COURT OF APPEALS
DECISION
DATED AND FILED

April 23, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2037 **Cir. Ct. No. 2013PR366**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE ESTATE OF ANN MCMAHON:

THOMAS L. CAMPBELL AND JOHN S. CAMPBELL,

APPELLANTS,

V.

HENRY M. CAMPBELL , PERSONAL REPRESENTATIVE,

RESPONDENT.

APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. This case concerns a dispute over how estate taxes are to be paid under the will of Ann McMahon. Under the will, Ann gave "one-half of [her] property" to her son Henry Campbell IV, and "the rest, residue

and remainder" of her property to her other three sons, William Campbell, Thomas Campbell, and John Campbell.[1] Henry and the three brothers filed cross motions for summary judgment as to the construction of the will with respect to the payment of estate taxes. The circuit court granted summary judgment to Henry, holding that under the will, the estate taxes are to be paid from the residue of the estate, *after* Henry's one-half share of the entire estate is computed and paid. Thomas and John appeal, arguing that the circuit court erroneously construed the will and that the estate taxes should be prorated among all four brothers. Whatever Ann's actual subjective intent, we agree with the circuit court that the plain language used in her will requires that we reject the brothers' arguments. We affirm the circuit court.

BACKGROUND

¶2 Ann moved from Michigan to Connecticut in 1998, and then to Wisconsin in 2006. She died in Wisconsin in 2013 and is survived by her four sons from her first marriage. Her will, executed in Connecticut in 2005, provides in relevant part:

> I, ANN M. McMAHON, of Essex, Connecticut, make this my last will and testament and hereby revoke all wills and codicils heretofore made by me.
>
> ARTICLE I. I give one-half of my property, both real and personal and wherever situated, to my son, HENRY M. CAMPBELL IV, per stirpes.

[1] Following the lead of the parties and the circuit court, we refer to the decedent and each of her sons individually by their first names. For ease of reading, we refer to the two brothers who are the appellants, Thomas and John, collectively as the brothers; and we refer to the beneficiaries of the residue of the estate, William, Thomas and John, collectively as the three brothers.

> ARTICLE II. I give the rest, residue and remainder of my property, both real and personal and wherever situated, to my sons, WILLIAM L. CAMPBELL, THOMAS L. CAMPBELL and JOHN SHERMAN CAMPELL, in equal shares per stirpes.
>
> ....
>
> ARTICLE IV. I direct that all estate, succession, inheritance and transfer taxes, together with any interest and penalties thereon, arising by reason of or assessed in any way in connection with my death, be paid out of my estate as an expense of administration, without proration.

¶3 Henry commenced this action as the personal representative of the estate by filing a petition for formal administration of the will. The three brothers responded by filing a petition for an order declaring that the will requires that "estate taxes ... be paid from the gross estate, before division and distribution to" Henry and the three brothers. The parties filed cross motions for summary judgment.

¶4 The circuit court first ruled that Connecticut law applies. The court then ruled that the language in the will is clear and not ambiguous, and that under its plain meaning, "it is clear that [Ann's intent] was that 50 percent of the gross estate be given to Henry Campbell. Then, after that happens, the rest, the residue and the remainder, are subject to all of the taxes mentioned in Article IV. And after the taxes are paid, then one third, one third, one third to the siblings."[2]

[2] If the circuit court meant to make a finding regarding Ann's actual subjective intent, such a finding was unnecessary. In the absence of ambiguity, wills are administered according to their language. *See* ***Bunting v. Bunting***, 760 A.2d 989, 993 (Conn. App. Ct. 2000) ("'A court ... may not stray beyond the four corners of the will where the terms of the will are clear and unambiguous.'" (cited source omitted)).

¶5 The circuit court entered an order granting Henry's summary judgment motion and denying the three brothers' summary judgment motion. The court determined that Ann's will "requires the payment of her ... taxes to be made from the residue of [her] estate such that Henry Campbell shall receive one-half of [Ann's] gross estate ... with no reduction for said ... taxes."

