STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Popie Lown Roberts,

Respondent,

-vs-

The Health Sciences Foundation of The Medical University of South Carolina and The Lutheran Homes of South Carolina, Inc.,

Appellants.

In the Matter of the Estate of Caroline Bischoff Lown.

2011-ES-10-276
2013-CP-10-02243

ORDER

This is an appeal from an Order of the Probate Court construing the will of the late Caroline Bishoff Lown.

A. Standard of review.

An action to construe a will is an action at law. *Kemp v. Rawlings,* 358 S.C. 28, 594 S.E.2d 845, 848 (2004). "If a proceeding in the Probate Court is in the nature of an action at law, review by the Circuit Court . . . extends merely to the correction of errors of law." *Bob Jones Univ. v. Strandell,* 344 S.C. 224, 229, 543 S.E.2d 251, 253 (Ct. App. 2001). *Accord: Epworth Children's Home v. Beasley,* 365 S.C. 157, 616 S.E.2d 710, 714 (2005).

> "When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts." *WDW Props. v. City of Sumter,* 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000). "In such cases, the appellate court owes no particular

> deference to the trial court's legal conclusions." *J.K. Constr., Inc. v. W. Carolina Reg'l Sewer Auth.*, 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999); *see also Duke Power Co. v. Laurens Elec. Coop., Inc.*, 344 S.C. 101, 104, 543 S.E.2d 560, 561-62 (Ct. App. 2001). On appeal from the final order of the probate court, the circuit court should apply the same standard of review that the Supreme Court or Court of Appeals would apply on appeal. *In re Howard,* 315 S.C. 356, 361, 434 S.E.2d 254, 257 (1993).

In re Estate of Boynton, 355 S.C. 299, 584 S.E.2d 154, 155 (Ct. App. 2003).

B. Principles of will construction.

The Probate Court applied familiar principles of will construction. "A will must be read in the ordinary and grammatical sense of the words employed, unless some obvious absurdity, repugnancy, or inconsistency with the declared intention of the testator, as abstracted from the whole will, would follow from such construction. *Matter of Clark,* 308 S.C. 328, 330, 417 S.E.2d 856, 857 (1992); *Love v. Love,* 208 S.C. 363, 369, 38 S.E.2d 231, 233 (1946)." *Epworth Children's Home v. Beasley,* 365 S.C. 157, 616 S.E.2d 710, 715 (2005). The rules of construction are subservient to the primary consideration of ascertaining what the testator meant by the terms used in the written instrument itself, and each item of a will must be considered in relation to other portions. *Allison v. Wilson,* 306 S.C. 274, 411 S.E.2d 433 (1991). An interpretation that fits into the whole scheme or plan of the will is most apt to be the correct interpretation of the intent of the testator. *Lemmon v. Wilson,* 204 S.C. 50, 28 S.E.2d 792 (1944).

> "The paramount rule of will construction is to determine and give effect to the testator's intent." *Holcombe-Burdette v. Bank of America*, 371 S.C. at 655, 640 S.E.2d at 483; *see* S.C.Code Ann. § 62-1-102(b)(2) (2009) ("The underlying

> purposes and policies of this Code are . . . (2) to discover and make effective the intent of a decedent in the distribution of his property.")." "In construing the provisions of a will, every effort must be made to determine and carry out the intentions of the testator." *Id.* at 656, 640 S.E.2d at 483. "A will must be read in the ordinary and grammatical sense of the words employed, unless some obvious absurdity, repugnancy, or inconsistency with the declared intention of the testator, as abstracted from the whole will, would follow from such construction." *Kemp v. Rawlings*, 358 S.C. 28, 34, 594 S.E.2d 845, 849 (2004). "The rules of construction are subservient to the primary consideration of ascertaining what the testator meant by the terms used in the written instrument itself, and each item of a will must be considered in relation to other portions." *Id*

Estate of Gill, 397 S.C. 419, 725 S.E.2d 516, 520 (Ct. App. 2012).

These are the principles applied by the Probate Court and by this Court.

C. Construction of Mrs. Lown's will.

In the First Item of Mrs. Lown's will, she directs the payment of all her just debts, etc.

In the Second Item, she bequeaths all her tangible personal property to her niece-in-law, Popie Lown Roberts.

In the Third Item, she bequeaths $1,000,000.00 to Mrs. Roberts.

The Fourth Item gives rise to the controversy. In material part it reads as follows:

> FOURTH: I direct that the rest and residue of my estate, the payment of the specific bequests, with all debts, expenses and taxes, be divided and I bequeath and devise as follows:
> (a) One-third (⅓) to my niece-in-law, POPIE LOWN ROBERTS, or if she should then be dead to her issue then living at the time of my death less, however, the sum of One Million and 00/100 ($1,000,000.00) Dollars, paid to her, or

her issue, under the preceding bequest.
(b) One-third (⅓) to the FRANKE HOME AT SEASIDE . . . .
(c) One-third (⅓) to the Health Sciences Foundation of the Medical University of South Carolina . . . .

