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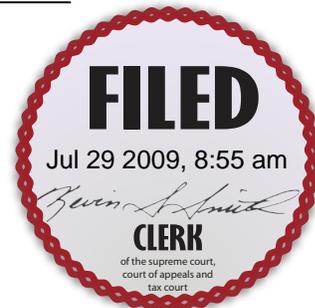
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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE)
UNSUPERVISED ESTATE OF)
HYACINTH CHIN SANG KIDMAN)

GLORIA STEDMAN,)

Appellant,)

vs.)

No. 55A05-0807-CV-401)

BLUE RIVER FOUNDATION,)
AMERICAN RED CROSS, and)
SALVATION ARMY,)

Appellees.)

APPEAL FROM THE MORGAN SUPERIOR COURT
The Honorable G. Thomas Gray, Judge
Cause No. 55D01-0611-EU-115

July 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant Gloria Stedman appeals from the trial court's summary judgment in favor of Appellees the Blue River Foundation, Inc. ("Blue River"), the American Red Cross ("Red Cross"), and the Salvation Army ("collectively, "the Charities"). Stedman contends that the trial court erred in concluding that Hyacinth Chin Sang Kidman's will did not incorporate an existing trust, thereby opting out of Indiana's apportionment statute. We reverse and remand.

FACTS AND PROCEDURAL HISTORY

On September 8, 2000, Kidman executed a will ("the Will") that provides, in part, as follows:

LAST WILL AND TESTAMENT OF
HYACINTH B. KIDMAN CHIN SANG

I, Hyacinth B. Kidman/Chin Sang, a resident of Morgan County, Indiana, do hereby make, publish and declare this to be my Last Will and for the purpose of identification I have initialed each page and I hereby revoke all wills and codicils heretofore made by me.

ARTICLE I

A. I acknowledge that I have intended to transfer all my property to the Chin Sang Kidman Family Trust under declarations or agreements dated April 20, 2000, hereinafter referred to as the Trust. I further acknowledge that I have in fact transferred to my Trust, all or substantially all of my property of every description. If, after my death, any of my property is not held and owned by the Trustee, such an omission will have been unintentional or due to some practical difficulty in re-titling assets.

B. I give, devise and bequeath the remainder of my property of

whatsoever kind of character, wheresoever acquired, and wheresoever situated, to the Successor Trustee of the Chin Sang Kidman Family Trust dated April 20, 2000, to be administered pursuant to the provisions of that Trust Declaration as it exists at the time of my death with all amendments and modifications thereto, whether such amendments or modifications are made before or after the execution of this will.

....

ARTICLE III

A. In this Article, “transfer taxes” means all estate, inheritance, succession, and similar death taxes that become payable by reason of my death with respect to (1) property passing under this will, and (2) property that is not held in any Trust of mine at my death and does not pass under this will, such as proceeds of life insurance or property titled in joint tenancy with rights of survivorship.

B. I direct my Executor to pay all taxes as a general charge against my residuary estate under Article II above. This is consistent with my direction, to the Successor Trustee of my Trust, that all transfer taxes with respect to property owned by any trust of mine be paid out of the Trust Residue.

Appellant’s App. pp. 23-24.

On December 17, 2004, Kidman executed an “Amended and Restated Declaration of Trust[,]” which provided, in part, as follows:

WITNESSETH:

A. On the 20th day of April, 2000, I executed the original Declaration of the Chin Sang Kidman Family Trust. On March 1, 2002, I executed the Amended and Restated Declaration of the Chin Sang Kidman Family Trust.

....

§6. Distribution at Death

A. At my death, the trustee may pay (or advance funds to my estate to pay) all or part of my funeral expenses, unreimbursed expenses of last illness, enforceable debts, costs and fees, and all inheritance and estate taxes, if any (including any interest and penalties thereon), payable by reason of my death – all without necessarily seeking reimbursement from my estate or any person.

