31 No. 2 Ohio Prob. L.J. NL 6

Ohio Probate Law Journal | November/December 2020

Volume 31, Issue 2

Probate Law Journal Of Ohio

By Adam M. Fried, Esq.[a0]

Resolving Ambiguity In Wills And Trusts: Homage To Testator/Settlor Intent

Based on presentation by the author at the 2020 Pliskin Advanced Estate Planning Seminar.

At the 2019 Ohio Probate Judge's annual conference, I had the opportunity to present on the topic of resolving ambiguities in wills and trusts. From a litigation, as opposed to drafting, perspective, my research revealed an interesting divergence as to how wills can be reformed, versus trust in the resolution of ambiguities. The divergence of the legal principles led to some interesting conversations with the probate judges: what is ambiguous to one judge might not be ambiguous to another. The law on ambiguities is complex, apparently amorphous, and shifts depending on how one views the world in terms of what might be ambiguous. While good advocacy will help convince a court of the existence of an ambiguity, a judge comes to the table with her own experiences and beliefs that can impact a decision. The question to explore with the Ohio probate judges was whether a real-life example of an ambiguity claim would yield different results depending on the venue of the action. It was not surprising to find that different judges held different opinions on the primary question: is the term ambiguous. The significance is that in one court, at least with one example, a judge might find ambiguity and allow extrinsic evidence. But in another court, the plain meaning rule would operate as a bar to extrinsic evidence because the judge could discern no ambiguity on the grounds of various rules of construction. The question of whether Ohio should continue to adhere to the historic and rigid plain meaning rule comes down to the simple question of whether courts should strive to find actual intent (via extrinsic evidence) versus attributed intent. Considering that there are 88 probate courts in Ohio, if there is such a divergence on whether an ambiguity exists in the first place, the failure to allow (reliable) extrinsic evidence is, in my view, a disservice to the testator, whose will we are actually interpreting.

The concept of actual versus attributed intent was tackled by the reporters in the Restatement (Third) of Donative Instruments, and was further adopted into the Uniform Trust Code, with the provisions making it into the Ohio Trust Code ("OTC") enacted in 2007. For trusts at least, Ohio has modernized the question of resolving ambiguity. It has opted for the ability to reform and rewrite trusts to conform to settlor intent, even if there is no ambiguity. Given that both wills and trusts provide a vehicle to transfer wealth, it is difficult to discern a reason why the probate courts resort to no extrinsic evidence absent an ambiguity when a will is being interpreted, but the rules allow extrinsic evidence to interpret trusts regardless of whether the trust language is ambiguous. The continued adherence to the plain meaning rule as it relates to wills is more confusing when the comments under R.C. 5804.15 express the legislative intent that courts should apply the principles behind trust construction to wills: "Reformation of inter-vivos instruments to correct a mistake of law or fact is a long-established remedy. Restatement (Third) of Property: Donative Transfers, Section 12.1 (Tentative Draft No. 1, approved 1995), which this section copies, clarifies that this doctrine also applies to wills." [1]

Despite the clear trend to modernize the way courts intuit settlor intent and the persuasive commentary suggesting the rules of will construction should be modernized in Ohio, several Ohio will construction cases continue to resort to the plain meaning rule without citing to the OTC comment. In *Belardo v. Belardo*, [2] a 2010 case, the Eighth District Court of Appeals followed the plain meaning rule, barring extrinsic evidence of testator intent. The court applied the rule of construction under which the testator was presumed to know the existence of Ohio's anti-lapse statute. [3] In *Belardo*, the battle was a typical all-or-nothing

proposition: either the person claiming the ambiguity would inherit or he would not. When the testator executed his will on March 12, 1985, his wife and two sons were alive. The will left the entire estate to his wife, Josephine, and provided that in the event she should predecease him, the estate was to pass "to my beloved sons, John Salvatore Belardo and James Charles Belardo, share and share alike, absolutely and in fee simple." At the time of Belardo's death on July 13, 2008, Josephine and James had predeceased him, leaving John as the only named beneficiary still living. The question was whether James' son would inherit under the anti-lapse statute, with the alleged ambiguity being whether the intent of the testator was to provide for the survivor of the two children to receive all.[4] The will failed to include survivorship language.[5]