DISCUSSION

¶6 The issue is whether the taxes on Ann's estate should be paid from the residue, as the circuit court determined, or should be prorated among Henry and the three brothers, as the brothers argue. We begin with an overview of the legal principles pertinent to the apportionment of the payment of estate taxes. We then state the appropriate standard of review. With these principles in mind, we then turn to the provisions in Ann's will and, finally, address and reject the brothers' arguments on appeal that the three brothers are entitled to summary judgment.

¶7 But first, we consider the parties' dispute as to whether Connecticut or Wisconsin state law applies to the construction of Ann's will. We assume without deciding, as the brothers contend, that the circuit court correctly ruled that Connecticut law applies. Moreover, as we will explain, in the respect that matters here, Connecticut law and Wisconsin law are the same. With respect to how estate taxes are to be paid, they both provide that if a will's directions are clear, those directions are to be followed. And, for the reasons stated below, we conclude that Ann's will clearly and unambiguously directs that the estate taxes are not to be prorated, and that the brothers fail to show that the directive is ambiguous. Therefore, we are bound to follow that directive under either state's law.

Nevertheless, consistent with our assuming without deciding that Connecticut law applies, we proceed with our analysis based on Connecticut law.

I. Estate Tax Apportionment Law

¶8 We begin with the definition of "residue," as that term is used in Article II of Ann's will ("I give the rest, residue and remainder of my property" to the three brothers). As used in testamentary documents, the "residue" is that portion of the entire estate that remains "'after the payment of all obligations and after all other bequests and devises have been satisfied.'" Carolyn Burgess Featheringill, *Estate Tax Apportionment and Nonprobate Assets: Picking the Right Pocket*, 21 Cumb. L. Rev. 1, 9 n.30 (1990/91) (quoted source omitted); *see also* BLACK'S LAW DICTIONARY 666 (10th ed. 2014) (defining "residuary estate," "[a]lso termed ... 'residue,'" as "[t]he part of a decedent's estate remaining after payment of all debts, expenses, statutory claims, taxes, and testamentary gifts ... have been made"); ***Central Hanover Bank & Trust Co. v. Nisbet***, 186 A. 643, 646 (Conn. 1936) (the residue means "that portion of an estate that remains after the payment of debts, legacies, and administration charges").

¶9 At common law, the beneficiary of the residue was responsible for payment of the taxes on the entire estate. Featheringill, supra at 9 n.31. This common law "burden on the residue" rule is currently the law in Wisconsin. ***Id.*** at 8 n.29; *see also* ***Estate of Sheppard v. Schleis***, 2010 WI 32, ¶52, 324 Wis. 2d 41, 782 N.W.2d 85. In Connecticut, the legislature supplanted this common law rule by enacting legislation that presumes that the estate tax is prorated among all the beneficiaries so that each beneficiary bears a proportionate share of the tax. Featheringill, supra at 9 n.29; Conn. Gen. Stat. § 12-401(a).

¶10 Specifically, the Connecticut statute provides that the estate tax, "upon or with respect to any property required to be included in the gross estate of a decedent ... *except when a testator otherwise directs in his will* ... shall ... be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues." Conn. Gen. Stat. § 12-401(a) (emphasis added). As explained by the Connecticut courts:

> The proration statute was enacted ... in 1945. Prior to that time, the burden of federal and state estate taxes rested on the estate as a whole and, in the absence of a directive in the will to the contrary ... the taxes were paid out of the residuary estate…. [The statute] provides … that estate taxes … shall, in the absence of a directive in the will to the contrary, [be] equitably prorated among the beneficiaries in proportion to the values of their gifts .... Prior to the enactment of the proration statute, [the testator's] failure to speak on taxes imposed the burden of their payment upon the residuary estate, while, under the statute, such a failure requires the beneficiary of each gift to pay a proportionate share of the taxes.

New York Trust Co. v. Doubleday, 128 A.2d 192, 195 (Conn. 1956) (citations omitted); *see also* ***Mosher v. United States***, 390 F. Supp. 1041, 1042 (D. Conn. 1975).

