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Case No. 10574-MZ

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN THE MATTER OF	)	
Trust Created Under the Will of	)	C.A. No. 10574-MZ
Harold S. Schutt	)	

MASTER'S REPORT

Date Submitted: March 1, 2017
Oral Draft Report: March 1, 2017
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Final Report: July 17, 2017

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ZURN, Master

This case presents a dispute between different branches of a testator's family as to the meaning of trust language indicating more distant, unnamed relatives would receive the trust principal before more immediate named relatives. A testator who intends to leave his estate to persons who are unidentifiable when he drafts his testamentary documents will necessarily use language requiring some interpretation to identify the eventual beneficiaries. In this case, the testator's more immediate relatives rely on that need for interpretation to assert an ambiguity that would permit them to take over the more distant relatives. I conclude that the trust language at issue is not ambiguous and expresses the testator's intent to benefit the more distant relatives. For the reasons that follow, I recommend that the immediate relatives' motion for summary judgment be denied, and the distant relatives' motion for summary judgment be granted.

I. Background

This action concerns a trust created under the will of Harold S. Schutt ("Harold") dated March 17, 1960 ("Harold's Trust").[1] Harold's Trust terminated when the last income beneficiary died without issue on June 17, 2013. Upon

[1] In my oral draft report, I erroneously referred to the operative will as having been executed in 1958. The petitioners pointed this error out on exception. I correct that error here, apologize to the parties, and assure them that the misnomer had no effect on the substance of my draft or final report.

termination of Harold's Trust, pursuant to Item VII(g)(2), the balance of the trust principal was to be paid in equal shares, per stirpes, as follows:

> to my then living issue, other than issue of my son, Charles Porter Schutt by his wife, Phyllis duPont Schutt; or in default of such issue of mine, shall pay over such principal in equal shares, per stirpes, **to the person or persons who would have been entitled to inherit the same from me under the intestate laws of the State of Delaware pertaining to personal property of mine had I died at the time intestate, unmarried, possessed of such principal and not survived by any issue of my said son Charles Porter Schutt by his wife Phyllis duPont Schutt or by my nephew, David S. Foster, or any of his issue**; or in default of such issue of mine and such persons, shall pay over such principal to the then living issue of my said son Charles Porter Schutt by his wife Phyllis duPont Schutt; or in default of such issue of mine, such persons, and such issue of my said son, shall pay over such principal to or for such charitable uses as Trustees shall in their sole discretion deem appropriate. [2]

Harold's only living issue as of June 17, 2013, when the Trust terminated, are the issue of Charles Porter Schutt by his wife, Phyllis duPont Schutt ("CPS Beneficiaries"). Petitioners in this action are all CPS Beneficiaries. Respondents are members of the class Harold defined as "the person or persons who would have been entitled to inherit the same from me under the intestate laws of the State of Delaware," who I will refer to as "Intestate Beneficiaries." The Intestate Beneficiaries are the issue of Harold's first cousins.[3]

[2] Pet'rs Op. Br. Summ. J. Ex. A (emphasis added).
[3] Resp'ts Op. Br. Summ. J. 13.

On January 22, 2015, petitioners filed a Verified Petition for Instructions explaining that the trustees of Harold's Trust were attempting to identify Intestate Beneficiaries, and asked the Court to direct distribution of the Trust principal to the CPS Beneficiaries. The trustees identified potential Intestate Beneficiaries, and several entered their appearance. On May 7, 2015, the CPS Beneficiaries filed an amended petition, naming Intestate Beneficiaries as respondents and again asking the Court to distribute the Trust principal to the CPS Beneficiaries. On June 8, 2015, the co-trustees filed an answer to the amended petition and asked the Court not to distribute the principal as the CPS Beneficiaries requested. Notice was given to additional potential Intestate Beneficiaries, and a larger group of Intestate Beneficiaries answered the amended petition and asked the Court to order distribution of the principal under Delaware's intestacy laws were Harold not survived by any CPS Beneficiaries. The parties proceeded to discovery.

The CPS Beneficiaries filed a motion for summary judgment on November 28, 2016, and the Intestate Beneficiaries responded and filed their own motion for summary judgment on December 28, 2016. Each motion asserted Harold's Trust should be interpreted so that the Trust's remaining principal would be distributed to the movant. The motions were fully briefed and oral argument was held on March 1, 2017, where I issued an oral draft report in favor of the Intestate

Beneficiaries. The CPS Beneficiaries took timely exception, and the parties briefed those exceptions. This is my final report.

II. Analysis

It is undisputed that the class of intestate heirs Harold described in his Trust must be bounded in some way, because Harold also described a third and fourth class of beneficiaries to take in the event the intestate class failed. It is also undisputed that Delaware's intestacy laws, both at the time Harold drafted his Trust and today, do not limit the degree of consanguinity required for a relative to be an intestate heir.[4] The CPS Beneficiaries assert that Harold's class of intestate heirs defined by Delaware law is problematic because it can never fail, and that the circumstances under which Harold drafted his Trust create a latent ambiguity that justifies looking to extrinsic evidence to interpret and limit Harold's class of intestate heirs. The Intestate Beneficiaries assert Item VII(g)(2) is not ambiguous, because even under the intestate laws of the State of Delaware, the category of intestate heirs is bounded and may fail. The Intestate Beneficiaries also argue that the CPS Beneficiaries' extrinsic evidence is too speculative to require a different interpretation.

[4] 12 *Del. C.* § 512 (1955); 12 *Del. C.* § 503 (2017).

Summary judgment is granted where there is no genuine issue of material fact in dispute and the movant is entitled to judgment as a matter of law.[5] Where, as here, there are cross motions for summary judgment and neither party argues that there is an issue of material fact, the Court considers the cross motions a stipulation for a decision based on the submitted record.[6]

The issue presented is what Harold intended by Item VII(g)(2). The standard for determining intent requires the Court to examine the language of the will as a whole, in light of the circumstances surrounding its creation. When the terms of the document are clear and unambiguous, the Court must enforce the terms as they are written, and cannot consider extrinsic evidence to interpret those terms.[7] No word or phrase should be rejected or treated as superfluous, redundant, or meaningless if it can be given a meaning which is reasonable and consistent with the object and purpose of the writing considered as a whole.[8] The Court will prefer an interpretation that gives effect to each term of an agreement.[9] Where "extrinsic facts appear which produce or develop a latent ambiguity not apparent upon the face of the will itself, since the ambiguity is disclosed by the introduction

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[5] *Comet Systems, Inc. S'holders Agent v. MIVA, Inc.*, 980 A.2d 1024, 1029 (Del. Ch. 2008).
[6] *Id.*
[7] *In re Nancy W. Couch Trust Co.*, 723 A.2d 376, 382 (Del. Ch. 1998) (quoting *Dutra De Amorim v. Norment*, 460 A.2d 511, 514 (Del. 1983)).
[8] *Wilmington Trust Co. v. Wilmington Trust Co.*, 24 A.2d 309, 313 (Del. 1942).
[9] *In the Matter of Peierls Family Inter Vivos Trust*, 77 A.3d 249, 265 (Del. 2013) (citing *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del. 2001)).

of extrinsic facts, the court may inquire into any other material extrinsic fact or circumstance to which the will certainly refers, as well as to the relation occupied by the testator to those facts, to the end that a correct interpretation of the language actually employed by the testator in his will may be arrived at."[10]

A. *The draft report concluded Harold's Trust unambiguously stated Harold's intent that the trust principal be distributed to the Intestate Beneficiaries.*

The CPS Beneficiaries claim Harold's Trust contains a latent ambiguity, born out of the circumstances of its drafting. The CPS Beneficiaries note that Harold's counsel who drafted versions of Harold's will in 1949, 1954, 1958, and finally in 1960, was part of a Pennsylvania law firm, Morgan, Lewis & Bockius LLP. They assert it was "unlikely that there were any lawyers in the firm knowledgeable in and licensed to practice Delaware law."[11] They note that Pennsylvania intestate law at the time of the 1949, 1954, and 1958 wills cut off consanguinity in a manner that, combined with other exclusions in Harold's Trust, would have limited the intestate class to the issue of Harold's brother Walter's two then-living sons. Those sons' ages, marital status, and issue made it conceivable at the time Harold drafted his Trust that Walter's line could have died out before the Trust terminated, justifying the creation of a third and fourth class. Walter's line is

[10] *Bird v. Wilmington Soc. of Fine Arts*, 43 A.2d 476, 491 (Del. 1945).
[11] Pet'rs Op. Br. Summ. J. 12.

the only line existing at the time Harold wrote his Trust that Harold did not mention specifically. Pennsylvania law changed in mid-December 1959, just before Harold drafted his 1960 will, to extend the intestate cutoff by one degree.[12]

The CPS Beneficiaries theorize that the Pennsylvania law firm that drafted Harold's will in 1960 might have mistakenly thought that Delaware intestacy law was the same as Pennsylvania intestacy law at the time of the 1949, 1954, and 1958 wills, and might have drafted Harold's 1960 will by carrying forward terms from Harold's prior wills without thinking about if they were still legally valid.[13] In other words, the CPS Beneficiaries assert that Harold's use of a Pennsylvania law firm creates a latent ambiguity that allows Harold's invocation of "the intestate laws of the State of Delaware" to be interpreted according to then-outdated Pennsylvania intestate law, which would limit the intestate class to Walter's defaulted line and require distribution of the Trust principal to the CPS Beneficiaries.

As support for this theory, the CPS Beneficiaries point to four additional circumstances. First, they point to Harold's wife's 1964 will, which was witnessed by the same lawyer that drafted Harold's 1960 will. Harold's wife's will also invoked Delaware's intestate law and contemplated a default of intestate heirs and

[12] Act of December 10, 1959, P.L. 1747, § 3.
[13] The CPS Beneficiaries admit that no copies of the 1949, 1954, or 1958 wills can be found to demonstrate any language was carried forward. Pet'rs Op. Br. Summ. J. 12.

a charitable gift in the event of that default. The CPS Beneficiaries claim this shows Harold and his wife were both counseled to apply Pennsylvania's more restrictive class of intestate heirs. Second, the CPS Beneficiaries rely on Item Nine in Harold's 1960 will, in which Harold explained he made no "immediate provision" for the CPS Beneficiaries because he "belie[ved] that they have been or will be substantially provided for by certain relatives of Phyllis duPont Schutt."[14] The CPS Beneficiaries argue this language indicates Harold intended to make some provision for them, if not "immediate."

Third, the CPS Beneficiaries reference a 1991 draft letter from Wilmington Trust to a co-trustee discussing Harold's intestate class in terms of Harold's nieces and nephews "together with their issue," other than those nieces and nephews specifically excluded by other provisions in Harold's Trust, and that the CPS Beneficiaries would take "if only there were no such persons living."[15] The CPS Beneficiaries argue this draft letter suggests that Wilmington Trust Company "may have believed that the language used in the Trust was limited to and contemplated to be [Harold's] nieces and nephews" other than the excluded nieces and nephews, and that a default of Harold's nieces and nephews would allow the CPS Beneficiaries to take over more remote relatives, including the Intestate

[14] Pet'rs Op. Br. Ex. A Item IX.
[15] Pet'rs Op. Br. Summ. J. 18-19.

Beneficiaries who are the issue of Harold's first cousins. Fourth and finally, the CPS Beneficiaries point to the absence of any evidence that Harold had any relationship with the Intestate Beneficiaries, which the CPS Beneficiaries call "laughing heirs,"[16] as compared to Harold's relationship with the CPS Beneficiaries.

The Intestate Beneficiaries assert Harold's Trust is not ambiguous and that there is no latent ambiguity that justifies looking to extrinsic evidence to interpret the Trust. The Intestate Beneficiaries assert Item VII(g)(2) is unambiguous: if no intestate heir could be identified or found, such that Harold's Trust principal would escheat to the state, then and only then would the CPS Beneficiaries take; and if the CPS Beneficiaries died out, then the trustees should give the estate to charity, again to avoid escheat. The Intestate Beneficiaries note Harold explicitly established this order because Harold believed Phyllis' family would provide for the CPS Beneficiaries. The Intestate Beneficiaries contend Harold did not name Walter's line because he intended his trust principal to go to any intestate heir, not confined to Walter's line, before the CPS Beneficiaries.

In my draft report, I concluded the terms of Item VII(g)(2) are clear and unambiguous and should be enforced as they are written without considering

[16]*See Laughing Heirs, Black's Law Dictionary* (10th ed. 2014) ("laughing heir (1943) Slang. An heir distant enough to feel no grief when a relative dies and leaves an inheritance (generally viewed as a windfall) to the heir.").

extrinsic evidence. I agreed that in order to give the third and fourth classes meaning, the intestate class must be somehow limited. But I concluded this limit is found within Harold's Trust as written. The plain language of Item VII(g)(2) sources this limit in the "intestate laws of the State of Delaware," including the law of escheat. Harold intended to give his trust principal first to his issue, and then to anybody else Delaware law identified as an intestate heir, other than the CPS Beneficiaries who Harold believed were already provided for by Phyllis' family. Harold defined the intestate class broadly, under Delaware law, and did not limit it to Walter's line. Harold intended his trust principal to go to the CPS Beneficiaries only if faced with his estate escheating to the State for lack of an intestate heir. If the CPS Beneficiary class defaulted, then Harold intended his trust principal to go to charity – again, rather than escheating to the State. I concluded Harold's Trust is unambiguous and each term has a meaning that is reasonable and consistent with the object and purpose of his will as a whole.

In my draft report, I also concluded the CPS Beneficiaries failed to demonstrate a latent ambiguity. I found the CPS Beneficiaries' extrinsic evidence to be too speculative, and to contain too many logical leaps, to create a latent ambiguity that permits the use of extrinsic evidence to interpret Harold's Trust in their favor. The CPS Beneficiaries offer only speculation that a sophisticated law

firm cut and pasted a will for a wealthy client relying on outdated law from one state, while explicitly invoking the law of a different state.

The circumstances the CPS Beneficiaries rely upon do not support a latent ambiguity. The fact that Harold's wife's will was structured similarly to Harold's does not compel the conclusion that both wills are subject to the same latent ambiguity; both may also be unambiguous. My interpretation of Harold's Trust allows for provision for the CPS Beneficiaries in the event the intestate class defaults; this provision is not "immediate" but is possible. I am not persuaded by the Wilmington Trust draft letter confining discussion of intestate heirs to Harold's nieces and nephews. Harold's intent is paramount over a draft letter from a trustee, and Harold knew when he made his Trust that he had several aunts and uncles and several first cousins: he knew his potential intestate heirs were more remote than Walter's line, and it was conceivable at the time that Walter's line would die out. Finally, I find no utility in comparing Harold's relationship with the Intestate Beneficiaries against his relationship with the CPS Beneficiaries; Harold explicitly explained he favored the intestate heirs because he believed Phyllis' family would provide for the CPS Beneficiaries.

I distinguished the CPS Beneficiaries' speculative invocation of extrinsic evidence from *Chavin v. PNC Bank, Delaware*, on which the CPS Beneficiaries

relied as the standard for a latent ambiguity.[17] In *Chavin*, a trust directed that upon the settlor's death the trustee should transfer trust assets to a beneficiary "if he shall then be living."[18] That beneficiary died after the settlor but before the trustee made the transfer, creating an issue of whether the trust assets should go to the deceased beneficiary's estate, or to other beneficiaries also identified in the will. The Delaware Supreme Court found the language of the trust was "ambiguous as applied to the facts of the case."[19] Therefore, extrinsic evidence was welcome; the scrivener gave specific testimony as to the settlor's intent to give her estate only to the other identified beneficiaries, and there was nothing in the trust or record to suggest she intended to change that plan to benefit the deceased beneficiary's heirs in unforeseen circumstances. In this case, there are no unforeseen circumstances; Harold could have foreseen the present state of affairs, namely that Walter's line died out and the only remaining eligible intestate heirs are more remote than the CPS Beneficiaries. My draft report concluded there is no latent ambiguity in applying the terms of Harold's Trust.

