[Cite as *Barr v. Jackson*, 2009-Ohio-5135.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CAROL BARR, CO-EXECUTOR	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
WILLIAM D. JACKSON, JR.	:	Case No. 08 CAF 09 0056
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	On Appeal from the Delaware County Court of Common Pleas, Probate Division, Case No. 205612-A
JUDGMENT:	REVERSED AND REMANDED
DATE OF JUDGMENT ENTRY:	September 28, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JEFFREY D. EVANS 15 W. Ottawa Street Richwood, OH 43344	STEVEN D. ROWE ERICA ANN PROBST 88 West Mound Street Columbus, OH 43215

Delaney, J.

{¶1} Defendant-Appellant William D. Jackson, Jr. appeals the August 22, 2008 judgment of the Delaware County Court of Common Pleas, Probate Division. Plaintiff-Appellee is Carol Barr.

STATEMENT OF THE FACTS AND THE CASE

{¶2} Appellant and Appellee are the children of the decedent, William D. Jackson, Sr. On May 19, 2003, William D. Jackson, Sr. ("Testator") executed his Last Will and Testament, naming Appellant and Appellee co-executors. In his Will, the Testator made specific bequests:

{¶3} "**ITEM V**: I give, devise and bequeath any interest I may own in my business known as J & J Realty Company to my **Son, William Jackson, Jr.** if he survives me provided, however, that such interest shall only pass to him if he pays to my **Daughter, Carol Barr**, *per stirpes* the sum of Forty-three thousand Seven hundred Fifty dollars ($43,750.00) representing what I believe to be the reasonable value of one fourth of such business.

{¶4} "**ITEM VI**: I give, devise and bequeath any interest I may own in my business known as J & J Carpet, Inc. to my **Son, William Jackson, Jr.** if he survives me provided, however, that such interest shall only pass to him if he pays to my **Daughter, Carol Barr** *per stirpes* the sum of Twenty-four thousand Six hundred Fifty dollars ($24,650.00) representing what I believe to be the reasonable value of one fourth of such business."

{¶5} As to the residue and remainder of the Testator's property, his Will stated as follows:

{¶6} "**ITEM X**: All the rest residue and remainder of the property which I may own at the time of my death, real, personal and mixed, tangible and intangible, of whatsoever nature and wheresoever situated, including all lapsed legacies and devises, including all property which I may acquire or become entitled to after the execution of this Will, I give, devise and bequeath:

{¶7} "a. one half (1/2) to my **Son, William Jackson, Jr.** *per stirpes,*

{¶8} "b. one half (1/2) to my **Daughter, Carol Barr** *per stirpes*."

{¶9} The Testator filed a Complaint with the Delaware County Court of Common Pleas, Probate Division on February 15, 2005 requesting the court determine the validity of his Will. The trial court in the present case states in its August 22, 2008 judgment entry that the Will was determined to be valid.[1]

{¶10} On March 17, 2005, the Testator sold his shares in both J & J Realty, Inc. and J & J Carpet, Inc. to Appellant through two Agreements to Sell Stock. The Agreement to Sell Stock in regards to J & J Realty, Inc. stated in pertinent part as follows:

{¶11} "**WHEREAS**, both shareholders having become aware that William D. Jackson, Sr. desires as expressed in his *Last Will and Testament*, to ultimately provide some portion of payment to his daughter as further recited in the *Will*, the provision indicating that the amount to be transferred to his Daughter, Carol Barr if she survives him is the sum of forty three thousand seven hundred fifty dollars ($43,750.00).

{¶12} "**WHEREAS**, William D. Jackson, Jr. is willing to acquire such stock, consent to the purchase from William D. Jackson, Sr., and further consent to an

[1] There is no evidence in the record regarding the trial court's prior determination of the validity of the Testator's will under Case No. 205064-C.

assignment of such *Note* to Carol Barr if William D. Jackson, Sr., so desires, the following agreement is made:

{¶13} "* * *

{¶14} "2. **Reference to Will**: William Jackson, Sr. has disclosed to William D. Jackson, Jr. the terms of **Item VI** [sic] of his *Last Will and Testament* dated May 19, 2003 and it is the intention of William D. Jackson, Sr. by this agreement and concurrent assignment of stock to satisfy and complete such **Item VI** [sic] of his *Last Will and Testament* such that he has no further interest in the company.

