S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

In re Estate of CECIL C. WARREN, JR., Deceased.

CINDY WARREN,

Petitioner-Appellant,

v

JEFFREY J. WARREN, SUSAN WARREN and SUSAN VALDISERRI, Personal Representative of the Estate of CECIL C. WARREN, JR., Deceased,

Respondents-Appellees.

UNPUBLISHED
November 16, 2006

No. 262937
Saginaw Probate Court
LC No. 04-116725-DE

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Petitioner appeals from an order of the probate court denying her an intestate share of her deceased husband's estate. Specifically, petitioner objects to the probate court's ruling that under Michigan's pretermitted spouse statute, MCL 700.2301, she was not entitled to claim an intestate share because the decedent had devised his entire estate in trust for the benefit of his son, respondent Jeffrey J. Warren, the decedent's child from a previous marriage. We affirm.

Petitioner first argues that the lower court erred when it ruled that she was not a pretermitted spouse under MCL 700.2301. Petitioner argues that as a pretermitted spouse, she is statutorily entitled to an intestate share of the decedent's estate, notwithstanding the provisions of the will. We agree with petitioner that she is, in fact, a pretermitted spouse, but we disagree that the lower court erred in not awarding her a share of the decedent's estate. We review the probate court's findings of fact for clear error. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). "A finding is clear error when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *In re Estes Estate*, 207 Mich App 194, 208; 523 NW2d 863 (1994). We review an issue of law de novo. *Danse Corp v Madison Heights*, 466 Mich 175, 178; 644 NW2d 721 (2002).

Michigan provides for the recovery of an intestate share by a surviving spouse if a testator fails to provide by will for a surviving spouse who married the testator after the execution of his will. MCL 700.2301. The statute reads, in pertinent part:

> (1) Except as provided in subsection (2),[1] if a testator's surviving spouse marries the testator after the testator executes his or her will, the surviving spouse is entitled to receive, as an intestate share, not less than the value of the share of the estate the surviving spouse would have received if the testator had died intestate as to that portion of the testator's estate, if any, that is not any of the following:
>
> (a) Property devised to or in trust for the benefit of a child of the testator who was born before the testator married the surviving spouse and who is not the surviving spouse's child. [MCL 700.2301(1) (footnote added).]

Petitioner married the testator on May 14, 2004, 14 years after he executed his will on May 9, 1990. Petitioner is not specifically named in the decedent's will or trust as a beneficiary of his estate. The probate court concluded, "in reviewing the statute 2301[, petitioner] would not be a pretermitted spouse." The court's order goes on to simply state that petitioner "is not entitled to claim an intestate share as a Spousal Election under MCL 700.2301."

Petitioner is, in fact, a pretermitted spouse because she and the testator were married after the testator executed his will. Any uncertainty with respect to the application of MCL 700.2301 that was created by the court's statement at the hearing was resolved by the court's order. The court clearly ruled that petitioner is not entitled to an intestate share under MCL 700.2301(1)(a).

The next issue is whether petitioner, as a pretermitted spouse under MCL 700.2301, is entitled to any share of the decedent's estate. In *In re Bennett Estate*, *supra* at 549-551, this Court discussed the application of MCL 700.2301. In *In re Bennett Estate*, the testator's will left his entire estate to his first wife, providing that in the event she predeceased him, the estate would go in equal shares to the testator's four natural children and his four stepchildren (his first wife's children from a prior marriage). *Id*. at 546. The decedent married his second wife after the execution of this will. *Id*. This Court held that "the statute provides that a surviving spouse in . . . [the second wife]'s position, i.e., one who married the testator after he executed his will, is entitled to an intestate share of her spouse's estate." *Id*. at 550. The Court then held that in order to determine the intestate share of the second wife, a court must "look to the will, deduct the devises to the natural children, and pay the surviving spouse's statutory share under MCL 700.2102(1)(f) [the intestacy statute] *to the extent possible*, from the remainder." *Id*. at 550 (emphasis added). Accordingly, the second spouse in *In re Bennett Estate* received the intestate share that was not devised to the testator's natural children. *Id.* at 554.

