IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 8, 2023 Session

JACKY BELLAR, PERSONAL REPRESENTATIVE OF THE ESTATE OF DEWEY KING KNIGHT v. DWIGHT ANTHONY EATHERLY, ET AL.

Appeal from the Chancery Court for Smith County, Probate Division
No. P-2368 C. K. Smith, Chancellor

No. M2022-00403-COA-R3-CV

This appeal arises from a petition for declaratory judgment to construe a will. At issue is whether the testator intended to bequeath cash, coins, vehicle titles, certificates of deposit, and other financial documents in a lock box located at the testator's residence pursuant to paragraph FIFTH, which reads: "I devise and bequeath my house and lot . . . where I live . . . to DWIGHT ANTHONY EATHERLY, and I devise and bequeath to him all personal property and household goods and furniture located thereon." The trial court held that the rule of *ejusdem generis* limited the testator's intended meaning of "all personal property" to items of like kind to "household goods and furniture." The trial court also relied on the principle that "[i]n the absence of a contrary testatorial intent, as a general rule, a bequest of the contents of a house will not include choses in action or money found therein at the testator's death." Based on these and other findings, the trial court summarily ruled that the testator did not intend for the contents of the lock box to be part of the bequest in paragraph FIFTH; instead, they were to pass pursuant to the residuary clause in paragraph NINTH. This appeal followed. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the court, in which ANDY D. BENNETT and KRISTI M. DAVIS, JJ., joined.

Miles T. Martindale, Nashville, Tennessee, for the appellant, Dwight Anthony Eatherly.

E. Guy Holliman, Lafayette, Tennessee, for the appellees, David Eatherly, Harold McCall, Michael McCall, Horace McCall, Sue Gunter, Mary Annette Bush, and Jenna Christian.[1]

[1] The Estate of Dewey King Knight did not file an appellate brief.

OPINION

FACTS AND PROCEDURAL HISTORY

Dewey King Knight ("Mr. Knight") left a last will and testament executed on September 14, 2017. There are eight beneficiaries: the appellant, Dwight Anthony Eatherly ("Mr. Eatherly"), and the appellees, David Ray Eatherly, Harold Wayne McCall, Michael Allen McCall, Horace Alexander McCall, Sue Carol Gunter, Mary Annette Bush, and Jenna Lynn Christian (collectively, "the Residuary Beneficiaries"). The will consists of four pages and a total of ten paragraphs.[2] It includes specific bequests to Dwight Eatherly[3] in the SECOND, THIRD, and FIFTH paragraphs, the last of which is at issue in this appeal. Also, the will includes a residuary provision, paragraph NINTH, pursuant to which the eight beneficiaries were bequeathed various percentages of the residuary estate.

On December 20, 2019, the Last Will and Testament of Dewey King Knight was admitted to probate in the Probate Court of Smith County, Tennessee, and letters testamentary were issued to Jacky O. Bellar as the executor of the estate ("the Estate").[4]

A dispute arose regarding Mr. Knight's intent as expressed in paragraph FIFTH of the will.[5] In order to resolve the dispute, the executor filed a petition for declaratory judgment to construe the will and "enter a declaratory judgment determining the validity of the provisions of Mr. Knight's will and its effect on the personal property and financial accounts." All of the beneficiaries were made parties to the action. In pertinent part, the petition for declaratory judgment states:

> 3. Dwight Eatherly takes the position that certain certificates of deposit, monies, or accounts located in the house are "personal property" as referenced in Section 5 of the Will and should be his as opposed to going to the residuary estate. . . .

[2] The will includes paragraph ELEVENTH. Thus, it appears to have eleven paragraphs; however, there is no EIGHTH paragraph.

[3] Dwight Eatherly is Mr. Knight's nephew, and they worked together for forty years.

[4] Jacky Bellar died on April 12, 2021. Pursuant to an agreed order, Jamie Winkler was appointed administrator *cum testament annexo* and served in that capacity throughout the remainder of the trial court proceedings.

[5] Mr. Eatherly also challenged the executor's interpretation of bequests in paragraphs SECOND and THIRD, but they are not at issue on appeal.

> 4. The Estate takes the position that items claimed by Dwight Eatherly do not fall under the clauses of the Will directing the "personal property" to him but the clause in Section 5 expressly references household goods and furnishings.

Mr. Eatherly filed an answer in which he contended, *inter alia*, that the contents of the lock box located in the house were to pass to him pursuant to paragraph FIFTH. The Residuary Beneficiaries filed an answer in which they agreed with the position taken by the Estate and contended that "all of the property described in paragraph 3 of the Complaint passes through 'paragraph NINETH' [sic] of the Will which provides for the residuary distribution to these devisees."

Following discovery, the Residuary Beneficiaries filed a joint motion for summary judgment seeking a declaration that Mr. Knight did not intend to bequeath the contents of the lock box under paragraph FIFTH. Instead, it was his intent for those assets to pass pursuant to the residuary clause in paragraph NINTH. The motion was supported by the affidavit of Jacky Bellar, the attorney who drafted the will at Mr. Knight's instruction. Mr. Bellar stated, in pertinent part:

> When I drafted paragraph FIFTH of the Will, it was for the purpose of carrying out the intent of Mr. Knight that Dwight Eatherly receive the home place where Mr. Knight lived as well as the household furnishings and other personal property associated with keeping house. Mr. Knight did not communicate to me any intent to convey to Dwight Eatherly anything except the tangible household furnishings and other personal property associated with keeping house, such as lawn mowers, gardening tools, etc. The language that I used in drafting paragraph FIFTH was meant to convey that Mr. Dwight Eatherly was going to receive the tangible household related property located at the homeplace. To the extent the language I used in drafting the Will conveys any other intent, it is a result of scrivener's error and not the intent of Mr. Knight.

Mr. Eatherly filed a response in opposition to the motion. The personal representative filed a response requesting the court grant the Residuary Beneficiaries' motion for summary judgment.

In the final order, the trial court summarized the parties' positions as follows:

> As pertaining to Paragraph "Fifth" of the Testator's Will, it is the position of Dwight Anthony Eatherly that the phrase "all personal property" means that he inherits everything, tangible and intangible, in the house and lot and approximately twenty (20) acres located at 8 Wate[r]vale Lane, particularly the contents of the "lock box" located on the property which purportedly

includes but is not limited to titles, vehicle titles, stocks, bonds, accounts receivables, and various other financial documents.

The Residuary Beneficiaries position is that the principal of Ejusdem generis controls the phrase "all personal property" as used in the Testator's Will and is like kind to property described which is household goods and furniture and should be disposed pursuant to the residuary clause in accordance with "Ninth" paragraph of [Mr. Knight]'s Will.

The trial court then set forth its ruling on this issue, stating:

This court finds *Rentz v. Lambuth Coll*., No. 01A01-9103CH00085, 1991 WL 164403 (Tenn. Ct. App. August 28, 1991) is controlling. In *Rentz* the Court stated, "In the absence of a contrary testatorial intention, as a general rule, a bequest of the contents of a house will not include choses in action or money found therein at the testator's death".

Examples of choses in action are shares of stock, and debts represented by negotiable instruments and savings bankbooks. They are personal property rights, not reducible to immediate tangible possession, not capable of physical delivery.

Rentz went on to state the Court declares the bequest of "furnishings and other contents" does not include the stocks and bonds found in the house. The general term, "contents", is limited to items of a like kind as the specific or limited term "furnishings".

This Court looks to the Latin phrase "Ejusdem generis" that means like kind. The items enumerated after the phrase "all personal property" are merely describing the type of property [Mr. Knight] intended to bequeath. Otherwise why would it be necessary for [Mr. Knight] to list specific items which were meant to restrict "all personal property" to that of "like kind".

The Court finds the lock box contents located at 8 Wate[r]vale Lane are not of "like kind" to all personal property and household goods and furniture located thereon as stated in paragraph "Fifth" of the Testator's Will.

It is therefore, ORDERED, ADJUDGED, and DECREED that the Motion for Summary Judgment is granted as to issue number three and the contents of the lock box located at [Mr. Knight]'s residence referenced as 8 Wate[r]vale Lane shall be disposed of through the residuary clause in accordance with the "Nineth" [sic] paragraph of the Testator's Will.

This appeal by Dwight Eatherly followed.

ISSUES

The sole issue on appeal is whether the trial court erred by summarily ruling that Mr. Knight did not intend for the bequest in paragraph FIFTH to include the certificates of deposit, savings bonds, and other financial documents contained in a lock box located at Mr. Knight's residence.

STANDARD OF REVIEW

We review a trial court's decision on a motion for summary judgment de novo without a presumption of correctness. *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 250 (Tenn. 2015). "The construction of a will is a question of law for the court and will construction cases are uniquely suited to the summary judgment procedure because they generally involve legal issues only." *Rentz*, 1991 WL 164403, at *2 (citing *Presley v. Hanks*, 782 S.W.2d 482 (Tenn. Ct. App. 1989); *Est. of Robison v. Carter*, 701 S.W.2d 218 (Tenn. Ct. App. 1985)).

This case involves the construction of a will, and the material facts are not in dispute. When we are required to construe a will and there is no dispute as to any material fact, the question on appeal is one of law. *In re Est. of McFarland*, 167 S.W.3d 299, 302 (Tenn. 2005). A question of law is reviewed de novo, with no presumption of correctness. *See id.*

ANALYSIS

"In construing a will, the cardinal rule is that the Court must attempt to ascertain the intent of the testator and to give effect to that intent unless prohibited by a rule of law or public policy." *Id.* If possible, the testator's intent is to be ascertained from the natural meaning of the language used in the will and from the context, scope, and purpose of the instrument. *Id.* "Every word used by the testator is presumed to have some meaning." *Daugherty v. Daugherty*, 784 S.W.2d 650, 653 (Tenn. 1990) (quoting *Third Nat. Bank in Nashville v. Stevens*, 755 S.W.2d 459, 462 (Tenn. Ct. App. 1988)). Stated another way:

> "The intent of the testator is the most important factor in will construction cases." *In re Tipler*, 10 S.W.3d 244, 249 (Tenn. Ct. App. 1998). A court must give effect to a testator's intent unless it contravenes a rule of law or public policy. *Id.* (citation omitted). "The testator's intention is to be ascertained from the particular words used in the will itself, from the context in which those words are used, and from the general scope and purposes of the will, read in the light of the surrounding and attending circumstances." *Fisher v. Malmo*, 650 S.W.2d 43, 46 (Tenn. Ct. App. 1983) (citations omitted). If a decedent's will [was] drafted by an attorney, a court should give its technical

> words their technical meaning "unless the intention of the testator is clearly to the contrary." *Id.* (citation omitted).

In re Est. of Watkins, No. E2016-02388-COA-R3-CV, 2017 WL 3149610, at *2 (Tenn. Ct. App. July 25, 2017).

The provision of the will that is at issue reads:

> FIFTH: I devise and bequeath my house and lot and approximately twenty (20) acres where I live at 8 Wate[r]vale Lane to DWIGHT ANTHONY EATHERLY, and I devise and bequeath to him all personal property and household goods and furniture located thereon.

The trial court found the reasoning in *Rentz* controlling. Specifically, the trial court's decision was based on two rules of construction: the rule of *ejusdem generis* and the general rule that "[i]n the absence of a contrary testatorial intention, . . . a bequest of the contents of a house will not include choses in action or money found therein at the testator's death." Based on these rules of construction, the trial court concluded that Mr. Knight did not intend for the bequest in paragraph FIFTH to include the contents of the lock box located at Mr. Knight's residence. Instead, he intended for the contents of the lock box to be bequeathed pursuant to the residuary clause in the NINTH paragraph of the will.

Mr. Eatherly contends that this was erroneous because the rule of *ejusdem generis* is not applicable to Mr. Knight's use of the phrase "all personal property." Mr. Eatherly explains, "this Court should reverse the Trial Court decision to grant summary judgment and hold that the phrase 'all personal property' has the inclusive—not exclusive—plain meaning because the FIFTH paragraph contains no limiting language."

For their part, the Residuary Beneficiaries contend that Mr. Eatherly's argument is misguided because

> it follows neither the rules of common sense, nor those of common law, to adopt the position urged by [Mr. Eatherly] upon this Court, and accept that the "personal property" involved with savings bonds, certificates of deposit, savings accounts and other financial instruments is located where the documents that only represent ownership of the property may be found, rather than where the money, cash deposits, checking account, bank deposits, etc., is found. The idea is rather obvious, as reflected in the Uniform Commercial Code's definition of a certificate of deposit, or CD, which states that:
>
> > "Certificate of deposit" means an instrument containing an acknowledgment by a bank that a sum of money has been

> received by the bank and a promise by the bank to repay the sum of money. UCC § 3-104(j).

Thus, the Residuary Beneficiaries argue that the contents of the lock box were not "property" located in or on Mr. Knight's home; they were merely evidence of a promise by the financial institutions to repay the owner of the account or holder of the negotiable instruments.[6]

As is the case here, *Rentz* was a will construction case in which the personal representative of the estate filed a declaratory judgment action against the beneficiaries seeking court guidance regarding several provisions in a will and how they impacted the distribution of certain stocks and bonds. *Rentz*, 1991 WL 164403, at *1. The appellants in *Rentz* filed a motion for summary judgment for the court to construe the will in a manner that would entitle them to the stocks and bonds found in the home as contents of the residence provided for in paragraph 4. *Id*. The appellees, who were the residuary beneficiaries, filed a cross-motion for summary judgment to declare that the stock certificates found in the home were not contents of the home within the meaning of paragraph 4 and should pass under the residuary clause. *Id*.

The trial court in *Rentz* held that the reference in paragraph 4 of the will to "furnishings and other contents" did not include the stocks and bonds found in the house and that "the securities found in the home [were] part of the residuary estate." *Id*. at *2. Similar to the case at bar, the dispositive issue in the *Rentz* appeal was whether the trial court erred in its construction of paragraph 4 of the will and its finding that "other contents" did not include the stocks and bonds found in the house. *Id*.

"The rule of *ejusdem generis* [is] a rule of construction that is adhered to by Tennessee courts." *In re Est. of Jackson*, 793 S.W.2d 259, 261 (Tenn. Ct. App. 1990) (citing 1 Robert Pritchard et al., *Pritchard on the Law of Wills and Administration of Estates Embracing the Law and Practice of Tennessee*, § 397 (4th ed. 1983)). The rule provides that "where there has been an enumeration of particular items followed by a sweeping clause comprising all other things under a general description, the scope of the sweeping clause is restricted to things within the description of the same kind with the items enumerated." *Id*. (citing *Cent. Drug Store v. Adams*, 201 S.W.2d 682 (Tenn. 1947)). Applying this rule to the language at issue in *Rentz*, the appellate court affirmed the trial court's finding: "[T]he bequest of 'furnishings and other contents' does not include the stocks and bonds found in the house. *The general term, 'contents', 'is limited to items of a*

[6] In a footnote in the brief on appeal the Residuary Beneficiaries acknowledge "that cash or coins do not have the same status as mere financial documents representing payments of money, which property is held by a banking institution, such as funds in a checking account, CD, savings account, etc. However, subsequent arguments herein explain why any cash or coins physically found in the house should have the same ultimate disposition as any property represented only by financial documents."

like kind as the specific or limited term 'furnishings.'" *Rentz*, 1991 WL 164403 at *3 (emphasis added) (citing *Cent. Drug Store*, 201 S.W.2d at 682; *In re Est. of Jackson v. Thompson*, 793 S.W.2d at 259).

