IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

JOANNA MARTINDALE, Plaintiff/Counter-Defendant/ Appellee,	)
	) **Shelby Chancery No. 102924-1 R.D.**
	)
	) **Appeal No. 02A01-9502-CH-00030**
VS.	)
	)
UNION PLANTERS NATIONAL BANK, Defendant/Counter-Plaintiff/ Appellee,	)
	)
	)
UNION PLANTERS NATIONAL BANK, Third Party Plaintiff,	)
	)
VS.	)
	)
PATRICIA COX BAKER and JEREL ALLEN COX, Third Party Defendants/ Cross Defendants/Appellants,	)
	)
and DAN COX, Third Party Defendant/ Cross Plaintiff/Appellee.	)

FILED

May 21, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

APPEAL FROM THE CHANCERY COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE
THE HONORABLE NEAL SMALL, CHANCELLOR

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AFFIRMED

ALAN E. HIGHERS, J.

CONCUR:

HOLLY KIRBY LILLARD, J.

HEWITT P. TOMLIN, JR., SR. J.

This is a will construction case involving the interpretation of a testamentary trust

provision.

I.

Facts

The testator, Carl Velah Kenner, executed his Last Will and Testament on July 30, 1968. The pertinent provisions of the will are as follows:

> My Trustee shall pay the net income derived from the management of said trust at such time and in such amounts as it, in its sole discretion, may determine to my wife, Mary Elizabeth Barber Kenner, but not less frequently than twice annually, so long as she may live and, upon her death, all the remaining principal and accumulated income of this trust estate shall be distributed in equal portions, share and share alike, to my sister, Mrs. Wilma B. Cox, and my nephew, Carl Van Kenner, or **in the event my said sister or nephew shall predecease the date of such distribution leaving children surviving, that share which would have gone to my sister or nephew had she or he survived, shall go to the children of said deceased sister or nephew in equal portions**, **share and share alike, or, in the event of no surviving children, then all shall go to the survivor.** (emphasis added)
>
> In the event my said wife shall predecease me or we shall die simultaneously as a result of a common catastrophe, then and in either of such events, after payment of all of my just debts, taxes, funeral expenses, expenses of administration and the like, I direct that my Executor hereinafter named divide the net estate into two equal shares, one of such shares I give, devise and bequeath in equal portions to my sister, Mrs. Wilma B. Cox and my nephew, Carl Van Kenner, absolutely and in fee simple, per stirpes and not per capita, or in the event either shall predecease me leaving no children, the survivor shall take the entire share...

The testator's wife was Mary Elizabeth Kenner. The testator had one brother and one sister. The testator's brother was Paul Kenner, whose son is Carl Van Kenner. Carl received his 1/2 share of the trust upon Mary Elizabeth Kenner's death on March 1, 1993, in accordance with the will. The remaining one-half of the trust, valued at approximately $500,000.00, is the subject of this suit.

The testator's sister was Wilma B. Cox, who had three children, Patricia Cox Baker, Jerel Allen Cox, and Duane Cox. Duane Cox predeceased the testator in 1978, leaving two children surviving him, Joanna Martindale and Dan Cox, who are the appellees in this

case. Wilma died in 1991, survived by Patricia and Jerel, who are the appellants.

Following the death of the testator's wife, the appellees, Joanna and Dan, brought suit to compel Union Planters National Bank, the trustee named in the will, to distribute to them their alleged portions of the trust corpus.

The trial court held that the trust proceeds should be distributed as follows: 1/3 to Patricia Cox Baker, 1/3 to Jerel Allen Cox, 1/6 to Joanna Martindale, and 1/6 to Dan Cox. Patricia and Jerel have appealed from this judgment. They contest several evidentiary rulings of the chancellor and urge this court to find that the Tennessee class gift doctrine does not apply in the present case because the testator intended that only surviving issue of his sister share in his estate.

II.

Evidentiary Rulings

Following the death of Duane Cox in 1978, the testator allegedly had two conversations in which he stated that he did not want Joanna or Dan to take an interest in his estate. The first alleged conversation was with his sister, Wilma, which was purportedly overheard by Patricia. Pursuant to an offer of proof, Patricia testified that the testator urged Wilma to make a will. The testator told Wilma that if she did not make a will, he was going to change his will in order to prevent Joanna or Dan from sharing in his estate. The other alleged conversation occurred between the testator and Patricia's husband, Dwight Baker. Dwight Baker, also under an offer of proof, testified that he had a conversation with the testator in which the testator told him that "he was glad he had his affairs fixed so that Dan and Joanna could not get any of his money."

The testator subsequently wrote, and Wilma signed, a properly witnessed holographic will. An attorney later typed the holographic will that was executed on October 18, 1978. This will was probated upon Wilma's death in 1991, in the Crockett County Probate Court.

The trial court excluded both the alleged conversations and Wilma's wills on grounds of hearsay.

Appellants argue that the alleged conversations and the wills should have been admitted into evidence. According to appellants, the testator's statements fall within the state of mind exception to the hearsay rule and are relevant to prove that the testator did not intend for Joanna or Dan to share in his estate. Conversely, Joanna and Dan argue that the wills, as well as the content of the alleged conversations, are inadmissible, both as hearsay and as parol evidence.

Admissibility of evidence rests within the sound discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of that discretion. Patton v. Rose, 892 S.W.2d 410, 415 (Tenn. App. 1994); Witter v. Nesbit, 878 S.W.2d 116, 122 (Tenn. App. 1993).

Tenn. R. Evid. 803(3) provides that the following constitutes an exception to the hearsay rule:

> **Then Existing Mental, Emotional, or Physical Condition**. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

This exception has long been recognized as a means through which to admit into evidence a declarant's state of mind in order to prove subsequent conduct that is consistent with that mental state. TENN. R. EVID. 803 advisory committee's note. However, the subsequent conduct must be that of the declarant, not of a third party. Id. In the present case, appellants are seeking to admit the conversations and the wills in order to prove that *Wilma's* conduct in drafting a new will was consistent with the *declarant's* statements that he wished to exclude Joanna and Dan from taking in the estate. These are not the types of statements that are excepted from the hearsay rule under the state of

mind exception. TENN. R. EVID. 803 advisory committee's note.

Even if we were to hold that the proffered evidence was admissible as a hearsay exception, we would nevertheless hold such evidence properly excludable as parol evidence.

It is a well-established proposition that extrinsic evidence may not be admitted into evidence to supplement, vary, or contradict the terms of a will when there exists no ambiguity within the four corners of the will. Stickley v. Carmichael, 850 S.W.2d 127 (Tenn. 1992); Fariss v. Bry-Block Co., 346 S.W.2d 705, 707 (Tenn. 1961). Although we acknowledge that proof of the circumstances surrounding the execution of a will may be admissible to clarify ambiguities in the will's language, Locke v. Davis, 526 S.W.2d 455, 457 (Tenn.1975); Mongle v. Summers, 592 S.W.2d 594, 596 (Tenn. App.1979), we perceive no such ambiguity in the present case.

From our examination of the record, we cannot conclude that the trial court abused its discretion in excluding the offered evidence.

III.

Distribution of Trust Proceeds

The chief object in the construction of wills is to discover and effectuate the intention of the testator, unless to do so would contravene some rule of law or public policy. Stickley v. Carmichael 850 S.W.2d at 132. In applying this rule and ascertaining the testator's intent, it is necessary to look to the manifest language of the entire will. The testator's intent must be determined from the language of what he has written, not from mere surmise or supposition. Martin v. Taylor, 521 S.W.2d 581, 584 (Tenn.1975). Where the language of a will is clear and unambiguous, the language must control. Moore v. Neely, 370 S.W.2d 537, 540 (Tenn.1963).

This case falls within the terms of T.C.A. § 32-3-104, which provides:

> Where a bequest, devise, conveyance, transfer or gift is made to a class of persons subject to fluctuation by increase or diminution of its number in consequence of future births or deaths, and the time of payment, distribution, vestiture or enjoyment is fixed at a subsequent period or on the happening of a future event, and any member of such class shall die before the arrival of such period or the happening of such event, and shall have issue surviving when such period arrives or such event happens, such issue shall take the share of the property which the member so dying would take if living, unless a clear intention to the contrary is manifested by the will, deed or other instrument.

T.C.A. § 32-3-104 (1984).

This statute modified the Tennessee class doctrine by providing that where a bequest is made to a class of persons that is subject to fluctuation by either increase or decrease of its number, and a class member dies before the time established for distribution, the issue of the deceased class member will take that members's share unless a clear intention to the contrary is evinced by the language of the will. Nicholson v. Nicholson, 496 S.W.2d 477, 479 (Tenn. 1973); Jennings v. Jennings, 164 Tenn. 295, 54 S.W.2d 961, 963 (1932).

In the present case, the will provides that if Wilma predeceases the date of distribution (the death of testator's wife), then "that share which would have gone to my sister...shall go to the children of said deceased sister...in equal portions, share and share alike." The bequest to the "children" of Wilma clearly establishes a class subject to fluctuation. Consequently, pursuant to T.C.A. § 32-3-104, the children of Duane Cox, Dan and Joanna, are entitled to receive Duane's share of the bequest, unless a clear intention to the contrary is manifested by the will.

Appellants contend that the following clause indicates a clear intent on the part of the testator to have the interest in the trust vest only in those individuals that survive Wilma:

> [I]n the event my said sister or nephew shall predecease the date of distribution **leaving children surviving**, that share which would have gone to my sister or nephew had she or he survived, shall go to the children of said deceased sister or nephew in equal portions, share and share alike, or, in the

> event of no surviving children, then all shall go to the survivor. (emphasis added)

Appellants argue that the testator's intent was that if Wilma predeceased the date of distribution, the class was to be limited to only those children that survived Wilma. Conversely, appellees argue that the phrase, "that share which would have gone to my sister or nephew had he or she survived, shall go to the children of said deceased children or nephew..." falls squarely within the language of T.C.A. § 32-3-104 and, therefore, the children of Duane Cox, Joanna and Dan, take a vested transmissible interest.

Appellants have advanced a cogent and persuasive argument in support of their position. However, after careful and thoughtful review, we are unable to glean any clear intention on the part of the testator to limit the class of beneficiaries to those who were living at the time of Wilma's death.

It is apparent from the record that the testator was a shrewd and intelligent businessman whose will was prepared by a competent attorney. Consequently, we can presume that the testator's will was drafted with knowledge of T.C.A. § 32-3-104, and that if the testator had wanted to avoid the effect of the statute, he would have clearly and unequivocally expressed that intent in the language of the will. See, Nicholson, 496 S.W.2d at 479. Moreover, because Duane Cox predeceased the testator, the testator had ample opportunity either to modify the will or attach a codicil thereto indicating his desire to exclude Joanna and Dan from sharing in the estate. The testator did not, however, expressly provide that only those children who survived Wilma should be entitled to the remainder.

In our judgment, the language before us does not unequivocally disclose a definite testamentary intent to attach a condition of survivorship to the class gift. Accordingly, we affirm the judgment of the trial court in its entirety. Costs on appeal are taxed to appellants, for which execution may issue if necessary.

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HIGHERS, J.

CONCUR:

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LILLARD, J.

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TOMLIN, Sr. J.