Caution
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Campbell v. Campbell

Court of Appeal of Florida, Third District

April 29, 1986

No. 85-1848

Reporter
489 So. 2d 774; 1986 Fla. App. LEXIS 7513; 11 Fla. L. Weekly D 1000

RICHARD W. CAMPBELL and HAROLD T. COLLINS, Appellants, v. GLADYS B. CAMPBELL, IRA M. ELEGANT, as Guardian Ad Litem and FLORIDA NATIONAL BANK, as co-personal representative of the Estate of HAROLD G. CAMPBELL, Appellees

Subsequent History: [**1] On Motion for Rehearing, June 10, 1986, Reported at: *489 So.2d 774 at 778*.

Prior History: An Appeal from the Circuit Court for Dade County, Edmund W. Newbold, Judge.

Core Terms

partnership, one-third, the will, ***ambiguity***, holdings, testator's, one-sixth, devise, words, undivided, apiece

Case Summary

Procedural Posture

Appellant brother and nephew sought review of an order from the Circuit Court for Dade County (Florida), which held that the testator's will unambiguously granted appellants, together, one-third of the testator's holdings in a business partnership.

Overview

Following the testator's death, appellee personal representative and others petitioned the trial court for construction of the testator's will. Appellees contended the testator unambiguously granted appellant brother and nephew one-third of the testator's interest in his business partnership. However, appellants contended that the will was ambiguous and attempted to proffer evidence to show that they were each entitled to receive one-third of the partnership, alleging the testator left out a crucial word in his bequest. The trial court found the will unambiguous and held appellants were entitled to a joint one-third share of the testator's business partnership. Appellants sought review of the trial court's order. The court reversed the order and remanded for a hearing. The court held the will was ambiguous, thus, extrinsic evidence was admissible. Further, the court held that a patent ***ambiguity*** existed resulting in various alternative interpretations of the testator's will;, therefore, because the paragraph bequeathing the testator's interest in his partnership to appellants was unclear, the presentation of extrinsic evidence was necessary to discern the testator's true intent.

Outcome

The order of the trial court, finding appellant brother and nephew together were entitled to one-third of the testator's holdings in a business partnership, was reversed and remanded for an evidentiary hearing. The court held that extrinsic evidence was admissible in the case at bar because the testator's will was ambiguous with respect to the share that appellants were to inherit.

LexisNexis® Headnotes

Estate, Gift & Trust Law > Wills > Interpretation > General Overview

Estate, Gift & Trust Law > ... > Interpretation > Rules of Construction > General Overview

Estate, Gift & Trust Law > ... > Interpretation > Intent of Testator > General Overview

HN1 The courts may construe a will as if words were inserted therein when such words were omitted solely by inadvertence or oversight and are essential to the expression of the testator's manifest intention. This power may extend to construing a will as if words were inserted therein, where it appears clearly on its face that such words were omitted solely by inadvertence, and are essential to the expression of testator's manifest intention; or to construing it as if words which actually appear therein were omitted.

Estate, Gift & Trust Law > Wills > Interpretation > General Overview

HN2 A patent ***ambiguity*** is a genuine uncertainty which results in alternative possible reasonable constructions of the language of the will.

Counsel: Sherman & Fischman and Bruce Fischman, for Appellants.

Edward I. Golden and Paul M. Cowan; Buchbinder & Elegant and Ira Elegant; Joseph H. Murphy, Jr., for Appellees.

Judges: Schwartz, C.J. and Hendry and Nesbitt, JJ.

Opinion by: SCHWARTZ

Opinion

[*775] The appellants, the brother and nephew of the testator, seek review of an order which construed the will of Harold G. Campbell as unambiguously granting them a total of one-third of his holdings in a Pennsylvania business partnership. They contend that the will itself gives rise to a reasonable uncertainty as to whether they were instead *each* entitled to a one-third interest and that proffered extrinsic evidence of the decedent's intent should therefore have been considered below. We agree and reverse for resolution of the controversy after an evidentiary hearing.

The instant dispute arose when the personal representative of Campbell's estate petitioned for the construction of, among others, the following portion of his will:

> [II] (f) I give, devise and **[**2]** bequeath unto Richard W. Campbell, my brother, and Harold T. Collins, my nephew, in equal proportions all my real estate upon which is situate the Williamsport Candy Company and Williamsport Sporting Goods **[*776]** Company, located on Montoursville Road, Williamsport, Pennsylvania, *together with an undivided one-third (1/3) interest in my partnership holdings in said concern.* I further give and bequeath unto Robert Guthrie and Charles J. Campbell, an undivided one-sixth (1/6) interest apiece in my partnership holdings in said concern. [e.s.]

