

# In the Indiana Court of Appeals

Cause No. 33A05-0805-CV-306

JACK R. ZIRKLE, <i>et al.</i> ,	)	
	)	
Appellants/petitioners below,	)	Appeal from the
	)	Henry County Superior Court
v.	)	Hon. Michael D. Payton,
	)	Presiding Judge
DELORES J. DEARING and	)	
RUTH E. STAGGS,	)	Lower Court Cause No.
	)	33D01-0604-ES-22
Appellees/respondents below.	)	

---

## **BRIEF OF APPELLEES**

---

DATED: August 11, 2008

Curtis E. Shirley, #15845-49  
151 North Delaware Street, Suite 1700  
Indianapolis, IN 46204  
317.685.6512  
317.685.6505 (facsimile)

Robert F. Wisehart, #1317-33  
580 Locust Street  
Middletown, IN 47356  
765.354.2226  
765.354.2227 (facsimile)

*Attorneys for Appellees,  
Ruth E. Staggs and Delores J. Darling*

**TABLE OF CONTENTS**

TABLE OF CONTENTS .....	<i>p.ii</i>
TABLE OF AUTHORITIES .....	<i>p.iii</i>
STATEMENT OF ISSUES .....	<i>p.1</i>
(I) Whether the Zirkels can challenge the Trial Court's Order on appeal with arguments they never made at the hearing?	
(II) Whether the Trial Court properly interpreted the decedent's Will . . . where the heirs stipulated to no ambiguity, and where the Will on at least four occasions uses language of equality?	
STATEMENT OF CASE .....	<i>p.1</i>
The Zirkels did not reserve the right to present evidence.	
STATEMENT OF FACTS .....	<i>p.3</i>
STANDARD OF REVIEW ON APPEAL .....	<i>p.4</i>
<i>De novo</i> does not mean a <i>do over</i>	
STANDARD OF REVIEW TO INTERPRET WILLS .....	<i>p.6</i>
SUMMARY OF ARGUMENT .....	<i>p.8</i>
ARGUMENT	
(I) <u>THE ZIRKELS WAIVED ANY AMBIGUITY</u> .....	<i>p.8</i>
(II) <u>ALL OF THE BEQUESTS ARE EQUAL</u> .....	<i>p.11</i>

<u>(III) THE THEME OF EQUALITY</u> .....	p.13
<u>(IV) THE FARM IS AN ASSET</u> .....	p.14
CONCLUSION .....	p.16
CERTIFICATE OF SERVICE	

**TABLE OF AUTHORITIES**

<b><u>Case Citations</u></b>	<b><u>Page #</u></b>
<u>Berry v. Ford</u> , 829 N.E.2d 1052 (Ind.App. 2005) .....	p.12
<u>Clark v. CSX</u> , 737 N.E.2d 752 (Ind.App.2000) .....	pp.7-8
<u>Cook v. Adams County</u> , 871 N.E.2d 1003 (Ind.App. 2007) .....	p.4
<u>Cooper v. Cooper</u> , 730 N.E.2d 212 (Ind.App.2000) .....	p.7
<u>Crawford County v. Enlow</u> , 734 N.E.2d 685 (Ind.App.2000) .....	p.7
<u>Curtis v. State</u> , WL 2854349 (Ind.App. July 25, 2008) .....	p.4
<u>East v. Estate of East</u> , 785 N.E.2d 597 (Ind.App.2003) .....	p.7
<u>Estate of Kirkendall</u> , 642 N.E.2d 548 (Ind.App. 1994) .....	p.12
<u>Fillmore v. Fillmore Machine</u> , 783 N.E.2d 1169 (Ind.App.2003) .....	p.7
<u>Fresh Cut v. Fazli</u> , 650 N.E.2d 1126, 1133 (Ind.1995) .....	p.7
<u>Gladden v. Jolly</u> , 655 N.E.2d 590 (Ind.App. 1995) .....	p.6
<u>Guipe v. Miller</u> , 180 N.E. 760 (Ind.App. 1932) .....	p.12
<u>Hancock v. Maynard</u> , 126 N.E. 451 (Ind.App. 1920) .....	p.12
<u>Hertford v. Harned</u> , 113 N.E. 727 (Ind. 1916) .....	p.6
<u>Hauck v. Second Nat. Bank</u> , 286 N.E.2d 852 (Ind.App. 1972) .....	p.8
<u>Hutch v. State</u> , 114 P.3d 917,920 (Haw. 2005) .....	p.4

