2012 WL 5892367 (Okla.) (Appellate Brief)
Supreme Court of Oklahoma.

In the Matter of the Estate of Gerald Laverne Brown, s/p/
a Gerald L. Brown, deceased Garry Olan Brown, Appellant
v.
Jessie L. BROWN, Individually Personal Representative of
the Estate of Gerald Laverne Brown, deceased, Appellee.

No. 110323.
August 10, 2012.

On Appeal from the District Court of Ellis County
Case No. PB-2010-14
Order Denying Appellant's Application for Share as Omitted Child
(Probate of the Estate of Gerald Laverne Brown)

Appellant Garry Olan Brown'S Reply Brief

Submitted by:

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The Honorable F. Pat VerSteeg Associate District Judge

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***1** In his Will, Gerald Brown specifically identified his children and step-children, Carol Marie Brown, Gerald Lynn Brown, Thomas Lee Alsup and Cynthia A. Alsup, and made a contingent bequest to them. Gerald's son Garry was not born for nearly five (5) years after the Will was executed. Garry was not named or otherwise mentioned in his father's Will.

As established by Oklahoma law and the many decisions analyzed in both the *Brief in Chief* and herein, the fact that Gerald Brown named his children and step-children who were living when he executed his Will, and did not mention or provide for Garry (or any other future-born child), renders Garry a pretermitted heir. He is therefore entitled to inherit an intestate share of his father's estate.

***2** Notably, Wife does not identify any reported decision in which a testator employed language similar to that used by Gerald Brown and was held to have established a class which included a child born after the will was executed. Wife's argument requires that she contort the words used by Gerald Brown to such a degree the phrases become nonsensical. She argues that Gerald Brown's devise "to my children and step-children, Carol Marie Brown, Gerald Lynn Brown, Thomas Lee Alsup and Cynthia A. Alsup, surviving me in equal shares," amounts to him "merely provid[ing] a list of his then living children and step-children." *Response Brief*, p. 5. Wife does not, however, opine as to why Gerald Brown would need to "provide a list" of his children and step-children or what would be the benefit of such a list.

When the words of the Will are taken in context and as they are written, it is clear that the only purpose or benefit of the "list" is that it defines the descriptive terms preceding it. The list identifies the "children and step-children" to whom the bequest is directed.

Wife's focus on Gerald Brown's use of the word "any" is also not helpful to her argument. Gerald Brown's bequest to his

> children and step-children, Carol Marie Brown, Gerald Lynn Brown, Thomas Lee Alsup and Cynthia A. Alsup, surviving me in equal shares, provided, however, that if any of my children or step-children shall predecease me leaving issue me surviving, such issue shall take equal parts per stirpes the share which such child or step-child who predeceased me would have taken if such child or step-child had survived me

3** must be read as a whole, with each word or phrase being interpreted and applied in context and as defined by Gerald Brown. See ***United States Trust Co. of New York v. Perry, 183 N.Y.S. 426, 429 (1920).[1] Wife asserts Gerald Brown's use of the word "any" to modify "children or step-children" somehow removes or modifies the definition supplied by Gerald Brown himself. However, removing the word "any" would render the remainder of the bequest nonsensical.[2] "Any" does not change the identifications previously made by Gerald Brown. Wife's attempt to re-write Gerald Brown's Will should be rejected.

I. GERALD BROWN IDENTIFIED THE BENEFICIARIES OF HIS WILL BY NAME. HE DID NOT ESTABLISH A "CLASS" WHICH INCLUDED AN UNNAMED PERSON.

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As Wife recognizes, the "cardinal rule for the construction of wills is to ascertain the intent of the testator, and to give effect thereto, if such intent does not attempt to effect that which the law forbids." ***Parnacher v. Hawkins***, 1950 OK 75 ¶ 0, 222 P.2d 362, (syll.l). "All rules of construction are designed for this purpose, and all rules and presumptions are subordinate to the intent of the testator where that has been ascertained." ***4** ***Id.*** The meat of the Supreme Court's analysis in the ***Parnacher*** decision is also pertinent:

> Careful examination of the will involved in the instant case discloses no uncertainty arising upon the face of the will, but the language therein contained is plain, clear and unequivocal.