[1] MCL 700.2301 (2) sets forth certain exceptions to the rights granted by subsection (1). Both parties concur that none of the exceptions are applicable in this case.

In this case, the will and trust plan executed by the decedent leaves everything to the decedent's first wife, Sue Ann E. Warren. However, in accordance with the document terms, Sue Ann, as a divorced spouse, is deemed to have predeceased the decedent. The will and trust provide that if Sue Ann predeceases the decedent, the entire estate goes to their son, Jeffrey. Under the principles outlined in *In re Bennett Estate, supra* at 549-550, petitioner is entitled to her intestate share under 700.2102(1)(f) as a pretermitted spouse, less the devise to the decedent's son Jeffrey. In this case, Jeffrey was devised the entire estate. Hence, there exists no "remainder" from which plaintiff's intestate share can be drawn. Thus, the trial court correctly held that under MCL 700.2301(1)(a), petitioner should receive nothing from the decedent's estate.

Petitioner next argues that she is entitled to her intestate share of the decedent's estate because there is a factual issue with respect to how the decedent wanted his subsequent spouse treated, and extrinsic evidence shows the decedent intended to provide for her. We disagree. "The role of the probate court is to ascertain and give effect to the intent of the testator as derived from the language of the will." *In re McPeak Estate*, 210 Mich App 410, 412; 534 NW2d 140 (1995). The settlor's intent at the time the instrument was created should be ascertained and carried out as nearly as possible. *In re Maloney Trust*, 423 Mich 632, 639; 377 NW2d 791 (1985).

"The rules of construction applicable to wills also apply to the interpretation of trust documents." *In re Reisman Estate*, 266 Mich App 522, 527; 702 NW2d 658 (2005). "Absent an ambiguity, the court is to glean the testator's intent from the four corners of the testamentary instrument." *In re McPeak Estate*, *supra* at 412. However, if a document does evidence an ambiguity, "a court may establish intent by considering two outside sources: (1) surrounding circumstances, and (2) rules of construction." *In re Allen Estate*, 150 Mich App 413, 416; 388 NW2d 705 (1986). An ambiguity may be patent or latent. *Thurston v Thurston*, 140 Mich App 150, 153; 363 NW2d 298 (1985). A patent ambiguity exists if uncertainty regarding meaning "clearly appears on the face of a document, arising from the language itself." Black's Law Dictionary (8th ed); see also *In re Woodworth Trust*, 196 Mich App 326, 328; 492 NW2d 818 (1992). "A latent ambiguity exists where the language and its meaning are clear, but some extrinsic fact creates the possibility of more than one meaning." *In re Woodworth Trust*, *supra* at 328. "Since the detection of a latent ambiguity requires a consideration of factors outside the instrument itself, extrinsic evidence is obviously admissible to prove the existence of the ambiguity, as well as to resolve any ambiguity proven to exist." *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 575; 127 NW2d 340 (1964).

In this case, no patent ambiguity exists because no uncertainty is evident on the face of the relevant documents. The language of the will clearly shows that "my spouse" and "my beloved spouse" refer to Sue Ann E. Warren, the decedent's first wife. Likewise, the trust specifically states: "My spouse, SUE ANN E. WARREN, herein referred to as 'spouse.'" This language clearly identifies Sue Ann E. Warren as the spouse to whom the testator made the bequest. The words of restriction used by the decedent create no patent ambiguity.

The next issue is whether a latent ambiguity exists because of some extrinsic fact that creates the possibility of more than one meaning in otherwise clear language. See *In re Woodworth Trust*, *supra* at 328. In *Thurston, supra* at 153, this Court found the adoption of a child by the testator's son after the execution of the testamentary instrument rendered a bequest

to the testator's grandchildren ambiguous. The will in *Thurston* referred to the testator's son's "children" but did not identify the specific children and did not state whether "children" included adopted children. *Id*. at 154. A latent ambiguity existed "because the language employed is clear and suggests but a single meaning, but some extrinsic fact, i.e., defendant's adoption, creates the possibility of more than one meaning." *Id*. at 153. In that case, the Court applied the statutory rebuttable presumption that an adopted child is included in the term "child." *Id*. at 154.

