RENDERED: DECEMBER 4, 2009; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002328-MR

BETTY MACKEY; EMERY JAY YELTON II;
CAROLYN HINSON; AND BRENDA FRALEY — APPELLANTS

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 08-CI-00661

GREG HINSON/CHARLES A. YELTON,
CO-EXECUTORS OF THE ESTATE OF DIANNE
HILL, DECEASED; THE SUSAN G. KOMEN
BREAST CANCER FOUNDATION, INC.;
AMERICAN CANCER SOCIETY, INC.; THE
ARTHRITIS FOUNDATION, INC., NATIONAL
HEADQUARTERS; AND EASTERN KENTUCKY
UNIVERSITY FOUNDATION, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND TAYLOR, JUDGES; HENRY,[1] SENIOR JUDGE.

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

LAMBERT, JUDGE: This is a will contest over a portion of the residuary estate of Dianne Hill. For the reasons stated herein, we affirm the judgment of the Campbell Circuit Court.

Born in 1943, Hill executed a will on September 23, 2005. Upon her death from lung cancer on September 29, 2007, Hill's will was admitted to probate in Campbell District Court on October 5, 2007. Pursuant to the terms of the will, Appellees Charles A. Yelton and Greg Hinson were appointed co-executors.

Hill was never married and had no children. Her parents predeceased her. Hill's only living heirs at the time of both her will execution and her death were her first cousins and appellants herein, Betty Mackey, Emery Jay Yelton II, Carolyn Hinson, and Brenda Fraley [hereinafter "the heirs"]. In her will, Hill made specific cash bequests to friends and family, including cash bequests to each appellant, totaling $101,500, as well as specific in-kind gifts of personal property appraised at a total value of $16,850.

After making the cash bequests and in-kind gifts of personal property, Hill directed as follows:

> All the rest and residue of my property which I may own or have the right to dispose of at the time of my death, both real and personal, of every kind and description and wheresoever situated (my "RESIDUARY ESTATE"), I give absolutely and forever as follows:
>
> (a) One-fourth to be divided between the Susan G. Komen Breast Cancer Foundation at Dallas, Texas, to be used for breast cancer research, but not to exceed $50,000, and any excess of said one-fourth over $50,000 to National Headquarters of the

> American Cancer Society, Inc. at Atlanta, Georgia, to be used for cancer research, but not to exceed $100,000;
>
> (b) One-fourth to the National Headquarters Arthritis Foundation at Atlanta, Georgia, to be used for arthritis research, but not to exceed $100,000, and any excess of said one-fourth over $100,000 to be added to the residuary bequest to Eastern Kentucky University at Richmond, Kentucky, under paragraph [c] below.
>
> (c) One-half to Eastern Kentucky University Foundation . . . as an endowment under the name of "Dianne Hill Scholarship Fund" with income only applied to scholarships to be allocated to students from Bracken, Campbell, Mason, and Pendleton Counties in Kentucky who have achieved a minimum cumulative grade point average of 2.75 over the previous two school years.

At the time of her death, the value of Hill's residuary estate was estimated to exceed $1,640,000. Thus, one-fourth of Hill's residuary estate was well over the $150,000 specifically designated in paragraph (a) above.

On April 21, 2008, the co-executors of Hill's estate filed a declaration of rights and fiduciary instructions action in Campbell Circuit Court. In this action, the co-executors sought guidance from the court as to the distribution of approximately $260,000, or 16 percent, of Hill's total residuary estate. The co-executors claimed the will was unambiguous as to the question of Hill's intent to distribute her entire estate, including the entirety of her residuary estate to the four named charities, but was ambiguous as to which charity or charities were entitled to the undesignated portion of the residuary estate. The co-executors contended

that since Eastern Kentucky University was the only residuary beneficiary without a dollar limitation on its bequest, Eastern Kentucky University should be entitled to the entire undesignated portion of the residuary estate.

On May 16, 2008, Hill's heirs filed an answer to the co-executors' declaration of rights action, claiming that Hill was partially intestate. Because approximately 16 percent of Hill's estate was not bequeathed to any specific party in Hill's will, the heirs argued that the approximately $260,000 in undesignated funds should pass to them as Hill's sole heirs via the intestacy laws. The Susan G. Komen Breast Cancer Foundation, Inc. also filed an answer and counterclaim to the co-executors' declaration of rights action, claiming that it was entitled to a portion of the approximately $260,000 in undesignated funds as a named residual beneficiary of Hill's estate.

After considering the legal arguments and evidence submitted by all participating parties, the trial court entered a final order of summary judgment distributing the undesignated residuum on October 28, 2008. This order was later amended on November 25, 2008. In its final summary judgment order, as amended, the trial court found Hill's will to be unambiguous as to the following determinations: (1) Hill intended to distribute her entire estate; and (2) Hill intended to distribute any undesignated portion of her estate according to the language set forth in the will's residuary clause. Based on these legal conclusions, the trial court apportioned the undesignated portion (approximately $260,000) of Hill's estate pursuant to the terms of the residuary clause set forth in her will. In

other words, the trial court filtered the money through the residuary clause a second time in order to complete the distribution of Hill's estate.

