, divided equally between the two of them, or a one-eighth share of the estate to each.

That Testatrix intended such a distribution is evidenced by none other than the clear and unambiguous language of Item II. *See id.* ("We think the intent of the testator is clear from the will itself . . . ."). It is not the role of the courts to intervene and change the plain language of a testamentary instrument simply because the distribution provided for therein differs from that which is more commonly employed.

III. CONCLUSION

We hold that the trial court erred when it construed Testatrix's intent as anything other than that which is explicitly stated within the four corners of her will.

[2] This is as compared to a *per capita* distribution, under which the grandchildren "would share equally." *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4, *reh'g denied*, 350 N.C. 385, 536 S.E.2d 70 (1999).

Accordingly, we reverse its judgment and remand for entry of an order consistent with this opinion.

REVERSED AND REMANDED.

Judge STROUD concurs.

Judge INMAN dissents by separate opinion.

INMAN, Judge, dissenting.

Because I disagree with the majority's interpretation of the *per stirpital* distribution scheme contained in Testatrix's will, I respectfully dissent.

When a will contains legal or technical words or phrases, we "presume[] that [the testatrix] used them in their well-known legal or technical sense unless, in some appropriate way in the instrument, [she] indicates otherwise." *Wachovia Bank & Tr. Co. v. Livengood*, 306 N.C. 550, 552, 294 S.E.2d 319, 320 (1982).

The term *per stirpes*, fundamentally, describes how a gift to a class is to be distributed among the class members, with each surviving member of the class taking the share that would have passed to any ancestral predecessor that also fell within the class. *Wachovia Bank & Tr. Co. v. Bryant*, 258 N.C. 482, 485, 128 S.E.2d 758, 761 (1963); *see also Walsh v. Friedman*, 219 N.C. 151, 161-62, 13 S.E.2d 250, 256 (1941) (defining "*per stirpes*" as "that method of dividing an intestate estate where a class or group of distributees take the share which *their deceased would have been entitled to*, taking thus by their right of representing such ancestor, and not as so many individuals" (emphasis added) (citation and quotation marks omitted)); Black's Law Dictionary (11th ed. 2019) (defining "*per stirpes*" as "[p]roportionately divided between beneficiaries according *to their deceased ancestor's share*" (emphasis added)). Quoting with approval an opinion by the South Carolina Supreme Court, our

Supreme Court in *Walsh* explained that the term "*per stirpes*" " 'as employed in our law relates to the mode of distribution—not who shall take, but the manner in which those shall take who come within the class entitled to take.' " 219 N.C. at 161, 13 S.E.2d at 255-56 (emphasis added) (quoting *Irvin v. Brown*, 160 S.C. 374, 378, 158 S.E. 733, 734 (1931)).

Testatrix's will instructs that, if either of her children predecease her, her grandchildren shall take *per stirpes*, *i.e.*, only by representation through their respective deceased parent. This interpretation is consistent with the *Restatement Third of Property*, which provides:

> If, for example, a gift is made to the "grandchildren" or to the "nieces and nephews" of a designated person "per stirpes," the described class members might stem from different children or different siblings of the designated person. In such case, the words "per stirpes" suggest an initial division of the property into shares at the generation above the generation of the class members, with one share going to the children of each child or of each sibling. In this situation, . . . the words "per stirpes" also cause the share of a deceased class member to be divided by representation among his or her descendants.

Restatement (Third) of Prop. (Wills & Donative Transfers) § 14.2 cmt. h (2011).

The majority asserts that by devising the share of any of her deceased children "to my grandchildren"—rather than "to the child of any deceased child" or other more precise description—the Testatrix indicated her intent for all of her grandchildren to take from the deceased child, with each grandchild's percentage interest calculated according to each grandchild's root or parent. The majority's analysis means that

Rebecca and Bradley—whose mother, Billie Cress, is still living—take from Bobby Ray, their deceased uncle. The analysis modifies a *per stirpes* devise in a manner that has never before been contemplated.

While Testatrix's lack of precise language created a chore for counsel, the trial court, and this Court, that imprecision cannot negate the plain meaning of the term "*per stirpes*" used to describe the method of distribution among the class members. No one disputes that Rebecca and Bradley are part of the class of grandchildren described in the will and can potentially benefit from the will's devise. But, because Billie Cress, unlike Bobby Ray, was still alive at the time of Testatrix's death, the *condition* for the manner in which Rebecca and Bradley take from the will did not occur. To put it differently, had Billie Cress predeceased Testatrix instead of Bobby Ray, Bobby Vance would not be able to take from Billie Cress' share because Billie Cress is not the "stock or root" of Bobby Vance.

Accordingly, consistent with the historical administration of the term "*per stirpes*," Rebecca and Bradley, whose root is Billie Cress and not Bobby Ray, should not be entitled to take of the will's devise to the deceased Bobby Ray, while Bobby Ray's son, Bobby Vance, should be entitled to all of his father's share. The majority's holding—allowing Rebecca and Bradley to be co-representatives along with Bobby Vance—conflicts with our jurisprudence's implementation of a *per stirpes* devise. By allowing Rebecca and Bradley to take from their uncle, the majority has extended and modified an otherwise basic *per stirpes* distribution to allow certain members of

a class, whose root did not predecease the testatrix, to take as representatives through an *indirect ancestor* absent clear intent from the will.

I therefore respectfully dissent.