

[Cite as *Beaston v. Slingwine*, 2004-Ohio-924.]

IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
SENECA COUNTY

ANN BEASTON

PLAINTIFF-APPELLEE

CASE NO. 13-03-04

v.

KATHRYN M. SLINGWINE, CO-EXECUTOR
OF THE ESTATE OF EDNA S. FALTER,
DECEASED, ET AL.

OPINION

DEFENDANTS-APPELLANTS

CHARACTER OF PROCEEDINGS: Appeal from Common Pleas Court,
Probate Division

JUDGMENT: Judgment Reversed and Cause Remanded

DATE OF JUDGMENT ENTRY: March 1, 2004

ATTORNEYS:

JAMES W. HART
Attorney at Law
Reg. #0003256
JAMES C. BARNEY
Attorney at Law
Reg. #0063739
165 East Washington Row
Sandusky, Ohio 44870
For Appellant, Extended Family Adult Care

DENNIS J. EBERLY
Attorney at Law
Reg. #0003570
180 South Washington Street
Tiffin, Ohio 44883
For Appellee, Ann Beaston

JAMES MURRAY
Attorney at Law
Reg. #0008837
111 East Shoreline Drive
P. O. Box 19
Sandusky, Ohio 44871
For Appellees, Next-of-Kin and
Heirs at Law

JAMES D. SUPANCE
Attorney at Law
Reg. #0003235
P. O. Box 767
Tiffin, Ohio 44883
For Appellees, Marvin J. Wise
and Robert A. Wise

KENNETH P. FOX
Attorney at Law
Reg. #0008531
106 Northwest Street
Bellevue, Ohio 44811
For Appellees, Slingwine and Wise
Co-Executors

DEREK W. DEVINE
Attorney at Law
Reg. #00662488
84 South Washington Street
Tiffin, Ohio 44883
For Appellee, Seneca County
Chapter of Hospice

JAMES H. ALLISON
Attorney at Law
Reg. #0012223
7737 Olentangy River Road
Worthington, Ohio 43235
For Appellee, American Heart
Association of Seneca County

STEPHEN M. McHUGH
Attorney at Law
Reg. #0018788
1700 One Dayton Centre
One South Main Street
Dayton, Ohio 45402
For Appellee, Society of
Precious Blood

SHAW, J.

{¶1} This is an appeal from the judgment of the Probate Division of the Seneca County Common Pleas Court, which found that Defendant-appellant,

Karen Pelton dba Extended Family Adult Care Center (“Pelton”), was not entitled to the residuary of Edna S. Falter’s (“Falter”) estate.¹

{¶2} Ms. Edna S. Falter (Falter) died testate on April 6, 2000. Prior to her death, she drafted two wills. The second will, which is the subject of this dispute, was drafted on July 27, 1999. The document contained a clause that left the residuary of Ms. Falter’s estate to “Extended Family Adult Care, Bellevue, Ohio.” At the time of her death, Falter lived in an adult care facility with the registered trade name, “Extended Family Adult Care Center” which is located in Bellevue Ohio.

{¶3} Upon Ms. Falter’s death, separate applications were made regarding each of her two wills. Ultimately, the second will was admitted to probate. The executor and a beneficiary under the first will, Ann Beaston (“Beaston”), subsequently filed a complaint, alleging (1) that the will is invalid because the testatrix lacked testamentary capacity and was under undue pressure and influence, and (2) that the residuary clause is invalid because the “Extended Family Adult Care” is not a legal entity and thus lacks capacity to take under a will.

{¶4} With the trial court’s permission, the parties filed cross motions for summary judgment regarding the validity of the will’s residuary clause. The trial

¹ An opinion deciding this appeal was first issued as *Beaston v. Slingwine*, 155 Ohio App.3d 505, [2003-Ohio-6702](#). However, upon granting a subsequent motion for reconsideration, we have vacated that decision and replaced it with the following opinion.

court entered summary judgment on behalf of Beaston, holding that “Extended Family Adult Care,” a non-registered trade name, is not the same as “Extended Family Adult Care *Center*,” a registered trade name and legal entity. The trial court went on to find “Extended Family Adult Care” as named in Falter’s will lacked capacity to take under the will.

{¶5} Thereafter, this court reversed the order of the trial court stating that there was a question of fact, or latent ambiguity, as to whether Falter intended to leave the residuary of her estate to “Extended Family Adult Care Center” but mistakenly gave the bequest to “Extended Family Adult Care” in her will. On November 18, 2002, a trial was held wherein a jury was instructed to determine whether Falter intended to leave the residuary of her estate to the place where she lived, “Extended Family Adult Care” or to “Karen Pelton dba Extended Family Adult Care Center.” The jury found that Falter intended to leave the residuary of her estate to the place where she lived. Thereafter, the trial court determined that because a place cannot accept a bequest, the bequest was void and therefore, the residuary would pass under the statutes of descent and distribution.

{¶6} Pelton now appeals, asserting seven assignments of error:

First Assignment of Error

The trial court erred in instructing the Jury that “Extended Family Adult Care, Bellevue, Ohio is a place and not a business entity.”

Second Assignment of Error

The trial court erred in instructing the jury that the burden of proof is upon defendant-appellant to prove by a preponderance of the evidence that Edna S. Falter in her will of January 27, 1999, intended to benefit Karen Pelton doing business as or at Extended Family Adult Care Center.

Third Assignment of Error

The trial court erred in ordering defendant-appellant to present her case-in-chief before plaintiff-appellee presented her case-in-chief.

Fourth Assignment of Error

The trial court erred by submitting improper verdict forms to the jury.

Fifth Assignment of Error

The trial court's judgment entry filed November 22, 2002 is contrary to law and is not sustained by the manifest weight of the evidence.

Sixth Assignment of Error

The trial court erred in denying defendant-appellant's motion for a new trial.

Seventh Assignment of Error

The trial court erred in denying defendant-appellant's motion for judgment notwithstanding the verdict.

{¶7} The treatment of this case by Beaston, her supporters and the trial court on remand seems to center around a statement we made in our previous decision in this case, *Beaston v. Slingwine*, Seneca App. No. 13-01-23, 2001-Ohio-2330. In that decision, we noted, "Appellant [Pelton] concedes that 'Extended Family Adult Care, Bellevue, Ohio,' as named in Mrs. Falter's will, is not a business entity but, rather, merely the name of a place." Based on this

statement, the stance of this declaratory judgment action took a turn down an unexpected path. However, in making this statement, it was not our intent to make a finding of fact, binding upon all subsequent proceedings as to an alleged dichotomy between the “place” and the “business entity.” Rather, we were merely trying to clarify, however inartfully, that the name “Extended Family Adult Care” is not actually the registered name of the business entity, “Extended Family Adult Care Center.”

{¶8} Regretfully, it seems that the use in our prior opinion of the phrase “*Karen Pelton dba* Extended Family Adult Care Center” rather than the registered trade name of the business, “Extended Family Adult Care Center” created additional confusion on remand. In sum, the interjection of Karen Pelton’s name appears to have turned a simple determination of whether “Extended Family Adult Care” is a misnomer for “Extended Family Adult Care Center,” into a question of whether Falter intended the residuary of her estate to go to the “place” or to Karen Pelton. This is not the issue of fact to be tried in this case, and it was error to frame the instruction to the jury in those terms.

{¶9} Contrary to the turn of events described above, we would now clarify that the question of fact to be determined by the jury is simply whether “Extended Family Adult Care” as written in Edna Falter’s will is merely a misnomer for “Extended Family Adult Care Center?” In other words, “If Edna

Falter, in writing the words “Extended Family Adult Care” actually intended to make her bequest to “Extended Family Adult Care Center” then the fact that this business is a dba owned by Karen Pelton is irrelevant to the descriptive validity of the bequest, i.e. whether the bequest was described adequately enough to be valid.²

{¶10} Additionally, as there was a question as to who bore the burden of proof in the previous trial, we will address the burden of proof which will be applicable on remand. As stated in our previous opinion,

A gift will not fail where it is possible to show by means of admissible extrinsic evidence, or by the name used, that the beneficiary named in the will is a misnomer and that a legal entity, in this case the sole proprietorship, was the intended beneficiary.

Beaston v. Slingwine, Seneca App. No. 13-01-23, 2001-Ohio-2330; see, also, *Strickler v. Courtright* (1939), 63 Ohio App. 1, 5-6.

{¶11} While Pelton argues that she should not have the burden of proof since she did not bring this action, the name in Falter’s will does not accurately reflect the registered trade name of the business. Consequently, it will be incumbent upon Pelton to prove that “Extended Family Adult Care” was merely a misnomer for “Extended Family Adult Care Center” or the gift will fail. See *Kovar v. Kortan* (1965), 3 Ohio Misc. 63, 68-9 (allowing extrinsic evidence to show that although decedent named “Marbetena Fathers of Depere, Wisconsin” in

² We note that even if the business entity is deemed to be described adequately the question of undue influence still remains. Moreover, the status and involvement of Karen Pelton in the business is obviously relevant to the issue of undue influence, should the case progress to that level.

his will, he intended to leave his bequest to “Norbertine Fathers of DePere, Wisconsin”); *McCormick v. Dunker* (1903), 14 Ohio C.D. 553, *affirmed* 70 Ohio St. 490 (finding that a bequest to a corporation erroneously named in a will will not fail if it is possible to identify the corporation by extrinsic evidence); *Strickler v. Courtright* (1939), 63 Ohio App 1.

{¶12} Based on the foregoing, Pelton’s assignments of error one through six are sustained. Pelton’s seventh assignment of error asserts that the trial court erred by failing to grant her Motion for Judgment Notwithstanding the Verdict (JNOV). Evaluation of a motion for JNOV is governed by Civ.R. 50(B), and the standard applied is the same as when evaluating a directed verdict motion. *Nickell v. Gonzalez* (1985), 17 Ohio St.3d 136, 137. As stated in *Posin v. A.B.C. Motor Court Hotel* (1976), 45 Ohio St.2d 271, 275:

The evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the [JNOV] motion is made, and, where there is substantial evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied. Neither the weight of the evidence nor the credibility of the witnesses is for the court’s determination * * *.

{¶13} However, motions for directed verdict and judgment notwithstanding the verdict are not evaluated identically. When a court rules on a judgment notwithstanding the verdict motion, all of the evidence introduced at

Case No. 13-03-04

trial is available for the trial court's consideration. *Osler v. Lorain* (1986), 28 Ohio St.3d 345, 347.

{¶14} In this case, Pelton requested that the trial court grant her motion for JNOV and in doing so declare that Falter intended to leave her residual estate to Karen Pelton dba Extended Family Adult Care Center. However, as we have determined that the only remaining question of fact to be decided on remand is whether "Extended Family Adult Care" as written in Edna Falter's will is merely a misnomer for "Extended Family Adult Care Center," we cannot find that the trial court erred in denying Pelton's motion for JNOV. Consequently, Pelton's seventh assignment of error is overruled.

{¶15} Based on the foregoing, the judgment of the trial court is reversed and remanded for further proceedings in accordance with this opinion.

Judgment reversed
and cause remanded.

BRYANT and CUPP, JJ., concur.