Id. at ¶ 13, 366. Similarly, examination of Gerald Brown's Will discloses no uncertainty. The language contained in the Will is plain, clear and unequivocal.

Wife relies on the Oklahoma cases of ***In the Matter of Estate of Broughton***, 1991 OK CIV APP 105, 828 P.2d 443 and ***In the Matter of Estate of Eversole***, 1994 OK 114, 885 P.2d 657. Interestingly, Wife states these cases are "very similar factually" to the matter now being considered and both "include a testamentary disposition to a class of individuals." *Reply Brief* at p. 8. Neither of Wife's statements are accurate.

The bequest in ***Broughton*** was a contingent devise (effective if Broughton's wife failed to survive him) to "my children" who survived "in equal shares, per stirpes." ***Broughton***, 1991 OK CIV APP at ¶ 3.

Whether this was a bequest to a class was not an issue. Not only was that question not relevant to the issue before the Court but Broughton's children were not identified by name in his will. They were identified only as a class. Moreover, there was no child born after the will was drafted. Thus, no one claimed to be a pretermitted heir, entitled to an intestate share of Broughton's estate by virtue of 84 O.S. § 131. The "sole issue" ***5** addressed by the Court of Civil Appeals was whether "Brougton unintentionally failed to provide" for his daughter and the children of his deceased daughter in his will.

The facts of the ***Eversole*** case are also entirely different from the facts now being considered by the Court. Eversole provided for each of his sons and his stepson as a contingent beneficiary of his estate by specifically identifying each person by name. Just as the Court of Civil Appeals did in ***Broughton***, the Supreme Court in ***Eversole*** rejected the claim that a contingent beneficiary is omitted and entitled to an intestate share by virtue of84 0.S. § 132.

The question now before the Court is not whether the children and step-children named by Gerald Brown in his Will were omitted. Certainly, ***Eversole*** and ***Broughton*** establish that contingent or residual beneficiaries are nevertheless beneficiaries and, as a result, are not omitted heirs.

Wife ignores the fact that *Garry Brown was born after his father's will was executed and he is not mentioned or provided for in the will*. These two important-and dispositive-facts distinguish this case from every decision cited by Wife.

As noted above, Wife fails to reference a single case in which a bequest similar to the bequest made by Gerald Brown-one which includes class-like language and then limits that language by specifically identifying the members of the class-was held to include an after-born or otherwise omitted child. In fact, Wife's attempt to distinguish one of the numerous cases relied upon by Garry Brown in his *Brief in Chief where* courts in other ***6** states held that language similar to that used by Gerald Brown did not establish a class including an un-named child is grounded on a misrepresentation of the law.

The California court in ***In re Sullivan's Estate***, 31 Cal.App.2d 527, 88 P.2d 55 (1939) held that words which would otherwise normally be deemed to form a class-such as sister or brother-but which are "followed by equally operative words of devise to devisees by name and in definite proportion" establish an individual gift to each of the persons named. "[T]he descriptive portion of the clause is intended merely as a matter of identification." ***Id.*** at 529.

Again, the facts in ***Sullivan*** were that the appellant's father was named among the residual beneficiaries of his brother's estate. The bequest was to "my sister, Angela May Pendergast....; my sister, Claire Josephine Harding....; my brother, Vincent Matthew Sullivan, and my brother, Ralph Timothy Sullivan." ***Id.*** at 528. Appellant's father, Ralph Timothy Sullivan, died before the testator died, leaving appellant as his only heir. The administratrix argued the quoted language did, in fact, establish a gift to the class members and, as a result, the gift to Ralph Timothy Sullivan must fail and his portion be distributed to the other members of the class. Appellant, of course, argued he was entitled to take the gift to his father, which was a gift to him individually. As recognized by Wife, the California anti-lapse statute on which the ***Sullivan*** appellant grounded his argument reads:

> If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute another in his place; except that when any estate is devised or bequeathed to any kindred of the testator, and the devisee or legatee dies ***7** before the testator, leaving lineal descendants, or is dead at the time the will is executed, but leaves lineal descendants surviving the testator, such descendants take the estate so given by the will in the same manner as the devisee or legatee would have done had he survived the testator.