In addition to the rule of *ejusdem generis*, the trial court relied on a rule of construction specifically applicable to choses in action. As explained in *Rentz*:

> In the absence of a contrary testatorial intention, as a general rule, a bequest of the contents of a house will not include choses in action or money found therein at the testator's death. The same rule applies to a bequest of the contents of an apartment or room, or in a particular place or business such as a store or office or a farm. On the other hand, in the absence of a contrary testatorial intention, it is the general rule that a bequest of the contents of receptacle, such as a trunk, desk, envelope, safe, or safe-deposit includes money and choses in action.

Id. at *2 (quoting 80 Am. Jur. 2d *Wills* § 1277).[7]

Here, paragraph FIFTH states in pertinent part, "I devise and bequeath my house and lot . . . where I live . . . to DWIGHT ANTHONY EATHERLY, and I devise and bequeath to him all personal property and household goods and furniture located thereon." Thus, the bequest refers to the contents of the house where Mr. Knight lived as distinguished from the contents of a "receptacle." As a consequence, the general rule expressed in the first two sentences regarding choses in action applies, while the rule in the third sentence, which references receptacles, does not.

We are also persuaded by a separate argument made by the Residuary Beneficiaries. This argument focuses on the fact that some of the financial instruments located in the lock box were the subject of specific bequests and contractual provisions, both of which supersede any bequest in Mr. Knight's will. It is undisputed that some of the contents are subject to pay-on-death provisions, which supersede any testamentary provisions in the

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[7] The November 2022 update to American Jurisprudence contains substantially the same general principles, but they now appear in § 1095:

> In the absence of a contrary testatorial intention, a bequest of the contents of a house generally will not include choses in action or money found therein at the testator's death. The same rule applies to a bequest of the contents of an apartment or room or in a particular place or business, such as a store or office or a farm. On the other hand, in the absence of a contrary testatorial intention, a bequest of the contents of a receptacle, such as a trunk, desk, envelope, safe, or safe deposit box, generally includes money and choses in action.

80 Am. Jur. 2d *Wills* § 1095 (footnotes omitted).

will. Thus, as the Residuary Beneficiaries argue, the facts further undermine Mr. Eatherly's argument that paragraph FIFTH controlled the disposition of the contents of the lock box.

We acknowledge Mr. Eatherly's argument that the decision in *Cobb v. Stewart*, 463 S.W.2d 693 (Tenn. 1971) is controlling. We respectfully disagree, finding it is distinguishable because the issue in *Cobb* was what constitutes "personal property." The operative bequest in Mr. Cobb's will provided, in pertinent part:

> I direct that all my interest in any business or partnership which I may own at the time of my death, and **all of my personal property** shall be sold, and all of my debts paid from the proceeds; I will and bequeath one-fourth of the amount remaining after the payment of my debts, to my wife, Alice Cobb; the remaining three-fourths shall be used by my executor hereinafter named in the purchase of real estate, the title to which real estate shall be taken in the name of my wife, Alice Cobb, for and during her natural life, with the remainder interest therein vested equally in the children of my brother, B. W. Cobb, namely, B. W. Cobb, Jr., and Lynn Cobb, and the children of my sister, Edna Earl Stewart, namely, Elise Stewart and David Stewart.

Id. at 695.

Thus, *Cobb* is distinguishable and unpersuasive because the question in *Cobb* was what constitutes "personal property," while the question here is whether Mr. Knight intended for paragraph FIFTH to control the disposition of the contents of a lock box.

Applying the rules of construction relied upon by the trial court to the express language used in Mr. Knight's will, we agree with the trial court and hold that Mr. Knight did not intend to bequeath the contents of a lock box located on his property pursuant to paragraph FIFTH; instead, he intended for the contents of the lock box to be bequeathed pursuant to the residuary clause in the NINTH paragraph of the will, not paragraph FIFTH.

For completeness, we wish to address the contention by the Residuary Beneficiaries that the affidavit of Jacky Bellar, the attorney who wrote the will, should also be considered in ascertaining Mr. Knight's intent. Although the motion for summary judgment was supported by the affidavit of Mr. Bellar, the trial court made no reference to his testimony in its ruling. Based on this omission, we assume that the trial court found the dispositive language in paragraph FIFTH to be unambiguous and, thus, it did not consider his affidavit.