¶11 As noted within the case law and statutory excerpts quoted above, the Connecticut statutory proration rule does not apply where the testator "otherwise directs." Conn. Gen. Stat. § 12-401(a); *see also* ***New York Trust Co.***, 128 A.2d at 195 (the proration statute applies "in the absence of a directive in the will to the contrary"); ***McLauglin v. Green***, 69 A.2d 289, 291 (Conn. 1949) (proration "'is the rule to which exception is allowed only if there be clear direction to the contrary'" (quoted source omitted)). We note that similarly, in Wisconsin, the burden-on-the-residue rule does not apply "[i]n the absence of a ... decedent's written directions." ***Estate of Sheppard***, 324 Wis. 2d 41, ¶52.

¶12 The question here is whether under the directives in Ann's will, the common law burden-on-the-residue rule, rather than Connecticut's statutory proration rule, applies to the payment of taxes on her estate. The answer matters because Henry receives more and the three brothers receive less under the burden-on-the-residue rule than with proration. If proration applies, then the estate taxes are apportioned one-half to Henry and one-half among the three brothers. In practice this means, as the brothers consistently state without dispute by Henry, that the estate taxes are paid from the entire estate *before* Henry's one-half bequest is computed and paid, so that Henry receives half of the after-tax balance that remains, the same amount as the three brothers together receive as the residue.

¶13 If proration does not apply, then all of the estate taxes are paid from the residue *after* Henry's one-half bequest is computed and paid, and before what remains of the residue is distributed to the three brothers. In other words, the parties agree that if proration does not apply, then one-half of the entire pre-tax estate is distributed to Henry and the taxes on the entire estate are paid from the one-half of the estate bequeathed to the three brothers as the residue. *See* ***Second Nat'l Bank of New Haven v. United States***, 351 F.2d 489, 492-93 (1965) (if there is no proration, the residue is what remains after it has been "diminished by" the estate tax).

¶14 To sum up so far, Wisconsin and Connecticut state law differ in their presumptions with respect to the payment of the estate tax, in that Wisconsin presumes the burden is on the residue whereas Connecticut presumes the burden is proportionally shared. But under both Wisconsin and Connecticut state law, the testator's directive as to the payment of estate taxes controls.

¶15 Returning to Connecticut law only, Connecticut courts make clear that the directive "must be clear and unambiguous." ***Bunting v. Bunting***, 760 A.2d 989, 996 (Conn. App. Ct. 2000); ***Crump v. Crump***, 140 A.2d 143, 144 (Conn. Super. Ct. 1957); ***Jerome v. Jerome***, 93 A.2d 139, 141 (Conn. 1952) ("The testator should have the right to provide in his will that the recipients of his bounty shall receive their bequests free from taxation. A testamentary directive against the prorating of taxes, as provided by statute, cannot, however, be spun out of vague and uncertain language. It must be clear and unambiguous ...." (citation omitted)); *see also* ***New York Trust Co.***, 128 A.2d at 195 ("[A] testamentary directive against the prorating of taxes must be clear and unambiguous, since the practical effect of such a directive is to increase the size of the gifts to some by shifting [to] others the burden of absorbing the tax. Proration, then, is the rule … to which exception is possible only if the testator clearly indicates otherwise." (citations omitted)); ***Mosher***, 390 F. Supp. at 1043 ("Connecticut courts have consistently held that proration is the rule unless the decedent by clear and unambiguous language in the will indicates otherwise.").

¶16 We now turn to the parties' central dispute: whether the language in Ann's will clearly and unambiguously directs that the estate taxes are to be paid from the residue without proration. We begin with the applicable standard of review, followed by a de novo examination of Ann's will under Connecticut law.

II. Standard of Review

¶17 The construction of a will is a question of law that we review de novo. ***Bunting***, 760 A.2d at 994. "The controlling consideration in the construction of wills is the expressed intention of the testator…. [T]o determine this intent, we examine the language of the entire will in the light of the

circumstances which surrounded the testator at the time [the testator] executed it, the real question being, not what did the testator mean to say, but what [the testator] did mean by what [the testator] said." ***Crump***, 140 A.2d at 144. "'A court ... may not stray beyond the four corners of the will where the terms of the will are clear and unambiguous.'" ***Bunting***, 760 A.2d at 993 (cited source omitted).