**Case Citations**

**Page #**

<u>Hutchinson Estate v. Arnt</u> , 1 N.E.2d 585 (Ind. 1936) .....	p.11
<u>Indiana Gaming v. Blevins</u> , 724 N.E.2d 274 (Ind.App.2000) .....	p.7
<u>Kelly v. Estate of Johnson</u> , 788 N.E.2d 933 (Ind.App. 2003) .....	p.1
<u>Kilgore v. Kilgore</u> , 26 N.E. 56 (Ind. 1890) .....	p.11
<u>Lasater v. House</u> , 841 N.E.2d 553 (Ind. 2006) .....	p.10
<u>Lippeatt v. Comet Coal</u> , 419 N.E.2d 1332 (Ind.App.1981) .....	p.8
<u>McAvoy v. Sammons</u> , 224 N.E.2d 323 (Ind.App. 1967) .....	p.12
<u>McIntyre v. State</u> , 460 N.E.2d 162, 165 (Ind.App. 1984) .....	p.9
<u>Niccum v. Niccum</u> , 734 N.E.2d 637 (Ind.App.2000) .....	p.7
<u>Rogier v. American Testing</u> , 734 N.E.2d 606 (Ind.App.2000) .....	p.7
<u>Ruff v. Charter</u> , 699 N.E.2d 1171, 1176 (Ind.App. 1998) .....	p.7
<u>Runyan v. Rivers</u> , 192 N.E.327 (Ind.App. 1934) .....	p.12
<u>Samar v. Hofferth</u> , 726 N.E.2d 1286 (Ind.App.2000) .....	p.7
<u>Sandage v. Studebaker</u> , 41 N.E. 380 (Ind. 1895) .....	p.7
<u>Sigler v. Shelly</u> , 105 N.E. 403 (Ind.App. 1914) .....	p.12
<u>Stevenson v. Druley</u> , 4 Ind. 519 (Ind. 1853) .....	p.12
<u>Sturgis v. Work</u> , 22 N.E. 996 (Ind. 1889) .....	p.6
<u>UFG v. Southwest</u> , 784 N.E.2d 536 (Ind.App.2003) .....	p.7
<u>Utica v. Precedent</u> , 782 N.E.2d 470 (Ind.App.2003) .....	p.7
<u>Uzelac v. Guzik</u> , 663 N.E.2d 238, 240 (Ind.App.1996) .....	p.7
<u>Vadas v. Vadas</u> , 762 N.E.2d 1234, 1242 (Ind. 2002) .....	p.9

**Rules and Other Citations**

**Page #**

<i>Appellate Rule 22(C)</i> .....	<i>p.5</i>
<i>Appellate Rule 46(A)(8)(a)</i> .....	<i>p.5</i>
<i>Black's Law Dictionary</i> .....	<i>p.15</i>
<i>Evidence Rule 803(3)</i> .....	<i>p.10</i>
<u><i>Henry's Probate law and Practice, VI.2(A), Ch.31, Sec.5, pp. 869-70 (1979)</i></u> .....	<i>p.7</i>

## STATEMENT OF ISSUES

(I) Whether the Zirkels can challenge the Trial Court's Order on appeal with arguments they never made at the hearing?

(II) Whether the Trial Court properly interpreted the decedent's Will . . . where the heirs stipulated to no ambiguity, and where the Will on at least four occasions uses language of equality?

## STATEMENT OF CASE

If the Zirkels do not succeed in reversing the trial court's reading of the Will, they want the Indiana Court of Appeals to find an ambiguity and remand for a hearing to evaluate extrinsic evidence of the decedent's intent. The Zirkels waived any such possibility. This case is not about construing a Will or resolving any ambiguity; it is about enforcing the language of the Will as the decedent expressed it – in writing, properly witnessed.<sup>1</sup>

In their Statement of the Case, the Zirkels write "Counsel ... reserved the right to present evidence should the Court find the Will to be ambiguous." *Brief, p.1*. Not in this case. The Zirkels cite to two statements in the transcript. *Id.* First "If the Court finds an ambiguity, I'm prepared to present evidence." *January 19, 2007 hearing, p.10 ll.21-22.*<sup>2</sup> Second "I want the Court to take as much time as it needs to be prepared to

---

<sup>1</sup> See *Kelly v. Estate of Johnson*, 788 N.E.2d 933 (Ind.App. 2003), relied on by the Trial Court in its Order dated February 8, 2007.

<sup>2</sup> The Zirkels did not include a copy of the transcripts in their appendix. Delores and Ruth will file an appellee appendix that includes these, although the Appellate Clerk will probably obtain the originals from the Trial Court.

determine this issue whether by way of evidence of otherwise.” *Id.*, p.17 ll.1-3. Both fall short of reserving anything.

At the hearing on January 19, 2007 all interested persons stipulated that the decedent’s Will was not ambiguous. They asked the Trial Court to find the decedent’s intent only by reviewing the Will. This Court should not permit a contrary argument on appeal.

