IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

* * * * * * *

NO. 05-2028

ESTATE OF MARJORIE T. McCANN, DECEASED
(a.k.a. MARJORIE ALICE TUFTS McCANN,
MARJORIE A. McCANN, and MARJORIE TUFTS McCANN)

* * * * * *

OPINION AND ORDER

This matter arises under a Petition for Declaratory Judgment filed by the Executrix, Marjorie L. McCann (hereinafter "Marjorie L."), seeking to offset Barbara Kane's share of her mother's residuary estate by $71,301.25, the amount of unpaid principal and interest allegedly owed on two promissory notes dated October 6, 1994 and September 1, 1996 executed in favor of the decedent, Marjorie T. McCann. Carole R. McCann, a child of the decedent and sister to Marjorie L. and Barbara Kane, joined in the Declaratory Judgment Petition as did Marjorie L. McCann, individually and as Trustee for a Trust created for the benefit of decedent's son, Douglas F. McCann. Barbara Kane filed a Response to the Petition for Declaratory Judgment contesting Petitioner's interpretation of decedent's Will and objecting to Petitioner's request that her share of her mother's residuary estate be reduced by $71,301.25.

The undisputed relevant facts are as follows:

1. Marjorie T. McCann (a.k.a. Marjorie Alice Tufts McCann, Marjorie A. McCann, and Marjorie Tufts McCann and hereinafter referred to as "Marjorie T.") died May 16, 2005, with a Will dated May 6, 1999, which was duly probated by the Register of Wills of Montgomery County on June 22, 2005 at which time the Register granted letters

testamentary to Marjorie L., the Petitioner herein, as the successor executrix under subparagraph 7.01(1) of decedent's Will.

2. Marjorie T.'s spouse, Forbes E. McCann, Sr. (hereinafter "Forbes Sr."), predeceased her. He died February 9, 2005, with a Will dated May 6, 1999, which was duly probated by the Register of Wills of Montgomery County on February 25, 2005 at which time the Register granted letters testamentary to Marjorie L., the Petitioner herein, as the successor executrix under subparagraph 7.01(1) of Forbes Sr.'s Will.

3. At the time of her death, Marjorie T. was survived by five children: Forbes E. McCann, Jr., who died October 30, 2005, Douglas F. McCann, Carole R. McCann, Barbara J. Kane ("Respondent"), and Marjorie L. McCann ("Petitioner").

4. On October 6, 1994, Barbara Kane and her husband, James J. Kane, signed a Promissory Note in favor of the decedent, Marjorie T., and her husband, Forbes Sr., agreeing to repay $1,500.00 plus interest at six percent (6%) on or before January 3, 1996. No payments were made on this Note.

5. On or about September 1, 1996, Marjorie T. loaned Barbara Kane and her husband $35,000.00. In exchange, Barbara Kane and her husband signed a Promissory Note agreeing to repay the loan to Marjorie T. in accordance with an attached amortization schedule with interest on the unpaid principal balance at the rate of nine percent (9%) per annum.

6. Forbes Sr. simultaneously loaned Barbara Kane and her husband $35,000.00 and received in exchange a similar Promissory Note with the same terms.

7. On May 6, 1999, Marjorie T. and Forbes Sr. executed identical, but separate, Wills.[1]

8. Paragraph 3.02 of decedent's Will provides as follows:

> Outstanding Loans to Children. I have made loans to each of my children and I may make additional loans to one or more of my children. If, at my death, *my husband does not survive me* and any portion of any loan to a child is outstanding, *the remaining principal and unpaid income* of a child's loan shall be allocated to the residuary share of such child under Paragraph 5.01(1), provided that if the remaining balance of principal and unpaid income ("balance") exceeds such child's share of the Residue, then the amount by which the balance exceeds such child's share of the Residue shall be repaid to my estate (emphasis added).

9. The Will drafted for and executed by Forbes Sr. contains an identical provision in its Paragraph 3.02, except that it provides that "If at my death, *my wife does not survive me*, and any portion of any loan is outstanding", there will be a reduction in the residuary share distributed to such indebted child or children (emphasis added).

10. By their respective Wills, each spouse gives his or her tangible personal property to the surviving spouse, and if none, to their children equally. Each Will creates a credit shelter trust pursuant to Paragraphs 5.01(1) and 5.02 for the benefit of the surviving spouse and the balance of the residue is distributed outright to the surviving spouse.

11. Each of their respective Wills provides that if the particular testator is the last to die, then, in accordance with subparagraph 5.01(2), the Residue shall be divided into six equal shares with each of their five children receiving an equal one-sixth share, either outright or in trust, and the remaining one-sixth share being divided equally among a daughter-in-law, Carol Mattern McCann, and six named grandchildren.