The *Belardo* court held that the probate court may consider extrinsic evidence to determine the testator's intent only when the express language of the will creates doubt as to its meaning. When the language of the will is clear and unambiguous, the testator's intent must be ascertained from the express terms of the will itself.[6] Under this rule of construction, it would not matter that the testator told his lawyer, *hypothetically*, that he wanted the survivor of his two children to take all. It further wouldn't matter if the scrivener lacked any knowledge of the existence of the anti-lapse statute or the requirement of the use of survivorship language to avoid a per-stirpes distribution. This is a problem that becomes more apparent considering that with Ohio's aging population, more lawyers are venturing into the field of estate planning, and a subset of those lawyers are not fully up to speed on the sophisticated rules of interpretation or may not be skilled in drafting donative instruments.

Because the *Belardo* appellate record does not detail what the testator "actually" intended, it is difficult to discern whether the plain meaning rule led to an unjust result. Nonetheless, "[b]ecause the plain meaning rule often excludes consideration of evidence of the testator's intent*, the Restatement (Third) of Property: Wills and Other Donative Transfers* distinguishes between a testator's actual intent and his attributed intent: 'The donor's intention is sometimes referred to in this restatement as the donor's actual intention, in order to contrast it with the intention that is attributed to the donor by an applicable constructional preference or rule of construction.' "[7]

The famous case of *Mahoney v. Grainger*[8] provides a frustrating example as to how the plain meaning rule can lead to a result that runs afoul of actual testator intent. In *Grainger*, the Supreme Court of Massachusetts was faced with the question of who the testator wanted to inherit the residue of her estate. Pitted against each other were the end-of-the-line potential beneficiaries in an all-or-nothing battle for the money. While alive, the testator sat with her attorney and had a typical discussion about her will. The scrivener requested of his ailing client, ["to whom do you want to leave the rest of your property? Who are your nearest relatives?"]. To which the testator replied: "I've got about twenty-five first cousins … let them share it equally." On those instructions, the lawyer wrote:

> "All the rest and residue of my estate, both real and personal property, I give, demise and bequeath to my heirs at law living at the time of my decease, absolutely; to be divided among them equally, share and share alike … ."[9]

The *Grainger* court affirmed the trial court's judgment in favor of the aunt, noting that the trial court held that the "statements of the testatrix were admissible only in so far as they tended to give evidence of the material circumstances surrounding the testatrix at the time of the execution of the will: that the words heirs at law were words in common use, susceptible of application to one or many: that when applied to the special circumstances of this case that the testatrix had but one heir … ."[10] The *Grainger* court went on to hold that "the fact that [a will] is not in conformity to the instructions given to the draftsman who prepared it or that he made a mistake does not authorize a court to reform or alter it or remold it with amendments. The will must be construed as it came in the hands of the [testator]."[11] In *Grainger*, the plain meaning rule created a palpable injustice to the intent of the testator.

The modern interpretive trend stands as a refreshing rebuke to the rigid rules employed in *Grainger*. "… [T]he law of will interpretation has gradually evolved from a stiff and often artificial formalism to an almost organic approach to interpretation that extols the quest for the testator's intention. Courts today, seeking to temper technical rigidity, contemplate a reduced role for the application of rules of construction in the wills context, with the trend toward admitting extrinsic evidence to cure a multiplicity of ills in wills. In the course of this evolution … the rules governing the admission of extrinsic evidence have been increasingly relaxed and refined. Modern codifications of will interpretation methods are remarkably brief and appear to have abandoned any pretense that a will's meaning can be divined though the mere application of a series of formalistic rules."[12]

In the face of the "modern trend" and decades post *Grainger*, Ohio demonstrated through *Bolardo* in 2010, and then in 2017 in *Baker v. Bogar*, [13] that the plain meaning rule has staying power.

