Filed 11/13/17 Estate of Barrios CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

Estate of DOROTHY LUCILLE BARRIOS, Deceased.

ANGELIQUE FRIEND, as Administrator, etc.,

Petitioner and Respondent,

v.

B. et al., Minors, etc.,

Objectors and Appellants;

RONALD J. BARRIOS et al.,

Claimants and Respondents.

2d Probate No. B281686
(Super. Ct. No. 56-2016-00486599-PR-LA-OXN)
(Ventura County)

Appellants B. and L. are the great-grandchildren of decedents Dorothy Barrios and Joe C. Barrios, Sr.[1] Decedents executed a trust naming their grandson Lawrence, Jr.—appellants' father—as their "specific beneficiary." Dorothy also executed a will *disinheriting* her two surviving sons, who are respondents in this appeal. Dorothy left all of her estate to Lawrence, Jr. and $1 to each of the respondents. The trust does not mention respondents at all. Dorothy's entire dispositional plan reveals her intent to leave everything to Lawrence, Jr., and nothing to respondents.

Though Lawrence, Jr. predeceased Dorothy, neither the Will nor the Trust requires that he outlive his grandparents. Dorothy did not amend either instrument during the 13 years following Lawrence, Jr.'s death, to name a different beneficiary or devisee. Under these circumstances the specific transfers to Lawrence, Jr., must pass to appellants pursuant to the anti-lapse statute, Probate Code section 21110.[2] The transfers are not superseded by the residuary clause.

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[1] This opinion uses given names "to ease the reader's task." (*Estate of Guidotti* (2001) 90 Cal.App.4th 1403, 1404, fn. 1.)

[2] The anti-lapse statute applies to wills and trusts. (Prob. Code, § 21101.) It states, in relevant part, "[I]f a transferee is dead when the instrument is executed, or fails or is treated as failing to survive the transferor . . . the issue of the deceased transferee take in the transferee's place . . . ." (Prob. Code, § 21110, subd. (a).) A transferee "means a person who is kindred of the transferor . . . ." (*Id.*, subd. (c).)

Unlabeled statutory references in this opinion are to the Probate Code.

The probate court awarded most of the trust assets to respondents. The anti-lapse statute, however, was not given proper effect, though it has long and "consistently provided that when a bequest to a protected transferee would otherwise lapse due to the transferee's death, that bequest passes by right of representation to his or her descendants." (*Estate of Mooney* (2008) 169 Cal.App.4th 654, 663.) The court rewrote the trust in a manner that thwarts Dorothy's intent to leave all assets to Lawrence, Jr., and his descendants. We reverse the judgment in favor of respondents and remand the matter to the probate court with directions to apply the anti-lapse statute to the specific transfers to Lawrence, Jr., allowing appellants to take in their deceased father's place as required by law. (§§ 240, 21110, subd. (a).) We also direct the court to appoint a different administrator.

FACTS

In 1996, Joe, Sr., and Dorothy created a revocable trust (the Trust). They had three sons: Lawrence, Sr. plus respondents Joe, Jr. and Ronald. Lawrence, Sr. died before the Trust was created; he had one child, Lawrence, Jr.

The Trust does not mention respondents at all, but refers several times to Lawrence, Jr. The Trust lists Lawrence, Jr. as successor trustee. Lawrence, Jr. is the "specific beneficiar[y]" of both settlors.[3] Respondents are not named as Trust beneficiaries.

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[3] Section IV (B) of the Trust reads, "**Wife's Primary and Alternate Beneficiaries** [¶] Upon the death of Dorothy L. Barrios, the trust property owned by Dorothy L. Barrios as her share of the trust property listed on Schedule A, shall be distributed to the beneficiaries named in this section. [¶]

"1. **Wife's Specific Beneficiaries** [¶] Joe C. Barrios, Sr. shall be given the trust property listed on Schedule A. If Joe C.

Trust assets, in Schedule A, were the settlors' home in Ventura and cash accounts.

Concurrent with the Trust, Dorothy executed a Last Will and Testament (the Will) in 1996. In section 2(B) of the Will, Dorothy lists respondents as her living children. Continuing on, the Will states, "In addition to any other property I may give, by this will or otherwise, to the person(s) listed in Section 2(B), I give each person listed there One Dollar ($1.00)." Apart from the $1 devise, respondents receive nothing under the Will.

The Will names Lawrence, Jr. as a contingent devisee and executor. It states, "I give my share of real and personal property items, and any residual thereof, not listed in Schedule A of [the Trust] to Joe C. Barrios, Sr., or if Joe C. Barrios, Sr. fails to survive me, to Lawrence Joseph Barrios, Jr." At the time of the probate hearing, the estate consisted of a $30,000 account.

Settlor Joe, Sr. predeceased everyone mentioned in the Trust and Will. He was followed by Lawrence, Jr., who was fatally shot in 2003. Settlor Dorothy died on September 3, 2016.

Respondents nominated Angelique Friend to be special administrator of Dorothy's estate. Twelve days after Dorothy's death, Friend petitioned for letters of administration, declaring that Dorothy died "intestate." The Will is not attached to the

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Barrios, Sr. does not survive Dorothy L. Barrios, that property shall be given to Lawrence Joseph Barrios, Jr.

"2. **Wife's Residuary Beneficiaries** [¶] The residuary beneficiary of any trust property previously owned by Dorothy L. Barrios as her share of the trust property listed on Schedule A, and not specifically and validly disposed of by Paragraph IV(A)(1), shall be Joe C. Barrios, Sr."

Joe, Sr.'s beneficiary clause is the same, except that Dorothy is the first specific beneficiary and residuary beneficiary.

petition. The probate court appointed Friend and granted her letters of administration.

Friend argued that because Lawrence, Jr. predeceased Dorothy, the Trust "fails for lack of a beneficiary" so that the assets should "be distributed pursuant to the laws of intestate succession." Friend wanted the court to rule that the estate is the true owner of Dorothy's house, and to transfer the property to Friend as administrator of the estate.

In January 2017, a guardian ad litem was appointed to represent appellants, who promptly petitioned to probate the Will. They opposed Friend's petition, arguing that "the Trust does not fail and the testator's probate assets should be distributed pursuant to her Will, not pursuant to the laws of intestate succession." Appellants urged the court to apply the anti-lapse statute to pass the property to them, owing to the death of their father Lawrence, Jr., who is the named beneficiary of the Trust. They noted that the Trust and the Will demonstrate Dorothy's intent to disinherit respondents. Appellants asked the court to appoint Anne Pierce as personal representative to administer the estate.

The Probate Court's Ruling

In its statement of decision, the probate court wrote that the Will "specifically disinherits" respondents, but does not purport to dispose of Trust assets, including the settlors' house. The court found that Dorothy's disinheritance of respondents in the Will does not carry over to the Trust. The court deemed the house to be a Trust asset, not a probate asset.

The Trust terms give Joe, Sr. the Trust corpus; however, because he predeceased Dorothy, those assets were to go to Lawrence, Jr. The court reasoned that because Lawrence, Jr. did

not survive decedent, there was no valid disposition and the assets pass to Joe, Sr., under the Trust residuary clause. The court then applied the anti-lapse statute to the residuary clause, giving respondents each one-third of the Trust as the surviving issue of Joe, Sr., and one-third to appellants as the surviving grandchildren of Joe, Sr.

DISCUSSION

Appellants challenge two aspects of the probate court's order: (1) its decision to divide the parties' interest in the Trust in thirds, and (2) its appointment of Friend.

Friend petitioned to have Trust assets transferred to Dorothy's estate and then distributed under the laws of intestate succession. (§ 850.) The court reached the result desired by respondents, giving them two-thirds of all assets, though it did so through the Trust. The court's orders are appealable under section 1303, subdivision (a) (granting letters to a personal representative) and subdivision (f) (order determining heirship, succession, entitlement, or the persons to whom distribution should be made), or section 1304, subdivision (a) (order ascertaining beneficiaries and determining to whom trust property shall pass under section 17200).

1. Distribution of Assets

This aspect of the appeal requires an interpretation of the language in the Trust and the Will. Review is de novo because the facts are not in dispute. (*Estate of Russell* (1968) 69 Cal.2d 200, 213; *Estate of Guidotti*, *supra*, 90 Cal.App.4th at p. 1406.)

