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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-704

No. COA22-27

Filed 18 October 2022

Craven County, No. 17CVS374

ROBERT CHRISTOPHER WALKER, Plaintiff,

v.

DANIEL JOSEPH FOLEY, JR., GLENDA T. FOLEY, STEPHEN T. FOLEY,
SHARON M. FOLEY, MICHAEL D. FOLEY, and CAROLYN E. FOLEY, Defendants.

Appeal by Plaintiff from Judgment entered 23 October 2019 by Judge John E.
Nobles, Jr. in Craven County Superior Court. Heard in the Court of Appeals 7 June
2022.

Harvell and Collins, P.A., by Wesley A. Collins, for Plaintiff-Appellant.

*White & Allen, P.A., by Christopher J. Waivers, and Brian Z. Taylor, for
Defendants-Appellees.*

HAMPSON, Judge.

Factual and Procedural Background

¶ 1

Robert Christopher Walker (Plaintiff) in his individual capacity and as
Executor of the Estate of William Foley (Decedent) appeals from Judgment entered
23 October 2019 declaring Stephen T. Foley, Sharon M. Foley, Michael D. Foley, and
Carolyn E. Foley (collectively Defendants) the owners of Decedent's interest in certain

real property by operation of intestate succession. The Record before us tends to reflect the following:

¶ 2 On 1 October 1997, Decedent executed his Last Will and Testament (Will). Plaintiff is the Executor and sole beneficiary under the Will. Defendants are Decedent’s brothers and their spouses.

¶ 3 The Will itself was comprised of seven Articles, which in relevant part provide:

ARTICLE I.

I direct that . . . my Executor may cause any debt to be carried, renewed, and refinanced from the time upon such terms and with such securities for its repayment as my Executor may deem advisable taking into consideration the best interest of the beneficiaries hereunder. If at the time of my death any of the real property herein devised is subject to a mortgage, I direct that the devisee taking such mortgaged property shall take it subject to such mortgage and that the devisee shall not be entitled to have the obligation secured thereby paid out of my general estate.

ARTICLE II.

I direct that all my estate and inheritance taxes and other taxes in the general nature thereof . . . which shall become payable upon or by reason of my death with respect to any property passing by or under the terms of this will or any codicil to it hereafter . . . shall be paid by my executor out of the principal of my residuary estate, and I direct that no part of any such taxes be charged against (or collected from) the person receiving or in possession of the property taxed, or receiving the benefit thereof, it being my intention that all such persons, legatees, devise[e]s, surviving tenants by the entirety, appointees and beneficiaries receive full benefits without any diminution on account of such taxes.

ARTICLE III.

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I give bequeath and devise all of the balance of my personal and household effects of every kind involving but not limited to checking and savings accounts, stocks and bonds, tools and equipment, automobiles, appliances, furnishings, pictures, silverware, china, glass, books, jewelry, wearing apparel, and all policies of fire, burglary, property damage, and other insurance on or in connection with the use of this property, to my Friend, Robert Christopher Walker, wheresoever situate, owned by me at the time of my death. I request that my beneficiary and my Executor abide by any memorandum by me directing this disposition of this property or any part thereof. This request is precatory and not mandatory.

ARTICLE [IV.]¹

I give to Robert Christopher Walker my One-Third (1/3) share of my stock in Foley & Foley Marine Contractors, Inc., my One-Third (1/3) share of my stock in Marine Equipment Leasing, Inc. and my One-Third (1/3) share of my stock in Innovative Vinyl Products, Inc. which I may own at the time of my death.

ARTICLE V.

I hereby appoint my Friend, Robert Christopher Walker, as my Executor of this my Last Will and Testament. In the event my Friend is to predecease me, then my Mother, Maude M. Foley, is executor of my Last Will and Testament. . . . My said executor shall not be required to furnish bond.

ARTICLE VI.

By way of illustration and not of limitation and in addition to any . . . implied or statutory powers granted to executors generally, my Executor is specifically authorized and empowered with respect to any property, real or personal . . . to exercise all the powers in the management of my Estate . . . and to do all acts

¹ The Will lists Article IV as VI.

which my Executor may deem property or necessary to carry out the purpose of this my will[.]

ARTICLE VII.

As used in this Will, the masculine, feminine, and neuter gender, and the singular and plural numbers, whether the context requires or permits, shall each be deemed to include the other genders or numbers respectively.

