

IN RE: ESTATE OF DORIS I. BILLOW, DECEASED,
CUMBERLAND VALLEY ON ICE, INC. VS. GREGORY
L. KIERSZ, EXECUTOR, C.P. Franklin County Branch, O.C.
Div., No. 23-1993

Orphans Court-Declaratory Judgment-Will Interpretation

1. If the will itself contains language which plainly and clearly disclosed the testator's intention, the will interprets itself.
2. The polestar in the interpretation of any will is the intent of the testator, which must be gathered from the entire will.
3. The Court must determine the testator's intent only from the will unless that intent cannot be ascertained from the will.
4. Unless there is an ambiguity in the will, the intent of the testator will be determined from the four corners of the will, and the court may not stray from the four corners of the will absent an ambiguity.
5. The Orphans' Court Division of the Court of Common Pleas has exclusive jurisdiction to construe and to interpret wills, 20 Pa.C.S.A. 711(1)
6. The Court may not presume to correct or re-draft a will in which a testator's wishes have been expressed.

Richard J. Walsh, Esquire, Attorney for Plaintiff
Gregory L. Kiersz, Esquire, Attorney for Defendant, Estate of
Doris I. Billow

OPINION AND ORDER

KAYE, J., December 17, 1993:

OPINION

The instant proceeding was brought by Cumberland Valley On Ice, Inc. ("CVOI"), a corporation not-for-profit, against Gregory L. Kiersz, Executor of the estate of Doris I. Billow, deceased, ("the decedent"). In this action CVOI seeks a declaration that construction of a proposed ice skating rink by CVOI at a location adjacent to Exit 3 of I-81 in Antrim Township, Franklin County is a permissible use of certain funds bequeathed in the will of the decedent.

**I. FACTS, PROCEDURAL HISTORY, AND
DISCUSSION:**

Doris I. Billow died on April 25, 1993, at the age of 73 years. Her will was duly probated in the Office of the Register of Wills and Recorder of Deeds of Franklin County, and Gregory L. Kiersz qualified as Executor of the estate.

One provision of the decedent's will provided as follows:

VII. By way of explanation, it has always been my desire to build or have built an ice skating rink, in or around the Waynesboro area that will enable amateur ice skaters to train for Olympic Ice Skating Competition(s). To effect this dream, I direct that my Executor shall attempt to locate and/or secure a foundation and/or not-for-profit organization, or municipality, who, within six months of my death, will commit in writing to the construction of an ice skating rink, to be used by the public at large (the public to be charged a reasonable fee), for ice skating as recreation in the Waynesboro area, extended. My executor shall have the power to appoint my residuary estate for this limited purpose. As a further condition of the use of my residuary estate for the construction of said ice skating rink, *any*, person or persons who have competed in any amateur ice skating competition, shall have the right, without paying any fees, to train on and in the skating facility, for a minimum of two hours per day, as designated by the then owner and operator of the ice skating rink, between the hours of 5:00 a.m. and 10:00 p.m. As a further condition of the bequest, that entity or agency, who shall consent to construct and operate said ice skating rink, at the inception of acceptance, commit to keep the ice skating rink open and available for the training of Olympic athletes the entire year.

Approximately \$600,000 is available from decedent's estate to fulfill this purpose.

Thereafter, in the administration of the estate, the Executor attempted to locate an entity that was willing to commit itself to the requirements of the foregoing provision. The local municipalities in the Waynesboro area did not respond favorably, nor did any other entity indicate a desire to undertake the

responsibility of the committing itself to the heavy burdens imposed by the cited provisions of decedent's will.

CVOI was formed to fill this void, and it executed the requisite commitment to undertake the obligations set forth in the will within the six (6) month period following the decedent's death. Following a prior declaratory judgment action, this Court by decree dated March 4, found, *inter al.*, that CVOI had qualified to receive the bequest provided for in the will of Doris I. Billow as set forth above.

CVOI then set forth to conduct a detailed study of the construction of an ice skating rink which met the specifications in decedent's will. As a part of this effort, the organization contacted two nationally noted experts in this field: Independent Consulting Engineers, of Minneapolis, Minnesota, and Jack Vivien, Ph.D., Director of the University of Michigan Sports Facilities Research Laboratories. These consultants provided advice and guidance regarding the technical requirements of an ice skating facility which would meet the needs of athletes preparing for Olympic competition.

CVOI also consulted Ketchum, Inc., a professional fund-raising concern, relative to the ability of the area to support a subscription effort to make up the deficit between the gift from decedent's estate and the total cost of the project. In this regard, CVOI also undertook a telephone survey of the area to determine interest in an ice skating rink.

As a result of the foregoing, CVOI came to certain determinations: the proposed ice skating facility would cost approximately \$3,700,000 due to the size requirements implicit in the will, i.e. since priority is given in the will to the creation of an ice skating rink "that will enable amateur ice skaters to train for Olympic Ice Skating Competition(s)", it was determined that an ice sheet of Olympic competition proportions (100 feet by 200 feet) would be required, as well as suitable workout space for preparation of skating routines, locker facilities, and other facilities necessary to accommodate sufficient numbers of people that the facility could be financially viable.

Among the complex of matters that had to be taken into account was the locating of a site which provided sufficient physical space to accommodate the ice arena and parking facilities. It was calculated that a minimum of eight (8) acres was required for the site, but it was also noted that it would be desirable to find a location that had adjacent vacant land for possible future expansion in the event the facility proves inadequate to meet the needs of the community.

As the process of planning continued, a complex array of considerations came before CVOI, including, but not limited to: the difficulty in locating sufficient land to permit the construction of an arena of this size, particularly land that would be donated so as to minimize the total project cost, while being sufficiently valuable to use as collateral for anticipated financing to make up the deficiency in the gift from decedent and other projected philanthropy; locating a site that would maximize the number of financial gifts to reduce the debt to and of the project; minimizing cost by finding a location that had minimal topographic variations so as to cut excavation costs; finding a location that is geologically stable to prevent settling of the massive floor of the ice sheet: since the ice is only one inch in thickness, even a minimal settling of the ice sheet from one end to the other would have serious, and perhaps catastrophic, consequences; avoiding possible litigation over site selection arising from zoning conflicts and local opposition; finding a location with ready access for large numbers of vehicles and with utilities readily available; and attempting to avoid unanticipated costs that would arise if construction occurred on a location that had been contaminated with hazardous wastes.

A committee was established by CVOI to attempt to locate sites meeting the criteria established. Only a few sites were available which met the criteria and, of these, only one, a site offered by Landis Tool Company, was situate within the Borough of Waynesboro. However, that location was found to be undesirable for numerous reasons, including: its topography would require very extensive and costly excavation to produce a level surface; extension of a sewer line to service the property would be expensive; access would be via narrow streets in a residential area, and the prospect of thousands of vehicles traveling through

a residential area onto Main Street (a two lane east-west thoroughfare with existing congested conditions) is of major concern; CVOI received information that the site may be contaminated by hazardous wastes, and noted that the location had been rejected for industrial development due to this concern; and new road construction for access would be necessary.

Another site, "the Hanlin site" in the Zullinger area of Washinton Township, was considered, but rejected for a variety of reasons. The property owner initially was willing to donate the land, but would do so only if the owner retained control over the location of the arena, which control CVOI felt it had to maintain as the building has to be situated to avoid direct sunshine into the arena ice sheet which would cause it to melt. The owner was willing to sell the property without that condition attached at a price of \$180,000. The cost, along with projected excavation costs, construction of an access road, and zoning changes required, resulted in its rejection as a possible location for the rink.

A third location, "the Koons site", near the Village of Shady Grove (presumably in Antrim Township), was rejected due to a need for zoning changes; difficulties in acquiring access to a sewage line, and the need to establish a pumping station; difficult topography; presence of a wetland in a portion of the property; neighborhood opposition; and no opportunity for future expansion due to the limited site size.

The site selected, the "Exit 3 Site", was determined to be the best choice for the following reasons, among others: it is adjacent to Interstate route 81, thus providing ready access for large numbers of vehicles; access roads are constructed; it would be a gift, and by far the most valuable (\$300,000) of the sites considered, thus maximizing its utility as collateral for funding sources; utilities are readily available; the location would encourage a geographically diverse group of philanthropists to contribute to the project; no residential neighbors exist, thus limiting local opposition; and there are no zoning or environmental constraints on use of this location as an ice arena.

