MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT

Joseph Leon Payne
Payne Law Office, LLC.
Austin, Indiana

ATTORNEY FOR APPELLEE

Kerry Thompson
Houston, Thompson and Lewis, PC
Scottsburg, Indiana

IN THE COURT OF APPEALS OF INDIANA

Ashley Victoriano, individually and as Administrator of the Estate of Patrick Barnes

Appellant-Respondent,

v.

Estate of Barbara J. Smith,

Appellee-Petitioner.

September 15, 2021

Court of Appeals Case No. 21A-ES-407

Appeal from the Scott Circuit Court

The Honorable Jason Mount, Judge

Trial Court Cause No. 72C01-2001-ES-1

Bradford, Chief Judge.

Case Summary

[1] Barbara ("Bobbi") J. Smith died testate on December 15, 2019, one day after her husband Cecil Smith died. Bobbi and Cecil had two children together, Toby A. Smith and Shannon Smith, while Bobbi also had two children, Patrick Barnes and Tammy Montana, by a prior marriage. Bobbi and Cecil's joint will called for distributions to be made so that the couple's estate would be split into halves, with half of the estate going only to the children Cecil and Bobbi had together, and the other half split amongst all of Bobbi's children. Toby predeceased Bobbi so Regan Smith, his only daughter, was substituted in his place. Barnes died sometime after Bobbi, so his distribution was directed to the Estate of Patrick Barnes ("Barnes's Estate"). The personal representative of the Estate of Barbara J. Smith ("Bobbi's Estate"), Shannon, eventually entered a final accounting dividing the couple's estate so that "Cecil's half" of the estate would be evenly divided between Shannon and Toby, while "Bobbi's half" would be evenly divided between Shannon, Toby, Montana, and the Barnes Estate. This accounting resulted in in 3/8 of the Bobbi's Estate going to Shannon, another 3/8 going to Toby, to be directed to Regan, 1/8 going to Montana, and 1/8 going to Barnes's Estate. Following a hearing, the trial court approved the distribution on February 9, 2021, awarding 3/8 shares of Bobbi's estate to Shannon and Regan and 1/8 shares of Bobbi's estate to Tammy and Barnes's estate. Barnes's estate appeals, arguing that the trial court erred in its interpretation of Bobbi's will, and that each of Bobbi's children, or their heirs or estates, should have received an equal 1/4 share. Because we believe that the

trial court correctly interpreted Bobbi's will to honor her and Cecil's intent, we affirm.

Facts and Procedural History

[2] Bobbi died testate on December 15, 2019, one day after her husband Cecil died. Bobbi and Cecil had two children together, Toby and Shannon, and Bobbi also had two children by a prior marriage, Barnes and Tammy. When Barnes died sometime after Bobbi, but before distribution of Bobbi's estate, Ashley Victoriano became the administrator of the Barnes's estate.

[3] Bobbi's last will and testament in force at the time of her death directed the following:

> BEQUESTS:
>
> We direct that after payment of all our just debts, our property be divided as follows: Cecil's half to be divided between Toby A and Shannon Smith.. [sic]
>
> Bobbi's half to be divided between Toby A. Smith, Shannon M. Smith, Patrick Barnes and Tammy Montana. In the event that one of us precedes the other in death, we both wish that in the event the remaining spouse should remarry that the new spouse would not be benefited [sic] any of the property, all properties should still be divided only as above mentioned when the remaining partner expires.

Appellant's App. Vol. II p. 15. On November 2, 2020, the personal representative of Bobbi's Estate, Shannon, eventually entered a final accounting dividing the couple's estate so that "Cecil's half" of the estate would be evenly

divided between Shannon and Toby, while "Bobbi's half" would be evenly divided between Shannon, Toby, Montana, and the Barnes Estate. This accounting resulted in in 3/8 of the Bobbi's Estate going to Shannon, another 3/8 going to Toby, to be directed to Regan, 1/8 going to Montana, and 1/8 going to Barnes's Estate. On November 2, 2020, Barnes's estate objected to the proposed distribution, arguing that the correct distribution would be for each of Bobbi's children to receive an equal 1/4 share of Bobbi's Estate. The trial court held a hearing on January 12, 2021, to determine the final accounting, settle the accounts, determine the beneficiaries under the will, and for authority to distribute assets from Bobbi's estate. On February 9, 2021, the trial court entered an order approving the final accounting, awarding a 3/8 share of the estate, or $158,228.91, each to Shannon and Regan, and a 1/8 share of the estate, or $52,742.98, each to Tammy Montana and Barnes's estate.

Discussion and Decision

[4] "Construction of the terms of a written contract is a pure question of law for the court, reviewed de novo." *Harrison v. Thomas*, 761 N.E.2d 816, 818 (Ind. 2002).

> Additionally, we note that when examining a will, the primary purpose is to determine and carry out the intent of the testator. *In re Estate of Grimm*, 705 N.E.2d 483, 498 (Ind. Ct. App. 1999). The interpretation, construction and legal effect of a will is a question to be determined by the court as a matter of law. *Hershberger v. Luzader*, 654 N.E.2d 841, 842 (Ind. Ct. App. 1995), *trans. denied*. Words contained in a will are to be understood to have been used by the testator in their common and ordinary sense and meaning. *Grimm*, 705 N.E.2d at 498. If the language

> in a will is unambiguous and clearly expresses the testator's intent, the express language of the will must govern. *Id*.

In re Estate of Cashen, 715 N.E.2d 922, 924 (Ind. Ct. App. 1999). "The will in all its parts must be considered together. *Keck v. Walker*, 922 N.E.2d 94, 100 (Ind. Ct. App. 2010). "When construing the language of a will, we should strive to give effect to every provision, clause, term, or word if possible." *Id*.

[5] Barnes's estate contends that the trial court erred when it accepted Bobbi's estate's final accounting, resulting in a split where Bobbi and Cecil's children received 3/8 shares while Bobbi's children from a previous marriage only received 1/8 shares. Specifically, Barnes's estate argues that it was not Bobbi's intent to distribute her estate unevenly, and that the trial court erred because, when facing ambiguity, wills should be construed to dispose of property as if the deceased had died intestate. Appellant's App. Vol. II p. 15. We disagree. There is nothing in the will that suggests that, if Cecil predeceased Bobbi, there should be a reason to ignore the provision giving half of the estate to Cecil's children. In fact, the will specifically states the intent that "[i]n the event that one of us precedes the other in death" Bobbi and Cecil wanted all properties to "still be divided only as above mentioned when the remaining partner expires[,]" even if a surviving spouse were to remarry. Appellant's App. Vol. II p. 15. Further, the fact that the will identifies the portions to be split among Bobbi's children and Cecil's children as "Bobbi's half" and "Cecil's half" underscores the couple's intent to distribute the estate in this manner, rather

than awarding each of Bobbi's children a 1/4 share. Appellant's App. Vol. II p. 15. "When construing the language of a will, we should strive to give effect to every provision, clause, term, or word if possible." *Keck*, 922 N.E.2d at 100. The language in the will supports the final accounting and the trial court's conclusion that this distribution was Bobbi's intent. "[W]hen examining a will, the primary purpose is to determine and carry out the intent of the testator." *Grimm*, 705 N.E.2d at 498.

[6] The judgment of the trial court is affirmed.

Robb, J., and Altice, J., concur.