

ORAL ARGUMENT – 9/13/00
99-1117
SAN ANTONIO AREA FOUNDATION V. LANG, ETC.

**JOHN’S FORMATTING MACHINE WAS BROKE, SO THIS TAPE
HAS MANY SPACES, COULDN’T HEAR RESPONSES VERY WELL**

GREEN: The San Antonio Area Foundation is a charitable foundation and it is the residuary beneficiary under the will here in dispute.

O’NEILL: Is it possible to read this language in the disjunctive as the CA found?

GREEN: I don’t think so.

O’NEILL: And why not?

GREEN: If you read the sequence of the language there, real property, and oil and gas real property _____ located in Frio County and Prue Road in San Antonio, Texas.

O’NEILL: If you put a comma after Texas, could it be read in the disjunctive, because the argument is that the devise of real property could prefer only to the Frio County point?

GREEN: That’s right. You divide the devise into the three elements. The first element is the gift. What is the gift, the description of a gift? It is real property and oil and gas real property in the _____ state. That’s the gift. Next, where is the location of the gift? The will uses the word ‘located’ which is perhaps the most essential word in paragraph 5: Frio County, Texas and True Road in San Antonio, Texas, and of the course, the beneficiaries. The three elements of the devise. Now we contend that Prue Road is not a description of a gift. Testatrix did not give a city street in San Antonio to the beneficiary. No. This is a descriptive term of real property, whether it is real property, and oil and gas real properties, it doesn’t matter. Because this is a description and the description is real property. And as a matter of fundamental law you cannot convey personal property by a devise of real property. They are opposites in the law. And so when you look at it this way, when you separate for purposes of these words, describe the gift, give the location, and the beneficiaries, then it makes clear that Prue Road is not itself a gift. It is meaningless. It’s _____ meaningless when you consider the fact that this is not a will written by a poor, uneducated lady in her own handwriting without knowledge of the _____ of these words. This is written by a Beverly Hills lawyer _____ to write her a will, and to convey her wishes. And so when the lawyer writes the word ‘real property’, vis a vis, ‘real property’, and when he writes the word ‘Prue Road’ he does not mean to describe a gift of a city street. So taking those things into consideration, real property, Prue Road is the gift and the

location _____.

The property here in dispute is intangible personal property: notes; promissory notes; contracts; property contracts; and cash _____. That's what it is. The contention here by the Langs is that by this devise, and if you read the devise as a whole, you can see this is the only paragraph in the will that devises real property paragraph 4 devises personal property in the form of cash gifts. Paragraph 5 is the real estate devise stated in the opinion. The Court said, oh we're not sure it's a specific devise. Look at the pleadings of the Langs and the _____, they describe it as a specific devise and that's particularly what it is. It is a specific devise of real property. Paragraph 6 is the residuary clause. And the bulk of all of the estate, the estate of _____, Texas, wherever goes to the Foundation as the residuary beneficiary. So this is the only one that has to do with real property.

This personal property came into being on the individual lot sales of raw land to the developer. That's how they came into being. And that's why the doctrine of ademption is big in this case.

HANKINSON: If the will is interpreted the way that you say it should be interpreted, then is it necessary for the doctrine of ademption to be applied in this case, or is that an alternative means of disposing of the issues in the case?

GREEN: It is alternative.

HANKINSON: So if we agree with your interpretation of the will, we would not reach the issue of ademption?

GREEN: As long as you deal with the words 'the real property'. Maybe you don't agree with the interpretation. _____ and all that said that you must go through to construe the will. If you lay that aside, you still have two doctrines that provide legal presumption. One is the ademption; and probate code §58(c). Both are legal presumptions. They are telling us as a matter of law, this is what happens in the case of land that is devised and has been sold, and is no longer in existence, and it's been exchanged for consideration.

HANKINSON: So in order for your client to win in this case, we would need to address the issue of ademption in connection with interpreting the will. I just want so summarize what you just said in terms of the issues in the case. It's necessary to look at both the case law and §58 of the probate code, as well as the Doctrine of Ademption, to ascertain what is meant by real property. Is that right?