We start with the cardinal rule that "the intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument." (§ 21102, subd. (a).)

We ascertain intent by examining the instrument as a whole. (§ 21121; *Estate of Cairns* (2010) 188 Cal.App.4th 937, 944.) Provisions are "given a liberal and reasonable interpretation rather than a narrow and technical one, with a view to discovering the decedent's testamentary intent, and the apparent meaning of particular words, phrases and provisions is to be subordinated to the testator's plan or dominant purpose." (*Cairns* at pp. 947-948; *Estate of Axcelrod* (1944) 23 Cal.2d 761, 766 [technical rules must yield to a clear expression of intent].) We consider "the entire scheme of disposition," especially the persons the transferor has named as beneficiaries or devisees. (*Estate of Raymond* (1950) 96 Cal.App.2d 808, 814.) "Preference is to be given to an interpretation of an instrument that will prevent intestacy or failure of a transfer, rather than one that will result in an intestacy or failure of a transfer." (§ 21120.)

The Will and Trust in this case are striking in their treatment of respondent sons. The Trust treats respondents as if they do not exist, never once mentioning them. The concurrently executed Will acknowledges respondents' existence, but only for the purpose of disinheriting them.[4]

"As a general rule and by custom, a one dollar provision indicates the testator contemplated disinheritance—not a bequest." (*Estate of Kaseroff* (1977) 19 Cal.3d 272, 275.) If a will

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[4] At oral argument, respondents urged us not to consider the Will because it is "extrinsic evidence" that alters the standard of review. We disagree. Interpretation of legal instruments presents a question of law when, as here, there is no conflict in the evidence. (*Burch v. George* (1994) 7 Cal.4th 246, 254.) The concurrent disposition plan helps to ascertain intent and meaning. (*Estate of Russell*, *supra*, 69 Cal.2d at pp. 208-210.) The probate court's order interprets the Trust and the Will.

gives "'one dollar each to my . . . brothers & sisters,'" but the court gives the siblings the entire estate, "the testator's intent obviously is not being carried out." (*Estate of Vanderhoofven* (1971) 18 Cal.App.3d 940, 946, fn. 1.) A will listing the decedent's four sons by name and "'[h]aving in mind my children'" devises all property "'to my [predeceased] daughter,'" "evidences an intentional omission of the four sons" so that the deceased daughter's minor children take the property under the anti-lapse statute. (*In re Estate of Fanning* (1937) 8 Cal.2d 229, 229-231.)

Lawrence, Jr. is the "specific beneficiary" in the Trust and the named devisee of the Will. The Will lists respondents and disinherits them with a $1 devise. Viewing the entire scheme of disposition, it is clear that Dorothy did not intend to leave anything to respondents. The omission was not an oversight; Dorothy did not forget that she had two living sons.

The transfer to Lawrence, Jr. does not lapse for lack of a beneficiary merely because he predeceased Dorothy. On the contrary, if a transferee "who is kindred of the transferor" fails to outlive the transferor relative, "the issue of the deceased transferee take in the transferee's place." (§ 21110, subds. (a), (c). See *Estate of Esposito* (1943) 57 Cal.App.2d 859, 860-863 [decedent left all of his property to a predeceased son, with the result that the property passed to the deceased son's two children under the anti-lapse statute].) Respondents do not dispute that Dorothy's grandson, Lawrence, Jr. is a lineal blood descendent and "kindred" to her. (See Cal. Law Revision Comm. Com., vol. 54A, pt. 2 West's Ann. Probate Code (2011 ed.) foll. § 21110, p. 76 ["[t]he term 'kindred' . . . refers to persons related by blood"].)

The anti-lapse statute is "'based on the presumed desire of the testator to have gifts intended for certain persons go to their

children or other descendants in lieu of disposition as lapsed gifts.' . . . Thus as to a disposition to a kindred of the testator who dies before the testator leaving lineal descendants, the section *enacts an exception to the general rule* that if a legatee under a will predeceases a testator and the will is silent regarding such a contingency, the gift falls into the residuary estate if there is one [citation] or, if there is none, the testator 'is deemed to have died intestate as to that portion of the estate.'" (*Estate of Friedman* (1961) 198 Cal.App.2d 434, 437 (italics added).)

The facts of the *Friedman* case are instructive. There, the decedent provided a cash gift to her daughter Rosalie. Rosalie predeceased her mother, who died without altering the will. The testatrix's surviving children challenged the gift. In his opinion, Justice Tobriner applied the anti-lapse statute and passed the gift to Rosalie's daughter. The court rejected the objectors' argument that their mother intended only to take care of Rosalie during the latter's lifetime, so any gift to her should now be distributed to them because Rosalie was dead. (*Estate of Friedman*, *supra*, 198 Cal.App.2d at pp. 435-440.)

In particular, a decedent's failure to amend her will after the death of a specified devisee is *not* proof that decedent wanted to substitute the residuary clause in the place of the specific devise. "The very purpose of the anti[-]lapse statute is to provide a substitutionary legatee in the case in which the testator does not express an intention on the matter. If the testator's failure to act will in itself defeat the operation of the statue, it will never apply. The statute rests upon the premise that the silence of the testator must dissolve in his presumed desire that the lineal descendant take in the place of the deceased legatee. Appellants

cannot use the nonaction of the testatrix to avoid the very statute which is designed to function in that special circumstance." (*Estate of Friedman*, *supra*, 198 Cal.App.2d at p. 441.)

The anti-lapse statute may be defeated "if the instrument expresses a contrary intention or a substitute disposition." (§ 21110, subd. (b).) An intent to defeat the anti-lapse statute is shown if an instrument expressly requires a transferee to survive the transferor. (*Ibid.*; *Burkett v. Capovilla* (2003) 112 Cal.App.4th 1444, 1448-1451 [a trust requirement that a daughter outlive the settlor by 60 days defeated the anti-lapse statute].) Here, the Trust is not conditioned on Lawrence, Jr. surviving his grandparents. There is no evidence of any intent to defeat the anti-lapse statute.

In sum, "All of the conditions for the application of section 21110 are present here: (1) the testator attempted to devise . . . her estate to her kin, (2) the intended devisee[] predeceased the testator, and (3) the will fails to evidence the testator's intent in that event. In those circumstances, section 21110 replaces the decedent's attempted devise to her [grandson] with a substitute disposition to her [grandson's] descendants." (*Estate of Mooney*, *supra*, 169 Cal.App.4th at p. 658.) Under the statute, appellants take in their deceased father's place.

It bears emphasizing that when the Trust was executed in 1996, neither of the appellants was alive. They were born in 2001 and 2003. Because Lawrence, Jr. had no children when the instrument was created, a residuary clause was included that sends Trust assets back to the settlors' estates if Trust assets are "not specifically and validly disposed of." The residuary clause prevents possible intestacy.

As it turns out, Trust assets were "specifically and validly disposed of" because Lawrence, Jr. had children who survive him and validly take in his place under the anti-lapse statute. Absent "a clear expression of intent" to avoid the operation of the anti-lapse statute, "the simple existence of a residual clause adequate to avoid intestacy is not sufficient to avoid the operation of the statute. To hold otherwise would . . . totally nullify the effect of the statute." (*Estate of Casey* (1982) 128 Cal.App.3d 867, 873.)

Contrary to the probate court's belief, the anti-lapse statute applies to the specific beneficiary clause, not to the residuary clause. The residuary clause does not sweep in failed and lapsed gifts, such as the one to Lawrence, Jr. It is thus distinguishable from *Estate of Salisbury* (1978) 76 Cal.App.3d 635, 638, in which the residuary clause encompassed "'the residue of my estate, . . . *including all failed and lapsed gifts*'"; that language was proof of the testator's intent to avoid the anti-lapse statute.

The early death of Lawrence, Jr.; Dorothy's failure to amend or revoke the Will and Trust after his death; and the existence of a residuary clause do not defeat effect of the anti-lapse statute. (*Estate of Friedman*, *supra*, 198 Cal.App.2d at p. 441.) A testator's failure to change the will after the death of a devisee evidences an intent that the gift should pass to the dead devisee's children, and not be apportioned among decedent's surviving siblings. (*Estate of Steidl* (1948) 89 Cal.App.2d 488.)

Our conclusion as to what Dorothy intended to accomplish is "gathered . . . by giving the most ordinary interpretation to the language used without resorting to specious or fanciful reasoning. [Citations.] . . . Courts are not invested under the guise of construction with the privilege of rewriting a testator's will. [Citations.] . . . The testator's words and all of them should be

considered in the light of common sense and given effect if it appears that violence to this simple virtue will not result in so doing. [Citation.]" (*Estate of Keller* (1955) 134 Cal.App.2d 232, 235-236; *Estate of McKenzie* (1966) 246 Cal.App.2d 740, 746 [courts cannot redraw a will in the belief that the rewrite would better serve the testator].) Our role is not to determine who "*should be* the objects of the testatrix's bounty, but, rather, to determine who the testatrix did, in fact, intend to make the object of her bounty." (*Estate of Strong* (1966) 244 Cal.App.2d 250, 254.)

The object of Dorothy's bounty was her grandson Lawrence, Jr. and by extension her great-grandchildren descended from Lawrence, Jr. Respondents are not mentioned in the Trust and are disinherited by the Will. A common sense reading of the instruments does not suggest, even remotely, that respondents are the intended objects of Dorothy's bounty, and a technical rewriting of the instruments cannot be deployed to thwart Dorothy's intent.

2. The Appointment of Friend

Appellants objected to the appointment of Friend, who originally sought her position on the ground that Dorothy "died intestate." Appellants nominated Anne Pierce to be as administrator with will annexed. Their request was unopposed. The court refused to appoint Pierce in lieu of Friend.

"After appointment of an administrator on the ground of intestacy, the personal representative *shall be removed from office* on the later admission to probate of a will." (§ 8504, subd. (a). Italics added.) The statutory language is mandatory, not discretionary.

Even if the probate court retained discretion to reappoint Friend after probating the Will, Friend's continued involvement

is inappropriate. First, Friend knew that Dorothy had a will, yet told the court that Dorothy "died intestate." At the hearing, she argued, "The decedent died with a will, but the will pours into a trust, which has no beneficiary. So from my perspective, the will doesn't have a valid beneficiary. The will fails. That's why she died intestate."[5] Friend showed bias in favor of respondents by failing to submit the Will for probate when that instrument shows Dorothy's intent to disinherit respondents.

Second, Friend is aligned with respondent sons and her brief supported the merits of their claims. Administrators are "indifferent persons as between the real parties in interest and consequently cannot litigate the conflicting claims of heirs or legatees at the expense of the estate. [Citations]." (*Estate of Kessler* (1948) 32 Cal.2d 367, 369.) Once the probate court has ruled, "[t]he beneficiaries must then protect their own rights, and it is not the duty of the executor or administrator to litigate the claims of one against another." (*Ibid.* Accord: *Estate of Goulet* (1995) 10 Cal.4th 1074, 1083-1084; *Estate of Ferrall* (1948) 33 Cal.2d 202, 204 [on appeal a trustee "must deal impartially with beneficiaries" and is a mere stakeholder who cannot participate in their competing claims].) Going forward, Friend should not serve as administrator for children whose interests she opposes.

Third, those who take under a will have priority in nominating an administrator. (§ 8441, subd. (b).) Respondents

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[5] This is a troubling argument. The probate court is charged with determining the validity and effect of a will. An administrator who knows that the decedent had a will cannot usurp the role of the judge by declaring that the person "died intestate," thereby obstructing the court's duty to examine the will. On appeal, Friend concedes that the Will does not "pour over" into the Trust, contrary to her claim in the probate court.

were disinherited in the Will and are not beneficiaries of the Trust. Appellants shall take all of the property. The probate court is directed to remove Friend as administrator and appoint another person.

DISPOSITION

The judgment is reversed. The matter is remanded with directions to the probate court (1) to apply the anti-lapse statute to the transfers to Lawrence J. Barrios, Jr. and his descendants, and (2) to remove Angelique Friend as administrator and appoint a new administrator nominated by appellants through their guardian ad litem. Costs on appeal are awarded to appellants as the prevailing parties.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Glen M. Reiser, Judge
Superior Court County of Ventura

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