2015 IL App (5th) 140225-U

NO. 5-14-0225

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re ESTATE OF MARJORIE IRENE SMITH, Deceased	)	Appeal from the Circuit Court of Madison County.
(Bonita Lou Krupp, as Personal Representative,	)	
Petitioner-Appellee,	)	
v.	)	No. 12-P-239
Katharine-Lee Quintanilla and Donald Dwayne Smith II,	)	Honorable Donald M. Flack, Judge, presiding.
Respondents-Appellants).	)	

JUSTICE WELCH delivered the judgment of the court.
Justice Schwarm concurred in the judgment.
Justice Chapman dissented.

ORDER

¶ 1 *Held*: The circuit court's determination that the 30-day survivorship provision manifested the testator's intent is reversed because the third provision of the will did not explicitly make survival a condition precedent.

¶ 2 The case before us represents the classic case for which anti-lapse statutes were created and one in which our anti-lapse statute should apply. The respondents, Katharine-Lee Quintanilla and Donald Dwayne Smith II, appeal an order of the circuit court of Madison County finding that a 30-day survivorship provision in Marjorie Irene

Smith's will manifested her intent to avoid application of Illinois's anti-lapse statute; that the entirety of Marjorie's estate should go to Bonita L. Krupp, Marjorie's only surviving child; and that none of the estate assets should go to the respondents, the children of Bonita's deceased brother, Donald Dwayne Smith. For the following reasons, we reverse the circuit court's order, and we remand the cause for further proceedings not inconsistent with this order.

¶ 3 Marjorie Irene Smith died on December 1, 2011. Her husband, Dickerson Welch Smith, preceded her in death. Her two children, Donald Dwayne Smith and Bonita L. Krupp, survived her. Twenty-six days after Marjorie passed away, Donald Dwayne Smith died. His two children, Katharine-Lee and Donald Dwayne Smith II (Donald) survived him. Marjorie's will, dated July 5, 1983, was admitted to probate, and Bonita was appointed as executrix of her estate.

¶ 4 Bonita filed a petition for directions asking the court to rule on the issue of whether she was entitled to the entire estate, or whether she was entitled to only one-half, with the remainder going to her deceased brother's two children. The will provisions at issue are:

> "THIRD: In the event my husband, Dickerson Welch Smith, and I meet death in a common accident or disaster, or in the event he predeceases me, then I do hereby direct that my estate be distributed as follows[:] one-half to my daughter, Bonita Lou Krupp of Collinsville, Illinois, and one-half to my son, Donald Dwayne Smith, of Austin, Texas, per capita.

FOURTH: No person named in this Will shall be deemed to have survived me unless he or she is living on the thirtieth (30th) day succeeding the day of my death."

The circuit court found that the fourth will provision manifested Marjorie's intent to avoid application of the anti-lapse statute and that Bonita was the sole legatee under the will. The court further found that there was no just reason for delaying enforcement or appeal.

¶ 5 The issue before us is whether Illinois's anti-lapse statute applies so that the respondents are entitled to the share of Marjorie's estate to which Donald Dwayne Smith would have been entitled had he outlived Marjorie by 30 days. We hold that it does.

¶ 6 When construing the provisions of a will, the cardinal rule is to determine and effectuate the testator's intent, unless it is contrary to law or to public policy. *Bolon v. Dains*, 54 Ill. App. 2d 64, 68 (1964). The testator's intent is determined by examining the entirety of the will and by giving words employed by the testator their plain and ordinary meaning. *Feder v. Luster*, 54 Ill. 2d 6, 11 (1973); *Hartwick v. Heberling*, 364 Ill. 523, 528 (1936). Construction of a will presents a legal question, and therefore our review is *de novo*. *Hopper v. Beavers*, 362 Ill. App. 3d 913, 917 (2005).

¶ 7 At common law, any provision for a legatee who predeceased the testator lapsed. See *Kehl v. Taylor*, 275 Ill. 346, 352 (1916). This common law rule had harsh consequences, especially in cases of legatees who died leaving children. Those children received nothing from the estate as a result of the lapse. As early as the 1700s, legislatures in the United States and Great Britain began to counter these harsh consequences by enacting statutes that protected certain devises from lapsing. Erich

Tucker Kimbrough, Note, *Lapsing of Testamentary Gifts, Antilapse Statutes, and the Expansion of Uniform Probate Code Antilapse Protection*, 36 Wm. & Mary L. Rev. 269 (1994). These "anti-lapse statutes" generally provide that unless a testator expressly provides otherwise in his or her will, a legacy to a descendant of the testator who dies before the testator will pass to the descendants of the legatee who are living when the legacy is to take effect in possession or enjoyment. "[A]nti[-]lapse statutes represent a legislative effort to implement the presumed intent of the testator when the testamentary directions are frustrated by conditions that the testator did not consider–namely, the death of a devisee." *Id.* at 270. The anti-lapse statute's purpose is to avoid unintended lapses. See *Schneller v. Schneller*, 356 Ill. 89, 92 (1934); *In re Estate of Bulger*, 224 Ill. App. 3d 456, 459 (1991).

¶ 8 Our State's anti-lapse statute is set forth in section 4-11 of the Probate Act of 1975, and provides in pertinent part:

> "Legacy to a deceased legatee. Unless the testator expressly provides otherwise in his will, (a) if a legacy of a present or future interest is to a descendant of the testator who dies before or after the testator, the descendants of the legatee living when the legacy is to take effect in possession or enjoyment, take per stirpes the estate so bequeathed; (b) if a legacy of a present or future interest is to a class and any member of the class dies before or after the testator, the members of the class living when the legacy is to take effect in possession or enjoyment take the share or shares which the deceased member would have taken if he were then living, except that if the deceased member of the class is a descendant of the testator, the

descendants of the deceased member then living shall take per stirpes the share or shares which the deceased member would have taken if he were then living ***." 755 ILCS 5/4-11(a), (b) (West 2010).

¶ 9 Illinois law presumes that "the testator made the will in view of the statute, and that he intended to have the statute prevail, unless the contrary appears." (Internal quotation marks omitted.) *Rudolph v. Rudolph*, 207 Ill. 266, 278 (1904); see also *Schneller*, 356 Ill. at 93. In order to avoid application of the anti-lapse statute, the testator must express his intention to disinherit his heirs clearly by "express words or by necessary implication." *Vollmer v. McGowan*, 409 Ill. 306, 312 (1951). The legatee making the claim that the anti-lapse statute is inapplicable bears the burden of proof. *Schneller*, 356 Ill. at 93; *Rudolph*, 207 Ill. at 278.

¶ 10 The circuit court found that the 30-day survivorship provision expressed Marjorie's intent to avoid application of the anti-lapse statute and disinherit her grandchildren. The respondents argue that the survivorship clause is merely a standard clause used by practitioners to avoid having to unnecessarily run a gift through multiple estates in order to minimize probate expenses, and that it does not express or necessarily imply any intention by Marjorie to avoid application of the anti-lapse statute or disinherit her grandchildren. They further argue that survivorship language in a will is insufficient to manifest a testator's intent to avoid application of the anti-lapse statute.

¶ 11 We need not address the respondents' argument that the 30-day survivorship provision was merely a planning device designed to minimize probate expenses because

we agree with the respondents that words of survivorship, alone, are not a sufficient manifestation of intent to avoid application of the statute.

¶ 12 A review of the wills in *Schneller*, *In re Estate of Bulger*, and *Vollmer* reveals the degree of clarity necessary to avoid application of the anti-lapse statute. In *Schneller*, our supreme court found the following language insufficient to bar application of the anti-lapse statute:

> " 'All the remainder *** of my estate *** I give, devise and bequeath to my three children, *** or to the survivors or survivor of them, to be distributed equally share and share alike.' " *Schneller*, 356 Ill. at 91, 100.

Likewise, in *In re Estate of Bulger*, the court found the following language in a will's residual clause insufficient to defeat the anti-lapse statute:

> " 'All the rest, residue, and remainder of my property, *** I give, devise and bequeath to my wife, ESTHER Z. BULGER, and in the event my wife, ESTHER Z. BULGER, shall predecease me *** all of my said property shall go and the same is hereby given, devised and bequeathed to my children, EDWARD G. BULGER, VERONICA STEDMAN, EMMETT BULGER and CHARLES BULGER, to share and share alike, or to the survivor or survivors of them, in equal shares.' " *In re Estate of Bulger*, 224 Ill. App. 3d at 458, 460.