GREEN: They are alternate means of recovery. They provide legal presumptions. First, we go through the construction procedure, we're interpreting the language. That's one thing. Aside from that is the doctrine of ademption.

ENOCH: But the problem is, if we decide that something other than real property is conveyed under that fifth, then ademption wouldn't apply. Because ademption goes with the assumption that real property was devised, but it was sold. In this case, we wouldn't reach your ademption argument until we determine that real property was not what was devised.

GREEN: I don't know if I agree with that. The actual fact of the matter which are not in dispute, not before the court is that Steve Lang has already received 90 acres of land that remains. We're fighting over the consideration received for previous land sales during the latter time of the deceased. So he cannot be extracted. The problem that he has with the property that he is going after, the property of the deceased, the personal property is the consideration received for land that had been sold. Neither can there be any mystery about the identification, where it is, _____. He has it. He closed it today. The land, the same land in that development that remained at the _____.

ENOCH: Are you saying that the Langs are arguing that there is no dispute between the Foundation and the Langs, that this paragraph only devises real property, and the only issue is whether or not they are entitled to proceeds from the sale of the property?

GREEN: We dispute that. There may be a different dispute in the SC for the very first time than we made before. They disputed the first by saying, Well real property we can come in and offer the meaning of real property but _____.

ENOCH: And if they lose on that issue, then we don't reach the ademption, because we've determined that that was real property?

GREEN: _____ and then you have the probate code 58(c) argument that clearly since 1993 the legislature said, this is what a devise of real property means, and it means to exclude personal property unless you _____. The point I'm going to make under both ademption and 58(c) is intent, is irrelevant. They say you can't - suppose you've got 58(c) _____ we could still bring in extrinsic evidence and instruct with the intent to _____. You cannot. That's a rule of law. All of the ademption cases say that. Intent is irrelevant. So that means extrinsic evidence of intent is irrelevant.

HANKINSON: Your opponent hangs their hat on *Stewart v. Selder*, 1971, out of this court in which there is language that the court cited from *Wigmore* that CJ Calvert criticized in his concurring opinion that said that you can use extrinsic evidence to be able to interpret this will. Would it be necessary for us to overrule *Stewart* in order to rule your way or, if not, how do you reconcile *Stewart* with your position and the rest of Texas law?

GREEN: In the first place, *Stewart* has two paragraphs of _____. And you have cases citing the first paragraph dealing with *Wigmore* as saying extrinsic evidence doesn't come in to show the meaning, etc. circumstances surrounding. That is followed by a second paragraph. However,

the intentions of the testator must be found in the _____ analysis in the words of the will. And the interesting thing is you find cases citing the *Stewart* case on our side. It's cited as they do in the *Lang* case on their side citing the two different paragraphs.

Two SC cases have said, This is what *Stewart* means. And in both instances it says, *Stewart* you must have a ambiguity or the words _____ meaning before you bring in extrinsic evidence to explain the words in the will. That's what *Stewart* means. One of the cases, the SC case distinguished *Stewart* and said, that's what it means. So you've got two later cases explaining what *Stewart* is talking about. First, if you had as you did in *Stewart* that decided if you had this uncertainty of language and they allowed a consideration.

The law is that you must have an ambiguity and CJ _____ examined in his concurring opinion. Suppose you leave separate properties. Is somebody going to come in and alter the meaning of that? No. Those are words that have absolute certain legal meaning and they would not allow extrinsic evidence. And so you have a case like *Stewart*. The two decisions _____ of this court explained their understanding of *Stewart*. It is true that you will find cases out there _____ a common _____ that says, *Stewart* just opened the door to extrinsic evidence. Forget the plain meaning rule. You can bring in evidence to show intent even in a will that is not ambiguous. The *Stewart* case does not say that.

GONZALES: There are notes involved here in this dispute. Are some of the notes secured by liens on real property?

GREEN: Yes.

GONZALES: Are they secured by liens on real property at Prue Road?

GREEN: Yes.

GONZALES: Is a lien on real property a real property interest?