Counsel for the Zirkels: “Your Honor, may it please the Court, with respect to the Petition for Construction, Indiana law is clear that the parol evidence rule prohibits the introduction of extrinsic evidence to vary or explain the terms of an unambiguous document. And I believe what we have here in terms of the decedent’s 1988 probated Will is an unambiguous document.” *January 19, 2007 hearing, p.6 l.21 to p.7 l.3.* “I submit to Your Honor that the Will in question is clear. It is not ambiguous.” *Id.*, p.7 ll.17-18. “There’s no ambiguity on the face of this Will. So I don’t believe that parol evidence is admissible to explain the terms of that Will.” *Id.*, p.10 ll.13-16.

The Trial Court stated “As a starting point, I think both of you are telling me, I don’t need any evidence to construe the Will.” To which counsel for the Zirkels responded “And we’re diametrically opposed to our individual constructions of that unambiguous document.” *Id.*, p.15 ll.5-11.

On May 21 2008 at the hearing on objections to the final accounting, counsel for the Zirkels stated “at that hearing [on January 19, 2007], both Mr. Wisheart and myself took the position that the Will was unambiguous.” *May 21, 2008 hearing, p.4 ll.1-3.*

## **STATEMENT OF FACTS**

Other than reciting part of the decedent's Will, the remainder of the Zirkels Statement of the Facts incorrectly characterizes what the Trial Court did and their version of why, which is better understood as argument. The Trial Court made certain findings which bear repeating:

1. On February 29, 1988, Clarence L. Brown (Decedent) executed his Last Will and Testament appointing his spouse, Violetmae Brown, as the Executrix. In the event of her inability to serve, the Decedent named Jack R. Zirkel, Delores Jean Dearing and Ruth E. Staggs as Co-Executors.

2. Violetmae Brown died on June 28, 1994.

3. The Decedent died on April 7, 2006. Thereafter, on April 19, 2006, the Decedent's Will was probated and Jack R. Zirkel, Delores Jean Dearing and Ruth E. Staggs were appointed and qualified as Co-Executors.

...

5. On January 15, 2007, the Personal Representative's Inventory was filed with the Court showing a Total Appraised Value of Estate at \$414,759.41. Of that value, the farm was listed as being 117.87 acres at a value of \$353,610.00. The remaining assets consisted of Stock (\$10,022.40); Bank Accounts/Money (\$50,706.41); Other property (\$420.60). *App.27-28.*

If the Zirkels elect to inherit the real estate, the Trial Court ruled they must pay \$117,870 to Delores and \$117,870 to Ruth, much of which the Zirkels will have to fund out of their own pockets. *App.111.* The Zirkels' argument on appeal reduces these amounts: \$61,500 to Delores and \$61,500 to Ruth, with much funded by the residuary. Under any scenario the Zirkels admit they can elect to inherit the real estate only if they can afford it and choose to pay the required price. *Brief, p.10.*

Delores and Ruth objected to the final accounting proposed Schedules E and F, asserting the Zirkels had no standing to complain about the Trial Court's order because

they could not afford to pay Delores and Ruth no matter the outcome.<sup>3</sup> There is no evidence in the Record that the Zirkels will elect to inherit the real estate under any scenario.<sup>4</sup>

### STANDARD OF REVIEW ON APPEAL

Controversies that do not involve disputed issues of fact present questions of law. It is often said that Courts on appeal review the case de novo. *De novo*, however, does not mean a *do over*. The Indiana Court of Appeals should resolve this case by reviewing the decedent's Will and the arguments raised in the transcript of the January 19, 2007 hearing.<sup>5</sup>

Much of the Zirkels' argument on appeal was never before the Trial Court at the January 19, 2007 hearing. Just as Appellate Courts do not permit arguments to be raised for the first time in a reply brief, so the Zirkels cannot wait until an appeal to raise a new argument as to why the Trial Court committed an error. For example, at the hearing on January 19, 2007 the Zirkels never identified which phrase or words of the Will were

---

<sup>3</sup> *Appellants' App.*, p.106 (In Schedule E and Schedule F, the Zirkel Camp shows as little as \$12,599 in cash, yet admit to owing Delores and Ruth either \$235,740, or \$123,000).

<sup>4</sup> Courts do not like to waste time. Clients do not like to pay attorney fees and expenses for academic exercises. Courts do not entertain hypothetical questions where one heir simply wants a bargaining chip. The Zirkels should not have standing unless and until they have shown they can and will pay a charge under any possible scenario.

