IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

On Appeal from the Honorable David H. Wilmoth, Judge
Circuit Court of Upshur County
Civil Action No. 20-P-21

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

This matter involves a dispute between beneficiaries of a decedent's estate concerning the source of payment of federal estate tax. The parties are Appellee, Sherree D. Martin, who believes that is appropriate for the Carl J. Martin Marital Trust to pay its proportionate share of federal estate tax due as a result of the death of Shirley A. Martin, and Appellants, Carl J. Martin, II, Teresa A. Martin-Pike, Patrick Stephen Martin, Carl Robert Martin, Carli Jo Martin, Jasmine Pike, and Sophia Pike, who believe that the Carl J. Martin Marital Trust should not be responsible for its proportionate share of federal estate tax.

Carl J. Martin, Sr. passed away a resident of Upshur County, West Virginia on August 9, 1996. Mr. Martin was survived by his spouse, Shirley A. Martin, and his children, William A. Martin, Sherree D. Martin, Carl J. Martin, II, and Teresa A. Martin Pike. Under the terms of the Last Will and Testament of Carl J. Martin, Sr., Mr. Martin established the Carl J. Martin Trust (the Carl J. Martin Marital Trust) for the benefit of his surviving spouse, Shirley A. Martin. Mr. Martin's Will provides that the assets of the Carl J. Martin Marital Trust are to be divided into equal shares for Sherree D. Martin, Teresa A. Martin Pike, and Carl J. Martin, II upon the death of Shirley A. Martin[1]. On the United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706) filed on behalf of the Estate of Carl J. Martin, the Executrix of the Estate of Carl J. Martin appropriately deducted as a marital deduction under I.R.C. § 2056 the amounts passing to the Carl J. Martin Marital Trust for the benefit of his surviving spouse, Shirley A. Martin. As a result of electing the marital deduction on the Form 706 filed on behalf of the Estate of Carl J. Martin, the assets of the Carl J. Martin Marital Trust were to be included in the gross estate of Shirley A. Martin under I.R.C. § 2044 upon her passing.

[1] William A. Martin, a son of Carl J. Martin, and Shirley A. Martin, disclaimed any interest he had in the Estate of Carl J. Martin, Sr. and in the Carl J. Martin Marital Trust.

Shirley A. Martin passed away a resident of Upshur County on August 11, 2019. Mrs. Martin was survived by her children, William A. Martin, Sherree D. Martin, Carl J. Martin, II, and Teresa A. Martin Pike. Mrs. Martin named her daughter, Sherree D. Martin, as Executrix of her Estate in Article IV of her Last Will and Testament. Article III, Paragraph 4 of the Last Will and Testament of Shirley A. Martin directs that the residuary of Mrs. Martin's Estate be distributed to the Shirley A. Martin Trust which Mrs. Martin established on dated November 24, 1997, and restated on May 23, 2016. On or about May 8, 2020, Sherree D. Martin, as Executrix of the Estate, paid the U.S. Treasury estimated federal estate tax in the amount of $3,089,693.08, of which $2,557,908.78 was paid from the Carl J. Martin Marital Trust in accordance with the provisions of I.R.C. § 2207A. On or about November 12, 2020, Sherree D. Martin, as Executrix of the Estate of Shirley A. Martin, filed the United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706) on behalf of the Estate in accordance with the provisions of Treas. Reg. § 20.6081-1(b).

On or about May 4, 2020, Sherree D. Martin, as Executrix of the Estate of Shirley A. Martin, as Trustee of the Shirley A. Martin Trust, and as Trustee of the Carl J. Martin Trust, filed a declaratory judgment action seeking guidance from the Circuit Court of Upshur County, West Virginia on various issues relating to the administration of the Estate of her mother, Shirley A. Martin. Certain beneficiaries of the Carl J. Martin Marital Trust objected to the use of trust funds to pay a portion of the federal estate tax in accordance with the provisions of I.R.C. § 2207A. Accordingly, Sherree D. Martin filed a "Motion for Partial Summary Judgment" and accompanying "Memorandum of Law in Support of Motion for Partial Summary Judgment" on March 10, 2022. Petitioners herein filed an "Opening Brief Regarding Estate Tax Liability of Respondents Carl J. Martin, II, Teresa A. Martin-Pike, Jasmine Pike, Sophia Pike, Carl Robert

Smith, Patrick Stephen Martin, and Carli Jo Martin" on that same date. Both parties subsequently filed timely briefs responsive to the aforesaid cross-motions. On April 7, 2022, the parties appeared before the Circuit Court of Upshur County for oral argument on the pending cross-motions. On April 28, 2022, the Circuit Court of Upshur County entered an "Order Granting Motion for Partial Summary Judgment Regarding Federal Estate Tax Payment" in which it concluded, as a matter of law, that the Estate of Shirley A. Martin was entitled to recover from the Trustee of the Carl J. Martin Marital Trust the amount of federal estate tax attributable to the inclusion of the Carl J. Martin Marital Trust in the gross estate of Shirley A. Martin. Appellees have appealed the foregoing ruling of the Circuit Court of Upshur County.