GREEN: No, it is not. There are a long line of cases. All of the cases, like the *Stahl* case, where you sell a piece of property and you receive a note in exchange, that's personal property: the note; secured or not. Mortgages are all personal property. So the courts have been through that many, many times. You don't get as real estate a consideration such as real estate and _____.

* * * * *

RESPONDENT

ABBOTT: Mr. Lea would you please get out your brief and turn to page 12, footnote 10. You say that there is no support in any controlling authority for a requirement of an ambiguity before a court may consider extrinsic evidence. Have you read the *Lehman* case?

LEA: Yes.

ABBOTT: *Lehman* says, if the will itself is unambiguous, the court should not go beyond the specific terms in search of that intent.

LEA: Indeed, because there are two kinds of extrinsic evidence that this court and other courts have identified in analyzing this issue. And I think this is the core of one of two issues essential to the _____ case. After *Lehman*, the latest word from this court on the question of consideration of extrinsic evidence, is *Kelly v. Marlin*, after *Leman* after *Shriner's Hospital*. Again in *Kelly v. Martin* the court says, it's always appropriate to consider extrinsic evidence regardless of whether _____ is ambiguous or not. Because there are two kinds of extrinsic evidence that a court might consider. One of them is always permissible, the other indeed depends on whether or not there's an ambiguity.

The first kind of extrinsic evidence that is always appropriate for the court to consider is historical evidence of the surrounding circumstances of the testator. And I think the best example of that comes from a case from the Austin CA, facts that are very similar to this case, where the testatrix has left to one of her beneficiaries, her Red River property. The CA allowed in extrinsic evidence from other people of how the testatrix during her life used this term "Red River property," not what was the intent _____ issue of what did she intend in the will. But extrinsic evidence of what did this phrase mean in her life, in her surrounding circumstance.

HANKINSON: If that's the case, why isn't that an ambiguity if there's some question about what she meant about the Red River property? I know you're trying to draw a line between two kinds of extrinsic evidence, but I don't understand why that is not an example if there was some question about what the term "Red River property" meant in the will. Why isn't that an ambiguity?

LEA: I think it may well be.

HANKINSON: So then can you think of an example then of another kind of case that you talk about where there is not an ambiguity, but extrinsic evidence can still be considered?

LEA: I think any time in a will where a testator or testatrix uses a popular or nickname for a bequest, there may be only one thing that it could be, but I think you are going to need extrinsic evidence even if there isn't two possible meanings for it to prove exactly what it is.

ABBOTT: Think about what you just said. Even if there is not two possible meanings to it, extrinsic evidence is going to be needed. In essence if we go down the path you are trying to lead us, extrinsic evidence is going to be needed in about 99.9% of all will cases, and I don't think we need to be opening the door up to involving a dispute by people who are left alive concerning the words and the intent of a person who is dead.

LEA: I don't know if the percentages that you suggest is correct...

ABBOTT: Well think about it. You're saying we've got two different kinds of extrinsic evidence, then we need to apply extrinsic evidence, even if the term is unambiguous. If a term is unambiguous, and we start involving going to extrinsic evidence under those circumstances, give me a type of will provision that we will not look to extrinsic evidence for, that we will not open it up for the whole litigation process? Give me a term?

LEA: In _____ this court said, the extrinsic evidence is proper _____, or if there is an uncertainty in the meaning. I really think that is the best expression to use here.

ABBOTT: But what I'm saying, a few things in law can be more clearer than the term 'real property'. If the term 'real property' is subject to the application of extrinsic evidence, I can't think of a legal term that would not be subject to extrinsic evidence.

LEA: I'm inclined to agree with you. But the question in this case is, Are there one bequest or two? Is it a bequest of real property?

ABBOTT: Let's focus on the first thing first. Give me an example of a legal term that would not be subject to the extrinsic evidence rule if, in fact, real property is subject to extrinsic evidence?

LEA: In *Stewart v. Selder*, the issue was the meaning of 'cash.'

ABBOTT: But *Stewart* has been grossly limited by *Lehman* and it's _____.

LEA: With all due respect, it's not limited in *Kelley v. Martin*. Again in *Kelley v. Martin*, the court said the same thing that it said in *Stewart v. Selder*: extrinsic evidence of the surrounding circumstances it is always admissible regardless of whether or not there is an ambiguity on the surface.

ENOCH: It seems to me what you're describing is a circumstance where the language in the will may appear to be clear, but when applied to the facts it becomes less clearer. The property of Red River: I give my property of Red River; and when you go down you find out it's a house, it's got all of these furnishings, it's got everything in it. And so the extrinsic evidence demonstrates that we've got both real and personal, but the will doesn't say which one. And so even though the will is perfectly clear, that once you apply it to the existing facts, it becomes uncertain and you get the extrinsic evidence. It seems to me that's what those cases all try to get at where the language appears to be clearer, but when you put it down on the property it's not clear what it is that the testator or testatrix wanted to do. I think the difficulty here is she says she's giving the real property, and the argument you're trying to make is: I devise and bequeath Prue Road is what you're trying to argue.

You're trying to argue, I devise and bequeath Prue Road. And because we don't know if it's the real property or personal property of Prue Road, we have to go to extrinsic evidence to get what she really meant and Prue Road really meant all of her transaction, not just part of it. But it seems to me you're stuck with Mr. Green's argument that the gift is real property and Prue Road just shows up in the location.

LEA: I would like to focus the court on this issue. The words simply are not that clear.

OWEN: The CA's opinion said it was not clear from the record whether the property in Frio County was just an oil and gas interest or whether there were other real property interests. What is the answer to that question?

LEA: I don't know. I have not been involved in the administration or the actual probate proceeding. I can't answer that. I simply don't know.

OWEN: Under your theory of the case wouldn't that be crucial to determining whether there's ambiguity, because if the only interest in Frio County was royalty interests, for example, there is no real property in Frio County?

LEA: I don't believe that is necessarily the case. Because you begin here with the actual words in the will. When you get right here in the second line, you are stuck with something that is simply unclear.

O'NEILL: This argument, I believe you have raised that for the first time here. Below you, yourself, admitted that the real property term was a predicate to Prue Rose. Is that right? I mean it was only the CA that came up with that argument on its own for the first time, and then you took off with that in this court, correct?

LEA: That's the way we presented the argument in the CA. Our pleadings in the TC were broader and covered...

O'NEILL: Well that's a different question - whether it could have covered back into the pleading. I mean this was an argument that you didn't make until the CA first came up with it, correct?

LEA: I didn't present it in the CA in the way that the CA analyzed it. But it's perfectly appropriate for the CA or this court to make rulings on that issue...

O'NEILL: I understand that, and I'm not arguing that with you. But I believe as I recall your briefing in the CA you, yourself, used the term 'real property' to define Prue Road, is that correct?

LEA: I think what we called it was Prue Road property. I think that's the way we characterized it. That's the way we suggested - the meaning that we suggested was 'Prue Road Property.' When you get like here, the words are simply unclear. Because she says located in Frio County, Texas, and Prue Road. She didn't put any sort of modifier before Prue Road. What did she mean? Did she mean in Prue Road? Obviously she didn't mean in Prue Road. And so both sides at that point began editing and characterizing, interpreting the will. The Foundation suggested that what she really meant was real property along or near Prue Road. But to suggest that is to...

HANKINSON: No, that's not what I heard Mr. Green saying though. Mr. Green looked at the language, the actual language and broke it down into the language of the devise, the location of it and the beneficiary which would be the element of the devise. How do you respond to his argument that those are the actual elements of the paragraph?

LEA: That's simply his interpretations. But if we begin with the words, the interpretation, I suggest is...

HANKINSON: It says, I devise and bequeath the real property and oil and gas real property in my estate. And you want to limit that to then Frio County?

LEA: Yes.

HANKINSON: The rest of the will, I think it was the paragraph 4th, that came before dealt with all the devises of personal property. This looks like the paragraph that devises real property. That's another one of his argument. How do you respond that when we look at the words of the will in its entirety, there's only one interpretation that can be given to the will, and that this is the paragraph that devises real property?

