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2019 IL App (3d) 170639-U

Order filed September 11, 2019

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2019

THE ESTATE OF THELMA B.	)	Appeal from the Circuit Court
PENNINGTON, Deceased,	)	of the 9th Judicial Circuit,
	)	Knox County, Illinois.
Plaintiff-Appellant,	)	
	)	Appeal No. 3-17-0639
v.	)	Circuit No. 15-P-27
	)	
THE AMERICAN RED CROSS,	)	Honorable
	)	James G. Baber,
Defendant-Appellee.	)	Judge, presiding.

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JUSTICE CARTER delivered the judgment of the court.  
Presiding Justice Schmidt and Justice O'Brien concurred in the judgment.

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**ORDER**

¶ 1 *Held:* We affirm the trial court's order granting defendant's motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2016)).

¶ 2 This appeal is from the trial court's dismissal of a petition filed by Ellen Moore, the executrix of the will of Thelma Pennington (deceased). The petition was filed in an attempt to have the legacy in Pennington's will to "the West Central Illinois Chapter of the American Red Cross" declared void or lapsed. The trial court granted the motion filed by the defendant, the

American Red Cross, to dismiss the petition pursuant to sections 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2016)). We affirm.

¶ 3

### FACTS

¶ 4

On January 13, 2015, Pennington executed a will, bequeathing \$5000 to Ellen Moore (executrix of the will and Pennington’s niece), \$5000 to the First Christian Church of Knoxville, Illinois, and \$5000 to the Galesburg Rescue Mission. In a residual clause, Pennington bequeathed the remainder of her estate “in equal portions, to Habitat for Humanity, Galesburg, Knox County, Illinois; the Galesburg, Illinois Lions Club to be used for the blind, the West Central Illinois Chapter of the American Red Cross and the Assembly of God Church, Galesburg, Illinois.” Pennington died six days later, on January 19, 2015. On January 26, 2015, Moore filed Pennington’s will in the trial court, and the will was subsequently admitted into probate.

¶ 5

#### A. Petition to Declare Legacy Void

¶ 6

On February 24, 2017, Moore filed a petition to declare Pennington’s legacy to the West Central Illinois chapter of the American Red Cross either void *ab initio* or lapsed because that chapter of the Red Cross, which had been located in Galesburg and had served Knox, Warren, and Henderson counties in Illinois was “abolished” in October 2014, prior to the execution of the will. Moore alleged that the chapter’s office in Galesburg “was closed and put up for sale,” the West Central Illinois chapter’s board of directors was “abolished and disbanded,” and a new chapter of the Red Cross was created—the Quad Cities and West Central Illinois chapter. Moore contended that as a result of the West Central Illinois chapter having been “abolished,” the bequest in Pennington’s will to that chapter was void *ab initio* and the remaining legatees of the residual clause should take the void or lapsed share. Moore argued, “the language in the will

makes it clear that the testator’s intent was to give to organizations located in Galesburg, Illinois, and the testator had made it clear in conversations with others that the money was to remain in Galesburg, Illinois.”

¶ 7

B. Red Cross’s Motion to Dismiss

¶ 8

The Red Cross filed a motion to dismiss the petition pursuant to sections 2-615 and 2-619 of the Code (735 ILCS 5/2-615, 2-619 (West 2016)). The Red Cross argued that the petition should be dismissed pursuant to section 2-619 of the Code because in October 2014, the West Central Illinois Chapter had been “consolidated into” its Quad Cities and West Central Illinois chapter and Pennington’s intent to give gifts to organizations servicing Galesburg, Illinois, could only be served if the bequest to the Red Cross survived. The Red Cross indicated that it promised that all money received from the Pennington estate will be reserved for Galesburg. The Red Cross additionally argued that it is a single corporation and its local chapters are not separate entities, so that Pennington’s gift had always been intended for the same organization. Additionally, the Red Cross argued that the petition should be dismissed pursuant to section 2-615 of the Code because the Red Cross entity that had been named in Pennington’s will “never ceased to exist.” The Red Cross argued that regardless of which chapter received the funds, the funds would be managed by the exact same organization because it is a single corporation and the local chapters are not separate legal entities. Alternatively, the Red Cross argued that even if the local chapter of the Red Cross had ceased to exist, the doctrine of *cy pres* should be applied for the funds to be distributed in a manner as near as possible to Pennington’s intent.

¶ 9

In support of its motion to dismiss, the Red Cross attached a letter and affidavit wherein the vice president and deputy general counsel of the Red Cross, Mary Elizabeth Cisneros, attested that the “American Red Cross will earmark the distributions from Ms. Pennington’s

estate to be used to provide Red Cross services in Galesburg, Illinois.” The Red Cross also attached its bylaws to the motion, which indicated that its chapters were local units of the corporation and “shall not be constituted as legal entities separate from the Corporation.”

¶ 10 In a response to Red Cross’s motion to dismiss, Moore argued that the language of the will was ambiguous and the trial court should allow the admission of extrinsic evidence regarding the purpose of the gift. In support, Moore attached affidavits from herself and Ana Maria Orozco (Pennington’s great niece). Moore attested in her affidavit that on January 2, 2015, she and Orozco had a conversation with Pennington while Pennington was making changes to a copy of her will. During that conversation Pennington had indicated that she did not know if there was still a local office for the Red Cross but that she would leave the bequest as-is “trusting that there [was] still a local Chapter here in Galesburg.” Pennington told Moore that she did not want the money going anywhere else. Moore attested that Pennington made her promise that Red Cross would not get the money if they did not have a local office in Galesburg and, instead, the other three organizations named in the residual clause should receive the money. Orozco attested that on January 2, 2015, when revising her will, Pennington had stated, “I want to give back to the community” and indicated that she had been raised in Galesburg and loved the community. Orozco further attested that Pennington was under the impression there was a West Central Illinois chapter of the Red Cross in Galeburg, all of the organizations Pennington wanted to leave her money to were in Galesburg (except a small church in Knoxville where Pennington had played the organ), and Pennington “would rollover in her grave if her money went to an Organization that was no longer in Galesburg.”

¶ 11 On June 14, 2017, a hearing on Red Cross’s motion to dismiss took place. Red Cross’s attorney agreed that Pennington’s intent in executing her will was to provide gifts and funds for

services provided in Galesburg, Illinois, which Red Cross had promised to do by way of reserving the funds for services provided in Galesburg, Illinois. Red Cross's attorney argued that enforcing the gift and upholding the bequest to Red Cross was the "best and only way to serve the intent of the will." Red Cross's attorney also argued that local chapters of the Red Cross are not separate entities and the West Central Illinois chapter did not cease to exist but, instead, had merged into the Quad Cities chapter. Red Cross's attorney contended that even if the local chapter had ceased to exist, under the doctrine of *cy pres* the gift intended for a particular charitable entity should not fail if a literal execution of the charitable gift is impossible but, rather, the property should be directed toward a charitable purpose that falls within the general charitable intent of the testator. Red Cross's attorney also objected to the admission of the affidavits of Moore and Orozco into evidence as being inadmissible hearsay.

¶ 12 In response, the attorney for Pennington's estate argued that the will indicated Pennington's intent was to give money to "local organizations that were functioning and operating in Galesburg or Knox, County, Illinois." He argued that the intent was not just that money be used for charitable purposes generally but that it be used by charitable organizations operating and existing in Galesburg, Illinois (or Knoxville, Illinois). The estate's attorney also argued that the affidavits of Moore and Orozco were not intended to show the truth of the matter asserted but that an issue of fact existed as to Pennington's intent. He further argued that there was an ambiguity in the will that required the trial court to consider extrinsic evidence because the West Central Illinois Chapter of the American Red Cross was no longer in existence and the new chapter is a "completely different organization." The estate's attorney argued that the extrinsic evidence would rebut the fact that Pennington's intent was to give the money to the Red

Cross generally and “that it was to actually give the money to other organizations that are here and located and running in Galesburg, Illinois.”

¶ 13 The estate’s attorney argued that in-court testimony regarding Pennington’s statements regarding the circumstances surrounding the execution of Pennington’s will were admissible as an exception to the Dead Man’s Act. In response, the attorney for Red Cross argued that the Dead Man’s Act argument had not been asserted in the estate’s written response to the motion to dismiss and the Dead Man’s Act was not applicable in this case because statements that are contradictory to the terms of the will cannot be used to invalidate a will.

¶ 14 C. Dismissal of the Petition to Declare Gift Void

¶ 15 The trial court indicated that it would take the matter under advisement, noting that the *cy pres* doctrine was fact based and would not be applied to grant a motion to dismiss where the pleading was to be viewed in the light most favorable to the nonmoving party. The trial court gave the parties 21 days to submit any additional authority (but not on the *cy pres* doctrine).

¶ 16 On August 14, 2017, the trial court entered its written order. The trial court found that at the time the will was executed, the West Central Illinois chapter of the American Red Cross in Galesburg, Illinois, “did not separately exist but had merged into the Quad Cities and West Central Illinois Chapter, which encompasses more counties in addition to those served by the West Central Illinois Chapter.” The trial court granted the motion to dismiss pursuant to section 2-615 of the Code because the beneficiary (the West Central Illinois chapter) did not cease to exist where it continued to exist in the reorganized Quad Cities and West Central Illinois chapter.