<sup>5</sup> *Curtis v. State*, WL 2854349 (Ind.App. July 25, 2008), citing *Hutch v. State*, 114 P.3d 917,920 (Haw. 2005), which dictates that "the appellate court steps into the trial court's position, reviews the same trial record, and redecides the issue" (emphasis in original); *Cook v. Adams County*, 871 N.E.2d 1003 (Ind.App. 2007) (de novo review is of the trial court record, not new arguments on appeal).

potentially ambiguous or needed construing. The decedent's Will contains a statement that "If my total estate, considering the farm bequeathed under subsection A(1) at a value of Sixty One Thousand Five Hundred Dollars (\$61,500), ...". The Zirkels use this phrase as the foundation for their entire appellate argument. They construe the Will to dictate \$61,500 as the value of the farm for all purposes.<sup>6</sup>

To the Zirkels, "Considering the farm at \$61,500" means "As if the farm had a value of \$61,500". In the upcoming argument section Delores and Ruth vehemently disagree on the merit of this argument. The point here is that the Indiana Court of Appeals should not permit the Zirkels to make such an argument now. The transcript of the January 19, 2007 hearing is void of any such remarks.<sup>7</sup> Delores and Ruth filed a petition and amended petition for instructions. The Zirkels never filed a written response or brief. Only at the very end of the estate administration did the Zirkels raise this new argument.<sup>8</sup> *May 21, 2008 hearing on final accounting, p.7 ll.5-21, p.8 l.17 to p.9 l.5.*

---

<sup>6</sup> In place of the lengthy Item IV, the Zirkels want the Will to state: "I give [the Zirkels] an option to buy my farm at appraised value, and at a price no more than \$184,500." No amount of extrinsic evidence can create such a bequest. Extrinsic evidence resolves ambiguities. Extrinsic evidence cannot add or change terms – especially to a Will which Indiana law requires to be in writing and witnessed.

<sup>7</sup> At the January 19, 2007 hearing, after mentioning the argument by Delores and Ruth that the Trial Court should consider fair market value, the Zirkels made only two responses: (1) that there is not enough cash in the estate to make the specific bequests to them, and (2) that would result in a disinheritance of the Zirkel descendants. *January 19, 2007 hearing, p.9 l.18 to p.10 l.8.*

<sup>8</sup> The Zirkels go so far as to inject argument and information never before seen in this case. Their Appellants' Brief, page 9, purports to state the age of Jack Zirkle, compute a life estate value, and compute remainder values for his descendants. The Zirkles do not cite to the Record because it is here raised for the first time. If the decedent wanted the family farm to stay in the family, it is a bit odd that Jack Zirkle would distance himself from the value of having his own child and grandchildren inherit it. Pursuant to Appellate Rules 22(C) and 46(A)(8)(a) the Court should strike this portion of the Appellants' Brief.

The Zirkels argue in their Appellants' Brief, bottom of page 5, that "the Court on appeal owes no deference to the Trial Court's construction of the Will". Not true. The Honorable Michael D. Payton is a distinguished jurist who crafted a detailed opinion that the Zirkels have all but ignored.<sup>9</sup>

As the Indiana Court of Appeals reviews this case, Delores and Ruth ask that it stand in the shoes of the Trial Court at the January 19, 2007 hearing, which does not include the Zirkels arguments on appeal.

### **STANDARD OF REVIEW TO INTERPRET WILLS**

Courts generally construe and enforce Wills without reference to extrinsic evidence. Unless an ambiguity exists, Courts should not allow extrinsic evidence to add to, eliminate, nor vary the terms.<sup>10</sup> Neither should Courts eliminate words or phrases and supply others under the auspices of finding the testator's intention.<sup>11</sup> Where a Will states the intention, Courts should not search elsewhere.

Courts should give effect to every provision, clause, term, and word.<sup>12</sup> Provided no ambiguity exists, written terms are given their plain and ordinary meaning.<sup>13</sup>

---

<sup>9</sup> Nay more, the Zirkels have attacked the Trial Court's opinion with unbelievable rhetoric. In the Appellants' Brief, page 7, they state that the construction by the Trial Court "could only be reached through extrinsic evidence". No heir offered any evidence at the January 19, 2007 hearing. The Trial Court signed an Order on February 8, 2007 resolving the dispute and in doing so referred only to the language of the Will.

<sup>10</sup> *Hertford v. Harned*, 113 N.E. 727 (Ind. 1916).

<sup>11</sup> *Sturgis v. Work*, 22 N.E. 996 (Ind. 1889).

<sup>12</sup> *Gladden v. Jolly*, 655 N.E.2d 590 (Ind.App. 1995).

If a written document is ambiguous solely because of its language, Courts construe it as a matter of law.<sup>14</sup> An ambiguity exists only where "reasonable people could come to different conclusions about the [Will's] meaning."<sup>15</sup> Courts exclude all parol evidence of prior or contemporaneous conversations or declarations tending to substitute a new or different intention for the one shown by the writing.<sup>16</sup> Under the "four corners" rule, unambiguous language determines the intent of the parties and parol or extrinsic evidence is not admissible to contradict, expand, vary, or explain the writing.<sup>17</sup> Even if ambiguity exists, extrinsic evidence is admissible only to explain the instrument and not to contradict it.<sup>18</sup>

---

<sup>13</sup> Uzelac v. Guzik, 663 N.E.2d 238, 240 (Ind.App.1996).

