

99PR1891 (2/24/00)

PROBATE COURT CITY AND COUNTY OF DENVER STATE OF COLORADO

Case No. 99PR1891

IN THE MATTER OF

TRUST CREATED UNDER THE WILL OF MARY CATHERINE CANDELARIA,
Deceased.

ORDER

THIS MATTER comes before the Court upon a Petition for Determination of Beneficiaries and Instruction Regarding Distribution filed by Norwest Bank Colorado, N.A. and Jake Candelaria, co-trustees of the trust created under the will of Mary Catherine Candelaria (hereinafter "Petitioners"). Petitioners have requested that the Court interpret the terms of the testamentary trust created under the Will of Mary Catherine Candelaria and have proposed that Samantha O'Conner, claimed daughter of devisee James Candelaria, have no interest in the distribution of the trust. Samantha Ellen O'Conner has objected to Petitioner's proposed interpretation.

Petitioners have asked the Court to determine two issues: whether Samantha Ellen O'Conner is entitled to a share of the distribution of the trust; and what proportions the beneficiaries are entitled to share in the distribution of the trust estate.

Background

Mary Catherine Candelaria died on March 17, 1977, leaving a Will dated December 11, 1973 (hereinafter "the Will"), which was duly admitted to informal probate by the District Court of Boulder County, Colorado on April 18, 1977. The Will created a testamentary trust that is currently registered in the City and County of Denver and is the subject of this litigation.

The terms of the trust allowed the designated trustees (Petitioners) to make discretionary distributions of principal and income for the benefit of Vivian M. Candelaria, Mary Candelaria's mother. Such distributions were to be distributed to Vivian during her lifetime, and the trust would terminate upon Vivian's death. Upon termination, the remaining principal and interest of the trust would be distributed to Mary's living brothers and sisters and their descendants.

The disputed portion of Mary Canderaria's will reads as follows: 5.05 TERMINATION AND DISPOSITION: This trust shall terminate upon the death of my mother. Upon termination, the principal and undistributed income shall be distributed to my then living brothers and sister, including Jake Candelaria, and the descendants of any deceased brother or sister, per stirpes.

At the time Mary's will was executed, Mary's only living brothers and sisters included: Viola Alire, Jake Candelaria, David Candelaria, Dorothy Peterson, Robert Candelaria, James Candelaria, and Virginia Candelaria. Viola Alire, David Candelaria, and James Candelaria all predeceased Vivian. Viola left three adult children (Charles Henry Alire, Mathew John Alire, Timothea A. Lozano), and David Candelaria left two adult children (David D. Candelaria and Craig Candelaria). Samantha Ellen O'Conner was born on August 25, 1981 and claims to be the only child of James Candelaria.

James Candelaria was never married to Samantha's mother. After Samantha's birth, Samantha's mother married Thomas O'Conner who is listed as Samantha's father on her birth certificate. James Candelaria never contributed to Samantha's support or maintenance.

Discussion

As a preliminary matter, the Court recognizes that under current Colorado law, Thomas Allen O'Conner is presumed to be Samantha's father, absent clear and convincing evidence. See C.R.S. § 19-4-105 (1999). The Court FINDS, however, that Samantha presented clear and convincing evidence at the February 8, 2000 hearing demonstrating that James Candelaria, rather than Thomas Allen O'Conner, is her father. The issue remains, however, whether Samantha is a "descendant" entitled to take under Article 5.05 of the will of Mary Candelaria. Petitioners have proposed that she is not a "descendant" and relies upon a Colorado intestate statute existing at the time the will was prepared, C.R.S. 63, § 153-2-8. This sections reads:

153-2-8. Illegitimate children. Illegitimate children shall inherit from their father the same as those born in wedlock, if the parents subsequently intermarry, and such children be recognized after such intermarriage by the father to be his, or, with respect to the estates of decedents dying after the effective date of this section, if the said father, during his lifetime, shall in writing, by his conduct, or otherwise have acknowledged said children to be his and shall have regularly contributed to their support and maintenance for a reasonable period prior to his death..."

As in all probate actions, the Court looks first for guidance to the governing instruments. The Court's primary duty in interpreting any testamentary instrument and the proceedings to administer and settle the estates of decedents is to determine the intent of the decedent. *Rhay v. Johnson*, 867 P.2d 669 (Wash. App. 1994). Determining intent is one of the primary purposes of probate. C.R.S. § 15-10-102(2)(b) (1998). See also *Heinneman v. Colorado College*, 374 P.2d 695 (Colo. 1962).

When determining intent, the Court should first look at the testamentary instrument in its entirety and give words in the instrument their usual and customary meaning. *Gibson v. Hills*, 272 P. 660 (Colo. 1928); *Collar v. Gaarn*, 171 P. 63 (Colo. 1918). See also *Goday v. Estate of Goldberg*, 424 P.2d 762 (Colo. 1967); *Wright v. Poudre Valley Nat. Bank*, 385 P.2d 412 (Colo. 1963). The Court must carry out the testator's intent unless it is contrary to law or public policy. *In re Estate of Holmes*, 821 P.2d 300 (Colo. App. 1991); *In re Estate of Daigle*, 642 P.2d 527 (Colo. App. 1982).

If the testator's intent is not clear from the testamentary instrument, the Court may look to relevant canons of construction. Daigle, 374 P.2d at 528. The Colorado Probate Code applies to any will of decedents dying after July 1, 1974. C.R.S. §15-17-101(1)-(2)(a) (1999). Pursuant to the Colorado Probate Code, the rules of construction provided in the current Colorado Probate Code apply to instruments executed before July 1, 1974, unless the instrument provides a clear indication of a contrary intent. C.R.S. §15-17-101(e) (1999). Part 7 of the Colorado Probate Code contains the rules of construction applicable to wills and other governing instruments. Under these rules of construction, C.R.S. §15-11-705 provides that individuals born out of wedlock and their respective descendants shall be included in class gifts in accordance with the laws of intestate succession. This statute further states that the term "descendants" standing alone in a testamentary instrument shall be construed to include individuals born out of wedlock. C.R.S. §15-11-705(1)(c) (1999).

Here, the express terms of the testamentary instrument do not define the term "descendants." Whether Mary Candelaria intended illegitimate children to be included in that definition can not clearly be determined from her will. The Court, therefore, must use canons of construction as an aid in construing Mary Candelaria's will. Mary Candelaria died after the Colorado Probate Code became effective, therefore, the Court directs its attention to C.R.S. §15-17-101(e). Since C.R.S. §15-17-101(e) requires that the current rules of construction articulated in the Colorado Probate Code be utilized, the Court FINDS that Samantha, a child born out of wedlock to James Candelaria, is a "descendant" of James Candelaria. Therefore, the Court ORDERS that Samantha shall be entitled to receive a distribution of the trust estate.

The other issue presented to this Court is in what proportions the beneficiaries are entitled to share in the distribution of the trust estate. Both parties have agreed that the distribution should be one share to each of Mary's living siblings, and one share collectively to the living descendants of each deceased sibling. The Court ACCEPTS the parties' interpretation. Therefore, the Court ORDERS that distributions to the beneficiaries shall be made as follows:

Dorothy Peterson: 1/7 of the trust estate
Robert Candelaria: 1/7 of the trust estate
Virginia Candelaria: 1/7 of the trust estate
Jake Candelaria: 1/7 of the trust estate
David D. Candelaria: 1/14 of the trust estate
Craig Candelaria: 1/14 of the trust estate
Charles Henry Alire: 1/21 of the trust estate
Mathew John Alire: 1/21 of the trust estate
Timothea A. Lozano: 1/21 of the trust estate
Samantha Ellen O'Conner: 1/7 of the trust estate
IT IS HEREBY ORDERED, this 24th day of February, 2000.

February 24, 2000

C. Jean Stewart
Judge, Probate Court