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TRIAL NOTEBOOK

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Vague trust opens estate to grandkids

Bank of America v. Judevine

An irrevocable trust drafted by a divorce attorney in 1958 wound up generating a fight between two groups of Herbert W. Kochs' grandchildren — the then–living and the after-born progeny — about who qualified as remaindermen. The amount at stake, which will either be divvied up between Kochs' four oldest grandchildren or split between all 15 of his grandkids, is $1.6 million.

When Kochs got divorced for the third time, he had four grandchildren (two each from the offspring of his first two marriages). As part of a 1958 divorce agreement with his third wife, Phyllis Anderson Picker, Kochs established a trust — funded with 8,450 shares of Diversey Co., a publicly traded corporation — that provided lifetime income for Phyllis and then her mother (if the mother lived longer than Phyllis).

Planting the seeds for future litigation about Kochs' intent, Paragraph C of the trust — a document drafted by his divorce attorney, not his longtime estate planning lawyers — said:

"Upon the death of both Phyllis Anderson and her mother, the trust estate shall be distributed in equal shares to those who are then living of the settlor's grandchildren, namely:

"William Shaw and Robert Shaw, and

"Susan Doniphan Hamilton and

"Oliver Theodore Hamilton IV,

"provided, however, that if any of such grandchildren are then deceased leaving one or more descendants then living, the share which such deceased grandchild would have received if then living shall be distributed to his or her then living descendants, per stirpes."

Phyllis died in 2011, having outlived her mother. By then, Kochs had another 11 grandchildren.

A Cook County judge ruled the remainder belongs to the four grandchildren who were listed by name in Paragraph C.

Reversing — with Justice Joy V. Cunningham dissenting — the Illinois Appellate Court concluded that there is a latent ambiguity in Paragraph C about whether Kochs intended to make a "class gift."

"Prior to the after-born grandchildren's birth," Justice Mathias W. Delort explained, "the terms of Paragraph C were unambiguous: They simply directed the remainder of the trust to be paid to his grandchildren, who were all individually named. It was when the settlor's additional grandchildren were subsequently born that a latent ambiguity arose." *Bank of America v. Judevine*, 2015 IL App (1st) 140532 (Jan. 26, 2015).

Here, with omissions not noted in the text, are highlights of Delort's majority opinion and Justice Joy V. Cunningham's dissent.

Justice Delort

A latent ambiguity "does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed." Black's Law Dictionary 93 (9th ed.2009).

Where a term is found to be ambiguous, a court may rely upon rules of construction to ascertain the donor's intent. *Harris Trust v. Beach,* 118 Ill.2d 1 (1987). One of these rules provides that equal treatment of descendants of equal degree is preferred rather than "an excessive share being given to members of one group to the partial or total exclusion of members of another, equally meritorious group." *Continental Illinois National Bank v. Llewellyn,* 67 Ill.App.2d 171 (1966) (citing *Jackman v. Kasper,* 393 Ill. 496 (1946)).

In addition, our Supreme Court generally prefers the construction of a will or trust that most closely follows the statutes of descent. Id. (citing *Cahill v. Cahill*, 402 Ill. 416 (1949), and *Condee v. Trout,* 379 Ill. 89 (1942)).

Rules of construction, however, are "court created presumptions of what the ordinary settlor or testator would have intended the ambiguous terms to mean," and they may not be allowed to defeat what the ordinary settlor would have intended. *Beach,* 118 Ill.2d at 4. Thus, if a rule of construction subverts these intentions, it must be discarded.

With respect to class gifts, although the general rule is that a settlor's gift to persons named is a gift to them individually and not as a class, "the mere fact that he mentions by name the individuals who make up the class is not conclusive." *Strauss v. Strauss,* 363 Ill. 442 (1936) (quoting *Stedman v. Priest,* 103 Mass. 293 (1869)).

As our Supreme Court held long ago, "The decisive inquiry is whether or not the testator, in making the particular gift in question, did so with group-mindedness, whether in other words, he was looking to the body of persons in question as a whole or unit rather than to the individual members of the group as individuals; if the former, they take as a class." *Krog v. Hafka,* 413 Ill. 290 (1952) (quoting 57 Am.Jur. Testorial Intention Controls — "Groupmindedness," Section 1259 (1948)).