CVOI has taken the position that the Exit 3 site is the *only* economically feasible site for the proposed ice skating facility

which would be known as the "Doris Billow Ice Arena". We have no reason to question this conclusion as no one has come forth with contrary data, and we think CVOI has performed a herculean task of assembling all the various information which it presented to the Court. However, we note that CVOI appears to concede that even at this most desirable location, without public funding, and with the conditions attached in the decedent's will, establishing and maintaining the proposed facility will be a difficult task indeed. While not necessary for the decision in the matter *sub judice*, we further have some concern about the conclusions reached regarding the financial feasibility of the project as they were reached, at least in part, upon projections from four allegedly similar ice arenas [See "Comparative Matrix of Four Similar Community Arenas" (Exhibit 7, at 3)]. We think that those arenas are dissimilar since: 1/ All are backed by the taxing authority of local governments, though they appear to be self-sustaining; 2/ most are in much larger population centers than the Exit 3 site; and 3/ none have any "strings" attached unlike those imposed by decedent's will, and thus usage presumably is dictated only by business considerations. Finally, the CVOI project appears to depend almost entirely upon the continued availability and participation of a handful of volunteers and their commitments. Although this question was not asked in these proceedings, one has to be concerned about the economic viability of the project if one or two key volunteers found it necessary or desirable to withdraw, or if they were unavailable for any reason.

Decedent's will contains numerous conditions and restrictions that significantly impact on the viability of the project. The provision regarding the rink's availability for Olympic aspirants, for instance, dictates the construction of a much larger and more elaborate facility than might be necessary for a community ice skating rink. The fact it is required to be made available for free usage for Olympic aspirants for a *minimum* of two hours per day significantly reduces the time it can be available for paying customers. (This language, and the priority accorded to Olympic aspirants over other facility users could be economically devastating, especially if a significant number of individuals qualified for free use). Similarly, the will requires that the rink be kept open for free use all year by Olympic aspirants thereby reducing the ability of the operator of the rink to reduce costs by

closing during slow periods, and to increase revenue by scheduling "dry floor" events, such as exhibitions or conventions, which would prevent usage of the ice by skaters for as much as a single day.

If the decision to be made herein were purely a business decision, without the "strings" attached in decedent's will imposing significant limitations on the establishment of the facility as to its location and other factors, we think the Exit 3 site would be the site of choice based on the data presented. However, we do not have that luxury, and must decide this thorny issue within the constraints imposed by decedent's will.

II. DISCUSSION OF THE LAW:

The current proceeding is an action for a declaratory judgment in which the plaintiff, CVOI, seeks Court approval of the Exit 3 site, or "the John Koons site" as acceptable sites for construction of an ice arena under the decedent's will, viz. that either or both sites meet the requirement that the arena be built "in or around the Waynesboro area". However, the evidence presented by CVOI seemed clearly to indicate that approval of the Exit 3 site is the only relief sought, and thus we consider the other request abandoned.

In support of the above proposition, testimony was presented to indicate how the conclusion was reached that the "Exit 3" site met the criteria. It was noted that the site is 7.5 miles from the center of Waynesboro, and that many areas lying within the Waynesboro Area School District would be at least as distant from Waynesboro as the proposed site. Testimony also pointed out that fund-raising activity for the Waynesboro Area United Way is conducted at Grove Manufacturing Company which is only a short distance from the Exit 3 site. Attorney Gregory L. Kiersz, executor of the decedent's estate and scrivener of the will containing the language which has created this controversy, testified that in discussions he had with decedent which led to numerous re-drafts of her will, the decedent came to recognize that an arena in Waynesboro might not be possible, and thus the language in the will regarding the site of the arena became less restrictive over time. He testified that her paramount desire was to see the rink become a reality.

In resolving an issue arising in this manner, the Courts are instructed to determine the testator's intent from the will itself and from other circumstances known to him or her, and to determine that intent from the most natural and reasonable meaning of the words used. *Re Estate of Jessup*, 441 Pa. 365, 276 A.2d 499, (1970).

If the will itself contains language which plainly and clearly disclosed the testator's intention, the will interprets itself. *Estate of Horrath*, 446 Pa. 484, 288 A.2d 725 (1972). The polestar in the interpretation of any will is the intent of the testator, which must be gathered from the entire will. *Estate of McKenna*, 340 Pa.Super. 105, 489 A.2d 862 (1985).

The Court must determine the testator's intent only from the will unless that intent cannot be ascertained from the will. *Estate of Weaver*, 392 Pa.Super. 312, 572 A.2d 1249, appeal den. *sub nom. Petition of Macklin*, 525 Pa. 657, 582 A.2d 324, appeal den. 525 Pa. 659, 582 A.2d 325 (1990).

Unless there is an ambiguity in the will, the intent of the testator will be determined from the four corners of the will, *In re Estate of Pyle*, 391 Pa.Super. 244, 570 A.2d 1074 (1990), appeal den. *sub nom. Petition of Bannon*, 527 Pa. 584, 588 A.2d 507, appeal den. 527 Pa. 588, 588 A.2d 510 (1991), and the Court may not stray four corners of the will absent an ambiguity. *In re Estate of Tashigian*, 375 Pa.Super. 221, 544 A.2d 67 (1988).

The Orphans' Court Division of the Court of Common Pleas has exclusive jurisdiction to construe and to interpret wills, 20 Pa.C.S.A. §711(1). The Court may not presume to correct or re-draft a will in which a testator's wishes have been expressed. *Re Estate of Kelly*, 473 Pa. 48, 373 A.2d 744 (1977).

With the foregoing principles in mind, we turn to the issue at hand, i.e. whether the language in decedent's will permits utilization of decedent's financial bequest for the construction of an ice skating arena at the Exit 3 site. CVOI appears to take two complementary positions on this: either the express language of the will is broad enough to permit this reading of the will, or the language is ambiguous, thus allowing the introduction of extrinsic

evidence to assist the Court in understanding the language employed.

The will expressly provides, *inter al.*, the desire of decedent "to build or have built an ice skating rink, in or around the Waynesboro area. . . ." and directed the Executor to "attempt to locate and/or secure a foundation, and/or not-for-profit organization, or municipality who [sic], within six months of my death, will commit in writing to the construction of an ice skating rink... in the Waynesboro area, extended." [Will, ¶ VII, (emphasis added)].

We think that the language utilized is somewhat ambiguous as we know of no single definitive physical boundary for the geographic area set forth in the will. However, we note that decedent twice indicated in her will her intent that the ice skating rink, if built, should be in the Waynesboro area. The question then, is what area constitutes "the Waynesboro area" or "the Waynesboro area extended". We think that virtually all reasonable persons would agree that the area located within the Borough of Waynesboro meets this criterion, and that most would agree that it would extend to areas served by the Waynesboro Post Office, and having the Waynesboro zip code. A slightly smaller group would probably include most, if not all, of the area within the Waynesboro Area School District, although certainly outlying areas therein have sufficient local identity that some would disagree.

It is difficult to define precisely what "the Waynesboro area" or "the Waynesboro area extended" consists of. Certainly, an element of this is physical proximity to the Borough of Waynesboro, but other historical and social factors incapable of exact description also are factors.

While it may be difficult to be precise in defining exactly where "the Waynesboro area" ends and another area having a separate identity begins, especially since there often is an overlap, we find that the Exit 3 site is not in "the Waynesboro area" or "the Waynesboro area extended", at least as most reasonable persons in Franklin County would define that geographic/social/economic trading area. The Exit 3 site clearly is in the Greencastle area, is

situate in Antrim Township, is served by the Greencastle Post Office, and is within the Greencastle-Antrim School District.

The decedent was an educated person, and had an attorney - the executor of her estate - draft the will which contains the language in question. Her will recites that she was a resident of Waynesboro, Franklin County, Pennsylvania. It would be extremely difficult for us to think that when she wrote "the Waynesboro area extended" in her will as the situs for the proposed ice skating rink, that she included an area extending to a distinct, though not geographically distant, location such as that area of Antrim Township lying east of the Borough of Greencastle, which is the Exit 3 site. Had she so intended, she easily could have instructed her attorney, Mr. Kiersz, to use other language to delineate the site for the proposed rink.

We recognize, as argued by CVOI, that the Exit 3 site is no more distant from the Borough of Waynesboro than some areas within the Waynesboro School District and that fund-raising activities for the Waynesboro Area United Way are conducted in close proximity to this site. Nonetheless, this does not alter the fact that the Greencastle area is generally recognized to be distinct from, and is not in, "the Waynesboro area".

Although we have arrived at this conclusion without resort to consideration of extrinsic evidence, we received such evidence in connection with this proceeding. Attorney Kiersz testified of his numerous meetings with decedent at her residence, wherein the ice skating rink concept was discussed, and numerous revisions of the will were gone over with decedent. Mr. Kiersz testified that as decedent's ideas about the rink "evolved", she gradually altered her original belief that it should be built in the Borough of Waynesboro, and came to use the language cited above, which he further testified was intended to be broad enough to permit construction in an area to include the Exit 3 site. Mr. Kiersz wrote the decedent's will pursuant to her instructions. If indeed she had intended to permit construction in a wider geographic area than the area commonly thought of as "Waynesboro" that change was not placed in the will in spite of the fact that decedent had the opportunity to do so in her numerous meetings with Mr. Kiersz, and the revisions of her will that resulted. Only decedent

could direct this change, and only Mr. Kiersz had the power to draft such a change if that language was not what was intended, but the language nonetheless was retained in the will. We think this language, though not crystalline clear in defining the geographic area intended, nonetheless is sufficiently clear to permit the Court to determine that the Exit 3 site is beyond the geographic area cited in the will.