{¶15} "3. **Price**: The price for purchase of such interest in J & J Realty, Inc. will total the sum of forty three thousand seven hundred fifty dollars ($43,750.00). The price shall be paid pursuant to the provisions of a *Promissory Note* executed concurrent with this agreement bearing interest at the rate of six percent (6%) per annum payable over five annual installments as otherwise set forth in such Note.

{¶16} "4. **Resignation:** Concurrent with the execution of this agreement and assignment of stock, the undersigned William D. Jackson, Sr. resigns as an officer and Director of the company. The undersigns further acknowledge that all equity interests or shares of stock or any other interest in the company has by this agreement and assignment of stock been transferred to William D. Jackson, Jr."

{¶17} The Agreement to Sell Stock in regards to J & J Carpet, Inc. contained the following relevant language:

{¶18} "**WHEREAS**, both shareholders having become aware that William D. Jackson, Sr. desires as expressed in his *Last Will and Testament*, to ultimately provide some portion of payment to his daughter as further recited in the *Will*, the provision

indicating that the amount to be transferred to his Daughter, Carol Barr if she survives him is the sum of twenty four thousand six hundred fifty dollars ($24,650.00).

{¶19} "**WHEREAS**, William D. Jackson, Jr. is willing to acquire such stock, consent to the purchase from William D. Jackson, Sr., and further consent to an assignment of such *Note* to Carol Barr if William D. Jackson, Sr., so desires, the following agreement is made:

{¶20} "* * *

{¶21} "2. **Reference to Will**: William Jackson, Sr. has disclosed to William D. Jackson, Jr. the terms of **Item VI** of his *Last Will and Testament* dated May 19, 2003 and it is the intention of William D. Jackson, Sr. by this agreement and concurrent assignment of stock to satisfy and complete such **Item VI** of his *Last Will and Testament* such that he has no further interest in the company.

{¶22} "3. **Price**: The price for purchase of such interest in J & J Carpet, Inc. will total the sum of twenty four thousand six hundred fifty dollars ($24,650.00). The price shall be paid pursuant to the provisions of a *Promissory Note* executed concurrent with this agreement bearing interest at the rate of six percent (6%) per annum payable over five annual installments as otherwise set forth in such Note.

{¶23} "4. **Resignation:** Concurrent with the execution of this agreement and assignment of stock, the undersigned William D. Jackson, Sr. resigns as an officer and Director of the company. The undersigns further acknowledge that all equity interests or shares of stock or any other interest in the company has by this agreement and assignment of stock been transferred to William D. Jackson, Jr."

{¶24} Concurrent to the Agreements to Sell Stock, the Testator and Appellant executed two Promissory Notes reflecting the terms of the Agreements. In the Promissory Notes, Appellant promised to pay the Testator five equal annual installments as consideration for the transfer of all of the Testator's interest in the corporations. The Promissory Notes also stated, "The undersigned executes this instrument having acknowledged receipt of the stock in J & J Realty, Inc. [and J & J Carpet, Inc.] and acknowledging that the holder has represented that such sum is intended to satisfy **Item VI** of his *Last Will and Testament* dated May 19, 2003." The Promissory Notes did not state they were secured by the stocks; if Appellant failed to make payments when due, the holder of the Note could call the entire principal balance due.

{¶25} The Testator passed away on October 5, 2005.

{¶26} Under Case No. 205612-E, the Testator's Estate was admitted to probate. On February 1, 2006, an Inventory and Appraisal of the Decedent's Estate was filed and a Schedule of Assets was attached. According to the Schedule of Assets, the Promissory Notes were included as the Testator's property existing at the time of his death.