Thus, one-fourth (approximately $65,000) of the disputed amount was distributed--$50,000 to the Susan G. Komen Breast Cancer Foundation and the remainder (approximately $15,000) to the American Cancer Society. One-fourth not exceeding $100,000 (approximately $65,000) was distributed to the Arthritis Foundation. Finally, one-half (approximately $130,000) was distributed to Eastern Kentucky University. From this order, the heirs appeal as a matter of right to this Court.

The heirs' sole argument on appeal is that the trial court erred as a matter of law in failing to find Hill partially intestate with respect to the approximately $260,000 undesignated portion of Hill's estate. We agree with the trial court that Hill's will was unambiguous in its direction that all undesignated portions of Hill's estate shall be distributed pursuant to the residuary clause therein. We therefore find no error in the trial court's finding of no partial intestacy.

As wills are interpreted under the same standards as contracts are interpreted, we shall apply the *de novo* standard of review to this case. *Compare Dils v. Richey*, 431 S.W.2d 497, 498 (Ky. 1968), *and Ratcliff v. Higgins*, 851 S.W.2d 455, 457 (Ky. 1993), *with Abney v. Nationwide Mutual Ins. Co.*, 215 S.W.3d 699, 703 (Ky. 2006).

The very making of a will creates the presumption that the testator did not intend for any portion of his or her estate to pass intestate. *Sigmon v. Moore's Adm'r*, 297 Ky. 525, 180 S.W.2d 420, 422 (1944). "[I]f a will is susceptible of two interpretations, one disposing of property and the other not, that construction disposing of all property will be favored." *Id.* The presumption against intestacy is even stronger when a will contains a residuary clause. *Lester's Adm'r v. Jones*, 300 Ky. 534, 189 S.W.2d 728, 730 (1945). In the absence of contrary direction in the will, residuary clauses shall be construed "liberally so as to pass all of the testator's estate which is not otherwise disposed of and any exclusion from its operation must be plainly and unequivocally manifested by the will." *Sigmon*, 180 S.W.2d at 422. *See also Breckinridge v. Breckinridge's Ex'rs*, 264 Ky. 82, 94 S.W.2d 283, 288 (1936); *Andrew's Ex'x v. Spruill*, 271 Ky. 516, 112 S.W.2d 402, 408 (1937); *Clay v. Security Trust Co.*, 252 S.W.2d 906, 907-08 (Ky. 1952).

We agree with the trial court that the residuary clause set forth in Hill's will unambiguously manifested Hill's intent to distribute all of her property, including property which was not otherwise disposed of or anticipated by Hill at the time of her will execution. In fact, the very purpose of a residuary clause is to dispose of such unanticipated or forgotten property. *See Chrisman v. Allman*, 302 Ky. 144, 194 S.W.2d 175, 176 (1946) ("It is true also that one of the functions of a residuary clause is to dispose of such property as the testator may have forgotten or have been ignorant of its ownership."); *Ward v. Curry's Ex'r*, 297 Ky. 420, 180

S.W.2d 305, 311 (1944) (the balance of all undesignated property in an estate is disposed of by the residuary clause).

Extending as far back as 1909, a long line of cases establish that property not otherwise disposed of in wills such as Hill's shall pass via the residuary clause. In *Deppen's Trustee v. Deppen*, 132 Ky. 755, 117 S.W. 352 (1909), the testatrix declared that the total value of her estate was $10,000 and that she wished for the estate to be equally divided between her two children with $5,000 going to each child. *Id.* at 353. At the time of her death, the testatrix's estate was worth considerably more than $10,000, leaving a substantial amount of money not specifically distributed by the will. *Id.* In construing this will, the Court held:

> [A] cardinal rule of construction is that in making a will the testator is presumed to intend to dispose of his entire estate, and though he may make a mistake in his estimate of the extent or value of his estate, that is not itself a ground for setting aside his will or disregarding his intention. It frequently occurs that devises cannot be paid in full, and where the testator's estate is in stocks or other securities, he is quite liable to mistake its value. We may safely say that, where there is a general description showing that the testator intended to dispose of his entire estate, words of quantity will not control.

Id. at 354.

We find this case analogous to the facts set forth in *Deppen*, *supra*, in that not only is there a general description showing that Hill intended to dispose of her entire residuary estate, but also Hill further included percentages in the residuary clause that amounted to a 100 percent distribution of the residuum. The

fact that the monetary caps set forth in subsection (a) of this clause are not in coherence with the one-quarter allocation directed in that subsection shall, according to the holding set forth in *Deppen*, *supra*, not control this case.