<sup>14</sup> Fresh Cut v. Fazli, 650 N.E.2d 1126, 1133 (Ind.1995).

<sup>15</sup> Ruff v. Charter, 699 N.E.2d 1171, 1176 (Ind.App. 1998).

<sup>16</sup> Sandage v. Studebaker, 41 N.E. 380 (Ind. 1895).

<sup>17</sup> Indiana law requires Wills to be in writing and duly witnessed. Courts should not permit testimony to replace terms or fill in blanks that by law fall to the residuary. See Henry's Probate law and Practice, VI.2(A), Ch.31, Sec.5, pp. 869-70 (1979) ("The following are instances in which parol evidence is not admissible in construing wills: 1. Filling up a total blank in a will. 2. Inserting a devise omitted by mistake. ... 6. Reconciling conflicting clauses in a will. ... 8. Explaining or altering the estate. ... 12. Construing a will with reference to the instructions given for preparing it. ... 28. Increasing that which is defective. 29. Adding a legacy to a will. 30. Proving what interest a legatee was intended to take in a legacy. 31. Ascertaining an intention which, on the face of the will, was indeterminate.").

<sup>18</sup> East v. Estate of East, 785 N.E.2d 597 (Ind.App.2003); UFG v. Southwest, 784 N.E.2d 536 (Ind.App.2003); Fillmore v. Fillmore Machine, 783 N.E.2d 1169 (Ind.App.2003); Utica v. Precedent, 782 N.E.2d 470 (Ind.App.2003); Rogier v. American Testing, 734 N.E.2d 606 (Ind.App.2000); Niccum v. Niccum, 734 N.E.2d 637 (Ind.App.2000); Crawford County v. Enlow, 734 N.E.2d 685 (Ind.App.2000); Cooper v. Cooper, 730 N.E.2d 212 (Ind.App.2000); Samar v. Hofferth, 726 N.E.2d 1286 (Ind.App.2000); Indiana Gaming v. Blevins, 724 N.E.2d 274 (Ind.App.2000); Clark v.

## **SUMMARY OF ARGUMENT**

The Zirkels, Delores, and Ruth stipulated that the Trial Court interpret the Will without extrinsic evidence. The decedent's Will contains an explicit statement that the bequest of the farm to the Zirkels, and the specific bequests of cash to Delores and Ruth, should be "equal". The Zirkels spin a few words out of context to inherit a far greater share. Yet the Will contains at least four references to equality among heirs. Indiana law presumes such an outcome even if the Zirkels raise an uncertainty.

## **ARGUMENT**

### **(I) THE ZIRKELS WAIVED ANY AMBIGUITY**

At the hearing on January 19, 2007 the Zirkel Camp had witnesses in the courtroom who were sworn.<sup>19</sup> The Zirkel Camp did not call any witness, did not proffer testimony, and did not attempt to introduce any evidence, by affidavit or otherwise. All heirs agreed to a resolution that did not allow evidence.<sup>20</sup> Whether ambiguous or not, the parties compelled the Court to resolve this case by reviewing only the Will. All other avenues were waived. On February 8, 2007 the Court enforced the Will in favor of Delores and Ruth, and only then did the Zirkels attempt to introduce extrinsic evidence by way of a motion to correct error, which was deemed denied.

---

*CSX*, 737 N.E.2d 752 (Ind.App.2000); *Lippeatt v. Comet Coal*, 419 N.E.2d 1332 (Ind.App.1981); *Hauck v. Second Nat. Bank*, 286 N.E.2d 852 (Ind.App. 1972).

<sup>19</sup> May 21, 2008 hearing, p.4 l.5-9.

<sup>20</sup> January 19, 2007 hearing, p.6 l.21 to p.7 l.3, p.7 ll.17-18, p.10 ll.13-16, p.15 ll.5-11; May 21, 2008 hearing, p.4 ll.1-3.

A motion to correct error and objections to the final accounting are not opportunities for more bites at the apple. Even if the Zirkels had tried to introduce the affidavits at trial, the Court could not have considered them.<sup>21</sup> Affidavits are never admissible because Delores and Ruth cannot cross examine the information. In response to the motion to correct error Delores and Ruth moved the Court to strike the tendered affidavits as improper.<sup>22</sup> Rather than rule on the motion to strike, the Court granted Delores and Ruth complete relief by the deemed denial of the motion to correct error.

