

**COURT OF COMMON PLEAS
PROBATE DIVISION
HAMILTON COUNTY, OHIO**

CASSIE RINK, EXECUTOR	:	CASE NO. CI-990453
of the Estate of Walter Eppley, deceased	:	
	:	
Plaintiff	:	<u>OPINION & ENTRY</u>
	:	<u>CONSTRUING WILL</u>
-vs-	:	
	:	
MARCI WISE, et al.	:	
	:	
Defendants	:	
	:	

This matter came before Judge Wayne F. Wilke on July 13, 1999, regarding a complaint to construe the decedent's will. All parties were properly before the Court. The Court makes its decision after considering the evidence presented, the parties briefs and their oral arguments.

FACTS

The decedent, Walter L. Eppley, died testate on December 22, 1998. His last will and testament was admitted to probate on December 28, 1998, the same day that Cassie Rink, the Plaintiff herein, was appointed executor of the decedent's estate.

Item II of the decedent's last will and testament provides for the establishment of a testamentary trust for the benefit of Claribel M. Eppley, the decedent's wife, for her medical care, maintenance and support. Upon Mrs. Eppley's death, the trust was to terminate and distribution made to various organizations and individuals. There is, however, no distributive provision should Claribel M. Eppley have predeceased the decedent.

Claribel M. Eppley did, in fact, predecease the testator. The decedent had no children and his closest next of kin are nieces and nephews. The Executor has asked the Court to determine how she is to make distribution of the estate residue.

CONCLUSIONS OF LAW

When construing a will, a probate court must ascertain and effectuate the intent of the testator within the bounds of the law. *Domo v. McCarthy* (1993), 66 Ohio St.3d 312, 314. The express language of the will generally provides the court with an indication of the testator's intent as related to the provisions therein. *Stevens v. National City Bank* (1989), 45 Ohio St.3d 276, 278. In the event the language employed in the will is unclear or ambiguous, then the court may look to extrinsic evidence to help ascertain the testator's intent. *In re Estate of Evans* (1956), 165 Ohio St. 27, 30. In this case, the words used by the testator are sufficiently clear so that extrinsic evidence is neither admissible nor needed to help determine the testator's intent.

By its unambiguous terms, Item II of the decedent's will requires the decedent's wife to survive him in order for its applicability. Counsel for some charitable beneficiaries have asked the Court to invoke its equitable powers so that the estate will not pass by intestacy. The Court cannot infer, contrary to those assertions, that the decedent clearly intended to benefit various organizations and individuals after his wife's death. All that can be conclusively found, based upon the clear and unambiguous language of the will, is that the decedent intended to provide for his wife's care and support should she survive the decedent.

As the Twelfth District Court of Appeals has written, courts cannot interpolate words or phrases into a will as to do so would be akin to writing what the testator has not written. *Nelson v. Minton* (1933), 46 Ohio App. 39, 40. Further the court in *Nelson* wrote that while courts will avoid intestacy, if possible, "the desire to do so cannot prevent a lapse, where words constituting testate disposition are lacking". *Id.* Moreover, language intentionally used in a will is presumed to have been placed there for a purpose and may not be ignored arbitrarily. *First Troy Natl. Bank & Trust Co. v. Holder* (1959), 109 Ohio App. 445, 455. The converse of that is also true. As stated above, language intentionally left out of a will may not be inserted. In this case, the testator could have easily inserted language in his will to address the contingency that he may outlive his wife. The Court declines to insert such language. Accordingly, Walter L. Eppley's estate residue is to pass by the laws of descent and distribution.

The executor is ordered to administer the Estate of Walter L. Eppley consistent with this construction and upon such distribution, the Executor is relieved of any and all liabilities with regard to the distribution of the estate assets.

SO ORDERED.

WAYNE F. WILKE, JUDGE

cc: all parties not in default