B. As promptly as practicable following my death, the Successor Trustee shall distribute the following amounts of money from the trust to the following named individuals:

Janice Minton	\$100,000.00
Roger Pollock	\$100,000.00
Mark Pollock	\$100,000.00
Richard Lyn	\$100,000.00
Dennis Lyn	\$100,000.00
Gloria Stedman	\$1,000,000.00

C. After my death, the Successor Trustee shall set aside a fund of \$100,000.00 for the educational needs of D’Andre Leon Pollock, son of Mark Pollock, of Miami, Florida....

D. If at the time of my death my Dogs Buster and Rascal are still living, (“Pets”), Trustee shall make arrangements for the care of the Pets as hereafter provided....

E. After satisfying the specific distributions and establishing the separate trust funds required by section 6, paragraphs A-D, the Trustee shall then promptly distribute the residue to the following charities in accordance with the percentages indicated herein:

20% to University Hospital of the West Indies, Kingston, Jamaica.

20% to Sisters of Mercy of the Americas Regional Community of Cincinnati for the sole benefit of the healthcare and educational ministries of the Sisters of Mercy in Jamaica.

10% to Blue River Foundation, Inc., in accordance with the provision of the Chin Sang/Kidman Scholarship Fund established June 23, 1999.

10% to British Schools and Universities Foundation, Inc., for the sole benefit of Queen Mary and Westfield College, University of London.

10% to the Associates of the University of Toronto, Inc., for the sole benefit of the University of Toronto School of Engineering.

10% to McMaster University, Hamilton, ON, Canada.

10% to the American Red Cross.

10% to the Salvation Army.

Appellant’s App. pp. 108-12.

Kidman died on October 25, 2006, in Morgan County. Kidman was survived by her sister Stedman and several cousins, who were the individual beneficiaries of the specific cash bequests outlined in the Will. On November 22, 2006, a petition for the probate of the Will was filed. On January 19, 2007, the trial court ordered that the Trust be docketed. On March

21, 2007, the assets of Kidman's estate were valued at an estimated \$10,261,209.62. Of this total, \$5,225,643.17 were assets that were to pass outside of the Trust, consisting of an individual retirement account ("IRA") worth approximately \$4,000,000 for which Stedman was the named beneficiary, and various other investment accounts, annuities, and other property. Approximately \$5,035,566.45 of assets were to pass into, and be administered under, the Trust.

On September 5, 2007, Stedman moved for summary judgment, claiming that the Will and Trust required that all death taxes be paid by the Trust before distribution of gifts to specific individuals. On November 21, 2007, the Salvation Army filed for summary judgment, claiming that all death taxes should be apportioned among all beneficiaries. On December 5, 2007, Blue River and the Red Cross filed for summary judgment, echoing the Salvation Army's claim. On June 12, 2008, the trial court ordered summary judgment in favor of the Charities and denied Stedman's motion for summary judgment. Stedman now appeals.

DISCUSSION AND DECISION

Standard of Review

Stedman contends that the trial court erred in granting the Charities' motion for summary judgment and denying hers. When reviewing the grant or denial of a summary judgment motion, we apply the same standard as the trial court. *Merchs. Nat'l Bank v. Simrell's Sports Bar & Grill, Inc.*, 741 N.E.2d 383, 386 (Ind. Ct. App. 2000). Summary judgment is appropriate only where the evidence shows there is no genuine issue of material

fact and the moving party is entitled to a judgment as a matter of law. *Id.*; Ind. Trial Rule 56(C). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmoving party. *Id.* To prevail on a motion for summary judgment, a party must demonstrate that the undisputed material facts negate at least one element of the other party's claim. *Id.* Once the moving party has met this burden with a prima facie showing, the burden shifts to the nonmoving party to establish that a genuine issue does in fact exist. *Id.* The party appealing the summary judgment bears the burden of persuading us that the trial court erred. *Id.*

Will Interpretation in General

The interpretation, construction, or legal effect of a will is a question to be determined *de novo* by this court as a matter of law. *Retseck v. Fowler State Bank*, 782 N.E.2d 1022, 1025 (Ind. Ct. App. 2003). In construing the language of a will, our primary focus is upon the intent of the testator. *Id.* We look to the four corners of the will and the language used in the instrument in determining that intent. *Id.* Also, the will in all its parts must be considered together. *Epply v. Knecht*, 141 Ind. App. 491, 496, 230 N.E.2d 108, 111 (1967). When construing the language of a will, the court should strive to give effect to every provision, clause, term, or word, if possible. *Hershberger v. Luzader*, 654 N.E.2d 841, 843 (Ind. Ct. App. 1995), *trans. denied*. “Where a will is ambiguous, and a testator’s intention cannot be determined from the language of the will, rules of construction are of necessity resorted to; not for the purpose of misconstruing that which is clear, but for the purpose of resolving a doubt as to the testator’s meaning.” *Attica Bldg. & Loan Ass’n of Attica v. Colvert*, 216 Ind.

192, 202-03, 23 N.E.2d 483, 488 (1939). “It is never permissible for courts to resort to rules of construction where the language of the instrument is clear and unambiguous.” *Id.* at 203, 23 N.E.2d at 488.

Nonetheless, it is well-settled that use of extrinsic evidence may not be used to add to, subtract from, or alter the terms of a will, although it may be used to divine the intent of the testator where it is less than clear from the language of the will.

The maintenance of this rule in its integrity, so that the language found in the instrument shall in truth be the legal declaration of the testator’s intentions concerning the disposition to be made of his property after his death, is a matter of transcendent importance, and, as will be seen from the cases cited, in no jurisdiction has the doctrine which denies the right to add anything to a will by parol been adhered to more steadily than by this court.

It does not follow that the law will suffer the manifest purpose of the testator to fail, because he may not have described the objects of his bounty or the subjects disposed of with such accuracy or completeness as that they may always, and with certainty, be identified by the language of the will, without more, or because he may have expressed his intention in an elliptical manner, and without going into such minute detail as to preclude the necessity of inquiry concerning his circumstances, situation and surroundings at the time the will was written, in order to enable the court to understand the meaning and application of the language employed....

The purpose for which extrinsic evidence may be legitimately admitted is not to add to or vary, or ordinarily to explain, the literal meaning of the terms of the will, or to give effect to what may be supposed to have been the unexpressed intention of the testator, but to connect the instrument with the extrinsic facts therein referred to, and to place the court, as nearly as may be, in the situation occupied by the testator, so that his intention may be determined from the language of the instrument, as it is explained by the extrinsic facts and circumstances.

Dougherty v. Rogers, 119 Ind. 254, 257-60, 20 N.E. 779, 780-81 (1889).¹

¹ This quotation as transcribed in the *www.westlaw.com* database and in West Publishing’s printed *Northeastern Reporter* varies from the same passage in the *Indiana Reports* in no fewer than *thirteen* particulars, most of which involve the omission or addition of commas. Although the differences do not seem to alter the meaning of the cited passage, we will continue to use caution in citing to non-official sources.

Kidman's Will

Here, the central question is how the taxes owed by the estate and the Trust, into which much of Kidman's property was transferred on her death, are to be apportioned.

Indiana Code section 29-2-12-2 (2000) provides as follows:

Unless a decedent shall otherwise direct by will, the federal estate tax imposed upon decedent's estate, shall be apportioned among all of the persons, heirs and beneficiaries of decedent's estate who receive any property which is includable in the total gross estate of said decedent for the purpose of determining the amount of federal estate tax to be paid by said estate, [p]rovided, [t]hat no part of the federal estate tax shall be apportioned against property which, in the absence of any apportionment whatsoever, would qualify for any charitable, marital or other deduction or exemption, nor against recipients of such property on account thereof.

In short, Stedman contends that the Will incorporates the Trust and that it unambiguously instructs that all death taxes be paid from the Trust before distribution to named individuals, followed only then by distributions to named charities, of which the Charities are three. The Charities contend that the Trust instrument stands alone and that it gives the Trustee discretion either to pay death taxes before any distribution or to direct that those taxes be apportioned on a *pro rata* basis to each beneficiary of the estate. The questions, then, are whether the Will does indeed incorporate the Trust, and, if so, whether the Will unambiguously directs the trustee either not to apportion the death taxes or provides that the trustee has discretion in the matter.

A. Incorporation of the Trust

Indiana Code section 29-1-6-1(h) (2000) provides, in part, that

if a testator in the testator's will refers to a writing of any kind, such writing, whether subsequently amended or revoked, as it existed at the time of

execution of the will, shall be given the same effect as if set forth at length in the will, if such writing is clearly identified in the will and is in existence both at the time of the execution of the will and at the testator's death.

Moreover, Indiana Code section 29-1-6-1(j) (2000) provides as follows:

If a testator devises or bequeaths property to be added to a trust or trust fund which is clearly identified in the testator's will and which trust is in existence at the time of the death of the testator, such devise or bequest shall be valid and effective. Unless the will provides otherwise, the property so devised or bequeathed shall be subject to the terms and provisions of the instrument or instruments creating or governing the trust or trust fund, including any amendments or modifications in writing made at any time before or after the execution of the will and before or after the death of the testator.

Here, the Will clearly refers to the Trust, specifically directing that all Kidman's property would be bequeathed to the Trust, "to be administered pursuant to the provisions of that Trust Declaration as it exists at the time of my death with all amendments and modifications thereto, whether such amendments or modifications are made before or after the execution of this will." Appellant's App. p. 23. As such, we conclude that the Trust, even in its subsequently amended forms,² was incorporated into the Will pursuant to Indiana Code subsections 29-1-6-1(h) and -1(j).

B. Apportionment of Taxes

The next question is whether the Will (and the incorporated Trust) unambiguously order that death taxes are to be paid "off the top" such that gifts are paid to individual beneficiaries tax-free. We conclude that the Will does not unambiguously direct death taxes to be paid off the top. Rather, we conclude that the Will is ambiguous in this regard, with the

² It is worth noting that the provision regarding payment of death taxes has remained unaltered since the Trust was originally executed on April 20, 2000. (Appellant's App. 94, 104, 110).

death tax provision of the Will conflicting with the death tax provision of the incorporated Trust. Quite simply, the Will provides that death taxes *must* be paid off the top, while the incorporated Trust provides that such taxes *may* be paid off the top. We see no way to reconcile these provisions, and so must resort to the rules of construction to divine Kidman's intent.

Here, we conclude that extrinsic evidence and well-settled Indiana law provide guidance. On October 4, 2007, John Mercer, Kidman's attorney, was deposed regarding the planning of her estate. Mercer testified that, during the planning of Kidman's estate, the subject of allocation of tax was discussed. According to Mercer, Kidman

did not want the specific beneficiaries under her will to receive – to be taxed either, and I remember having that discussion with her.

And I specifically remember when we increased Gloria Steadman [sic] – and I forget if that was the name that she was given under that will. But when Gloria Steadman's [sic] gift was increased from 500,000 to a million dollars, I specifically remember discussing, "Do you want Gloria to receive the whole million dollars or do you want her to receive a million dollars less the taxes that may become due?" And she said, "I want her to get the whole million dollars."

Appellant's App. p. 273.

The above, which we must accept as true as it is uncontradicted, clearly indicates Kidman's intent that Stedman receive one million dollars tax-free. What is less clear, however, is whether Stedman was to receive *all* of her gifts tax-free, including those gifts

that passed to her outside the Trust.³ We conclude that Kidman's general intent is best served by a conclusion that she did not intend all of Stedman's gifts to be tax-free. This conclusion is supported by well-established Indiana law.

First, we note that Indiana favors apportionment of death taxes, with apportionment being the rule absent a clearly expressed intent to the contrary. Eighteen years before the enactment of Indiana Code section 29-2-12-2, this Court, in adopting equitable apportionment of death taxes as the default in Indiana, stated, "We approve the views expressed in the authorities [approving apportionment] from which we have quoted so extensively herein. In our opinion they are based on sound principles of law, logic and justice." *Pearcy v. Citizens Bank & Trust Co. of Bloomington*, 121 Ind. App. 136, 156, 96 N.E.2d 918, 927 (1951). Now, of course, the concept of apportionment as the default is codified at Indiana Code section 29-2-12-2, and has been since 1969. In the end, the Will and designated evidence indicate a clear intent to exempt gifts to individuals detailed in the Trust from death taxes and not more, and, as such, we will not depart from apportionment beyond that.

³ There is some indication in the designated evidence that Kidman's intended beneficiary of the IRA worth approximately \$4,000,000 was the Trust, and that she believed that that was, in fact, the case. Mercer's notes from discussions with Kidman in 2004 indicate that he believed the beneficiary of the IRA was the Trust, and Mercer testified that he believed that Kidman had told him that it was. (Appellant's App. 239). As it happens, the named beneficiary of the IRA at the time of Kidman's death was Stedman. This is consistent with that portion of the Will providing that, "I acknowledge that I have intended to transfer all my property to the ... Trust [and that i]f, after my death, any of my property is not held and owned by the Trustee, such an omission will have been unintentional or due to some practical difficulty in re-titling assets." Appellant's App. p. 23.

In the end, however firmly we may be convinced that Kidman intended the IRA to pass into the Trust, there is nothing in the Will or Trust that refers to the IRA or its intended disposition or provides any remedy for "omissions," and, as such, we may not alter the IRA's destiny. "However clearly an intention not expressed in the will may be proved by extrinsic evidence, the rule of law requiring wills to be in writing stands as an insuperable barrier against carrying the intention thus proved into execution." *Dougherty v. Rogers*, 119 Ind. 254, 257, 20 N.E. 779, 780 (1889).

Moreover, our decision is consistent with the proposition that a will should be construed so as to give effect to all of its provisions. “A will should be so construed as to give effect to all the language and provisions thereof, and, if possible, it must not be interpreted so as to render any part thereof superfluous, absurd or meaningless.” *Skinner v. Spann*, 175 Ind. 672, 684, 93 N.E. 1061, 1066 (1911)⁴; *see also Billings v. Deputy*, 85 Ind. App. 248, 253, 146 N.E. 219, 221 (1925) (“Where a will is open to two constructions, and one will give effect to the whole instrument, while the other will destroy a part, the former must be adopted.”). Quite simply, allowing the IRA to pass to Stedman tax-free would effectively render any gifts to the Charities meaningless, as all of the residuary of the Trust would be consumed by death taxes, and the Charities would receive nothing. (Appellant’s App. 133, 135).

Finally, our conclusion is consistent with the proposition that “a lawful general intent expressed in a will must be given effect at the expense of any particular intent.” *In re Estate of Grimm*, 705 N.E.2d 483, 495 (Ind. Ct. App. 1999) (citing *Fowler v. Duhme*, 143 Ind. 248, 259, 42 N.E. 623, 626 (1896)), *trans. denied*. We favor an interpretation of the Will that gives effect to Kidman’s general intent that several charities receive gifts at the expense of a possible specific intent that Stedman receive all of her cash gifts tax-free.

CONCLUSION

⁴ This quotation appears in the www.westlaw.com database and the Northeastern Reporter as “A will should be so construed as to give effect to all *of* the language and provisions thereof, and, if possible, it must not be interpreted so as to render any part thereof superfluous, absurd, *and* meaningless.” (Variances emphasized). This error is especially troublesome, as it suggests that no part of a will must be allowed to become superfluous, absurd, *and* meaningless, when in fact, it must not be allowed to become any one of the three.

While we conclude that Kidman intended to depart from the default of *pro rata* apportionment of death taxes, the record indicates a clear intent to do so only to the extent that individual beneficiaries of the Trust are to receive their cash gifts tax-free. As such, Stedman will receive one million dollars from the Trust tax-free as to her, but will be liable for death taxes on everything else she receives, including the IRA. Although not parties to this appeal, the other named beneficiaries of the Trust, namely Janice Minton, Roger Pollock, Mark Pollock, Richard Lyn, Dennis Lyn, D'Andre Leon Pollock, and the canines Buster and Rascal, are also to receive their cash gifts tax-free. The total death tax liability for Kidman's estate is to be apportioned to all other beneficiaries of the Trust and recipients of gifts outside the Trust (even if they also receive tax-free gifts under the Trust), whether passing through Kidman's estate or not, on a *pro rata* basis, if such liability exists.

Consequently, we order that the trial court enter partial summary judgment in favor of Stedman to the extent that such judgment ensures that she receive her \$1,000,000 gift from the Trust tax-free. We further order that the trial court ensure that the personal representative of Kidman's estate and Trustee of the Trust otherwise act in accordance with our interpretation of the Will and incorporated Trust. We reverse the summary judgment of the trial court in favor of the Charities and remand for proceedings consistent with this opinion.

BROWN, J., concurs.

CRONE, J., dissenting with opinion.

**IN THE
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IN THE MATTER OF THE)
UNSUPERVISED ESTATE OF)
HYACINTH CHIN SANG KIDMAN)

GLORIA STEDMAN,)

Appellant,)

vs.)

No. 55A05-0807-CV-401

BLUE RIVER FOUNDATION,)
AMERICAN RED CROSS, and)
SALVATION ARMY,)

Appellees.)

CRONE, Judge, dissenting.

I agree with the majority's conclusion that the Will incorporates the Trust. I respectfully disagree, however, with its conclusion that Article III of the Will irreconcilably conflicts with Section 6 of the Trust regarding the payment of death taxes. Therefore, I dissent.

Section 6 of the original Trust, which was executed in April 2000, reads in pertinent part as follows:

A. At my death, the trustee *may pay* (or advance funds to my estate to pay) all or part of my funeral expenses, unreimbursed expenses of last illness, enforceable debts, costs and fees, and all inheritance and estate taxes, if any (including any interest and penalties thereon), payable by reason of my death -- all without necessarily seeking reimbursement from my estate or any person.

....

F. *After* satisfying the specific distributions and establishing the separate trust funds required by Section 6 A-E, the Trustee shall then promptly distribute the residue to [X⁵].

Appellant's App. at 94, 96 (emphases added). Article III of the Will, which was executed in September 2000, reads in pertinent part as follows:

I direct my Executor to pay all taxes *as a general charge* against my residuary estate under Article II above. *This is consistent with* my direction, to the Successor Trustee of my Trust, that all transfer taxes with respect to property owned by any Trust of mine be paid out of the Trust Residue.

Id. at 24 (emphases added). Kidman executed subsequent amendments to the Trust that left the aforementioned portions of Section 6 substantially unchanged.

As I see it, Article III of the Will is entirely consistent with Section 6 of the Trust and does not conflict with it in any way. If anything, the Will more specifically expresses Kidman's intent to pay all death taxes without apportionment. "[S]pecific language generally controls that of a general nature." *Weishaar v. Burton*, 132 Ind. App. 597, 608, 179 N.E.2d 211, 216 (1962). I believe that the phrase "may pay" as used in Section 6 of the Trust grants the trustee the authority to pay death taxes on property passing under either the Trust or the Will without the necessity of apportionment. The testator specifically said that the two provisions are consistent, and this reading of the two documents is the only way to

⁵ The original Trust provided that the residue was to be distributed to the Chin Sang Kidman Family

harmoniously reconcile the two provisions. Consequently, I would reverse and remand with instructions to enter summary judgment in favor of Stedman.