12. On or about March 3, 2003, almost four years after the decedent, Marjorie T. and her

[1] Marjorie T.'s Will contained two specific charitable bequests in the amount of $5,000.00 each. Forbes Sr.'s Will

husband, Forbes Sr., executed their Wills, Barbara Kane and her husband filed a joint bankruptcy petition and a bankruptcy judge discharged all their debts by Order dated September 25, 2003.

13. At the time of decedent's death, Barbara Kane and her husband had not made any payments on the $1,500.00 loan evidenced by the 1994 Promissory Note in favor of Forbes Sr. and Marjorie T. According to the Declaratory Judgment Petition, at the time of decedent's death, $3,066.78 of unpaid principal and interest remained outstanding under this 1994 Promissory Note. *See* Petition for Declaratory Judgment, ¶ 15.

14. Barbara Kane and her husband only partially repaid the $35,000.00 loan evidenced by the 1996 Promissory Note in favor of Marjorie T. According to the Declaratory Judgment Petition, at the time of decedent's death, $68,234.47 of unpaid principal and interest remained outstanding under this 1996 Promissory Note. *See* Petition for Declaratory Judgment, ¶ 24.

15. Respondent, Barbara Kane, does not dispute the amounts that remain unpaid and outstanding under the 1994 Promissory Note and 1996 Promissory Note. Rather, Respondent contends (a) that the reference in Paragraph 3.02 to subparagraph 5.01(1) evidences an intent by the decedent to make the offset provision of Paragraph 3.02 illusionary and a nullity; (b) that decedent's failure to pursue collection of the Notes during bankruptcy proceedings evidences an intent to forgive these debts; and (c) regardless of whether these Notes were forgiven by the decedent and her spouse, the Notes nevertheless were completely discharged by the Bankruptcy Court in its Order of September 25, 2003.

---

contained one charitable bequest in the amount of $10,000.

DISCUSSION:

At the outset, this Court notes that two prior persuasive cases from Orphans' Courts of other counties have addressed the effect of a bankruptcy court order upon an offset provision in a will or trust. *Carver Estate*, 22 Fid. Rep.2d 107, 119 (O.C., Somerset Co. 1995)(*citing Gretz Trust*, *infra*); *Gretz Trust*, 25 Fid. Rep. 211 (O.C., Phila Co. 1975). In both cases, the courts held that the amount of the debt discharged in bankruptcy, even though legally uncollectible, nonetheless would reduce the beneficiary's distributable share if such were the intent of the testator or settlor as expressed in the will or trust. *Carver Estate*, 22 Fid. Rep.2d at 119; *Gretz Trust*, 25 Fid. Rep. at 219-20. "The pivotal question is: What was settlor's intent?" *Gretz Trust*, 25 Fid. Rep. at 219-20.

Here, the operative language from Paragraph 3.02 provides "If, at my death, my husband does not survive me and any portion of any loan to a child is outstanding, the remaining principal and unpaid income of a child's loan shall be allocated to the residuary share of such child under Paragraph 5.01(1)." By this provision, decedent, Marjorie T., expressed an intent that any child's share of her residuary estate should be offset by the amount of remaining principal and unpaid interest on any loan to the child that remained outstanding at her death if her husband, Forbes Sr., already was deceased at the time. There is no language in the Will that qualifies the offset or forgives the debt in the event of a bankruptcy proceeding. Because the controlling authority is decedent's intent as expressed in the four corners of her Will, the Bankruptcy Court Order of September 25, 2003 is of no consequence. Thus, the offset provision of Paragraph 3.02 remains operative and controlling despite the Kane's bankruptcy proceeding.

The language of Paragraph 3.02 is seemingly clear and unambiguous and the intent of the Marjorie T. readily discernible and easily fulfilled, except for an incorrect reference in Paragraph 3.02 to Paragraph 5.01(1). Turning to the latter provisions of the Will, Paragraph 5.01(1) establishes

the credit shelter trust in favor of decedent's husband, Forbes Sr., if he is living at the time of her death. No residuary share in favor of a child is created under Paragraph 5.01(1). Rather, the equal residuary shares for decedent's children are created in the next subparagraph, 5.01(2).

Respondent Barbara Kane posits that decedent never wished to reduce her inheritance by the amount of outstanding loans and unpaid interest. Under Respondent's argument, because no child receives a residuary share under subparagraph 5.01(1), no offset was intended ever to occur.

The accepted hornbook law is that

> (1) that the testator's intent is the polestar and must prevail; and (2) that his intent must be gathered from a consideration of (a) all the language contained in the four corners of his will and (b) his scheme of distribution and (c) the circumstances surrounding him at the time he made his will and (d) the existing facts; and (3) that technical rules or cannons of construction should be resorted to only if the language of the will is ambiguous or conflicting or the testator's intent is for any reason uncertain. (Citations omitted.) *Burleigh's Estate*, 405 Pa. 373, 376, 175 A.2d 838, 839 (1961).

