STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of RICHARD BRUCE MONAHAN,
Deceased.

EVELYN J. MONAHAN,

Appellee,

v

JUDITH L. STEFFER, ALICE K. MONAHAN, and RICHARD BRUCE MONAHAN, JR.,

Appellants.

UNPUBLISHED
November 20, 2007

No. 271408
Ogemaw Probate Court
LC No. 04-012626-DE

Before: Owens, PJ, and Bandstra and Davis, JJ.

PER CURIAM.

In this will contest, appellants appeal as of right the court's order finding that Joyce Evelyn Forth and Ken Bruce Monahan were the devisees of decedent Richard Bruce Monahan's will and distributing the remainder of his estate to them. We affirm.

Decedent and his first wife had three children, appellants Richard B. Monahan, Jr., Judith L. Monahan Steffer, and Alice K. Monahan. Decedent's first marriage ended in divorce in the early 1970s. Decedent's natural children visited him periodically for a few years after the divorce, but they stopped seeing him about 1975 or 1976. Richard Monahan testified that he did not know why he and his sisters became estranged from his father. He claimed that he had not had the opportunity to visit his father after he became an adult, and that, although he wanted to reunite with decedent, neither he nor decedent took the initiative to renew their relationship.

In 1976, decedent married Evelyn J. Monahan. Evelyn had two children from a previous marriage, Joyce, aged 14, and Ken, aged eight. Decedent developed a father-child relationship with Evelyn's children and, according to Evelyn, intended to leave all his assets to Joyce and Ken after his and Evelyn's deaths. Although Ken changed his last name to Monahan when he was 15 years old, decedent never legally adopted either child. Evelyn claimed that Joyce and

Ken's biological father was not involved in their lives "and so adoption did not seem necessary."[1]

Decedent executed his last will and testament on September 5, 1980. The will contained the following provisions:

> Article I
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> Testator's Family
>
> Section 1 My wife is Evelyn Joyce Monahan. Any reference in this Will to "my wife" is to her.
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> Section 2 My children from a previous marriage, now living are Judith Lynn Monahan, Richard Bruce Monahan, Jr., and Alice Kaye Monahan.
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> Section 3 My wife's children, from a previous marriage, are Joyce Evelyn Glidden and Kenneth Harvey Glidden. Any reference in this Will to "my wife's children" is to them.
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> * * *
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> Article V
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> Distribution of Remainder of Estate
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> * * *
>
> Section 2 I give all the remainder of my estate to my wife, Evelyn Joyce Monahan, if she survives me by thirty days. If my wife does not survive me by thirty days, I give all the remainder of my estate in equal shares to my wife's children or to their descendants by right of representation. I intentionally make no bequest for my children as set forth in Article I, Section 2.

Evelyn and decedent separated in 1994 and divorced in 1999. However, the divorce was not contentious and the parties remained in friendly contact. Further, decedent's relationship with Joyce and Ken remained strong after the separation and divorce. For example, decedent participated in Ken's 1995 wedding ceremony and gave Ken $30,000 toward the cost of a home after he and Evelyn divorced. Decedent and Evelyn also celebrated family holidays, including Christmas, Thanksgiving, and birthdays, together with Joyce, Ken, and their families. Joyce, Ken, and their families visited decedent frequently.

[1] Evelyn also mentioned briefly that she and decedent thought that Ken and Joyce could receive Social Security proceeds when their natural father died if they remained legally bound to him.

Decedent's friend, James Burgess, noted that Joyce and Ken frequently visited decedent even after the divorce, and that decedent continually referred to Joyce and Ken as his children and Joyce and Ken's children as his grandchildren. Burgess also testified that in 2004, decedent told him that if he died, Evelyn and her children would receive a $100,000 life insurance policy and his property. Burgess claimed that decedent's children from his first marriage never visited decedent (either at home or when he was hospitalized) and that decedent rarely spoke of them. Burgess said that decedent never explained why he was estranged from his natural children except to mention that the divorce with their mother had been "very trying and hard and messy."

