FILED
AUG 30 2022
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 22-0417

CARL J. MARTIN, II, TERESA A. MARTIN-PIKE, PATRICK STEPHEN MARTIN, CARL ROBERT MARTIN, CARLI JO MARTIN, JASMINE PIKE, and SOPHIA PIKE,

Petitioners,

v.

SHERREE D. MARTIN,

Respondent.

Appeal from Order of the
Circuit Court of Upshur County
Civil Action No. 20-P-21
(Judge David H. Wilmoth)

BRIEF OF PETITIONERS CARL J. MARTIN, II, TERESA A. MARTIN PIKE, PATRICK STEPHEN MARTIN, CARL ROBERT MARTIN, CARLI JO MARTIN, JASMINE PIKE, AND SOPHIA PIKE

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I. ASSIGNMENT OF ERROR

1. The Circuit Court erred in finding that the estate taxes for the gross Estate of Shirley A. Martin should have been paid for with the assets of the Carl J. Martin Marital Trust.

2. The Circuit Court erred in ignoring the language of the Last Will and Testament of Shirley A. Martin and instead making findings related to extrinsic evidence to make certain make certain findings regarding testamentary intent contrary to that Will.

II. STATEMENT OF THE CASE

Carl J. Martin and Shirley A. Martin were husband and wife. Appendix Record ("AR") at 4 and 381. Mr. Martin predeceased Mrs. Martin and established in his will the Carl J. Martin Testamentary Trust (the "Marital Trust") for the benefit of his surviving spouse. Id. Shirley A. Martin, as Executor of the Estate of Carl J. Martin, made an election under Internal Revenue Code § 2056 to qualify the Marital Trust for the unlimited marital deduction. AR at 5 and 381. Shirley A. Martin passed away on August 11, 2019. AR 6 and 382. Pursuant to 26 U.S.C. § 2044(a) and (c), the value of her taxable Estate included the property making up the Marital Trust and, for tax purposes, "shall be treated as property passing from the decedent." Payment of her Estate tax liability was expressly provided for in her Last Will and Testament, directing in Article II, Section 1 that all such taxes "be paid from the residue of my estate and not be apportioned." AR 77.

Contrary to those provisions, Sherree D. Martin used her position as Trustee of the Marital Trust to pay from that corpus the tax liability of the Shirley A. Martin Estate. Sherree D. Martin was subsequently removed from those fiduciary roles by judicial order. Once she was removed, the successor fiduciary properly identified that her actions as inconsistent with the language of the Will and the parties presented the issue for judicial determination. The Circuit Court, however, did not effectuate the language of the Will to determine the issue, but rather relied on extrinsic evidence and rendered the language of the Will meaningless. Petitioners appeal that error.

III. SUMMARY OF THE ARGUMENT

Shirley A. Martin's Last Will and Testament expressly directed that all estate taxes accruing at her death "be paid from the residue of my estate and not be apportioned" (Article II, Section 1). AR at 77. The terms of the Will are controlling. While both federal and state law provide for the right to seek recovery or apportion taxes in certain instances, these rights can be waived by a testator. "[T]he intent of the testatrix regarding apportionment of taxes must be ascertained and, if clearly expressed, applied." Dilmore v. Heflin, 159 W. Va. 46, 53, 218 S.E.2d 888, 892 (1975). "[T]he testator's intention controls and must be given effect, provided it does not violate some positive rule of law or public policy. In ascertaining this intention, the law requires that the entire will be considered and all of its language given effect, if possible. Further, in construing a will, the true inquiry is not what the testatrix meant to express but what the language she has used does express." Id. (Citations omitted.)

Here, the clear, unambiguous language in the Will at issue directs that her taxes be paid from the residue of her estate and not apportioned. That express language waived any right to recovery from the Marital Trust reimbursement for taxes owed by the Shirley Martin Estate, in accord with W. Va. Code 44-2-16a(5) and 26 U.S.C. § 2207A(a)(2). Thus, the Circuit Court erred in holding that the Marital Trust was responsible for Shirley A. Martin's Estate taxes and payment thereof. Moreover, given the unambiguous language in the Will, the Circuit Court erred in relying on extrinsic evidence of testamentary intent to contradict the terms in the Will, rendering those words meaningless. Therefore, this Court should reverse the Circuit Court' order.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In accordance with Rule of Appellate Procedure 18 (a), oral argument is not necessary because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

V. STANDARD OF REVIEW

As this is an appeal from a summary judgment ruling, the standard of review is *de novo*. Syl. Pt. 1, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994).