As previously noted the Court must not presume to correct or re-draft the will of a decedent in which the decedent has expressed her intentions. *Re Estate of Kelly, supra*. Were we to deviate from the decedent's express wishes, we would be doing precisely what is prohibited in the cited case.

We have also read the provision in controversy in the context of the whole will. We note that testator clearly understood that the conditions she imposed for the use of her money might result in the non-acceptance of the bequest with the conditions attached, as she went on in ¶ VIII of her will to state:

"A. *In the event an agency, foundation, trust, entity or not-for-profit organization, shall not elect to accept the residue of my estate, for the purpose of constructing a year round ice skating rink, subject to the above conditions, I then direct that the residue of my estate shall be made available to The Quincy United Methodist Home....*"

Furthermore, she went on to establish a trust which would ultimately benefit the Hershey Medical Center to permit research in the fields of oncology and dermatology in the event the contingent bequest to The Quincy United Methodist Home were not accepted with the terms imposed in her will.

We gather from this that Miss Billow had some understanding that even her very generous gift might not be accepted due to the conditions that she imposed. We think this lends support to our belief that she wanted the conditions she imposed to be strictly construed, and that if those conditions were unacceptable, the gift would be withdrawn. Her first preference obviously was the utilization of her bequest for the creation of the ice skating facility with the attendant conditions, but she clearly was prepared to

accept that that would not occur for any of various reasons, in which event contingent beneficiaries were named.

While the foregoing disposes of the issues in the declaratory judgment action, we hasten to add that this does not necessarily mean the proposal cannot survive. " CVOI's position was dictated by the belief that the Exit 3 site was the only one that could survive economically. Clearly, if a site in the Borough of Waynesboro, or in the immediate area, can be made economically feasible, the project can proceed. A number of individuals who have an interest in seeing the project proceed if located in such areas have expressed the belief that it can and will be successful if built there. CVOI obviously disagrees, and has provided testimony that sufficient funding can not be secured if this constraint is imposed. We suspect these concerns could be alleviated if a local municipality, such as the Borough of Waynesboro, or Washington Township, acting through the Borough Council or Township Supervisors, were to agree to support the project by making up any deficiency that could not be raised through fund-raising efforts and, upon the opening of the facility, through fees charged. If local authorities, acting as individual bodies, or cooperatively, were to provide such guarantees, we have little doubt the project could proceed in the area designated by Ms. Billow. Opportunities could also be given to permit private donors to come forward with gifts to support construction of an ice skating rink in Waynesboro or in the surrounding area. Obviously, this is an enormous undertaking, as decedent's will provides only one-sixth the cost of construction, and nothing toward payment of expenses and debt service, which in all likelihood will exceed \$500,000 annually.

We suggest the foregoing is not inconsistent with the failure of the municipalities to come forward to accept the initial responsibility contained in the bequest. The prior failure to undertake this project may have been based on the expectation that the work required to commence such an undertaking, with little or no background or expertise, would be a daunting one indeed. CVOI has undertaken this task, and has obtained the expertise of nationally-known experts to develop the plan to its current level. At this point, the extent of the project is known, and cost projections have been prepared. It would be entirely proper

for the local residents who wish to retain this project for Waynesboro to contact their local elected officials and make their wishes known if they desire to have local tax dollars made available to permit the project to proceed in Waynesboro or the surrounding area.

III. CONCLUSION:

The will of Doris I. Billow required that any entity which accepted her bequest as contained in paragraph VII of the will would undertake construction of the proposed ice skating rink in or around the Waynesboro area. The gift is conditional upon the premise that construction would occur only in that area. The Exit 3 location is in the Greencastle area, and that site is not within the area contemplated by Doris I. Billow in her will. The relief sought must be denied.

ORDER OF COURT

NOW, December 17, 1993, the prayer for relief in the declaratory judgment action pending before the Court is DENIED for the reasons set forth in the attached opinion.

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