Titles and headings contained in this Will shall not be deemed to govern, limit, modify or in any way affect the scope, means or intent of the provisions of this Will.

The Will contains no express devise of Decedent's real property. The Will also contains no residuary clause. Decedent died on 26 November 2013. Addended to the Will is a statement listing insurance policies, the location of Deeds to a lot and house, and Decedent's wishes for his burial.

¶ 4 Decedent died on 26 November 2013, and the Will was subsequently admitted to probate with the Craven County Clerk of Superior Court. At the time of his death, Decedent had an interest in three parcels of real estate. Decedent and Plaintiff each owned a one-half interest as tenants in common in two pieces of property—one in Craven County and one in Carteret County. Decedent and Plaintiff also each owned an interest in a third property—also located in Craven County—along with two of the Defendants.

¶ 5 Plaintiff commenced this action on 23 March 2017 by filing a Complaint against Defendants seeking an equitable lien and accounting related to the real

property in Carteret County. This Complaint alleged upon information and belief that the Will failed to devise Decedent's interest in real property and that Decedent's interest in the real property passed to Defendants by way of intestate succession. On 9 June 2017, Defendants filed an Answer and Counterclaim seeking monetary damages from Plaintiff.

¶ 6 On 15 March 2018, the trial court granted Plaintiff leave to file an Amended Complaint. The Amended Complaint, filed 23 March 2018, now included a claim for Declaratory Judgment declaring the Will ambiguous and that the Will, in fact, devised Decedent's real property interests to Plaintiff. In the alternative, Plaintiff again sought relief against Defendants—including claims for contribution, equitable and statutory liens, and unjust enrichment. In response, Defendants filed an Answer to the Amended Complaint and reasserted their pre-existing counterclaim.

¶ 7 On 11 June 2019, Defendants filed a Motion for Partial Summary Judgment on Plaintiff's Declaratory Judgment claim. The trial court denied the Motion by Order signed 21 August 2019.² The case then proceeded to a bench trial solely on Plaintiff's claim for Declaratory Judgment during the 26 August 2019 session of

² The Record on Appeal does not reflect when this Order was filed. Indeed, the Record here contains several minor defects including documents lacking signatures, legibility, chronology, or file stamps. Nevertheless, the parties do not dispute the overall procedural history of this case and these defects do not substantially impair our ability to review the merits of this case, although they certainly do not make it any easier.

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¶ 8 Following the bench trial, the trial court entered Judgment on 23 October 2019 in favor of Defendants. The trial court concluded the Will was unambiguous and indicated a plain intent not to leave Decedent's interest in real property to Plaintiff, and, instead, Decedent's real property interests passed to Defendants by intestate succession. The trial court, thus, decreed the Will did not devise Decedent's interest in real property and Decedent's brothers (Defendants Daniel, Stephen, and Michael Foley) are the owners of Decedent's interest in the three real properties by operation of intestate succession.

¶ 9 On 20 March 2020, Plaintiff filed a voluntary dismissal of the remaining claims asserted in the Amended Complaint. On 20 September 2021, Defendants voluntarily dismissed their counterclaim. On 20 October 2021, Plaintiff filed the operative Notice of Appeal.³

Appellate Jurisdiction

¶ 10 The parties' respective dismissals of their remaining claims render the trial court's Judgment on Plaintiff's Declaratory Judgment claim a final judgment which may be appealed pursuant to N.C. Gen. Stat. § 7A-27(b)(1). *See generally Combs & Assocs. v. Kennedy*, 147 N.C. App. 362, 367, 555 S.E.2d 634, 638 (2001) ("Plaintiff's

³ Plaintiff had previously filed an interlocutory Notice of Appeal on 18 November 2019, prior to the parties dismissing their remaining claims.

voluntary dismissal of this remaining claim . . . has the effect of making the trial court's grant of partial summary judgment a final order. . . . Thus, the order is no longer interlocutory in nature and an appeal is permissible.") (citations omitted). Plaintiff's Notice of Appeal was filed 30 days following Defendants' voluntary dismissal of their counterclaim and was, as such, timely. *See* N.C.R. App. P. 3(c). Therefore, this Court has appellate jurisdiction over this appeal.

Issue

¶ 11 The dispositive issue on appeal is whether the trial court erred in concluding Decedent's Will was not ambiguous and, therefore, could not be interpreted to devise Decedent's interests in real property to Plaintiff.