The fact that there is a natural class among the beneficiaries "is ofttimes held to be indicative of a class gift." Id. Other factors to be considered in determining whether the settlor intended a class gift are: the relation of the testator to the objects of his bounty; the subject matter of the gift; and the skill of the draftsman who drew the will. Id. at 299–300.

"It is difficult to be more definite than to say that a gift is a class gift if, from the entire will and the circumstances surrounding its making, one may conclude that the testator intended to treat the takers of the gift as a group and not as individuals — that his interest in them was a 'collective' interest." Homer F. Carey and Daniel M. Schuyler, "Illinois Law of Future Interests," 340 (1941).

In this case, the trial court erred in finding that the provision at issue in Paragraph C was unambiguous. To the contrary, although the provision directed that the remainder of the estate was to be distributed to the settlor's grandchildren, it also individually named his four grandchildren living at that time.

Prior to the after-born grandchildren's birth, the terms of Paragraph C were unambiguous: They simply directed the remainder of the trust to be paid to his grandchildren, who were all individually named. It was when the settlor's additional grandchildren were subsequently born that a latent ambiguity arose.

In this respect, the trial court further erred in finding (in a footnote) that the after-born grandchildren were alleging a patent ambiguity.

A patent ambiguity "clearly appears on the face of the document." Black's Law Dictionary 88 (8th ed.2004). Here, the language of Paragraph C was not ambiguous on its face — indeed, had the settlor not had any additional grandchildren, Paragraph C would not have been ambiguous at all. Instead, the ambiguity arose from a collateral matter (i.e., the subsequent birth of additional grand-

children) when Bank of America [the trustee] tried to apply the terms of Paragraph C.

On these facts, and in light of Illinois' strong preference that heirs of equal degree be treated equally, there is at least an honest difference of opinion with respect to whether the settlor intended the remainder of the trust to be distributed to either the named grandchildren only or the named and after-born grandchildren. Consequently, Paragraph C is latently ambiguous, and we must resort to rules of construction to ascertain the settlor's intent.

The preferences for equal treatment of descendants of equal degree and for the construction of a will or trust that most closely follows the statutes of descent (*Llewellyn*, 67 Ill.App.2d at 189) seem to favor construction of Paragraph C as providing a class gift.

The opposing parties are both grandchildren by blood of the settlor, and the statute governing intestate descent would provide for a distribution to all grandchildren, not solely the named grandchildren. 755 ILCS 5/2–1(b) ("If there is no surviving spouse but a descendant of the decedent: the entire estate to the decedent's descendants per stirpes.").

In addition, turning to the other relevant factors, since the claimed beneficiaries are all the settlor's grandchildren, there is a natural class among them, which is "indicative of a class gift." *Krog*, 413 Ill. at 299. The other remaining relevant factors also appear to indicate that the settlor intended a class gift.

In sum, we hold that there is an unresolved issue of fact concerning the settlor's intent as to Paragraph C of the trust. Consequently, the trial court erred in granting the named grandchildren's motion for summary judgment, and we therefore reverse the trial court's judgment and remand this case for further proceedings.

Justice Cunningham

There is nothing ambiguous about the trust language by which the settlor identified the four individual grandchildren whom he wished to take the remainder of the trust. The fact that he specifically named them further supports the interpretation of lack of ambiguity.

He knew exactly whom he wished to have the remainder of the trust; and that is the four grandchildren whom he identified by name. It does not require great imagination to realize that the settlor could easily have said "any" of his grandchildren then living, without naming them.

The fact that he specifically named the four grandchildren, shows his intent to pass the remainder to any member of that group of four named grandchildren who were living when the remainder of the trust was to be distributed.

The trial court gave the language its plain meaning and reached the conclusion that, in my view, is supported by case law, common sense and the trust document.

An ambiguity does not exist simply because it is advantageous to the litigants to declare a document ambiguous. In this case, without an ambiguity, the trial court's ruling is clearly correct. In that scenario, the after-born grandchildren take nothing. I, like the trial court, would decline to find an ambiguity where none exists.