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## OPINION OF THE CONNECTICUT PROBATE COURT

### IN RE: THE ESTATE OF FRANCIS W. BASNIKIEWICZ

PROBATE COURT, NORTH CENTRAL CONNECTICUT DISTRICT

JANUARY 9, 2017

#### EDITOR'S SUMMARY & HEADNOTES

Petitioner sought construction of a Will and Codicil. The Residuary Clause left percentages to named beneficiaries, although the percentages did not add up to dispose of the entire Residue. The Court construed the Will and Codicil to give effect to the plain language that distribution be by specified percentages, with any amounts not disposed of under the Residuary Clause to pass intestate. The Court then addressed the issue of whether each listed beneficiary was to receive the percentage indicated, or whether the indicated percentage was to be divided among the listed beneficiaries. The Court concluded that the Testator intended the percentage indicated to pass to each listed beneficiary severally.

#### 1. Wills: Testator's Intent

The cardinal rule to be followed in construing a will is to find and effectuate the intent of the testator. In seeking a testator's intent, the court looks first to the will itself and examines the words and language used in light of the circumstances under which the will was written.

#### 2. Wills: Testator's Intent

The meaning of the words as used by the testator is the equivalent of his legal intention, the intention that the law recognizes as dispositive.

#### 3. Wills: Testator's Intent

The words used by the testator are to be interpreted according to their

ordinary meaning unless the context or circumstances indicate a different meaning.

**4. Wills: Construction**

A court may not stray beyond the four corners of the will where the terms of the will are clear and unambiguous.

**5. Wills: Construction**

An interpretation that requires that a will be rewritten cannot be accepted because the power of a court is limited to an interpretation of the language used by the testator.

**6. Wills: Construction**

A court may construe a will, however it is powerless to construct one.

**7. Wills: Construction**

A construction of a will that will avoid intestacy is to be sought and to this end, the presumption must be entertained that the testator did not intend intestacy as to any part of his estate.

**8. Wills: Construction**

The court may not supply a dispositive provision that a will has omitted.

**9. Wills: Construction**

A construction plainly required by the terms of a will cannot be avoided because it leads to intestacy.

**10. Estate: Distribution**

Failed gifts of residue pass as intestate estate.

**11. Wills: Intent**

Provisions in a will evidencing a general intent may serve sometimes to explain, but never to explain away, the expression of a particular intent. A general intent can prevail only if the will can fairly be so read, considered as a whole. General intent cannot avail to supply an intent that does not find expression in the will.

**12. Wills: Construction**

In construing a will, the function of the court is to give effect, not to an intention that it may conclude the testator had, but to the intention which finds expression in the words he has used.

### 13. Wills: Construction

A presumption against intestacy applies only when the particular provision in question is fairly open to two constructions, one of which leads to intestacy.

### 14. Wills: Construction

The meaning of testamentary language is not to be determined by examining the words in artificial isolation, but in light of their context within the particular provision as well as with reference to the will as a whole.

#### Opinion

Francis W. Basnikiewicz (“Testator”) died on August 18, 2015, leaving a Will dated August 11, 2015, and a First Codicil to the Will dated August 15, 2015. The Will and Codicil were approved and admitted to probate as the Last Will and Testament of the Deceased, and Diane J. Preble (“Petitioner”) was approved as Executrix on January 6, 2016. Petitioner has filed the instant petition seeking a construction of the Will and Codicil.

Schedule A of the Will, consisting of three pages in Testator’s handwriting, disposes of real estate, contains several cash bequests, and divides the remainder (“Residue”) in various percentages among a number of beneficiaries. The Codicil amends Schedule A of the Will and increases the amount passing to two beneficiaries named therein, while deleting bequests to two others. Taking the Will and Codicil together, it quickly becomes apparent that if the shares of the residuary legatees are viewed as percentages, as the language indicates, the Will and Codicil fail to dispose of the entire Residue.

The Petitioner argues that it was Testator’s intent to dispose of his entire estate to family and friends. She maintains that he did not intend that the beneficiaries receive percentages, but rather that each of the fifty-four beneficiaries of the Residuary Estate receive a proportional share, totaling seventy-nine shares and each share being worth 1.265823%. Reference is made to Article V of the Will, which disposes of the Residue and states, “All the Rest, residue and remainder of the property which I may own at the time of my death . . . I bequeath and devise . . . to be apportioned and divided between and among my cherished relatives and wonderful friends as more specifically identified and more particularly detailed on ‘Schedule A.’” Counsel argues that “the [R]esiduary [C]lause clearly states the Testator’s intent to dispose of all his property and to apportion the same between and among his relatives and friends.”

The issue before the Court is whether the Will passes only a portion of the Residuary Estate, leaving the rest to be distributed under the laws of intestacy, or whether it provides for the distribution of the entire Residuary Estate to the named beneficiaries in proportional shares.

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### Applicable Law

[1] [2] [3] [4] [5] [6] *Bank of Boston Connecticut v. Brewster* states:

[t]he cardinal rule to be followed in construing a will is to find and effectuate the intent of the testator. In seeking that intent, the court looks first to the will itself and examines the words and language used in light of the circumstances under which the will was written . . . [T]he meaning of the words as used by the [testator] is the equivalent of [his] legal intention—the intention that the law recognizes as dispositive. The question is not *what* [he] meant to say, but what is meant by what [he] did say.

42 Conn. Supp. 474, 486 (1992) (citations omitted) (emphasis added). “The words used by the [testator] are to be interpreted according to their ordinary meaning unless the context or circumstances indicate a different meaning.” *Carr v. Huber*, 18 Conn. App. 150, 155 (1989) (citation omitted). “A court may not stray beyond the four corners of the will where the terms of the will are clear and unambiguous.” *Canaan Nat’l Bank v. Peters*, 217 Conn. 330, 337 (1991) (citation omitted). An interpretation that requires that a will be rewritten cannot be accepted because “[t]he power of a court is limited to an interpretation of the language used by the testator[, and while a court may construe a will, it is] “powerless to construct one.” *Hoening v. Lubetkin*, 137 Conn. 516, 523-24 (1951) (citation omitted).

[7] [8] [9] *Colonial Bank & Trust Co. v. Stevens* states:

[a] construction of a will which will avoid intestacy is to be sought and to this end the presumption must be entertained that the testator did not intend intestacy as to any part of his estate. But we cannot rewrite the will of a testator. Nor can we supply a dispositive provision which a will has omitted. A construction plainly required by the terms of a will cannot be avoided because it leads to intestacy.

164 Conn. 31, 41 (1972) (citations omitted) (quotations omitted).

[10] Failed gifts of residue pass as intestate estate. *Connecticut Bank & Trust Co. v. Brody*, 174 Conn. 616, 631 (1978) (citation omitted).

### Discussion

Looking first to the language used by Testator, as the cases say we must, Schedule A, in six places, describes the gifts as percentages of the remaining Estate. The Codicil, executed four days later, reiterates in three places that the gifts are percentages of the Residue and reaffirms the Will in other respects. The language is clear and unambiguous. The only uncertainty is founded, not in the language used, but in the fact that the Will and Codicil fail to dispose of the

entire Estate. The Supreme Court has cautioned that “a court may not stray beyond the four corners of the will where the terms of the will are clear and unambiguous.” *Canaan Nat’l Bank*, 217 Conn. at 337 (citation omitted).

[11] In support of her position, Petitioner points to the fact that Article V, the Residuary Clause, indicates the Testator’s intent to give “[a]ll the rest, residue and remainder” of his Estate. It must be acknowledged that a residuary clause, by its very nature, indicates the intent to make a complete disposition of the testator’s property. Nonetheless, in this case, the general intent to dispose of the residue is in sharp contrast with the specific language of Schedule A, which is part of the Residuary Clause. Schedule A indicates the beneficiaries and the percentages of the Residue that each will receive. “Provisions in a will evidencing a general intent, may serve sometimes to explain, but never to explain away, the expression of a particular intent.” *Connecticut Trust & Safe Deposit Co. v. Hollister*, 74 Conn. 228, 233 (1901). A general intent can prevail only “if the will can fairly be so read, considered as a whole.” *Walsh v. McCutcheon*, 71 Conn. 283, 286 (1898) (citation omitted). General intent cannot avail to supply an intent which does not find expression in the will. *Bronson v. Pinney*, 130 Conn. 262, 269 (1943).

[12] The construction urged by the Fiduciary would require the conclusion that when Testator said that the specified beneficiaries are to receive one, two, or five percent of the Residue, he actually meant that they should receive a larger amount. Such an interpretation would require that the Court rewrite the Will, which the cases say the court cannot do. The meaning of the words as used by Testator is the equivalent of his legal intention—the intention that the law recognizes as dispositive. *Bank of Bos. Conn.*, 422 Conn. Supp. at 486. “[A court] cannot rewrite a will or trust instrument. The expressed intent must control . . . .” *Ahern v. Thomas*, 248 Conn. 708, 728 (1999) (citation omitted). “[I]n construing a will the function of the court is to give effect, not to an intention which it may conclude the testator had, but to the intention which finds expression in the words he has used.” *Bronson*, 130 Conn. at 268-69 (citation omitted).

[13] The cases caution courts that a construction that avoids intestacy should be sought whenever possible. However, this presumption against intestacy “applies only when the particular provision in question is ‘fairly open to two constructions,’ one of which leads to intestacy.” *Willis v. Hendry*, 130 Conn. 427, 438 (1943) (citation omitted). In other words, when two constructions are possible, the one that avoids intestacy is to be preferred. However, as indicated above, such a construction must find expression in the language of the will. In this case, Testator clearly and unambiguously provided for distribution to specified persons in specified percentages. There is no alternate construction to which the language of the Will and Codicil can fairly said to be open. The construction offered by Petitioner can only be reached by disregarding the clear and unambiguous language used in the Will and Codicil, and by rewriting the Will. A court cannot rewrite a will, nor supply a dispositive

provision which a will has omitted. *Colonial Bank*, 164 Conn. at 41. “A construction plainly required by the terms of a will cannot be avoided because it leads to intestacy.” *Id.* (citation omitted).

For the foregoing reasons, the Court concludes that the Will and Codicil must be given effect in accordance with their plain language. The Residuary Estate should be distributed to the individuals named in the percentages specified. Any portion of the Estate not so distributed must pass as intestate estate of Testator.

There is one additional aspect of the Will and Codicil requiring construction. In various places, Schedule A provides for a stated percentage to pass to a list of two or more persons. The question is whether this means that the percentage indicated is to be divided equally among those on the list, or whether each member of the list is to receive the percentage indicated.

On the first page of Schedule A, Testator states, “I leave 2% of the remaining estate to each of my cousins,” followed by a list of thirteen individuals. Immediately thereafter, Testator states, “[a]lso 2% of remaining estate to the following wives of deceased cousins,” followed by a list of two persons. The second page of Schedule A contains the following, “I leave 2% of the remaining estate to my 2nd cousins,” followed by a list of two persons. It goes on to provide, “I leave 1% of the remaining estate to my 2nd cousins,” followed by a list of some thirty persons. Finally, it indicates, “1% to friends,” followed by a list of six persons.

The first such entry, providing for “2% of the remaining estate to each of my cousins,” makes abundantly clear that each person on the list is to receive the stated percentage. Schedule A is handwritten. The words “each of” appear to have been added after the clause was first written, in that they appear above the rest of the words in that phrase. None of the subsequent provisions contain the words “each of.”

[14] The cases indicate that meaning of the words used is not to be determined by examining the words in artificial isolation, but in light of their context within the particular provision as well as with reference to the will as a whole. *Bank of Bos. Conn.*, 422 Conn. Supp. at 495. The Testator repeatedly provides for a stated percentage to pass to a group of individuals. The Will and Codicil do not suggest any rationale for treating any such list differently than the others. Further, in one such case Testator made perfectly clear that each person on the list is to receive the percentage indicated.

The presumption against intestacy, discussed above, seems applicable in this context. Here, there are two plausible constructions of the language used. However, under one (i.e., that the listed recipients divide the stated percentage equally among them) a considerably larger portion of the Residuary Estate would fail, resulting in a larger amount passing under the laws of intestacy. Accordingly, the Court will adopt that construction that minimizes the amount

that will pass as intestate estate. The Court concludes that in each instance in which Schedule A provides for a percentage of the Residue to pass to two or more beneficiaries, Testator intended that the percentage indicated is to pass to each person on the list.

In summary, the Court construes the Will and Codicil as follows: (1) pursuant to the clear and unambiguous language of Schedule A, the individuals named shall take the percentages specified therein, with any amounts not disposed of under the Residuary Clause passing as intestate estate of the decedent; and (2) in each instance in which Schedule A provides that a stated percentage shall pass to two or more individuals, each person so listed shall receive the percentage indicated.

It is so ORDERED.

Dated at Enfield, Connecticut, this 9th day of January 2017.

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/s/

Timothy R.E. Keeney, Judge