VI. ARGUMENT

A. The Circuit Court Erred in Not Giving Effect to Terms of Will

Shirley A. Martin passed away on August 11, 2019. AR 6 and 382. In Article II, Section 1 of the Last Will and Testament of Shirley A. Martin (the "Will"), she expressed her intent that all her Estate taxes be paid from the residue of her Estate and not apportioned:

> . . . all estate, gift, income, inheritance, transfer, and succession taxes, not including generation skipping taxes, assessed or accruing as a result of my death, including penalties and interest, if any **be paid from the residue of my estate and not be apportioned**.

(Emphasis added.) AR at 77. Immediately thereafter, in Article II, Section 2, Shirley Martin went on to provide that, if her probate estate was insufficient to pay the taxes, then sufficient funds were to be provided from the Shirley A. Martin Trust Agreement dated November 24, 1997. AR 77-78.

"[T]he intent of the testatrix regarding apportionment of taxes must be ascertained and, if clearly expressed, applied." Dilmore v. Heflin, 159 W. Va. 46, 53, 218 S.E.2d 888, 892 (1975). "[T]he testator's intention controls and must be given effect, provided it does not violate some positive rule of law or public policy. In ascertaining this intention, the law requires that the entire will be considered and all of its language given effect, if possible. Further, in construing a will, the true inquiry is not what the testatrix meant to express but what the language she has used does express." Id. (Citations omitted.) Reading Article II, Section 1 of the Will in conjunction with the Will as a whole, there is no ambiguity and the terms are express that payment of all estate taxes is to be made from the residuary of the Estate and that said taxes not be apportioned, in accordance with state and federal law. See W. Va. Code 44-2-16a(5) and 26 U.S.C. § 2207A(a)(2).

Contrary to the express terms of the Will and the clear law on the issue as set forth above, prior to her removal, Sherree D. Martin as Administrator of the Estate used her other position as Trustee of the Marital Trust to use Marital Trust assets to directly pay for the Estate taxes. Without any basis, Sherree D. Martin alleged that, "[a]t Shirley's death, the Marital Trust will be required, pursuant to Internal Revenue Code Section 2207A, to contribute the estate taxes due that are attributable to it." AR 5 at ¶ 24. However, 26 U.S.C. § 2207A does not "require" such "contribution." Once she was removed from her fiduciary position, the successor fiduciary properly identified that her actions were contrary to the applicable law and the parties presented the issue to the Circuit Court to correct that error. AR at 178-185 and 384 at ¶ 22.

As a matter of law, an estate must pay the taxes on all property includable in that estate. See 26 U.S.C. § 2001 (imposing a tax on the taxable estate of every decedent). The value of a taxable estate shall include property in which the decedent had a qualifying income interest for life and, for tax purposes, "shall be treated as property passing from the decedent." See 26 U.S.C. § 2044(a) and (c). Carl J. Martin created in his will the Marital Trust for the purpose of providing for "the comfortable and reasonable support and maintenance" of Shirley A. Martin and, to accomplish that purpose, all income was to be paid to her and as well as any additional payments or use of the principal for her benefit "as the Trustees, from time to time, determine to be required and desirable for her support, welfare and best interests." AR 18 at Art. III, (h) First (A)(3)-(5). There is no dispute that Shirley A. Martin as Executrix of the Estate of Carl J. Martin elected to have the Marital Trust qualify for the unlimited marital deductionunder the Internal Revenue Code. See 26 U.S.C. § 2056(b)(7) and AR 381 at ¶4. Moreover, there is no dispute that, as Shirley A. Martin had the interest income from the Marital Trust, the value of her taxable Estate shall include the property making up the Marital Trust and, for tax purposes, "shall be treated as property passing from the decedent [Shirley A. Martin]." See 26 U.S.C. § 2044(a) and (c).

Under West Virginia law, an administrator who pays estate taxes under a federal or state tax law on property required to be included in the gross estate, "the amount of the tax so paid shall be prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues." W. Va. Code § 44-2-16a(2). "But," Section 16a continues, "it is expressly provided that . . . none of such provisions shall in any way impair the right or power of any person by will . . . to make direction for the payment of such estate taxes, and to designate the fund or funds or property out of which such payment shall be made, and in every such case the provisions of the will . . . shall be given effect to the same extent as if this section had not been enacted." Id. at (5). Federal law also provides a right to seek recovery of taxes incurred because property was included in the estate pursuant to § 2044, see U.S.C. § 2207A(a)(1), and that the right to seek recovery may be waived: the right to recover "shall not apply with respect to any property to the extent that the decedent in his will (or revocable trust) specifically indicates an intent to waive any right of recovery under this subchapter with respect to such property." See 26 U.S.C. § 2207A(a)(2).