Id. at 529 (quoting Cal. Probate Code § 92). The court quoted this provision and then reasoned that, unless the gift was to a class, the appellant would take the gift intended for his father.

Wife argues the language of the California statute somehow "creates a presumption that the devisees or legatees were intended to take as individuals and not as a class" and thereby attempts to distinguish ***Sullivan*** from the present case. (*Response Brief*, p. 14.) This logic is flawed.

First, the California court indulged in no such presumption. Rather, as noted in Garry Brown's *Brief in Chief*, the court's analysis focused completely on whether the devise was to a class as argued by the administratrix or to the named invidividuals as argued by the appellant. The court reasoned that the "words, which standing alone, would be effectual to create a class" did not have that effect because they were "followed by equally operative words of devise to devisees by name and in definite proportions." ***Id.***

> [T]he law infers from the designation by name and mention of the share each is to take, that the devisees are to take individually and as tenants in common, and that the descriptive portion of the clause is intended merely as a matter of identification.

Id.

8** Second, Wife's argument is based on a misrepresentation of Oklahoma law and an assertion that the law which would have been applied to the facts of ***Sullivan would have been different in Oklahoma.

Oklahoma's corrolary to California's anti-lapse statute is 84 O.S. § 177, quoted at page 14 of Wife's *Response*, is as follows:

> If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place, except as provided in Section 8922.

Wife goes on to argue that Oklahoma law "does not have the exception appearing in the California statute."

In truth, the general rule set forth in Section 177 *does* incorporate an exception very similar to the California provision emphasized by Wife. Section 177's general rule "except as provided in Section 8922." Section 8922, re-codified as 84 O.S. § 142, reads:

> When any estate is devised or bequeathed to any child or other relation of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will, in the same manner as the devisee or legatee would have done had he survived the testator.

While the purported relevance of this alleged distinction is not apparent, perhaps Wife's misrepresentation of the law on this issue reveals the complete lack of legal support for her position.

***9 II. GARRY BROWN WAS BORN AFTER HIS FATHER MADE HIS WILL AND WAS NOT PROVIDED FOR OR IN ANY WAY MENTIONED IN THAT WILL. GARRY BROWN IS A PRETERMITTED HEIR.**

Garry Brown was born nearly five years after his father executed his Will. Of course, Garry Brown's name does not at all appear in the Will. Certainly, there is no reference to unborn children nor any indication that future-born children were in any way considered by Gerald Brown when he wrote his Will. Garry Brown is the textbook case of pretermitted heir.

Wife relies on the case of ***Pease v. Whitlach***, 1964 OK 264, 397 P.2d 894 and asserts the devise made in that case is similar to the devise made by Gerald Brown. In fact, there is no factual similarity between the cases.

The issue in *Pease* was whether Darlene Whitlock, who sought to inherit by way of 84 O.S. § 132 as an unintentionally omitted heir, was in fact unintentionally omitted. In contrast to Garry Brown's situation, Darlene was specifically named in the will:

> My family consists of my husband, Ora Elmer Whitlatch, Sr., of my daughters, Rosella Greenleaf and Marjorie Owene Pease, and my son, Leonard Thomas Whitlatch. I also have grandchildren. Among my grandchildren are Bill Ray Whitlatch and Darlene Whitlatch, the son and daughter of may deceased son, Ora Elmer Whitlatch, Jr.

Id. at ¶ 3. In ruling that Darlene was not a pretermitted heir, the Supreme Court did not, as Wife asserts, find that "the testator [sic] created the class of 'my family'." (See *Response Brief*, p. 16.) On the contrary, the Court emphasized the very fact that is blatantly absent in the present case: *Darlene was named in the will*.

10** The Court further recognized that, in the Oklahoma cases finding children and grandchildren to be pretermitted, the children and grandchildren were not mentioned in the wills at issue. ***Id. at ¶¶ 11-12. Taking these facts into account, the Court concluded "that the will shows that testatrix intentionally omitted to provide for her granddaughter, Darlene." ***Id.*** at ¶ 27.

