IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Joelle R. Castillo, et al.	Court of Appeals No. L-14-1248
Appellants	Trial Court No. 2014 ADV 000470
v.	
Mark Ott, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: March 13, 2015

* * * * *

John R. Kuhl, for appellants.

Anne M. Frayne and Donald W. Harper II, for appellee Mark Ott.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} Appellants, Joelle Castillo, Amanda Ott, and Christopher Ott, bring this accelerated appeal from the judgment of the Lucas County Court of Common Pleas, Probate Division, dismissing their declaratory judgment action against appellees, Mark Ott, Curt Ott, and Gloria Chadwick. We affirm.

A. Facts and Procedural Background

{¶ 2} The facts relevant to our disposition of this appeal are not in dispute. On July 8, 2013, appellants' grandfather, Herman Ott, died testate. In his will, Herman stated his desire to leave the entirety of his estate to his wife, Wanda Mae Ott. However, Wanda predeceased Herman. Thus, the will provided for a distribution of Herman's estate "to [Herman's] children, share and share alike, absolutely and in fee simple." Herman's children included appellees and appellants' father, Roger Ott. Unfortunately, Roger also predeceased Herman. Consequently, the attorney for Herman's estate notified appellants that they would not receive a distribution under the will because Roger's share lapsed upon his death.

{¶ 3} On March 11, 2014, upon receiving notification that they would not receive Roger's share of Herman's estate, appellants filed their complaint, seeking an order from the probate court declaring that they were entitled to receive Roger's share of the inheritance pursuant to R.C. 2107.52. One month later, Mark Ott filed a motion to dismiss the complaint under Civ.R. 12(B)(6), arguing that R.C. 2107.52 was inapplicable to appellants because the devise was in the form of a residuary class gift.[1] Thereafter, on April 25, 2014, the remaining appellees filed their answer.

{¶ 4} Following briefing on Mark's motion to dismiss, the probate court set the matter for a hearing. One week before the hearing was scheduled to occur, appellants

[1] The court subsequently issued an order notifying the parties that, "[a]lthough the motion is encaptioned Motion to Dismiss, the Court interprets it to be an Motion for Summary Judgment and will proceed accordingly."

filed a motion for summary judgment, asserting that R.C. 2107.52 entitled them to receive Roger's portion of the estate bequeathed by Herman. Eventually, on September 25, 2014, the probate court heard oral argument on Mark's motion to dismiss and appellants' motion for summary judgment. Following oral argument, the court issued its decision granting Mark's motion to dismiss and denying appellants' motion for summary judgment.

B. Assignment of Error

{¶ 5} Appellants now appeal the decision of the probate court, assigning the following error for our review:

> The Probate Court erred in granting defendant Mark Ott's Motion to Dismiss plaintiffs' Complaint for Declaratory Judgment and denying plaintiffs' Motion for Summary Judgment.

II. Analysis

{¶ 6} In appellants' sole assignment of error, they contend that the trial court erred in granting Mark's motion to dismiss and denying their motion for summary judgment. As an initial matter, we reiterate the fact that the trial court, prior to ruling on the motions, issued an order converting Mark's motion to dismiss into a motion for summary judgment. Thus, we review the trial court's decision under the standard applied to summary judgment rulings.

{¶ 7} We review summary judgment rulings de novo, applying the same standard as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241

(1996); *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978); Civ.R. 56(C).

{¶ 8} Here, the parties concede that the relevant facts are undisputed. They disagree, however, on the application of R.C. 2107.52 to the facts of this case. R.C. 2107.52 provides, in relevant part:

> (2) Unless a contrary intent appears in the will, if a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent, or a stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, either of the following applies:
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> * * *
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> (b) If the devise is in the form of a class gift, other than a devise to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," *or a class described by language of similar import*, a substitute gift is created in the surviving descendants of any deceased

devisee. The property to which the devisees would have been entitled had all of them survived the testator passes to the surviving devisees and the surviving descendants of the deceased devisees. Each surviving devisee takes the share to which the surviving devisee would have been entitled had the deceased devisees survived the testator. Each deceased devisee's surviving descendants who are substituted for the deceased devisee take, per stirpes, the share to which the deceased devisee would have been entitled had the deceased devisee survived the testator. * * *

(C) For purposes of this section, each of the following applies:

(1) Attaching the word "surviving" or "living" to a devise, such as a gift "to my surviving (or living) children," is not, in the absence of other language in the will or other evidence to the contrary, a sufficient indication of an intent to negate the application of division (B) of this section.

