20074001

IN THE COURT OF COMMON PLEAS

COMPUTER

PROBATE DIVISION

CLARK COUNTY, OHIO

FILED
CLARK COUNTY PROBATE COURT

Joan M. Vrettos, : Case No. 20074001
Plaintiff

DEC 22 2008

-vs-

: JUDGE CAREY

Anne Hughes Rutherford, et al RICHARD P. CAREY
Defendants PROBATE JUDGE **DECISON-ENTRY**

This matter came before this Court to consider a Motion for Relief from Judgment pursuant to Civ. R. 60(B) and filed herein July 22, 2008. As the basis for this Motion, the applicants, Anne C. Rutherford and Kay Richards, have argued that their prior counsel misinterpreted a key provision of the Last Will and Testament of Beatrice Hughes, who died August 16, 2004. Specifically, the applicants contend that their prior counsel interpreted the residual clause of said Will as calling for a *per stirpes* distribution rather than a *per capita* distribution amongst Hughes' surviving children. The interpretation of this clause had a direct impact on this Court's prior Judgment adjusting the various rights of the heirs of Beatrice Hughes.

As the parties know, Civ.R. 60(B) provides an equitable remedy that is intended to afford relief in the interest of justice. To prevail on a motion pursuant to Civ.R. 60(B), the movant must demonstrate: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time. *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146. In this matter, the applicants presented arguments solely under Civ. R. 60(B)(1), to-wit: that prior

counsel had made a "mistake" in his interpretation of the Hughes' Will, and that the same constituted "excusable neglect".

The Court chooses first to consider whether the applicants would have a meritorious defense or claim if their motion for relief from this Court's Judgment were to be granted. To this end, the Court considers the testamentary clause at the heart of the matter, Item III of said Last Will and Testament, which provides the following language, in pertinent part, to wit:

> ...I give, devise and bequeath all of my said property to my children, absolutely and in fee simple: Beatrice Kay Richards, Anne Carolyn Rutherford, Mary Irene Alderete, Jane Elisabeth Thomas, Thomas Edward Hughes and Joan Maria Hughes, share and share alike.

Of these children, Mary Irene Alderet, Jane Elisabeth Thomas, and Thomas Edward Hughes predeceased Beatrice Hughes, leaving one issue, Roberta Brooks.

Prior counsel had agreed and represented to this Court that the Will directed that there be an equal distribution of Estate assets between Beatrice Richards, Anne Rutherford, Joan Hughes (nka Vrettos) and Roberta Brooks. That is to say that they had interpreted the clause in question to call for a *per stirpes* distribution—with Roberta Brooks taking her parent's share by representation. That the estate might be instead divided on a *per capita* basis amongst the surviving children—that is equally between Beatrice Richards, Anne Rutherford, and Joan Vrettos—was never presented as an issue for the Court's consideration. Applying the *per stirpes* distribution, then, this Court awarded 25% of Beatrice Hughes' family business, the estate's principal asset, to Roberta Brooks—which ultimately affected the control of the business.

New counsel for the applicants, Attorney Paul Kavanagh, now challenges this interpretation of counsel; suggesting that the language in Item III does indeed call for a

per capita distribution to the surviving children as opposed to a *per stirpes* distribution to the children *and* the issue of any predeceased child, to wit: Roberta Brooks. A *per capita* distribution to the survivors would remove Roberta Brooks as a legatee under the Will. This would significantly alter the ownership formula of the family business —the crux of the prior lawsuits, the judgment from which the applicants now seek relief. The question, ultimately, is whether this claim or defense would have any merit.

In furtherance of their position, the applicants direct this Court's attention to *Polen v. Baker* (2001), 92 Ohio St.3d 563, wherein the Ohio Supreme Court reached the following propositions: first, that the dispositive testamentary language, "equally share and share alike, the same to be theirs absolutely, or to the survivors thereof" calls for an equal distribution to the named beneficiaries who survive the decedent, and defeats the antilapse statute; and second, that the language, "equally share and share alike" calls for a *per capita*, as opposed to a *per stirpes* distribution. Applicants contend that these propositions dictate a *per capita*, or equal, distribution of assets only amongst the three Hughes' children who survived the decedent, to wit: Rutherford, Vrettos, and Richards.

This Court, however, is not inclined to conclude that the *Polen* case is dispositive of the case at bar. *Polen* considered and focused on testamentary language which included words of survivorship, that is: "...to the survivors thereof." Such words are not present in the Hughes Will, which merely presents the words: "share and share alike". There are no other words which afford a clue as to the identity of the specific beneficiaries of the residuum in the event of the death of any of the named children.

