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)

REPLY 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. INTRODUCTION

Petitioners Carl J. Martin, II, Teresa A. Martin-Pike, Jasmine Pike, Sophia Pike, Carl Robert Martin, Patrick Stephen Martin, and Carli Jo Martin (hereinafter, "Petitioners") submit this reply in support of their appeal from the Circuit Court's Order dated April 28, 2022. A.R. 380-89.

The question presented is a question of law regarding the proper application of the terms of the Last Will and Testament of Shirley A. Martin (the or her "Will") that provide for all taxes to be paid from the Estate of Shirley A. Martin (the "Estate"). Once Respondent Sherree D. Martin ("Respondent") was removed by the Circuit Court from administering the Estate of Shirley A. Martin, the third-party successor fiduciary properly identified that Respondents' actions in paying those Estate taxes from the Carl J. Martin Marital Trust ("Marital Trust") were inconsistent with the language of the Will. A.R. 184.

The express terms of the Will direct that the residuum of her Estate is liable to payment of all estate tax and prohibit any apportionment of that liability. A.R. 77. The Will then provides that if the probate Estate is insufficient to pay those taxes, then the amounts owed should be paid from her existing trust, the Shirley A. Martin Trust Agreement dated the 24th day of November, 1997, as amended and restated (the "Trust"). A.R.77-78. Respondent Sheree D. Martin ("Respondent") does not dispute those express terms. Instead, Respondent argues that the express terms are not specific enough to be effective and that only if certain "magic words" are used can providing for payment of taxes be effective, which is incorrect. Contrary to Respondent's argument, courts have rejected Respondents' "magic words" approach in determining a testator's intent. Moreover, the law does not require more than the language in the Will to expressly provide for payment of taxes from an estate.

Accordingly, this Court should reverse the decision of the Circuit Court.

II. ARGUMENT

A. Shirley A. Martin Clearly and Effectively Waived the Right of Recovery in Her Will, In Accordance with Federal and State Law.

i. 26 U.S.C. § 2207A Does Not Require "Magic Words" to Constitute Specific Waiver of Right of Recovery.

In her response, Respondent incorrectly argues that 26 U.S.C. § 2207A, as amended in 1997, requires that the testator specifically refer to (1) the QTIP trust, (2) 26 U.S.C. § 2044, or (3) 26 U.S.C. § 2207A to waive the right of recovery from the trust. See Response at 8-9. The language of 26 U.S.C. § 2207A(a)(2) states that 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." 26 U.S.C. § 2207A(a)(2). **Nowhere** in the text of the statute does it require the testator to refer to the QTIP trust, 26 U.S.C. § 2044, or 26 U.S.C. § 2207A to effectively waive the right to recover from a QTIP trust. The only requirement is the right to recover such taxes by apportioning them among property giving rise to the taxes must be specifically indicated.

Respondent erroneously cites to a United States House of Representatives Report that addressed the 1997 change to support her argument that specific reference to above-mentioned QTIP trust or statutes is required to constitute waiver of the right to recovery. In relevant part, the Report states:

> 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 a 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. 105-148, 614, 1997 U.S.C.C.A.N. 678, 1008 (emphasis added). Importantly, this quote is from a congressional report and is not law. More tellingly, the language on which Respondent

relies does not reflect Respondent's argument that the statute requires a testator use "magic words" referring to the QTIP trust or the statutes at issue to effectuate a waiver. The Report uses the term "e.g." prior to the reference to QTIP trusts and the applicable statutes. E.g. is an abbreviation for the Latin phrase exempli gratia, which means "for example." Exempli Gratia Definition, *Black Law's Dictionary* (11th ed. 2019). Clearly, at best, the Report suggests that the listed information in parenthesis can serve as **examples** of what may suffice. It certainly does not provide examples to be used as an exclusive list of requirements under the amendment, and no such exclusive magic words are in the codified statute. Not only is this Report nonbinding legal authority, but it also does not support Respondent's argument that the examples provided are to be used as a definitive list of what language must be used to demonstrate the specific intent required by the statute. Similarly, Respondent attempts to rely on a Private Letter Ruling 200452010 for the same "magic word" requirement, but that Letter expressly states that it "is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent." See Private Letter Ruling 200452010.

Importantly, actual courts of law have rejected this "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)).

Further, the cases cited by Respondent to suggest that Shirley A. Martin failed to use sufficient language to demonstrate her specific intent to waive the right of recovery are distinguishable. For instance, Respondent relies on In re Estate of Klarner, 113 P.3d 150 (Colo. 2005). However, the issue in Klarner was whether Section 2207A preempted Colorado's conflicting law regarding estate taxes. Because the focus of the case was on this question, the parties conceded that the particular testamentary language in the matter was insufficient to satisfy 26 U.S.C. § 2207A. As such, the issue relevant to the question before this Court was not analyzed because the parties did not dispute it. Thus, Klarner provides no analysis or holding regarding the requirements of 26 U.S.C. § 2207A. Therefore, because West Virginia's apportionment law is not at issue, Klarner is irrelevant.

Respondent also relies on In re Blauhorn Revocable Trust, 275 Neb. 256, 746 N.W.2d 136 (2008), but the reasoning used therein is inapplicable. First, in its opinion, the court itself notes that its research found no cases interpreting the post-1997 version of Section 2207A; thus, it did not rely on any other court or case for its novel decision. See In re Blauhorn Revocable Trust, 275 Neb. 256, 262-263, 746 N.W.2d 136, 141 (2008). Nonetheless, the Supreme Court of Nebraska found that "indicates an intent to waive any right of recovery under this subchapter" made it necessary to reference Section 2207A. Id. at 263. However, that is not what the statute says. The statute does not require the mention of Section 2207A, and the House Report discussed above only provides examples of potential means to specifically waive, including a reference to Section 2207A. Such a reading is entirely too rigid and would potentially reverse the desire of testators, which is not the intent of the statute. Eisenbach, 140 Wash.App. at 655.

Lastly, Respondent's arguments continue to ignore the fact that in the Will the specific intent to waive the right of recovery is expressed by both requiring that all taxes be paid from the residuary Estate and prohibiting apportionment, and then provides for a back-up source for payments if the probate Estate was insufficient. A.R. 77-78. For instance, though Respondent relies on Blauhorn, the trust agreement in Blauhorn did not make any reference to "apportionment." The Blauhorn court cited the one (1) paragraph at issue, stating that the language was insufficient to waive the right of recovery. However, here, Shirley A. Martin's Will contains at least two (2) relevant clauses, where she clearly expressed her intent, including a stated desire against apportionment. The Will both expressly provides that the taxes shall be paid for from the Estate and, specifically, from the residuary (Article II, Section 1), but then goes on to provide that if such residuary is not sufficient then the taxes shall be paid from her Trust (Article II, Section 2). A.R. 77-78. Accordingly, in examining the entire Will and specifically the two (2) clauses providing for payment of all estate taxes, the intent of Shirley A. Martin is clear, as opposed to the random placement of a generalized paragraph that could be overlooked that was analyzed (and rejected as an effective waiver) in Blauhorn.

Alternatively, courts have held that Section 2207A does not specifically require a testator to refer to the statute. Klarner, 113 P.3d at 156 (citing In re Estate of Miller, 230 Ill.App.3d 141, 595 N.E.2d 630). In Miller, petitioner argued that language in a testator's will was insufficient because it did not specifically mention Section 2207(a)(2) and pointed to a proposed amendment to the I.R.S. regulations to support its specificity argument. Miller, 230 Ill.App.3d at 147. The court held that even if the amended regulation had been adopted, there would still be no requirement that a direct reference to Section 2207A must be made before an "otherwise" direction clause would be effective. Further, the parallel provision of Section 2207B does not require a specific reference to statute. Id. at 148. Even though Miller was decided before 1997, the reasoning

prevails upon review of the proposed amendment and language of the 1997 amendment. Therefore, there is no basis for Respondent's argument that there is an exclusive list of references ("magic words") that must be used to effectively waive the right of recovery.

ii. The Unambiguous, Specific Language in Shirley A. Martin's Will Waived the Right of Recovery Under West Virginia and Federal Law, As Clearly Intended.

Respondent overlooks the role that West Virginia law has in this analysis. 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 state. Respondent argues that this language is too general to be an effective waiver. However, the Will makes clear that this was not misplaced, general language that could have gone undetected by the testator. The same clause contains the affirmative request/words of "and not be apportioned." A.R. 77. Importantly, Article II, Section 2 of the Will reinforces the testator's intent to waive the right of recover and expressly provide multiple sources to ensure for payment of taxes by affirming that if the probate Estate was insufficient to pay for the previously-referenced taxes,

sufficient funds would be provided from the Shirley A. Martin Trust Agreement.[1] A.R. 77-78. Respondent fails to address this language, because it renders her argument untenable. The intent of Shirley A. Martin is clear from these two sections, and there is no ambiguity. Thus, the testator's intention controls since it neither violates the rule of law, as it is clear and specific, nor does it violate public policy. Id.; Eisenbach, 140 Wash.App. at 655. Therefore, the Court should hold that Shirley A. Martin effectively waived apportionment and the right of recovery, as intended.

B. Respondent's New Attempt to Claim Ambiguity Waived.

Finally, in her Response Brief, Respondent for the first time appears to imply that there is a latent ambiguity in the Will. See Response 18. Respondent, however, does not identify what language she thinks is latently ambiguous. More importantly, Respondent never raised any argument before the Circuit Court that any language in the Will was ambiguous. Accordingly, Respondent has waived any such argument that any language in the Will is ambiguous. See Wang-Yu Lin v. Shin Yi Lin, 224 W. Va. 620, 624, 687 S.E.2d 403, 407 (2009).

III. CONCLUSION

For all of the foregoing reasons and the reasons state in the Brief of Petitioners, this Court should reverse the judgment of the Circuit Court, and remand with directions that the terms in the

[1] Respondent presents without citation to the record statements about reductions of bequests and devises. There is no dispute that the provisions in the Will for payment of all taxes (Article II, Section 1) and the devises and bequests (Article III, Sections 2-3) could be made without any reduction, but then the remainder of the Estate to be then added to her Trust (Article III, Section 4) would not fully fund the Trust. Respondent's argument is that the size of a separate trust if not fully funded should alter the terms set forth in a will or the application of law with respect to how those testamentary terms are applied. In other words, if Shirley A. Martin intended to pay for the taxes from her probate Estate as set forth in the language of her Will, but if her Estate was not large enough after applying the terms of the Will to also completely fund bequests in a separate Trust, then Respondent argues that the terms of her Will should be ignored as contrary to her intent for her separate Trust bequests. Respondent cites no law to support that argument. Respondent also completely ignores the fact that Shirley A. Martin provided both for the payment of taxes from her Estate (Article II, Section 1) and that her Trust first serve as a back-up source to fund those tax payments if her probate Estate was not sufficient (Article II, Section 2). A.R. at 77-78. Respondent further ignores the fact that only after the tax payments and particular bequests and devises set forth in her Will are made would the remainder of her probate Estate then be added to her existing Trust (Article III, Sections 1-4). AR at 77-79. Respondent wants this Court to believe the Will as written is somehow taking something from the Trust, but that is not the case. To the extent Shirley A. Martin did not have as large an estate as she wished or had not already funded a separate trust, it is of no legal consequence in evaluating the application of the law to the testamentary terms set forth in her Will.

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 3rd day of November 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November 2022, I caused the foregoing "Reply 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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