SUMMARY OF THE ARGUMENT

The Supreme Court of Appeals of West Virginia should affirm the decision of the Circuit Court of Upshur County, West Virginia because I.R.C. § 2207A provides that a surviving spouse's estate is entitled to reimbursement from a predeceased spouse's marital trust for federal estate tax due from the surviving spouse's estate as a result of the inclusion of the predeceased spouse's marital trust in the gross estate of the surviving spouse. I.R.C. § 2207A and Treas. Reg. § 20.2207A-1 require that the Carl J. Martin Marital Trust reimburse the Estate of Shirley A. Martin for the share of federal estate tax attributable to the inclusion of the Trust in Mrs. Martin's gross estate. The language of Article II of the Last Will and Testament of Shirley A. Martin does not shift the burden of federal estate tax away from the Carl J. Martin Marital Trust because it is impossible for a surviving spouse to waive the application of I.R.C. § 2207A in his or her will without specifically indicating an intent to waive the reimbursement right, something which Shirley A. Martin did not do in the present matter. While there was compelling extrinsic evidence that Shirley A. Martin did not intend to waive the application of I.R.C. § 2207A to her

deceased husband's Marital Trust, there is no indication that the Court improperly relied on such extrinsic evidence to reach its conclusion. The Supreme Court of Appeals of West Virginia has repeatedly held that extrinsic evidence is admissible where there is a latent ambiguity in the will. Accordingly, it was appropriate for the Circuit Court to consider extrinsic evidence on the apportionment issue because the tax apportionment clause in Article II of the Last Will and Testament of Shirley A. Martin contains a latent ambiguity in light of the inclusion of the Carl J. Martin Marital Trust in Shirley's gross estate.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent Sherree D. Martin does not believe oral argument is necessary because the relevant facts and legal arguments have been adequately presented in the briefs and in the record on appeal. The decisional process would not be significantly aided by oral argument. In addition, Respondent Sherree D. Martin notes that the Petitioners' brief does not set forth assignments of error relating to the application of settled law. Respondent Sherree D. Martin notes that this is a case involving an issue of first impression in West Virginia, but suggests that it is not a particularly complex issue in light of the language of I.R.C. § 2207A and Treas. Reg. § 20.2207A-1, as set forth more fully below.

STANDARD OF REVIEW

A circuit court's entry of summary judgment is reviewed *de novo*. Painter v. Peavy, 192 W. Va. Code 189, 451 S.E.2d 755 (1994). In the present matter, the parties all conceded that there were no genuine issues of material fact on the question presented and summary judgment was appropriate as a matter of law.

ARGUMENT

I. The Circuit Court of Upshur County correctly applied the provisions of I.R.C. § 2077A to the terms of the Last Will and Testament of Shirley A. Martin.

In accordance with the provisions of I.R.C. § 2207A, the Estate of Shirley A. Martin is entitled to reimbursement from the Carl J. Martin Marital Trust for federal estate tax due from the Estate as a result of the inclusion of the Trust in the gross estate of Shirley A. Martin. The provisions of I.R.C. § 2207A require that the assets of the Carl J. Martin Marital Trust (the Trust) be used to pay the portion of the federal estate tax due as a result of the inclusion of the Trust in the gross estate of Shirley A. Martin. While Congress has deferred to state law on some tax apportionment matters, that is not the case with respect to I.R.C. §§ 2206 through 2207B which create federal tax reimbursement rules with respect to certain types of nonprobate assets includible in the decedent's gross estate for federal estate tax purposes. I.R.C. §§ 2206, 2207, 2207A, and 2207B each grant a right of recovery to the personal representative or to the decedent's estate for estate tax attributable to the recipients of particular categories of nonprobate assets includable in the gross estate. I.R.C. § 2207A, which was enacted in 1981, grants a decedent's estate a right of recovery for the increase in estate taxes caused by estate tax inclusion of qualified terminable interest property (QTIP) under I.R.C. § 2044. In relevant part, I.R.C. § 2207A provides as follows:

> If any part of the gross estate consists of property the value of which is includible in the gross estate by reason of section 2044 [26 USCS § 2044] (relating to certain property for which marital deduction was previously allowed), the decedent's estate shall be entitled to recover from the person receiving the property the amount by which—
>
> (A) the total tax under this chapter [26 USCS §§ 2001 et seq.] which has been paid, exceeds
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> (B) the total tax under this chapter [26 USCS §§ 2001 et seq.] which would have been payable if the value of such property had not been included in the gross estate.