Thus, my draft report concluded Harold's Trust is unambiguous. Harold intended his trust principal to pass to any intestate heir under Delaware law, but would give his trust principal to the already fortunate CPS Beneficiaries if that

[17] 816 A.2d 781 (Del. 2003).
[18] *Id.* at 782.
[19] *Id.* at 783.

class defaulted, and then to charity if the CPS Beneficiaries defaulted, in order to avoid escheatment.

B. *The CPS Beneficiaries' exceptions are dismissed.*

On exception, the CPS Beneficiaries assert: 1) their factual and legal assertions were incorrectly disregarded; 2) the draft report's interpretation of Harold's Trust implies an ambiguity even as it states that no ambiguity is present; 3) the draft report would result in the forfeiture of vested rights of unknown or missing intestate heirs, and contravene the rights of the State Escheator; and 4) the draft report problematically leaves open the question of what happens if any member of the intestate class of heirs cannot be located. The Intestate Beneficiaries respond that the CPS Beneficiaries' blanket exception reincorporating their summary judgment briefs was improper. They also respond that Harold invoked not only intestacy provisions identifying the relatives that would inherit, but also those provisions explaining what would happen to the assets if there were no such relatives. The Intestate Beneficiaries argue that the law of escheat helps to define the intestate class. Finally, the Intestate Beneficiaries point out that the issue of missing heirs is moot, but that in any case it is addressed by the law of escheat.

The CPS Beneficiaries' first exception cursorily asserts in one paragraph that the draft report erred because it was contrary to the CPS Beneficiaries'

summary judgment briefs. This exception is not specific as to any finding of fact or application of law, and provides no foothold for useful review of the draft report. The CPS Beneficiaries' first exception is dismissed.

Second, the CPS Beneficiaries claim the draft report is inherently inconsistent because it concluded that Harold's Trust is unambiguous, but "add[ed] language that did not actually exist" in Harold's Trust.[20] The CPS Beneficiaries argue the draft report added language creating a default of the intestate class "if no intestate heirs can be located or found," which belied the draft report's conclusion that the class definition was unambiguous. This exception is dismissed. Language is not ambiguous merely because there is a dispute as to its meaning; to be ambiguous, disputed language must be fairly or reasonably susceptible to more than one meaning.[21] The draft report's interpretation of Harold's unambiguous language does not render that language ambiguous.[22] I maintain that Harold unambiguously defined the second class of potential takers as "persons who would have been entitled to inherit the same from me under the intestate laws of the State

[20] Pet'rs Op. Br. Exception 3.
[21] *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012).
[22] The CPS Beneficiaries have never asserted that the language in Harold's Trust was patently ambiguous. They asserted only a latent ambiguity, under which the text itself is unambiguous but there is extrinsic evidence that creates another reasonable interpretation. Pet'rs Op. Br. Summ. J. 9-10; *In Matter of Estate of Gallion*, 1996 WL 422338, at *2 (Del. Ch. June 27, 1996) (quotation omitted). I rejected the evidence presented by the CPS Beneficiaries as too speculative to create another reasonable interpretation of Harold's Trust, and concluded no latent ambiguity existed. The CPS Beneficiaries did not take any specific exception to this rejection of latent ambiguity.

of Delaware pertaining to personal property of mine had I died at the time intestate, unmarried, [and] possessed of such principal" and interpret this language to provide that the intestate class would default if intestate heirs could not be located or found "under the intestate laws of the State of Delaware."

The CPS Beneficiaries also take exception to the draft report on the grounds that it is inconsistent with Delaware's escheatment scheme. They contend that the draft report's recommendation would result in the forfeiture of vested rights of any unknown or missing intestate heirs, and that the rights of the State Escheator would be contravened. The CPS Beneficiaries assert that if one or more intestate heirs cannot be found, Delaware law requires their interest become unclaimed property, and that skipping those heirs in favor of the CPS Beneficiaries would be contrary to Delaware's escheatment scheme.