Until the jurisprudence surrounding will interpretation catches up with the enactment of the OTC, Ohio courts and parties are left with a difficult to manage set of rules that rely on the venue in which a claim is pursued. They have no predictability as to when a judge may find an ambiguity. How is it that two people, viewing the same language, can come to different opinions as to whether an ambiguity exists? In his "immensely influential critique of the no-extrinsic-evidence rule … . Wigmore argued that any effort to limit the proofs to the words of a document runs afoul of the 'truth … that words *always* need interpretation … .' Wigmore coined the famous phrase that 'the plain meaning' … is simply the meaning of the people who did *not* write the document.' " [14] In Ohio, at least for the present time, if forced to litigate a question of the intent of words or phrases within a will, an advocate should come prepared to argue (a) that the enactment of the OTC demonstrated the legislative intent to modernize the rules of interpretation; and short success on that argument, (b) that extrinsic evidence is needed to resolve an ambiguity.

Ambiguities in will construction cases can be either patent or latent. "A latent ambiguity is one where the terms of the will appear clear and without ambiguity, but those terms yield more than one meaning once the extrinsic evidence is admitted." [15] The seminal case on the subject is *Patch v. White*. [16] This case arose from an action in ejectment and surrounded the interpretation of a bequest in a will. The will provided for certain real property to transfer to the testator's nephew, Henry. But the decedent never owned the property that was identified under the will. The decedent, however, did own property that was very similar to the property identified in the transfer to Henry. The only difference between the two was the lot number identified. If the incorrect lot number was replaced with the correct lot number, Henry would receive the bequest. The ambiguity existed because when it was attempted to give meaning to the will, it was discovered that there was no such lot number. [17] To get to the point where Henry would inherit, in a 5-4 decision, the United States Supreme Court concluded, "[i]t is settled doctrine that, as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence." [18]

A patent ambiguity, on the other hand, arises from a contradiction within the document itself or where a term in a will could yield several meanings. "A patent ambiguity is one which appears on the face of the language or the instrument; as occurs when the expressions of the language or instrument are so defective that a court which is obligated to place a construction upon them cannot, placing itself in the situation of the one making them, ascertain therefrom his intention. … extrinsic evidence can not be used, and is not proper, where the instrument or language upon its face shows no uncertainty of intention; but where it is insensible unless this borrowed light is thrown upon it, the same may be resorted to in order to ascertain the intention of the one making the instrument." [19] Historically, however, the rule of construction required a patent ambiguity to be resolved from the document itself, not from extrinsic evidence. It is believed that an ambiguity that appears in the writing can be cured only from the writing itself. [20]

With these rules in mind, it is interesting to consider as an example the will of Hobert Arledge. This was the example presented to the Ohio probate judges. In his will, Hobert stated the following: "I give and devise all my real estate, wheresoever situate[sic] to William I. Arledge and Wanda Jean Arledge, or the survivor, for and during their natural life, and upon the death of both William L. Arledge and Wanda Jean Arledge, I give and devise the fee simple title to their children, share and share alike." [21] Wanda and William had two children who were the issue of their marriage, Defendants William Jr., and Tamra. Wanda had two additional children born prior to her marriage to William L. Arledge, Defendants Rhonda and Terry. Both Wanda and her Husband William predeceased the testator. The trial court held: "it is the duty of this Court to interpret the will of Hobert Arledge and not make a new one. The Court must attempt to ascertain and carry out the intention of the Testator. Words used in a will are to be construed according to their ordinary use and meaning. If language in a will is plain and its meaning obvious the Court cannot qualify by conjecture and doubt from extraneous facts. The general rule is that the term 'children' does not include stepchildren but is subject to the intent of the testator. (internal cite omitted). The Court finds that the ordinary use and meaning of the pronoun 'their' is of or belonging to them or belonging to or connected with them. Based on the principles and law outlined herein, the Court finds 'their children' in item 3 of the Last Will and Testament of Hobert Arledge is construed to mean the children born issue of the marriage of William L. Arledge and William L. Arledge." [22]

In making this finding, the probate judge acknowledged that the evidence indicated the testator treated all of the children (step and issue) like his own children. Thus, it was the implication of the plain meaning of the word "their" that led to the conclusion that the step children would not inherit. This 2019 will interpretation case demonstrates that the forms of construction are paramount to "actual intent," and that the interpretive goal in this circumstance was to find "attributed intent." Would the same

result have occurred had the will been admitted in a different county? Assuming the testator loved and treated all four children (whether step-children to William or issue of both William and Wanda), it is reasonable to assume that the testator intended to distribute to all four children.

