[Cite as *Demeraski v. Bailey*, 2015-Ohio-2162.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102304

JENNIFER J. DEMERASKI

PLAINTIFF-APPELLANT

vs.

JOHN R. BAILEY, EXECUTOR, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Probate Court
Case No. 2014 ADV 198128

BEFORE: E.A. Gallagher, P.J., Boyle, J., and Blackmon, J.

RELEASED AND JOURNALIZED: June 4, 2015

ATTORNEYS FOR APPELLANT

Anthony W. Kerber
Anthony W. Kerber Co., L.P.A.
14701 Detroit Avenue, Suite 540
Lakewood, Ohio 44107

John L. Reulbach Jr.
14701 Detroit Avenue, Suite 575
Lakewood, Ohio 44107

ATTORNEYS FOR APPELLEES

FOR JOHN R. BAILEY

Kevin T. O'Connor
Laura E. Englehart
Kohrman Jackson & Krantz P.L.L.
1375 Ninth Street
One Cleveland Center, 20th Floor
Cleveland, Ohio 44114

FOR JAMES P. BAILEY

Algis Sirvaitis
Algis Sirvaitis & Company
880 E. 185th Street
Cleveland, Ohio 44119

FOR MARY GAIL BURNSON

Amanda M. Buzo
Wegman, Hessler & Venderburg
6055 Rockside Woods Boulevard
Suite 200
Cleveland, Ohio 44131

EILEEN A. GALLAGHER, P.J.:

{¶1} In this accelerated appeal, plaintiff-appellant Jennifer Demeraski appeals from the dismissal of her complaint to construe the will of James Phillip Bailey, III ("Bailey") pursuant to Civ.R. 12(B)(6). Finding merit to the appeal, we reverse the judgment of the probate court and remand the case for further proceedings.

Factual and Procedural Background

{¶2} Demeraski is the natural born daughter of Bailey and Gail Elaine Bailey. Until she was five years old, she was known by her legal birth name, Jennifer Joan Bailey. Shortly after her fifth birthday, following her parents' divorce and her mother's remarriage to James Jaworski, Demeraski's name was legally changed, with Bailey's consent, to Jennifer Joan Jaworski. There was no adoption of Jennifer by Jaworski. When she later married, she changed her surname to Demeraski.

{¶3} Bailey died testate on October 24, 2012. His will was probated by the Cuyahoga County Court of Common Pleas, Probate Division (the "probate court") on November 15, 2012. By operation of a residuary clause, the will disposed of the residue of Bailey's estate as follows:

> 4.1 All the rest, residue and remainder of my property (including any interest in J.B. Stamping, Inc. and Lucky 13) shall be liquidated within two (2) years after my death and the proceeds of such property shall be apportioned in equal shares among my children who survive me and shall be distributed to them: JAMES P. BAILEY, IV, JOHN R. BAILEY,

JEFFREY W. BAILEY, JERALD M. BAILEY, JILL SHANTZLIN, JANET KRUSE, J. PHILIP BAILEY and JASON L. BAILEY.

{¶4} With respect to Bailey's "children," paragraphs 6.2 and 6.3 of the will further provided:

> 6.2. Presently, I have eight (8) children, namely, JAMES P. BAILEY, IV, JOHN R. BAILEY, JEFFREY W. BAILEY, JERALD M. BAILEY, JILL SHANTZLIN, JANET KRUSE, J. PHILIP BAILEY, JASON L. BAILEY, all of whom are adults.
>
> 6.3 The words "child," "children," and "issue" as used herein include persons whose relationship is such by adoption as well as issue of such adopted person. No person who is otherwise a child or issue of mine shall lose his or her status as such by being adopted by another person.

{¶5} On May 12, 2014, Demeraski filed a complaint for declaratory judgment against John R. Bailey, executor of Bailey's estate (the "executor"), and the beneficiaries of the estate, seeking (1) a declaration that she was Bailey's daughter and was entitled to inherit an equal share of Bailey's residuary estate under the will, and (2) an order requiring the executor to distribute the residuary estate accordingly. Although she was not specifically named in the will, Demeraski claimed that she was entitled to inherit a share of Bailey's residuary estate as one of Bailey's surviving "children" under paragraphs 4.1 and 6.3 of the will. Demeraski further alleged that she had not received notice of the probating of Bailey's will and that she would have inherited as Bailey's daughter under Ohio's statutes of descent and distribution had Bailey died intestate.

