IN RE: ESTHER G. KITE, individually and as Executrix of the Estate of Allan E. Hockersmith, deceased, late of the borough of Waynesboro, Franklin County, Pennsylvania, PLAINTIFF vs. CAPITOLA JOHNSTON, individually and as Co-Executrix of the Estate of Allan E. Hockersmith; AMERICAN CANCER SOCIETY; AMERICAN HEART ASSOCIATION; WAYNESBORO AMBULANCE SQUAD; WAYNESBORO HOSPITAL; MEDIC II; ALWAYS THERE HOOK & LADDER COMPANY; MECHANICS S.F.E. & HOSE COMPANY; BOROUGH OF WAYNESBORO; CHRIST UNITED METHODIST CHURCH; GUY C. JOHNSTON; JAMES and BETTY PRYOR; ALEXANDER HAMILTON MEMORIAL FREE LIBRARY; UNITED WAY OF FRANKLIN COUNTY; SALVATION ARMY CORPS; AMERICAN RED CROSS; HEARTHSTONE RETIREMENT HOME; ISABELLE L. MCCLEARY; ROBERT FRANKLIN JOHNSTON; JUDITH S. LOUIS; CLIFFORD L. MOWEN; JOAN V. OBERHOLZER; DARLENE GASTON; BONNIE L. WILT; LEWIS R. MOWEN; FRANK E. JOHNSTON; DONALD RICHARD JOHNSTON; FRED LEE JOHNSTON; BARBARA J. MONDELLO; JACK J. MOWEN; PATRICIA WOLFE; HARRY G. MOWEN; BRENDA K. MOWEN; SHIRLEY FUNK; ROY JOHNSTON; GEORGE M. JOHNSTON; CONSTANCE L. WEBB; JAMES S. WEBB; LOIS V. STINE; LEROY FRANKLIN MOWEN; NANCY SHOVER; DEAN L. MOWEN; ROLLO MOWEN; TERRY OVERCASH; JOHN DENNIS ZEIGLER; GALEN MOWEN; MARSHA SNIDER; E. EVERETT MOWEN; SHELBY JEAN ZEIGLER; ELDON S. MOWEN; E. DWAIN MOWEN; SHAWN L. MOWEN; GERALD H.C. MOWEN; CONNIE KUNKLE; AUBREY MOWEN; OLEN MOWEN; BETTY BRECHBEIL; CLIFFORD E. MOWEN; ATTORNEY GENERAL OF PENNSYLVANIA, DEFENDANTS, Franklin County Branch, Orphan's Court Division - No. 22-1996

In re Esther Kite v. Capitola Johnston, et al.

Holographic Wills - Residuary Clauses - Trusts - Dry or Passive Trusts

1. The testator's intent must be resolved from the will itself, although circumstances surrounding the creation of the will may be looked at to determine the most natural and reasonable meaning of the words used in the will.

2. Initially, courts must examine the "four corners" of the document when interpreting a will.

3. Where the language clearly discloses the testator's intention, the will interprets itself.

4. The writing of a will creates a presumption that its author did not wish to die intestate.

5. If at all possible, courts must construe a will to avoid intestacy.

6. In order for a valid trust to be created, the language must evidence a definite declaration of an intent to create a trust, there must be duties imposed upon a trustee, and the beneficiary or beneficiaries must be readily ascertainable.

7. A dry or passive trust is one in which a trustee (or trustees) holds title to the trust property but has no duties to perform with respect to that trust.

8. Dry or passive trusts may be terminated.

9. If no ultimate purpose for the trust is expressed in the will or can be inferred from the document, or if the only purpose is to make annual distributions to the beneficiaries until the trust is depleted, the trust may be terminated and the proceeds distributed to the beneficiaries.

Gregory L. Kiersz, Esquire, Attorney for Plaintiff Attorney General of Pennsylvania
David W. Rahauser, Esquire, Attorney for defendants, Guy L. Johnston, Frank E. Johnston, Roy Johnston, Isabelle Johnston McCleary, Rollo Mowen, Eldon Mowen, Aubrey Mowen, Galen Mowen, Gerald Mowen, Betty Mowen Brechbeil, and E. Everett Mowen
John R. Keller, Esquire, Attorney for defendant, Christ United Methodist Church
Timothy W. Misner, Esquire, Attorney for defendants Waynesboro Ambulance Squad and Mechanics S.F.E. & Hose Company
D. L. Reichard, II, Esquire, Attorney for defendant Borough of Waynesboro
Todd A. Dorsett, Esquire, Attorney for Executrices American Cancer Society, defendant, American Heart Association, defendant, Waynesboro Hospital, defendant Medic II, defendant, Always There Hook & Ladder Company, defendant, James Pryor, defendant, Betty Pryor, defendant, Alexander Hamilton Memorial Free Library, defendant, United Way of Franklin County, defendant, Salvation Army Corps, defendant, American Red Cross, defendant, Hearthstone Retirement Home, defendant, Robert Franklin Johnston, defendant, Judith S. Louis, defendant, Clifford L. Mowen, defendant, Joan V. Oberholzer, defendant, Darlene Gaston, defendant, Bonnie L. Wilt, defendant, Lewis R.

Mowen, defendant, Donald Richard Johnston, defendant, Fred Lee Johnston, defendant, Barbara J. Mondello, defendant, Jack J. Mowen, defendant, Patricia Wolff, defendant, Harry G. Mowen, defendant, Patricia K. Mowen, defendant, Shirley Funk, defendant, George M. Johnston, defendant, Constance L. Webb, defendant, James S. Webb, defendant, Lois V. Stine, defendant, Leroy Franklin Mowen, defendant, Nancy Shover, defendant, Dean L. Mowen, defendant, Terry Overcash, defendant, John Dennis Zeigler, defendant, Marsha Snider, defendant, Shelby Jean Zeigler, defendant, E. Dwaine Mowen, defendant, Shawn L. Mowen, defendant, Gerald H.C. Mowen, defendant, Connie Kunkle, defendant, Olen Mowen, defendant, Clifford E. Mowen, defendant

Kaye, J., April 1, 1997:

ADJUDICATION

This cause of action for Declaratory Judgment, brought pursuant to 42 Pa.C.S.A. §7535, arises out of the holographic will of Allen E. Hockersmith, which seeks to have the Court to construe the will to ascertain the testator's intent with regard to the intended devise or bequest of the decedent's estate. The will itself reads as follows:

> This is my will of NOV 13TH 1993; I authorize the Executor to sell all of my assets; except the Automobile which is to go to Esther Kite of 126 N. Franklin St. Waynesboro, PA; This includes Stocks & Bonds and Bank Accounts Citizens National Bank of Waynesboro PA, F.N. Bank of WBO, Chevy Chase of Hagerstown &
> ---
>
> I APPOINT CAPITOLA JOHNSTON of 51 BROADWAY of HAGERSTOWN MD AS MY EXECUTRIX AND ESTHER Kite of 126 N. FRANKLIN St. WBO AS CO EXECUTRIX
>
> LISTED BELOW ARE THE PERCENTAGES EACH PARTY AND ORGANIZATION ARE TO RECEIVE
> TOTAL
>
> CAPITOLA JOHNSTON-HAGERSTOWN 51 BROADWAY 5%

ESTHER KITE 126 N. FRANKLIN ST, WBO-- 5%
CANCER & HEART FUND 1/2% -EAST TOTAL 1%
WBO AMBULANCE & MEDICAL DEPT 1% EACH 2%
WBO FIRE DEPTS 1% EACH 2%
CHRIST UNITED METHOD CHURCH 1%
GUY JOHNSTON 1%
MR & MRS JAMES PRYOR 127 N. FRANKLIN ST. 1%
WBO LIBRARY 1%
WBO UNITED WAY 1%
SALVATION ARMY 1%
AMERICAN RED CROSS 1%
HEARTHSTONE HOME 1%

THE REST TO BE PUT IN TRUST & PAID OUT EACH YEAR UNTIL DEPLETED

/s/ Allan E. Hockersmith

DATE
ANY PERSON DIES OR ORGANIZATION CEASE TO EXIST,

CHECK LANDIS TOOL CO AND VFW ANY OTHER FUND IN MY FILING CABINET FOR NATURAL DEATH AND ACCIDENTAL DEATH BENEFITS

The plaintiff in this action is Esther Kite ("plaintiff") as Co-Executor of the estate as well as a beneficiary named in the will. The defendants are those beneficiaries named in the will as well as Allan E. Hockersmith's interstate heirs, all of whom are cousins of the deceased. The parties have agreed on the identities of the entities named in the will. Therefore, the only dispute concerns the amount, if any, each beneficiary is entitled to receive according to the holographic will. The complaint requests resolution of four issues: 1/ Whether the opening paragraph of the will intended for Esther Kite to receive the automobile as well as the stocks, bonds and bank accounts; 2/ Whether the will contains a residuary clause or residuary intent so that intestacy may be avoided by vesting the residue of the estate in the named beneficiaries; 3/ Whether the persons or entities named in the will are the Decedent's residuary beneficiaries; and 4/ Whether the last

sentence of the will actually creates a trust. We will address these issues *seriatim*.

I. Devise to Esther G. Kite

At the time of Allan Hockersmith's death, he resided in Waynesboro with the plaintiff. The two had known each other since 1933 when they were about twenty years old. The two dated until Mr. Hockersmith was drafted into the military in 1942. While he was overseas, the plaintiff got married to another man in 1943, and settled in Virginia. The two had no contact for over forty years. In 1983, the year after the death of plaintiff's husband, Mr. Hockersmith, who had never been married and had no children, telephoned plaintiff after he learned from mutual friends that she was a widow. He visited plaintiff in Virginia and eventually moved in with her. In 1984, she moved into an apartment across the hall from his on Main Street in Waynesboro. In 1987, they bought a house on Tritle Avenue in Waynesboro and moved in together. When they sold that house in 1988, plaintiff and Mr. Hockersmith moved into a rented house on North Franklin Street in Waynesboro, where they were living at the time of Mr. Hockersmith's death, and where plaintiff continues to reside. The home that they shared on Franklin Street was a half of a double home with two bedrooms. All financial responsibilities for the home were shared equally. Mr. Hockersmith and plaintiff were never married to each other although they lived together for over ten years prior to the former's death.

The dispute with respect to the bequest to Esther Kite concerns language in the first paragraph of the will which reads as follows: "I authorize the executor to sell all of my assets; except the Automobile which is to go to Esther Kite of 126 N. Franklin St. Waynesboro, PA; This includes Stocks & Bonds and Bank Accounts....". Plaintiff argues that this language should be interpreted to reflect the testator's intent of bequeathing his automobile as well as his stocks, bonds and bank accounts to plaintiff. Defendants assert that the language clearly bequeaths only the automobile to plaintiff.

In making determinations of this type, we must attempt to resolve the testator's intent from the will itself as well as consider

circumstances surrounding the will that will aid in arriving at the most natural and reasonable meaning of the words used. *In re Estate of Jessup,* 441 Pa. 365, 276 A.2d 499 (1970). The Court must initially attempt to interpret the will from its "four corners", taking into account the written words of the testator as a whole." *Estate of Taylor,* 480 pa. 488, 391 A.2d 991 (1978). However, where the will itself contains language which plainly and clearly discloses the testator's intention, the will interprets itself. *Estate of Horvath,* 446 Pa. 484, 288 A.2d 725 (1972). Only when there is an ambiguity can the Court stray from the document itself and consider other evidence. *In re Estate of Tashjian,* 375 Pa.Super. 221, 544 A.2d 67 (1988).

Upon close examination of the opening paragraph of the will, we do not find any ambiguity. The Court finds that the testator's intent was for his Executor to liquidate all of his assets including his stocks, bonds and bank accounts, excepting only his automobile which he bequeathed to plaintiff in kind. Plaintiff argues that this interpretation does not reflect the testator's intent which she believes was for her to receive the stocks, bonds and bank accounts as well as the car. However, this interpretation is contrary to the clear language of the document itself and, thus, must be rejected. The testator's use of semi-colons to set off the instruction regarding his automobile clearly manifest his intent that this be an exception to his instructions regarding disposition of the residue of his estate.

We do not find it to be a reasonable construction of the language in the first paragraph of the will to include within the intended bequest to Esther Kite the "...Stocks & Bonds and Bank Accounts..." when testator so clearly delineated a specific bequest to Esther which he excised from the state disposition of the residue of his estate. When he specifically gave her "the Automobile...", we find no reasonable way to include within that distribution "This includes Stocks & Bonds and Bank Accounts..." as assets of that nature obviously are distinct in kind from a vehicle. It makes much more sense to read the specific bequest of the automobile on an interjection which interrupts testator's intent to sell all of his assets, excepting the automobile, but including his stocks, bonds and bank accounts, and to

distribute the proceeds pursuant to the provisions of the third paragraph of the will.

We also note that even if we were to find the opening paragraph of the will ambiguous, plaintiff has not produced any extrinsic evidence which supports her position. Although it is true that the plaintiff lived with the testator for years, they were never married and they shared their living expenses equally. There was no evidence that the plaintiff was financially dependent upon Mr. Hockersmith. Further, the plaintiff was provided for in the will as she is listed as a beneficiary who is to receive a 5% share of the estate as well as the automobile. The record does not contain any evidence that the testator's intent was contrary to the language contained in the four corners of his will.

The record also shows that the decedent's entire estate was made up almost exclusively of stocks, securities and cash in his bank accounts. If his intent at the time of the making of his will had been to bequeath those assets to plaintiff, it would have made no sense for testator to have gone through the process of naming fifteen other beneficiaries of his estate as there would have been virtually nothing left for distribution to them. We conclude that plaintiff is entitled to receive only the decedent's automobile under to the first paragraph of the will.

II. Residuary Clause

The plaintiff also asserts that the will intended to dispose of the entire estate even though the will expressly provides for distribution to designated beneficiaries of only twenty-three(23%) per cent of the residuum of the estate. In other words, the plaintiff is seeking for the will to be construed to avoid intestacy with respect to that seventy-seven (77%) percent portion of the estate which was not specifically bequeathed in the will.

"One who writes a will is presumed to intend to dispose of all his estate and not die intestate as to any portion thereof. If possible to do so, a will must be construed to avoid an intestacy." *Grier Estate,* 403 Pa. 517, 522, 170 A.2d 545, 548 (1961), quoting *Carmany Estate,* 357 Pa. 296, 299, 53 A.2d 731 (1947) [citations omitted]. It is clear from the plain language of the will that the testator did not intend to die intestate. First, he directed

his Executors to "sell all of my assets" manifestly expressing an intent to dispose of his entire estate. Second, although the specific bequests to the sixteen individuals and organizations only amount to twenty-three percent of his estate, he attempted to set up a trust for the remaining seventy-seven percent with the language "The rest to be put in trust & paid out each year until depleted". Therefore, it is evident to this Court that the testator knew that he was only disposing of a portion of his estate with specific bequests since he made a provision concerning the residue. Although his directions for administering the trust are vague at best, it is clear whom he wanted to benefit by that trust. although we will address the validity of the trust provision later in this Opinion, we find that this paragraph is a valid residuary clause since it distributes the remaining assets in the estate.

The testator's intention to dispose of his entire estate through his will is also strongly supported by the deposition testimony of the plaintiff and her niece, Loretta Jean Harris. Both women testified that Mr. Hockersmith repeatedly told them that when he died he wanted his first cousins, who are his only intestate heirs, to receive nothing from his estate. He also told them that he would not even recognize them on the street because they never visited him. We also see Mr. Hockersmith's desire that his intestate heirs receive no part of his estate evidenced in his will. Although sixteen beneficiaries are named, only two cousins are mentioned in the will, Capitola Johnston and Guy Johnston. We find that this is sufficient evidence that the testator intended that his will would provide for disposition of his entire estate. Therefore, since it was the testator's intent to dispose of his entire estate through his will and having found sufficient language in that will to dispose of all of his assets, we find that intestacy may be avoided.

III. Residuary Beneficiaries

The testator's will attempts to designate of his estate. However, some of these designations are ambiguous. The plaintiff asserts that the following persons and entities are the intended beneficiaries of the residuary estate: Capitola Johnston; Esther Kite; the American Cancer Society and the American Heart Association (identified as "cancer & heart fund"); the

Waynesboro Ambulance Squad and the Waynesboro Hospital (identified as "WBO ambulance & medical dept"); Always There Hook & Ladder Company and Mechanics S.F.E. & Hose Company (identified as "WBO fire depts"); Christ United Methodist Church; Guy Johnston; Mr and Mrs. James Pryor; Alexander Hamilton Free Library (identified as "WBO library"); United Way of Franklin County (identified as "WBO United Way"); Salvation Army Corps; American Red Cross; and the Hearthstone Retirement Home.

No objection to plaintiff's identification of residuary beneficiaries has been forthcoming. The Court also finds that this list accurately reflects the testator's intent at the time he executed his will. Therefore, we find that the aforementioned persons and entities are the sole beneficiaries of the testator's estate.

IV. Trust Provision

Having already found that the testator intended for the last paragraph of his will to be a residuary clause, we must now address whether or not the language is sufficient to create a valid and enforceable trust for the benefit of the sixteen named beneficiaries. The only language concerning the establishment of a trust is as follows: "The rest should be put in a trust and paid out each year until depleted." In order for a valid trust to be created, "there must be a definite declaration of an express intention to create the status, there must be enforceable duties imposed upon the trustee, and the beneficiary must be readily ascertainable." *38 P.L.E., Trusts §11.* In the case at bar, the will fails to name a trustee and also fails to enumerate any duties and powers of the trustee. Further, there are no instructions as to how, when, and under what circumstances the income and/or principal is to be paid out. Therefore, the will does not establish a valid and enforceable trust.

However, even assuming that a valid trust had been created the trust would be a dry or passive trust. A passive trust is a trust to which the trustees hold title but have no duties to perform with respect to that trust. *39 P.L.E., Trusts §145.* All parties agree that if the instrument actually creates a trust, that trust is dry and as such may be terminated. See e.g., *Miller Trust,* 80 D.&C. 528 (1952). Where all beneficiaries are sui juris or corporations, and

no ultimate purpose for the continuance of the trust is expressed or can be inferred, the trust may be terminated. *Standard Pennsylvania Practice 2d, Trusts, §160.3.* further, "where the only purpose of a trust is to make annual distributions until the fund is wholly distributed, it may be terminated." *Id.*

In this case, there is no expressed purpose for the creation of the trust and none can be inferred from the document itself. The language merely mandates that the money be paid out of the trust each year until depleted. Therefore, we find that, at most, the testamentary language creates a dry trust which all parties agree should be terminated. However, regardless of whether or not the instrument creates a valid trust, the outcome is still the same. If there is no trust, the remainder of the estate must be distributed to the beneficiaries. The same result occurs if we were to find that the instrument created a dry trust that can be terminated. Accordingly, we must be now determine how the remaining seventy-seven percent of Mr. Hockersmith's estate should be distributed.

As we previously stated, we must be guided by the language in the document itself. Although the testator did not expressly say how the remainder should be divided, he did set forth specific percentages that the parties were to receive upon his death. It is certainly reasonable to infer that these percentages should carry over to the remainder. However, as these percentages total only twenty-three percent, the only way to distribute the residue according to the proportions allocated by the testator himself is to divide the remaining seventy-seven percent of the estate into twenty-three shares so that each party would then receive his, her or its proportionate share. For example, the plaintiff would receive 5/23 since the testator wanted her to have five times as much as Guy Johnston, who would be entitled to 1/23. We find that this is the only distribution scheme that reflects the testator's intent. Accordingly, after the specific bequests have been distributed, the remainder shall be distributed pro rata to the sixteen named beneficiaries of the testator's estate.

DECREE NISI

NOW, April 1, 1997, the Court determines that the Last Will and Testament of Allan E. Hockersmith, deceased, provides for

the distribution of his Estate in conformity with the determinations made in this Adjudication attached hereto.

This Decree Nisi shall become a final decree unless post-trial motions are filed within ten (10) day of the date hereof.