Clarence Brown wrote his Will on February 29, 1988. He died on April 7, 2006. At the hearing on the final account on May 21, 2008, the Trial Court did not permit evidence on a matter previously tried on January 19, 2007. It had been over a year and no heir had conducted discovery, filed a witness or exhibit list, nor filed a petition asking for relief. Counsel for the Zirkels recited what evidence he might have introduced; but to have done so would have surprised Delores and Ruth, preventing them from having an opportunity during the past year of deposing witnesses, conducting discovery, or otherwise preparing cross examination in any meaningful way.

Potential witnesses in any contested estate matter include the decedent's family, friends, lawyers, doctors, nurses, social workers, pastors, barbers, and neighbors. Interesting that the Zirkels did not serve a subpoena on the witnesses to the Will, Judith

---

<sup>21</sup> Interesting that the affidavit of Daniel Semler purports to show the farm had a fair market value of \$106,083 in February 1988 when the decedent signed his Will. If he had the same \$80,000 in cash as when he died, the decedent owned the \$184,500 mentioned in the Will that would have led to Delores and Ruth each receiving one third value of the entire estate, further supporting the Trial Court's resolution.

<sup>22</sup> *McIntyre v. State*, 460 N.E.2d 162, 165 (Ind.App. 1984) (citations omitted); *Vadas v. Vadas*, 762 N.E.2d 1234, 1242 (Ind. 2002) (Boehm, J., dissenting).

Robbins and Janice Turner. They are either deceased or do not support what the Zirkels want to argue.

At the hearing on the final accounting on May 21, 2008, the Zirkels asserted that “this Court has the inherent power to reconsider any of its prior rulings”. *May 21, 2008 hearing, p.3 ll.14-15*. But the Zirkels never filed such a motion. After the hearing on January 19, 2007 they filed a motion to correct error, deemed denied. *App.64*. Over the following year they never again filed a motion to reconsider. The order concerning the final accounting was necessary to have a final, appealable order for the Indiana Court of Appeals to entertain jurisdiction over the case. However, the hearing on the final accounting did not open the door for another trial on the Will’s construction, or permit the Zirkels to raise arguments or introduce evidence that they decided not to offer at trial.<sup>23</sup> In response to Zirkels’ stipulation of no ambiguity and waiver of the introduction of any evidence, the final accounting was no place to allege disputed issues of fact, or challenge the Trial Court’s Order on how the co-executors should enforce the Will.

---

<sup>23</sup> The Zirkels argued in their motion to correct error that certain witnesses could testify as to what the testator said. At the hearing on the final accounting counsel for the Zirkels proffered a summary of the prior affidavits as potential evidence. All of this is classic hearsay. The Zirkels admit this is hearsay by arguing that Evidence Rule 803(3) provides an exception. *App.37*. Not so. Evidence Rule 803(3) has the following title: “Then Existing Mental, Emotional, or Physical Condition”. In essence the rule allows hearsay “related to the execution, revocation, identification, or terms of declarant’s will” where the heirs dispute the testator’s soundness of mind. In this case no heir questions Clarence Brown’s mental, emotional, or physical condition at the time he signed his Will.

In the case of *Lasater v. House*, 841 N.E.2d 553 (Ind. 2006), beneficiaries under a prior Will attempted to use Evidence Rule 803(3) to show the probated Will a product of undue influence. The Indiana Supreme Court held “this provision is a state-of-mind exception to the hearsay rule.” *Id.*, at 556. As in *Lasater*, this Court should not allow hearsay testimony on what the testator might have said about his Will. Under the Zirkels’ reading of 803(3), Indiana might as well allow oral Wills.

## (II) ALL OF THE BEQUESTS ARE EQUAL

The Zirkels want to inherit \$305,622 in farm value, while Delores and Ruth receive \$61,500. The Zirkels construe the Will to cap the gifts to Delores and Ruth at \$61,500 no matter the value of the farm – yet if the farm were worth less than \$184,500 the Zirkels would want to reduce the gifts to Delores and Ruth so that everyone gets the same amount. No language in the Will supports such a contention. The decedent's Will does not give the Zirkels such a windfall.<sup>24</sup>

All three of the decedent's primary beneficiaries are of the same degree of kinship. Jack Zirkel, Delores Dearing, and Ruth Staggs are all nephew and nieces of the decedent's wife. Delores and Ruth maintain the Will provides for the three branches of the family to receive an equal amount. The Trial Court in essence gave the Zirkels the option to purchase the decedent's farm at appraised value, and after an equal division of the residue, the Zirkels, Delores, and Ruth receive an equal share. The Zirkels have a heavy burden to prove otherwise – Indiana law construes uncertain provisions as if the decedent intended to treat similarly situated family members similarly.<sup>25</sup>