Applying the foregoing to the present matter, the Carl J. Martin Marital Trust, a qualified terminable interest (QTIP) trust, is obligated to reimburse the Estate of Shirley A. Martin for the estate taxes caused by the inclusion of the Carl J. Martin Marital Trust in the gross estate of Shirley A. Martin.

It should be noted that the federal statutory right of recovery imposes on the personal representative a corresponding state law duty to recover the estate tax attributable to the inclusion of the QTIP trust in the decedent's gross estate. *See, e.g.* Pearcy v. Citizens Bank & Trust Co., 96 N.E.2d 918 (Ind. 1951). The personal representative's general state law fiduciary obligation is to marshal assets for the benefit of the estate, and the right to recover funds is properly viewed as an asset of the estate under the personal representative's control. Thus, a failure to seek recovery could subject the personal representative to liability to estate beneficiaries, creditors, and the government.

Further, a personal representative's failure to exercise the right of recovery under I.R.C. § 2207A may trigger adverse gift tax consequences for the beneficiaries of the probate estate. Under Treas. Reg. § 20.2207A-1(a)(2), a failure to recover estate tax from a QTIP trust is treated as a gift to the QTIP beneficiaries, and a delay in recovering estate tax attributable to the QTIP trust is treated as an interest-free loan (and thus a gift) under I.R.C. § 7872.

The plain language of I.R.C. § 2207A and Treas. Reg. § 20.2207A-1 requires that the Carl J. Martin Marital Trust reimburse the Estate of Shirley A. Martin for the share of federal estate tax attributable to the inclusion of the Trust in Ms. Martin's gross estate. I.R.C. § 2207A sets forth the right of a decedent's estate to recover federal estate tax paid with respect to marital deduction property included in the decedent's gross estate. In relevant part, I.R.C. § 2207A provides as follows:

> If any part of the gross estate consists of property the value of which is includible in the gross estate by reason of Section 2044 (relating to certain property for which marital deduction was previously allowed), the decedent's estate shall be entitled to recover from the person receiving the property the amount by which the total tax under this chapter has been paid exceeds to the total tax under the chapter which would have been payable if the value of such property has not been included in the gross estate.

Similarly, Treas. Reg. § 20.2207A-1, entitled "Right of Recovery of Estate Taxes in the Case of Certain Marital Deduction Property", provides as follows:

> If the gross estate includes the value of property that is includible by reason of Section 2044 (relating to certain property in which the decedent had a qualifying income interest for life under sections 2056(b)(7) or 2523(f)), the estate of the surviving spouse is entitled to recover from the person receiving the property (as defined in paragraph (d) of this section) the amount of Federal estate tax attributable to that property.

Thus, because the gross estate of Shirley A. Martin included the value of the Carl J. Martin Marital Trust by reason of I.R.C. § 2044, the Estate of Shirley A. Martin is entitled to recover from the Carl J. Martin Marital Trust the amount of federal estate tax attributable to that property under I.R.C. § 2207A and Treas. Reg. § 20.2207A-1.

The provisions of I.R.C. § 2207A and Treas. Reg. § 20.2207A-1 preempt state law apportionment or waiver of apportionment of federal estate taxes unless the will or trust "specifically indicates an intent to waive" the right of recovery under I.R.C. § 2207A. In the present matter, neither the Last Will and Testament of Shirley A. Martin nor the Shirley A. Martin Trust specifically indicate an intent to waive the right of recovery under I.R.C. § 2207A. Based on the foregoing, it is appropriate for the Carl J. Martin Marital Trust (Marital Trust) to reimburse the Estate of Shirley A. Martin for the share of federal estate tax attributable to its inclusion in Mrs. Martin's gross estate under I.R.C. § 2044.

The language of Article II of the Last Will and Testament is insufficient to shift the burden of the federal estate tax away from the Carl J. Martin Marital Trust. While the language

of I.R.C. § 2207A permits that Code section to be negated by a contrary provision in the decedent's will, the tax apportionment clause of the Last Will and Testament of Shirley A. Martin is insufficient to negate the reimbursement requirement of I.R.C. § 2207A in the present matter. Prior to 1997, the I.R.C. § 2207A waiver provision provided that the right of recovery "shall not apply if the decedent otherwise directs by will". Thus, under the earlier version of the statute, an effective waiver did not depend on the decedent making a specific reference to §§ I.R.C. 2207A or 2044 or otherwise specifically indicating an intent to waive I.R.C. § 2207A. *See, e.g.* Estate of Vahlteich v. Commissioner, 69 F.3d 537 (6th Cir. 1995). A tax simplification change set forth in the Taxpayer Relief Act of 1997 made it impossible for a testator to waive I.R.C. § 2207A without "specifically indicat[ing] an intent to waive" the reimbursement right, thereby avoiding inadvertent waivers of the right of reimbursement through clauses such as that contained in Article II of the Last Will and Testament of Shirley A. Martin which provides as follows:

> I further direct that any and 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 apportioned.

Significantly, neither the Last Will and Testament of Shirley A. Martin nor the Shirley A. Martin Trust includes any reference to qualified terminable interest property (QTIP), the QTIP Trust, I.R.C. § 2044, or I.R.C. § 2207A.

In relevant part, the post-1997 version of I.R.C. § 2207A provides:

> Paragraph (1) shall not apply with respect to any property to the extent that the decedent in his will (or a revocable trust) *specifically indicates an intent to waive any right of recovery under this subchapter [26 USCS §§ 2201 et seq.] with respect to such property.*

(Emphasis added). Thus, the post-1997 version of I.R.C. § 2207A makes it clear that a testator may only negate the application of I.R.C. 2207A by specific reference to "QTIP, the QTIP Trust, I.R.C. § 2044, or I.R.C. § 2207A" in his or her will. As a result of the 1997 amendment, I.R.C. § 2207A(a)(2) now provides that the right of recovery exists under I.R.C. § 2207A(a)(1) unless the language in a decedent's will specifically indicates the decedent's intent to waive the estate's statutory right of recovery. The U.S. House of Representatives Report that accompanied the 1997 change to I.R.C. § 2207A(a)(2) states as follows:

> It is understood that persons utilizing standard testamentary language often inadvertently waive the right of recovery with respect to QTIP. Similarly, persons waiving a right to contribution are unlikely to refer to the code section granting the right. Accordingly, allowing the right of recovery (or granting the right of [*10] contribution) to be waived only by specific reference should simplify the drafting of wills by better conforming with the testator's likely intent.
>
> Explanation of Provision
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> The bill provides that the right of recovery with respect to QTIP is waived only to the extent that language in the decedent's will or revocable trust specifically so indicates (e.g., by specific reference to QTIP, the QTIP trust, section 2044, or section 2207A). Thus, a general provision specifying that all taxes be paid by the estate is no longer sufficient to waive the right of recovery.

H.R. Rep. No. 105-148, at 614, 1997-4 C.B. 319, 936. A review of the language of Article II of the Last Will and Testament of Shirley A. Martin makes it clear that Shirley A. Martin did not make specific reference to QTIP, the QTIP trust, section 2044, or section 2207A. Accordingly, the language of Article II is insufficient to opt out of the reimbursement provisions of I.R.C. § 2207A(a)(1).

A helpful example of the application of I.R.C. § 2207A to facts strikingly similar to those of the present matter is found in Private Letter Ruling 200452010. In PLR 200452010, the IRS addressed the question of whether or not the decedent's surviving spouse had waived the reimbursement requirement of I.R.C. § 2207A through the language of her will. As in the

present matter, the husband predeceased his wife and established a QTIP trust in order to utilize the marital deduction under I.R.C. § 2056. As in the present matter, the husband's estate filed a United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706) and made an election under I.R.C. § 2056(b)(7) with respect to the property held in the QTIP trust. As in the present matter, the surviving spouse directed that all estate, inheritance, succession, death or similar taxes "be paid out of my residuary estate" without any specific reference to opting out of the reimbursement language of I.R.C. § 2207A. As in the present matter, the trustee of the QTIP trust indicated that it would not reimburse the estate for the estate taxes attributable to the inclusion of the QTIP trust in the surviving spouse's gross estate[2]. In determining that the QTIP trust was responsible for its proportionate share of the estate tax liability, the Internal Revenue Service held that the tax apportionment clause of the decedent's "last will and testament does not constitute a waiver by taxpayer of her estate's right to recover the amount of federal estate taxes attributable to the QTIP Trusts." Based on this finding, the IRS then held that the surviving spouse's estate was "entitled to recover from the trustee of the QTIP Trusts the amount of federal estate tax (including penalties and interest) attributable to the QTIP Trusts." Applying the foregoing to the present matter, the Estate of Shirley A. Martin is entitled to recover from the Trustee of the Carl J. Martin Marital Trust the amount of federal estate tax (including any penalties and interest) attributable to the Carl J. Martin Trust.