Specific language, such as the language contained in the Will, is sufficient as a matter of law to waive the right to recover or prorate payment of estate taxes. See First National Bank of Morgantown v. McGill et al., 180 W. Va. 472, 377 S.E.2d 464 (1988). In McGill, the decedent's will provided that the executor "discharge all of my just debts and funeral expenses, including Federal estate tax, West Virginia Inheritance Tax, and other expenses of the administration of my estate." Id. at 473, 377 S.E.2d 465. The West Virginia Supreme Court of Appeals examined the term of the will in light of West Virginia Code § 44-2-16a, "which provides for apportionment of federal estate tax between or among the beneficiaries, absent specific direction in the will as to a specific fund or funds, for example, the residuary estate, from which the federal estate tax is to be paid." Id. at 475, 377 S.E.2d 467. After analyzing the general language at issue in McGill, the

Court held that "a clause in a will which contains a general direction to the personal representative to pay debts, expenses and taxes, or similar 'stock' language, is not sufficient by itself to shift the liability for the former West Virginia inheritance tax from the specific devisees or legatees to the residuary estate." Id. at Syl. Pt. 2.

The same is true for waiving the federal right to seek recovery—a general waiver will not be sufficient. One congressional report provided four possible examples of what type of language could suffice, "e.g., by specific reference to QTIP, the QTIP trust, section 2044, or section 2207 A." H.R. Rep. 105-148, 614, 1997 U.S.C.C.A.N. 678, 1008. However, the statute does not require any particular language and courts have rejected a "magic words" approach when reading wills and determining the intent of the testator. See Eisenbach v. Schneider, 140 Wash.App. 641, 655, 166 P.3d 858, 864 (2007) (rejecting the argument that the failure to use certain words negates the clear intent of testators and recognizing that the federal government does not benefit from such a narrow interpretation). "The amendment [to Section 2207A] was to ensure that the testator's intent effectively controlled. Nowhere in the legislation or in its legislative history is there any suggestion that a clear statement of testamentary intent regarding the allocation of the tax burden is to be displaced by the provisions of the statute." Id. Additionally, "[t]echnical words are not necessary in making testamentary disposition of property; any language which clearly indicates the testator's intention to dispose of his property to certain persons, either named or ascertainable, is sufficient." See In re Teubert's Estate, 171 W. Va. 226, 231, 298 S.E.2d 456, 461 (1982) (quoting Syl. Pt. 1, Runyon v. Mills, 86 W. Va. 388, 103 S.E.112 (1920)). But contra, In re Blauhorn Revocable Trust, 275 Neb. 256, 746 N.W.2d 136 (2008) (where court imposed onto federal statute a magic word requirement and found one term in trust agreement insufficient to waive right of recovery).

By contrast, the terms of the Will at issue in this case expressly shift the liability of estate taxes to the residuary estate and specifically waives any apportionment: "all estate . . . taxes . . . if

any be paid from the residue of my estate and not be apportioned." AR 77 at Art. II, Sect. 1. In accord with the principles laid out in McGill, there is no ambiguity in the terms of the Will and the terms of the Will clearly shifted the liability of estate taxes to the residue of the Estate. Moreover, the intention that the taxes be paid by the Estate is further reflected when the Will is read as a whole. Recognizing that the probate estate might not be sufficient to pay those taxes, immediately following the term that the taxes be paid from the residue of the Estate, Shirley Martin expressly provided that, if the probate estate was insufficient to pay for those taxes, then sufficient funds would be provided from her trust. AR 77-78 at Art. II, Sect. 2. See also Dilmore (reversing circuit court ruling and finding that the testator's terms in her will, when read in its entirety, reflected intent that taxes were to be paid from the residue of the estate).

The Supreme Court of the United States stated, "We are of the opinion that Congress intended that the federal estate tax should be paid out of the estate as a whole and that the applicable state law as to the devolution of property at death should govern the distribution of the remainder . . ." Riggs v. Del Drago, 317 U.S. 95, 97-98 (1942). "[T]he intent of the testatrix regarding apportionment of taxes must be ascertained and, if clearly expressed, applied." Dilmore v. Heflin, 159 W. Va. 46, 53, 218 S.E.2d 888, 892 (1975). "[T]he testator's intention controls and must be given effect, provided it does not violate some positive rule of law or public policy. In ascertaining this intention, the law requires that the entire will be considered and all of its language given effect, if possible. Further, in construing a will, the true inquiry is not what the testatrix meant to express but what the language she has used does express." Id. (Citations omitted.)

When examining Shirley A. Martin's entire Will, as Dilmore instructs, Shirley A. Martin's intent is clear. Article II, Section 1 states that the taxes at issue are to be paid from the residue of her estate. The same section also contains the affirmative directive that the taxes "not be apportioned." Importantly, Article II, Section 2 reinforces that intent by affirming that if her

probate estate was insufficient to pay for the previously-referenced taxes, sufficient funds would be provided from the Shirley A. Martin Trust Agreement. The intent of Shirley A. Martin is clear from these two sections, and there is no ambiguity. Thus, the testator's intention controls provided that it does not violate the rule of law, as it is clear and specific, nor does it violate public policy. Id.; Eisenbach, 140 Wash.App. at 655.

