Circuit Court for Kent County
Case No. C-14-CV-17-50

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3115

September Term, 2018

ANNA ORVARSSON, ET AL.

v.

ATLANTIC UNION BANK, ET AL.

–

Graeff,
Reed,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Moylan, J.

Filed: January 10, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

The appellants, Anna Orvarsson and Thomas J. Wallen, Jr., filed a Complaint for Declaratory Judgement and Other Relief in the Circuit Court for Kent County. The appellee is the Atlantic Union Bank[1], the trustee of the Second Amended and Restated Revocable Trust of J. Willis Wells. On July 26, 1995, J. Willis Wells of Kent County established the J. Willis Wells Revocable Trust. Following the death of Wells's widow, the Residuary Trust was for the benefit of Wells's three daughters, Bonnie W. Gatton, Iola Wells Downes, and Deborah W. Orr[2]. J. Willis Wells died on October 7, 2012.

It is that part of the J. Willis Wells Revocable Trust that was left to the second daughter, Iola Wells Downes, that concerns us in this case. On January 15, 2017, Iola Wells Downes died testate. Among the assets of her estate was her part of the trust left to her by her late father. The original trust instrument had granted to each of the three daughters a power of appointment over her respective share of the Residuary Trust. At the time of Iola Wells Downes's death, the estimated value of the Residuary Trust was $1,445,795. The core issue before us on this appeal is that of whether Iola Wells Downes properly exercised the legal authority, in her Last Will and Testament, to bequeath to her beneficiaries, her share of the J. Willis Wells Revocable Trust.

In her will, Iola Downes had attempted to pass on to the appellants, Orvarsson and Wallen, her share of the Residuary Trust. In her will, Downes made several specific

[1] Prior to May of 2019, Atlantic Union Bank had been known as Union Bank, and before February 16, 2015, had been known as Union First Market Bank.

[2] The third daughter, Deborah W. Orr, is since deceased. The oldest daughter, Bonnie W. Gatton, and two of her children, are among the appellees.

bequests of portions of her estate, followed by what has been described by the appellants as a "catch-all" or residuary clause reading:

> All the rest of my estate and property, whether in possession, expectancy or remainder, including all property over which I may have any power of appointment, I give, devise, bequeath and appoint in trust to Joe Wallen for the duration of the lives of such pets that I own at the time of my death… Upon the death of the last of my pets, I direct that any balance of the trust assets be evenly divided between Joe Wallen and Ann Orvison [sic].

(Emphasis supplied.)

Upon Downes's death, Appellee Atlantic Union Bank, as trustee of the Wells Trust, determined that Downes had not sufficiently exercised her power of appointment in her will and transferred the assets of the trust to the only remaining daughter of J. Willis Wallen, Bonnie Gatton.

Appellants, as the beneficiaries named in the residuary clause of Iola Downes's will, filed a Complaint for Declaratory Judgment in the Circuit Court for Kent County asking that court to declare that the above-quoted residuary clause was a sufficient execution of Downes's power of appointment and seeking damages against Atlanta Union for breach of fiduciary duty. After holding a hearing on Appellees' motion to dismiss and a separate hearing to consider the parties' competing motions for summary judgment, Judge Harris P. Murphy orally granted summary judgment in favor of Appellees, finding the residuary clause to have been insufficiently specific for Downes to exercise her power of appointment. The Circuit Court entered a written order on November 30, 2018, simply stating that Appellees' "Motions for Summary Judgment are GRANTED" and the

Appellants' "Motion for Summary Judgment is DENIED." No written additional declaration or supplemental explanatory document outlining the rights of the parties was filed.

Contentions

Appellants have presented us with two contentions, the first of which is conceded to by Appellees:

1. The trial court erred by failing to reduce its declaratory judgment to writing; and
2. The trial court erred in ruling that the language used in decedent's will did not sufficiently exercise her power of appointment as required by the Wells Trust.

The Requirement of a Written Document

As both Appellants and Appellees commendably agree, the trial court should have entered a declaratory judgment in writing along with its naked final order.

> When a declaratory judgment action is brought, and the controversy is appropriate for resolution by declaratory judgment, the court must enter a declaratory judgment, defining the rights and obligations of the parties or the status of the thing in controversy, and that judgment must be in writing and in a separate document.

