REL: October 18, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180281

Regina C. Norwood and Rita Patelliro

v.

Elise Barclay, as personal representative of the Estate of Josephine Mary Damico, deceased

Appeal from Jefferson Probate Court
(17BHM01647)

STEWART, Justice.

Regina C. Norwood and Rita Patelliro appeal from an order of the Jefferson Probate Court. This appeal involves the interplay between § 43-8-224, Ala. Code 1975 ("the antilapse

statute"), § 43-8-222, Ala. Code 1975, which addresses testamentary intent, and § 43-8-44, Ala. Code 1975, which provides for the escheat of a testator's estate to the State of Alabama.

Facts and Procedural History

Josephine Mary Damico ("the testator") executed a will on June 16, 1993. In her will, the testator devised the entirety of her estate to her sister, Sarah Frances Cox ("the sister"). The testator expressly disinherited all of her other heirs. On June 15, 2017, the testator died. Elise Barclay filed in the probate court a petition for probate of the will and a petition for letters testamentary. On July 10, 2017, the probate court granted the petitions and issued letters testamentary to Barclay ("the personal representative").

On July 21, 2017, Norwood and Patelliro, the testator's nieces ("the nieces"), filed a "motion for letters of instruction" in which they asserted that the sister had predeceased the testator, that they were the sister's two surviving children, and that, as the sister's surviving children, they were entitled to receive the testator's estate

in place of the sister pursuant to the antilapse statute.[1] The nieces also asserted that the testator had had other siblings who had predeceased her and that those siblings all had surviving children ("the other nieces and nephews"). The personal representative filed a response in which she asserted that the testator's estate should pass through intestacy as governed by § 43-8-40 et seq., Ala. Code 1975.

On March 8, 2018, the probate court held a hearing. A transcript from that hearing is not contained in the record on appeal, but, based on the language of the probate court's orders, it appears that only argument was received at the hearing. On March 26, 2018, the nieces filed a brief in the probate court in which they argued, among other things, that the antilapse statute abrogated the common law and that the nieces were entitled to the entirety of the testator's estate under the antilapse statute. The personal representative filed

[1]Pursuant to Act No. 1144, Ala. Acts 1971 (Reg. Session), a local act, the Jefferson Probate Court has "'general jurisdiction concurrent with that of the Circuit Courts of this State, in equity, in the administration of the estates of deceased persons, minors and insane or non compos mentis persons, including testamentary trust estates.' (§ 1.)" Jett v. Carter, 758 So. 2d 526, 529 (Ala. 1999). Accordingly, the probate court had the authority to entertain an action seeking the construction of a will.

a response in which she asserted, among other things, that the disinheritance language in the testator's will precluded the operation of the antilapse statute.

On May 4, 2018, the probate court rendered a handwritten bench note in which it "granted" the nieces' motion seeking instruction regarding the terms of the will and set forth its reasoning.[2] On June 18, 2018, the probate court memorialized its bench note in an order, stating:

> "It is, therefore, ORDERED, ADJUDGED AND DECREED by the Court as follows:
>
> "After due consideration of all of the above, it appears to the Court that the testator's wishes are very clear in the body of the Last Will and Testament. Thus, the Anti-Lapse statute does not apply. The Probate Code (Code of Alabama) states, in Section 43-8-222, that the intention expressed in a testator's will controls the legal effects of dispositions. The rules of construction set out in the Code do not apply if 'a contrary intention is indicated by the will.' In this case, the testator clearly states that she disinherits all of her relatives except Sarah Frances Cox. This Court will not rewrite the Testator's will by applying the

[2]Rule 58(d), Ala. R. Civ. P., which is applicable only to probate courts, provides that, after the rendition of an order, "the judge or clerk of the probate court shall forthwith enter such order or judgment in the court record." Although the May 4 bench note is substantively similar to an order issued on June 18, there is no indication that it was entered or sent to the parties. Accordingly, based on the record, we conclude that the June 18 order was the final order from which the nieces were required to appeal.

> Anti-lapse statute when the testator clearly has disinherited her nieces, contrary to the effects of the Anti-lapse statute."

(Capitalization in original.)

On July 18, 2018, the nieces filed a motion seeking to alter, amend, or vacate the June 18, 2018, order. On September 1, 2018, the nieces and the personal representative filed a joint agreement to extend the 90-day period to rule on the motion to alter, amend, or vacate "until such time as the probate judge conducts a hearing and rules on the post-trial motion."[3] On September 5, 2018, the probate court entered an order setting the motion to alter, amend, or vacate for a hearing on November 8, 2018.