{¶27} On May 9, 2007, Appellee filed a Complaint for Construction of Will by Fiduciary in the Delaware County Court of Common Pleas, Probate Division. Appellee and Appellant were named as Defendants as they were the co-executors of the Will. In her Complaint, Appellee requested the trial court determine the construction of Items V and VI of the Testator's Will in relation to the Promissory Notes executed on March 17, 2005. Specifically, Appellee argued that the Promissory Notes should be considered

specific bequests to Appellee under an interpretation of Items V and VI, as opposed to considering them to be property of the residue to be distributed per the terms of Item X of the Will.

{¶28} The trial court held a hearing on the matter on January 9, 2008. At the hearing, the trial court admitted into evidence over Appellant's objection the Promissory Notes and the Agreements to Sell Stock. The trial court issued its judgment entry on August 22, 2008. In its entry, the trial court found the Testator's Will to be unambiguous; but when the Will was read in conjunction with the Promissory Notes and Agreements to Sell Stock, the trial court found latent ambiguities in the Will. In order to determine the testator's intent, the trial court looked to the extrinsic evidence to find that the Promissory Notes were not part of the residue of the Estate. The trial court found that the Promissory Notes were specifically bequeathed to Appellee as a beneficiary under the Will.

{¶29} It is from this judgment Appellant now appeals.

{¶30} Appellant raises two Assignments of Error:

{¶31} "I. THE ORDER OF THE PROBATE COURT IS INCORRECT AS A MATTER OF LAW BECAUSE THE NOTES INCLUDED IN THE ESTATE INVENTORY ARE BY THE TERMS OF THE WILL PART OF THE RESIDUE OF THE ESTATE. [EXHIBIT A AUGUST 22, 2008 JUDGMENT ENTRY PG. 3].

{¶32} "II. THE ORDER OF THE PROBATE COURT ADMITTING THE EXTRINSIC DOCUMENTS INTO EVIDENCE IS INCORRECT AS A MATTER OF LAW. [EXHIBIT C FEBRUARY 1 (SIC) 2008 JUDGMENT ENTRY PG. 1]."

I, II

{¶33} We will address Appellant's Assignments of Error simultaneously as they set forth related issues regarding the interpretation of the Testator's will. It is well settled that the construction of a will is a question of law and thus, we will apply a *de novo* standard of review. *Vaughn v. Huntington Natl. Bank Trust Div*., Tuscarawas App. No. 2008 AP 03 0023, 2009-Ohio-598, ¶19. The most fundamental tenet for the construction of a will mandates that the court ascertain and carry out, within the bounds of the law, the intent of the testator. *Domo v. McCarthy* (1993), 66 Ohio St.3d 312, 314, 612 N.E.2d 706, 708.

{¶34} In the case of *Townsend's Ex'rs. v. Townsend* (1874), 25 Ohio St. 477, the Ohio Supreme Court set forth four rules to be followed when construing the language of a will to determine the testator's intent. These rules are as follows: (1) In the construction of a will, the sole purpose of the court should be to ascertain and carry out the intention of the testator; (2) Such intention must be ascertained from the words contained in the will; (3) The words contained in the will, if technical, must be taken in their technical sense, and if not technical, in their ordinary sense, unless it appear[s] from the context that they were used by the testator in some secondary sense; (4) All the parts of the will must be considered together, and effect, if possible, given to every word contained in it. *Id.* at paragraphs one, two, three and four of the syllabus. *Vaughn,* supra.

{¶35} If the language of the will is clear and unambiguous, the testator's intent must be ascertained from the express terms of the will itself. *Domo*, supra at 314. The court may consider extrinsic evidence to determine the testator's intention only when the

language used in the will creates doubt as to the meaning of the will. *Oliver v. Bank One, Dayton, N.A*. (1991), 60 Ohio St.3d 32,34, 573 N.E.2d 55 citing *Sandy v. Mouhot* (1982), 1 Ohio St.3d 143, 145, 1 OBR 178, 180, 438 N.E.2d 117, 118; *Wills v. Union Savings & Trust Co.* (1982), 69 Ohio St.2d 382, 23 O.O.3d 350, 433 N.E.2d 152, paragraph two of the syllabus.

