Circuit Court for Prince George's County
Case No. CAL 1903312

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1340

September Term, 2019

ALAN HOLT

v.

THOMAS ELLIS

Kehoe,
Beachley,
Shaw,
JJ.

Opinion by Kehoe, J.

Filed: August 5, 2022

It has long been the law of Maryland that the contents of a lost or inadvertently destroyed will could be established by production of a copy of the will or other evidence of its contents coupled with evidence that the testator had not revoked the will. *See, e.g.*, *Tilghman v. Bounds*, 214 Md. 533, 539 (1957); *Tall v. Bunditz*, 162 Md. 208, 211 (1932); *Preston v. Preston*, 149 Md. 498, 505, 518 (1926); *Tinnan v. Fitzpatrick*, 120 Md. 342, 349 (1913); and *Rhodes v. Vinson*, 9 Gill 169, 171 (1850). As part of the comprehensive recodification of Maryland's testamentary, estate, and trust law that occurred in 1969,[1] the General Assembly enacted what is now codified as Md. Code, Est. & Trusts § 5-402(5), which authorizes orphans' courts to admit copies of wills into probate upon proper proof adduced in an evidentiary proceeding. In 2009, the General Assembly enacted Est. & Trusts §§ 5-801–04, which sets out an expedited process by which an orphans' court can direct a register of wills to accept a copy of a will for probate without a hearing if the decedent's heirs and the legatees consent. The issue in this appeal is whether the 2009 legislation clarified a point of probate procedure (the position of Alan Holt, the appellant) or effected a repeal by implication of Est. & Trusts: § 5-402(5) (the view of Thomas Ellis, the appellee). The Circuit Court for Prince George's County

[1] The events that led to the 1969 recodification have been discussed on several occasions by Maryland's appellate courts. *See, e. g. Piper Rudnick LLP v. Hartz*, 386 Md. 201, 222–24 (2005); *Allen v. Ritter*, 196 Md. App. 617, 626–27 (2010); *see also* Shale D. Stiller and Roger D. Redden, *Statutory Reform in the Administration of Estates of Maryland Decedents, Minors and Incompetents*, 29 MD. L. REV. 85 (1969).

agreed with Mr. Ellis. Because we agree with Mr. Holt, we will reverse the judgment of the circuit court and remand this case for further proceedings.

BACKGROUND

This case was decided on a motion for summary judgment and we will summarize the undisputed facts.

In 2016, Mildred Holt-Ellis, a Maryland resident, executed a will in front of three witnesses. She designated Mr. Holt as her personal representative. By a separate document, she also named him as her attorney-in-fact. She left the executed will in Mr. Holt's possession.

In the will, she devised her real property to her son, Parrish J. Schoon, and her personal property to Mr. Schoon, her grandchildren, Mr. Holt, and other family members. Significantly, however, she left nothing to her husband, Mr. Ellis, but stated that he would be responsible for maintaining an automobile bequeathed to one of her grandchildren until the grandchild reached the age of 18.

Ms. Holt-Ellis passed away in 2018. Following her funeral, Mr. Holt searched for her will in his home but was unable to find it. That notwithstanding, he filed a petition for the administration of a small estate with the Register of Wills for Prince George's County on April 12, 2018. The petition also requested that the court hold a judicial probate proceeding to decide whether the photocopy of Ms. Holt-Ellis's will could be admitted into probate. As exhibits to the request for judicial probate, Holt attached affidavits by him and by Mr. Schoon, Ms. Holt-Ellis's son.

In his affidavit, Holt averred that Ms. Holt-Ellis gave her will to him for safe-keeping after she executed it. Ms. Holt-Ellis never asked him to return the will to her, nor did she ask him to destroy it, nor did she ever indicate to him that she had revoked the will. Mr. Holt gave the will to Theodora H. Brown, Esquire, the lawyer who had prepared the will so that she could make photocopies of the executed will. Ms. Brown did so and then returned the original will to him. He placed the will in a file cabinet located in his residence. With the exception of the brief time when it was in Ms. Brown's possession for photocopying, Mr. Holt kept the will in his personal custody for safe-keeping. He conceded, however, that he had lost the will.

In his affidavit, Mr. Schoon stated that he had discussed the will with his mother on two occasions in February and early March of 2018. In both conversations, she told him that she wanted her will to stay "straight" and "in order." The second discussion took place just weeks before her death.

The orphans' court scheduled a hearing on Mr. Holt's request for judicial probate and sent notice of the hearing to the interested persons[2] in Ms. Holt-Ellis's estate. All of these

[2] In pertinent part, Est. & Trusts § 1-101(i) defines "interested person" as:

> (i) A person named as executor in a will;
>
> (ii) A person serving as personal representative after judicial or administrative probate;
>
> (iii) A legatee in being, not fully paid, whether the legatee's interest is vested or contingent;

individuals consented to probate of the photocopy of the will with one exception—Mr. Ellis.

There is no reason for us to belabor the procedural history. The various contentions presented by the parties to the court were essentially the same as those presented to us. Although we will discuss them later in more detail, the parties' arguments boiled down to one dispositive issue: whether the relevant provisions of the Estates and Trusts Article prohibit admission of a copy of a lost will into probate absent the consent of all of the legatees named in the will and the decedent's heirs at law. The orphans' court concluded that Est. & Trusts § 5-802 had precisely that effect. The court commented that it found this construction of the statute to be "troubling" but that its views "[did] not negate the responsibility of this Court to abide by the legislature's direction in these situations[.]" Because Mr. Ellis did not consent to the admission to probate of the photocopy of Ms. Holt-Ellis' will, continued the court, the administration of her estate "must proceed by the laws of intestacy."

> (iv) An heir even if the decedent dies testate, except that an heir of a testate decedent ceases to be an "interested person" when the register has given notice pursuant to § 2-210 or § 5-403(a) of this article; or
>
> (v) An heir or legatee whose interest is contingent solely on whether some other heir or legatee survives the decedent by a stated period if the other heir or legatee has died within that period.
>
> * * *

Mr. Holt appealed the decision of the orphans' court to the circuit court. Mr. Ellis filed a motion for summary judgment and argued that § 5-802 mandated that the photocopy of Ms. Holt-Ellis's will could not be admitted into probate unless he consented. After a hearing, the court granted the motion and entered judgment accordingly. The court's judgment did not provide an explanation of its reasoning. The parties assume that the circuit court agreed with the reasoning of the orphans' court. We will proceed on the same assumption.

THE STANDARD OF REVIEW

We review a trial court's grant of a motion for summary judgment *de novo*. A trial court may grant a motion for summary judgment if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Md. Rule 2-501. At this juncture, there are no factual disputes, material or otherwise, between the parties. "Therefore, under a *de novo* standard, we review the circuit court's legal conclusions to determine whether they are legally correct." *Uthus v. Valley Mill Camp, Inc*., 472 Md. 378, 385 (2021).

THE PARTIES' CONTENTIONS

On appeal, Mr. Holt asserts that the circuit court erred when it granted Mr. Ellis's motion for summary judgment for two reasons. His first argument is based on Courts &

Jud. Proc. § 12-502,[3] which authorizes a party aggrieved by a judgment of an orphans' court to file an appeal with the circuit court which will be decided by the court *de novo.* He argues that the circuit court failed to give him a *de novo* evidentiary proceeding when it decided the appeal on summary judgment.[4]

Mr. Holt's second contention is that the circuit court misread the relevant provisions of the Estates and Trusts Article. He asserts that Est. & Trusts § 5-402[5] expressly

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[3] Courts & Jud. Proc. § 12-502 states in relevant part (emphasis added):

> (a)(1)(i) Instead of a direct appeal to the Court of Special Appeals under § 12-501 of this subtitle, a party may appeal to the circuit court for the county from a final judgment of an orphans' court.
> (ii) *The appeal shall be heard de novo by the circuit court.*
> (iii) *The de novo appeal shall be treated as if it were a new proceeding and as if there had never been a prior hearing or judgment by the orphans' court.*
> (iv) The circuit court shall give judgment according to the equity of the matter.
>
> * * *

[4] We do not agree with this assertion. The relevant language of § 12-502 means that the circuit court must decide the case without deference to the judgment of the orphans' court. Nothing in § 12-502 prevents a circuit court from disposing of a case by summary judgment as long as there is no genuine dispute of material facts and the moving party was entitled to judgment as a matter of law. *See* Md. Rule 6-461(b) (providing that Md. Rule 2-501, which authorizes a circuit court to grant summary judgment, "applies to a proceeding in the orphans' court.").

