20160123A

COMPUTER

IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
CLARK COUNTY, OHIO

SCANNED

In the matter of	:	
		CASE NO. 20160123A
Deborah Potts, Spec. Adm.,	:	
Plaintiff	:	
-vs-	:	JUDGE RICHARD P. CAREY
Glenn Allen Potts, et al.	:	**ENTRY**
Defendants	:	

FILED
CLARK COUNTY PROBATE COURT
JUN 26 2019
RICHARD P. CAREY
PROBATE JUDGE

This matter is before the Court to consider a complaint for construction of a Will filed by Special Administrator Deborah Potts on March 12, 2019. The Administrator represents that she is in doubt as to the true construction of certain paragraphs of the Decedent's Last Will and Testament. The Court's attention is directed toward Article IV of the said Last Will and Testament which reads as follows:

ARTICLE IV
Specific Gifts

A. **Gifts of Specified Items of Property.** I give all my interest in certain items of tangible personal property to the beneficiaries designated in this section as follows:

1. **Specific Gift One.** I give and wish for my living daughter to live at my home 4523 EnonXenia Road upon her death my two remaining sons Glen A. Potts and Foster Ray Potts will have my eatate (sic) 50% to each one to my daughter, JoElla Denzer if she survives me. If JoElla Denzer does not survive me no property shall pass under this Article.

Glenn Allen Potts, the son of the decedent, filed an Answer by and through counsel, Attorney Andrew Elder. Kristy Ratliff, the granddaughter of the decedent, by way of the decedent's son, Foster Ray Potts, filed an Answer pro se. And Jessica Anon and Misti Couch, grandchildren by

way of the decedent's children, Albert Estes, Jr. and Donna Estes respectively, filed an Answer by and through counsel, Attorney Paul Kavanagh. All interested parties were given an opportunity to file respective briefs on the issue.

As it has been represented by the parties in their briefs in the underlying estate, the decedent, Ruby Estes, died on December 29, 2015. On December 10th of that year, Ruby Estes signed her Last Will and Testament; and therein listed the following as her children, to-wit: Glenn Allen Potts, Foster Ray Potts, JoElla Denzer, "Albert Estes, Jr. (deceased)", and "Donna K. Estes (deceased)". This comprised the full list of children as referred to in her Will. Glenn Allen Potts survived the decedent and remains alive to date. Foster Ray Potts survived the testator by more than five days but less than thirty days, dying on January 21, 2016. JoElla Denzer survived the testator by approximately two years. Albert Estes Jr., who predeceased the testator, is survived by children Jessica Anon and Andrea Estes. Donna K. Estes, who predeceased the testator, is survived by her one child, Misti Couch.

The role of the Court in a will construction case is to ascertain and give effect to the testator's intent. *Oliver v. Bank One Dayton N.A. (1991),* 60 OhioSt 3rd 32. In this case, the Court would agree with counsel that the Will herein was inartfully drafted. Nevertheless, the Court must first look to the four corners of the Will document to discern the intention of the testator if possible. To this end, when two different constructions are possible, the Court must give effect to the one which sustains the provisions of the Will, rather than to the one that defeats it. *McMerriman v. Schiel (1923),* 108 OhioSt. 334.

In this case, the Court finds it beneficial to begin with a review of the residuary clause. In Article V, the testator employs the following language: "I give all of the rest and residue of my estate, wherever located … to my descendants if they survive me per stirpes." In *Black's*

Law Dictionary 908 (9th Edition 2009) "descendant" is defined as "[o]ne who follows in the bloodline of an ancestor, either lineally or collaterally. Examples are children and grandchildren." The testator adds the language "per stirpes" to her instructions. This language does have legal significance, as it helps to suggest an intent to limit the definition of "descendants" to a particular class --- here, children --- with the next line of descendants --- i.e. grandchildren --- in a position to take, not directly, but by representation. The Court, then, finds that the intention of the testator in this case by using the word "descendants" is to describe her named children.

The Court notes, however, that the word "descendants" is further qualified with the language, "if they survive me". This suggests that the testator deemed their survival of her to be of import. As stated above, the testator specifically in Article I announced that two children were already deceased, that is Albert Estes Jr. and Donna K. Estes. For this reason, the class of potential beneficiaries in the residuary clause is reduced, as of the time the Will was executed, from five to three children, to-wit: Glenn Allen Potts, Foster Ray Potts and JoElla Denzer.

This having been considered, the Court returns to an examination of Article IV. The testator's language in Article IV A is that she was giving "all my interest in certain items of *tangible personal property* to the beneficiaries designated in this section." Unfortunately, there is, in fact, no specific gift of tangible personal property expressed by the testator. Rather the sole asset specifically described is a parcel of real estate located at 4523 Enon Xenia Road. Under these circumstances, the use of the words "tangible personal property" should be deemed a scriveners error and without legal effect and, to that end, ignored.

The Court next considers that JoElla Denzer, and more specifically her status as living or deceased at the time of the testator's demise, holds the key to the interpretation and execution of

the Will herein. The Court finds the following language in the body of Article IV, A.1: "to my daughter, JoElla Denzer, if she survives me." As written, if JoElla Denzer were *not* to survive the testator, then the real estate would pass under the residuary clause, and Article IV paragraph A1 would have no effect or operation. On the other hand, if JoElla Denzer survived the testator, then the testator specifically devised a life estate regarding the real property to JoElla Denzer. This is the natural and legal consequence of the language "I give and wish for my living daughter to live at my home 4523 Enon Xenia Road" as amplified by the additional language "upon her death".

As represented by the parties, JoElla Denzer did in fact survive the testator by more than thirty days. And, accordingly, she was given a vested life estate interest in said described real property. She did, apparently, reside in this property until her death.

The Court now looks to Article IV paragraph A1 to discern what is to become of the property upon JoElla's death. The Court finds, albeit poorly drafted, the following language, to-wit: "upon her death my two remaining sons, Glenn A. Potts and Foster Ray Potts, will have my estate 50% to each one..." Confusion is compounded by the additional language which then followed: "to my daughter, JoElla Denzer, if she survives me." The Court, after reflection, finds that this language was mistakenly placed at that point of the paragraph and has no legal effect with respect to this remainder interest. That is to say that neither JoElla Denzer, nor her heirs, stand to receive any interest beyond the stated life estate. The reason for this is that if each son receives 50%, as per the directive of the Will, there is no extra interest to pass to any other person. So, at the end of the day, the Court does find that the testator intended to and did devise her real estate to her two sons, Glenn A. Potts and Foster Ray Potts, with a life estate vested to

JoElla Denzer. Moreover, these respective interests vested immediately upon the death of the testator. *Woodbridge v. Branning* (1836), 14 OhioSt. 328.

The legal twist that presents itself with this interpretation is that Foster Ray Potts died within thirty days of the testator. Article VIII, paragraph B states that "[t]o 'survive' me, as that term is used in this Will, a person must continue to live for thirty (30) days after my death." It is suggested that this would mean that the interest devised to Foster Ray Potts should therefore lapse to his brother , Glenn A. Potts.

Two things. First, the thirty day requirement under Article VIII is limited in application to those parts of the Will where the term is used, "to survive me". Article IV, paragraph A1, however, does not use any such survivorship language per se as a condition of operation, but rather simply employs the language: "upon her death my two remaining sons, Glenn A. Potts and Foster Ray Potts," (clearly consistent with the assertion that the third son had already passed).

Secondly, we must consider R.C. 2107.52 as there has been a suggestion that Foster's devise must lapse. The "anti-lapse" statute is of use herein, but only to the extent that it defines who is and who isn't a surviving devisee. R.C. 2107.52 defines "surviving devisee" as one who survives the testator by at least 120 hours. That is five days. R.C. 2107.52 (A)(7). In light of the observations in the former paragraph, the thirty day requirement per Article VII must yield to the lesser five day requirement per R.C. 2107.52. The Court believes that since Foster Ray Potts survived the testator by more than five days, he must be considered under law to be a "surviving devisee" for purposes of the anti-lapse statute. Once Foster Ray Potts is discerned to be a surviving devisee, the anti-lapse statute is of no further service: there is no lapse as a result of death. What this means is that the 50% interest in the real property vests in Foster Ray Potts;

and does not lapse to Glenn A. Potts nor does it vest by representation in his descendants --- as would have been the result had the anti-lapse statute been applied.

Accordingly, and with respect to the real estate listed as 4532 Enon Xenia Road, Glenn A. Potts and Foster Ray Potts each received a devise of 50% interest in said real estate upon the death of the testator. Glenn A. Potts enjoys that 50% interest to date. Insofar as Foster Ray Potts is now deceased, his 50% interest becomes an estate asset in the Estate of Foster Ray Potts and passes either in accordance with his Last Will and Testament or by the laws of intestate succession.

The Court now returns to the matter of the operation of the residuary clause in Article V. The specific question here is who should receive the funds subject thereto. The Court focuses its attention on the following Article V language, to-wit: "to my descendants if they survive me per stirpes." As previously stated, the Court finds the bequest of the residuary to be a "class gift" to a class comprised of three of the children named in Article I of the Will. Here, unlike Article IV, the testator did specifically employ the words "if they survive me". And so here, the thirty day time requirement,and not the lesser five day requirement, would apply. To that end, only two of the testator's children survived her by thirty days --- Glenn A. Potts and JoElla Denzer --- and so only these two children make up the class of beneficiaries in light of this language.

This Court notes that generally a class gift to "descendants" does not trigger the application of the anti-lapse statute. See 2107.52(B)(2)(b). Rather, the use of that term, especially as coupled with the language: "if they survive me," evinces the intention of the testator that the gift be enjoyed only by the "children" who survived her --- that is, that the share of a deceased child would, indeed, lapse. This inures to the benefit of Glenn A. Potts and JoElla

Denzer; but is of no value to the descendants of Foster Ray Potts, Albert Estes, Jr. and Donna Estes.

Accordingly, Glenn A. Potts would take 50% of the residuum and the lineal descendants of JoElla Denzer --- as she is now deceased --- would take the balance. Sadly, however, and as represented to the Court, JoElla Denzer died without any children. As a result, the devise of the residuary to JoElla Denzer fails. Pursuant to R.C. 2107.52 (D), the share of a residuary devisee that fails for any reason passes to the other residuary devisee. That is to say that Glenn A. Potts receives that residue which otherwise would have passed to any children of JoElla Denzer.

The Court has been advised that the Special Administrator has sold the real property in question. Accordingly, the Court now declares that Glenn A. Potts receive 50% of the proceeds from said sale, and the Estate of Foster Ray Potts receive 50% of the proceeds of said sale. Furthermore, Glenn A. Potts is to receive the residuary of the estate assets in total.

IT IS SO ORDERED.

THIS IS A FINAL APPEALABLE ORDER.

RICHARD P. CAREY, PROBATE JUDGE

cc: Andrew Elder, Esq.
Paul Kavanagh, Esq.
Jack Spencer, Esq.
Kristy Ratliff, pro se
Andrea Estes

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