Wife next attempts to distinguish the Supreme Court's decision in ***Roberson v. Hurst***, 1920 OK 170, 190 P. 402, *Opinion on Reh'g* 194 P. 898, from the present case. The testator in ***Roberson*** devised his estate to his wife

> Henrietta Roberson, and her three minor children, [Margaret Roberson, Lillian Roberson, and Albert Roberson] provided my said wife, Henrietta, shall have absolute control of said estate during the minority of any and all of said minors....

1920 OK 170, ¶ 9, *Op, on Reh'g* ¶ 1. Wife suggests that the inclusion of the number three in the devise somehow distinguishes that situation from the one presently before the Court. Wife **neglects** to note, however, that the Court did not mention or place any importance on the inclusion of the number but, instead, noted that the children were identified by name: "The will mentioned the three children of the testator by his last wife, to with, Margaret Roberson, Lillian Roberson, and Albert Roberson, and does not mentioned Jerome Roberson, nor make any provision for any child born after the execution of the will." ***Id.***

Notably, Wife also makes much of the testator's use of "the phrase 'any and all of *said* minors' at the end of the provision." (*Response Brief*, p. 17.)

> ***11** This phrase is a limiting phrase, which further indicates it was Mr. Roberson's intention to only include the three *specific* minors to whom he had listed in his will. ... As discussed above, the provisions of the Will must be considered as a whole and not in separate portions.

Response Brief p. 17.

Wife's point is a very good one. The language of Gerald Brown's devise bears repeating here (emphasis supplied):

> I give, devise and bequeath, absolutely and forever, all my property, real and personal, owned by me at my death, to my beloved wife, Jessie L. Brown, and if she does not survive me, **then to my children and step-children, Carol Marie Brown, Gerald Lynn Brown, Thomas Lee Alsup and Cynthia A. Alsup**, surviving me in equal shares, provided, however, that if any of my children or step-children shall predecease me leaving issue me surviving, such issue shall take equal parts per stirpes the share which *such* **child or step-child who predeceased me would have taken if *such* child or step-child had survived me**.

Wife characterizes the phrase "any and all of said minors" - used by John Roberson in his will - as "a limiting phrase," demonstrating the testator's intent to include only the *specific* children named in his bequest. She must similarly characterize the language used by Gerald Brown.

The phrase "such issue shall take equal parts per stirpes the share which *such* child or step-child who predeceased me would have taken if *such* child or step-child had survived me" is likewise a "limiting phrase" which demonstrates Gerald Brown's intent to include only the specific children and step-children named in his Will. As Wife recognizes, the provisions of the Will must be considered as a whole and not in separate portions.

12** Wife next makes a particularly convoluted attempt to apply the Supreme Court's holding in the case of ***Matter of Estate of Hester, 671 P.2d 54, 1983 OK 93, to the facts of the present matter. In ***Hester***, the father/testator specifically denied he had any children. In fact, he had a son. The Supreme Court denied the son's quest to be treated as a pretermitted heir, holding that the father's mention of children as a class and simultaneous denial of the son's existence indicated a clear intent to omit to provide for the son.

Wife's attempt to parlay this holding to the facts of the present case again demonstrates the utter dearth of legal authority to support her arguments. The facts on which the ***Hester*** decision were based could not be more distinct from the facts now being evaluated by the Court. The son in ***Hester*** was alive when his father made his will. The Supreme Court's holding recognizes that the testator specifically considered his son-and intentionally chose to deny his existence-as he drafted his will.

In contrast, Garry Brown had not yet been born when Gerald Brown drafted his Will. There is no indication whatsoever that Gerald Brown intended to include *or* exclude Garry Brown from the disposition of his estate. Garry Brown is simply omitted.

Finally, Wife's reference to the A.L.R. article *Pretermitted heir Statutes: What Constitutes Sufficient Testamentary Reference to, or Evidence of Contemplation of, Heir to Render Statute Inapplicable*, 83 A.L.R.4th 779, § 54 (1991) should be carefully ***13** evaluated. Wife quotes the introductory paragraph of the annotation as though it is a statement of established law (*Response Brief* at p. 19):

> The courts...from jurisdictions generally prohibiting reference to extrinsic evidence in pre-termission cases, dealing with pretermission claims by heirs not yet born at the time of execution of the wills in question, held or recognized that a gift by the testator to a general class consisting of the testator's "children" or "issue"

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> is generally a sufficient reference to any particular claimant heir falling within that class, whether born or unborn at the time of the will's making, to avoid application of the pretermission statute in question to an after-born child.