At the hearing on the petition, the present appellees -- the personal representative, Gladys Campbell, the testator's widow and principal residuary legatee, and the guardian ad litem -- all contended that the emphasized portion of the devise unambiguously granted only one-third of Harold's interest in the Williamsport Candy and Sporting Goods partnership to both Richard Campbell and Collins. Considering the one-sixth interest "apiece" granted to Guthrie and Charles Campbell, this would pass only two-thirds of the business holdings, leaving the remaining one-third to fall into the residue. Richard Campbell and Collins, proffering **[**3]** evidence beyond the face of the will in support of their contention, [1] argued on the other hand that they were *each* to receive one-third of the partnership, thus resulting in a disposition of all of the property.

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[1] They proffered two areas of testimony:

(a) their own depositions which stated that only the named beneficiaries, together with Harold before his retirement, were active in the operation of the Williamsport business; thus indicating the unlikelihood that Harold would have desired that any interest pass to anyone else, let alone his wife, who was the beneficiary of the residuary clause but who played no part in the concern, and

(b) the more significant deposition of Campbell's Pennsylvania attorney who had drawn the will and who stated that the testamentary intent was indeed as the appellants asserted; this testimony suggested that the omission of the word "apiece," which followed the dispositions to Guthrie and Charles Campbell, from the otherwise identical language granting the appellants the disputed "one-third (1/3) interest" was simply a scrivener's error.

In essence, the appellants contended that the testator's intent would be effected by reading the provision as if the omitted word were present. Thus, the clause, they said, was intended to read:

> [II] (f) I give, devise and bequeath unto Richard W. Campbell, my brother, and Harold T. Collins, my nephew . . . together with an undivided one-third (1/3) interest [*apiece*] in my partnership holdings in said concern. I further give and bequeath unto Robert Guthrie and Charles J. Campbell, an undivided one-sixth (1/6) interest apiece in my partnership holdings in said concern.

[**4] The trial court declined to consider the proffered evidence ruling as follows:

> In regard to paragraph II (f) of the Last Will and Testament of HAROLD G. CAMPBELL, Deceased, dated August 5, 1974, as said paragraph relates specifically to the decedants devise of his Partnership holdings in the Williamsport Candy Company and Williamsport Sporting Goods Company, that no ***ambiguity*** exists in the language of said paragraph and that distribution of the Decedent's Partnership holdings shall be as follows:
>
> (a) One third (1/3) to be divided equally between Richard W. Campbell and Harold T. Collins.
>
> (b) One Sixth (1/6) to Robert W. Guthrie.
>
> (c) One Sixth (1/6) to Charles J. Campbell.
>
> (d) One third (1/3) to become part and parcel of the residuary of said estate which shall be determined and to be distributed in accordance with the provisions thereof.

We find error in this conclusion.

In considering the appellants' sole contention that the proper interpretation of paragraph II (f) may be resolved only after consideration of parol and extrinsic evidence, we start with the apodictic principle [*777] that such evidence may be received if, but only if, the will is [**5] in some way "ambiguous." *Perkins v. O'Donald, 77 Fla. 710, 82 So. 401 (1919)*; *Hulsh v. Hulsh, 431 So.2d 658 (Fla. 3d DCA 1983)*, pet. for review denied, *440 So.2d 352 (Fla. 1983)*; *In re Estate of Rice, 406 So.2d 469 (Fla. 3d DCA 1981)*, pet. for review denied, *418 So.2d 1280 (Fla. 1982)*. Everyone agrees with this proposition; the argument is, as usual, only over whether an ***ambiguity*** in fact exists in this particular instance. Contrary to the determination below, we conclude that there is ***HN2*** a "patent ***ambiguity***" [2] -- that is, a genuine uncertainty which results in alternative possible reasonable constructions of the language of the will; *Rice, 406 So.2d at 476* -- as to whether II (f) gave each of the appellants or both of them together one-third of the partnership.

