

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 19, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP614

Cir. Ct. No. 2006PR14

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE ESTATE OF EDWARD A. SCHUNK, JR.:

**DONNA LEMMER, AIMEE SCHUNK GUDIS, JAYNE SCHUNK, JOHN SCHUNK,
VIRGIL SCHUNK AND TRULENA NELSON SCHNEIDER,**

APPELLANTS,

v.

LINDA SCHUNK, MEGAN SCHUNK AND CHARLES WILKINSON,

RESPONDENTS.

APPEAL from an order of the circuit court for Clark County:
JON M. COUNSELL, Judge. *Reversed and cause remanded.*

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Six children of Edward A. Schunk, Jr., appeal from an order construing his will to leave the bulk of his estate to his seventh and

youngest child, Megan Schunk. We conclude that the court's construction of the will is not a reasonable interpretation. An unresolved ambiguity in the will remains, however, as to whether the will disinherits three of the appellants. We therefore reverse and remand for further proceedings to resolve that remaining ambiguity.

¶2 The appellants were adults at the time of Schunk's death, and Megan was seventeen. The following paragraph appears at the beginning of Schunk's will:

In making this will, I have considered my wife, Linda Schunk and my children, Virgil Schunk, John Schunk, Donna Lemmer, Trulena Schunk, Jayne Schunk, Aimee Schunk and Megan D. Schunk, who are my natural heirs at law. It is not through oversight that I have failed to provide for my daughters, Trulena Schunk and Aimee Schunk and my son, Virgil Schunk. I have intentionally not included them as beneficiaries herein.

¶3 Article 2 of the will, entitled Specific Bequests, left \$10,000 to Charles Wilkinson, a party to this appeal as the personal representative but not as a will contestant, and cash grants of \$5000 each to John Schunk, Jayne Schunk and Donna Lemmer. The will left the bulk of the remaining estate to Megan, unless Schunk died before she reached age eighteen.¹ In that event, the bulk of the estate went to the family trust created in Article 4 of the will, and Megan received no specific bequest. Article 4 stated that the primary purpose of the trust was "to provide for the expenses of raising my children." Section C provided that: "[W]hen my youngest living child reaches the age of eighteen (18), the remaining net trust assets shall be divided into equal shares so that there is one share for each

¹ Megan was eleven when Schunk signed the will.

of my then living children and one share for each of my then deceased children who is survived by living issue.”

¶4 Wilkinson petitioned the court to construe the will to disregard the provisions of the family trust, which Wilkinson alleged did not reflect Schunk’s intent, and distribute the estate as if Megan were eighteen at the time of Schunk’s death. The court agreed that the will was ambiguous, and heard testimony as to Schunk’s intent at the time he wrote it. The witnesses were the attorney who drafted the will for him, and a paralegal who worked in her office.² The attorney unequivocally testified that Schunk included the family trust provision at her suggestion, and that he intended to make Megan the sole beneficiary of the trust. She also testified that the reference to “children” in the family trust portion of the will was standard form, or “boiler plate,” language that she, at one point, recognized as an error. However, for unexplained reasons, the erroneous reference to “children” was never corrected to reflect Schunk’s actual intent.

¶5 Based on that testimony, the court found that Schunk intended “children” in the family trust portion to mean Megan, and construed the will accordingly to make her the only beneficiary of the trust provision. That ruling is the subject of this appeal.

¶6 The construction of a will is a question of law we review without deference to the trial court. *See Furmanski v. Furmanski*, 196 Wis. 2d 210, 214, 538 N.W.2d 566 (Ct. App. 1995). Our task in construing a will is to determine the testator’s intent, and the best evidence of this is the language of the document

² The paralegal could not recall her encounters with Schunk or her work on the will, and the trial court gave no weight to her testimony for that reason.

itself. See *Lohr v. Viney*, 174 Wis. 2d 468, 480, 497 N.W.2d 730 (Ct. App. 1993). When the will is unambiguous, there is no need to look any further to ascertain the testator's intent, as it is clearly stated in the will. See *id.* Only if ambiguity or inconsistency exists in the will's language, may we look to the surrounding circumstances at the time of the will's execution, or to extrinsic evidence. *Id.* We will not rewrite a will to create language that is not there. See *Furmanski*, 196 Wis. 2d at 216.

¶7 It was error to construe “children” to mean Megan, because nothing in the text of the will allows a reasonable inference that the term is used ambiguously in the sense that it could mean only one, specific child. Consequently, there was no basis to rely on extrinsic evidence that Schunk intended to make Megan the sole trust beneficiary. That he did not so intend is plainly answered within the four corners of the will. “A court in construing a will cannot reform the same and change the meaning of the express language used in order to correct a scrivener’s mistake.” *Grove v. National Mfrs. Bank of Neenah*, 6 Wis. 2d 659, 662, 95 N.W.2d 788 (1959).

¶8 There is, however, an ambiguity as to whether “children” refers to all of Schunk’s children, or whether it excludes the three children expressly disinherited in the prologue to the will. Either construction is reasonable. We therefore remand for further proceedings to resolve this ambiguity, with resort to surrounding circumstances and extrinsic evidence, if necessary. The court may permit the parties to introduce additional evidence, in its discretion.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2007-08).

