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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

Estate of EMIKO KERN, Deceased.	B263225 (Los Angeles County Super. Ct. No. BP148952)
THOMAS PATRICK KEHRER, Petitioner and Respondent, v. KENZO ISHIGOOKA, Objector and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, David J. Cowan, Judge. Affirmed.

Snyder & Hancock, Scott A. Hancock; Witherspoon & Siracusa and Andrew K. Schultz for Objector and Appellant.

Schindler Eyrich and John F. Eyrich for Petitioner and Respondent.

I. INTRODUCTION

The objector, Kenzo Ishigooka, appeals from an order granting a petition to determine distribution rights. Plaintiff, Thomas Patrick Kehrer, filed petitions to admit the will of Emiko Kern to probate and to determine distribution rights. Plaintiff asserted he is a beneficiary entitled to 50 percent of her estate. Mrs. Kern had bequeathed her estate to her husband. In the event he predeceased her, she bequeathed her estate to two individuals, who also did not survive her. Plaintiff asserts he is the sole surviving heir of one of those two named individuals.

The Los Angeles County Public Administrator (public administrator), who also filed a petition to admit Mrs. Kern's will to probate, objected to Mr. Kehrer's petitions. The objector joined in the public administrator's objection to Mr. Kehrer's petition. The probate court found Mrs. Kern intended to devise her estate to the two individuals or their "survivors." The probate court ruled plaintiff was one of the "survivors" within the will's meaning. Given the ambiguity in Mrs. Kern's will, we agree with the probate court and affirm the orders under review.

II. BACKGROUND

On April 20, 1973 Mrs. Kern executed a last will and testament (the will). The will bequeathed her entire estate to her now late husband, Wilbur C. Kern. The will further stated in pertinent part: "In the event that my said husband, Wilbur C. Kern, does not survive me, then I give, devise and bequeath all of my said estate unto the following two (2) individuals to share and share alike or to survivor or survivors. [¶] Mrs. Ruth Schneider . . . [¶] Mr. Charles Kehrer . . . ." The will provided no other disposition. Mrs. Schneider was named as the will's executor. Mr. Kern died on February 17, 1984. Mrs. Schneider died on December 6, 1973. Mr. Kehrer died on December 22, 1991. Mrs. Kern died on June 1, 2013.

On January 30, 2014, the public administrator filed a petition to probate the will and for letters of administration with will annexed. The public administrator also sought to be appointed the estate's administrator of the will annexed. On April 10, 2014, the public administrator supplemented its petition. The public administrator asserted that the laws of intestacy should govern distribution of Mrs. Kern's estate. Declarations were filed by employees of the public administrator concerning efforts to locate Mrs. Kern's relatives or heirs. Those declarations reveal extensive efforts by the public administrator's office to garner relevant information including: contacting other government agencies concerning Mrs. Kern and her deceased husband; computer searches seeking information about Mrs. Kern's potential next of kin; speaking to relatives of Mrs. Kern's late husband; conferring with employees of the Consulate of Japan; searching Mrs. Kern's residence; and mailing letters to potential heirs and next-of-kin of Mrs. Kern.

One of the declarations was filed by Deputy Public Administrator Carl Fonseca. Mr. Fonseca was involved in the efforts to locate Mrs. Kern's relatives. Mr. Fonseca stated in part: "I have personally undertaken, or am informed and believe and thereon allege were undertaken, the following efforts to locate the decedent's next-of-kin: [¶] . . . [¶] Spoke with relatives of decedent's pre-deceased spouse who confirmed that decedent was a widow and had no children. They stated that decedent was very secretive and did not share much information. Decedent may have family in Japan, but she was estranged from them." Further, Mr. Fonseca spoke with Mrs. Kern's neighbors, Jennifer and David Brumley. The Brumleys stated that Mrs. Kern had received no visitors in years. Mr. Fonseca, while searching Mrs. Kern's residence, found potential contact information concerning possible Japanese relatives. Notices were sent to them but no response had been received as of August 5, 2013.

On April 11, 2014, plaintiff filed his own petition to admit the will to probate. Plaintiff also filed a petition to determine distribution rights. Plaintiff declared he was the sole living heir and survivor of Mr. Kehrer. Plaintiff argued, "When giving all of the Testator's words meaning and construing them together to form a consistent whole and to

avoid rendering the language meaningless, the Testator's plain language reflects her intent to give her estate to the designated individual beneficiaries or their survivors (i.e. equally to the survivors of ***Mrs. Schneider*** and ***Mr. Kehrer***)." (Emphasis original.) Citing extrinsic evidence, plaintiff also contended Mrs. Kern's intent was to not have her Japanese relatives receive anything from her estate. Plaintiff asserted Mrs. Kern had been "disowned" by her family in Japan. Plaintiff relied in part upon Mr. Fonseca's declaration concerning potential estrangement from her relatives in Japan. Plaintiff argued he was entitled to 50 percent of Mrs. Kern's estate. Plaintiff initially claimed to be Mr. Kehrer's nephew. Later, plaintiff claimed to be Mr. Kehrer's cousin.

The public administrator objected to plaintiff's petitions. The public administrator asserted the estate should pass by intestacy. The public administrator argued "estranged" does not mean disowned. On January 28, 2015, the objector and other heirs of Mrs. Kern filed their joinder to the public administrator's objection.

The probate court issued its order on February 5, 2015. The probate court granted the public administrator's request to be appointed the executor of the will. However, the probate court granted plaintiff's request regarding distribution of the will. The probate court concluded: "If Decedent had wanted to leave the estate to *her* family, if these two individuals had passed by when she died, she would not have used the survivor language at all. That she did use the survivor language is inferred to mean 'their' survivors. If it does not mean 'their' survivors, then there would have been no reason to make reference to survivors. That here both these individuals passed by when she died, as opposed to just one, does not make a difference. There is no reason to believe decedent intended any different result depending on whether one or both these individuals had passed as of her death. . . . In addition, if Decedent did not mean 'their' survivors there was a much clearer way she could have made that provision; i.e., by stating that if they had both died, that her estate would go to *her* family members or by intestate succession." The probate court further ruled: "[T]hat the word 'survivor' may be subject to differing interpretations is an issue for another day if there is an objection to the [public administrator's] determination of who are the appropriate survivors of Charles Kehrer

and [Ruth] Schneider. There is nothing presented that [plaintiff] is not a survivor of his uncle. [¶] Consistent with the foregoing, the Court finds Probate Code sec. 21111, not sec. 21109(a), controlling: Here, the language of the will does provide for an 'alternative disposition' if the transfer fails; i.e., to the individuals' survivors if the individuals had passed before Decedent passed. Hence, given said alternative disposition, there is no concern about lapse of the transfer." The probate court denied the public administrator's petition to distribute Mrs. Kern's estate by intestacy. The probate court appointed the public administrator as the executor and ordered a final accounting, including a finding that plaintiff has a one-half interest in Mrs. Kern's estate. The public administrator has not filed a brief as the pertinent issues on appeal have been ably litigated by Mr. Ishigooka's counsel.

III. DISCUSSION

The objector asserts the probate court erred in its interpretation of Mrs. Kern's will. The relevant portion of the will states: "In the event that my said husband, Wilbur C. Kern, does not survive me, then I give, devise and bequeath all of my said estate unto the following two (2) individuals to share and share alike or to survivor or survivors. [¶] Mrs. Ruth Schneider . . . [¶] Mr. Charles Kehrer . . . ." The key issue is the meaning of the "survivor or survivors" language. The probate court adopted plaintiff's interpretation that "survivor or survivors" refers to those of Mrs. Schneider and Mr. Kehrer. The objector argues plaintiff's distribution rights petition should be denied and the subject bequest fails for lack of a discernable beneficiary.

Our Supreme Court has described our responsibilities thusly: "'The intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument.' ([Prob. Code,[1]] § 21102, subd. (a).) '"The paramount rule in the construction of wills, to which all other rules must yield, is that a will is to be construed according to the intention of the testator as expressed therein, and this intention

[1] Future statutory references are to the Probate Code.

must be given effect as far as possible." (*Estate of Wilson* (1920) 184 Cal. 63, 66-67.) The rule is imbedded in the Probate Code. (§ 101.) Its objective is to ascertain what the testator meant by the language he used.' (*Estate of Russell* (1968) 69 Cal.2d 200, 205-206, fns. omitted.)" (*Newman v. Wells Fargo Bank* (1996) 14 Cal.4th 126, 134.) Section 21102, subdivision (a) provides, "The intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument." (See also 14 Witkin, Summary of Cal. Law (10th ed. 2005) Wills and Probate, § 191, p. 266 ["In carrying out this policy, the court may transpose, interpolate, or substitute words where the terminology is obviously inaccurate or confused."].)

Section 21120 provides: "The words of an instrument are to receive an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative. 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." (See *Estate of Duke* (2015) 61 Cal.4th 871, 892.) Section 21121 provides: "All parts of an instrument are to be construed in relation to each other and so as, if possible, to form a consistent whole. If the meaning of any part of an instrument is ambiguous or doubtful, it may be explained by any reference to or recital of that part in another part of the instrument." (See *Siegel v. Fife* (2015) 234 Cal.App.4th 988, 996.) Finally, section 21122 provides: "The words of an instrument are to be given their ordinary and grammatical meaning unless the intention to use them in another sense is clear and their intended meaning can be ascertained. Technical words are not necessary to give effect to a disposition in an instrument. Technical words are to be considered as having been used in their technical sense unless (a) the context clearly indicates a contrary intention or (b) it satisfactorily appears that the instrument was drawn solely by the transferor and that the transferor was unacquainted with the technical sense." (See *Estate of Goyette* (2004) 123 Cal.App.4th 67, 70-71.)

In the case of ambiguous language in a will, extrinsic evidence is admissible to explain a patent ambiguity, which is one that appears on the face of the instrument. (*Estate of Russell*, *supra*, 69 Cal.2d at p. 206; *Estate of White* (1970) 9 Cal.App.3d 194,

200.) An ambiguity exists when the will's language is fairly susceptible to two or more constructions. (*Estate of Russell*, *supra*, 69 Cal.2d at p. 211; *Estate of White*, *supra*, 9 Cal.App.3d at p. 200.) If there is a conflict in the extrinsic evidence, we are bound by the inferences drawn by the probate court. (*Newman v. Wells Fargo Bank*, *supra*, 14 Cal.4th at p. 134; *Estate of Smith* (1998) 61 Cal.App.4th 259, 265.) Additionally, when an issue turns on the credibility of extrinsic evidence, the probate court's determination is binding. (*Estate of Dodge* (1971) 6 Cal.3d 311, 318; *Estate of Verdisson* (1992) 4 Cal.App.4th 1127, 1135-1136.) In terms of circumstantial evidence, the course of events surrounding a will's execution may demonstrate the decedent's affection toward possible devisees. (*Id.* at p. 1136.) Further, extrinsic evidence is admissible as an aid in the construction of a will. (*Estate of Duke*, *supra*, 61 Cal.4th at p. 888; see *Estate of Barnhart* (1964) 226 Cal.App.2d 289, 296.) If there is no ambiguity, we interpret a will's language de novo. (*Newman v. Wells Fargo Bank*, *supra*, 14 Cal.4th at p. 134; *Meyer v. Meyer* (2008) 162 Cal.App.4th 983, 990.)

We agree with the probate court. To begin with, the probate court ruled that the term "unto the following two (2) individuals to share and share alike or to survivor or survivors" is ambiguous. It is unclear whose "survivor or survivors" are to receive the estate's proceeds--Mrs. Kern's surviving relatives or those who outlive Mrs. Schneider or Mr. Kehrer? Therefore, extrinsic evidence may be relied upon. (*Estate of Russell*, *supra*, 69 Cal.2d at p. 206; *Estate of White*, *supra*, 9 Cal.App.3d at p. 200.) And as alluded to by the probate court, the extrinsic evidence indicated Mrs. Kern was estranged from her family other than her late husband. There is evidence Mrs. Kern had received no visitors in her home in the years preceding her death. Of further consequence is the fact, as noted by the probate court, the only reference to a family member is to Mrs. Kern's late husband. No other family members are identified in the will. Mrs. Schneider was named as the will's executor. In addition, the reference to "survivor or survivors" appears immediately above the names of Mrs. Schneider and Mr. Kehrer. Also, the probate court correctly reasoned that had Mrs. Kern intended that her "survivor or survivors" receive her estate, she could have said so in a clearer manner. The foregoing analysis is

consistent with the preference against interpreting an instrument to create an intestacy. (§ 21120; *Estate of Duke*, *supra*, 61 Cal.4th at p. 892.) And it is presumed that the act of making a will demonstrates an intent to avoid an intestacy. (*Estate of Belden* (1938) 11 Cal.2d 108, 111-112; *Estate of Wierzbicky* (1945) 69 Cal.App.2d 690, 692.) The probate court correctly ruled the transfer to Mrs. Schneider and Mr. Kehrer failed because of their deaths and the alternative disposition to their "survivor or survivors" must be enforced. (§ 21111, subd. (a); see *Estate of Stoddart* (2004) 115 Cal.App.4th 1118, 1131-1132.)

IV. DISPOSITION

The order under review is affirmed. Plaintiff, Thomas Patrick Kehrer, shall recover his costs incurred on appeal from the objector, Kenzo Ishigooka.

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TURNER, P. J.

I concur:

BAKER, J.

RAPHAEL, J., Concurring

I agree with the result of the majority's opinion and would affirm the judgment. I write separately because I would use a different analysis to resolve the dispute.

Emiko Kern executed her last will and testament in 1973 and died 40 years later in 2013. In the second operative paragraph of her will, she bequeathed her estate to her husband, who predeceased her. In the third operative paragraph, she devised to her contingent beneficiaries, Ruth Schneider and Charles Kehrer, who also predeceased her.

This case turns on the meaning of the term "survivor or survivors" in that third paragraph, as that is the last bequest in the will. The paragraph reads, in full:

"THIRD: In the event that my said husband, Wilbur C. Kern, does not survive me, then I give, devise and bequeath all of my said estate unto the following two (2) individuals to share and share alike or to survivor or survivors.

Mrs. Ruth Schneider, [address]

Mr. Charles Kehrer, [address]."

Construing this paragraph, the probate court awarded the proceeds of Kern's estate to the relative of the deceased beneficiaries who is the sole "survivor" of them, in effect reading the will to leave the property to "their" survivor or survivors. Under this construction, the estate would be distributed to petitioner Thomas Patrick Kehrer, Charles Kehrer's nephew.

Appellant Kenzo Ishigooka is one of Kern's brothers from her native Japan. In his opening brief, he argues only, as he did as an objector in the probate court, that the term "survivor or survivors" refers to the person *out of the two contingent beneficiaries* who survives. He claims: "The word 'survivor' can only be interpreted as meaning one named contingent beneficiary who survives the other and the Decedent." Thus, he argues, there is no survivor because Ruth Schneider and Charles Kehrer are deceased. As

there is no further devise in the will, he claims that Kern's property should pass by intestacy to him.

This type of dispute about the meaning of the term "survivors" when it follows a class of beneficiaries has arisen in several dozen reported cases nationwide. (See J.R. Kemper, *Wills: Gift Over to "Survivors" of Class or Group of Designated Beneficiaries as Restricted to Surviving Members of Class or Group, or as Passing to Heirs or Representatives of Deceased Beneficiary*, 54 A.L.R.3d 280 [collecting cases].) I believe we must address it here.

Our court has observed that "the phrase 'the survivor or survivors of them'" ordinarily means the last survivor(s) out of the class of listed people, but "is permissibly susceptible to [multiple] interpretations, depending on the manner and context in which it is used." (*Estate of Mohr* (1970) 7 Cal.App.3d 641, 646 (*Mohr*).) In *Mohr, supra*, 7 Cal.App.3d at pp. 646-649, the court relied on both the text of the will and extrinsic evidence to affirm the probate court's determination that the testator intended the term "survivors" to refer to *other* individuals who survived the named and predeceased beneficiaries.