[**6] In our view, this ***ambiguity*** appears on the face of II (f) in two separate respects:

1. The result of the interpretation adopted below, although it acknowledgedly tracks the literal language of II (f), is that Richard Campbell and Harold T. Collins, sharing as they do a one-third interest, each receive an undivided one-sixth interest in the partnership. But this is exactly what Guthrie and Charles J. Campbell explicitly receive under the totally unambiguous next sentence of the same paragraph. Grave doubt is cast upon the acceptability of the outcome reached below by the fact that the testator used entirely different expressions supposedly to grant the four persons the same respective interests. Just as it is recognized that the same words used in two parts of an instrument are deemed to mean the same thing in both places, 17A C.J.S. Contracts § 303 (1963); *17 Am.Jur.2d Contracts § 248* (1964), so, as in this case, the use of different language strongly implies that a different meaning was intended. See *Persinger v. Islamic Republic of Iran, 234 U.S. App. D.C. 349, 729 F.2d 835, 843 (D.C. Cir. 1984)* ("When Congress uses explicit language in one part of a statute to cover a [**7] particular situation and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing. *See* *Russello v. United States, 464 U.S. 16, 104 S. Ct. 296, 300, 78 L. Ed. 2d 17 (1983)*; *United States v. Martino, 681 F.2d 952, 954 (5th Cir. 1982)* (en banc), *quoting* *United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)*."), cert. denied, *469 U.S. 881, 105 S. Ct. 247, 83 L. Ed. 2d 185 (1984)*. Thus, the common sense observation that if Campbell wanted to leave the appellants one-sixth each as he clearly did Guthrie and Charles Campbell, he would have said so in the same way, leads to the eminently

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See *In re Estate of Wood, 226 So.2d 46, 50 (Fla.2d DCA 1969)* ***HN1*** ("the courts may construe a will as if words were inserted therein when such words were omitted solely by inadvertence or oversight and are essential to the expression of the testator's manifest intention"), cert. denied, ***232 So.2d 181 (Fla. 1969)***; 4 Page on Wills § 30.25 (W. Bowe & D. Parker rev. ed. 1961) ("This power may extend to construing a will as if words were inserted therein, where it appears clearly on its face that such words were omitted solely by inadvertence, and are essential to the expression of testator's manifest intention; or to construing it as if words which actually appear therein were omitted.").

[2] The other type of cognizable ***ambiguity*** is a "***latent ambiguity***" which occurs when attempting to apply the language of a will to the actual "subject matter or object of a devise or to the devisee," *Rice, 406 So.2d at 476*. No "***latent ambiguity***" is involved in this case. The decisions cited by appellant which concern, for example, misdescriptions of property designated in a will, e.g., *Albury v. Albury, 63 Fla. 329, 58 So. 190 (1912)*, are therefore inapposite on this issue.

reasonable conclusion that, by *not* doing so, he may have intended something else.

2. As has been noted, the application of the "one-third plus two one-sixths" version of II (f) has the consequence of disposing of only two-thirds of the partnership interest in an ongoing business. But this result is contrary both to the thrust of II (f) as a whole, which plainly transfers all the realty upon which the business is located, and otherwise evinces an intent to dispose of the entire business; and to **[**8]** the common pattern of the entire will, which nowhere else specifically devises only a portion of a particular asset. See *Albury v. Albury, 63 Fla. 329, 58 So. 190 (1912)* (will must be construed as a whole). A clear internal conflict thus exists between the quite-obvious, and quite-obviously sensible, intention to keep the business together and the anomalous one-third lacuna created by the failure of the actual words employed to accomplish that result. See *In re Estate of Gibson, 19 Ill.App.3d 550, 312 N.E. 2d 1 (1974)* (***ambiguity*** created when only nine persons designated to receive one-eighteenth share each of residue properly resolved after consideration **[*778]** of extrinsic evidence); *In re McNeil's Estate, 35 Misc. 2d 891, 233 N.Y. S.2d 531 (Sur.Ct. 1962)*, aff'd, *18 A.D.2d 170, 238 N.Y.S.2d 389 (1963)* (***ambiguity*** created by conflict between will computation setting up five shares of estate and "draftsman's formula [which] requires distribution of seven shares"); cf. Annot., Proper Disposition Under Will Providing for Allocation of Express Percentages or Proportion Amounting to More or Less Than Whole of Residuary Estate, *35 A.L.R. 4th 788 (1985)*.

In sum, reasonable **[**9]** persons reading paragraph II (f) could fairly differ as to the interest in the partnership the appellants were meant to receive. They were therefore entitled to present appropriate extrinsic evidence, see *In re Mullin's Estate, 133 So.2d 468 (Fla. 2d DCA 1961)*; see also *Hays v. Illinois Industrial Home for the Blind, 12 Ill.2d 625, 147 N.E.2d 287 (1958)*, indicating the construction which reflects the testator's true intention and which therefore should be adopted. *In re Estate of Roberts, 367 So.2d 269 (Fla. 3d DCA 1979)*, cert. denied, *378 So.2d 348 (Fla. 1979)*; *Gibson*.

Reversed and remanded with directions.