The Probate Court construed the will to devise to Mrs. Roberts the tangible personal property of the testatrix and one million dollars, and to devise the residue in equal thirds to Mrs. Roberts and the two appellants.

The appellants are The Franke Home (now The Lutheran Homes of South Carolina, Inc.) and MUSC. They contend that the testatrix intended to devise the value of her *gross* estate, not the residue, to the three devisees in equal shares. This contention is based upon the fact that there is no conjunction or adverb following the first comma in the text of Article IV. The will reads:

> I direct that the rest and residue of my estate, the payment of the specific bequests, . . . be divided and I bequeath and devise as follows: . . . .

The appellants contend that this language should be construed as though worded:

> I direct that the rest and residue of my estate, **[and]** the payment of the specific bequests, . . . be divided and I bequeath and devise as follows: . . . .

Thus, the appellants contend that the residuary clause draws back in to the residuary estate the value of the tangible personal property devised in Article II and the million dollars devised in Article III. Effectively, the residue thereby becomes the entire gross estate. As the appellants put it in their proposed order in the Probate Court: "Article

FOURTH requires that the Decedent's gross estate with all debts, expenses and taxes be calculated and divided equally among the three residuary beneficiaries." [Charities' Proposed Order, ¶ 25.] The Probate Court observed:

> "The net effect [of the appellants' argument] is that all three Devisees share the entire Estate in equal ⅓ shares."

Probate Court Order, p. 8. This construction would effectively strike Articles II and III, and would convert the residuary clause into a provision controlling the disposition of the entire gross estate.

Rejecting this reading of the will, the Probate Court construed this language to mean:

> I direct that the rest and residue of my estate, **[after]** the payment of the specific bequests, . . . be divided and I bequeath and devise as follows: . . . .

The South Carolina Probate Code does not define "residue" or "residuary devise." Generally speaking, a residuary clause of a will is that clause which disposes of property, usually not specifically described, which has not been disposed of by the other provisions of the will. 96 C.J.S. *Wills* § 796, p. 215. A residuary clause commonly refers to the "rest, residue or remainder," or uses language of similar import. *Id.* at p. 217. A residuary clause is "[a] testamentary clause that disposes of any estate property remaining after the satisfaction of specific bequests and devises." BLACK'S LAW DICTIONARY 1311 (7th ed. 1999). "Residue" means "[s]omething that is left over

after a part is removed or disposed of; a remainder." *Id.* Article IV of Mrs. Lown's will is plainly a residuary clause. It was not intended effectively to nullify the specific bequests of the preceding two articles, as the construction proposed by the appellants would do. The residue consists of what is left after the specific bequests are made and after the expenses of the estate are paid.

In like manner, the appellants contend that the introductory language of Article IV means that not only the earlier specific devises but also *the expenses* of the estate are a part of the residue. This is a contradiction in terms. By definition the residue of an estate consists of assets not specifically devised, not liabilities. The expenses are not property of the estate but liabilities of the estate which, by law, must be satisfied before the property remaining can be devised. Debts, expenses and taxes are not "divided and distributed". They are paid before anything is devised. The appellants nonetheless contend that this negative number, whatever it may turn out to be, is intended to be included in the residue because Article IV directs that "the rest and residue of my estate, . . . with all debts, expenses and taxes, be divided" and distributed in the prescribed way. The testatrix meant to define her residuary estate as being what was left "[**after**] the payment of the specific bequests [and **after**] all debts, expenses and taxes". This is the only construction which makes sense.[1] The court will not

[1] When a typographical error is apparent in the document being construed, the court can and should correct the error. *See, e.g., Sphere Drake Ins. Co. v. Litchfield,* 313 S.C. 471, 438 S.E.2d 275 (Ct. App. 1993) ("This meaning is not obscured by the phrase 'of any cause whatsoever' at the end of the sentence. The 'of' is most likely a typographical error that should read 'or.'"). A typographical error occurs not only when

construe a will in an absurd way.

Regarding the "less, however" clause of Article IV(a), the appellants contend that if the testatrix intended to subtract one million dollars from the one-third share of the residue devised to Mrs. Roberts, this million dollars would constitute a "failed devise" within the meaning of Section 62-2-604(b), and would go to the appellants. This section, generally known as an "anti-lapse statute," provides as follows:

> SECTION 62-2-604. Failure of testamentary provision.
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> *****
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> (b) Except as provided in Section 62-2-603 if the residue is devised to two or more persons and the share of one of the residuary devisees fails for any reason, his share passes to the other residuary devisee, or to other residuary devisees in proportion to their interests in the residue.

The Probate Code does not define a failed devise, but the South Carolina reporter's comments supply the meaning:

> The rule preserves from intestacy devises failing for any reason, *e.g.*, because of the indefiniteness of the devise, illegality, a violation of the Rule Against Perpetuities, incapacity of the devisee, or the failure of the devisee to survive to take the devise . . . .

