

[Cite as *Will v. Rokus*, 2009-Ohio-3948.]

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

MONTFORD S. WILL, EXECUTOR OF :
THE ESTATE OF
MARY E. PETTICREW

Plaintiff-Appellee : C.A. CASE NO. 08CA0113

vs. : T.C. CASE NO. 20080090

LORI ROKUS, et al. : (Civil Appeal from
Common Pleas Court)

Defendants-Appellants :

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O P I N I O N

Rendered on the 7th day of August, 2009.

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GRADY, J.:

{¶ 1} This is an appeal from a summary judgment granted by
the probate court in an action to construe the terms of a last
will and testament.

{¶ 2} Mary E. Petticrew died on February 8, 2008. Her last will and testament was thereafter admitted for probate. The will contains twenty-three specific bequests and the following residual clause:

{¶ 3} "ITEM X: All the rest and residue of the property which I may own at the time of my decease, real and personal, or mixed, tangible and intangible, of whatsoever nature and wheresoever situated, including all the property which I may acquire or become entitled to after the execution of this Will, including all lapsed legacies and devises, I GIVE, BEQUEATH AND DEVISE to the STANLEY S. PETTICREW AND MARY E. PETTICREW FOUNDATION, which will be created by separate instrument for the charitable uses and purposes set forth in said instrument.

{¶ 4} "The original Trustee of said foundation shall be MONTFORD S. WILL, whom shall, if he accepts the Trust, be governed by said instrument of Trust in the management and distribution of the income together with the assets as set forth in said instrument of Trust."

{¶ 5} Stanley S. Petticrew was the late husband of Mary E. Petticrew and was deceased when she executed her last will and testament in 1987. It is undisputed that, thereafter, Mary E. Petticrew did not execute any separate instrument creating the Stanley S. Petticrew and Mary E. Petticrew Foundation to

which Item X of her will refers. It is also undisputed that should the bequest made in Item X lapse, the property therein bequeathed will pass to Mary E. Petticrew's son, Thomas S. Flegge, as though she had died intestate, pursuant to the Statute of Descent and Distribution. R.C. 2105.06.

{¶ 6} The executor of Petticrew's estate commenced an action asking the Probate Court to construe Item X of her will and to answer the following question: "[i]s the rest and residue to be distributed pursuant to the law of intestate succession . . . or will the Court imply/create an entity to carry out the unstated charitable purpose with the named Trustee, Montford S. Will?"

{¶ 7} The Attorney General was made a party to the action pursuant to R.C. 2109.34. Thomas Flegge was also a party. Following evidentiary hearing, the parties each filed motions for summary judgment. The probate court granted the Attorney General's motion on a finding that Item X of Petticrew's will created a charitable trust. Flegge appeals.

ASSIGNMENT OF ERROR

{¶ 8} "THE CLARK COUNTY PROBATE COURT ERRED IN GRANTING THE MOTION OF DEFENDANT NANCY H. ROGERS, ATTORNEY GENERAL OF OHIO, FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANT THOMAS STANLEY FLEGGE'S CROSS-MOTION FOR SUMMARY JUDGMENT."

{¶ 9} Summary judgment may not be granted unless the entire record demonstrates that there is no genuine issue of material fact and that the moving party is, on that record, entitled to judgment as a matter of law. Civ.R. 56. On appeal, the issues of law are reviewed de novo. *Navilar v. Osborn* (1998), 127 Ohio App.3d 1.

{¶ 10} "In an action to construe a will, the sole function of the court is to ascertain and give effect to the intention of the testator. Such intention must be ascertained from the words used in the will by giving to such words their usual and ordinary meaning." *Findley v. City of Conneaut* (1945), 145 Ohio St. 480, at paragraph three of the Syllabus. Every phrase must be given its ordinary meaning, and the court cannot add to or detract from the language the testator used. *Wittenberg University v. Waterworth* (1984), 13 Ohio App.3d 452. "The language intentionally used in a will is presumed to have been placed there for a purpose and cannot arbitrarily be ignored." *First Troy National Bank and Trust Co. v. Holder* (1959), 109 Ohio App. 445, 455.

{¶ 11} The requirements for creation of a trust are established by R.C. 5804.02(A), which provides, in pertinent part:

{¶ 12} "A trust is created only if all of the following apply:

{¶ 13} "(1) The settlor of the trust, other than the settlor of a trust created by a court order, has capacity to create a trust.

{¶ 14} "(2) The settlor of the trust, other than the settlor of a trust created by a court order, indicates an intention to create the trust.

{¶ 15} "(3) The trust has a definite beneficiary or is one of the following:

{¶ 16} "(a) A charitable trust."