{¶36} In the present case, the trial court found that the Will itself was unambiguous, but upon review of the Promissory Notes and Agreements to Sell Stock, a latent ambiguity appeared as to the construction of Items V and VI. A latent ambiguity is one that is not apparent from the language used or from the face of the instrument. *Conkle v. Conkle* (1972), 31 Ohio App.2d 44, 285 N.E.2d 883. A latent ambiguity can arise even if the language of the instrument is unambiguous and suggests only a single meaning, but some extrinsic fact or evidence creates the necessity for interpretation or a choice between two or more possible meanings, or if the words apply equally well to two or more different subjects or things. Id. Extrinsic evidence may be used to resolve a latent ambiguity in a will, "and aid in the interpretation or application of the will." Id. Where there is a latent ambiguity appearing in a will, extrinsic evidence is admissible, not for the purpose of showing the testator's intention, but to assist the court to better interpret that intention from the language used in the will. *Shay v. Herman* (1948), 85 Ohio App. 441, 83 N.E.2d 237. Since a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by such evidence. *Conkle*, supra citing *Shay*, supra; *Kaplan v. Fair,* 6th Dist. No. L-03-1300, 2004-Ohio-3457, ¶ 20.

{¶37} Upon our *de novo* review of the matter, we disagree that Items V and VI of the Will and the related extrinsic evidence present a latent ambiguity. We find that

when Items V and VI are compared to the extrinsic evidence of the Promissory Notes and Agreements to Sell Stock, a choice between two or more possible meanings does not occur. Courts have applied latent ambiguity analysis to the construction of a will when the "will contains a misdescription of the object or subject, as where there is no such person or thing in existence, or, if in existence, the person is not the one intended, or the thing does not belong to the testator." See *Walsh v. Walsh* (1920), 13 Ohio App. 315 (testatrix bequeathed two Louisville & Nashville Railroad Bonds to her sisters, but extrinsic evidence revealed that she really owned two bonds of Newport & Covington Bridge Company which owned and leased to Louisville & Nashville Railroad); *Kaplan v. Fair*, Lucas App. No. L-03-1300, 2004-Ohio-3457 (uncontroverted extrinsic evidence, in form of affidavit from attorney of testatrix, introduced by executor of testatrix's will, established that will contained latent ambiguity in that attorney erroneously named "Joyce" Smith as testatrix's beneficiary, instead of "George" Smith, and, thus inclusion of "Joyce" Smith in will was error on part of attorney, in declaratory judgment proceeding involving construction of will).

{¶38} In the present case, we do not find a latent ambiguity to support the interpretation that the Testator intended that Appellee was to receive the executed Promissory Notes as a beneficiary. Rather we find the terms of Items V and VI of the Will to clearly and unambiguously express the Testator's testamentary intent to dispose of his interest in J & J Realty, Inc. and J & J Carpet, Inc. to Appellant upon the Testator's death, contingent upon paying Appellee a reasonable share of the business value. At the time of the Testator's death, the Testator had no interest in J & J Realty, Inc. or J & J Carpet, Inc.

{¶39} We find the case of *Church v. Morgan* (1996), 115 Ohio App.3d 477, 685 N.E.2d 809, cited by Appellant in his brief to be instructive in this matter.

{¶40} In *Church*, the testator specifically bequeathed a savings account to her niece that at the time of execution contained $94,108.25. On the same day the testator executed her will, she withdrew $90,000 from that savings account and opened a high yield certificate of deposit with the funds. The testator did not amend her testamentary dispositions or close the savings account. At the time of the testator's death, the savings account contained $4,108.25 plus interest. Id. at 482.

{¶41} The executor of the testator's estate filed a complaint for construction of the will, requesting the probate court to provide instructions as to the disposition of the certificate of deposit. Id. at 481. At the hearing, the trial court allowed the admission of extrinsic evidence to show the circumstances surrounding the $90,000 transfer of funds. The probate court held that the testator's niece was entitled to the $90,000 used to open the certificate of deposit. Id.