[5] Est. & Trusts § 5-402 states (emphasis added):

> A proceeding for judicial probate shall be instituted at any time before administrative probate or within the period after administrative probate provided by § 5-304 of this title:

authorizes an orphans' court to admit a copy of a will into probate through the judicial probate process when the original of the will has been lost or inadvertently destroyed. He argues that the circuit court misinterpreted Est. & Trusts § 5-802;[6] according to him, title 5, subtitle 8 of the Estates and Trusts Article establishes a procedure whereby the contents of a lost will can be proven through administrative probate, thereby avoiding the necessity of a judicial probate proceeding.

For his part, Mr. Ellis maintains that § 5-802 bars admission of a copy of a lost will whenever an heir or legatee objects. In support, he cites to what he terms the "unambiguous and clear" language of the statute and to the statute's legislative history.

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(1) At the request of an interested person;

(2) By a creditor in the event that there has been no administrative probate;

(3) If it appears to the court or the register that the petition for administrative probate is materially incomplete or incorrect in any respect;

(4) If the will has been torn, mutilated, burned in part, or marked in a way as to make a significant change in the meaning of the will; or

(5) *If it is alleged that a will is lost or destroyed*.

[6] Est. & Trusts § 5-802 states (emphasis added):

A petition for admission of a copy of a will may be filed with the court at any time *before administrative or judicial probate* if:
(1) The original executed will is alleged to be lost or destroyed;
(2) A duplicate reproduction of the original executed will, evidencing a copy of the original signatures of the decedent and the witnesses, is offered for admission; *and*
(3) *All the heirs at law and legatees named in the offered will execute a consent in the manner set forth in § 5-803 of this subtitle.*

He argues that, in enacting Est. & Trusts § 5-802, the legislature intended to resolve the inconsistences among local jurisdictions by requiring all heirs and legatees to consent to admission. The statute, he claims, directs orphans' courts to admit a copy of a lost will to probate only when all three prongs of § 5-802 are met. Because he objected to the copy's admission, he asserts, the circuit court correctly granted summary judgment because the requirements of § 5-802 weren't satisfied. For the reasons we will explain below, this is incorrect.

ANALYSIS

A. Framing the problem

In Maryland, there are two processes by which a decedent's estate can be opened for purposes of administration, namely, administrative probate and judicial probate. A noted Maryland scholar on probate law has summarized the essential differences in the two procedures:

> Administrative probate is within the exclusive jurisdiction of the register of wills, requires no prior notice, requires no formal court hearing, and is usually available immediately upon application. Judicial probate is within the exclusive jurisdiction of the [orphans'] court, requires prior notice and a formal hearing, and is subject to the schedules of the court, the necessary witnesses, and the parties.

Allan J. Gibber, GIBBER ON ESTATE ADMINISTRATION § 2.26 (2018).

In the absence of fraud, mistake, or irregularity, a decision by a register to accept a will for probate is "final and binding" upon all parties unless a party objecting to the

decision timely files a petition for judicial probate to resolve the matter in dispute. Est. & Trusts § 5-304(a).

A register's authority to admit a will into probate is not untrammeled; there are certain scenarios in which judicial probate is mandatory. One of them is when there is an allegation that the decedent's will has been "lost or destroyed." Est. & Trusts § 5-402 states (emphasis added):

> A proceeding for judicial probate shall be instituted at any time before administrative probate or within the period after administrative probate provided by § 5-304 of this title:
>
> (1) At the request of an interested person;
>
> (2) By a creditor in the event that there has been no administrative probate;
>
> (3) If it appears to the court or the register that the petition for administrative probate is materially incomplete or incorrect in any respect;
>
> (4) If the will has been torn, mutilated, burned in part, or marked in a way as to make a significant change in the meaning of the will; or
>
> (5) *If it is alleged that a will is lost or destroyed*.

In 2009, the General Assembly enacted chapter 37 of the Laws of 2009, which added subtitle 8 to title 5 of the Estates and Trusts Article. This subtitle consists of three substantive sections (emphasis added):

Est. & Trusts § 5-801:

> (a) An interested person *may* file a petition for the admission of a copy of an executed will in accordance with this subtitle.
>
> (b) Notice to interested persons of the filing of the petition is not required.

Est. & Trusts § 5-802:

> A petition for admission of a copy of a will *may* be filed with the court at any time before administrative or judicial probate if:

> (1) The original executed will is alleged to be lost or destroyed;
>
> (2) A duplicate reproduction of the original executed will, evidencing a copy of the original signatures of the decedent and the witnesses, is offered for admission; and
>
> (3) *All the heirs at law and legatees named in the offered will execute a consent* in the manner set forth in § 5-803 of this subtitle.[7]

Est. & Trusts § 5-804:

> The court *may*:
>
> (1) Without a hearing, issue an order authorizing:
>
> (i) The petitioner to proceed with administrative probate in accordance with Subtitle 3 of this title; and
>
> (ii) The register to accept the copy of the will for administrative probate; or
>
> (2) Require the filing of judicial probate in accordance with Subtitle 4 of this title.

B. Statutory Interpretation

When courts interpret a statute, "[o]ur chief objective is to ascertain the General Assembly's purpose and intent when it enacted the statute." *Berry v. Queen*, 469 Md. 674, 687 (2020). In so doing, we "assume that the legislature's intent is expressed in the statutory language and thus our statutory interpretation focuses primarily on the language of the statute to determine the purpose and intent of the General Assembly." *Id*. We undertake this through:

> an examination of the statutory text in context, a review of legislative history to confirm conclusions or resolve questions from that examination,

[7] Section 5-803 sets out the form for the consent. There is no dispute that the consent signed by all of the interested parties to Ms. Holt-Ellis's estate other than Mr. Ellis satisfied the requirements of § 5-803.

> and a consideration of the consequences of alternative readings. "Text is the plain language of the relevant provision, typically given its ordinary meaning, viewed in context, considered in light of the whole statute, and generally evaluated for ambiguity. Legislative purpose, either apparent from the text or gathered from external sources, often informs, if not controls, our reading of the statute. An examination of interpretive consequences, either as a comparison of the results of each proffered construction, or as a principle of avoidance of an absurd or unreasonable reading, grounds the court's interpretation in reality."

Blue v. Prince George's County, 434 Md. 681, 689 (2013) (quoting *Town of Oxford v. Koste*, 204 Md. App. 578, 585–86 (2012), *aff'd*, 431 Md. 14 (2013)); *see also Berry*, 469 Md. at 688 ("In addition to the plain language, the modern tendency of [the Court of Appeals] is to continue the analysis of the statute beyond the plain meaning to examine extrinsic sources of legislative intent in order to check our reading of a statute's plain language through examining the context of a statute, the overall statutory scheme, and archival legislative history of relevant enactments." (cleaned up)).

This practice is based on the recognition that "some statutes that might initially appear to be unambiguous are, in fact, ambiguous when considered in the context of the statute as a whole, the broader statutory scheme, or the apparent purpose, aim or policy of the Legislature in enacting the statute." *Daughtry v. Nadel*, 248 Md. App. 594, 613 n.9 (cleaned up) (citing *Berry*, 469 Md. at 687)).

We identify legislative purpose by considering the language of the statute "within the context of the statutory scheme to which it belongs, considering the purpose, aim, or policy of the Legislature in enacting the statute." *State v. Johnson*, 415 Md. 413, 421

(2010). The "statutory scheme" in the present case is title 5 of the Estates and Trusts Article, which pertains to opening an estate of a decedent for administration.

The first step is to look at the plain language of the statute in context. Sections 5-801, 5-802, and 5-804 provide that a party or the court "may" take certain actions.[8] The Court of Appeals "has long interpreted the term 'may' in a statute to be permissive." *Uthus v. Valley Mill Camp, Inc*., 472 Md. at 393 (citing, among other cases, *WSC/2005 LLC v.*

[8] Est. & Trusts § 5-801 (emphasis added):

> (a) An interested person *may* file a petition for the admission of a copy of an executed will in accordance with this subtitle.
> (b) Notice to interested persons of the filing of the petition is not required.