{¶ 17} "'Charitable trust' means any fiduciary relationship with respect to property arising under the law of this state or of another jurisdiction as a result of a manifestation of intention to create it, and subjecting the person by whom the property is held to fiduciary duties to deal with the property within this state for any charitable, religious, or educational purpose." R.C. 109.23(A). "If the terms of a charitable trust do not indicate a particular charitable purpose or beneficiary, the court may select one or more charitable purposes or beneficiaries. The selection must be consistent with the settlor's intention to the extent it can be ascertained." R.C. 5804.05(B).

{¶ 18} It is undisputed that Mary Petticrew had the capacity to create a trust when she executed her last will and testament.

Further, the bequest she made in Item X of her will states that the property bequeathed shall be used for charitable purposes. The issue is whether Petticrew indicated an intention to create the trust, when she did not execute a separate instrument she specified would be necessary to create the Stanley S. Petticrew And Mary E. Petticrew Foundation.

{¶ 19} The probate court found that Petticrew indicated an intention to create the trust because she anticipated that she would execute the separate instrument necessary to create the Stanley S. Petticrew And Mary E. Petticrew Foundation, and that "[h]ad she intended this creation to be mandatory as a pre-condition to the bequest remaining charitable in nature, the Court would have expected such terms as 'shall,' 'solely,' 'only,' or 'conditioned upon' to have been employed. These terms, however, do not therein appear. As such, Petticrew did not condition her charitable bequest upon creation of a trust by separate instrument." (Decision-Entry, November 17, 2008, p. 5).

{¶ 20} The language that Petticrew used in Item X is clear and unambiguous, and the trial court's analysis improperly adds to it to determine her intention. *Wittenberg University v. Waterworth*. Further, the court erred in finding that Petticrew indicated her intention to create a trust by and through what

the court termed her "anticipatory act and/or an intention to act." (Decision and Entry, p. 4).

{¶ 21} The intention to create a trust that R.C. 5804.02(A) requires is the settlor's present intention to create a trust, concurrent in time with the settlor's indication of that intention or subsequently, upon the happening of a condition precedent specified by the settlor. A condition precedent is "[a]n act or event, other than a lapse of time, that must exist or occur before a duty to do something promised arises. If the condition does not occur and is not excused, the promised performance need not be rendered." Black's Law Dictionary (7 Rev.Ed. 1999) 289

{¶ 22} The specification in Item X of Mary E. Petticrew's will that the Stanley S. Petticrew and Mary E. Petticrew Foundation, to which the bequest is therein made, would be created by an instrument separate from her will and executed by Mary E. Petticrew operates as a condition precedent to creation of a trust that Item X indicated Mary Petticrew intended would result from that further act on her part. Because Mary E. Petticrew never executed such an instrument, which Item X identifies as "said instrument of Trust," Item X of her will is insufficient, standing alone, to indicate the intention to create a trust that R.C. 5408.02(A)(2) requires.

{¶ 23} Item X also specifies that the "charitable uses and purposes" of the trust created by the separate instrument Mary E. Petticrew would execute would be "set forth in said instrument," and that the trustee shall "be governed by said instrument of Trust in the management and distribution of the income together with the assets as set forth in said instrument of Trust."

{¶ 24} The referenced separate trust instrument that Item X states would identify the charitable uses and purposes of the trust was never executed by Mary Petticrew, and Petticrew's will fails to indicate any charitable purpose the trust must serve. R.C. 5804.05(B) authorizes the probate court to select one or more charitable purposes or beneficiaries in that circumstance, "consistent with the settlor's intention to the extent it can be ascertained." When, as here, the settlor fails to state any intention that can be ascertained, the intended charitable trust fails. Restatement of the Law (Second) - Trust, §395, Comment a. That prior failure prevents the court from acting pursuant to R.C. 5804.05(B) to itself select any charitable purposes or beneficiaries when none are indicated by the settlor.

{¶ 25} Charitable trusts are favored in the law. However, the language Mary E. Petticrew intentionally used in Item X

of her will cannot arbitrarily be ignored. *First National Bank and Trust Co.* From that language, which is plain and unequivocal, we find that Mary E. Petticrew reserved to herself, by and through her future execution of a separate document creating the Stanley S. Petticrew And Mary E. Petticrew Foundation, the power to create the charitable trust she intended by the terms of her will would result from her performance of that further act. The probate court therefore erred in granting the summary judgment on the motion of the Attorney General.

{¶ 26} The assignment of error is sustained. The summary judgment from which the appeal is taken will be reversed and vacated, and the case will be remanded for further proceedings consistent with this opinion.

FROELICH, J. And WOLFF, J., concur.

(Hon. William H. Wolff, Jr., retired from the Second District, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

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