{¶42} Upon its *de novo* review, the Fourth District Court of Appeals reversed the decision of the trial court. It reluctantly found it was error to allow the admission of extrinsic evidence because the words of the testamentary disposition clearly and unambiguously bequeathed the savings account to the niece. The court stated:

{¶43} "Unfortunately for Fleming, the words of Lacy's will clearly and unambiguously express her testamentary intent about the disposition of her estate. The second provision of her will enumerates several specific bequests to Ms. Fleming, testator's niece, one of which states, 'I give, devise and bequeath to SPRING FLEMING * * * all funds located in the following accounts: * * * Savings Account # 72424, in my

name at Belpre Savings Bank, of Belpre, Ohio.' Since the express language contained within the four corners of this will creates no doubt as to its meaning, neither the lower court nor this court may consider any extrinsic evidence to determine Lacy's intent. At the time of testator's death, savings account No. 72424, in Lacy's name at Belpre Savings Bank in Belpre, Ohio, contained $4,108.25 plus interest. Pursuant to the express terms of the specific bequest cited above, appellee is thereby entitled to receive $4,108.25 plus interest from savings account No. 72424. See *In re Estate of Evans, supra,* 165 Ohio St. 27, 59 O.O. 43, 133 N.E.2d 128, paragraph two of the syllabus, which states:

{¶44} "'A specific bequest to a designated beneficiary of 'all cash in the box on the desk in the back room of my home' is plain and unambiguous, and such beneficiary, *on the death* of the testator, takes such amount of cash as is in the box *at that time.*' (Emphasis added.)

{¶45} "However, the executor has submitted extrinsic evidence that $90,000 was withdrawn from that account, literally within hours of the execution of the will, to fund a certificate of deposit at a higher rate of interest. Even though that extrinsic evidence might indicate that Lacy intended the $90,000 to remain part of Fleming's specific bequest, we are nevertheless bound to ignore that evidence and construe the terms of the will as written by the testator. To do otherwise would result in this court's rewriting the testator's will, an action which is clearly precluded by law. *Cleveland Trust Co. v. Frost* (1957), 166 Ohio St. 329, 2 O.O.2d 234, 142 N.E.2d 507; *Bachman v. Swearingen* (Feb. 8, 1983), Delaware App. No. 82-CA-24, unreported, 1983 WL 6369; 32 Ohio Jurisprudence 3d (1981), Decedent's Estates, Section 526." Id. at 482.

{¶46} Items V and VI of the Will clearly state that upon the Testator's death, he bequeathed any interest that he had in J & J Carpet, Inc. and J & J Realty, Inc. to Appellant. The bequests were contingent upon Appellant paying Appellee a sum of money that would represent a one-fourth share of the Testator's interest in the corporations. On March 17, 2005, the Testator and Appellant executed Agreements to Sell Stock that wholly conveyed the Testator's interest in J & J Carpet, Inc. and J & J Realty, Inc. to Appellant. At the time of the Testator's death, the Testator had no interest in J & J Carpet, Inc. or J & J Realty, Inc. We find that Items V and VI were specific bequests and the Testator's conveyance of his interest in those bequests prior to his death resulted in an ademption of the bequests.[2] *In re Moore*, Highland App. No. 03CA3, 2003-Ohio-5486, ¶ 11 citing *Gilbreath v. Alban* (1840), 10 Ohio 64.

{¶47} We find therefore the Promissory Notes in the possession of the Testator at the time of his death to be property of the residue of the Testator's Estate. The Promissory Notes should be distributed pursuant to the disposition scheme of Item X of the Will.

{¶48} Appellant's first and second Assignments of Error are sustained.

[2] The principle of ademption refers to a taking away of a specific bequest and occurs when the object of the legacy ceases to exist. *In re Estate of Hegel* (1996), 76 Ohio St.3d 476, 477, 668 N.E.2d 474.

{¶49} Accordingly, the judgment of the Delaware County Court of Common Pleas, Probate Division is reversed and the cause is remanded with instructions to the lower court to enter judgment consistent with this opinion.

By Delaney, J.

Farmer, P. J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

PAD:kgb

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

CAROL BARR, CO-EXECUTOR	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
WILLIAM D. JACKSON, JR.	:	
Defendant-Appellant	:	Case No. 08 CAF 09 0056

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Delaware County Court of Common Pleas, Probate Division is reversed and the cause is remanded with instructions to the lower court to enter judgment consistent with this opinion. Costs to Appellee.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE