



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

June 19, 2001

The Honorable Edwin M. Davis
Chesterfield County Probate Judge
200 W. Main Street
Chesterfield, South Carolina 29709

Dear Judge Davis:

By your letter of June 5, 2001, you have requested an opinion from this Office concerning the disposition of certain real property under the terms of a will. The pertinent provisions of the will provide the following:

Item Four

Any interest I may own at the time of my death in my home, located at 108 Prestige Park, Cheraw, S.C., 29520, and all the furnishing therein and all land adjoining the same, I give and devise to my sister, Mary Pearl McIntosh Moore, for and during her life, if she survives me. If not, then this property shall become a part of my estate and shall be disposed of in the manner stated herein.

...

Item Nine

All of the rest, residue and the remainder of my property of every kind and description and wherever located, including all shares of stocks, bonds, CD's, and other valuable papers, any lapse or void legacies or devise, I give and bequeath to my brother, Edward Jerome McIntosh and my sisters who survive me to share and share alike.

Furthermore, you have informed me that the testator's sister, Mary Peal McIntosh Moore ("Moore"), survived the testator by two months. Specifically, you now ask, "What happens to the home left to sister Mary Pearl McIntosh Moore for a life estate?"

The cardinal rule of will construction is the determination of the testator's intent. Matter of Clark, 308 S.C. 328, 417 S.E.2d 856 (1992). In construing the language of a will, a court must give

Judge Davis
June 19, 2001
Page 2

the words contained in the document their ordinary and plain meaning unless it is clear the testator intended a different sense or such meaning would lead to an inconsistency with the testator's declared intention. In re Estate of Fabian, 326 S.C. 349, 483 S.E.2d 474 (Ct.App.1997). In construing a will, a court's first reference is always to the will's language itself. Fenzel v. Floyd, 289 S.C. 495, 347 S.E.2d 105 (Ct.App.1986).

Under the terms of the will, Moore received a life estate in the house, furnishings, and adjacent property. Although apparently the will was not probated before the death of Moore, she did, in fact, receive a life estate because she survived the testator by two months. At the death of Moore, the life estate extinguished. As no other provisions in the will address the disposition of this property, the testator's remainder interest falls into the residuary clause. The residuary clause, or Item Nine, disposes of the estate property remaining after the satisfaction of specific bequests and devises. The specific devise to Moore of a life estate in the home, furnishings and property must be disposed of pursuant to the terms of the clause. Thus, the specific language used in the residuary clause determines how the interests in this property will be divided.

Item Nine states, "All the rest ... I give and bequeath to my brother ... and my sisters who survive me to share and share alike." The phrase "to share and share alike" is generally construed to mean "to divide (assets, etc.) in equal shares or proportions; to engage in per capita division." BLACK'S LAW DICTIONARY 1380 (7th ed 1999). Importantly, the clause also conditions the devise by bequeathing the property to the brother and sisters "who survive me..." The interest in the property vests at the time of the testator's death. Construing these provisions together, the property passes in equal shares to all siblings who satisfy the condition, i.e., survive the testator. Because Moore did, in fact, survive the testator, she is a sibling who satisfied the condition of the devise. Thus, Moore is entitled to her share of the residuary property, as are the other two siblings who survived the testator.

This case might be made somewhat confusing because Moore survived the testator by only two months and is not alive during the probate of the will. However, these circumstances are distinguishable from those in which the devisee *predeceases* the testator. In that case, the issue of Moore would take her share equally, if all of the same degree of kinship, or by representation if of unequal degree. See S. C. Code Ann. § 62-2-603.

In sum, the residuary clause requires that the property be divided in equal shares among the siblings who survive the testator. From your information, all three siblings survived the testator, if only for a short duration. Although Moore is deceased at the time the testator's will is probated, her estate is entitled to that one-third share of the testator's residuary property. Of course, what actually becomes of that one-third share depends on the terms of Moore's will, if one exists.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It

Judge Davis
June 19, 2001
Page 3

has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,



Susannah Cole
Assistant Attorney General