¶ 17 D. Motion to Reconsider

¶ 18 On August 11, 2017, Moore filed a motion to reconsider. In support thereof, Moore attached almost 40 newspaper articles documenting past fundraising efforts for the local chapter

of the Red Cross located in Galesburg. Moore argued that the articles show that the public perception was that of the existence of a separate entity known as the West Central Illinois Chapter of the American Red Cross. Moore argued that donors, including Pennintgon, would have concluded that they were donating to the local chapter in light of the local chapter having solicited donations and, in the public's mind, the local chapter had not merged into a larger chapter but had, instead, "ceased to exist" when it closed.<sup>1</sup> In the motion to reconsider, Moore also argued the individuals served by the new chapter were not the same because the new chapter served 19 counties in three states and the service area of the abolished chapter constituted less than 16% of the new service area. Moore further argued that the affidavits she provided established Pennington's intent to condition her gift on the existence of the Western Illinois chapter. The trial court denied Moore's motion to reconsider.

¶ 19 Moore appealed.

¶ 20 ANALYSIS

¶ 21 On appeal, Moore argues the trial court erred in granting Red Cross's motion to dismiss because there was a latent ambiguity in the will and the trial court should have considered extrinsic evidence of the affidavits executed by her and Orozco. Specifically, Moore argues that an ambiguity existed because the West Central Illinois chapter of the American Red Cross no longer existed and extrinsic evidence must be considered in light of the ambiguity. Moore contends that once extrinsic evidence is considered, it is clear that Pennington intended for her

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<sup>1</sup>The articles attached to the motion to reconsider appear, by way of handwritten notes on the articles, to date back to the 1970's until about the year 2000; it is not apparent that any of the articles were published at or near the time that Pennington executed her will in 2015. The copies of many of the articles attached to the motion to reconsider were copied too dark and were illegible.

gift to the West Central Illinois chapter of the Red Cross to be conditioned upon that chapter continuing to operate locally in Galesburg.

¶ 22 Red Cross argues on appeal that the West Central Illinois chapter of the Red Cross never ceased to exist so that, as a matter of law, the gift must survive because the intent of the gift can be carried out. Red Cross additionally argues that even if there was a latent ambiguity in the will, the extrinsic evidence offered by Moore of the affidavits referencing statements Pennington allegedly had made at the time she was reviewing her will is inadmissible hearsay.

¶ 23 Here, the issue for our review on appeal is whether the trial court erred by granting Red Cross's motion to dismiss the petition pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2016)). A section 2-615 motion to dismiss tests the legal sufficiency of the complaint, and the question presented in determining a 2-615 motion is whether the allegations of the complaint, when taken as true and viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Cowper v. Nyberg*, 2015 IL 117811, ¶ 12. The facts that are apparent on the face of the pleadings, including the exhibits attached thereto, may be considered. *Id.* A motion to dismiss pursuant to section 2-615 should not be allowed unless it is clearly apparent that no set of facts can be proven that would entitle the plaintiff to recovery. *Id.* The standard for reviewing a trial court's dismissal pursuant section 2-615 of the Code is de novo. *Id.*

¶ 24 When interpreting a will, the intention of the testator as expressed in the will must be ascertained and given effect if it is not contrary to law or public policy. *Citizens Nat. Bank of Paris v. Kids Hope United, Inc.*, 235 Ill. 2d 565, 574 (2009). The best proof of the testator's intent is the language of the will. *In re Estate of Siedler*, 2019 IL App (5th) 180574, ¶ 22. When determining this intent, courts consider the plain and ordinary meaning of the words used, taking



into consideration the entire document. *Kids Hope United*, 235 Ill. 2d at 574. If the language of the will is clear and unambiguous, extrinsic evidence will not be admitted to vary that language. *Siedler*, 2019 IL App (5th) 180574, ¶ 24. However, extrinsic evidence will be considered to determine the testator's intent where latent ambiguities exist in the will. *Id.*

¶ 25 In looking within the four corner of Pennington's will, the parties agree that Pennington intended to provide gifts to organizations providing charitable services in or near Galesburg, Illinois. Moore, however, argues Pennington also intended for those charitable organizations actually be located in Galesburg, Illinois. There is no language in the will indicating such a restrictive condition on the gifts in Pennington's donative statement. Consequently, the fact that the West Central Illinois chapter of the Red Cross closed its local office and merged those operations within a larger service area is of no consequence where Pennington's intent is effectuated by allowing the Quad Cities and West Central Illinois Chapter of the American Red Cross to take under her will.

¶ 26 Additionally, there is no ambiguity in the will and, therefore, Moore's argument that extrinsic evidence should have been considered by the trial court to determine Pennington's intent need not be addressed. See *Coussee v. Estate of Efston*, 262 Ill. App. 3d 419, 425 (1994) ("[a] party does not create an ambiguity and thereby open the door to extrinsic evidence merely by offering evidence that the testator did not intend to say what is otherwise clearly stated in a will"). We, therefore, need not determine whether the affidavits offered by Moore are inadmissible hearsay.

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, we affirm the judgment of the circuit court of Knox County.

¶ 29 Affirmed.