UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0619

September Term, 2015

W. RANDOLPH SHUMP, SPECIAL ADMINISTRATOR FOR THE ESTATE OF D. LYNN CRAWFORD, ET AL.

v.

DOUGLAS K. WANNALL

Wright,
Shaw Geter,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: October 4, 2016

This case arises from a dispute over the last will and testament of D. Lynne Crawford ("the Will"), dated April 26, 2013. By Consent Order dated June 1, 2014, the orphans' court for Baltimore City admitted to probate the Will and appointed W. Randolph Shump, as the special administrator of the estate. Prior to this appointment on May 21, 2014, Douglas Wannall, appellee, filed a petition to caveat the will. On June 27, 2014, the orphans' court heard arguments on Wannall's motion for determination of a question of law. At the conclusion of that hearing, the orphans' court ruled in favor of Wannall and issued an order. Shump and Mark Smoot ("appellants"), the trustee and primary beneficiary of the Trust, filed a timely notice of appeal from the orphans' court's June 27, 2014 order to the circuit court for Baltimore City. The orphans' court transmitted the appeal to the circuit court on July 11, 2014.

On July 30, 2014, the circuit court ordered that the parties would proceed by producing an agreed statement of the case and filing it with the register of wills on or before August 22, 2014. On August 21, 2014, the parties filed a joint submission of the agreed statement of the case, and in it, the parties "reserve[d] the right to further brief the question of law presented by this Agreed Statement of the Case." Both parties subsequently submitted briefs, and oral arguments were heard on October 9, 2014. On April 27, 2015, the circuit court ruled in favor of Wannall. Shump timely appealed to this Court, presenting the following question:

> Did the Circuit Court for Baltimore City err in concluding that the residuary provision contained in the Will was invalid and void under Estates and Trusts Article § 4-411?

In his brief, Wannall also filed a motion to dismiss appeal of personal representative.[1] For the following reasons, we affirm the decision of the circuit court.

FACTS

This case arises out of a dispute over the Will dated April 26, 2013. In the Will, Ms. Crawford had a residuary clause that devised the remainder of her estate to an *inter vivos* revocable trust ("the Trust"). The Trust was executed by Ms. Crawford on May 21, 2013, over three weeks after the Will was executed. Ms. Crawford passed away on December 15, 2013.

By consent order, dated June 1, 2014, the orphans' court admitted to probate the Will and appointed Shump as the special administrator of the estate. Prior to this appointment, on May 21, 2014, Wannall filed a petition to caveat the will. On June 27,

[1] In Wannall's brief, he also filed a motion to dismiss appeal of personal representative arguing that Shump does not have standing to appeal because he is not an aggrieved party.

Only an aggrieved party may appeal from the order of the orphans' court adjudicating an estate. *Alston v. Gray*, 303 Md. 163, 166 (1985). We have "consistently decreed that an executor or personal representative is *not* an aggrieved party entitled to appeal." *Id*. (citations omitted). This rule was established because "once a court determination is made, a personal representative is bound to make distribution in accordance with the order," and "an unlimited right of appeal, in the hands of the executor or representative, could seriously deplete a small estate and might delay indefinitely the distribution of estate assets to deserving heirs." *Id.* at 167 (internal citations omitted).

Shump is merely a special administrator, not an aggrieved party. However, Smoot, a beneficiary of the Trust, has standing. Accordingly, we will address the merits of this case.

2014, the orphans' court heard arguments on Wannall's motion for determination of a question of law. Wannall argued in the hearing that Paragraph Sixth of the Will ("Paragraph Sixth"),[2] which purports to convey Ms. Crawford's residuary estate to the Trust, is void because, at the time that the Will was executed, the Trust was not in existence. At the conclusion of this hearing, the orphans' court ruled in favor of Wannall and issued an order. The order stated that the court found Paragraph Sixth to be void because the Trust had not yet been created at the time the Will was executed, and therefore, was not in compliance with Md. Code (1974, 2011 Repl. Vol.), Estates and Trusts Article ("E&T") § 4-411.

Both parties subsequently submitted briefs and oral arguments were heard on October 9, 2014. On April 27, 2015, the circuit court ruled in favor of Wannall holding that Paragraph Sixth is void because it left the residuary estate to a Trust that was not in existence at the time the Will was executed.

DISCUSSION

I. Standard of Review

The issue on appeal is a legal issue of statutory applicability to the Will. When the circuit court made its decision, it made a legal ruling. "Because our interpretation of the

[2] Paragraph Sixth reads:

> I give the balance of my property situated in the United States, including all property over which I possess a power of appointment and/or disposition pursuant to the D. Lynne Crawford Revocable Trust, dated May 21st, 2013 to be distributed under the terms of that Agreement.