---

<sup>24</sup> Previously the Zirkels argued in the alternative that the Trial Court should adopt proposed Schedule E. The Zirkels wanted the residue to pay for the obligation to distribute an equal share of the farm. That is, if the Zirkels owed Delores \$117,870, they want what she receives under the residuary (\$25,004) to reduce the amount the Zirkels owe on the farm. The end result is that the Zirkels inherit \$75,012 more than each niece. ( $\$192,882 + \$117,870 + \$117,870 = \$428,622$ ). In proposed Schedule E, the Zirkels might as well have argued that the Will gives them 100% of the residuary clause (of course the Will states that all three are to receive an equal share). Schedule E also showed that if the estate did not have to pay the inheritance tax, the Zirkels got to keep the additional cash. They did not press forward with this alternative argument on appeal.

<sup>25</sup> *Hutchinson Estate v. Arnt*, 1 N.E.2d 585 (Ind. 1936) (construction favors equality among heirs at law); *Kilgore v. Kilgore*, 26 N.E. 56 (Ind. 1890) (if two constructions are

Item IV of the Will makes specific bequests to Ruth and Delores, each in the amount of \$61,500. *App.12*. According to the inventory, the parties do not dispute that without the farm, the estate does not have sufficient assets to pay these amounts.

Item IV(A)(1) gives a life estate in the farm to Jack Zirkel, with the remainder to his son and three grandchildren. *Id.* The parties do not dispute that the decedent wanted them to have the farm “subject to the possible charge as hereinafter provided in subsection 4.” There the decedent made the following statement:

“However, the bequest to Jack R. Zirkel, his son and grandchildren under section A(1) of this Item of my Last Will and Testament, shall be charged in an amount that will make all of the bequests under subsection 1, 2 and 3 **equal**.”

*App.13* (emphasis added). The Court in its order dated February 8, 2007 adopted this language:

“... the individual shares of Delores J. Dearing and Ruth E. Staggs under Item IV, A, 2 and 3 shall each amount to one-third (1/3) of the value of the real estate being conveyed under Item IV, A, 1.” *App.30-31*.

Read together, all of the provisions of Item IV show that the decedent thought his farm was worth \$61,500, or that his total estate was worth \$184,500. The decedent wanted to give the farm to the Zirkels while giving an equal amount to Delores and Ruth. The decedent set out a specific example as to how to calculate what went to Delores and Ruth should the estate not have enough cash. The Will does not provide the

---

possible, heirs inherit as if decedent had no Will at all); *Stevenson v. Druley*, 4 *Ind.* 519 (*Ind.* 1853) ( in doubtful cases the law of inheritance prevails against the terms of the Will); *Berry v. Ford*, 829 *N.E.2d* 1052 (*Ind.App.* 2005); *Estate of Kirkendall*, 642 *N.E.2d* 548 (*Ind.App.* 1994); *McAvoy v. Sammons*, 224 *N.E.2d* 323 (*Ind.App.* 1967); *Runyan v. Rivers*, 192 *N.E.2d* 327 (*Ind.App.* 1934) (construction of a Will considers the degrees of kinship); *Guipe v. Miller*, 180 *N.E.* 760 (*Ind.App.* 1932); *Hancock v. Maynard*, 126 *N.E.* 451 (*Ind.App.* 1920) (the law favors construction of a Will so that property is distributed as if the decedent died intestate); *Sigler v. Shelly*, 105 *N.E.* 403 (*Ind.App.* 1914).

same example should the farm increase in value and the estate not have enough cash to treat everyone equally.<sup>26</sup> Examples are not bequests. Examples explain, not mandate. Examples describe a method, not dictate an outcome.

The Will contains explicit language that reflects a specific intent with respect to specific property:

“the bequest to Jack R. Zirkel, his son and grandchildren under section A(1) of this Item of my Last Will and Testament, shall be charged in an amount that will make all of the bequests under subsection 1, 2 and 3 equal.” *App.13.*

The Trial Court’s order on February 8, 2007 gives this language effect. The Zirkels fail to explain why the Court should ignore this language and its significance. “Equal” is a strong, specific word that leaves little doubt as to what the decedent meant.

### (III) THE THEME OF EQUALITY

The Will contains other examples of the decedent treating his nieces and nephew in an equal manner:

(2) The decedent appointed Jack R. Zirkel, Ruth E. Staggs and Delores Jean Darling to all serve as alternate co-personal representatives. *App.11.*

(3) Item V, the residue, gives “all the rest, residue and remainder of my estate to the said Jack R. Zirkel, Ruth E. Staggs and Delores Jean Darling, share and share alike.” *App.13.*

(4) The Will in Item II calls for the residuary to pay all claims, fees, and taxes. *App.11.* This shows an intention that Delores and Ruth pay their two-thirds share. But

---

<sup>26</sup> Suppose the decedent had sold the farm prior to his death. Doubtful the Zirkels would take the position that Delores and Ruth each receive the specific bequests of \$61,500 before everything is divided into thirds.

according to the Zirkels, they are charged with paying Delores and Ruth \$61,500 if the net assets, exclusive of the farm are not sufficient. *Brief, p.13.* The Zirkels want a valuable farm and in return want the Court to interpret the Will so that Delores and Ruth receive \$61,500 free of all claims, fees, and taxes. This interpretation renders Item II meaningless.