Est. & Trusts § 5-802:

> A petition for admission of a copy of a will *may* be filed with the court at any time before administrative or judicial probate if:
> (1) The original executed will is alleged to be lost or destroyed;
> (2) A duplicate reproduction of the original executed will, evidencing a copy of the original signatures of the decedent and the witnesses, is offered for admission; and
> (3) All the heirs at law and legatees named in the offered will execute a consent in the manner set forth in § 5-803 of this subtitle.[ ]

Est. & Trusts § 5-804:

> The court *may*:
> (1) Without a hearing, issue an order authorizing:
> (i) The petitioner to proceed with administrative probate in accordance with Subtitle 3 of this title; and
> (ii) The register to accept the copy of the will for administrative probate; or
> (2) Require the filing of judicial probate in accordance with Subtitle 4 of this title.

Trio Ventures Assocs., 460 Md. 244, 271 (2018); and *Rowland v. Harrison*, 320 Md. 223, 232–33 (1990)).

For this reason, we read § 5-801 as permitting an interested person to file a petition for the admission into probate a photocopy of a will if the requirements for admission set out in § 5-802 are satisfied. And the language of § 5-804 permits an orphans' court (1) to issue an order admitting the will into probate without holding a hearing, or (2) to require the petitioner to file for judicial probate even though all the interested persons consent to admission of the photocopy. (The latter course gives the orphans' court an opportunity to form its own assessment of the circumstances surrounding the loss of the original will.)

Subtitle 8 does not address the scenario presented by the case before us; namely, what should a court do when someone seeks to prove the contents of a lost will by introduction of a photocopy if, as in the present case, an interested party objects. Clearly, the procedure described in subtitle 8 is not available in such cases. The orphans' court (and we assume the circuit court) concluded that subtitle 8 sets out the exclusive means by which a copy of a lost will can be admitted to probate. But this reasoning does not take into account Est. & Trusts § 5-402, which states that judicial probate is required "[i]f it is alleged that a will is lost or destroyed."

As we have noted, subtitle 8 was enacted in 2009. The statutory predecessor to what is now Est. & Trusts § 5-402 was enacted in 1969. In effect, the orphans' court and the circuit court concluded that, when the General Assembly enacted subtitle 8, it intended to repeal Est. & Trusts § 5-402(5), which requires judicial probate if an interested person

seeks to prove the validity of terms of a lost or destroyed will. The problem with this reasoning is that the Court of Appeals does not look with favor on repeal by implication. *See 120 W. Fayette St., LLLP v. Mayor & City Council of Baltimore City*, 413 Md. 309, 331 (2010) ("[W]hen two statutes appear to apply to the same situation, this Court will attempt to give effect to both statutes to the extent that they are reconcilable."); *Maryland-Nat'l Cap. Park & Planning Comm'n v. Anderson*, 395 Md. 172, 183 (2006) (same).

For this reason, when statutes appear to be inconsistent, courts "must attempt first to reconcile" them. *Blackstone v. Sharma*, 461 Md. 87, 135 (2018). "'Thus, if two acts can reasonably be construed together, so as to give effect to both, such a construction is preferred, and the two should be construed together to be interpreted consistently with their general objectives and scope.'" *Id.* (quoting *Immanuel v. Comptroller of Maryland*, 449 Md. 76, 87 (2016)).

Reconciling the statutes at issue in this case is not a particularly difficult task. The provisions of subtitle 8 are manifestly not inconsistent with Est. & Trusts § 5-402(5). As we have previously explained, it has long been the law of Maryland that the contents of a lost or inadvertently destroyed will can be proven by evidence of the contents of the will and the circumstances of its execution. Subtitle 8 and § 5-402(5) can be reconciled by interpreting the former to set out the procedures and standards by which a copy of a will can be probated through administrative probate, as an alternative to judicial probate, which is authorized by § 5-404(5). Substitle 8 applies when all legatees and heirs consent

to that expedited procedure; § 5-404(5) comes into play when they don't. The legislative history of subtitle 8 supports this interpretation.