LEA: I just disagree with that, because when you get to these words, you get stuck when you get to Prue Road.

HANKINSON: No, I'm asking you how you reconcile his argument that this paragraph deals with real property and the 4th paragraph of the will devises personal property. That's the way the will is structured. How do you respond to that without looking at the internal language of this paragraph?

LEA: It's a proposal for an interpretation. But it's nothing more than that. You simply must edit the words to make them make sense one way or the other. Because she didn't leave Prue Road unless it means something more than a street. She obviously didn't leave real property in Prue Road.

HANKINSON: Why not? Maybe that's just an awkward use of preposition. Grammatically in order to separate Prue Road the way you want to separate it, there should be a comma after Frio County, comma, Texas, comma in order to separate. Isn't that correct grammatically?

LEA: I don't believe the comma is necessary.

ABBOTT: When applying rules of grammatical construction to the interpretation of contracts, because there is no comma and because of the word and, doesn't Prue Road necessarily refer back to the real property of oil and gas properties?

LEA: I don't think it does.

ABBOTT: I'm talking about you applying only rules of contract construction and grammatical construction.

LEA: And I don't think it does because if it did, it would mean _____. And I don't think that's what it meant. I think there is something missing there, or there must be separation then. I think to look at the words of the will, those are the only two possibilities: either there is something missing, or there's a separation because the only third possibility is that it means in Prue Road, and nobody contends that, nobody suggests that a reasonable interpretation.

HANKINSON: One of your main points in your brief that you take from the CA's opinion is the proposition that if any evidence supports a reasonable construction of a will other than that urged in the summary judgment motion based on the words of the will, the TC must recognize evidence supporting the construction opposing the motion to deny the motion. And that seems to me to be the fundamental premise underlying your arguments. What authority do you have for that proposition, that if the summary judgment motion is based on the words of the will, then that then invites extrinsic evidence and a summary judgment motion _____. You cite no authority in your brief for that. Do you have any?

LEA: This court's decision in *Stewart v. Selder*, where the court said, we will look to the record and extrinsic evidence. Because it could possibly mean two different things. And so the court said, we will search for record evidence. If we find record evidence that supports a broader meaning of cash, that is securities, deposit accounts, and if we find support in the record then we'll consider that and we won't go to the ordinary common meaning of the word 'cash.'

HANKINSON: But that is because the court determined there is an ambiguity in the will with respect to the use of the word 'cash.' And aren't you inviting us to find an ambiguity in the use of the word 'real property' in this case in order to make it fit underneath the *Stewart* framework?

LEA: Not in the words 'real property.'

HANKINSON: Why not?

LEA: Either in the words Prue Road or in the phrase that has something missing in it. It says real property in Prue Road, which is nonsensical, or requires some interpretation beyond

the words, requires the possibility...

ENOCH: Let's assume that it requires some interpretation. One interpretation would be that this is simply a common drafting problem. And this is simply a problem that any of the judges up here encounter when there are two descriptions: Frio County, and Prue Road; and they are all subject to the introductory phrase: I devise and bequest the real property. And you're just trying to figure out how to save words, but in County property can be in a county, but it can only be on a road. And so you just as you're drafting the phrase: I devise and bequeath the real property and oil and gas properties in my state located in Frio County and Prue Road, and you just forget - you're just trying to - wait a minute that doesn't quite fit because the 'in' isn't the right prepositional word for Prue Road. That's a very common drafting error and so they just made a mistake. Is that a more reasonable explanation for interpreting that paragraph than one that says, Well because the 'on' is not there, what they really did was convey two gifts not real property, they conveyed a real property in Frio County and they conveyed all property on Prue Road. Is that as reasonable an understanding of how this came into being?

LEA: I can't tell you it's more reasonable, but that's what a jury is for. The question before the court is are they both at least reasonable. If they are both reasonable interpretations, then it's for a jury to decide. And I suggest to you that they are both reasonable interpretations. Which is more reasonable? Well I think mine is particularly when you look at the correspondence among the Lang family members where the letters begin, _____ Prue Road and go on to talking about the land and the development of the land in the proceeds from the sale of lots in development of the land.