Under the Zirkels' interpretation the residue has significance only if the decedent sold the farm or won the lottery. The Zirkels do not attempt to explain away the decedent's intention that the three branches of the family share and share alike – rather, the Zirkels want the entire residuary to fund what they admit owing on the farm.

#### **(IV) THE FARM IS AN ASSET**

The Zirkels' argument ignores yet another specific statement in the Will. Item IV(A)(4) begins as follows:

In the event there are ***insufficient assets*** to make the cash bequests to the said Ruth E. Staggs and Delores Jean Dearing in the amount of Sixty One Thousand Five Hundred Dollars (\$61,500), ***their said bequest shall be reduced to the remaining assets in the estate.*** However, the bequest to Jack R. Zirkel, his son and grandchildren under Section (A)(1) of this Item of my Last Will and Testament, shall be charged in an amount that will make all of the bequests under subsections 1,2, and 3 equal. *App.12-13.*

The highlighted language shows that if there were not sufficient assets in the estate to pay Delores and Ruth they would receive a share of the farm (obviously "assets" includes the farm). This is contrary to the Zirkels' argument that the farm is valued at \$61,500 for all purposes. *Brief, p.8.* The highlighted statement values the farm at fair market value because it has to be included in the estate's "remaining assets".<sup>27</sup> Nothing in the Will or

---

<sup>27</sup> If the farm had a fair market value of \$35,000 instead of \$350,000, you can bet the farm that the Zirkels would be arguing that the fair market value must be considered to reduce the bequests to Delores and Ruth from \$61,500 to \$35,000.

rules of construction can change the words “remaining assets” to “net assets, exclusive of the farm”.<sup>28</sup>

The Zirkels rely on a single statement in the Will to trump all the rest: “If my total estate, considering the farm bequeathed under subsection A(1) at a value of Sixty One Thousand Five Hundred Dollars (\$61,500), ...”. The Zirkels construe the Will to dictate \$61,500 as the value of the farm for all purposes. *Brief, p.11*. To them, “Considering the farm at \$61,500 ...” means “As if the farm had a value of \$61,500, notwithstanding its fair market value, ...”. The Zirkels have not cited to any definitions in a dictionary or rules of grammar to require such a result. Rather, “considering the farm at ...” are words of description, not directives. Courts in the name of construction should not bend a few words in order to strike several sentences.

The mention of \$61,500 as it applies to the value of the farm explains why the decedent gave the specific amount of \$61,500 to Delores and Ruth. By itself, \$61,500 is a rather odd bequest. Anyone who reads a Will and sees that an heir receives \$61,500 might ask “Where did that number come from?” \$61,500 had to represent the value of the farm or one third of the decedent’s estate. Given that the residuary is the primary place where Wills show intent, the equality called for under the residuary leads to the conclusion

---

<sup>28</sup> *Black’s Law Dictionary* defines “assets” to include all of the decedent’s property, whether items, cash, inventory, equipment, real estate, accounts receivable, and goodwill. Yet in the Appellants’ Brief on page 8 the Zirkels argue that “the Will is clear that Staggs and Dearing were each to receive the specified sum of \$61,500 and, should there be a short fall in the Estate of net assets, exclusive of the farm, to pay these bequests, the Zirkels must make up the difference with their own funds”. Obviously the Will contains no such language. Important here is that for the first time in the Record the Zirkels argue that they could have inherited what they wanted by the use of the 49 words used above. Yet the decedent’s Will, Item IV(A), uses approximately 354 words that say much, much more. The decedent did not intend the former to replace the latter.

that the specific bequests were intended to treat all three branches of the family in an equal manner.

If the decedent had wanted Delores and Ruth to receive only \$61,500 he could have signed a simple Will that made such specific bequests and given the remainder of the estate (the farm) to the Zirkels. The decedent did not. Instead he signed a Will that on numerous occasions showed an intention to treat heirs equally.

### **CONCLUSION**

The Indiana Court of Appeals should affirm the Trial Court's Order approving the final accounting and the prior Order interpreting the decedent's Will.

Respectfully submitted,

---

Curtis E. Shirley, #15845-49  
Robert F. Wisheart, #1317-33

*Attorneys for Appellees,  
Ruth E. Staggs and Delores J. Darling*