B. The Legislative History

Est. & Trusts §§ 5-801–04 was added to the Maryland Code by Chapter 37 of the Laws of 2009, which originated as Senate Bill 154, introduced by then Senator Brian Frosh. He introduced the bill at the behest of the Estate and Trust Law Section Council of the Maryland State Bar Association, which in turn was responding to concerns voiced by orphans' court judges and registers of wills throughout the state. There is nothing in the legislative history of SB 154 to suggest that the bill was attended by public controversy or interest. It certainly was not controversial in the Legislature because it passed unanimously in both houses. The legislative history is sparse, but there are two significant documents.

The first is written testimony submitted in support of the bill by the Estate and Trust Law Section Council. It first framed the problem (emphasis added):

> In many cases, original counterparts of a decedent's will cannot be located but copies are available. Whether or not such a copy of an executed will can be admitted to probate and, if so, what procedure is to be used *are issues that are currently addressed differently in separate jurisdictions. In some, the Register of Wills admits copies in the place of originals is a matter of course. In others, such admission requires the commencement of judicial probate* with all ensuing proceedings requiring continued judicial probate (and required formal hearings).
>
> Maryland's Orphans' Court Judges and Registers of Wills have requested a legislative clarification as to how they should respond when asked to admit such copies of executed wills to probate.

The Section Council then explained its proposed solution:

> At the request of the Orphans' Court Judges and Registers of Wills, [the Law Section Council] members have proposed a procedure for the admission of copies of original executed Wills to administrative probate and situations where all legatees and heirs at law consent. In these situations, *Senate Bill 154 would authorize the Orphans' Court to decide whether to issue an order authorizing the petitioner to proceed with administrative probate or an order requiring the filing of judicial probate for the estate*. To provide uniformity and to facilitate this process, Senate Bill 154 also provides a consent form to be used by legatees and heirs at law in initiating this process.

The second document is the floor report[9] of the Senate Judicial Proceedings Committee. In recommending passage of the bill, the committee explained:

> This bill allows an interested person to file a petition for the admission of a copy of an executed will at any time before administrative or judicial probate if the original is alleged to be lost or destroyed, a copy with the signatures of the decedent and the witnesses is offered, and all the heirs and persons that receive property under the will execute a specified consent to the probate of the copy. The orphans' court may authorize the petitioner to proceed with administrative probate or to require the filing of judicial probate.
>
> In many cases, the decedent's original will cannot be found, but copies are available. The Estate and Trust Law Section Council of the Maryland State Bar Association indicates that there is uncertainty regarding whether a copy of an original executed will can be admitted to probate in the absence of the original will and the issue was addressed differently among local jurisdictions. In some jurisdictions, the register of wills admits a copy of the executed will in place of the original as a matter of course, while in other

[9] A committee floor report is a "key legislative history document" in discerning legislative intent. *Blackstone*, 461 Md. at 130.

jurisdictions admission of a copy of an executed will requires judicial probate.

In summary, there is no evidence in the legislative history that the General Assembly intended either to abrogate the common law or to repeal Est. & Trusts 5-402(5) when it enacted subtitle 8 of title 5 of the Estates and Trusts Article.

C. Conclusions and Proceedings on Remand

The orphans' court erred when it denied Mr. Holt's petition to admit a photocopy of Ms. Holt-Ellis's will based upon its interpretation of Est. & Trusts § 5-802. Mr. Holt has the right to have the court to determine whether the photocopy should be admitted into probate after an evidentiary hearing, i.e., judicial probate. The circuit court erred when it affirmed the orphans' court's judgment.

We reverse the judgment of the circuit court and remand this case for that court to reverse the judgment of the orphans' court. This case is to be remanded to the orphans' court with instructions for that court to open a judicial probate proceeding to determine whether the photocopy of Ms. Holt-Ellis's will should be admitted to probate pursuant to Est. & Trusts § 5-402(5).

THE JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY IS REVERSED AND THIS CASE IS REMANDED TO IT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

APPELLEE TO PAY COSTS.