Two decisions from other states are also instructive in the present matter. In Blauhorn v. Cockle (In re Ervin W. Blauhorn Revocable Trust), 746 N.W.2d 136 (Neb. 2008), the Supreme Court of Nebraska addressed the interplay between Nebraska's estate tax

[2] Sherree D. Martin, the initial Executrix of the Estate and Trustee of the Trust, followed the reimbursement provisions of I.R.C. § 2207A, but Citizens Bank of West Virginia, through its counsel, has taken a position contrary to the provisions of I.R.C. § 2207A.

apportionment statute and I.R.C. § 2207A. In that matter, Mrs. Blauhorn had died in 1997, establishing a QTIP trust for her surviving spouse, who later passed in 2001. In Blauhorn, language in Mr. Blauhorn's trust allegedly provided for a waiver of any apportionment of estate taxes. Mr. Blauhorn's attempted waiver in his trust, the Court concluded, applying the revised language of IRC §2207A, was not sufficient to waive the application of I.R.C. § 2207A because the trust did not specifically include any reference to I.R.C. § 2207A, QTIP trust, or QTP property and, thus, "no language specifically indicating an intent to waive any right of recovery" as required by IRC §2207A was present. Id. at 142.

The Supreme Court of Colorado noted the same conclusion in the decision of In the Matter of the Estate of Klarner, 113 P.3d 150 (Col. 2005). In Klarner, the application of revised IRC §2207A juxtaposed with the Colorado estate tax apportionment section and will language was at issue. Mr. Klarner at his death in 1982 created a QTIP Trust for his surviving spouse. Mrs. Klarner passed in 2000, and at issue was the application of Colorado law regarding tax apportionment and the waiver by Mrs. Klarner in her will of tax apportionment. The lower court applied IRC §2207A and authorized Mrs. Klarner's estate to seek the recovery of federal estate taxes from the QTIP Trust and that Mrs. Klarner's attempted waiver of apportionment was "insufficient to indicate such intent" to waive. Id. at 153. A disgruntled beneficiary appealed to the Colorado Supreme Court and the Colorado Supreme Court upheld the lower court's decision, including its conclusion that federal tax law preempted Colorado law as to the applicability of recovery of federal estate taxes from a QTIP trust.

Applying I.R.C. § 2207A, PLR 200452010, Blauhorn, and Klarner to the present matter, the Court correctly concluded that (a) the tax apportionment clause of Mrs. Martin's Will did not specifically refer to the QTIP Trust, waiver of I.R.C. § 2044, or the inapplicability of IRC

§2207A to the waiver; (b) the tax apportionment clause in Mrs. Martin's Will does not waive the apportionment of federal estate tax to the Trust created by Mr. Martin pursuant to the plain language of IRC § 2207A; (c) the provisions of IRC § 2207A preempt the West Virginia tax apportionment statute and require the personal representative of the Estate to seek reimbursement to the Estate from the QTIP Trust of the federal estate taxes attributable to the inclusion of the assets in the QTIP Trust in Mrs. Martin's estate to the extent and in the manner as set out in I.R.C. § 2207A and the Treasury Regulations thereunder; and (4) it was appropriate for the Carl J. Martin Marital Trust to reimburse the Estate of Shirley A. Martin for the Trust's proportionate share of federal estate tax attributable to its inclusion in Ms. Martin's gross estate.

There is a crucial difference between estate tax apportionment and estate tax recovery. In seeking to avoid the application of I.R.C. § 2207A to the present matter, the opposing parties suggest that Shirley A. Martin opted out of the provisions of § 2207A by directing that federal estate tax be paid "from the residue of my estate" and further directing that the tax "not be apportioned[3]." This argument ignores the distinction between estate tax "apportionment" under W. Va. Code § 44-2-16a and estate tax "recovery" under I.R.C. § 2207A and Treas. Reg. § 20.2207A-1. Shirley A. Martin's bequest to her grandchildren provides a useful illustration of the distinction between estate tax "apportionment" under W. Va. Code § 44-2-16a and estate tax "recovery" under I.R.C. § 2207A and Treas. Reg. § 20.2207A-1. Article VI of the Shirley A. Martin Trust, as amended, provides for bequests of Twenty-Five Thousand Dollars ($25,000.00) to each of Mrs. Martin's grandchildren. If Mrs. Martin had not opted out of "apportionment", each bequest to a grandchild would be reduced by its proportionate share of federal estate tax liability, thus reducing the amount of the actual bequest to each grandchild. By opting out of

[3] A discussion of the actual intent of Shirley A. Martin is set forth in Section 2 below.

"apportionment" in her Will, Mrs. Martin took the necessary steps to ensure that her grandchildren would each receive the full amount of their bequests. Conversely, if Mrs. Martin opted out of her Estate's "right of recovery" under I.R.C. § 2207A, the bequests to the grandchildren would be significantly reduced, if not eliminated, by requiring the probate assets of Mrs. Martin's Estate to bear a disproportionate share of the federal estate tax burden and allowing the beneficiaries of the Carl J. Martin Marital Trust to reap a windfall at the expense of the beneficiaries of the Estate of Shirley A. Martin and the Shirley A. Martin Trust. Thus, the strained interpretation of Mrs. Martin's Will argued by the opposing parties would have the effect of undermining Mrs. Martin's intent with respect to the dispositive provisions of her Will and of the Shirley A. Martin Trust.

Prior to 1997, there was potential ambiguity with respect to the language necessary for a surviving spouse to opt out of the application of I.R.C. § 2207A. To address this ambiguity, I.R.C. § 2207A(a)(2) was amended in the Taxpayer Relief Act of 1997. Prior to the amendment, I.R.C. § 2207A(a)(2) provided that the right of recovery set forth in I.R.C. § 2207A(a)(1) did not apply if the decedent otherwise directed by will. As a result of the 1997 amendment § I.R.C. § 2207A(a)(2) now provides that no right of recovery will exist under I.R.C. § 2207A(a)(1) to the extent that the language in a decedent's will or revocable trust specifically indicates the decedent's intent to waive the estate's right of recovery.

A helpful illustration of the application of the 1997 amendment to I.R.C. § 2207A is set forth in PLR 200452010. In PLR 200452010, the Internal Revenue Service addressed the identical question presented in the above-styled civil action based on the language of a surviving spouse's will which provided as follows:

> I direct that all estate, inheritance, succession, death or similar taxes (except generation-skipping transfer taxes) assessed with respect to my estate . . . be paid out of my residuary estate and shall not be charged to or against any recipient, beneficiary, transferee or owner of any such property or interests in property in my estate for such tax purposes.

After a discussion of the interplay between I.R.C. §§ 2056, 2044, and 2207A, the Internal Revenue Service concluded that the foregoing language "does not constitute a waiver by Taxpayer of her estate's *right to recover* the amount of federal estate taxes attributable to the QTIP Trusts." (emphasis added). The Service reached this conclusion based on the language of the Taxpayer Relief Act of 1997 which "provides that the *right of recovery* with respect to QTIP is waived only to the extent that language in the decedent's will or revocable trust specifically so indicates (e.g. *by specific reference to QTIP, the QTIP Trust, section 2044, or section 2207A*)." (emphasis added). The Service then held as follows:

> [b]ecause Taxpayer's last will and testament does not waive the estate's *right of recovery* under § 2207A, once the federal estate tax on Taxpayer's estate has been paid, Taxpayer's estate will be entitled to recover from the trustee of the QTIP Trusts the amount of federal estate tax (including penalties and interest) attributable to the QTIP Trusts.

(emphasis added). Thus, the Service correctly identified the issue as a question of estate tax "recovery", as opposed to estate tax apportionment.

In seeking to avoid the application of I.R.C. § 2207A to the present matter, the opposing parties mistakenly rely on the decision of Eisenbach v. Schneider, 166 P.3d 858 (Wash. 2007). Reliance on the Eisenbach decision in the present matter is inappropriate for two reasons. First, Eisenbach involved a joint trust indenture executed before to the enactment of the Taxpayer Relief Act of 1997. The present matter involves separate estate planning documents executed independently by Carl J. Martin and Shirley A. Martin and, specifically, the language of Article II of the Last Will and Testament of Shirley A. Martin which was executed in 2016, well after

the enactment of the current version of I.R.C. § 2207A in 1997. Second, and perhaps more importantly, the holding in the Eisenbach decision hinges on language of a 1979 joint trust indenture which provides that "a ratable share" of federal estate taxes and Washington estate taxes "determined by the proportion which the taxable portion of the trust estate bears to the net taxable estate of the Settlor". Id. at 862. There is no indication in any of the estate planning documents executed by Carl J. Martin or Shirley A. Martin that it was their intent to establish a joint trust with language similar to that employed in the Eisenbach matter. In fact, the Eisenbach court noted that a general tax clause provision "was insufficient to shift the tax burden from the QTIP remainder beneficiaries to the decedent's estate". Id. at 865, *citing* Firstar Trust Co. v. Cooney, 541 N.W. 2d 467 (Wis. 1995). Similarly, the Eisenbach court acknowledged that "there is a presumption that testators do not intent to apply a general tax exoneration clause to QTIP property." Id. at 865, *citing* In re Estate of Gordon, 510 N.Y.S.2d 815 (1986). Based on the foregoing, reliance on the Eisenbach decision in the present matter is misguided and misleading.