Under these circumstances, this Court believes that Ohio's antilapse statute is not defeated; but, rather, comes into play. This statute, O.R.C. 2107.52(B), provides that:

> Unless a contrary intention is manifested in the will, if a devise of real property or a bequest of personal property is made to a relative of a testator and the relative * * * dies after that time, leaving issue surviving the testator, those issue shall take by representation the devised or bequeathed property as the devisee or legatee would have done if he had survived the testator.

Pursuant to this statute, the child, or children, of a predeceased beneficiary would normally take the named, but predeceased, beneficiary's share by representation—that is, *per stirpes*. The statute provides an exception to this rule if, but only if, there is a "*contrary intention*...manifested in the will." (Emphasis added) A contrary intention, for instance, might be language such as words of survivorship---such as in *Polen*. A reading of the Hughes' Will, however, reveals no such *contrary intention*. Rather, the language in the Hughes' Will specifically gives the residual estate "absolutely and in fee simple" to all of the six named children, outright—said gift qualified only later with the language "share and share alike." No direction is otherwise afforded in the event a child predeceases the testator.

Applicants, nevertheless, cite *Polen's* second proposition, in addition to the first proposition, as calling for the defeat of the anti-lapse statute herein. They point out that *Polen* stated that it is well settled that the language, "equally share and share alike" designates the manner in which beneficiaries are to take. *Mooney v. Purpus* (1904), 70 Ohio St. 57, 65. "Such language presumptively indicates an intent for the beneficiaries to take *per capita* and not *per stirpes*." (*Polen, supra,* p.568).

This Court believes, however, that the applicants may be in jeopardy of confusing rules of construction. The term, "*per capita*", after all, does not *define* the class of beneficiaries; but only the *nature of the share* to be taken by each beneficiary. The *Mooney* Court, cited by *Polen*, considered the following testamentary

language:"[w]hatever there remains after my decease shall be equally divided amongst my lawful heirs, share and share alike." Much like the case at bar, *Mooney* considered a scenario wherein the decedent left several surviving children and two grandchildren of a predeceased child. In concluding that the Will called for the grandchildren each to take equal shares, rather than to split one share, the *Mooney* Court stated:

> By the phrase "my lawful heirs" testator *describes the objects of his bounty and designates who are to be his beneficiaries;* and by the words, "equally, share and share alike," he *defines and points out the manner* in which they are to take the estate comprehended by the gift....By the use of the phrase "my lawful heirs" he manifestly intended that all those persons who would be his heirs under the statute of descent, in case of his intestacy, should be his beneficiaries, and should take the residuum of his estate. And by the use of the words "equally, share and share alike," he just as clearly evidenced the intention that they should not take such residuum in the manner prescribed by the statute, but should take it equally, share and share alike, as directed by his will. By reference to the statute we ascertain who are to take under item four, and by the plain provisions of the will itself, we are told how they are to take, that is: "equally, share and share alike," per capita and not per stirpes. *Mooney v. Purpus* (1904), 70 Ohio St. 57, pp.65-66. (Emphasis added).

Accordingly, this Court finds that the words in the Hughes' Will, "share and share alike", do not dictate the beneficiaries of the Hughes' residuum. As stated above, Roberta Brooks, as the child of one of Hughes' predeceased children, stands now to be counted amongst her beneficiaries. As she is the sole grandchild, it matters not whether the manner of the distribution is *per capita* as opposed to *per stirpes*. The Court, nevertheless, notes that, absent the antilapse statute, *Mooney* would have called for a *per capita* distribution—that is that any and all grandchildren would have been on equal footing with the children regarding the division of the residuum. However, as the anti-lapse statute was enacted *after* the 1904 *Mooney* decision, the statute becomes superior to the ruling; and Brooks takes her parent's share by representation—that is, *per stirpes*.

Thus had there been other grandchildren, they would necessarily have had to split their parent's share.

In light of the forgoing, this Court finds that, even should the applicants be granted relief from the prior judgment in this case, that their claim or defense would not prove to be meritorious. Specifically, this Court would apply the same manner of distribution in rendering its prior judgment.

Accordingly, the applicants' Motion for Relief from Judgment is Overruled.

IT IS SO ORDERED.

THIS IS A FINAL APPEALABLE ORDER.

RICHARD P. CAREY, PROBATE JUDGE

cc: Paul J. Kavanagh, Esq.
Wilfred Potter, Esq.

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RICHARD P. CAREY
PROBATE JUDGE

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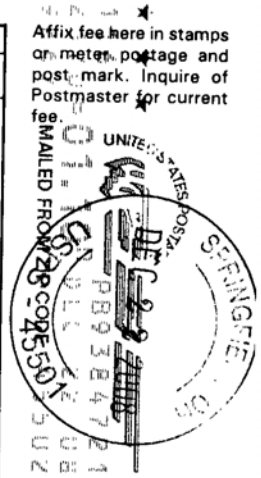

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