UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0832

September Term, 2015

IN RE THE ESTATE OF

RICHARD HARTLE

Eyler, Deborah S.,
Woodward,
Berger,

JJ.

Opinion by Woodward, J.

Filed: June 8, 2016

In this case, we are asked to determine whether Maryland's Anti-Lapse Statute should apply to a certain will. The will at issue devised and bequeathed the rest and residue of the testator's estate to three named individuals, with each receiving a one-third share of the residuary estate. Edwin Hartle, appellant, claimed that he was entitled to the entire residuary estate as the only legatee surviving on the date of the testator's death. The Orphans' Court for Washington County disagreed, ruling that the Anti-Lapse Statute saved the legacies to the deceased legatees, and accordingly, ordered their shares to be distributed to their heirs, respectively.

On appeal, appellant presents one question for our review, which we have rephrased:[1]

> Did the Orphans' Court err in ruling that the Anti-Lapse Statute applied?

We answer the question in the negative and, accordingly, affirm the judgment of the Orphans' Court.

BACKGROUND

On July 26, 1977, Richard E. Hartle ("the testator") executed a Last Will and Testament. Item II of the will devised and bequeathed "all the rest and residue" of his estate to his father, Arthur Hartle, "if he is living at the time of my death." Item III of the will then provided:

[1] Appellant's question, as presented in his brief, is as follows:

> 1. Did the Orphans' Court err in declining to approve the dispositive provisions of the first and final account as submitted?

> Should my said father not be living at the time of my death, then I give, devise and bequeath all the rest and residue of my estate, real, personal and mixed and wheresoever situate as follows:
>
> 1. One-third to my brother, Edwin L. Hartle.
>
> 2. One-third to my sister, Barbara Jean Weese.
>
> 3. One-third to Craig A. Ryce.

The testator died on June 18, 2014. At the time of his death, Barbara Weese, Craig Ryce, and the testator's father had all predeceased him. Appellant was the sole surviving legatee.

The will was probated on June 23, 2014, and appellant was appointed the personal representative of the estate. On June 26, 2014, the Register of Wills for Washington County sent a letter to appellant indicating that the distribution of the estate should follow Section 4-403 of the Estates and Trusts Article, also known as the Anti-Lapse Statute. The letter explained to appellant that, under the statute, one-third of the residuary estate would go to appellant, one-third would go to Barbara Weese's son, and one-third would go to Craig Ryce's wife and children. The Register of Wills also requested that appellant provide him with the addresses of the heirs of Craig Ryce. On July 14, 2014, appellant submitted an information report listing the heirs and addresses as requested, but stated that he did not consider them as having any interest under the will. On January 27, 2015, appellant's attorney wrote a letter to the Register of Wills claiming that Section 4-404(b) of the Estates and Trusts Article, also known as the Void Legacy Statute, should apply to the estate instead of the Anti-Lapse Statute, and that under the Void Legacy Statute, the

entire residuary clause should be distributed to him, as the sole surviving residuary legatee.

On February 19, 2015, appellant filed the First Administrative Account for the estate, which provided for the residuary estate to be distributed solely to appellant. On February 24, 2015, the Orphans' Court for Washington County denied the First Account, and ordered appellant to file an Amended First and Final Account that distributed the estate pursuant to the Anti-Lapse Statute. The court's order instructed appellant that, under the amended account, "distribution shall be 1/3 unto [appellant]; 1/3 unto the heirs of Barbara Weese and 1/3 unto the heirs of Craig Ryce."

Appellant responded to the Orphans' Court's denial by filing a motion to reconsider on March 6, 2015. In his motion, appellant reiterated his argument that the Anti-Lapse Statute should not apply and that the entire residuary estate should be distributed to him. On May 12, 2015, the court held a hearing on the motion to reconsider. On June 2, 2015, the court issued an order denying the motion and ordering appellant to file an amended account in the same manner as directed in the February 24, 2015 order. On June 19, 2015, appellant filed his notice of appeal.

STANDARD OF REVIEW

> The findings of fact of an Orphans' Court are entitled to a presumption of correctness. But the lower court's interpretations of law enjoy no presumption of correctness on review: the appellate court must apply the law as it understands it to be. Thus, an appellate court . . . must ascertain whether the conclusions of law made by a trial court in the first instance are legally correct[.]

Kelly v. Duvall, 441 Md. 275, 280 (2015) (citations and internal quotation marks omitted).

DISCUSSION

"In the construction of wills, the sole object of the inquiry is to ascertain the intention of the testator." *Patchell v. Groom*, 185 Md. 10, 14 (1945). At issue here is whether Maryland's Anti-Lapse Statute applies to the residuary clause of the testator's will. The Register of Wills and Orphan's Court both determined that it does. Appellant claims that it does not.

Appellant asserts that the will intends a *per capita* distribution of the residuary estate. Specifically, appellant claims that the residuary clause of the will was dependent on survivorship, and thus the entire residuary estate should pass to him as the only surviving legatee. Appellant argues that the Anti-Lapse Statute only applies when there is no alternative distribution available and the statute is needed to save an ineffective bequest from slipping into intestacy. That is not the case here, according to appellant, because he is available as an alternative to receive the shares of the deceased legatees. We disagree and shall explain.[2]

This Court has previously addressed the history of the Anti-Lapse Statute in Maryland:

> At common law, if a devisee or legatee predeceased the testator, absent a clause in the will providing for an alternate disposition of the gift, the devise lapsed. *See Bartlett v. Ligon*, 135 Md. 620, 623-24, 109 A. 473, 475 (1920). **Maryland's first anti-**

[2] No appellee's brief was filed in the instant appeal.

> **lapse statute, contained in the Acts of 1810, ch. 14, § 4, reversed the common law, and provided that a bequest to a legatee who predeceased the testator would not lapse or fail. Rather, such devises would transfer to the heirs of the deceased legatee as if the legatee had died intestate.** Since then, the statute has undergone several amendments but has essentially retained its original effect. In its current iteration, the Anti-Lapse Statute provides: Unless a will states otherwise, if a legatee does not survive the testator, the legacy is saved from lapsing and, at the testator's death, passes to those persons then living who would have been entitled to take as distributees of the legatee, had he survived the testator and dies, testate or intestate, owning the property.
>
> It did not take long for the Court of Appeals to recognize that the sole object of the Anti-Lapse Statute was to prevent the lapsing of devises and bequests. *Glenn v. Belt*, 7 G. & J. 362, 366 (Md. 1835). Consistent with this purpose, the Court also recognized that, when the devise or bequest would not have lapsed, the statute was inapplicable.

Gallaudet Univ. v. Nat'l Soc'y of the Daughters of the Am. Revolution, 117 Md. App. 171, 187-88 (1997) (emphasis added) (footnotes omitted).

The current Anti-Lapse Statute provides:

> (a) **Death of legatee prior to testator**. — **Unless a contrary intent is expressly indicated in the will, a legacy may not lapse or fail because of the death of a legatee after the execution of the will but prior to the death of the testator if the legatee is**:
>
> (1) **Actually and specifically named as legatee**;
>
> (2) Described or in any manner referred to, designated, or identified as legatee in the will; or
>
> (3) A member of a class in whose favor a legacy is made.
>
> (b) **Effect of death of legatee**. — **A legacy described in subsection (a) of this section shall have the same effect and operation in law to direct the distribution of the property directly from the estate of the person who owned the property**

> **to those persons who would have taken the property if the legatee had died, testate or intestate, owning the property.**
>
> (c) **Creditors of deceased legatee**. ─ Creditors of the deceased legatee shall have no interest in the property, whether the claim is based on contract, tort, tax obligations, or any other item.

Md. Code (1974, 2011 Repl. Vol.), § 4-403 of the Estates & Trusts Article ("ET") (emphasis added).