. . . Maryland Rules are appropriately classified as questions of law, we review the issues *de novo* to determine if the trial court was legally correct in its rulings on these matters." *Davis v. Slater*, 383 Md. 599, 604 (2004) (citations omitted).

II. Paragraph Sixth is void.

Before turning to our analysis, it would be helpful to first define the basic relevant legal terms.

A will is defined as a "legal expression of an individual's wishes about the disposition of his or her property after death," or said another way, it is the "document by which a person directs his or her estate to be distributed upon death." BLACK'S LAW DICTIONARY, 1833 (10th ed. 2014). A will may include a residuary clause, a "testamentary clause that disposes of any estate property remaining after the satisfaction of all other gifts. " *Id.* at 1502.

A trust, legally distinct from a will, refers to the "right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title." *Id.* at 1740. Functionally, a trust is "a property interest held by one person (the *trustee*) at the request of another (the *settlor*) for the benefit of a third party (the *beneficiary*)." *Id.* There are many types of trusts which serve different purposes, including private and charitable trusts, as well as revocable and irrevocable trusts. *Id.* at 1740–48.

It is not uncommon for wills and trusts to interact or refer to one another. For example, pourover wills give "money or property to an existing trust." *Id.* at 1836.

Here, Ms. Crawford executed a valid will with a residuary clause that created a pourover will. The clause left the remainder of her estate to a trust, specifically an *inter vivos* revocable trust, a trust "that is created and takes effect during the settlor's lifetime" but where "the settlor reserves the right to terminate the trust and recover the trust property and any undistributed income." *Id.* at 1744, 1746. There is no dispute that the will itself is valid. Rather, the question is whether the residuary clause is void because it referred to a trust not in existence at the time the will was executed. As we will explain, the circuit court properly found that Paragraph Sixth is indeed void.

The tradition of strict application of rules regarding estates and trusts in Maryland is long held. "Wills are more especially guarded and protected by the law, than any other instruments." *Ex parte Hull*, 164 Md. 39, 44 (1933) (citation omitted). In construction of a will, "the intention of the testator [must] be carried out as deduced from the 'four corners of the will.'" *Wesley Home Inc. v. Mercantile-Safe Deposit & Trust Co.*, 265 Md. 185, 198 (1972) (citations omitted). When the words of the will are unambiguous, extrinsic evidence is not admissible to show that the testator's intention was different than stated in the will. *Nugent v. Wright*, 277 Md. 614, 622 (1976). Here, the words of the will are clear; Ms. Crawford intended to leave the residuary of her estate to the Trust.[3] Therefore, extrinsic evidence will not be admitted.

The pertinent statute at issue in this case is E&T § 4-411(a) which states:

[3] The terms of the trust were not contained in the will itself. In a "pourover" arrangement, the testamentary disposition of property was to be given to the *inter vivos* trust.

> A legacy may be made . . . to the trustee in accordance with the terms of a written *inter vivos* trust . . . if the trust instrument has been executed and is in existence *prior to or contemporaneously with* the execution of the will.

(Emphasis added).

Maryland has historically paid particular attention to E&T § 4-411 and the timing of the trust instrument execution. *See, e.g., Chase v. Stockett*, 72 Md. 235, 244 (1890) (holding that a memorandum dated two days after the will was executed would not be incorporated by reference into the will "because it was not in existence at the date of the execution of the will"). The emphasis on the timing of the trust instrument was further emphasized more recently when we held that "[E&T § 4-411] is not conditioned upon the existence of a trust but upon the existence of a trust instrument." *Trosch v. Maryland Nat'l Bank*, 32 Md. App. 249, 253 (1976).

Shump and Smoot argue that Section 4-411 only expressly sanctions the creation of a pourover trust without the need to otherwise rely on the common law doctrines of 1) *incorporation by reference*, or 2) *independent significance*. They then look to these two doctrines to save their failure to comply with the relevant statute.

Under the common law *doctrine of incorporation by reference*, incorporation may be held to have been effected so that the terms of the document become part of the will and may be probated as such if a will refers to a document in existence at the time the will is executed, speaks of the document as existing, clearly identifies the document, and shows an intent to incorporate it into the will. *Newton v. Seaman's Friend Society*, 130 Mass. 91 (1881). The doctrine was codified in Maryland as Md. Code (1974, 2011 Repl. Vol), Estates and Trusts Article § 4-107:

> The terms of any writing which is in existence when a will or trust instrument is executed, including but not limited to a statement of administrative provisions and fiduciary powers recorded in a record office of this State, may be incorporated into the will or trust instrument by reference to it to the extent the language of the will or trust instrument manifests an intent to do so and describes the writing sufficiently to permit its identification.

The doctrine of independent significance[4] allows a court to hold that a testamentary gift to the trustee of an existing, described trust may be sustained, despite that the beneficiaries of the donee trusts or their interests are not described, and allows the court to proceed as if the full terms of the donee trust were copied into the will. *Bogert's Trust and Trustees*, September 2016 update, Chapter 6, The Wills Act. The doctrine allows the court to hold that the statement as to the trustee and the trust under which he is acting is an adequate description of the intended beneficiaries. *Id.* In *In re* Rausch's Will, 179 N.E. 755, 756 (N.Y. 1932), Judge Cardozo stated:

> It is one thing to hold that a testator may not import into his will an unattested memorandum of his mere desires and expectations, his unexecuted plans. It is another thing to hold that he may not effectively enlarge the subject-matter of an

[4] To illustrate, the act of a devisee or a third party can have independent significance. The act of having or adopting a child is an example, giving validity to a devise in the form of a class of "children" of a designated person. The execution or revocation of another person's will is an external event having independent significance. A more exotic illustration of a devise validated by the doctrine of independent significance would be one "to the person who wins the gold medal in women's tennis at the first Olympic Games to be held after my death."

Another example is where the testator devises a general type of property, and then changes the specific item of property within that category. For example, the will states, "I leave my car to Andrew." The testator drives a 1971 Vega at the time of the testamentary instrument but later sells the Vega and purchases a 2017 Ferrari 488 GTB, twin-turbo,3.9 liter V-8, 661 hp. Because the testator bought the new car for a more sporty ride, rather than to change the will without going through the testamentary formalities, the gift to Bob remains enforceable.

> existing trust by identifying the trust deed and the extent and nature of the increment. . . . What is taken as trustee is taken subject to the trust, for it can be held no other way. A gift to a trust company as trustee of a trust created by a particular deed identifies the trust in describing the trustee, like a gift to a corporation for the uses stated in its charter. Only a quibble will find a difference between a gift to a trust company as trustee under a deed and a gift to the same company with instructions to hold what is given in accordance with the deed. . . . The mind rebels against the formalism that would invalidate a bequest for no better reason than the omission to state the purpose of the trust again.

(internal citation omitted).

Under the above described doctrines, it is held that if a will refers to a document which is in existence at the time the will is executed, speaks of the document as so existing, clearly identifies the document, and shows an intent to incorporate it into the will, such incorporation may be held to have been effected so that the terms of the deed or other *inter vivos* document becomes a part of the will and may be probated along with it. *Bogert's Trust and Trustees*, September 2016 update, Chapter 6, The Wills Act (citation omitted).

However, neither of these common law doctrines breathe life into the belated trust, and they do not apply to the circumstances of the creation of Ms. Crawford's trust for the simple reason that the trust was not in existence when the will was executed.

In an effort to persuade us otherwise, Shump and Smoot bring to our attention our sister state Colorado's opinion in *In re* Estate of Allen, 475 P.2d 629 (Colo. 1970), where the Colorado Court of Appeals construed a statute similar to E&T § 4-411. Shump and Smoot argue that the Court observed that a purpose of the statute was to remove conceptual difficulties which arise from the doctrine of incorporation by reference and the doctrine of independent significance. Although their statement of the purpose of the

statute may be correct, *Allen* does not support Shump and Smoot's conclusion, but to the contrary the Court clearly stated that to create a valid residuary provision under the state statute, "the trust [must] be in existence at the time the will is executed[.]" *Id.* at 631.

As previously stated, the intent of Ms. Crawford was clear; she intended to leave the residuary of her estate to the Trust. The Trust, however, was not in existence at the time the Will was executed. E&T § 4-411 requires that the trust instrument be executed prior to or contemporaneously with the execution of the will. Here, the Trust instrument being executed over three weeks later than the Will is not within the plain meaning of the statute's language, "prior to or contemporaneously with." Because the Will was made before the existence of the trust instrument, we hold that the residuary clause is void.

Shump's perception of some flexibility in the term "contemporaneously" as used in E&T § 4-411 is misplaced. We cannot interpret contemporaneous to mean "within a period of time."[5] Contemporaneous with the execution of the will can only mean at the event or otherwise close in time. GARNER DICTIONARY ON LEGAL USAGE defines contemporary and contemporaneous as both referring to simultaneously. GARNER'S DICTIONARY ON LEGAL USAGE 211 (2nd ed. 2005).

[5] The situation could have been remedied by delaying the signing of the will until the trust could be executed as well. Nothing has been presented to enable us to throw Shump a "lifeline" to undo what occurred, and what did not occur, on April 18, 2013.

Thus, the circuit court did not err in concluding that the residing provision contained in the Will was invalid and void under E&T § 4-411.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.