Would the result be different if the challenged instrument was a trust instead of a will? According to the comments to R.C. 5804.15, the section applies whether there is a mistake of expression or of inducement: "A mistake of expression occurs when the terms of the trust misstate the settlor's intention [like *Grainger*, perhaps?], fail to include a term that was intended to be included [like perhaps *step*, as in step children]. A mistake of inducement occurs when the terms of the trust accurately reflect what the settlor intended to be included or excluded but this intention was based on a mistake of fact or law [like lack of knowledge of the anti-lapse statute in *Bolander* perhaps?]."[23] The Restatement (Third) of Donative Transfers speaks to the concept of finding actual intent as being a lofty and reachable goal. To get to actual intent, Ohio must abandon the old and formulaic reliance on rules of construction that can do no more than attribute intent of the testator, regardless of what the testator actually wanted.

Footnotes

a0 Reminger Co., L.P.A.
Cleveland, Ohio

1 R.C. 5804.15, Official Comment.

2 Belardo v. Belardo, 187 Ohio App. 3d 9, 2010-Ohio-1758, 930 N.E.2d 862 (8th Dist. Cuyahoga County 2010).

3 Belardo v. Belardo, 187 Ohio App. 3d 9, 2010-Ohio-1758, ¶ 22, 930 N.E.2d 862, 867 (8th Dist. Cuyahoga County 2010).

4 Belardo v. Belardo, 187 Ohio App. 3d 9, 2010-Ohio-1758, ¶¶ 2-4, 930 N.E.2d 862, 864 (8th Dist. Cuyahoga County 2010).

5 Belardo v. Belardo, 187 Ohio App. 3d 9, 2010-Ohio-1758, ¶ 22, 930 N.E.2d 862, 867 (8th Dist. Cuyahoga County 2010).

6 Belardo v. Belardo, 187 Ohio App. 3d 9, 2010-Ohio-1758, ¶ 8, 930 N.E.2d 862, 864-65 (8th Dist. Cuyahoga County 2010).

7 Fred Franke and Anna Katherine Moody, *The Terms of the Trust: Extrinsic Evidence of Settlor Intent,* 40 ACTEC Law Journal 1 (2014) quoting Restatement of the Law 3d, Property, Wills and Other Donative Transfers, Section 10.2, Comment a (2003).

8 Mahoney v. Grainger, 283 Mass. 189, 186 N.E. 86 (1933).

9 Mahoney v. Grainger, 283 Mass. 189, 190, 186 N.E. 86 (1933).

10 Mahoney v. Grainger, 283 Mass. 189, 191, 186 N.E. 86 (1933).

11 Mahoney v. Grainger, 283 Mass. 189, 191, 186 N.E. 86, 97 (1933).

12 Richard F. Sorrow, *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction*, 56 Case W. Res. 65, 66 (2005).

13 Bogar v. Baker, 2017-Ohio-7766, 97 N.E.3d 1109 (Ohio Ct. App. 7th Dist. Mahoning County 2017).

14 John H. Langbein and Lawrence Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. Pa. L. Rev. 521, 526 (1982) (emphasis in original).

15 Franke and Moody, *supra* note 8, at 10.

16 Patch v. White, 117 U.S. 210, 6 S. Ct. 710, 29 L. Ed. 860 (1886).

17 Patch v. White, 117 U.S. 210, 212-213, 6 S. Ct. 710, 29 L. Ed. 860 (1886).

18 Patch v. White, 117 U.S. 210, 217, 6 S. Ct. 710, 29 L. Ed. 860 (1886).

19 Mateer v. Croft, 6 Ohio App. 13, 29 Ohio C.D. 9, 1915 WL 867 (5th Dist. Morrow County 1915).

20 Angela M. Vallario, *Shape up or Ship out: Accountability to Third Parties for Patent Ambiguities in Testamentary Documents*, 26 Whittier L. Rev. 59, 67-68 (2004).

21 *In the Matter of Robert Arledge*, Highland C.P. No. 1971666A (April 28, 2019).

22 *In the Matter of Robert Arledge*, Highland C.P. No. 1971666A (April 28, 2019)

23 R.C. 5804.15, Official Comment.

End of Document