Esther Z. Bulger and Emmett Bulger predeceased the testator. The court concluded that the phrase "or to the survivor or survivors of them" was not a sufficiently clear indication that the testator provided for the contingency of the prior death of his son, and that Emmett's children were entitled to his share. *Id.* at 460. In both cases the court found

that words of survivorship did not so clearly demonstrate the testator's intent to disinherit his grandchildren. *Schneller*, 356 Ill. at 91-93, *In re Estate of Bulger*, 224 Ill. App. 3d at 459-60.

¶ 13 By contrast, the court in *Vollmer* found the following language to be sufficiently clear to avoid the anti-lapse statute and disinherit a deceased child's children:

> " 'In case any child above named should depart this life, either with or without heirs of his or her body, at any time previous to my demise, then and in that case, the surviving children under this Will shall become seized equally of the property specified of such deceased child or children so departing this life aforesaid, and the property interest so accruing of such deceased child or children under this will.' " *Vollmer*, 409 Ill. at 309-10, 313-15.

As in *Schneller* and *In re Estate of Bulger*, and in contrast to *Vollmer*, the will in the present case does not clearly demonstrate the testator's intent to avoid application of the anti-lapse statute.

¶ 14 Bonita argues that the 30-day survivorship provision demonstrates Marjorie's awareness that a legatee might predecease her, and that this awareness, coupled with her use of the *per capita* distribution term found in the third provision clearly demonstrates Marjorie's intent that her estate pass to a surviving child and not to grandchildren of a deceased child. We disagree.

¶ 15 The terms *per capita* and *per stirpes* designate the method of determining how the estate will be divided among those entitled to take and have no application in determining those entitled to share in the estate. *Goodwine State Bank v. Mullins*, 253 Ill. App. 3d

980, 1006-07 (1993) (citing *Johnston v. Herrin*, 383 Ill. 598, 606 (1943)); 96 C.J.S. *Wills* § 1154 (2012). In both *Schneller* and *In re Estate of Bulger*, the courts held that words of survivorship did not sufficiently demonstrate the testator's intent to bar application of the anti-lapse statute, notwithstanding the testator's use of the phrase "share and share alike"–a phrase our courts have equated to the term "*per capita*" (see, *e.g.*, *Heller v. Metcalf*, 98 Ill. App. 3d 76, 79 (1981) (citing *Kiesling v. White*, 411 Ill. 493 (1952)). *Schneller*, 356 Ill. at 100; *In re Estate of Bulger*, 224 Ill. App. 3d at 460. We likewise conclude that the use of the term "*per capita*" in the third will provision combined with the survivorship language in the fourth provision do not so clearly demonstrate Marjorie's intent to disinherit her grandchildren as to avoid application of the anti-lapse statute.

¶ 16 Citing *Aurora National Bank v. Old Second National Bank*, 59 Ill. App. 3d 384, 390 (1978), Bonita also argues that this case involves a failed legacy rather than a lapsed legacy. In that case, the court held that if the testator's will requires survivorship of the legatee for the legacy to vest, then the legacy is not technically a lapsed legacy, but is a failed legacy. *Aurora National Bank*, 59 Ill. App. 3d at 390. While Bonita argues this distinction supports her position, we are not convinced that this technical distinction is determinative of the outcome because our courts have held survivorship language alone does not overcome the anti-lapse statute. *Schneller*, 356 Ill. at 100; *In re Estate of Bulger*, 224 Ill. App. 3d at 459-60; see also Erich Tucker Kimbrough, Note, *Lapsing of Testamentary Gifts, Antilapse Statutes, and the Expansion of Uniform Probate Code Antilapse Protection*, 36 Wm. & Mary L. Rev. at 272-73, 289-90 (remarking that these distinctions have become somewhat blurred under anti-lapse statutes and generally are

not considered a factor in the operation of the statute). Moreover, the legacy in question in *Aurora* failed because survivorship was explicitly made a condition precedent. In *Aurora*, Edna D. Davidson's will bequeathed the sum of $5,000 to Catherine Herrs, "if she survives me." Herrs predeceased Davidson. The *Aurora* court held that the legacy failed rather than lapsed, reasoning that while a legacy generally lapses if the legatee dies before the testator, it fails where survival is a condition precedent. Unlike the will provision at issue in *Aurora*, the third provision of Marjorie's will did not explicitly make survival a condition precedent to the gift over to Bonita and Donald Dwayne Smith.

¶ 17 For the reasons stated in this order, we reverse the judgment of the circuit court of Madison County, and we remand the cause for further proceedings not inconsistent with this order.

¶ 18 Reversed and remanded.

¶ 19 JUSTICE CHAPMAN, dissenting.

¶ 20 Application of the anti-lapse statute "is contingent upon the testator's having made no provision in his will for the disposition of the property in case of the death of the devisee before that of the testator." *Schneller*, 356 Ill. at 101-02 (De Young, J., & Jones, J., dissenting). In order to avoid application of the anti-lapse statute, the testator must express his intention to disinherit his heirs clearly by "express words or by necessary implication." *Vollmer*, 409 Ill. at 312.

¶ 21 In the case before us the trial court found that the 30-day survivorship clause expressed Marjorie Smith's intent to disinherit her grandchildren, thereby avoiding application of the anti-lapse statute.

¶ 22 Katharine-Lee and Donald contend that the Illinois anti-lapse statute controls because their grandmother did not include the necessary contingency language to avoid a lapse.

¶ 23 Bonita Krupp counters that the 30-day survivorship language and the *per capita* distribution language taken together show that Marjorie recognized the possibility that one of her children might not survive her and that she provided for that contingency through a *per capita* distribution.

¶ 24 I agree with Katharine-Lee and Donald's contention that the survivorship language in the will's fourth provision, *alone*, does not provide the necessary contingent language to avoid application of the anti-lapse statute. *Schneller*, 356 Ill. at 100. However, because we can affirm a trial judge's decision on any basis that appears of record, this finding does not necessarily dispose of this case. *People v. Huff*, 195 Ill. 2d 87, 91 (2001); *People v. Yarber*, 279 Ill. App. 3d 519, 524 (1996); *Estate of Johnson v. Condell Memorial Hospital*, 119 Ill. 2d 496, 502 (1988).

¶ 25 Conversely, I am unconvinced and find no support for Katharine-Lee and Donald's contention that the fourth provision is merely an estate planning device that Marjorie intended to apply only in the event that her husband predeceased her and not if one or both of her children did. While I have already stated that the fourth provision alone does not supply the necessary contingency language to avoid the statute, I find that it *does*

clearly indicate Marjorie's awareness that any of her named legatees might predecease her. To find otherwise would require us to disregard the plain meaning of the fourth provision language–"*No person named in this Will* shall be deemed to have survived me unless he or she is living on the thirtieth (30th) day succeeding the day of my death." (Emphasis added.) And, as I will further explain, it is this awareness that a legatee might predecease her, coupled with the *per capita* distribution term found in the third provision, that provides Marjorie's clear expression of intent that her estate pass to a surviving child and not *per stirpes* to grandchildren of a deceased child.

¶ 26 The third provision of the will names both her daughter, Bonita, and her son, Donald, as legatees in the event Marjorie's husband predeceases her and states that each is to receive one-half of the estate, *per capita*. Bonita reasons that her mother's use of the *per capita* term, coupled with the requirement that she and her brother had to outlive their mother by 30 days in order to receive the distribution, establishes her clear intent to disinherit her grandchildren. I agree.

¶ 27 "Examination of the cases in Illinois dealing with 'lapsed legacies' are, at best, confusing." *Aurora National Bank v. Old Second National Bank*, 59 Ill. App. 3d 384, 390 (1978). A "lapsed legacy" occurs when the legatee dies before the testator and the bequest to the deceased legatee falls into the residuary fund of the estate, unless there is an anti-lapse statute. Black's Law Dictionary 802 (5th ed. 1979). If the testator's will requires survivorship of the legatee for the legacy to vest, then the legacy is not technically a lapsed legacy, but is a failed legacy. *Aurora National Bank*, 59 Ill. App. 3d at 390; see also *Elliott v. Brintlinger*, 376 Ill. 147, 151 (1941). While Bonita argues this

distinction supports her position, I am not convinced that this technical distinction is determinative of the outcome because our courts have held survivorship language alone does not overcome the anti-lapse statute. *Schneller*, 356 Ill. at 100; *In re Estate of Bulger*, 224 Ill. App. 3d at 459-60; see also Erich Tucker Kimbrough, Note, *Lapsing of Testamentary Gifts, Antilapse Statutes, and the Expansion of Uniform Probate Code Antilapse Protection*, 36 Wm. & Mary L. Rev. at 272-73, 289-90 (remarking that these distinctions have become somewhat blurred under anti-lapse statutes and generally are not considered a factor in the operation of the statute).

¶ 28 Courts look to the language of the will to best determine the distributive intent of the testator. The language of the will should control if the testator's intention can be ascertained. *Mercantile Trust & Savings Bank v. Rogers*, 5 Ill. App. 2d 162, 169 (1955). A *per capita* division of the assets of an estate means by the number of individuals equally or share and share alike. Black's Law Dictionary 1022 (5th ed. 1979). "A *per capita* distribution is dependant upon survivorship of the person named as the legatee, whereas a *per stirpes* distribution can pass to the heirs of a legatee if the legatee predeceases the testatrix." *Rowe v. Rowe*, 720 A.2d 1225, 1228 (Md. Ct. Spec. App. 1998). Under a *per capita* distribution, the court must distribute the devise among the then-surviving heads on the generational line. *In re Estate of Raymond*, 739 N.W.2d 889, 893-94 (Mich. Ct. App. 2007), *aff'd*, 764 N.W.2d 1 (2009). A *per stirpes* distribution "denotes that method of dividing an intestate estate where a class or group of distributees take the share which their deceased would have been entitled to." Black's Law Dictionary 1030 (5th ed. 1979). "It is the antithesis of *per capita*." *Id.* When the will

discloses the intent to bequeath either *per capita* or *per stirpes*, the courts will give effect to that intention. *Northern Trust Co. v. Wheeler*, 345 Ill. 182, 191-92 (1931).

¶ 29 I note that the cases urged by the appellee are mainly ones in which the testator's intent to distribute the estate on either a *per capita* or *per stirpes* basis was ambiguous. In *Rudolph v. Rudolph*, the court held that the words " 'to my beloved children as their absolute property in fee simple to be equally divided between them' " were not sufficient to avoid the application of the anti-lapse statute. *Rudolph*, 207 Ill. at 275, 279. In *Schneller*, the testator used words commonly denoting a *per capita* distribution but did not specifically use the *per capita* term to designate the distribution. There, the Illinois Supreme Court found that the words " 'or to the survivor or survivors of them to be distributed equally share and share alike' " did not by themselves indicate the testator's intent to bar application of the anti-lapse statute and therefore *per stirpes* distribution prevailed. *Schneller*, 356 Ill. at 100. Likewise, in *In re Estate of Bulger*, the court found that a bequest to the testator's children which used the phrase " 'to share and share alike, or to the survivor or survivors of them, in equal shares' " was not sufficiently clear to overcome the application of the anti-lapse statute. *In re Estate of Bulger*, 224 Ill. App. 3d at 458.

¶ 30 Similarly, in *First Illini Bank v. Pritchard*, the appellate court applied the anti-lapse statute because there was no clear contrary intent to a *per stirpes* distribution. *First Illini Bank v. Pritchard*, 230 Ill. App. 3d 861, 865-66 (1992). The court below had ruled that testamentary trust language devising to the testator's " 'lineal descendants, share and

share alike' " proved that the testator intended a *per capita* distribution. *Id*. The appellate court reversed. *Id.* at 867.

¶ 31 I find the rationale for the court's holding supports a *per capita* distribution in the case before us:

> "In Illinois, the law presumes a *per stirpes* distribution was intended when gifts are made to a class of beneficiaries who stand in unequal degrees of relationship to the testator, and this presumption will prevail unless the testator uses inconsistent words showing a clear contrary intent, or to do so would defeat the obvious general intention of the testator. [Citation.] The testator is presumed to have known the law in force when the will was drafted [citation], *and the testator's failure to employ the term 'per capita', we feel, is highly probative of her intent*." (Emphasis added.) *Id.* at 865 (citing *Harris Trust & Savings Bank v. Beach*, 118 Ill. 2d 1, 21-22 (1987); *In re Estate of Hughlett*, 113 Ill. App. 3d 910, 913 (1983)).

¶ 32 The court went on to further state that "it seems unlikely that the decedent intended a *per capita* distribution of her estate but merely neglected to include that term in her will." *Id.* at 865-66.

¶ 33 Unlike in *First Illini Bank*, in the case before us, Marjorie *did* employ the term *per capita* to indicate her distributive intent. Furthermore, when the beneficiaries stand in equal degrees of relationship to the testator, as is the case here, the common law favors a *per capita* distribution over a *per stirpes* distribution. *Condee v. Trout*, 379 Ill. 89, 92 (1942); see also *Smith v. Thayer*, 28 Ill. 2d 363, 367 (1963).