Analysis

¶ 12 "The standard of review in declaratory judgment actions where the trial court decides questions of fact is whether the trial court's findings are supported by any competent evidence. Where the findings are supported by competent evidence, the trial court's findings of fact are conclusive on appeal." *Nelson v. Bennett*, 204 N.C. App. 467, 470, 694 S.E.2d 771, 774 (2010) (citation and quotation marks omitted). "Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *In re Estate of Harper*, 269 N.C. App. 213, 215, 837 S.E.2d 602, 604 (2020) (citation and quotation marks omitted). The trial court's conclusions of law are, however, reviewed de novo. *Id.* "The interpretation of a will's language is

a matter of law,” *Brawley v. Sherrill*, 267 N.C. App. 131, 133, 833 S.E.2d 36, 38 (citation omitted), *appeal dismissed*, 373 N.C. 587, 835 S.E.2d 463 (2019), which we review de novo, *see Treadaway v. Payne*, 2021-NCCOA-535, ¶ 13, 279 N.C. App. 664, 668.

¶ 13 “When the parties place nothing before the court to prove the intention of the testator, other than the will itself, they are simply disputing the interpretation of the language which is a question of law.” *Brawley*, 267 N.C. App. at 133, 833 S.E.2d at 38 (quoting *Cummings v. Snyder*, 91 N.C. App. 565, 568, 372 S.E.2d 724, 725 (1988)). “A party may resort to the courts for the construction of a will when there are doubts as to a testator’s intent and the terms of a will are not set out in clear, unequivocal and unambiguous language.” *Hollowell v. Hollowell*, 107 N.C. App. 166, 171, 420 S.E.2d 827, 831 (1992). However, “[i]f a will is sufficiently distinct and plain in its meaning as to enable the court to say that a particular person is to take, and that a particular thing passes, that is sufficient; and it must be construed upon its face without resorting to extraneous methods of explanation to give it point.” *Wachovia Bank & Tr. Co. v. Wolfe*, 243 N.C. 469, 474, 91 S.E.2d 246, 251 (1956).

¶ 14 In this case, Plaintiff—through the Amended Complaint—sought a declaratory judgment construing the provisions of the Will and seeking a declaration of Plaintiff’s rights under the Will pursuant to N.C. Gen. Stat. § 1-254. Notably, Plaintiff did not

seek reformation of the Will pursuant to N.C. Gen. Stat. § 31-61.⁴ Rather, Plaintiff sought a declaration that the Will devised all of Decedent’s real property interests to Plaintiff. The trial court, however, concluded the provisions of the Will were unambiguous, did not specifically devise Decedent’s real property interests, and did not include any residuary devise that would include Decedent’s real property interests. The trial court further concluded that nothing in the Will reflected any intent to devise real property to Plaintiff—and, to the contrary—reflected a “plain intent” not to leave Decedent’s real property interests to Plaintiff.

¶ 15 On appeal, Plaintiff contends the trial court erred in concluding the Will was unambiguous. Plaintiff makes no argument there is any extrinsic evidence to show Decedent’s intent, instead relying on the Will itself. As such, Plaintiff disputes the trial court’s interpretation of the language of the Will. *See Brawley*, 267 N.C. App. at 133, 833 S.E.2d at 38. Specifically, Plaintiff points to three portions of the Will which Plaintiff asserts demonstrate an intent to devise real property. The first of these provisions is found in Article I of the Will and provides: “If at the time of my death any of the real property herein devised is subject to a mortgage, I direct that the devisee taking such mortgaged property shall take it subject to such mortgage and

⁴ N.C. Gen. Stat. § 31-61 was enacted effective 1 January 2018 prior to Plaintiff filing the Amended Complaint in this matter. *See* 2017 North Carolina Laws S.L. 2017-152 (S.B. 567). Plaintiff also does not rely on Section 31-61 in briefing to this Court as a basis for relief. Defendants do, however, cite this statute in their own briefing.

that the devisee shall not be entitled to have the obligation secured thereby paid out of my general estate.” The second provision relied on by Plaintiff is found in Article VI: “my Executor is specifically authorized and empowered with respect to any property, real or personal . . . to exercise all the powers in the management of my Estate . . . and to do all acts which my Executor may deem property or necessary to carry out the purpose of this my will[.]” Third, Plaintiff points to the fact Decedent appended the list including information about the location of deeds to the Will.