A more appropriate authority for the present matter is the decision of In re Estate of Stark, 2011 N.J. Super. Unpub. LEXIS 2270, 2011 WL 3687421 (N.J. 2011) in which the Appellate Division of the Superior Court of New Jersey expressly rejected the Eisenbach argument based on "the presumption that most testators do not intend to apply a general tax exoneration clause to QTIP property[4]." Id. at 18. In Stark, the residuary beneficiaries of a QTIP Trust opposed the request of the surviving spouse's estate for reimbursement of the estate taxes attributable to the QTIP assets, relying on a clause in the surviving spouse's will. In rejecting this argument of the beneficiaries of the QTIP Trust, the Court recognized that the right of reimbursement can only be waived by the surviving spouse if she "*specifically indicates an*

[4] As noted above, a discussion of the actual intent of Shirley A. Martin is set forth in Section 2 below.

intent to waive any right of recovery under this subchapter with respect to such property."

(emphasis added). Id. at 17. The Court then held as follows:

> Because the presumption created by I.R.C. § 2207A is that the residuary beneficiaries of the QTIP Trust, not the estate, will pay the tax, *the majority view is that there must be 'clear and unequivocal' or 'clear and unambiguous' intent expressed in a testamentary document to exonerate the QTIP residuary beneficiaries from reimbursing the excess estate taxes created by the inclusion of their interest in the QTIP Trust.*

(emphasis added). Based on the presumption created by I.R.C. § 2207A and the logic of the Stark decision, this Court should apply the "majority view" and conclude that the language of the Last Will and Testament of Shirley A. Martin does not exonerate the Carl J. Martin Marital Trust from its obligation to reimburse the Estate for the excess estate taxes created by the inclusion of the Carl J. Martin Marital Trust in the gross estate of Shirley A. Martin.

Applying the foregoing provisions of the Internal Revenue Code and decisions thereunder to the present matter, it is readily apparent that Shirley A. Martin did not make specific reference to QTIP, the QTIP Trust, section 2044, or section 2207A. Accordingly, Shirley A. Martin did not waive the Estate's right of recovery under I.R.C. § 2207A and the Estate is entitled to recover from the Carl J. Martin Marital Trust the amount of federal estate tax attributable to it.

II. The Circuit Court of Upshur County was entitled to consider extrinsic evidence in reaching its conclusion in the present matter.

The paramount rule in construing a will is that the intention of the testator controls and must be given effect. Ruble v. Ruble, 217 W. Va. 713, 619 S.E.2d 226 (2005); Charleston Nat'l. Bank v. Thru the Bible Radio Network, 203 W.Va. 345, 507 S.E.2d 708 (1998); Weiss v. Soto, 142 W. Va. 783, 98 S.E.2d 727 (1957). The cardinal rule in the construction of

testamentary instruments is that a court should give effect to the intent of the testator. Charleston Nat'l. Bank, *supra*; Reedy v. Propst, 169 W. Va. 473, 288 S.E.2d 526 (1982).

Shirley A. Martin clearly and unequivocally expressed her intent to devise and bequeath numerous specific assets in a specific matter. The Last Will and Testament of Shirley A. Martin and the Shirley A. Martin Trust set forth multiple specific bequests of personal property and specific devises of real property, coupled with detailed directions as to the disposition of her assets. If the Court determined that the Carl J. Martin Marital Trust is not responsible for its proportionate share of the federal estate tax, the specific bequests and specific devises set forth in Mrs. Martin's Will and the Shirley A. Martin Trust will be rendered meaningless because Mrs. Martin's probate estate will be exhausted through the payment of federal estate tax. This result would be (a) contrary to the intent of Shirley A. Martin as expressed in her Last Will and Testament and the Shirley A. Martin Trust, (b) violative of the cardinal rule of will construction, and (c) contrary to the language of I.R.C. § 2207A.

In Article VI(d) of the Shirley A. Martin Trust, as amended, Shirley A. Martin expressly provided for bequests of Twenty-Five Thousand Dollars ($25,000.00) to each of her seven (7) grandchildren[5]. If the Court had determined that all of the federal estate tax as a result of the death of Mrs. Martin was to be paid from her probate assets without reimbursement from the Carl J. Martin Marital Trust, the bequests to Mrs. Martin's grandchildren would be significantly reduced and, possibly, eliminated in their entirety. This is a result contrary to the express wishes of Mrs. Martin and would result in an injustice to those grandchildren, among others.

Requiring the Carl Martin Marital Trust to pay its proportionate share of federal estate tax due from the Estate of Shirley A. Martin is consistent with the intent of Shirley A. Martin. In

[5] The minor grandchildren of Shirley A. Martin are represented in the above-styled civil action by their Guardian Ad Litem, R. Mike Mullens.

seeking to avoid the application of I.R.C. § 2207A to the present matter, the opposing parties mistakenly rely on the decision of Dilmore v. Heflin, 159 W. Va. 46, 218 S.E.2d 888 (1975) in support of their position that Shirley A. Martin waived the application of I.R.C. § 2207A to the present matter. A careful review of the Dilmore decision, however, makes it clear that Shirley A. Martin did not waive the application of I.R.C. § 2207A to the present matter. In Dilmore, the Supreme Court of Appeals of West Virginia noted that "the intent of the testatrix regarding apportionment of taxes must be ascertained and, if clearly expressed, applied." Id. at 53, 218 S.E.2d at 892. The Court further noted that "the testator's intention controls and must be given effect, provided that it does not violate some positive rule of law or public policy." Id. at 53, 218 S.E.2d at 892.

Applying Dilmore to the foregoing facts, the Court should conclude as a matter of law that the Carl J. Martin Marital Trust is responsible for its share of the federal estate tax liability due from the Estate of Shirley A. Martin. Any other conclusion would have calamitous consequences on Shirley A. Martin's estate plan and would be inconsistent with the intent of Shirley A. Martin as articulated in her own estate planning documents.

Moreover, while there was compelling extrinsic evidence that Shirley A. Martin did not intend to waive the application of I.R.C. § 2207A to her deceased husband's Marital Trust, there is no indication that the Court improperly relied on such extrinsic evidence to reach its conclusion. The Supreme Court of Appeals of West Virginia has repeatedly held that extrinsic evidence is admissible where there is a latent ambiguity in the will. Syl. Pt. 1, Hobbs v. Brenneman, 94 W.Va. 320, 118 S.E.546 (1923); Syl. Pt. 1, Weiss v. Soto, 142 W. Va. 783, 98 S.E.2d 727 (1957); Farmers & Merchants Bank v. Farmers & Merchants Bank, 158 W.Va. 1012, 216 S.E.2d 769 (1975); Transamerica Occidental Life Ins. Co. v. Burke, 179 W.Va. 331, 368

S.E.2d 301 (1988); Dantzic v. Dantzic, 222 W.Va. 535, 668 S.E.2d 164 (2008); Marshall v. Stiltner, No. 17-0048, 2018 W.Va. LEXIS 545 (2018). "A latent ambiguity is one that is not apparent upon the face of the instrument alone and that is discovered when it is sought to identify the property, the beneficiaries, etc." Syl. Pt. 2, Farmers & Merchants Bank, 216 S.E.2d 769 (1975). The tax apportionment clause of Article II of Shirley A. Martin's Last Will and Testament provides as follows:

> I further direct that any and 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.

Looking to the language of the will, it was appropriate for the Circuit Court to consider extrinsic evidence on the apportionment issue because the tax apportionment clause in Article II of the Last Will and Testament of Shirley A. Martin contains a latent ambiguity in light of the inclusion of the Carl J. Martin Marital Trust in Shirley's gross estate.

CONCLUSION

The Circuit Court of Upshur County correctly concluded that the Estate of Shirley A. Martin is entitled to reimbursement from the Carl J. Martin Marital Trust under I.R.C. § 2207A for federal estate tax due from the Estate as a result of the inclusion of the Trust in the gross estate of Shirley A. Martin. It is well-established in West Virginia that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). "A motion for summary judgment should be granted if the pleadings, affidavits, or other evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Aluise v. Nationwide Mutual Fire Insurance Company,

218 W.Va. 498, 503, 625 S.E.2d 260, 265 (2005) (citing Syl. Pt. 2, Harrison v. Town of Eleanor, 191 W.Va. 611, 447 S.E.2d 546 (1994)). "Upon a motion for summary judgment, all exhibits and affidavits and other matters submitted by both parties should be considered by the court, and such motion can be granted only when it is clear that no genuine issue of material fact is involved." Aluise, 218 W.Va. at 503, 625 S.E.2d at 265 (citing Haga v. King Coal Chevrolet Co., 151 W.Va. 125, 132, 150 S.E.2d 599, 603 (1966)). In the present matter, there is no genuine issue as to any material fact on the issue in question and the Court below correctly applied I.R.C. § 2207A. Based on the foregoing, Sherree D. Martin requests that the Supreme Court of Appeals of West Virginia affirm the decision of the Circuit Court of Upshur County, West Virginia on the question of whether or not the Estate of Shirley A. Martin is entitled to reimbursement from the Carl J. Martin Marital Trust for federal estate tax due from the Estate as a result of the inclusion of the Trust in the gross estate of Shirley A. Martin.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-0417

In Re: On Appeal from the Honorable David H. Wilmoth, Judge
Circuit Court of Upshur County
Civil Action No. 20-P-21

CERTIFICATE OF SERVICE

The undersigned, of counsel for Respondent Sherree D. Martin, does hereby certify that the foregoing **Respondent's Brief** has been served upon the following by this day mailing to them, by United States first class mail, postage prepaid, a true copy thereof:

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