Lovell Land, Inc. v. State Highway Admin., 408 Md. 242, 256, 969 A.2d 284, 292 (2009). (Emphasis supplied.) Therefore, as both parties contend, the order in the case below must be vacated, and the case must be remanded to the circuit court for entry of the necessary written declaration defining the rights and obligations of the parties and the status of the trust assets.

Both Appellants and Appellees note, moreover, that we have the discretion under circumstances such as this, where a case is remanded to a trial court for a written declaration, to "review the merits of the controversy and remand for entry of an appropriate declaratory judgment by the circuit court," consistent with our determination. Bushey v. Northern Assurance, 362 Md. 626, 651, 766 A.2d 598, 611 (2001).

Strict Compliance With The Terms Of The Trust

At the crux of this dispute is an assessment of the plain meaning of the words in the Wells Trust. It seems here that the conflicting positions hinge on the meanings of two words in particular: "specific" and "express". What the trial court, and now this court, has been asked to decide is whether the residual clause in the Downes will satisfies the Wells Trust's requirement that the exercise of her power of appointment is "specific" and "express". We hold that it does not.

Maryland Code, Estate & Trusts, Sec. 4-407 does allow the use of a residuary clause to exercise a power of appointment:

> Subject to the terms of the instrument creating the power, a residuary clause in a will exercises a power of appointment held by the testator only if
>
> (1) an intent to exercise the power is expressly indicated in the will; or
>
> (2) The instrument creating the power of appointment fails to provide for disposition of the subject matter of the power upon its non-exercise.

(Emphasis supplied.) So, while a residuary clause can be used to exercise power of appointment, that use of a residuary clause is governed by the terms set out in the

instrument that originally created the power: the Wells Trust. Put simply: the instrument's terms rule the day. The Court of Appeals made this clear when they wrote:

> When the mode in which a power is to be executed is not defined by the instrument creating the power, it may be executed by deed or will or simply in writing. But any methods, formalities or conditions prescribed by the instrument must be strictly complied with. The person who creates the power has the right to create what checks he pleases to impose, to guard against a tendency to abuse. The instrument creating the power may prescribe any ceremonies which the will or caprice of the party creating it may think proper. All such ceremonies must be complied with, however unessential or unimportant they may appear to be in themselves.

Leidy Chemicals Foundation, Inc. v. First Nat. Bank of Maryland, 276 Md. 689, 695-696, 351 A.2d 129, 132 (1976) (Emphasis supplied.)

While the "ceremonies" prescribed in the Wells Trust may not be particularly rigorous or detailed, they do require that Downes "direct by a specific reference to this testamentary general power of appointment in her [w]ill expressly stating therein her intention to exercise such power." (Emphasis supplied.)

Downes's will makes no reference at all to the Wells Trust. It is never named or singled out, and never identified as an acknowledged asset. The only mention of a "power of appointment" comes in the catch-all residuary clause which appears below several provisions where she bequeaths particular items of personal property to various individuals. The fact that the "power of appointment" appears in only the residuary clause is telling.

The term "residuary clause" comes from the notion that a will must try to dispose of the "residue" of a person's estate. The clause is meant to address the distribution of all

the property left over or overlooked after all the bequests and debts are paid. The very nature of a residuary clause is that it is general and **non-specific,** designed to distribute those assets that have been ignored or have **not been expressly mentioned**. The residuary clause in Downes's will, like most residuary clauses, uses such broad words like "all the rest" and "including all property over which I may have any power of appointment." (Emphasis supplied.) We cannot now find, as the Appellants ask, that the language of this residuary clause is sufficiently specific and explicit to exercise this power of appointment as required by the Wells Trust.

Appellants' brief provided us with extensive information about Downes's family relationships, her awareness of the Wells Trust and her appointment power, and the Wells Trust being the only power of appointment she retained. It appears Appellants want us to glean Downes's intentions from this information in assessing whether and how she wanted to exercise her appointment power. However, looking beyond the four corners of a will to determine the intent of the deceased is only appropriate where the will's terms are ambiguous. See Click v. Click, 204 Md. App. 349, 40 A.3d 1005 (2012). In this case, there is no need to do so.

Because Downes's will fails to specifically and expressly exercise her power of appointment required by the Wells Trust, the trust's assets should be distributed as outlined in the Wells Trust consistent with the terms contemplated by the trust for the circumstance in which Downes fails to exercise her power of appointment.

CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE DIVIDED EQUALLY BETWEEN APPELLANTS AND APPELLEES.