Decedent died of a sudden heart attack on July 2, 2004. Decedent's sister, Judith Ann Monahan, was eventually appointed successor personal representative of decedent's estate pursuant to the terms of his will.

On December 8, 2005, Judith Monahan petitioned the trial court to identify decedent's heirs and to distribute his estate accordingly. In making this request, she claimed that pursuant to Section 2807 of the Michigan Estates and Protected Individuals Code ("EPIC"), "the devise in the Will to Evelyn Joyce Monahan, her children and her children's descendents was revoked by the subsequent divorce of Decedent and said Evelyn Joyce Monahan," and that decedent's natural children were the rightful heirs of his estate. In response, Evelyn claimed that she and her children were the intended devisees of decedent's estate pursuant to the terms of his will.

The trial court noted that decedent's will was drafted when the Revised Probate Code ("RPC") was in effect. It explained that the RPC required that a spouse named in a testator's will be considered predeceased for purposes of probating the will if the marriage between the testator and his spouse ended in divorce or annulment after implementation of the will, but it did not discuss the effect of divorce or annulment on bequests made to that spouse's children. The trial court concluded that although EPIC, which superceded the RPC on April 1, 2000, required the revocation of appointments and dispositions made in a will to a spouse's children upon the divorce or annulment of the marriage between a testator and his spouse, it also included an interest of justice exception in which the trial court retained the discretion to instead apply the RPC in a particular circumstance. After considering both decedent's will and extrinsic evidence presented to the court, the trial court concluded that decedent viewed Evelyn's children as his family and intended to leave them the remainder of his estate after his death, even though he and Evelyn had divorced. The court found that the RPC was still applicable to decedent's 1980 will and divided the remainder of decedent's estate between Evelyn's children.

Appellants now challenge the trial court's holding, arguing that the trial court should have applied EPIC, which precludes the relatives of a testator's former spouse from receiving distributions from the testator's will after his death, and therefore should have distributed decedent's estate pursuant to the laws of intestacy. We disagree.

We review factual findings of a probate court sitting without a jury for clear error and review application of the law to the facts of a case de novo. *In re Eggleston Estate*, 266 Mich App 105, 112; 698 NW2d 892 (2005). Resolution of this issue requires interpreting provisions of the RPC and EPIC. The proper interpretation and application of a statute presents a question of law that we consider de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003). Our Supreme Court noted:

> The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory. [*Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001) (citations omitted).]

"Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *In re Smith Estate*, 252 Mich App 120, 124; 651 NW2d 153 (2002).

The RPC was implemented in 1979, MCL 700.991(1) (repealed by MCL 700.8102(c)), and was in effect both when decedent executed his will and when he divorced Evelyn. The RPC specified that, in the absence of an express provision stating otherwise, if a testator and his spouse divorced after the testator's will was executed, the testator's former spouse would be considered predeceased for the purpose of distributing the testator's property after his death. The applicable provision of the RPC stated:

> If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as a personal representative, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce passes as if the former spouse failed to survive the decedent and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent. Provisions not revoked by any means except the operation of this subsection are revived by testator's remarriage to the former spouse. A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section. Any other change of circumstances does not revoke a will. [MCL 700.124(2) (repealed by MCL 700.8102(c)).]

Although this provision of the RPC precluded a testator's former spouse from receiving distributions from his estate (in the absence of an express provision in his will to the contrary), it did not preclude the former spouse's relatives from receiving distributions from the testator's estate pursuant to the terms of his will. Further, this provision required that "[p]roperty prevented from passing to a former spouse because of revocation by divorce passe[d] as if the former spouse failed to survive the [testator] . . . ." Therefore, if the testator's bequest to a former spouse's relative was contingent on the testator surviving his spouse, and the testator's former spouse was considered predeceased under the RPC after she and the testator divorced, then the former spouse's relative would automatically take pursuant to the terms of the testator's will, even if the former spouse was still alive.