Assuming arguendo that the language at issue constituted a latent ambiguity, the trial court could have considered the affidavit of Jacky Bellar "to explain a latent

ambiguity" in the will.[8] "Parol evidence is generally inadmissible to add to, vary, or contradict language used in a will, although it is admissible to explain a latent ambiguity." *Stickley v. Carmichael*, 850 S.W.2d 127, 132 (Tenn. 1992).

Mr. Bellar's affidavit reads, in pertinent part:

> When I drafted paragraph FIFTH of the Will, it was for the purpose of carrying out the intent of Mr. Knight that Dwight Eatherly receive the home place where Mr. Knight lived as well as the household furnishings and other personal property associated with keeping house. Mr. Knight did not communicate to me any intent to convey to Dwight Eatherly anything except the tangible household furnishings and other personal property associated with keeping house, such as lawn mowers, gardening tools, etc. The language that I used in drafting paragraph FIFTH was meant to convey that Mr. Dwight Eatherly was going to receive the tangible household related property located at the homeplace. To the extent the language I used in drafting the Will conveys any other intent, it is a result of scrivener's error and not the intent of Mr. Knight.
>
> . . .
>
> Mr. Knight was a very successful and wealthy farmer and businessman who had several financial investments and accounts. While assisting him in his estate planning and the drafting of his Will he clearly understood the significance in designating an account, POD or listing a beneficiary. He understood that any account without that designation would pass through his estate according to his Will.
>
> Mr. Knight's estate in part consists of several financial accounts that have no designated beneficiaries and therefore would pass under his Will. He did have some accounts that were designated payable to Annette Bush and Dwight Eatherly. Mr. Knight had me draft his Will with the intent that those

[8] Our supreme court has provided that a latent ambiguity exists

> where the equivocality of expression, or obscurity of intention does not arise from the words themselves, but from the ambiguous state of extrinsic circumstances to which the words of the instrument refer, and which is susceptible of explanation by the mere development of extraneous facts, without altering or adding to the written language, or requiring more to be understood thereby than will fairly comport with the ordinary or legal sense of the words or phrases made use of.

Perdue v. Est. of Jackson, No. W2012-02710-COA-R3-CV, 2013 WL 2644670, at *4 (Tenn. Ct. App. June 12, 2013) (quoting *Weatherhead v. Sewell*, 28 Tenn. (9 Hum.) 272, 295 (1848)).

> accounts with undesignated beneficiaries would pass under paragraph NINETH [sic] of his Will.

If we were to consider the affidavit of Mr. Bellar to explain a latent ambiguity in the will, we would still reach the same conclusion as the trial court, that Mr. Knight did not intend to bequeath the contents of the lock box pursuant to paragraph FIFTH. As Mr. Bellar unequivocally states, Mr. Knight "understood the significance in designating an account, POD or listing a beneficiary"; yet, two such documents were located inside the lock box. Also, Mr. Bellar unequivocally stated that Mr. Knight "did not communicate to me any intent to convey to Dwight Eatherly anything except the tangible household furnishings and other personal property associated with keeping house, such as lawn mowers, gardening tools, etc." More specifically, Mr. Bellar stated, "When I drafted paragraph FIFTH of the Will, it was for the purpose of carrying out the intent of Mr. Knight that Dwight Eatherly receive the home place where Mr. Knight lived *as well as the household furnishings and other personal property associated with keeping house*." (emphasis added). Thus, Mr. Bellar's affidavit supports our earlier conclusion, which was based on the rule of *ejusdem generis* and the general rule regarding choses in action, that Mr. Knight did not intend to bequeath the contents of the lock box pursuant to paragraph FIFTH. As such, Mr. Bellar's affidavit provides a separate and additional basis on which to conclude that the Residuary Beneficiaries were entitled to summary judgment as a matter of law.

Accordingly, we affirm the trial court's decision to grant the Residuary Beneficiaries' motion for summary judgment.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded for further proceedings consistent with this opinion. Costs of appeal are assessed against the appellant, Dwight Anthony Eatherly.

FRANK G. CLEMENT JR., P.J., M.S.