Maryland's Anti-Lapse Statute "has been liberally construed" and "expresses a presumed intent of the testator. The presumption may be overcome by expression of a contrary intent in the will, but is supported by the *presumption that the will was made in view of the statute*." *Mayor & City Council of Balt. v. White*, 189 Md. 571, 574-75 (1948) (citations omitted) (emphasis added). "Anti-lapse statutes apply unless a testator's intention to exclude its operation is shown with reasonable certainty. Courts often say that in order to overcome the anti[-]lapse statute, a will must use clear and plain language to this effect." *Kelly*, 441 Md. at 285 (citations and internal quotation marks omitted). "Appellant, as the party asserting a contrary intent, has the burden of demonstrating that intent and overcoming the presumption that the will was made 'in view of the statute.'" *Rowe v. Rowe*, 124 Md. App. 89, 96 (1998) (citations omitted).

The Anti-Lapse Statute has been applied in two recent cases: *Rowe* and *Kelly*. In *Rowe*, the testatrix left the rest, residue and remainder to her husband. 124 Md. App. at 93. In the event that he did not survive her, the rest and residue of the estate was devised and bequeathed to her two sons, Maurice and Ronald, "equally, share and share alike." *Id.* The testatrix's husband and one of her sons, Maurice, predeceased her. *Id.* at 92.

Maurice was survived by his wife and children. *Id.* The surviving son, Ronald, believed he was entitled to the entire residuary estate, because he was the only survivor named in the will. *Id.* at 93. Maurice's wife argued that, under the Anti-Lapse Statute, she was entitled to the half that Maurice would have received had he survived. *Id.*

This Court came to the conclusion that the Anti-Lapse Statute applied based on several factors. *Id.* at 99-100. The appellant claimed that the testatrix's use of the phrase "equally, share and share alike," expressed an intent to have a *per capita* distribution, and thus he would receive Maurice's share. *Id.* at 96. This Court determined that the meaning of such phrase was too indefinite to conclude that it called for a *per capita* distribution, and thus the rest of the will needed to be examined. *Id.* at 96-97. In looking at the will, we observed that the will contained no "explicit indication of [the testatrix's] intentions regarding the residuary estate should one of her sons predecease her." *Id.* at 100. We noted first that "[t]hroughout the will, the testatrix demonstrated that she understood the need to specify her intent should her beneficiaries predecease her, and she was able to express clearly that intent." *Id.* "The lack of any provision for her sons predeceasing her, however, deal[t] a solid blow to appellant's contention that the testatrix clearly expressed a desire to have a *per capita* distribution . . . ." *Id.* at 101.

Next, we stated that

> [t]he current anti-lapse statute provides that, absent a contrary intent, legacies will not lapse if the legatee predeceases the testatrix, whether or not the legatee is specifically named. . . .
>
> Therefore, the testatrix need not have specifically identified her two sons by name as her legatees, but the fact that she did identify them indicates that she intended them to receive their legacies as

> individuals, rather than as a class. . . . **The specific identification of the legatees lends weight to appellee's argument that the testatrix intended a *per stirpes* arrangement.**

Id. at 101 (emphasis added).

Finally, we observed that a "testator's inaction after a named legatee predeceases the testator can be significant in an interpretation of the testator's intent." *Id.* The testatrix died nine years after Maurice's death, but never made any attempt to amend her will following his death. *Id.* at 102. We concluded that "[h]er failure to do so does not prove that she intended Maurice's heir to receive his share of her residuary estate, but it lends support to that contention." *Id.*

Taken together, this Court concluded that (1) the lack of any express intent to provide a *per capita* distribution, (2) the testatrix's understanding of the need to provide for an alternate disposition if one or both of her sons predeceased her and the failure to do so, (3) the identification of her two sons by name rather than as a class, and (4) the testatrix's inaction in changing her will for nine years following Maurice's death, indicated an intent that the Anti-Lapse Statute apply. *Id.* at 100-02. Thus we held that Maurice's wife should receive his share of the residuary estate. *Id.* at 102.

A similar residuary clause was addressed in *Kelly*. In *Kelly*, the testatrix's will included the following clauses:

> ITEM III.
>
> If any of the legatee or beneficiary named or described under any provision of my Will does not survive me by a period of thirty (30) days, then all provisions of my Will shall take effect as if such legatee or beneficiary had, in fact, predeceased me.

ITEM IV.

***

> All the rest, residue and remainder of my estate and property, real, leasehold, personal or mixed, of all kinds, nature and description, and wheresoever situate, I do hereby give, devise and bequeath unto my children, GEORGE W. DUVALL, JR., ALFRED N. KELLY, DENNIS J. KELLY and DAVID M. KELLY, to share and share alike, in equal shares.

441 Md. at 278.

One of the testatrix's four children, Dennis Kelly, died just weeks before his mother. *Id.* The three remaining children argued that the residuary estate should pass only to them. *Id.* Dennis Kelly's son contended that he should receive the share that would have gone to his father. *Id.* The Orphans' Court and this Court both ruled in favor of the surviving children and found that ITEM III of the will imposed survivorship as a condition precedent to inheritance, thus negating the Anti-Lapse Statute. *Id.* at 278-79. The Court of Appeals reversed, concluding that ITEM III was just a restatement of ET § 4-401, which provides:

> A legatee, other than his spouse, who fails to survive the testator by 30 full days is considered to have predeceased the testator, unless the will of the testator expressly creates a presumption that the legatee is considered to survive the testator or requires that the legatee survives the testator for a stated period in order to take under the will and the legatee survives for the stated period.

Kelly, 441 Md. at 282. According to the Court, ET § 4-401 does not impose a survivorship requirement; instead, it "was crafted principally 'to avoid multiple administration and taxation of estates.'" *Id.* (quoting *Bratley v. Suburban Bank,* 68 Md.

App. 625, 630 (1986)). Therefore, the Court held that, "[w]ithout any evidence of a survivorship provision, our case law leads us to the conclusion that [the testatrix] did not express an intent contrary to Maryland's anti-lapse statute and that ET § 4-403 protects the devise from lapse." *Id.* at 286-87. Accordingly, Dennis Kelly's son received his deceased father's share of the residuary estate. *Id.* at 287.

The teachings of *Rowe* and *Kelly* compel us to conclude that the Anti-Lapse Statute, ET § 4-403, should apply to the instant case. Like the wills in *Rowe* and *Kelly*, the will here did not contain an express intent to avoid the Anti-Lapse Statute. The will did not provide for an alternate disposition of the shares of the residuary legatees if any one or more of them predeceased the testator. Indeed, the testator did not use the language of *Rowe* and *Kelly* that the legatees receive the residuary estate "equally, share and share alike." *Rowe*, 124 Md. App. at 96; *see Kelly*, 441 Md. at 278. Instead, the testator devised and bequeathed exactly one-third of the residuary estate to each of the three legatees. Thus, by the precise language of the will, each legatee was entitled to only one-third of the residuary estate.

In addition, by virtue of (1) Item II of the will, wherein the testator devised and bequeathed the entire residuary estate to his father, "if he is living at the time of my death," and (2) the beginning clause of Item III, which states that "[s]hould my said father not be living at the time of my death," the testator understood the need to specify his intent "should [his] beneficiaries predecease [him], and [he] was able to express clearly that intent." *See Rowe*, 124 Md. App. at 100. Thus the testator's failure to

provide such alternative disposition contradicts "appellant's contention that the testat[or] clearly expressed a desire to have a *per capita* distribution." *See id.* at 101.

Finally, the testator took no action in the years after the other legatees' deaths to alter the will's language to give appellant the entire residuary estate. Barbara Weese died in February 2001 and Craig Ryce died in October 2003, giving the testator over a decade to revise his will. Therefore, we hold that the Anti-Lapse Statute applies to the instant case to protect the legacies to Barbara Weese and Craig Ryce from lapse. Accordingly, under ET § 4-403(b), each such legacy is to be distributed directly to the heirs or legatees of the deceased legatee.[3]

At oral argument before this Court, appellant sought to distinguish *Rowe* and *Kelly* from the instant case.[4] First, appellant contended that the Anti-Lapse Statute was applied in *Rowe* and *Kelly* because the deceased legatees were members of the testatrix's family. Contrary to such contention, there is no language in the Anti-Lapse Statute limiting its applicability to legacies to only blood relatives of the testator, nor any cases so interpreting the Anti-Lapse Statute. More importantly, such contention conflicts with

[3] The record does not disclose whether Barbara Weese or Craig Ryce died testate or intestate.

[4] Appellant failed to distinguish *Rowe* and *Kelly* in his brief. Indeed, appellant never even mentioned *Rowe* or *Kelly*. We find disturbing the fact that appellant's counsel did not cite to the leading, and in our view controlling, cases on the issue presented in the instant appeal. *See* Md. Lawyers' Rules of Prof'l Conduct R. 3.3(a)(3) ("A lawyer shall not knowingly: . . . (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel[.]").

appellant's consistent position in the instant case, namely, that he is entitled to receive the legacies to both *his sister*, Barbara Weese, and Craig Ryce.

Second, appellant attempted to distinguish *Kelly* by claiming that *Kelly* involved a provision in the will that required a legatee or beneficiary to survive the testatrix by thirty days and a claim that such provision imposed a condition precedent of survivorship on the residuary legatees. *See Kelly*, 441 Md. at 282-84. It is true, as appellant argued, that one of the issues in *Kelly* was whether the thirty day survivorship clause "imposed survivorship as a condition precedent to inheritance under the Will." *Id.* at 279. But *Kelly* also addressed a second issue: "Whether the lower court erred in construing Item III [the thirty day survivorship clause] and Item IV [the residuary clause] as demonstrating the Testatrix's contrary intent sufficient to overcome the presumption that Maryland's anti-lapse statute, ET § 4-403 applies." *Id.* As previously indicated, without any evidence of survivorship or express indication of contrary intent, the Court of Appeals held in *Kelly* that the Anti-Lapse Statute "shields this devise from lapse, permitting [the deceased legatee's son] to inherit." *Id.* at 287.

Finally, appellant asserted that *Rowe* never addressed his argument that, for the Anti-Lapse Statute to apply to a residuary clause, there must be a complete failure of that clause. In other words, according to appellant, because one of the three residuary legatees in the instant case survived the testator, "there was no failure of the rest and residue clause of the Will," and the Anti-Lapse Statute is not "invoked." Although *Rowe* did not address appellant's argument, in *Kelly*, the Court of Appeals expressly rejected the premise underlying his argument. The premise of appellant's argument is that, by

simply giving the residuary estate to more than one person, a testator intends that the survivor or survivors of the residuary legatees receive the entire estate, thereby expressing an intent contrary to the Anti-Lapse Statute. In *Kelly*, the Court stated:

> Such contrary intent is not present in Ms. Duvall's will. As discussed *supra,* Item III is a mere restatement of ET § 4-401 and expresses no survivorship requirement or contrary intent. Nor does Item IV contain any language that suggests an intent to rebut ET § 4-403. **That Item IV contains a residuary clause is not by itself sufficient to express contrary intent**.

Id. at 286 (emphasis added).

Accordingly, the Orphans' Court did not err by applying the Anti-Lapse Statute to the instant case, which thereby prevented the lapse of the legacies to Barbara Weese and Craig Ryce.

JUDGMENT OF THE ORPHANS' COURT FOR WASHINGTON COUNTY AFFIRMED. APPELLANT TO PAY COSTS.