I would reach the same conclusion here as did the court in *Mohr, supra*, 7 Cal.App.4th 641, based on the text of the will itself. In the relevant portion of her will, Kern left her estate to Ruth Schneider and Charles Kehrer "or to survivor or survivors." Ishigooka's view might be tenable if the will had referred to only the "survivor" of those two contingent beneficiaries, as such a devise could serve to make clear that, if *one* of the two predeceased Kern, the entire estate would pass to the other. But it is impossible for there to be two "survivors" out of a class of legatees limited to Ruth Schneider and Charles Kehrer. (See *Mohr, supra*, 7 Cal.App.3d at p. 646 ["when Mrs. Mohr used 'and,' it became meaningless and redundant unless she was referring to someone other than, or in addition to, the surviving beneficiaries."]). Absent extrinsic evidence to the contrary, the interpretation that is linguistically plausible is more convincing than the one that is not. This approach follows the Probate Code's presumption that "[t]he words of an instrument are to receive an interpretation that will give every expression some effect,

rather than one that will render any of the expressions inoperative." (Prob. Code, § 21120.)

Ishigooka concedes that the use of the plural was "an error in drafting in the Decedent's will which created a grammatical ambiguity. . . ." He has no extrinsic evidence, however, that establishes that the use of the plural was an error rather than a conscious choice. (See *In re Estate of Duke* (2015) 61 Cal.4th 871, 898 [a court may reform a will "if clear and convincing evidence establishes that the will contains a mistake in the testator's expression of intent at the time the will was drafted, and also establishes the testator's actual specific intent at the time the will was drafted."].) We do not, for instance, know whether the will was drafted by a probate lawyer rather than by Kern herself, which might support Ishigooka's claim that we should employ the technical meaning of "survivor." (Among the indications that it may not have been drafted by a lawyer are that Kern appoints her husband as her "executrix," a term typically used for a female.) It is always possible to speculate that a will contains a drafting error, but I do not think we can reach that conclusion absent evidence that there was such an error, or perhaps unless all interpretations are equally flawed.

Here, the probate court's construction is consistent with the ordinary meaning of the will. Even Ishigooka concedes that "[i]f 'survivors' is taken with its everyday usage, it typically refers to relatives of extremely close degree or lineal descendants," citing the use of "survived by" in obituaries. Ishigooka urges us to adopt the technical use of the term rather than the everyday usage, but I do not think we have cause to do so, where that term does not fit the use of the plural in the will and we lack any extrinsic evidence establishing that Kern intended the technical usage. The plural, in contrast, is entirely consistent with the probate court's construction, as there could be more than one relative who survives the contingent beneficiaries.

Ishigooka argues that the probate court effectively and improperly added the word "their" to the will, in front of the term "survivor or survivors." It is true that this possessive would render the will more certain. But, if she had intended the will as Ishigooka would like it, Kern could have made her meaning more clear by adding other

words; for example, using the phrase "survivor out of these two beneficiaries." We must construe the will as it was written, and, although it was not written with perfect clarity, it was written such that it is susceptible to the probate court's construction but not Ishigooka's, due to Kern's use of the plural "survivors."

I would end the analysis with this construction of the text of the will, as I do not think the extrinsic evidence, gathered in 2013, sheds any light on Kern's intentions in drafting the will 40 years earlier.

I am not joining the majority opinion because, in my view, it addresses a different question than the one that Ishigooka presses in this appeal. The majority addresses whether the "survivor or survivors" devise should be interpreted as referring to "their" survivors (those of Ruth Schneider and Charles Kehrer) or to "my" survivors (those of Kern). Ishigooka does not argue in favor of the latter interpretation. Had a party asked us to adopt that interpretation, I would join the majority in concluding that it should be rejected, based solely on the language in the will itself. The placement of the bequest to the "survivor or survivors" plainly ties it to the contingent beneficiaries, either as the probate court found (the surviving relatives of those beneficiaries) or as Ishigooka argues (the surviving member of the class of beneficiaries). It is not plausible to read the term as untethered to those beneficiaries, where it comes in a paragraph devoted to them, immediately after they are indentified as two individuals and immediately before they are named.

RAPHAEL, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.