COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION

Estate of Daniel Avington, Deceased
O.C. No. 1002 DE of 2017
Control No. 174599

OPINION

Matthew Avington, Shawn D. Avington, and Danielle Avington (collectively, "Petitioners"), children of Daniel Avington ("Daniel"), Deceased, sought declaratory judgment as to the proper disposition of Daniel's interests in the business he co-owned with his brother, Lawrence Avington ("Lawrence"), Deceased, under Daniel's Will dated March 13, 2014. For the reasons stated below, the Court holds that Paragraph 3 of the Will devises the entirety of Daniel's business interest in the Eggs Nest Bar.

I. Background

Daniel co-owned the Eggs Nest Bar ("Bar") with his brother Lawrence; it was situated in a space leased by the brothers–as individuals and through their business corporation–within the Hub Motor Lodge in Northeast Philadelphia. (Pet. for Cit., ¶ 10-11) On March 13, 2014, Daniel executed a Will, which he declared to be his "Last Will and Testament regarding [his] business interest in the [Bar.]"[1] (Last Will and Testament of Daniel Avington, ¶ 1) The only paragraph of the Will making any devise states: I hereby give, devise and bequeath my real estate interest in the [Bar]…to my brother, Lawrence Avington." (Last Will and Testament of Daniel Avington, ¶ 3) Paragraph 3 of the Will is the only instance that makes use of the term "real estate interest," while it makes continual references to his "business interest" throughout. (Last Will and Testament of Daniel Avington)

The Will does not make any other bequest or contain a residuary clause.

Daniel died on April 4, 2014, and Lawrence died January 7, 2015 without qualifying as Executor of Daniel's Estate. Catherine Moore-Pugh, Respondent in this case, is Daniel and Lawrence's sister and serves as Administrator of both men's estates.

Petitioners commenced the instant action on December 15, 2017, and Respondent filed her Answer on January 25, 2018. The Court carefully considered all of the parties' filings and the legal arguments they advanced. This Opinion follows.

[1] Daniel's interest in the Bar includes an interest in a liquor license worth approximately $200,000.00.

II. Discussion

Petitioners seek declaratory judgment construing the Will to devise any interest in real property Daniel may have had as a result of his co-ownership of the Bar–which is to say, nothing, as the space the Bar occupied was leased–and that any remaining interests in the Bar, along with any property not disposed of by the Will, should pass in accordance with the intestacy statute, 20 Pa.C.S. § 2101 *et seq.* Respondent argues that the Will evidences an intent to pass the entirety of Daniel's interest in the Bar to Lawrence, but does not dispute that any of Daniel's property not disposed of by the will should pass through intestacy. Respondent's interpretation of the Will is the correct one.

It is gospel that the testator's intent is the central guiding force in the interpretation of wills. *In re Harris*, 351 Pa. 368, 394, 41 A.2d 715, 727 (Pa. 1945). A testator's intent is generally ascertained from the plain meaning of the words within the four corners of his will, with individual clauses not being read in isolation, but in their larger context. *Estate of Zerbey*, 313 Pa.Super. 297, 304, 459 A.2d 1297, 1241 (Pa. Super. 1983). Of course, where the will is ambiguous or contradictory, it becomes necessary to look to the distribution scheme, facts, and circumstances surrounding the testator at the time of the execution of the will to determine his intent. *In re Jessup's Estate*, 441 Pa. 365, 370-71, 276 A.2d 499, 502 (Pa. 1970). Any property not disposed of in a decedent's will passes under the laws of intestacy. 20 Pa.C.S. § 2101. However, Pennsylvania law favors testamentary disposition over intestacy, and where possible, wills should be construed to avoid intestacy. *Burns v. Kabboul*, 407 Pa.Super. 289, 317, 595 A.2d 1153, 1167 (Pa. Super. 1991).

Latent ambiguities arise from collateral facts which make the meaning of the document uncertain, in spite of what appears to be clear language on the document's face. *In re Estate of Schultheis*, 747 A.2d 918, 923 (Pa. Super 2000). In *Schultheis*, for example, the Superior Court held that the Orphans' Court did not err in finding a latent ambiguity in the decedent's will where her will indicated an intent to give all of the stock she owned at the time of her death to certain beneficiaries, but only actually devised a portion of the stock. *Id.* at 920-24. It further held that the Orphans' Court was correct in finding that the testator intended to devise all of the stocks she owned to the listed beneficiaries, and that it did not err in confirming the executor's account that proposed distribution of the remainder of the stock to those beneficiaries rather than with the residuary estate. *Id.* at 926.

There can be no question that Daniel's Will does not dispose of his entire estate. The Will itself states that it is intended to dispose of Daniel's "business interest in the [Bar]," makes no attempt to dispose of any other assets Daniel may have had, such as tangible personal property, and does not contain a residuary clause. Therefore, anything that does not pass by the Will's sole

bequest becomes a part of the residuary estate, which in turn passes in accordance with the rules of intestate succession. The only true dispute in this case is what the Will actually devises.

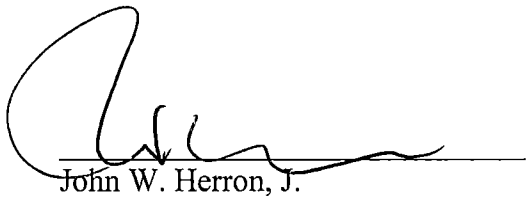
The Court finds that the Will is latently ambiguous. It begins by stating that its purpose is to dispose of Daniel's "business interest" in the Bar. The term "business interest" is an umbrella term that incorporates one's governance and distributional interests in a business. *See* 15 Pa.C.S. § 102. Its only bequest, however, devises Daniel's "real estate interest"–a term that is not statutorily defined–in the Bar to Lawrence. A plain reading of the term "real estate interest" would imply that the bequest devises only the real property in which the Bar is situated. But as a lessee of the site of the Bar, Daniel certainly knew he did not own the property, and interpreting the bequest as devising a nonexistent right in real property the Court would be forced to ignore the testator's own statement in the Will that his intent was to devise his business interest, and allow for his governance and distributional interests in the Bar, whatever they may be, to pass through intestacy. To construe the Will in the manner that the Petitioners urge would be to disregard the most fundamental rule of will interpretation: the testator's intent controls. Because Daniel himself plainly stated that he intended to devise his business interest, the Will's devise must be construed to leave the entirety of Daniel's interest in the Bar to Lawrence.

The Superior Court's holding in *Schultheis* lends further support to this interpretation. The testator in that case stated an intent to devise all of the stock she owned to particular beneficiaries, but only actually devised a portion. 747 A.2d 918, 920-24. Here, Daniel stated an intent to devise his business interest, but only actually devised a portion of his interest, and at that, a portion he certainly must have known did not actually devise anything. As the Orphans' Court in *Schultheis* would have been remiss to hold that the remainder of the testator's stock would be distributed as part of her residuary estate and ignore her statement of intent, the Court here would be remiss to ignore Daniel's statement of intent and hold that his business interest in the Bar should pass through intestacy.

III. Conclusion

For the foregoing reasons, the Court holds that "real estate interest," as used in Paragraph 3 of the Will shall mean "business interest" for the purpose of interpreting Daniel's Will, and the entirety of his business interest in the Bar shall pass in accordance with Paragraph 3 of his Will.

BY THE COURT:



John W. Herron, J.

Dated this 23rd day of April, 2018

John J. O'Connor, Esq.
Martin I. Kleinman, Esq.