On November 28, 2018, the probate court entered an order denying the motion to alter, amend, or vacate, but modifying the last sentence of the June 18, 2018, order to read: "This Court will not rewrite the Testator's will by applying the Anti-lapse statute when the testator clearly has disinherited her nieces and nephews, contrary to the effects of the Anti-lapse statute." (Emphasis in original.) The nieces appealed.

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[3]See Rule 59.1, Ala. R. Civ. P. (permitting an extension of a court's 90-day period in which to rule on the motion to alter, amend, or vacate by "express consent of all the parties").

Discussion

The nieces argue that they are entitled to inherit the sister's share devised by the testator's will based on the application of the antilapse statute and that the antilapse statute operates to prevent the other nieces and nephews from receiving any portion of the testator's estate and also prevents the estate from escheating to the State of Alabama.

The personal representative, on the other hand, argues that the will unambiguously represents the testator's intent to disinherit all of her heirs except the sister and, therefore, pursuant to § 43-8-222, the antilapse statute cannot be applied because its application is contrary to the testator's intent. Accordingly, she argues, the testator's estate should pass by intestacy and the testator's estate, therefore, escheats to the State of Alabama pursuant to § 43-8-44, which provides that, "[i]f there is no taker under the provisions of this article, the intestate estate passes to the state of Alabama."

Section 43-8-222 provides that "[t]he intention of a testator as expressed in his will controls the legal effect of his dispositions. The rules of construction expressed in the

succeeding sections of this article apply unless a contrary intention is indicated by the will." This Court has explained:

> "'In Alabama the law is well settled that "the intention of the testator is always the polestar in the construction of wills, and that the cardinal rule is to give that intention effect if it is not prohibited by law."' Hansel v. Head, 706 So. 2d 1142, 1144 (Ala. 1997), quoting deGraaf v. Owen, 598 So. 2d 892, 895 (Ala. 1992). 'To determine the intent of a testator or testatrix, the court must look to the four corners of the instrument, and if the language is unambiguous and clearly expresses the testator's or testatrix's intent, then that language must govern.' Born v. Clark, 662 So. 2d 669, 671 (Ala. 1995)."

Cottingham v. McKee, 821 So. 2d 169, 171-72 (Ala. 2001).

The antilapse statute, which is a rule of construction, provides, in part:

> "If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator by five days take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree then those of more remote degree take by representation. ..."

§ 43-8-224.

In her will, the testator specifically directed as follows:

> "I direct that all items of my estate, whether real, personal or mixed, wheresoever situated and

> howsoever held, of which I shall die seized and possessed or to which I may be entitled to at the time of my death, I give, devise, and bequeath to my sister SARAH FRANCES COX.
>
> "I have intentionally omitted all my heirs who are not specifically mentioned herein, and I hereby generally and specifically disinherit each, and any and all persons whomsoever claiming to be or who may be lawfully determined to be my heirs at law, except as otherwise mentioned in this will."

(Capitalization in original.)

The sister predeceased the testator, and the testator had made no provision for that contingency. Ordinarily, the gift would lapse, and the application of the antilapse statute would result in the nieces taking the sister's share.

We must determine, however, whether a "contrary intention ... indicated by the will" prevents the default application of the antilapse statute. § 43-8-222. If the antilapse statute is inapplicable and the testator's estate cannot be disposed of by her will, the testator's estate would pass by intestacy. See § 43-8-40, Ala. Code 1975 ("Any part of the estate of a decedent not effectively disposed of by his will passes to his heirs as prescribed in the following sections of this chapter.").

This Court has not had the occasion to consider a situation similar to this one. We "presume that, when a