However, in *In re McPeak Estate*, *supra* at 412-413, this Court held that a latent ambiguity did not exist when the decedent's will contained the following provision: "*My Children/My Descendants* . . . . All references to 'my descendants' are to Kristine and Kerry and the descendents of Kristine and Kerry." Kristine and Kerry were the natural daughters of the decedent. *Id*. at 412 (emphasis in original). The decedent executed his will while married to JoAnn McPeak, and at the time of the will's execution was considering adoption of Emily, JoAnn's daughter from a previous marriage. *Id*. at 411. The will provided for a bequest of one-third of the residuary estate to Emily in the event JoAnn did not survive the decedent. *Id*. at 412. The decedent did later adopt Emily, but did not change his will to expressly include Emily as a "child" or "descendant." *Id*. at 411-412. The issue before the Court was whether the testator intended to include adopted children when he referred to "my children" or "my descendants." *Id.* at 412.

Relying on the Court's holding in *Thurston*, JoAnn argued on Emily's behalf "the decedent's post-execution adoption of Emily creates a latent ambiguity regarding the definition of 'children' or 'my descendants.'" *In re McPeak Estate, supra* at 412-413. Although *Thurston* also involved a post-execution adoption, the *In re McPeak Estate* Court held that the similarities ended there. *Id*. at 413. "In *Thurston*, the adoption was not by the testator, but rather by a devisee under her will, and there was no indication that the testator was even aware of the adoptee at the time of execution." *Id*. In contrast, *In re McPeak Estate*, "Emily was living with decedent and [he] . . . was contemplating adoption at the time he executed his will." *Id*. "Under these circumstances," the Court held, "there can be no ambiguity concerning whether decedent meant to exclude prospective adoptees when he sought to define 'children' and 'my descendants.'" *Id*. "The testamentary plan was a thoughtful and careful one," the Court concluded, executed while the testator was contemplating the inclusion of Emily into his immediate family. *Id*. at 414. Furthermore, because Emily was provided for in a separate, contingent devise, the Court held that Emily did not qualify as a pretermitted heir, finding it "unlikely that the subsequent adoption would have altered the testator's intent, especially where . . . the testator was already contemplating adoption of his spouse's child at the time of execution and therefore had the opportunity to devise a greater portion of his estate to the child in the event that the contemplated adoption occurred." *Id*. Accordingly, Emily was not permitted to share in the decedent's estate as a "child" or "descendant" of decedent. *Id*. at 414-415.

Similar to the decedent's estate plan in *In re McPeak Estate*, the thorough and precise nature of the decedent's testamentary plan suggests it was thoughtfully and carefully executed. The decedent specifically named Sue Ann E. Warren as his "spouse" in the documents. Further, while the decedent drafted the will long before he was divorced from his first wife, the trust language indicates that, at the time of its execution, the decedent anticipated the possibility of a future divorce and took pains to prepare for it accordingly. It is reasonable to conclude that given an awareness of the possibility of divorce, the decedent was also aware of the possibility of

remarriage at the time the instruments were created. However, the decedent did not elect to substitute a future spouse in Sue Ann's place. The parties do not dispute petitioner's assertion that she and the decedent enjoyed several years of courtship, during which time they lived together, and remodeled a home where they planned to reside. The decedent had ample time before he dated petitioner, during their courtship, and during their short marriage to effectuate changes to his testamentary documents. Decedent failed to make any such revisions. No evidence exists to suggest the decedent intended for petitioner to be a beneficiary under his will and trust. Further, the fact that the decedent died shortly after the marriage began does not allow for the conclusion that the language used in the documents might have had more than one meaning. The evidence does not support an assertion that a latent ambiguity exists in the decedent's will and trust.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot