NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 0446

IN THE MATTER OF THE SUCCESSION OF
BERNICE HODGES HUTCHINSON

CONSOLIDATED WITH

NUMBER 2006 CA 0447

IN THE MATTER OF THE SUCCESSION OF
ALBERT SIDNEY HUTCHINSON

Judgment Rendered: MAR 2 3 2007

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Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Livingston
State of Louisiana
Docket Numbers 8175 and 9483

Honorable Ernest G. Drake, Jr., Judge

* * * * * *

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

Guidry, J. dissents and assigns reasons.

McCLENDON, J.

This appeal is taken from a judgment declaring one of the legatees named in an olographic will to be entitled to a one-eighth interest in the decedent's net estate. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

On May 31, 1999, Albert Sidney Hutchinson executed an olographic will. He was a widower, his second wife, Bernice Hodges Hutchinson, having died on December 4, 1996. Mr. Hutchinson neither had nor adopted any children. In the will, he named his sister, Marjorie Hinners (Hinners), and her sons, David and Donald Hinners, as legatees, as well as Dale Hodges, Gay Alfonso, and Wayne Hodges,[1] who were the children of Bernice Hodges Hutchinson from a previous marriage. Additional legatees were Bobbie Falks (Falks), Hebron Baptist Church (Hebron), and Judson Baptist Church (Judson). After Mr. Hutchinson died on October 26, 1999, his succession was opened, his will was probated, and Hinners was confirmed as executrix.

Subsequently, a dispute arose between Hinners, the Hodgeses, and Falks regarding the proper interpretation of the will. Specifically, the Hodgeses and Falks disagreed with Hinners' position that she was a universal legatee under the will, whereas they were only particular legatees. As a result of this dispute, the Hodgeses and Falks filed a Petition for Declaratory Judgment seeking a judicial declaration as to the proper interpretation of the will. Hinners, in her capacity as executrix, was named as defendant. The Hodgeses and Falks filed two amending petitions, naming Hinners as a defendant in her individual capacity, and adding the remaining legatees, Donald Hinners, David Hinners, Hebron, and Judson as additional defendants. The Hodgeses also sought damages from Mr. Hutchinson's

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[1] The decedent referred to his stepchildren by these names in the will. Their actual full names are Dale Keith Hodges, Florence Gaynell Hodges Alfonso, and Wilton Wayne Hodges. They are referred to hereafter collectively as "the Hodgeses."

estate and an accounting of the former community existing between him and their mother, on the grounds that a substantial amount of community property belonging to their mother was inadvertently omitted from her succession. On that basis, the Hodgeses filed a petition to reopen their mother's succession, which the trial court granted. The Hodgeses and Falks also sought to remove Hinners as executrix of Mr. Hutchinson's succession. In view of the Hodgeses' claims regarding their mother's succession, the trial court consolidated that succession with Mr. Hutchinson's succession.

Prior to trial on the merits, all parties, with the exceptions of Hebron and Judson, reached a compromise and settlement resolving all disputes with regard to the successions of both Mr. Hutchinson and the Hodgeses' mother, Bernice. Further, on April 21, 2004, Hebron acknowledged delivery of the sum of $10,000 as being in full satisfaction of the particular legacy it was entitled to under Mr. Hutchinson's will and released all claims against Mr. Hutchinson's succession. At that point, Judson made its first appearance in the proceedings and filed an answer and cross-claim disputing Hinners' interpretation of Mr. Hutchinson's will and seeking a declaratory judgment of its proper interpretation. Pursuant to a joint motion, the trial court dismissed, with prejudice, all claims between Hinners, David Hinners, Donald Hinners, the Hodgeses and Falks. The trial court also vacated the order consolidating the successions of Albert Hutchinson and Bernice Hodges Hutchinson, since all related claims between the two successions had been settled.

Thereafter, Judson was the only legatee who disputed Hinners' interpretation of Mr. Hutchinson's will. Judson contended it was one of the general legatees named in the will and, as such, was entitled to a fractional interest in the estate after all particular legacies had been satisfied. Hinners' position was that she was a universal legatee under the will, while Judson was a particular legatee.

At trial on April 25, 2005, the parties agreed to submit the matter to the trial court on the record in general, as well as three specific documents: namely, the joint pretrial order filed by the parties; the pretrial brief filed on behalf of Hinners (individually and as executrix) and her sons; and Judson's pretrial memorandum. Subsequently, the trial court concluded in its reasons for judgment that Judson was a general legatee under the terms of the will and rendered judgment declaring Judson to be the owner of a one-eighth interest in Hutchinson's entire net estate "after fictitiously collating back into the estate any sums paid to [legatees] Dale Hod[g]es, Gay Alfonso, Wayne Hodges, Bobbie Falks, or their attorneys."

Hinners and her sons have now appealed, assigning as error both the trial court's failure to find the will was so ambiguous that the legacies therein must fail and the trial court's conclusion that Judson was entitled to a one-eighth interest in Mr. Hutchinson's net estate.

DISCUSSION

Appellants argue initially that the terms of decedent's will are so ambiguous that it should fail entirely and the decedent's estate should be distributed in accordance with the laws applicable to intestate successions. We disagree. When testamentary language is subject to two reasonable interpretations, courts should choose an interpretation that validates the will rather than one that invalidates it, so long as such interpretation does not violate the testator's intent. **Succession of Goode**, 425 So.2d 673, 676 (La.1982). Whenever possible, a will should be read so as to lead to testacy, not intestacy. See LSA-C.C. art. 1612; **Carter v. Succession of Carter**, 332 So.2d 439, 442 (La.1976); **Succession of Jones**, 369 So.2d 1143, 1149 (La.App. 1 Cir.), writ denied, 373 So.2d 526 (La.1979). Moreover, it is the function of courts to determine and carry out the intention of the testator if it can be ascertained from the language of the will. **Succession of Mydland**, 94-0501, p. 5 (La.App. 1 Cir. 3/3/95), 653 So.2d 8, 11. In the instant

case, by applying the rules of interpretation applicable to wills, we believe Mr. Hutchinson's intent is ascertainable.[2] Appellants' contention to the contrary lacks merit.

In the alternative, appellants argue the trial court erred in holding Judson was a general legatee entitled to one-eighth of the net estate. They maintain Judson was a particular legatee entitled to a single legacy of $10,000.[3]

The intent of the testator is the paramount consideration in interpreting the provisions of a will. LSA-C.C. art. 1611; **Succession of Barranco**, 94-1726, p. 8 (La.App. 1 Cir. 6/23/95), 657 So.2d 708, 713, writ denied, 95-1902 (La. 11/3/95), 662 So.2d 11. The intention of a testator must be ascertained from the whole will with effect given to every part of it. **Carter**, 332 So.2d at 441; **Barranco**, 94-1726 at p. 8, 657 So.2d at 713. The first and natural impression conveyed to the mind on reading the will as a whole is entitled to great weight. The testator is assumed to be conveying his ideas to the best of his ability so as to be correctly understood at first view. See **Mydland**, 94-0501 at p. 5, 653 So.2d at 12. If any ambiguity exists as to the testator's intent with regard to a particular clause or bequest, other clauses or bequests must also be considered to reach, if possible, an interpretation that harmonizes the whole. **Succession of Griffin**, 366 So.2d 1029, 1030 (La.App. 1 Cir. 1978). In case of doubt, the preferred interpretation would be that which will

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[2] When a will is free from ambiguity, the will must be carried out according to its written terms, without reference to information outside the will. **Succession of Williams**, 608 So.2d 973, 975 (La.1992). However, when a provision in a will is subject to more than one reasonable interpretation, then the court may look to extrinsic evidence to aid in determining the intent of the testator. See LSA-C.C. art. 1611; **Williams**, 608 So.2d at 975. In the instant case, no extrinsic evidence was presented by the parties, who agreed to submit the matter to the trial court on the record, the joint pretrial order, and the pretrial memoranda filed by appellants and Judson.

[3] Testamentary dispositions currently are classified as particular, general, or universal legacies. See LSA-C.C. arts. 1584 – 1587 (effective July 1, 1999). However, at the time the decedent executed the will at issue herein, LSA-C.C. art. 1605 provided that testamentary dispositions were classified as being either particular, universal, or under a universal title. The 1997 Revision Comments to article 1584 note that "the name of the 'legacy under universal title' has been changed to 'general' legacy, and its characteristics are slightly modified in the new definition," as a means of clarifying a confusion in the jurisprudence. See also LSA-C.C. art. 1586, Revision Comments-1997.

most closely approximate the legal order of distribution. This rule flows from the general principle that the law favors the distribution that itself provides. See **Adams v. Taylor**, 552 So.2d 744, 745 (La.App. 1 Cir. 1989).

In this case, the pertinent portions of the disputed will provide as follows:[4]

> Page I
> Albert Sidney Hutchinson
>
> This is my last will. This
> 31st of May 1999. Everything I
> own goes to my Sister
> Marjorie Hinners. to be divided
> to the best of my ability.
> To Dale Hodge cash $10.000.00
> To Guy Alfonso $10.000.00
> To Wayne Hodges $ 5,000.00
> To Bobbie Falks $ 5,000.00
> each
> To Don and David Hinners $10,000.00
> To Judson Church $10.000.00
> To Hebron Church were all my
> folks are buried $10.000.00 to the
> grave yard fund in form of
> a Bond They get the interest
> once a year for the grave
> yard fund.
> To my Sister Marjorie $20.000.00
> all this the first year of my
> death and each year after until
> all cash is gone

In attempting to determine the decedent's intent, the trial court observed that all the legacies (except Hebron's) were uniform in style, wording, and position with respect to each other. The trial court then stated:

> Without more, this Court would consider these eight simple particular legacies for the respective sums and proceed to see what else Mr. Albert Sidney Hutchinson wanted done with the rest of his estate. But the next three lines have the effect of changing those otherwise particular legacies to general legacies for varying relative sums or fractions of his estate.
>
> The Court refers now to the following language: "all this the first year of my death and each year after until all cash is gone" .... This Court believes that this sentence is an instruction that all of these

[4] A copy of the entire handwritten will is attached hereto as Appendix A. None of the parties have contested the validity of this olographic will, which the trial court specifically found was in proper form. See LSA-C.C. art. 1575.

> legatees, namely, Dale Hodge, Gay Alfonso, Wayne Hodges, Bobbie Falks, Don and David Hinners, Judson Church and "my sister Marjorie" are to receive their respective sums "the first year of my death and each year after until all cash is gone".

In the instant case, the first impression conveyed by a reading of the whole will is that: (1) with one exception on page I, Mr. Hutchinson listed the amount of the legacies in a like manner, that is, in a vertical column, with each amount across from the name of the intended legatee, and (2) the use of the phrase "all this," which began another line, applied to "all" of the vertically aligned legacies, including Hinners. The exception, Hebron's legacy, is clearly different, and so identified by the language of the particular bequest and the inclusion of the monetary amount in the sentence, rather than along the aligned margin with the other legacy amounts. Thus, the consistent and logical reading of the sentence is that the phrase, "all this the first year of my death and each year until all cash is gone," refers to "all" of the vertically aligned amounts and the corresponding legatees. The testator's word choice and his alignment of certain dollar amounts must be considered together, and the testator's intention derived from the whole, with effect given to every part of the will. See **Barranco**, 94-1726 at p. 8, 657 So.2d at 713.[5]

CONCLUSION

For the above reasons, we find no error in the trial court's judgment and we affirm. All appeal costs are assessed to appellants, Majorie Hinners, individually and as Executrix of the Succession of Albert Sidney Hutchinson; David Hinners;

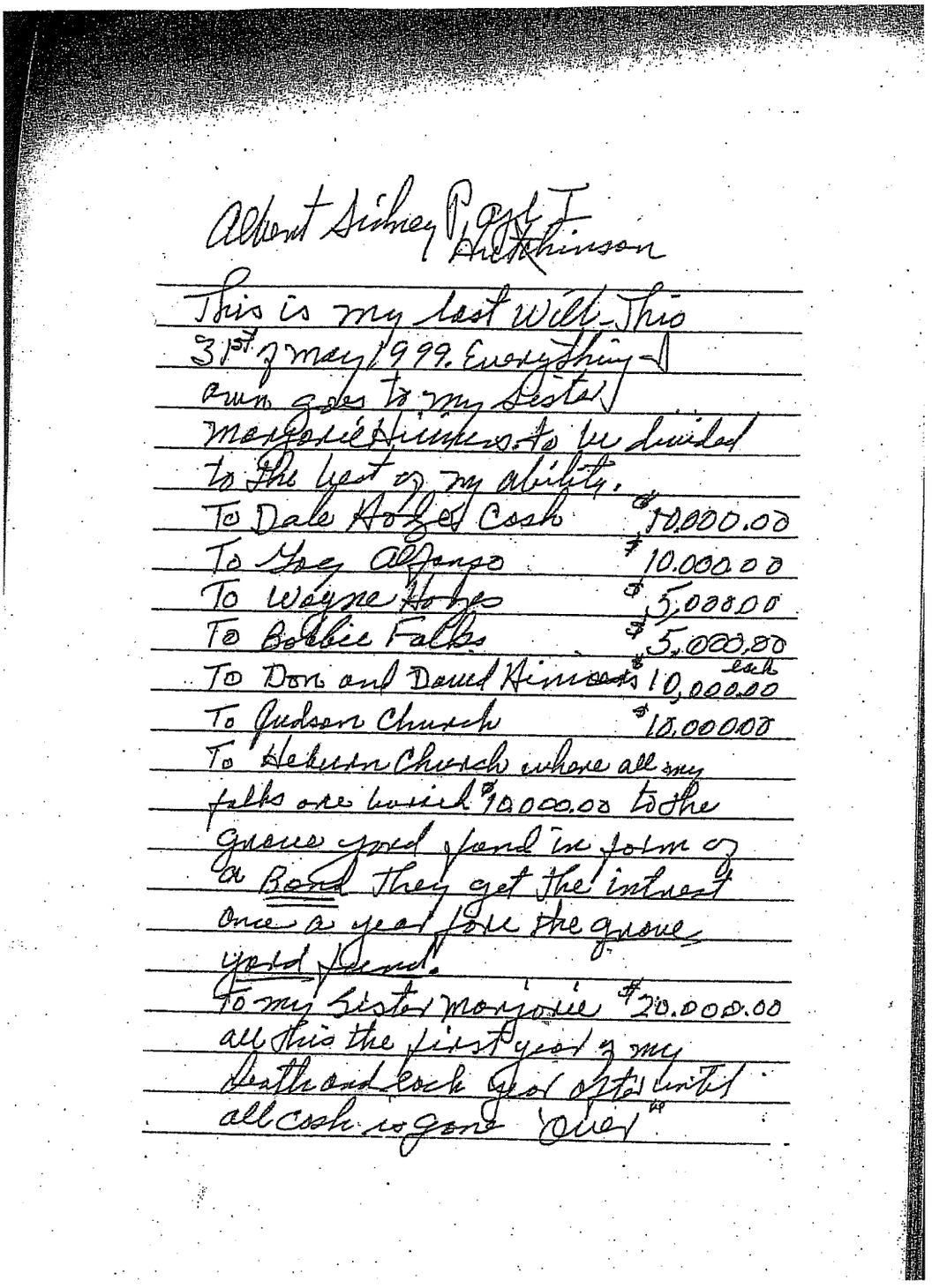
[5] We further note that the testator could have chosen to omit the word "all," and we must attribute some meaning to said word choice.

and Donald Hinners.[6]

AFFIRMED.

[6] Judson requests in brief that this matter be remanded to the trial court in order to allow that court to resolve the issue of whether attorneys' fees allegedly paid by appellants with estate assets should be fictitiously returned to the estate for purposes of calculating Judson's interest therein and to allow the entry of a judgment of possession. However, because Judson neither appealed nor answered the appeal requesting such relief, we decline to consider its request. See LSA-C.C.P. art. 2133.

APPENDIX A



Albert Sidney Pigg Jr
Albert Hutchinson

This is my last Will This
31st of may 1999. Everything I
own goes to my Sister
Margorie Hinkens to be divided
to the best of my ability.
To Dale Hodges Cash $10,000.00
To Joey Alfango $10.000.00
To Wayne Hodges $5,000.00
To Bobbie Falks $5,000.00
To Don and David Hinkens $10,000.00 each
To Judson Church $10.000.00
To Hebron Church where all my
folks are buried $10,000.00 to the
graves yard fund in form of
a Bond They get the intrest
once a year for the grave
yard Fund.
To my Sister Margorie $20.000.00
all this the first year of my
death and each year after until
all cash is gone Over

Page 2

To Dale give him the property back of his house up to the ditch and straight back from his North property line.
Marjorie There is Coins (money) in closet in bed room cash it in and deposit it in bank
To be given to above people.
The furniture can be given to any of the family any left can be sold including Tractors (2) any tools hand & power tools I hope Marjorie will come live in house To be out of Baton Rouge if she will keep furniture if you want it. Town of Walker is interested in field they can have it for $12,000.00 acres all lots to be sold for going price and added to land sale
Albert Sidney Hutchinson

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GUIDRY, J., dissents and assigns reasons.

GUIDRY, J., dissenting.

I disagree with the majority's conclusion that "all this the first year of my death and each year until all cash is gone" refers to "all" of the vertically aligned legacies, including Hinners. In reaching this conclusion, the majority failed to give proper consideration to the rule that the first and **natural** impression conveyed to the mind on reading the will as a whole is entitled to great weight, since it is assumed the testator is conveying his ideas to the best of his ability so as to be correctly understood at first view. See Succession of Mydland, 94-0501, p. 5 (La. App. 1st Cir. 3/3/95), 653 So.2d 8, 12.

In the instant case, the impression first conveyed by a reading of the whole will is that: (1) the decedent intended for all legacies, excluding Hinners', to be one-time legacies of either $5,000 or $10,000; and (2) the phrase "all this the first year of my death and each year after until all cash is gone" referred exclusively to the $20,000 legacy to Hinners. Since there is no period after "Marjorie" and "all" is not capitalized, it is clear that the phrase "all this" is part of a single sentence

that begins with the words "To my sister Marjorie $20,000" and expresses the decedent's intent with respect to that legacy only. This sentence strongly conveys the intent that decedent's sister should receive the sum of $20,000 annually. However, the same intent is not conveyed with respect to the other legatees, who are not mentioned therein.

The natural and logical reading of the sentence is that "all this" refers to the $20,000 legacy only, and not, as the trial court concluded, to the preceding legacies. This reading is consistent with decedent's clear intent, as evidenced by the amounts of the respective legacies, that his sister receive a legacy substantially larger than that of any of the other legatees. It would require a strained and unnatural interpretation to conclude that the decedent intended the phrase "all this" to refer to each of the legacies (except Hebron's) that preceded it, so that each legatee would be entitled to annually receive the amount of each respective legacy. Therefore, I respectfully dissent.