STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of Vanderwall.

JAMI MOORE and DIANA DUNHAM,

Petitioners-Appellants,

v

STEVEN VANDERWALL, personal representative of the estate of TERRI LYNN VANDERWALL,

Respondent-Appellee.

UNPUBLISHED
October 8, 2013

No. 313419
Otsego Probate Court
LC No. 11-8507-DE

Before: HOEKSTRA, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

In this probate action, petitioners contest the distribution of certain property in the estate of the decedent, Terri Lynn Vanderwall. Respondent is the personal representative of the estate. Following a motion hearing, the trial court granted respondent's motion for summary disposition. The court subsequently entered an order closing the estate and dismissing petitioners' objections. Petitioners now appeal as of right. We Affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case concerns the last will and testament of the decedent. Attorney Ronald J. Kirkpatrick prepared the decedent's will, which provides in relevant part:

> THIRD: I may leave a separate list or statement, either in my handwriting or signed by me at the end, regarding gifts of specific books, jewelry, clothing, automobiles, furniture, and other personal and household items, and direct that all such personal property be distributed in accordance with the terms of any such list or statement.
>
> I give to my husband, STEVEN R. VANDERWALL, if he survives me, all my books, jewelry, clothing, automobiles, furniture, and other personal and household

> items not included on any such list or statement, to be distributed at the sole discretion of my Personal Representative.
>
> FOURTH: If my husband, STEVEN R. VANDERWALL, shall not survive me, I give, devise, and bequeath all of the rest, residue, and remainder of my property and estate of which I may die, seized or possessed, or to which I may be entitled at the time of my death, of whatsoever kind or nature, real, personal, or mixed, and wheresoever situate, excluding all property over which I may have the power to appoint or dispose of by my Last Will and Testament (it being my intention not to exercise any power of appointment I may have except as it may be exercised specifically by other provisions of this Will), to: ANGELA M. VANDERWALL, of Wayland Michigan, JAMI L. MOORE, of Vanderbilt, Michigan, and DIANA L. DUNHAM, of Vanderbilt, Michigan, share and share alike.

After the decedent's death, respondent, as personal representative of her estate, conveyed to himself certain real property the decedent owned in Cheboygan County. The parties now dispute the decedent's intent regarding who should receive the Cheboygan County property. In support of his summary disposition motion, respondent submitted his signed affidavit stating "[t]hat both Terri and [he] wanted each other to receive everything in [their] respective estates should one go before the other." He further stated "that the first and primary intent of [their] Wills at that time would be 'all to each other' first." Kirkpatrick confirmed in an affidavit "[t]hat Terri Vanderwall expressed the clear intent to [him] that it was her wish that her surviving spouse receive everything in her estate, and only if he did not survive were Steven's daughter, Angela, or Terri's daughters, Jami and Diana, to receive anything." He further provided his notes from his meeting with the Vanderwalls in 1999 which stated, "Resid. – all to each other, if surv." In response, petitioners submitted signed affidavits claiming that the decedent "advised" "in the presence of" respondent in 2002 that she "was leaving the Cheboygan property to the children."

After petitioners objected to the conveyance of the property to respondent, respondent moved for summary disposition. The trial court held that the absence from the will of a classic "residue clause" of "all to spouse" "was an oversight," and it found that "the clarity is provided through Mr. Kirkpatrick's affidavit and also through looking at the overall intent of the will." Consequently, the court granted respondent's motion for summary disposition, and it entered the order closing the estate and dismissing the objections. This appeal followed.

II. STANDARD OF REVIEW

If a court has determined the testator's intent through the plain meaning of the will's language, it has made a determination of law, not of fact. See *In re Estate of Bem*, 247 Mich App 427, 433; 637 NW2d 506 (2001). Consequently, when this Court reviews a lower court's determination of the testator's intent that looked solely at the four corners of the will itself, the Court "review[s] de novo the language used in [the] will because its meaning presents a question of law." *Id*. However, if the court below considered extrinsic evidence due to an ambiguity, "findings of the probate court sitting without a jury will be reversed only where clearly erroneous." *In re Woodworth Trust*, 196 Mich App 326, 328; 492 NW2d 818 (1992).

When a party moves for summary disposition pursuant to MCR 2.116(C)(10), such a motion, "which tests the factual support of a claim, is subject to de novo review." *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

III. DISCUSSION

The issue on appeal is whether the trial court correctly determined the decedent's intent and properly granted summary disposition to respondent. We hold that the trial court correctly determined that the intent of the decedent, as expressed in her will, was to leave everything to respondent if he survived past the decedent's death. We further hold that the trial court also properly granted summary disposition to respondent because petitioners failed to raise a genuine issue of material fact.

First, the trial court properly ascertained that the decedent intended for respondent to receive the rest, residue, and remainder of her estate provided he survived her death. The intent of a testator as laid out in a will is not always clear, and "[t]he role of the probate court is to ascertain and give effect to the intent of the testator as derived from the language of the will." *In re McPeak Estate*, 210 Mich App 410, 412; 534 NW2d 140 (1995). "Absent an ambiguity, the court is to glean the testator's intent from the four corners of the testamentary instrument." *Id*. The court discerns the testator's intent by looking at "the plain language of the will." *In re Estate of Raymond*, 483 Mich 48, 52; 764 NW2d 1 (2009). "The will must be read as a whole and harmonized, if possible, with the intent expressed in the document." *Id*.

However, if a will is ambiguous in its wording, a court must look beyond the will to ascertain the testator's intent. *Matter of Kremlick's Estate*, 417 Mich 237, 240; 331 NW2d 228 (1983). There are two types of ambiguity:

> A patent ambiguity exists if the uncertainty as to meaning "appears on the face of the instrument, and arises from the defective, obscure, or insensible language used". A latent ambiguity, on the other hand, arises "where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates" the possibility of more than one meaning. [*Id*. (quoting *In re Butterfield Estate*, 405 Mich 702, 711; 275 NW2d 262 (1979)).]

If there exists either a patent or latent ambiguity in the language of a will, "extrinsic evidence is admissible: (1) to prove the existence of ambiguity; (2) to indicate the actual intent of the parties; and (3) to indicate the actual intent of the parties as an aid in construction." *Kremlick's Estate*, 417 Mich at 241.

We conclude that the language of the decedent's will was not ambiguous. We therefore need only look at the plain language of the will to interpret the decedent's intent. The decedent stated in her will that "[i]f my husband, STEVEN R. VANDERWALL, shall not survive me, I give, devise, and bequeath all of the rest, residue, and remainder of my property and estate" to

petitioners.[1] While the will does not include a companion clause specifically directing that the residue of the decedent's estate be left to her husband if he survived her, the language of the quoted clause supports that interpretation, and demonstrates that the decedent *only* intended to leave the residue of her property and estate to petitioners if her husband did not survive her. The will's plain language reveals that if respondent did not survive, petitioners were to receive the entire estate. The logical inference, based upon the language used, is thus that if respondent did survive the decedent, he would receive the entire estate.

This interpretation is further supported by a reading of the will as a whole, which makes no provision for petitioners in the event that respondent survived the decedent, and further provides that the testator may make a separate list of specific gifts to various beneficiaries. While the relevant clauses may have been imperfectly worded, the will, read as a whole, expresses the intent that respondent receive the residue of the estate if he survives the decedent, with specific gifts left to other beneficiaries at the testator's direction. *Raymond*, 483 Mich at 53. Adopting the construction suggested by petitioners would render paragraph 4 essentially nugatory; as respondent would not receive the residue of the estate whether he was alive or dead at the testator's death, there would be no need for a clause indicating that the residue would pass to the remaining beneficiaries if respondent *did not* survive the testator. We avoid constructions that do not give effect to each word of a will. *In re Estate of Reisman*, 266 Mich App 522, 527; 702 NW2s 658 (2005).

In reaching this conclusion, the trial court did not rely solely on the language of the will itself, but considered extrinsic evidence, namely, Kirkpatrick's affidavit and notes, in order to glean the decedent's intent. Thus, it appears the trial court found the will ambiguous.[2] As stated above, we do not find the language of the will to be ambiguous. However, even assuming that the language was ambiguous, the trial court correctly resolved the ambiguity in granting summary disposition to respondent.

Kirkpatrick confirmed the decedent's intent to leave everything to respondent if he survived her death, and he even provided a copy of his notes from his meeting with the decedent and respondent which said, "Resid. – all to each other, if surv." The lower court found that "clarity [in the decedent's will] is provided through Mr. Kirkpatrick's affidavit and also through looking at the overall intent of the will." The trial court did not err in making that determination. The extrinsic evidence thus supported our interpretation of the unambiguous language of the will. Consequently, we hold that the decedent intended for respondent to receive the entire estate

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[1] Also to share in the distribution of the estate residue in that event was Angela M. Vanderwall, who is not a petitioner in this action. For ease of reference, however, we will describe this distribution as directed to "petitioners."

[2] Although the trial court did not explicitly state that it found the will ambiguous, it did refer to absence of a classic "residue clause" leaving the residue of the decedent's estate to her husband if he survived her, as "an oversight" and also made reference to Kirkpatrick's affidavit as providing "clarity" in its interpretation of the will.

if he survived her death, and that the trial court did not err in thus ascertaining her intent, whether through a review of the plain language of the will or through use of extrinsic evidence.

Finally, the trial court properly granted summary disposition to respondent because petitioners did not raise an issue of material fact. Respondent moved for summary disposition pursuant to MCR 2.116(C)(10), and such a motion, "which tests the factual support of a claim, is subject to de novo review." *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420, 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id*. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J. Walter Thompson*, 437 Mich 109, 115, 469 NW2d 284 (1991). [*Id*. at 455 (quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996)).]

In resisting a motion for summary disposition under MCR 2.116(C)(10), the non-moving party must avoid mere "[o]pinions, conclusionary denials, unsworn averments, and inadmissible hearsay [for they] do not satisfy the court rule; disputed fact [sic] (or the lack of it) must be established by admissible evidence." *SSC Assoc Ltd Partnership v Gen Retirement Sys of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991). Accordingly, "the review standard for summary disposition is [not] whether a record 'might be developed' on which 'reasonable minds might differ.'" *Grand Trunk Western R, Inc v Auto Warehousing Co*, 262 Mich App 345, 350; 686 NW2d 756 (2004). Ultimately, "[i]f a party opposing a motion for summary disposition fails to present evidentiary proofs establishing the existence of a material factual dispute, summary disposition is properly granted." *Id*. at 360.

The trial court properly granted respondent's motion for summary disposition. In determining whether to grant or deny the motion, the court considered all the evidence presented, in particular the affidavits submitted by the parties. As the moving party, respondent had the initial burden of supporting the motion with affidavits, and respondent presented both his own affidavit as well as Kirkpatrick's affidavit. Kirkpatrick included tangible evidence with his affidavit by providing copies of his notes from his meeting with the decedent and respondent. As a result, he supported his affidavit with specific facts. Respondent and Kirkpatrick both averred that the decedent intended to bequeath her entire estate to respondent provided he survived her death.

In contrast, petitioners provided two nearly identical affidavits that merely consisted of unsupported allegations. As the nonmoving party, petitioners had the burden of opposing the motion for summary disposition with specific facts through documentary evidence, avoiding mere allegations and conclusory statements. Petitioners asserted that in 2002, the decedent "advised" "in the presence of" respondent that she "was leaving the Cheboygan property to the children." They also unequivocally stated that the decedent never intended "to leave the

Cheboygan County property to Steven Vanderwall." However, petitioners provided no specific facts to support their allegations. They did not provide specificity regarding the alleged statement in 2002, and they provided no writing from the decedent that indicated a contrary intent to that found by the trial court.[3] Therefore, the trial court properly granted respondent's motion for summary disposition because petitioners presented no evidentiary proof of a material factual dispute.

Because the trial court did not err in determining the testator's intent as a matter of law, we affirm the order of the trial court granting summary disposition in favor of respondent.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra

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[3] While we largely find inapplicable petitioner's reliance on exceptions to the hearsay rule, we need not decide whether the decedent's alleged statement in 2002 constituted inadmissible hearsay or fell within the exception of MRE 803(4) as a statement of the decedent's "then existing state of mind." To support a motion for summary disposition under MCR 2.116(C)(10), evidence submitted must be substantively admissible. MCR 2.116(G)(6). Inadmissible hearsay submitted via affidavit does not satisfy this requirement. *SSC Associates Ltd Partnership v General Retirement Sys of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991). At bottom, petitioners' assertions of oral expressions of the decedent's intent in 2002, after the decedent executed her will, are insufficient to overcome the unambiguously expressed intention expressed by the decedent in her written will in 1999 and the extrinsic evidence buttressing our interpretation of the plain language of the will. After all, the decedent's state of mind concerning the disposition of her property in 2002 was not at issue, but rather her state of mind and intent at the time she executed her will. See *Waldron v Waldron*, 45 Mich 350, 353; 7 NW 894 (1881) ("[O]ral evidence cannot be received to explain the intent [of the testator] except as it may bring before the such circumstances surrounding the making of the will as may be necessary to an understanding of the terms employed."); see also *In re Estate of Cullmann*, 169 Mich App 778, 788; 426 NW2d 811 (1988) (statements of decedent regarding the disposition of funds in a joint bank account are not admissible if the statements are made after the joint bank account deposit was made).