¶ 16

None of the provisions of the Will identified by Plaintiff, however, creates an ambiguity. The provisions in Articles I and VI do not require or make any devise of real property but are instead general provisions applicable in the event real property was devised by the Will. Likewise, identifying the location of the deeds also does not show any intent to devise real property interests through the Will and makes no devise of the real property interests. Indeed, as the trial court determined, to the contrary, these provisions illustrate Decedent’s awareness of the distinction between real and personal property and Decedent’s awareness of his own ownership interests in real property. Moreover, the trial court also determined the Will reflects Decedent knew to make specific devises of property to Plaintiff in other provisions of the Will bequeathing personal property to Plaintiff. Plaintiff does not directly challenge these determinations by the trial court. We agree with the trial court’s determinations interpreting the language of the Will.

¶ 17 Plaintiff nevertheless contends ambiguity exists in the Will because to interpret the Will as not making any devise of Decedent’s real property interests would be in opposition to the presumption against partial intestacy. “It is true that in searching a will to determine the testator’s intent, courts are to be guided by the presumption that ‘one who makes a will is of disposing mind and memory and does not intend to die intestate as to any part of his property.’ ” *McKinney v. Mosteller*, 321 N.C. 730, 732, 365 S.E.2d 612, 614 (1988) (quoting *Wing v. Trust Co.*, 301 N.C. 456, 463, 272 S.E.2d 90, 95 (1980)). However, “it should be kept in mind that the presumption against partial intestacy is applied only as an aid in construction.” *Armstrong v. Armstrong*, 235 N.C. 733, 736, 71 S.E.2d 119, 122 (1952). “Accordingly, a construction based on such presumption will not be made where it is apparent from the language of the will that it would be contrary to the intention of the testator, or where intestacy is effected by the plain and unambiguous language of the will.” *Id.* (citations and quotation marks omitted).

¶ 18 Plaintiff contends our decision in *Halstead v. Plymale* is controlling and requires a conclusion Decedent did not intend for the real estate interests to pass through intestacy. 231 N.C. App. 253, 750 S.E.2d 894 (2013). We disagree. In *Halstead*, this Court—affirming the trial court—determined a will was ambiguous where the will expressly stated an intent to disinherit the testator’s husband, devised all tangible personal property to a friend, but also contained a residuary clause which

while on one hand expressed an intent to devise all remaining personal and real property, again only expressly devised “tangible personal property.” *Id.* at 257, 750 S.E.2d at 897. This Court concluded the repeated references to and devise of the same “tangible personal property” created a patent ambiguity. *Id.* Moreover, because the will expressed a clear intent to disinherit the husband and the effect of partial intestacy would have been to allow the husband to inherit through intestacy, this Court concluded the proper interpretation of the will was to devise all the testator’s property, including real and intangible personal property, through the residuary clause. *Id.* at 259, 750 S.E.2d at 898.

¶ 19 In this case, unlike *Halstead*, there is no residuary clause in Decedent’s Will. *See McKinney*, 321 N.C. at 732, 365 S.E.2d at 614 (“the presumption against intestacy is strengthened by the presence of a residuary clause in a will”). There is also no express intent stated to disinherit Defendants. Further, unlike *Halstead*, there is also no conflict or duplication in the provisions of, or devises made by, the Will. Rather, the plain and unambiguous provisions of the Will only devise Decedent’s personal property to Plaintiff and do not include any reference to Decedent’s real property interests. As such, as it relates to those real property interests, “intestacy is effected by the plain and unambiguous language of the will.” *Armstrong*, 235 N.C. at 736, 71 S.E.2d at 122. As a result, and as the trial court properly concluded, the presumption was overcome by the plain language of the Will.

¶ 20 Thus, the trial court did not err in concluding the Will was unambiguous and did not devise Decedent's interests in real property to Plaintiff. Therefore, the trial court, in turn, properly concluded Decedent's real property interests passed by operation of intestate succession. Consequently, the trial court did not err in declaring Defendants the owners of Decedent's interests in real property.

Conclusion

¶ 21 Accordingly, for the foregoing reasons, the trial court's 23 October 2019 Judgment is affirmed.

AFFIRMED.

Judges INMAN and GRIFFIN concur.

Report per Rule 30(e).