See also In re Trust Estate of Pew, 411 Pa. 96, 106, 191 A.2d 399, 405 (1963), *overruled in part on other grounds*, *Estate of Tyler*, 447 Pa. 40, 289 A.2d 441 (1972) (*citing In re Kelsey's Estate*, 393 Pa. 513, 143 A.2d 42 (1958)); *Burleigh Estate*, 405 Pa. 373, 376, 175 A.2d 838, 839 (1961); *Britt's Estate*, 369 Pa. 450, 87 A.2d 243 (1952); *In re Sowers' Estate*, 383 Pa. 566, 119 A.2d 60 (1956)). *See also Bloom v. Selfon*, 520 Pa. 519, 523, 555 A.2d 75, 77 (1989).

Because ascertaining and implementing the testator's intent is paramount, the rules of grammar and punctuation are not absolute; "the order of words is immaterial if a different arrangement will best express that intent." *Estate of Farrington*, 422 Pa. 164, 167, 220 A.2d 790, 792 (1966)(citing *Biles v. Biles*, 281 Pa. 565, 569, 127 A. 235, 237 (1924) and *Worst v. DeHaven*, 262 Pa. 39, 104 A. 802 (1918)). "The use of incorrect or inaccurate language cannot defeat a testator's plain intent. . . . We can attribute no intention to a testator of writing meaningless words in

his will when another construction gives such words intelligent and proper meaning." *Irwin's Estate*, 304 Pa. 200, 202 155 A. 432, 433 (1931). "In wills obscurely expressed the court may transpose a word or a sentence in order to effectuate the testamentary purpose, the order in which the words are placed being immaterial if a different arrangement will best answer the apparent intent of the testator." *Worst v. DeHaven*, 262 Pa. 39, 42, 104 A. 802, 803 (1918).

In the cases cited above, the courts transposed sentences, relocated dependent clauses, and changed the word "or" to "and" based solely upon a reading and consideration of the will's dispositive scheme without resorting to any extrinsic evidence, such as the scrivener's testimony. *Estate of Farrington*, *supra* (transposing the clause regarding income so that residuary clause first disposed of the estate's residue and thus gave a source for the income); *Burleigh's Estate*, *supra* (replacing "or" with "and" so that the two lines of heirs from testator's brother and sister both inherited remainder); *Irwin Estate*, *supra* (construing survivorship language to include grandchildren of testator living at his death even though testator's son had predeceased him); *Biles v. Biles*, *supra* (transposing phrases so that son obtained a vested interest in real property at father's death while widow had a life estate subject to divestment upon remarriage); *Worst v. DeHaven*, *supra* (transposing phrase regarding rent so that children obtained a vested, not contingent, interest in both the real property and the rent upon death of mother). Although a court may not rewrite an unambiguous will, a court may construe a patently ambiguous will so that every clause is given meaning and the will, as a whole, fulfills the testator's intent.

This Court has examined decedent's entire Will and has found that, at least among decedent's children, she wished to treat them all equally and to account for prior loans advanced to any child which remained outstanding at her death if her husband already had predeceased her. For example, in Paragraph 3.01(1), decedent directs that her tangible personal property should be "divided as equally

among [her children] *according to value* as may be possible" (emphasis added). It is in the very next paragraph, Paragraph 3.01(2), that decedent provides for an offset if any loan to a child remains outstanding and unpaid at her death, provided that her husband, Forbes Sr., already has predeceased her. Decedent provides for an offset only if her children actually are inheriting from her estate.[2] The disputed sentence allocates the unpaid debt and income to the child's "residuary share". Decedent then continues in this Paragraph 3.01(2) by providing that the indebted child must repay the estate "if the remaining balance of principal and unpaid income ('balance') exceeds such child's share of the Residue."

This Court rejects as wildly speculative Respondent's reading of this Will. First, Respondent's suggested reading of the Will conflicts with well-established legal precedent that "a will must be read so that every clause is given meaning, and courts are not to assume that a testator drafted his will with meaningless words and clauses when another reasonable and plausible interpretation gives all the words and clauses an intelligent and cohesive meaning. *Estate of Farrington*, 422 Pa. at 167, 220 A.2d at 792 (citing *Biles v. Biles, supra* and *Worst v. DeHaven, supra*). *See also Irwin's Estate*, 304 Pa. 200, 202 155 A. 432, 433 (1931). Second, the last provision of Paragraph 3.02 provides that a child must repay the decedent's estate if his or her share of the Residue is insufficient to cover the amount of outstanding principal and unpaid income. Thus, if Respondent's argument is taken to its logical conclusion, Barbara Kane is liable to this Estate for the full amount of the outstanding loans and unpaid interest because there is no residuary estate from which she is inheriting. Finally, this Court takes note that the same misreferencing is contained in Forbes Sr.'s Will, making it even more implausible that decedent was trying to slyly and covertly outmaneuver anyone by clever draftsmanship.

[2] A different result occurs and there is no offset if decedent was the first spouse to die. *See* Opinion and Order, Estate of Forbes E. McCann, Sr., O.C. No. 05-0691 (dated Jan. 10, 2007).

From the four corners of this Will, this Court is convinced that decedent intended for each of her children to receive equal amounts, and thus, a child who received amounts during decedent's life, which remained unpaid, has to suffer an offset from the share that such child would take upon her death provided that she were the last parent to die. Given these reasons, and in order to construe each clause of this Will within decedent's general dispositive scheme, this Court directs that the erroneous reference in Paragraph 3.02 shall be resolved by changing the reference in this Paragraph to Paragraph 5.01(2).

Respondent next posits that Marjorie T. and Forbes Sr. exhibited an intent to forgive the debts represent by the unpaid Promissory Notes of 1994 and 1996 by failing to file a claim as unpaid creditors when the Kanes instituted their bankruptcy proceeding. In fact, the opposite inference is just as likely and plausible. Marjorie T. and Forbes Sr. had no need or desire to seek collection from the bankruptcy court because they knew that some of the loans made to Barbara Kane and her husband eventually would be repaid through an offset upon the death of the last of them to survive. Even more importantly, though, this Court is bound by the language in the four corners of decedent's Will and decedent's Will cannot be rewritten based upon speculation of her subsequent actions or inaction. *Wright Estate*, 380 Pa. 106, 109, 110 A.2d 198, 200 (1955).

Lastly, Respondent argues that the offset determined by the Court should not include interest accruing after the date of the Bankruptcy Court Order on September 25, 2003. Again, as indicated at the beginning of this Opinion, the Bankruptcy Court Order is of no consequence; it is the intent of the testator as expressed in the four corners of the Will that is controlling. *Carver Estate*, *supra; Gretz Trust*, *supra*. Paragraph 3.02 provides that both *the remaining principal and unpaid income* of a child's loan shall reduce the child's residuary share. The italicized language evidences an intent to charge the indebted child for decedent's loss of use of monies advanced. As a result, even though the debts of Barbara Kane and her husband were discharged in bankruptcy and from thence on were

legally uncollectible, interest continues to accrue on the unpaid principal balance because the terms of decedent's Will so provide.

Both the $1,500 loan evidenced by the 1994 Promissory Note and the $35,000 loan evidenced by the 1996 Promissory Note are subject to offset. The loan of $1,500 was given by both the decedent, Marjorie T., and her husband, Forbes Sr., and the Promissory Note was executed in favor of both of them. Without question, the loan was made by the decedent, and it remained outstanding at the death of the survivor of herself and her husband, Forbes Sr. There could be no offset of this loan until the death of the survivor. The loan for $35,000 was given solely by Marjorie T. and evidenced by the 1996 Promissory Note. The remaining balance of principal and unpaid income is subject to offset because the loan remained partially outstanding at the death of Marjorie T., and at that time, Forbes Sr. had predeceased her.

For the foregoing reasons, the following Order is appropriate:

AND NOW, this 10th day of January, 2007, for the foregoing reasons, it is hereby **ORDERED** and **DECREED** that the Petition for Declaratory Judgment is **GRANTED**, and Barbara Kane's share of the residue from the Estate of Marjorie T. McCann shall be offset by $71,301.25, the amount of outstanding principal and unpaid interest owed by Respondent Barbara Kane to the decedent under two Promissory Notes executed on October 6, 1994 and September 1, 1996.

As this ORDER determines the interests of the parties to the assets of decedent's estate and orders a distribution accordingly, it is further **ORDERED** and **DECREED** that this ORDER shall constitute a final Order for purposes of Rule 342 of the Pennsylvania Rules of Appellate Procedure. Exceptions may be filed within twenty (20) days from the entry of this Order, or an Appeal may be taken to the appropriate Appellate Court within thirty (30) days of the entry of this Order. *See* Pa. O.C. Rule 7.1, as amended, and Pa.R.A.P. 902 and 903.

BY THE COURT:

Calvin S. Drayer, Jr.

Copies of the above mailed
January 10, 2007 to:
James F. Mannion, Esq./ Adam T. Gusdorff, Esq.
Catherine Beller Meinhart, Esq.
Antoinette Garnett