In truth, the introduction to the annotation is not a statement of general law; it is a description of the decisions collected in the article. The ellipses in the introductory phrase dramatically alter the message. The annotation actually begins: "The courts *in the following cases* from jurisdictions generally prohibiting...." (Emphasis supplied.)

Further, a review of the cases collected in the annotation reveals no case in which the members of the alleged class were identified by name, as were Garry Brown's siblings and step-siblings. *See*, e.g. ***Chandler v. Chandler*** 94 S.E. 995 (Ga. 1918) (Testator's gift of his estate for "the benefit, use, and maintenance of his wife and "all of the minor children left with me at my death, until the youngest of them should come of age, with the property then to be divided among them equally," showed sufficient contemplation of the subsequent birth of a child to prevent the revocation of the will under pretermission statute; taking the will as a whole, testator seemed to have regarded the will as contemplating the birth of his then-unborn child.); ***Lamar v. Crosby*** 172 S.W. 693 (Ky. 1915) (Testator's posthumous daughter was not a pretermitted child where will referred ***14** to his children as a class, rather than referring to the posthumous child's two **elder** brothers by name. The court recognized the general rule that, had testator made the gift to his "children" and also named the then-living children individually, the court would have been required to construe the gift to "children" as meaning the then-living children only.); *McLean v. McLean* 207 N.Y. 365, 101 N.E. 178 (1913) (Contingent remainder in testatrix' estate to such of her issue as survived her husband, who in turn was named in the will as life tenant, was sufficient to satisfy the terms of the New York "pretention" statute vis-a-vis testatrix' after-born children.).

A more pertinent collection of decisions is found at Section 56 of the same A.L.R. Annotation, titled "Naming of Living Children":

> In the following cases involving allegedly pretermitted heirs not yet bora at the time of the making of the wills in question, and decided under the laws of jurisdictions prohibiting the introduction of extrinsic evidence on pretermission issues, the courts held or recognized that notwithstanding testamentary gifts or references to a general class of "children" which would normally have included the claimant after-born heir, the express naming of other, individual members of that class served in each instance to limit the class gift to the named, living members, leaving the unnamed after-born members pretermitted.

See, e.g.: Kidd v. Borum 61 So. 100 (Ala. 1913) (Notwithstanding a devise of remainder to the testator's "children" as a class, an after-born child was pretermitted by the will where the will, in other places, referred to the testator's three then-living children by name, showing clearly that the reference to "children" was only to those already living, rather than to the class of all children anticipated to be living at the time of the testator's death.); ***15** ***Painter v. Painter***, 45 P. 689 (Cal. 1896) (Claimant, testator's after-born son, deemed a pretermitted heir where the only testamentary language which could arguably refer to him was the expression "my sons." Noting that all property was given to persons other than testator's children, the court said the words "my sons" referred to the sons living at execution, who were specifically named and enumerated, and certainly did not include an after-born child.).

CONCLUSION

Wife does not cite a single decision or authority involving facts similar to those of the present case. In effect, she ignores the reality that Gerald Brown identified the beneficiaries of his Will by name. Garry Brown, not yet having been born at the time, is not named among those beneficiaries. Garry Brown was unintentionally omitted from his father's Will.

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Garry Brown respectfully requests that the trial court's order be reversed and that this court determine that he is a pretermitted heir, entitled to take an intestate share of his father's estate as required by 84 O.S. § 131 and 84 O.S. § 132.
Respectfully Submitted,

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Footnotes

1 ("[W]hen a testator has made a dictionary for himself, we must look at that to see in what sense he has used the words in his will. ... If we find from a will, as we do here, that a testator has used a word in a particular sense, we must give it that meaning wherever it occurs in the will." (Citation omitted.))

2 Removal of the word "any" would transform the phrase "however, that if *any* of my children or step-children shall predecease me leaving issue me surviving, such issue shall take equal parts. ..." to "however, that if my children or step-children shall predecease me leaving issue me surviving, such issue shall take equal parts...." The anti-lapse provision would then only come into play, it seems, if *all* of Gerald Brown's children predeceased him.

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