In 2000, the Legislature repealed the RPC and adopted EPIC. MCL 700.8101(1); MCL 700.8102(c). EPIC provides more guidance than the RPC regarding circumstances in

which the subsequent divorce of a testator and his spouse affects bequests in the testator's will. MCL 700.2807 includes the following provision:

> (1) Except as provided by the express terms of a governing instrument, court order, or contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage does all of the following:
>
> (a) Revokes all of the following that are revocable:
>
> (*i*) A disposition or appointment of property made by a divorced individual to his or her former spouse in a governing instrument and a disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse.

MCL 700.2806 defines certain terms in MCL 700.2807(1)(a)(*i*) as follows:

> (d) "Governing instrument" means a governing instrument executed by a divorced individual before the divorce from, or annulment of his or her marriage to, his or her former spouse.
>
> (e) "Relative of the divorced individual's former spouse" means an individual who is related to the divorced individual's former spouse by blood, adoption, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity.

Accordingly, in the absence of express terms to the contrary in the governing instrument, when a testator who has executed a will subsequently divorces his spouse, the divorce revokes any disposition or appointment of property to either the former spouse or the former spouse's relatives.

Again, the primary goal of statutory interpretation is to effectuate the intent of the Legislature, and this is accomplished by examining the plain language of the statute. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526-527; 672 NW2d 181 (2003). The Legislature's intent in passing EPIC was, in part, to provide a series of rules for interpreting the provisions of a will to ensure that the distribution of a testator's estate would correspond to his wishes. See MCL 700.1201(b). In both the RPC and EPIC, the Legislature assumed that a testator who provided for a spouse in his will and later divorced his spouse would probably not want his former spouse to receive a portion of his estate, even if he did not revise his will after the divorce, and it adopted legislation preventing a former spouse from receiving a distribution from the testator's estate absent an express provision in the testator's will to the contrary. See MCL 700.124(2); MCL 700.2807(1)(a)(*i*). However, EPIC reflects an additional policy determination by the Legislature. By also precluding the relatives of a testator's former spouse from taking under the testator's will (in the absence of an express provision in the will to the contrary), the Legislature assumed that a testator who executed his will and subsequently divorced his spouse would also not want his former spouse's relatives to receive distributions from his estate. See MCL 700.2807(1)(a)(*i*).

EPIC also continues the RPC provision permitting an alternate disposition of property "as provided by the express terms of a governing instrument." See MCL 700.2807(1). Accordingly, if a testator is aware of the provisions of MCL 700.2807 and decides that he wants his spouse's children or other relatives to receive distributions from his estate even if he were to divorce his spouse, he can include an express provision in his will specifying this intent.[2]

EPIC took effect on April 1, 2000. MCL 700.8101(1). Pursuant to MCL 700.8101(2)(a), EPIC "applies to a governing instrument executed by a decedent dying after that date." However, MCL 700.8101(2)(e) also provides the following caveat: "A rule of construction or presumption provided in this act applies to a governing instrument executed before that date unless there is a clear indication of a contrary intent." Decedent died over four years after EPIC took effect. However, decedent executed his will and divorced Evelyn before EPIC took effect, when the RPC governed the effect that his divorce would have on the later distribution of his estate.

If MCL 700.8101(2)(a) alone governed (and MCL 700.8101(2)(e) were not taken into consideration), EPIC would control the interpretation of decedent's will. As stated earlier, decedent's will provided that Evelyn receive the remainder of his estate. Further, if she did not survive him by 30 days, her children and her children's descendents would receive decedent's estate in equal shares. However, Evelyn's children are not related to decedent by blood, adoption, or affinity; therefore, they would be considered "relatives of the divorced individual's former spouse" pursuant to MCL 700.2806(e). Under MCL 700.2807(1)(a)(*i*), the right of Evelyn's children to take pursuant to the terms of decedent's will would be revoked.

However, MCL 700.2807(1)(a)(*i*) does not govern the revocation of provisions in decedent's will concerning the distribution of his estate to Evelyn's children. The parties do not dispute that decedent's will was executed long before EPIC was implemented in 2000. Therefore, MCL 700.8101(2)(e) applies, and provides that a rule of construction or presumption in EPIC applies to decedent's will "unless there is a clear indication of a contrary intent." And, as will be explained later, a clear indication of decedent's contrary intent existed: extrinsic evidence indicates that he wanted Evelyn's children to receive his estate when he died.

Appellants maintain that MCL 700.8101(2)(e) only applies to rules of construction and MCL 700.2807(1) is a substantive rule of law. We disagree. Instead, we conclude that MCL 700.2807(1) is a rule of construction. Therefore, the exception set forth in MCL 700.8101(2)(e) applies, and the trial court did not err when it declined to apply MCL 700.2807(1) when interpreting and implementing the provisions of decedent's will.

Black's Law Dictionary (8th ed) defines a "substantive law" as "[t]he part of the law that creates, defines, and regulates the rights, duties, and powers of parties" and defines a "rule of construction" as "[a] rule used in construing legal instruments, esp. contracts and statutes." However, MCL 700.2807(1) applies when implementing the provisions of a will or other

[2] Presumably, a testator executing his will after EPIC took effect on April 1, 2000, would be aware of the default provisions of MCL 700.2807.

governing instrument "[e]xcept as provided by the express terms of a governing instrument . . . ." This statute does not create, define, or regulate the rights of parties to recover from a testator's estate. Instead, the governing instrument executed by the testator governs the rights of parties to receive distributions from the testator's estate and the circumstances under which they may receive these distributions. Again, one goal of EPIC is to more effectively determine a testator's intent regarding the distribution of his property, and MCL 700.2807(1) is designed to anticipate the effect that a testator's subsequent divorce would have on his earlier intent, as expressed in his will, to distribute portions of his estate to his spouse and her relatives if his will is silent with regard to this change in circumstances. Accordingly, MCL 700.2807(1) is a rule of construction, because its purpose is to provide guidelines under which the court may construe the provisions of a testator's will in light of his subsequent divorce and in the absence of express provisions in his will to the contrary.

Because MCL 700.2807(1) is a rule of construction, MCL 700.8101(2)(e) governs the circumstances under which the trial court may apply it when interpreting decedent's will. Again, MCL 700.8101(2)(e) provides that a rule of construction or presumption in EPIC applies to decedent's will "unless there is a clear indication of a contrary intent."

Appellants argue that MCL 700.8101(2)(e) precludes the trial court from considering extrinsic evidence to determine if "a clear indication of a contrary intent" exists. However, MCL 700.8101(2)(e) does not require that a showing of contrary intent must be found in the governing document for the exception to apply. Nothing in MCL 700.8101 precludes a trial court from using extrinsic evidence to determine whether a testator who executed his will before EPIC was implemented had a contrary intent from that presumed by the provisions of EPIC.

Appellants also contend, however, that the trial court erred when it looked beyond the four corners of decedent's will to determine that decedent intended that Evelyn's children receive the remainder of his estate. Instead, they argue that decedent's will was not ambiguous and, therefore, the plain language of the will, which did not specifically provide for Evelyn's children in the event of her divorce from decedent, should control.

"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). Accordingly, the testator's intent at the time he executed his will should be ascertained and carried out as nearly as possible. *In re Maloney Trust*, 423 Mich 632, 639; 377 NW2d 791 (1985). "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 includes an ambiguity, "a court may establish intent by considering two outside sources: (1) surrounding circumstances, and (2) rules of construction." *In re Maloney Trust*, *supra* at 639, quoting *In re Kremlick Estate*, 417 Mich 237, 240; 331 NW2d 228 (1983).

An ambiguity in a will or other estate-planning document may be patent or latent. *Thurston v Thurston*, 140 Mich App 150, 153; 363 NW2d 298 (1985). A patent ambiguity is an ambiguity that "clearly appears on the face of a document, arising from the language itself." Black's Law Dictionary. Conversely, a latent ambiguity is "[a]n ambiguity that does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed." Black's Law Dictionary. In *In re Woodworth Trust*, 196 Mich App 326, 328; 492 NW2d 818 (1992), this Court noted, "A latent ambiguity exists

where the language and its meaning is clear, but some extrinsic fact creates the possibility of more than one meaning." "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).

Admittedly, no patent ambiguity exists in the applicable provisions of decedent's will. The will clearly indicates on its face that, at the time decedent executed it, he wanted his wife, Evelyn, to receive the remainder of his estate after his death and, if she did not survive him by 30 days, he wanted his wife's children, Joyce and Ken, to receive the remainder of his estate. He also indicated that he intentionally did not provide for his natural children in his will.

Further, no latent ambiguity existed at the time decedent executed his will. Decedent indicated in his will that Evelyn was his wife, that as his wife, she would receive the remainder of his estate after his death pursuant to the terms of his will, and that her children would receive the remainder of his estate if she did not survive him. Further, the RPC, which was in effect at the time and of which decedent presumably was aware, would have treated Evelyn as predeceased if she and decedent divorced and, as a result, Evelyn's children would have received the remainder of decedent's estate. Decedent did not include any provisions in the will indicating that his intent regarding the ability of Evelyn's children to inherit in the event of his and Evelyn's divorce was different from the default provisions set forth in the RPC. Stated differently, he did not indicate that he did not want Evelyn's children to automatically receive the remainder of his estate after his death if he and Evelyn were divorced when he died.

However, a latent ambiguity developed when MCL 700.2807 took effect. Although decedent's will, on its face, was unambiguous, extrinsic facts (namely, decedent's divorce and the implementation of EPIC) created an ambiguity in the document. These circumstances, taken together, indicate that decedent would have had one of two possible intents regarding whether Evelyn's children would still receive the remainder of his estate if he and Evelyn divorced. Decedent could have intended that, consistent with the provisions of the RPC in effect at the time he executed his will, he wanted Evelyn's children to receive the remainder of his estate if he divorced Evelyn. Alternately, he could have simply wanted the provisions of the probate code in effect at the time of his death to govern whether Evelyn's children would inherit from his estate if he and Evelyn divorced. Accordingly, a latent ambiguity in decedent's will exists, and the trial court properly considered extrinsic evidence to resolve this ambiguity and determine decedent's intent at the time he executed the will. See *McCarty*, *supra* at 575.

Extrinsic evidence presented before the trial court indicates that decedent intended that Evelyn's children would inherit the remainder of his estate although he and Evelyn were divorced. Evelyn and Burgess testified that decedent had a parent-child relationship with Evelyn's children both during and after his marriage to Evelyn. Evelyn acknowledged that decedent never adopted her children, but provided plausible reasons for not doing so, namely, that adoption did not seem necessary because her children's father was not involved in their lives and that Evelyn and decedent thought that her children might be eligible for Social Security benefits when their natural father died if they remained legally bound to him.

Extrinsic evidence that Evelyn's children viewed decedent as a father figure and that decedent continued to maintain a fatherly relationship with them after the divorce further

supports a finding that decedent viewed Joyce and Ken as his children and wanted them to receive the remainder of his estate regardless of his and Evelyn's marital status at the time of his death. Evelyn testified that her children considered decedent to be their father, and Ken changed his last name to Monahan to express this connection with decedent. Evelyn noted that decedent participated in her children's weddings and gave them generous wedding gifts. After the divorce, he continued to celebrate holidays with Evelyn, her children, and their families, and Joyce, Ken, and their families regularly visited him. Both Evelyn and Burgess testified that decedent told them after the divorce that he still intended for Evelyn and her children to receive his property after his death. Further, the father-child relationship that decedent had with Joyce and Ken did not exist with his natural children, from whom he was estranged and for whom he did not provide in his will. This extrinsic evidence indicates that from the time decedent executed his will through the time of his death, he had a parental bond with Joyce and Ken that was independent of his relationship with Evelyn and was unaffected by their divorce. Accordingly, this evidence clarifies the latent ambiguity in decedent's will and indicates that, consistent with the provisions of the RPC, he wanted Evelyn's children to receive the remainder of his estate after his death. Accordingly, the trial court did not err when it determined that decedent wanted Evelyn's children to receive the remainder of his estate, although he and Evelyn had divorced, and interpreted decedent's will in a manner consistent with the provisions of the RPC in effect at the time decedent executed his will in order to effectuate this intent.

Affirmed.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Alton T. Davis