REPORTER'S COMMENTS, 1986 Act No. 539, § 1. Thus, a "failed devise" is a devise which never takes effect, as where the devisee predeceases the testatrix or where the devise is precluded by a rule of law.

The devise to Mrs. Roberts of a share of the residue is not a "failed devise".

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a word is misspelled but where it is omitted by mistake. *See, e.g., Connelly v. Earl Frazier Special Sch. Distr.,* 167 Ark. 49, 266 S.W. 929 (1924).

Mrs. Roberts did not predecease the testatrix nor is the devise to her of a share of the residue precluded by some rule of law. The question is not whether the devise failed since clearly it did not. Mrs. Roberts is certainly entitled to a share of the residue. The only question is the amount of the gift. The question is whether the testatrix intended to leave Mrs. Roberts her tangible personal property under Article II, plus one million dollars under Article III, plus one-third of the residue under Article IV; or whether she intended to leave Mrs. Roberts her tangible personal property under Article II, plus one million dollars under Article III, plus one-third of the residue *minus one million dollars* under Article IV.

If the testatrix intended to leave Mrs. Roberts one-third of the residue minus one million dollars, then the million dollars withheld from Mrs. Roberts' third of the residue would not go to the appellants under Section 62-2-604(b) since it is not a failed devise. Each of the appelants is entitled to one-third of the residue and no more. The million dollars, if withheld from Mrs. Roberts' share of the residue, would pass by intestate succession. This is the rule of the common law, the so-called "English rule".[2] *See Padgett v. Black,* 229 S.C. 142, 92 S.E.2d 153 (1956) (generally a lapsed legacy falls into the residuum, but where the lapsed legacy is part of the residuum itself, it is

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[2] The common law rule is often called the "residue of the residue" rule, since it applies where the residuary clause does not fully dispose of the residue of the estate. *See, e.g., Ex parte Byrom,* 47 So.3d 791, 793 (Ala. 2010).

distributed as intestate property (unless the later-enacted "failed devise" provision of § 62-2-604(b) applies)).[3] This is a result not advocated by the appellants or by any of the potential intestate heirs.[4] On the contrary, the appellants are adamant that nothing passes under Mrs. Lown's will by intestate succession.

The testatrix' intent should be discerned from a consideration of the entire will. The presumption against intestacy for one who leaves a will is a strong one. *Pate v. Ford,* 293 S.C. 268, 285, 360S.E.2d 145, 156 (Ct. App. 1987) ("The law abhors intestacy . . . .") It seems unlikely that Mrs. Lown, who was a widow with no children, would intend for a substantial part of her estate to pass by intestacy to a large number of nieces and nephews, and their issue. *See* Complaint, ¶¶ 15-16. The "less, however" proviso may be seen as a misplaced repetition of the clause which begins Article IV, emphasizing that the residue is that which remains "[after] the payment of the

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[3] *See* S.C .Code Ann. § 62-2-101 (1987) ("Any part of the estate of a decedent not effectively disposed of by his will passes to his heirs as prescribed [by the sections concerning intestate succession]."); *Cornelson v. Vance,* 220 S.C. 47, 58, 66 S.E.2d 421, 426 (stating that if the testator does not choose to devise property by express provision in the testator's will, the testator may dispose of assets by use of a residuary clause — when no such clause exists, disposition will be accomplished via the laws of intestacy). Although the law engages a presumption against intestacy, this presumption may be overcome by the facts and plain language of the testator's will. *Albergotti v. Summers,* 203 S.C. 137, 26 S.E.2d 395 (1943); *In re Estate of Blankenship,* 336 S.C. 103, 518 S.E.2d 615 (Ct.App.1999).

Bob Jones Univ. v. Strandell, supra, 344 S.C. at 231, 543 S.E.2d at 254-55.

[4] The heirs at law of the testatrix were all made parties to this action and none have appeared to advocate this construction of their ancestor's will.

specific bequests" and the payment of expenses.

Be that as it may, the sole question before this Court on appeal is whether the appellants' construction of the will is the correct one, not whether some other possible construction not advocated by any party may be a better one. Since the appellants' proposed construction cannot be upheld, the appeal must fail.

Mr. Cabaniss testified regarding the instructions given him by his client concerning how to draft her will. This Court agrees with the appellants that the testimony was inadmissible hearsay. The error was harmless, however. This Court has reached the same conclusion as did the Probate Court in the construction of the will, without considering the testimony of Mr. Cabaniss.

CONCLUSION

The appellants contend that Mrs. Lown's will should be read as though it contained only one item, leaving her entire estate in equal thirds to Mrs. Roberts and the two appellants. The construction urged by the appellants would rewrite the will.

For these reasons the judgment of the Probate Court is affirmed.

IT IS SO ORDERED.

J.C. NICHOLSON, JR.
Presiding Judge, Ninth Judicial Circuit

Charleston, South Carolina

April 10, 2014.