testator undertakes to make a will of all his property, he did not intend to die intestate as to any of it or during any period of time." Roberts v. Cleveland, 222 Ala. 256, 259, 132 So. 314, 316 (1931). Moreover, this Court "on a number of occasions has affirmed the doctrine that every doubt in a will must be resolved in favor of a testator's heirs at law." Rhodes v. First Alabama Bank, Montgomery, 699 So. 2d 204, 209 (Ala. Civ. App. 1997)(citing Festorazzi v. First Nat'l Bank of Mobile, 288 Ala. 645, 656, 264 So. 2d 496, 506 (1972), and Wilson v. Rand, 215 Ala. 159, 160, 110 So. 3, 4 (1926)). Further, "[i]t is a well-settled principle that the law does not favor escheat, because society prefers to keep real property within the family as most broadly defined, or within the hands of those whom the deceased has designated." 27A Am. Jur. 2d Escheat § 13 (2019). See also District of Columbia v. Estate of Parsons, 590 A.2d 133, 138 (D.C. 1991)("Moreover, escheats are not favored by the law, 'and any doubt whether property is subject to escheat is resolved against the state.' 27 Am. Jur. 2d Escheat § 10 (1966)."); In re Estate of Melton, 128 Nev. 34, 54, 272 P.3d 668, 681 (2012) ("The law disfavors escheats."); Stokan v. Estate of Cann, 100 Ark. App. 216, 220, 266 S.W.3d 210, 213 (2007)("Considered as a whole, our

intestacy statutes disfavor escheats. This sound policy echoes the common law. 30A C.J.S. Escheat § 1 (2007)."); and In re Estate of Shannon, 107 A.D.2d 1084, 486 N.Y.S.2d 502 (N.Y. App. Div. 1985)(explaining that a presumption arising from the mere existence of a will is that the testator intended to avoid escheat).

Alabama's antilapse statute is modeled after § 2-605, the antilapse provision in the original Uniform Probate Code. See Hellums v. Reinhardt, 567 So. 2d 274, 277 (Ala. 1990)("Alabama's current probate code was derived from the Uniform Probate Code ('UPC') drafted by the National Conference of Commissioners on Uniform State Laws."). The comments to § 2-603, which is the revised and renumbered antilapse provision in the Uniform Probate Code, state that "[a]n anti-lapse statute is a rule of construction, designed to carry out presumed intention. In effect, Section 2-603 declares that when a testator devises property 'to A (a specified relative),' the testator (if he or she had thought further about it) is presumed to have wanted to add: 'but if A is not alive (120 hours after my death), I devise the property in A's stead to A's descendants (who survive me by 120 hours).'"

Under the Restatement of Property, antilapse "statutes should be given the widest possible sphere of operation and should be defeated only when the trier of fact determines that the testator wanted to disinherit the line of descent headed by the deceased devisee. ..." Restatement (Third) of Property: Wills & Donative Transfers § 5.5 (1999). See Rhodes v. First Alabama Bank, Montgomery, 699 So. 2d at 209 ("Alabama law is in accord with the fundamental principle underlying the Restatement.").

Although the testator expressly disinherited all of her heirs with the exception of the sister, her will was executed while the sister was living. "In arriving at the proper meaning of the will the terms used should be interpreted in the light of the contingencies which the testatrix could foresee." Cooper v. Birmingham Tr. & Sav. Co., 248 Ala. 549, 555, 28 So. 2d 720, 726 (1947). The testator could foresee that, if she devised the entirety of her estate to her sister, the sister could thereafter devise it, upon her death, to her own issue, the nieces. Moreover, the testator could foresee that, if her sister predeceased her, as happened, the nieces would inherit the sister's share pursuant to the antilapse statute. If the testator wanted to prevent the nieces from

inheriting her estate, she could have included language in her will preventing the application of the antilapse statute. The testator gave no indication in her will that the antilapse statute should not apply. See, e.g., Annotation, Testator's Intention as Defeating Operation of Antilapse Statute, 63 A.L.R.2d 1172 § 7 (1959) ("The expression of an intention to exclude from participation persons not mentioned in the will continues to be held insufficient in itself to exclude such persons from taking by virtue of the application of the antilapse statute."). See also Erich Tucker Kimbrough, Lapsing of Testamentary Gifts, Antilapse Statutes, and the Expansion of Uniform Probate Code Antilapse Protection, 36 Wm. & Mary L. Rev. 269, 288 (Oct. 1994)("Accordingly, the disinheritance does not mean that the testator intends that the disinherited individual not take if the ancestor has died. Furthermore, applying an antilapse statute to allow a disinherited heir to take a lapsed devise makes sense when viewed in light of the rule that disinherited heirs cannot be prevented from taking by intestacy.").

Accordingly, based on the above applicable rules of construction and the persuasive authority interpreting those, we hold that the antilapse statute applies in this case and

that the nieces are entitled to take the sister's share of the testator's estate.

REVERSED AND REMANDED.

Parker, C.J., and Wise, Sellers, and Mitchell, JJ., concur.