For all of the foregoing reasons, the Circuit Court erred in not effectuating the unambiguous language in her Will and this Court should hold that that language in Shirley A. Martin's Will that all taxes "be paid from the residue of my estate and not be apportioned" waived any right to seek recovery for taxes accrued by her Estate from other sources.

B. The Circuit Court Erred In Considering Extrinsic Evidence

The Circuit Court did not apply the applicable law set forth above but instead erred in relying on extrinsic findings related to what Shirley A. Martin's intended in her Estate planning to impose certain directives contrary to the actual testamentary terms in the Will. In its ruling, the Circuit Court found that "Shirley Martin's estate planning was done in contemplation of I.R.C. § 2207A and does not indicate an intent to waive any right of recovery under I.R.C. § 2207A." AR 382 at ¶ 12. The Circuit Court also found, without any basis and which Petitioners dispute, that it would somehow be in their best interests if the Marital Trust paid the taxes of the Shirley A. Martin Estate and that Shirley Martin would have known beginning in 1997 the amount her Estate would be in 2019. AR 383 at ¶ 13, 15-17.[1] Those findings lack any evidentiary support and are irrelevant because, as a matter of law, the clear and unambiguous language of the Will controls.

[1] None of the parties briefed issues regarding the effect on individual beneficiaries, as that was not relevant to the question of law presented at that time or now on appeal. However, as set forth on the record at the hearing on April 7, 2022 in response to the Circuit Court's inquiry and reflected in the testamentary documents, the distributions and beneficiaries differ between the Estate of Shirley A. Martin, the Shirley A. Martin Trust, and the Carl J. Martin Trust, such that the Petitioners are worse off following the decision of the Circuit Court and their best interests actually would be served by giving effect to the language of the Will as argued herein by Petitioners.

It is black letter law that "[e]xtrinsic evidence is admissible to establish testamentary intent only when there is a latent ambiguity." First Nat. Bank of Morgantown v. McGill, 180 W. Va. 472, 478, 377 S.E.2d 464, 470 (1988) (Citation omitted). "[T]he true inquiry is not what the testatrix meant to express but what the language she has used does express." Id. (citing Dilmore, 159 W. Va. at 53). "Extrinsic evidence of statements and declarations of the parties to an unambiguous written contract occurring contemporaneously with or prior to its execution is inadmissible to contradict, add to, detract from, vary or explain the terms of the contract. . ." Syl. Pt. 1, Kanawha Banking & Trust Co. v. Gilbert, 131 W. Va. 88, 88, 46 S.E.2d 225, 226 (1947).

Here, as in McGill, there are no latent ambiguities. Shirley A. Martin's intent is clearly expressed. See Collins v. Treat, 108 W. Va. 443, 446, 152, S.E. 205, 206 (1930) ("A 'latent ambiguity arises when the instrument upon its face appears to be clear and unambiguous, but there is some collateral matter which makes the meaning uncertain. . .' The most common example of a latent ambiguity is where there are more than one person or thing of the same name or description employed in the instrument.") (Citation omitted). No party argued and the Circuit Court below did not find that there was any ambiguity in the terms of the Will, latent or otherwise.

The law is clear that "the true inquiry is not what the testatrix meant to express but what the language she has used does express." See McGill, supra (citation omitted). The language of the Will does not contradict itself; it directs for all taxes to be paid from the residue of her Estate; directs that taxes not be apportioned; provides (and refers to a specific trust) for a secondary source of funds for payment of those taxes; and there is no confusion between parties and items in the Will; and the language is plain, clear, and unambiguous. Accordingly, in addition to not applying the applicable law, the Circuit Court's conclusions based on its extrinsic findings related to Shirley Martin's estate planning render unambiguous language and express terms in the Will meaningless.

The language in the Will explicitly directs payment of all taxes from her Estate and prohibits apportionment of taxes, which is an express waiver of any right of recovery in accord with W. Va. Code 44-2-16a(5) and 26 U.S.C. § 2207A(a)(2).

VII. CONCLUSION

For all of the foregoing reasons, this Court should reverse the judgment of the Circuit Court, and remand with directions that the terms in the Will directing that Estate taxes "be paid from the residue of my [Shirley A. Martin's] estate and not apportioned" be enforced and the payment of estate taxes by the Marital Trust be reimbursed.

Respectfully submitted this 29th day of August 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August 2022, I caused the foregoing "Brief of Petitioners Carl J. Martin, II, Teresa A. Martin Pike, Patrick Stephen Martin, Carl Robert Martin, Carli Jo Martin, Jasmine Pike, and Sophia Pike" to be served on counsel of record via U.S. Mail in a postage-paid envelope addressed as follows:

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