¶ 34 In the case *Vollmer v. McGowan*, the Illinois Supreme Court found the following language sufficiently clear to avoid the anti-lapse statute and disinherit a deceased child's children, even though the testator did not include *per capita* language:

> " 'In case any child above named should depart this life, either with or without heirs of his or her body, at any time previous to my demise, then and in that case, the surviving children under this Will shall become seized equally of the property specified of such deceased child or children so departing this life aforesaid, and the property interest so accruing of such deceased child or children under this will.' " *Vollmer*, 409 Ill. at 309-10, 313-15.

¶ 35 The court found the provision clearly expressed the testator's intent to disinherit his grandchildren and was consistent with other provisions in the will. *Id.* at 313. The court stated, "Since a testator's heirs cannot be disinherited upon mere conjecture, when the testator seeks to disinherit them he must express his intention clearly, either by express words or by necessary implication." *Id.* at 312-13. The court further remarked that "[a] testator enjoys the undoubted right to make an unequal disposition of his property, so far as his children and grandchildren are concerned." *Id.* at 313.

¶ 36 I believe the *Vollmer* holding supports the appellee's position. The language the testator used in *Vollmer* to describe his distributive intent essentially defines a *per capita* distribution. In contrast, the anti-lapse statute mandates a *per stirpes* distribution to the living children of a deceased individual or class member legatee. The term "*per capita*" has a well-defined legal meaning that is the antithesis of *per stirpes*. Black's Law Dictionary at 1030. In the case before us, I believe the intent to disinherit Marjorie's

grandchildren was expressed by "necessary implication" when she chose the term *per capita* to describe the distribution. *Vollmer*, 409 Ill. at 313-14.

¶ 37 Additionally, in the case before us, *unlike* in *Schneller*, *In re Estate of Bulger*, and *First Illini Bank*, we are *not* left to surmise the testator's distributive intent, as the qualifying term, *per capita*, was supplied by the testator and included in her will. "Although it is said that the law favors *per stirpes* distribution to *per capita* distribution under the laws of descent, unless the latter intent clearly appears, when the will shows a clear intention on the part of the testator of devising *per capita* or *per stirpes*, this intention will be conclusive without reference to the statute of descent, since the testator has plenary authority over the distribution of his or her property." 3A Horner Probate Practice & Estates, § 61:19 (2015) (citing *Northern Trust Co.*, 345 Ill. 182). The testator is presumed to know the meaning of terms used in the will. *Northern Trust Co.*, 345 Ill. at 192 (the court finding that there is no ambiguity about the words "*per capita*" or "*per stirpes*"). "The direction that an estate be divided equally *per capita* is not consistent with, but opposed to, a division of the estate *per stirpes* ***." *Id.* at 196 (citing *Proctor v. Lacy*, 160 N.E. 441 (Mass. 1928)).

¶ 38 I find that Marjorie intended her estate to be shared by her two children, and if one of her children died before her, or within 30 days after her death, that child's share was to be distributed to the surviving child. The *per capita* language Marjorie used "necessarily implied" her clear intent to disinherit her grandchildren and thereby avoid the effects of the anti-lapse statute. *Vollmer*, 409 Ill. at 313-14. The *per capita* term in the third provision requiring distribution by the surviving heads on a generational line is consistent

with the survivorship clause in the fourth provision acknowledging Marjorie's awareness that any one of her named legatees might predecease her. The *per capita* term provides the contingency that modifies the legacy. I find to hold otherwise makes the distinction between a *per stirpes* and a *per capita* distribution irrelevant. I do not believe that the anti-lapse statute requires such a conclusion. Illinois law presumes that Marjorie knew the effects of the law when she and her attorney drafted her will. See *Estate of Hughlett*, 113 Ill. App. 3d at 913. A testator has the right to make an unequal disposition of his property with respect to children and grandchildren and courts are without power to change a will under the guise of interpretation. *Vollmer*, 409 Ill. at 315. At the time of her death, Marjorie was aware of the existence of her grandchildren and for her own reasons determined not to include them in her legacy.

¶ 39 For the reasons stated in this dissent, I would affirm the judgment of the circuit court of Madison County.