In any event, even if we were to presume that an outright omission was committed by either Hill or her attorney in the drafting of Hill's will, we hold that the residuary clause contained therein operated to save the undesignated portion of Hill's estate from intestacy. Authority for this holding is found in *Ward v. Curry's Ex'r*, *supra*. In that case, the testatrix revoked a specific bequest made in her will by codicil but forgot or neglected to redistribute the revoked bequest in that same document. 180 S.W.2d at 308. The Court held that since the will contained a residuary clause, the omitted portion of the testatrix's estate naturally passed to the residuary beneficiaries. *Id.* at 311. *See also Lester's Adm'r v. Jones*, 189 S.W.2d at 730 (undesignated remainder interest in monetary bequest passed to residuary beneficiaries); *Sigmon v. Moore's Adm'r*, 180 S.W.2d at 422 (balance of estate not specifically disposed of passed to residuary beneficiaries); *Settle v. Vercamp*, 485 S.W.2d 251, 253-54 (Ky. 1972)(where will granted life estate in property but did not designate remaindermen and life tenant predeceased testator and will contained residuary clause, legacy did not lapse but became part of testator's estate to which residuary clause of will was applicable).

In the case at bar, the heirs concede both the presence of a residuary clause in Hill's will and Hill's likely intent to dispose of the entirety of her property. In fact, it is apparent that in any case Hill did not intend to pass any

portion of the residuum to her heirs since they are not named as residuary beneficiaries but rather were each bequeathed cash gifts by Hill in the will. However, the heirs cite *Pimpel v. Pimpel*, 253 S.W.2d 613 (Ky. 1952), and *Robinson v. Von Spreckelsen*, 287 Ky. 705, 155 S.W.2d 30 (1941), as authority for their argument that even if unintended, intestacy is mandated "when the fact becomes apparent that some part of the estate was not disposed of [in the will]." *Pimpel*, 253 S.W.2d at 614.

While we agree with the general rule set forth in *Pimpel, supra,* and *Robinson*, *supra*, that the "presumption [against intestacy] cannot be applied to supply a disposition which was not made or intended," there is no such circumstance in this case. *Pimpel*, 253 S.W.2d at 614. In both *Pimpel, supra*, and *Robinson, supra,* the testator's will contained no residuary clause and hence, there was no express or implied disposition in the testator's will for property not specifically bequeathed. *Id.* In contrast, the will in this case contained a residuary clause which manifestly expressed Hill's intent to distribute all of her property and operated to effectuate an actual distribution of all of Hill's property not otherwise disposed of in the will.

The heirs further argue, and the trial court found, that no extrinsic evidence was necessary to determine the distribution of property directed by Hill's will. We agree. The will contained a residuary clause which unambiguously set forth Hill's intent to distribute the entirety of her estate, including property which was not otherwise specifically disposed of in the will. The fact that the distribution

section of the residuary clause either inadvertently omitted a named beneficiary for the remainder interest set forth in subsection (a) of that article or incorrectly calculated the size Hill's estate is without effect.

To be sure, we are guided by this Court's holdings in *Belew v. Sharp*, 696 S.W.2d 788 (Ky. App. 1985), and *Conley v. Brewer*, 666 S.W.2d 751 (Ky. App. 1983). In *Belew v. Sharp*, this Court held that a lapsed bequest located in the residuum itself did not render the entire residuary clause invalid or ineffective in its operation or purpose "unless, of course, there is only one beneficiary named in the residuum." 696 S.W.2d at 791. As support for its holding, the *Belew* Court cited KRS 394.500, which provides: "Unless a contrary intention appears from the will, real or personal estate, comprised in a devise or bequest incapable of taking effect, shall be included in the residuary devise contained in the will." In *Conley v. Brewer*, this Court also cited KRS 394.500 as authority for its holding that revoked portions of a testatrix's will, including a portion of the residuary clause, passed to the remaining residuary devisees and not to the heirs at law of the testatrix. 666 S.W.2d at 754.

We therefore hold that a miscalculation or omission, if any, which resulted in a portion of Hill's estate, including a portion of Hill's residuary estate, going undesignated in her will did not result in intestacy as to this undesignated portion. Rather, this contingency was expressly and manifestly provided for by the general and manifest language of total distribution set forth in the will's residuary clause. Accordingly, the heirs' argument that Hill died partially intestate is

without merit and must be rejected. As established by over a century of precedent, the very purpose and function of the residuary clause is to account for miscalculations or omissions such as the one that was made in this case.

For these reasons, we affirm the Campbell Circuit Court's order, as amended, holding that Hill was not partially intestate at the time of her death.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Mark Schumacher
Brooksville, Kentucky

Michael A. Clark
Brooksville, Kentucky

BRIEF FOR APPELLEES, CHARLES A. YELTON AND GREG HINSON, CO-EXECUTORS OF ESTATE OF DIANNE HILL:

Robert G. Zweigart
Maysville, Kentucky

BRIEF FOR APPELLEE, THE SUSAN G. KOMEN BREAST CANCER FOUNDATION, INC.:

Joseph E. Conley, Jr.
Florence, Kentucky

BRIEFS FOR APPELLEES, AMERICAN CANCER SOCIETY, INC.; THE ARTHRITIS FOUNDATION, INC., NATIONAL HEADQUARTERS; AND EASTERN KENTUCKY UNIVERSITY FOUNDATION, INC.:

None.