(2) Attaching other words of survivorship to a devise, such as "to my child, if my child survives me," is, in the absence of other language in the will or other evidence to the contrary, a sufficient indication of an intent to negate the application of division (B) of this section.

* * *

(D) Except as provided in division (A), (B), or (C) of this section, each of the following applies:

* * *

(2) If the residue is devised to two or more persons, the share of a residuary devisee that fails for any reason passes to the other residuary devisee, or to other residuary devisees in proportion to the interest of each in the remaining part of the residue. (Emphasis added.)

{¶ 9} In the case at bar, Mark argues that, under R.C. 2107.52(D)(2), Roger's interest in Herman's estate lapsed. As a result, Mark contends that the trial court properly concluded that the entire estate passed to appellees and that appellants are not entitled to receive Roger's share.

{¶ 10} For their part, appellants assert that the anti-lapse protections of R.C. 2107.52(B)(2)(b) applies in this case. Because the devise is in the form of a class gift, and because it is a devise to Herman's "children" and not his "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," appellants argue that they are entitled to receive the share of Herman's estate to which Roger would have been entitled had he not predeceased Herman.

{¶ 11} The fact that Herman's devise does not use the words "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family" does not automatically subject it to that section's anti-lapse provisions. Notably, in addition to the classes of individuals expressly set forth in the statute, R.C. 2107.52(B)(2)(b) also excludes from anti-lapse protection other classes "described by language of similar import." Thus, the issue we must determine is whether the class of "children" is of similar import to those specifically set forth in the statute.

{¶ 12} Appellants posit that the class of "children" is dissimilar to the classes set forth in the statute. They argue that the legislature "wanted to distinguish 'children' from the other categories of relatives." While they acknowledge that all children would qualify as "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," and "family," they note that not all members of those classes qualify as children. Further, appellants note that "children" are referenced in R.C. 2107.52(C). Because the word "children" is used in R.C. 2107.52(C), appellants argue that the absence of "children" in the list of classes set forth in R.C. 2107.52(B) evinces the legislature's intent to prevent the lapse of class gifts to children. In contrast, Mark argues that children are a class of similar import to those listed in R.C. 2107.52(B). Thus, he contends that Herman's devise to Roger is not protected from lapse under R.C. 2107.52.

{¶ 13} At the outset, we note that the primary purpose of statutory construction is to give effect to the intention of the General Assembly. *Henry v. Cent. Natl. Bank*, 16 Ohio St.2d 16, 20, 242 N.E.2d 342 (1968), paragraph two of the syllabus. A court must first look to the language itself to determine the legislative intent. *Provident Bank v. Wood*, 36 Ohio St.2d 101, 105, 304 N.E.2d 378 (1973). "If that inquiry reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretative effort is at an end, and the statute must be applied accordingly." *Id.* at 105-106, citing *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944).

{¶ 14} Looking to the language of the statute, we begin our analysis with an examination of the definition of "issue," "descendant," and "family."[2] Black's Law Dictionary defines "issue" as "[l]ineal descendants; offspring." *Black's Law Dictionary* 908 (9th Ed.2009). Further, "descendant" is defined as "[o]ne who follows in the bloodline of an ancestor, either lineally or collaterally. *Examples are children* and grandchildren." (Emphasis added.) *Id*. at 510. Finally, "family" is defined as "[a] group consisting of parents and their children." *Id.* at 679. Given the plain and ordinary meaning of these words, we find that the class of "children" is of similar import to the classes of "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," and "family." Consequently, we hold that a devise to one's "children" is not entitled to the anti-lapse protections afforded under R.C. 2107.52(B)(2)(b).

{¶ 15} As to appellants' argument concerning R.C. 2107.52(C), we recognize the confusion wrought by the legislature's use of the word "children" in explaining the language that is necessary to negate the anti-lapse protections in R.C. 2107.52(B)(2)(b). However, because we need not look beyond the plain language used in R.C. 2107.52(B)(2)(b) in order to ascertain its meaning, we find Mark's argument to be more persuasive.

{¶ 16} In light of the foregoing, we find that the trial court did not err in granting Mark's motion to dismiss and denying appellants' motion for summary judgment. Accordingly, appellants' sole assignment of error is not well-taken.

[2] These terms are not defined in R.C. Chapter 2107.

III. Conclusion

{¶ 17} The judgment of the Lucas County Court of Common Pleas, Probate Division, is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE