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Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201-2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.

In Re: Estate of Homer C. Mellott, Late of Bellfast Township, Fulton County, Pennsylvania, Deceased

Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Fulton County Branch, Orphans Court Division NO. OC-2014-16

HEADNOTES

Declaratory Judgment

1. The testator's intent is "the polestar in the construction of every will and that intent, if it is not unlawful, must prevail." *In re Estate of Rider*, 711 A.2d 1018, 1021 (Pa.Super. 1998).
2. The first thing the Court must do is focus on "the precise wording of the will, and if ambiguity exists, on the circumstances under which the will was executed." *In re Estate of Rider*, 711 A.2d 1018, 1021 (Pa.Super. 1998).
3. A patent ambiguity is an ambiguity that "appears on the face of the [document] and is a result of defective or obscure language." *Krizovensky v. Krizovensky*, 624 A.2d 638, 643 (Pa.Super. 1993).
4. A latent ambiguity "arises from collateral facts which make the meaning of a written [document] uncertain, although the language appears clear on the face of the document." *Krizovensky v. Krizovensky*, 624 A.2d 638, 643 (Pa.Super. 1993).
5. Parole evidence is admissible to determine a decedent's intent as to a devise. *See In re Estate of Beisgen*, 128 A.2d 52, 55 (Pa. 1956).
6. In interpreting a will, the Court must apply certain statutory presumptions unless the testator expresses contrary intent within the will. *See In re Estate of Dex*, 596 A.2d 1143, 1146 (Pa.Super. 1991).
7. "A will shall be construed to apply to all property which the testator owned at his death, including property acquired after the execution of his will." 20 Pa.C.S. § 2514(1.1).
8. While the law disfavors intestacy and partial intestacy, the presumption against intestacy is rebuttable. *See Bowman v. Brown*, 149 A.2d 56, 60 (Pa. 1959).
9. Black's Law Dictionary defines "void for vagueness" under the definition of "void" as "(of a deed or other instrument affecting property) having such an insufficient property description as to be unenforceable." Black's Law Dictionary (10th ed. 2014).
10. In an action for specific performance for the sale of land, the description of the land must be clear enough to enable a surveyor to locate it with certainty. *See Dale v. Crawford*, 418 A.2d 509, 511 (Pa.Super. 1980).
11. Where a will has multiple devises of "1 lot ~ 10 acres to individuals" and a professional surveyor could not provide with reasonable certainty what land was to be devised, the legacies fail as being void for vagueness.

Appearances:

Stanley J. Kerlin, Esquire, *for the Estate*

David C. Cleaver, Esquire, *for the Estate*

John W. Frey, Esquire, *for Paige Varner*

OPINION AND ORDER OF COURT

Before Zook, J.

PROCEDURAL HISTORY

This matter is before the Court on the *Petition for Declaratory Judgment* filed by Naomi Kline, the Administrator of the Estate of Homer C. Mellott (hereinafter decedent). The decedent passed away on April 27, 2014. On July 8, 2014, Letters of Administration c.t.a. were issued by the Register of Wills to Naomi Kline. On the same date, the Register of Wills probated the instrument titled “Homer Mellott – Last Will + Testament (sic)” dated April 25, 2014. Petitioner filed the *Petition for Declaratory Judgment* on October 10, 2014, at which time the Court entered an *Order* setting the matter for hearing and service of a citation returnable on December 16, 2014 at 1:30 p.m. to all parties named in the instrument.

On December 16, 2014, the Court held the hearing as scheduled. The Estate was present and represented by Stanley S. Kerlin, Esq., and David Cleaver, Esq.. Paige Varner was present and represented by John Frey, Esq., and Adam Mellott, Denny Mellott, and Herman Hill were present but unrepresented. Jillian Chang was not present nor represented. The Court gave all parties the opportunity to present and cross-examine witnesses; however, only Attorneys Frey, Kerlin and Cleaver presented evidence or cross-examined witnesses. At the conclusion of the hearing, the Court entered an *Order* granting counsel for Paige Varner until January 16, 2015, to submit a brief in support of his argument. Attorney Cleaver was granted until January 30, 2015, to file a brief in support of his argument. Denny Mellott was granted leave to file a brief of legal authority by January 30, 2015 for his request for the Court to hold a hearing on his additional claims against the estate.

On January 14, 2015, the Court received a letter from John Frey, Esq., informing the Court that he would not be filing a brief in this matter at his client’s request. The Court entered an *Order* directing this letter to be filed of record on March 2, 2015. On January 23, 2015, the Court received a letter from Denny Mellott stating his intention to not file a brief in this matter. The Court entered an *Order* directing this letter to be filed of record on March 2, 2015. On January 30, 2015, the Court received a brief in this matter from the Petitioner. The Court entered an *Order* directing this brief to be filed of record on March 2, 2015. The matter is now ready for decision.

DISCUSSION

1. Is the devise “I want Denny Mellot (*sic*) to have Land East of Pigeon Roads – all can see (~2 Lots in size)” enforceable?

The testator’s intent is “the polestar in the construction of every will and that intent, if it is not unlawful, must prevail.” *In re Estate of Rider*, 711 A.2d 1018, 1021 (Pa.Super. 1998). The first thing the Court must do is focus on “the precise wording of the will, and if ambiguity exists, on the circumstances under which the will was executed.” *Id.*

At law there are two types of ambiguities that can appear in a will - patent and latent ambiguities. See *In re Estate of Beisgen*, 128 A.2d 52, 55 (Pa. 1956). A patent ambiguity is an ambiguity that “appears on the face of the [document] and is a result of defective or obscure language.” *Krizovensky v. Krizovensky*, 624 A.2d 638, 643 (Pa.Super. 1993). A latent ambiguity “arises from collateral facts which make the meaning of a written [document] uncertain, although the language appears clear on the face of the document.” *Id.*

In the instant matter, the devise to Denny Mellott has a latent ambiguity, rather than a patent ambiguity. On its face, the language is clear that Denny Mellott shall receive all the lands East of Pigeon Roads; however, the amount of land is listed as “all can see (~2 lots in size)”, which is an imprecise amount. See Petitioner’s Ex. 3. Because there is a latent ambiguity, parole evidence is admissible to determine the decedent’s intent as to this devise. *In re Estate of Beisgen*, 128 A.2d 52, 55 (Pa. 1956).

The Court heard testimony from Dennis Golden, a professional land surveyor who had previously surveyed the land in 2012 for the decedent. Mr. Golden testified that Homer Mellott owned approximately 14 acres of land East of Pigeon Cove Road. Mr. Golden further testified that the devise to Denny Mellott would constitute all the property to the East of Pigeon Cove. Based upon the evidence presented, the Court finds that this provision is enforceable.

2. Are the devises to Herman Hill, Adam Mellot, Jolene Chap (*sic*) and Paig Bernam (*sic*) enforceable?

Similar to the devise to Denny Mellott, the decedent’s will devised four additional parcels of land to four individuals: Herman Hill, Adam Mellott,¹ Jillian Chang,² and Paige Varner.³ These four devises provide that each named individual receives “1 lot” of “10 acres.” Petitioner’s

¹ Adam Mellott is listed in the will as “Adam Mellot”

² Jillian Chang is listed in the will as “Jolene Chap” of “Switzer Rd-Johnstown, NY.”

³ Paige Varner is listed in the will as “Paig Berman-works Drugstore, McConnellsburg PA.” (*sic*)

Ex. 3. However, as discussed above, these devises contain a latent ambiguity, as the property owned by the Decedent at the time of his death was not subdivided into 10 acre parcels. *See* Petitioner’s Ex. 1; Petitioner’s Ex. 2.

The primary goal of the Court is to effectuate the intent of the testator. *In re Estate of Janney*, 446 A.2d 1265 (1982); *see also Estate of Williams by Lorgan v. Williams*, 516 A.2d 359, 361 (Pa.Super. 1986) (“The testator’s intent must appear with reasonable certainty, such that little doubt exists as to the testator’s intent.”) It is clear to the Court that the testator intended to leave portions of his property to the four named individuals: Herman Hill, Adam Mellott, Jillian Chang, and Paige Varner; however, it is not at all clear which portions of his property the decedent intended to devise to each party.

In the instant matter, the provisions in the will state “1 lot ~ (10 acres)” followed by a name. Furthermore, upon inspection of the property map of the decedent’s land in Petitioner’s Ex. 2, and considering the testimony of professional surveyor Dennis Golden, there are no parcels of land that match the size/description of these legacies. Dennis Golden testified that if the property is split into ten acre lots, the devises would vary greatly in value due to the characteristics of the terrain, some of which includes wetlands.⁴

In interpreting a will, the Court must apply certain statutory presumptions unless the testator expresses contrary intent within the will. *See In re Estate of Dex*, 596 A.2d 1143, 1146 (Pa.Super. 1991). The first of these presumptions is that “[a] will shall be construed to apply to all property which the testator owned at his death, including property acquired after the execution of his will.” 20 Pa.C.S. § 2514(1.1). While the law disfavors intestacy and partial intestacy, the presumption against intestacy is rebuttable. *See Bowman v. Brown*, 149 A.2d 56, 60 (Pa. 1959). Black’s Law Dictionary defines “void for vagueness” under the definition of “void” as “(of a deed or other instrument affecting property) having such an insufficient property description as to be unenforceable.” Black’s Law Dictionary (10th ed. 2014). In this case, Dennis Golden testified that he could not provide with reasonable certainty what land was to be devised to the four named individuals.

While the Court was unable to find a case directly on point as it relates to a devise of land in a will under these circumstances, the Court analogizes this matter to a contract action wherein specific performance

⁴ Additionally, splitting the lots would result in violations of land subdivision ordinances which require access to a public road. The Court notes that “zoning ordinances regulate the use of property and do not control the holding of a land...Zoning pertains to a permissible use of land, not to an individual’s right to hold land.” *Estate of Williams by Lorgan v. Williams*, 516 A.2d 359, 362 (Pa.Super. 1986). “A zoning ordinance per se cannot prevent an otherwise valid devise of a specific quantity of property no matter how large or how small.” *Id.*

for the sale of land is sought. In such an action for specific performance for the sale of land, the description of the land must be clear enough to enable a surveyor to locate it with certainty. *See Dale v. Crawford*, 418 A.2d 509, 511 (Pa.Super. 1980). The uncontroverted evidence in this case establishes that a professional surveyor, Dennis Golden, could not provide with reasonable certainty what land was to be devised to the four named individuals. As a result, the Court finds that these legacies fail as they are void for vagueness.

3. Are Denny Mellott's claims to the coins in the decedent's lock box and flat land enforceable?

The Court did not hear any evidence regarding the lock box or any coins located inside during the hearing on December 16, 2014. Denny Mellott's letter⁵ claims the decedent intended to give him these items⁶ on April 24, 2014, just one day prior to the decedent executing the will in question. Because these devises were not included in the will, they are unenforceable. When looking at the intent of the testator, the Court must look within the four corners of the will. *See In re Estate of Rider*, 711 A.2d 1018, 1021 (Pa.Super. 1998). Because the will does not make any reference to these items, the Court cannot interpret the testator's intent as to these items.

Furthermore, the Court is without jurisdiction to hear these claims as they would be tantamount to an advisory opinion. "A proceeding to obtain a declaratory judgment will not be entertained where another equally serviceable remedy has been provided for the character of case in hand." *Leafgreen v. La Bar*, 142 A.2d 224 (Pa. 1928). Therefore, no judgment shall be entered on these claims by Denny Mellott.

CONCLUSION

Upon review of the record and the law, the Court finds that the legacy to Denny Mellott is enforceable; however the legacies to Herman Hill, Adam Mellott, Paige Varner and Jillian Chang are void for vagueness. As discussed above, the Court does not address Denny Mellott's claims to the coins and the flat land. An appropriate Order follows.

⁵ Petitioner's Exhibit 4.

⁶ And some other items including a farm blade.

ORDER OF COURT

AND NOW THIS 2nd day of March, 2015, based upon the forgoing *Opinion*,

IT IS HEREBY ORDERED:

1. The legacy “I want Denny Mellot to have Land East of Pigeon Roads – all can see (~2 lots in size)” is enforceable;
2. The legacy to Herman Hill is void for vagueness;
3. The legacy to Adam Mellott is void for vagueness;
4. The legacy to Jillian Chang is void for vagueness;
5. The legacy to Paige Varner is void for vagueness;

Pursuant to the requirements of Pa. R.C.P. 236(a)(2)(b) and (d), the Clerk of Courts shall immediately give written notice of the entry of this Order, including a copy of this Order, to each party’s attorney of record, or if unrepresented, to each party; and shall note in the docket the giving of such notice and the time and manner thereof.