This exception is both moot and incorrect. It is moot because the issue before me on summary judgment was Harold's intent, which I concluded was to distribute trust principal to all his intestate heirs, and all of those heirs have been located.[23] Determining how to handle the share owed to a missing intestate heir would be a purely theoretical exercise. It is incorrect because Delaware's law of intestacy and escheat support Harold's intent to distribute trust principal to the CPS Beneficiaries in the event an intestate heir could not be found. The "intestate laws

[23] Resp'ts Ans. Br. Exception 13.

of the State of Delaware" that Harold used to define the intestate class address both Intestacy (Title 12, Part III, Chapter 5) and Escheats (Title 12, Part III, Chapter 11). Under the statutes the CPS Beneficiaries rely upon, if a trust beneficiary does not claim his interest after five years, that interest would be unclaimed property subject to escheat.[24] In *Matter of Boyle*, this Court held that when there are unidentified or unknown members of a class of heirs, those members' share should be paid into court until such time as the shares are claimed by their rightful heirs or they escheat to the State of Delaware.[25] The State Escheator may take custody of property that is presumed abandoned.[26] Upon the State Escheator taking custody of any unclaimed trust distribution, the CPS Beneficiaries could file a claim for it.[27] Thus, while it is unlikely that the CPS Beneficiaries would take under Harold's Trust, their assertion that they would *never* take because the intestate class is boundless is unfounded. Over the CPS Beneficiaries' exception, I continue to interpret Harold's Trust as relying on the "intestate laws of the State of

[24] 12 *Del. C.* § 1130(16)(b); *id.* § 1133(17); 13 C.J.S. *Escheat* § 13 (2017) ("Property subject to escheat … includes … trust funds the owners of which are unknown."). The parties engage in some debate as to whether the newly enacted versions of the unclaimed property statutes would govern Harold's trust principal. Resp'ts. Ans. Br. Exception 8-9; Pet'rs Reply Br. Exception 8 n.4. I assume *arguendo* that the statutes the CPS Beneficiaries rely on in their exception would apply.

[25] *In Matter of Boyle*, 1995 WL 419971, at *3 (Del. Ch. May 26, 1995).

[26] 12 *Del. C.* § 1140.

[27] 12 *Del. C.* § 1165-67. The State Escheator must pay property to a claimant upon receipt of "evidence sufficient to establish to the reasonable satisfaction of the State Escheator that the claimant is the owner of the property." In my view, Harold's Trust should satisfy this standard. If it did not, the CPS Beneficiaries could appeal to this Court. 12 *Del. C.* § 1167.

Delaware" to execute his intent that his trust principal pass to any intestate heirs, and then to the CPS Beneficiaries to avoid escheatment.

Lastly, the CPS Beneficiaries take exception to the draft report on the grounds that it leaves open the question of what happens if members of the intestate class cannot be found. Again, I did not address this moot question in my draft report because the issue in front of me was Harold's intent, and all the members of the intestate class have been identified and located. But the intestate law of the State of Delaware outlines the process that the CPS Beneficiaries would follow in the event an intestate heir could not be found. If certain members of a class are not found, their share is paid into Court, and if not claimed would be claimed by the State Escheator. A subsequent class can then lay claim to the property, and if no subsequent class exists, the property escheats to the State of Delaware.

The CPS Beneficiaries failed to establish that Harold's Trust was born out of a latent ambiguity. I conclude Harold unambiguously intended to pay his trust principal to a class of heirs fully defined by "the intestate law of the State of Delaware," including the law of unclaimed property and escheat. In my view, that law would appropriately express and implement Harold's intent in the hypothetical event of a missing intestate heir. Determining and applying Harold's intent to the

circumstances of this case does not require this analysis. The CPS Beneficiaries' exceptions are dismissed.

III. Conclusion

For the reasons stated herein, I recommend the Court deny the CPS Beneficiaries' motion for summary judgment and grant the Intestate Beneficiaries' motion for summary judgment. I refer the parties to Rule 144 for the process of taking exception to a Master's Final Report.

Respectfully,

/s/ *Morgan T. Zurn*

Master in Chancery