{¶6} In support of her claim, Demeraski attached to her complaint a copy of Bailey's will and copies of various documents establishing that she was Bailey's

daughter, including her birth certificate, various applications for marriage licenses referencing Bailey's marriage to Demeraski's mother, documentation relating to Demeraski's name change and Bailey's consent to her name change and a stipulation by the executor that Demeraski was Bailey's daughter.

{¶7} On July 23, 2014, the executor filed a motion to dismiss the complaint pursuant to Civ.R. 12(B)(6) for failure to state a claim for which relief can be granted. The executor argued that although Demeraski was Bailey's biological daughter, she was not entitled to inherit under the will because the plain language of the will indicates: (1) Bailey intended to disinherit Demeraski by necessary implication by excluding her from the will and specifically naming all of his other children as beneficiaries of his residuary estate, and (2) Bailey did not intend to make a class gift of his residuary estate to his children.

{¶8} Demeraski opposed the motion. On November 6, 2014, the probate court granted the motion to dismiss, concluding that Demeraski could prove no set of facts that would entitle her to take under Bailey's will and entered a judgment entry dismissing the complaint. Relying on this court's decision in *Belardo v. Belardo,* 187 Ohio App.3d 9, 2010-Ohio-1758, 930 N.E.2d 862 (8th Dist.), the probate court held that because Demeraski was not among the children Bailey had listed by name in his will as the beneficiaries of his residuary estate, Demeraski needed to establish that Bailey intended to make a class gift of his residuary estate to his children (rather than individual gifts to the children specifically named), in order to share in his estate under the residuary clause.

The probate court held that because the will's residuary clause specifically designated eight of Bailey's children by name, it did not manifest an intent to create a class gift and was "a gift to them as individuals and not as a class." In so holding, the probate court rejected Demeraski's argument (based on the language in paragraph 6.3 of the will) that Bailey had mistakenly believed that Demeraski had been adopted by her stepfather and had included the language in paragraph 6.3 to ensure that Demeraski would share in his residuary estate as one of his children. The probate court reasoned that even if Bailey had mistakenly believed that Demeraski had been adopted by her stepfather, paragraph 6.3 of the will did not apply to her because she was not, in fact, adopted.

{¶9} Demeraski appealed the probate court's judgment, raising the following assignment of error for review:

> The Lower Court committed prejudicial error by dismissing Plaintiff-Appellant's Complaint for Declaratory Judgment, without a hearing, based upon a misreading of *Belardo* and a corresponding misinterpretation and/or disregard of provision in the underlying will which demonstrated that the Testator's likely intent was not to make a gift to specifically-named children, but rather, to create a class gift that included Plaintiff-Appellant, a natural-born daughter thereof, whom the Testator thought had been adopted.

Law and Analysis

Standard of Review

{¶10} A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim tests the sufficiency of the complaint. *Antoon v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 101373, 2015-Ohio-421, ¶ 7. An action for a declaratory judgment may be dismissed pursuant to Civ.R. 12(B)(6) where (1) "'there is no real controversy or

justiciable issue between the parties'" or (2) "'the declaratory judgment will not terminate the uncertainty or controversy.'" *High St. Properties v. Cleveland*, 8th Dist. Cuyahoga No. 101585, 2015-Ohio-1451, ¶ 28, quoting *Home Builders Assn. of Dayton & Miami Valley v. Lebanon*, 12th Dist. Warren No. CA2003-12-115, 2004-Ohio-4526, ¶ 13. "In order for a justiciable question to exist, '[t]he danger or dilemma of the plaintiff must be present, not contingent on the happening of hypothetical future events * * * and the threat to his position must be actual and genuine and not merely possible or remote.'" *High St. Properties* at ¶ 29, quoting *Mid-Am. Fire & Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142, ¶ 9. A "controversy" exists for purposes of a declaratory judgment action "when there is a genuine dispute between parties having adverse legal interest of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *High St. Properties* at ¶ 29, citing *Brewer v. Middletown*, 12th Dist. Butler No. CA91-02-039, 1992 Ohio App. LEXIS 3983, *10 (Aug. 3, 1992), citing *Burger Brewing Co. v. Liquor Control Comm.*, 34 Ohio St.2d 93, 296 N.E.2d 261 (1973).

{¶11} The probate court dismissed Demeraski's complaint under Civ.R. 12(B)(6) after determining, based on its construction of the will, that Demeraski could prove no set of facts that would entitle her to a share of Bailey's residuary estate. A lower court's determination that a plaintiff can prove no set of facts that would entitle the plaintiff to relief is reviewed de novo, requiring the appellate court to undertake an independent analysis without deference to the lower court's decision. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5; *Hendrickson v. Haven Place*,

Inc., 8th Dist. Cuyahoga No. 100816, 2014-Ohio-3726, ¶ 12. A probate court's construction of a will is likewise reviewed on a de novo basis. *Belardo,* 187 Ohio App.3d 9, 2010-Ohio-1758, 930 N.E.2d 862, at ¶ 7, citing *Church v. Morgan*, 115 Ohio App.3d 477, 481, 685 N.E.2d 809 (4th Dist.1996).

{¶12} In deciding whether a complaint should be dismissed pursuant to Civ.R. 12(B)(6), the court's review is limited to the four corners of the complaint along with any documents properly attached to or incorporated within the complaint. *High St. Properties* at ¶ 17, citing *Glazer v. Chase Home Fin. L.L.C.*, 8th Dist. Cuyahoga Nos. 99875 and 99736, 2013-Ohio-5589, ¶ 38. The court accepts as true all the material factual allegations of the complaint and construes all reasonable inferences to be drawn from those facts in favor of the nonmoving party. *Brown v. Carlton Harley-Davidson, Inc.*, 8th Dist. Cuyahoga No. 99761, 2013-Ohio-4047, ¶ 12, citing *Garofalo v. Chicago Title Ins. Co.*, 104 Ohio App.3d 95, 104, 661 N.E.2d 218 (8th Dist.1995). To prevail on a Civ.R. 12(B)(6) motion, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling the plaintiff to relief. *O'Brien v. Univ. Comm. Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. If there is "'a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss.'" *High St. Properties* at ¶ 16, quoting *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 145, 573 N.E.2d 1063 (1991). Thus, a dismissal under Civ.R. 12(B)(6) "is reserved for the rare case that

cannot possibly succeed." *Tri-State Computer Exchange, Inc. v. Burt*, 1st Dist. Hamilton, No. C-020345, 2003-Ohio-3197, ¶ 12.

{¶13} Where a plaintiff's claim is predicated upon a written instrument attached to the complaint, a dismissal under Civ.R. 12(B)(6) is proper only where the language of the writing is "clear and unambiguous" and "'presents an insuperable bar to relief.'" *See, e.g., Abdallah v. Doctor's Assocs.*, 8th Dist. Cuyahoga No. 89157, 2007-Ohio-6065, ¶ 3, quoting *Fairview Realty Investors v. Seaair, Inc.*, 8th Dist. Cuyahoga No. 81296, 2002-Ohio-6819, ¶ 8; *see also Denlinger, Rosenthal & Greenberg, LPA v. Cohen*, 12th Dist. Warren No. CA2012-03-019, 2012-Ohio-4774, ¶ 17 ("'When a motion to dismiss is founded upon a written instrument attached to the complaint, the complaint should not be dismissed under Civ.R. 12(B)(6) unless the complaint and any attached written instruments on their face show the court to a certainty that there is an insuperable bar to relief as a matter of law.'"), quoting *Cash v. Seery*, 12th Dist. Butler No. CA97-10-194, 1998 Ohio App. LEXIS 871,*2 (March 9, 1998), citing *Slife v. Kundtz Properties*, 40 Ohio App.2d 179, 185, 318 N.E.2d 557 (8th Dist.1974).

{¶14} Applying the foregoing standards, we find that the probate court erred in dismissing Demeraski's complaint for failure to state a claim for which relief can be granted.

Failure to Hold a Hearing on the Motion to Dismiss

{¶15} As an initial matter, we note that although Demeraski asserts in her assignment of error that the probate court erred by dismissing her complaint without a

hearing, her brief includes no argument relating to this issue. Accordingly, we need not consider it. App.R. 12(A)(2); App.R. 16(A)(7).

{¶16} However, even if we were to consider the issue, we would find that the probate court did not err in failing to hold a hearing on the executor's motion to dismiss. Loc.R. 40.1(A) of the Court of Common Pleas for Cuyahoga County, Probate Division, states: "Motions, in general, shall be submitted and determined upon the pleadings and motion papers. Oral arguments of motions may be permitted at the discretion of the Court."

{¶17} Resolution of a Civ.R. 12(B)(6) motion involves the application of law to the facts as alleged in the complaint. In ruling on a motion to dismiss, the court properly considers only the complaint and any documents attached to or incorporated by reference into the complaint. Accordingly, the fact that the probate court "took no testimony and the matter was apparently decided on the motions, pleadings and exhibits," does not, as Demeraski contends, warrant a remand for a hearing on the motion to dismiss. There is nothing in the record that suggests that the probate court abused in discretion in deciding the motion without hearing oral argument.[1]

Construction of the Will

[1]The executor asserts that at the October 28, 2014 hearing on the motion to dismiss, the probate court judge gave the parties a choice: the probate court could hold "a full hearing" on the motion or the parties could "accept a ruling [based] on the pleadings and motions." The executor further asserts that the parties elected to forgo a hearing and to have the probate court decide the matter based on the complaint and motion papers. This is not reflected in the record. If it were true, however, that Demeraski consented to the probate court ruling on the motion without a hearing, she could not now properly claim it as error.

{¶18} Turning to the remaining issues in her assignment of error, Demeraski argues that the probate court erred in granting the executor's motion to dismiss because it "misinterpret[ed] and/or disregarded" paragraph 6.3 of the will. She contends that the residuary clause in paragraph 4.1 must be read in conjunction with paragraph 6.3 and that paragraph 6.3 of the will demonstrates that Bailey's likely intent in the residuary clause was not to make individual gifts to specifically-named children, but rather, to create a class gift that included Demeraski. Demeraski argues that because none of Bailey's children was adopted by anyone else, the provision in paragraph 6.3 of the will that "[n]o person who is otherwise a child or issue of mine shall lose his or her status as such by being adopted by another person" "created an ambiguity in need of resolution" as to whether Bailey intended that Demeraski share in his residuary estate that precluded dismissal of her complaint under Civ.R. 12(B)(6). She argues that the "only reasonable explanation" for Bailey's inclusion of such a provision in his will (and his failure to otherwise specifically name her as one of his "children" in paragraphs 4.1 and 6.2 of the will) was that Bailey mistakenly believed that Demeraski had been adopted by her stepfather. As such, she contends, the probate court's conclusion that she could prove no set of facts in support of her claim for relief was "incorrect and erroneous." We agree that the probate's court dismissal of her complaint was premature.

{¶19} "'In the construction of a will, the sole purpose of the court should be to ascertain and carry out the intention of the testator.'" *Polen v. Baker*, 92 Ohio St.3d 563, 565, 752 N.E.2d 258 (2001), quoting *Oliver v. Bank One, Dayton, N.A.*, 60 Ohio St.3d 32,

34, 573 N.E.2d 55 (1991). This intent must be ascertained from the language used in the will. *Oliver* at 34, citing *Carr v. Stradley*, 52 Ohio St.2d 220, 371 N.E. 2d 540 (1977), paragraph one of the syllabus; *Townsend's Exrs. v. Townsend*, 25 Ohio St. 477 (1874), paragraphs one and two of the syllabus. The words used in the will, '"if technical, must be taken in their technical sense, and if not technical, in their ordinary sense, unless it appear(s) from the context that they were used by the testator in some secondary sense."' *Ohio Natl. Bank of Columbus v. Adair*, 54 Ohio St.2d 26, 30, 374 N.E.2d 415 (1978), quoting *Townsend's Exrs.* at paragraph three of the syllabus.

{¶20} The court may consider extrinsic evidence to determine the testator's intent only when the language used in the will creates doubt as to its meaning. *Oliver* at 34. Extrinsic evidence may be considered where the language of the will is ambiguous; however, where the language of the will is clear and unambiguous, the testator's intent must generally be ascertained from the express terms of the will itself. *Boulger v. Evans*, 54 Ohio St.2d 371, 378-379, 377 N.E.2d 753 (1978); *Belardo*, 187 Ohio App.3d 9, 2010-Ohio-1758, 930 N.E.2d 862, at ¶ 8, 23.

{¶21} Extrinsic evidence may also be considered to resolve a latent ambiguity in a will, i.e., an ambiguity that is not apparent from the language used in the will but arises because "some extrinsic fact or evidence creates the necessity for interpretation or a choice between two or more possible meanings, or if the words apply equally well to two or more different subjects or things." *Radzisewski v. Szymanczak*, 8th Dist. Cuyahoga No. 97795, 2012-Ohio-2639, ¶ 18-19. "Where there is a latent ambiguity appearing in a will,

extrinsic evidence is admissible, not for the purpose of showing the testator's intention, but to assist the court to better interpret that intention from the language used in the will." *Id.*

{¶22} Thus, "'where a term in a will is susceptible to various meanings, the [court] may consider the circumstances surrounding the drafting of the instrument, in order to arrive at a construction consistent with the overall intent of the testator so as to uphold all parts of the will.'" *Sandy v. Mouhot*, 1 Ohio St.3d 143, 145, 438 N.E.2d 117 (1982), quoting *Wills v. Union Savings & Trust*, 69 Ohio St.2d 382, 433 N.E.2d 152 (1982), paragraph two of the syllabus*; see also Holmes v. Hrobon*, 158 Ohio St. 508, 518, 110 N.E.2d 574 (1953) ("[W]here there is some doubt as to the meaning of the will the court may admit extrinsic evidence of the testator's family situation, his business and financial circumstances, the nature and extent of his investments, the character and manner of operation of his business and the natural objects of his bounty. With such evidence the court is better able to see things as the testator saw them and to construe the words used in the will as he understood them and to give that construction which he intended."). A court, however, cannot rewrite a will. *Boulger* at 379; *Barr v. Jackson*, 5th Dist. Delaware No. 08 CAF 09 0056, 2009-Ohio-5135, ¶ 45. "A court has no power to make a new and different will for a testator in contravention of the language employed in the will." *Kurtz v. Kurtz*, 12th Dist. Preble No. CA90-09-017, 1991 Ohio App. LEXIS 2363, *8 (May 20, 1991), citing *Cleveland Trust Co. v. Frost*, 166 Ohio St. 329, 142 N.E.2d 507 (1957); *see also Weygandt v. Ward*, 9th Dist. Wayne No. 09CA0050,

2010-Ohio-2015, ¶ 10 (“‘If the terms and expressions employed by a testator forbid interpretation by reason of their clarity, a court is without power to change them.’”), quoting *Everhard v. Brown*, 75 Ohio App. 451, 461, 62 N.E.2d 901 (9th Dist.1945).

{¶23} “[A] person has a right to dispose of his property in a manner he thinks fit.” *Birman v. Sproat*, 47 Ohio App.3d 65, 68, 546 N.E.2d 1354 (2d Dist.1988), citing *Moskowitz v. Federman*, 72 Ohio App. 149, 51 N.E. 2d 48 (9th Dist.1943). “Ohio law allows a testator to disinherit a child without specifically stating that he intends to disinherit that child.” *Estate of Snell v. Kilburn*, 165 Ohio App.3d 352, 364, 2005-Ohio-7076, 846 N.E.2d 572, ¶ 52 (7th Dist.). Under Ohio law, an heir may be disinherited expressly or “‘by necessary implication,’” i.e., where “‘such a strong probability’” of disinheritance exists that “‘an intention to the contrary cannot be supposed.’” *Id.*, quoting *Crane v. Exrs. of Doty*, 1 Ohio St. 279, 283 (1853). “‘If [a] testator makes no mention of one of his children in his will and by such will disposes of all of his property, such child is as completely disinherited as if the testator had specifically so provided.’” *Estate of Snell* at ¶ 52-56 (where testator completely disposed of all his property in his will, including devising his residuary estate to a specifically named devisee without mentioning his son, such disposition overcame the presumption against disinheritance), quoting *Birman* at 69; *Walther-Coyner v. Walther*, 2d Dist. Montgomery No. 18131, 2000 Ohio App. LEXIS 2319, *14-15 (June 2, 2000) (necessary implication existed in testator’s will to disinherit child with former spouse based on language in the will stating “[f]or all purposes of this will, references to a child or

children of mine, or to my children, shall be deemed to include only a child or children of mine born or legally adopted by me during my marriage to my [current] spouse").

{¶24} The residuary clause listed by name eight of Bailey's children to whom Bailey devised his residuary estate. Absent from that list was any reference to Demeraski. Demeraski was not, however, expressly disinherited in the will. Because Bailey's will disposed of all his property and Demeraski was not specifically named as one of the beneficiaries of his residuary estate, she would need to establish (1) that Bailey intended to make a class gift of his residuary estate to "his children" and (2) that she was included within that class, in order for her to take under the will's residuary clause.

{¶25} A class gift is "a gift of an aggregate sum to be divided among a group of persons, uncertain in number and specific identification at the time of the gift, but which can be ascertained at a future time, the amount of each share depending on the ultimate number of persons included in the class." *Cent. Trust Co., N.A. v. Smith*, 50 Ohio St.3d 133, 138, 553 N.E.2d 265 (1990), citing Annotation, *When is a Gift by Will or Deed of Trust One to a Class*, 61 A.L.R.2d 212, 221 (1958); *see also Kurtz*, 12th Dist. Preble No. CA90-09-017, 1991 Ohio App. LEXIS 2363, at *8 ("Generally, a gift to a number of persons not named, but answering a general description, is a gift to a class. * * * A bequest 'to the children of ' a named person is a class gift."

{¶26} The general rule is that when a gift is made to named persons, it is a gift to them individually, and not as a class. *See Jewett v. Jewett*, 12 Ohio C.D. 131, 21 Ohio C.C. 278 (1900), *aff'd without opinion*, 67 Ohio St. 541, 67 N.E. 1098 (1903) ("[T]he rule

of law is, that when the gift is made to persons designated by name, that is, individually, it is a gift to them as individuals, and not as a class, even though the persons designated may constitute a class[.]"); *Belardo*, 187 Ohio App.3d 9, 2010-Ohio-1758, 930 N.E.2d 862, at ¶ 9. This is true even where the will identifies the beneficiaries by name and also describes them as a class. *Id.* at ¶ 9-10. The generally accepted construction is that '''the gift by name constitutes a gift to individuals to which the class description is added by way of identification.'" *Id.* at ¶ 9, *quoting Jewett, supra*. Where, as here, the number of beneficiaries as well as the names of the beneficiaries are specified, the testator's intent to make gifts to individuals rather than to a class is even stronger. 4 *Page on Wills* § 35.4 (2014) ("If the will gives the number of the members of the class, this is prima facie a gift to them individually, the class being given merely by way of identification or description. If the names of the members of the class as well as the number of the members are given, the inference is quite strong that the gift is to individuals, and not to a class.").

{¶27} This court considered a similar issue in *Belardo, supra*. *Belardo* involved the interpretation of a testator's bequest to "to my beloved sons, John Salvatore Belardo and James Charles Belardo, share and share alike, absolutely and in fee simple." *Belardo* at ¶ 2. James Charles Belardo predeceased the testator. *Id.* at ¶ 3. James D. Belardo, his son and the grandson of the decedent, filed a complaint for declaratory judgment in the probate court claiming that under Ohio's antilapse statute, R.C. 2107.52, he was entitled to his father's share of the estate. *Id.* at ¶ 4. John Salvatore Belardo asserted that according to the plain language of the will, R.C. 2107.52 did not apply and that, therefore, he was the sole beneficiary of the estate under the will. *Id.* Resolution of the issue turned on whether the language used in the will manifested an intent to create a class gift. *Id.* at ¶ 8-10. Relying on *Jewett, supra*, the court interpreted the language of the will as making a gift to the testator's sons as individuals and not as a class. As the court explained:

> In his will, Belardo designated the individual beneficiaries both as a class, i.e., "his beloved sons," and he named them as individuals. In *Jewett v. Jewett*, 12 Ohio C.D. 131, 21 Ohio C.C. 278, *aff'd without opinion*, 67 Ohio St. 541, 67 N.E. 1098 (1900), the rule in such a case was stated as follows: "[T]he rule of law is, that when the gift is made to persons designated by name, that is, individually, it is a gift to them as individuals, and not as a class, even though the persons designated may constitute a class[.]" The court explained that where the will designates beneficiaries as individuals, and also as a class, and there is nothing more to show the testator's intent, "the construction is that the gift by name constitutes a gift to individuals to which the class description is added by way of identification." *Id.*
>
> As in *Jewett*, it seems clear to us that this is a gift to John Salvatore Belardo and James Charles Belardo as individuals, and not as a class. There is nothing to show that Belardo intended anything more than to identify John and James as being "beloved sons." Accordingly, we find Belardo's intent was to give each son, individually, an equal one-half share of his estate.

Belardo at ¶ 9-10.

{¶28} Demeraski acknowledges the general rule set forth in *Belardo* but argues that this case is distinguishable because in this case, unlike *Belardo*, there is something "more to show the testator's intent," namely, the provision in paragraph 6.3 relating to a child who has been "adopted by another person."

{¶29} Demeraski argues that, given that there is no allegation that (1) any of Bailey's other children had been by adopted another person or (2) Bailey would have believed that any of his other children would had been adopted by another person, it would have been "senseless" for Bailey to have included such a provision in his will unless Bailey believed that Demeraski had been legally adopted by her stepfather, James Jaworski, and wanted to provide for her, as he had for his other biological children, in his

will. She contends that inclusion of this provision in the will "strongly suggests" that Bailey's intention was "more expansive" and that he, in fact, intended to make a class gift of his residuary estate to all of his surviving children, including Demeraski, rather than to make individual gifts of his residuary estate to the eight children specifically named in paragraphs 4.1 and 6.2 of his will.

{¶30} When construing a will to determine a testator's intent, "'all the parts of the will must be construed together, and effect, if possible, given to every word contained in it.'" *Polen*, 92 Ohio St.3d at 568, 752 N.E.2d 258, quoting *Adair*, 54 Ohio St.2d at 30, 374 N.E.2d 415; *Townsend's Exrs.*, 25 Ohio St. 477, at paragraph four of the syllabus; *see also In re Henderson*, 12th Dist. Butler No. CA2012-03-051, 2013-Ohio-1380, ¶ 18 (ascertaining testator's intent "based upon a holistic reading of his will"). "'Conjecture is not permitted to supply what the testator has failed to indicate * * * .'" *Crane*, 1 Ohio St. at 284, quoting 1 Jarman, *Wills*, 315.

{¶31} In paragraph 4.1, Bailey states that his residuary estate "shall be apportioned in equal shares among my children who survive me and shall be distributed to them" but then, without explanation, proceeds to identify only eight of his nine children in the list that follows. Similarly, in paragraph 6.2 of his will, Bailey states:

> 6.2. *Presently, I have eight (8) children*, namely, JAMES P. BAILEY, IV, JOHN R. BAILEY, JEFFREY W. BAILEY, JERALD M. BAILEY, JILL SHANTZLIN, JANET KRUSE, J. PHILIP BAILEY, JASON L. BAILEY, all of whom are adults.

(Emphasis added.) It is undisputed that this statement is incorrect. The record reflects that Demeraski was born in February1969, that Bailey executed the will at issue in

December 2003 and that Demeraski was still alive (and still one of Bailey's children) at the time he executed his will. Thus, although she was not identified as such in the will, Demeraski clearly was one of the "children" Bailey had "presently" when he executed his will. It is unclear from the language of the will whether the omission of Demeraski in the list of Bailey's "children" named in paragraphs 4.1 and 6.2 of the will was intentional or an error. It is likewise unclear why paragraph 6.3 was included in the will. There is no claim that any of Bailey's children identified by name in the will had been "adopted by another person."

{¶32} "'A Civ.R. 12(B)(6) dismissal based upon the merits is unusual and should be granted with caution.'" *Bono v. McCutcheon*, 2d Dist. Clark No. 2004 CA 23, 159 Ohio App.3d 571, 2005-Ohio-299, 824 N.E.2d 1013, ¶ 8 (trial court erred in dismissing complaint pursuant to Civ.R. 12(B)(6) based on finding that the lack of a sale price in contract at issue constituted a lack of consideration for sale of puppy), quoting *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs.*, 72 Ohio St.3d 464, 467, 650 N.E.2d 1343 (1995); *State ex rel. Edwards v. Toledo City School Dist. Bd. of Edn.*, 72 Ohio St.3d 106, 109, 647 N.E.2d 799 (1995). "'A court cannot dismiss a complaint under Civ.R. 12(B)(6) merely because it doubts the plaintiff will prevail.'" *Bono* at ¶ 8, quoting *Leichtman v. WLW Jacor Communications, Inc.*, 92 Ohio App.3d 232, 234, 634 N.E.2d 697 (1st. Dist.1994).

{¶33} Based on our examination of the will and consideration of the allegations of Demeraski's complaint, we cannot state that the language of Bailey's will "'presents an insuperable bar to relief'" as a matter of law, *see, e.g., Abdallah*, 2007-Ohio-6065, at ¶ 3; *Fairview Realty Investors*, 2002-Ohio-6819, at ¶ 8, or that there is no set of facts under

which Demeraski would be entitled to a share of Bailey's residuary estate under the will. Demeraski's complaint is based on the theory that Bailey intended to make a class gift of his residuary estate to all of his surviving "children." She alleges that although Bailey omitted her from the list of "children" to whom he explicitly referenced by name in devising his residuary estate, he nevertheless intended that she take under the residuary clause of the will as one of his "children" as evidenced by his inclusion of paragraph 6.3 in the will — a provision that she alleges could not have been intended to apply to anyone but her and that otherwise would have no purpose in the will. Accepting as true all of the material factual allegations of the complaint, construing all reasonable inferences to be drawn from those facts in favor of Demeraski and applying the principles of construction set forth above, in our judgment Demeraski has pled sufficient facts to survive a motion to dismiss for failure to state a claim for which relief can be granted. When the will is read in its entirety, and in particular when paragraph 4.1 of the will is read in conjunction with paragraphs 6.2 and 6.3 (which on their face appear to be contrary to undisputed facts), we find a potential ambiguity exists as to whether the gift of Bailey's residuary estate in paragraph 4.1 of the will was intended to be a gift to the specifically-named beneficiaries as individuals or to all of Bailey's "children," which would include Demeraski, as a class. Accordingly, the probate court erred in dismissing her complaint pursuant to Civ.R.12(B)(6). Demeraski's assignment of error is overruled in part and sustained in part. The probate court's order dismissing the complaint is reversed, and the case is remanded for further proceedings consistent with this opinion.

{¶34} Judgment reversed and remanded.

It is ordered that appellant recover from appellees the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____

EILEEN A. GALLAGHER, PRESIDING JUDGE

MARY J. BOYLE, J., and

PATRICIA A. BLACKMON, J., CONCUR