HANKINSON: Taking you back to originally when you were talking about the fact that there were two rules regarding extrinsic evidence: 1) is that it's always permissible, historical evidence of surrounding circumstances; and 2), I take it is in connection with an ambiguity?

LEA: Indeed.

HANKINSON: Which rule are you applying in this case?

LEA: I think you need only to surrounding circumstances evidence.

HANKINSON: Then there is not an ambiguity in this particular will?

LEA: I think there is, but I don't think you need to find that to consider the surrounding circumstances.

HANKINSON: The issue that's presented in this case is asking us to review what the CA said and did with respect to consideration of extrinsic evidence. So it's very important for us to understand what your position is on what you think Texas law is on extrinsic evidence and how it

should be applied here. So you're asking us to say that it's always permissible and that when historical evidence of surrounding circumstances needs to be considered and that this is one of those cases and this is not a case where we should look to the law on ambiguity?

LEA: I'm saying you should, because I think there is an ambiguity. I don't think you need to reach that to affirm the CA. I think you could stop at the historical evidence submitted in an appendix to our brief. I think if you would look at that and I think that's enough. Beyond that I think it is ambiguous and I think if you consider the other evidence in the record, the direct evidence of Ms. Lang's intent...

HANKINSON: I would like to go back to your first rule then since that's the one you want us to apply, because I still do not understand how that rule is applied. The examples I've heard you give in response to questions seem to be based upon an ambiguity. Give us an example of the kind of always permissible situation that you're talking about where there is not an ambiguity at issue?

LEA: If you look outside the law, if you looked at a Webster's dictionary ambiguity means subject to two or more meanings. And in law, I think we would use ambiguity to mean either that possibility, or simply unclear or doubtful. Not clear from the words. If when you use ambiguity, you mean both of those possibilities, then I agree with you.

HANKINSON: And you agree with me and what is your conclusion?

LEA: I can agree with you that in the _____ time there is either something that is the subject to two meanings, or unclear, then consideration of extrinsic evidence is always proper.

HANKINSON: And then that means that there really are not two different types then?

LEA: You could attach that meaning. And then I think that's correct.

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REBUTTAL

GREEN: It is, I think, undoubtedly true that if this judgment is affirmed and the lower courts tend to follow the language of the CA that any disappointed beneficiary can simply go out and dredge up some witnesses and sign up some affidavits and say this is for Aunt Susie, I heard her say one time...

O'NEILL: Well that's not necessarily true if you read it in the disjunctive. In other words, we could find that real property is unambiguous and you can't use extrinsic evidence to determine what that means. But if as the CA did read it in the disjunctive, we don't open the floodgates as you suggest?

GREEN: I don't know that I agree with that. I think the idea of this kind of language - arguing that this kind of language _____ open up to jury trials _____ wills. I thought many times what would the jury be charged with in this case? The jury would be told. (can't hear response)

Counsel for the Langs have described this as _____. In his trial pleading in the probate court it is said: Well the assets may be described as Prue Road, Prue Road Property, Prue Road real property, including not only the raw land but the notes of the _____ property agreements, accounts and all derivations thereof. This is what Ruth Lang meant by the words 'Prue Road Real Property in San Antonio, Texas' in the Will. They take that and turn it around and precede that clause with Prue Road, and call it 'Prue Road Real Property in San Antonio, Texas,' in the Will. That is what everybody called it. Here in the amended pleading filed by leave of the court after _____, this is what everybody called it: All the Prue Road real property assets. So the lawyer is telling the court this and the same identical language is found in the response to summary judgment in federal court. This is what we are going to call it: It's Prue Road Real Property. This is what we're calling this devise. This uniting of those terms except putting Prue Road first for some reason. And then, of course, we've complained that they have not even pled ambiguity _____. This is a pleading of ambiguity. Thus, the phrases Prue Road Real Property in San Antonio, Texas are ambiguous because they are subject to two meaningful meanings.

O'NEILL: But the court's not precluded from finding on its own as the CA here did, that there's an ambiguity?

GREEN: (couldn't hear response)