III. The Will's Directive Against Proration

¶18 The brothers argue that the estate taxes must be prorated among the beneficiaries, as is presumed under Connecticut law, because Ann's will does not clearly and unambiguously direct against proration. We conclude that under Connecticut law, Article IV of the will is a clear and unambiguous expression that taxes not be prorated, and therefore, the brothers are not entitled to summary judgment. *See* ***Bunting***, 760 A.2d at 996.

¶19 In ***Bunting***, the disputed will directed that estate taxes "'arising by reason of or in any way in connection with my death, be paid out of my estate as an expense of administration thereof, *without apportionment or contribution*.'" 760 A.2d at 992 (emphasis added). The court held that this language was "sufficient to satisfy the requirements of the statute that there be an unambiguous expression of an intent that taxes not be apportioned or prorated." ***Id.*** at 996.

¶20 Article IV of Ann's will similarly directs: "all estate, succession, inheritance and transfer taxes ... arising by reason of or assessed in any way in connection with my death, be paid out of my estate as an expense of administration, *without proration*." (Emphasis added.)

¶21 Thus, as in ***Bunting***, the phrase "without proration" here is a sufficiently clear and unambiguous directive that the estate taxes should not be apportioned among the beneficiaries and are to be paid only out of the residue. *See* ***id.*** at 993; *see also* ***Cornell v. Cornell***, 334 A.2d 888, 890 n.5, 893 (Conn. 1973) (concluding that a broad will direction stating that taxes "be paid out of my residuary estate as an expense of the settlement of my estate" sufficiently demonstrated testator's intent to not prorate taxes). Indeed, the brothers concede in their reply brief that the phrase "without proration" can be "sufficient to overcome the [Connecticut] statutory presumption" of proration. Thus, we conclude that Article IV clearly and unambiguously expresses an intent not to prorate the estate taxes among the beneficiaries.[3]

IV. Alleged Ambiguities Elsewhere in the Will

¶22 Despite their concession above, the brothers argue that the will, with respect to the treatment of the estate taxes, is ambiguous for three reasons: (1) the phrase "without proration" is ambiguous on its face because it does not indicate the object of the directive and is "likely" directed at different types of assets rather than beneficiaries; (2) the phrase "without proration" is ambiguous because the terms "property" and "estate" are not sufficiently specific; and (3) an earlier will executed by Ann demonstrates that the will at issue is ambiguous. We address and reject each of these arguments below.

[3] The brothers also argue that the circuit court erred because it "did not consider or apply Connecticut's fractional bequest rule." This argument is no more than a reformulation of their argument that the estate taxes should be prorated among the beneficiaries. For the same reasons that we conclude that Ann's will contains a clear and unambiguous direction against proration, we reject the brothers' reformulated argument referencing the "fractional bequest rule."

A. "Without Proration" is Ambiguous on its Face

¶23 We understand the brothers to argue that the phrase "without proration" is ambiguous on its face, because it does not identify the object of the directive against prorating estate taxes. The brothers contend that "'without proration' likely means that the estate taxes created by the receipt of non-estate (non-probate) assets are not to be apportioned or 'prorated' against estate assets."

¶24 We conclude that this argument is without merit because the brothers fail to identify any non-probate assets to which the phrase "without proration" could refer. The brothers' construction of "without proration" is illogical where there are no non-probate assets at issue.

¶25 Moreover, even if there were non-probate assets at issue, the brothers fail to explain how the presence of non-probate assets would preclude the interpretation, consistent with the case law cited in the preceding section, that "without proration" is directed at different beneficiaries. Indeed, if non-probate assets were present, the question would be whether the directive *also* applies to the non-probate assets. *Cf.* ***Bunting***, 760 A.2d at 993-97 (holding that the words "without apportionment or contribution" are clear and unambiguous, but identifying the issue as whether the directive to not prorate applied to a prior inter vivos gift that was part of the estate); ***Crump***, 140 A.2d at 144 (holding that the clear and unambiguous direction against proration of taxes was not effective as to estate taxes attributable to property passing outside of will); ***Morgan Guaranty Trust Company of New York v. Huntington***, 179 A.2d 604, 607-08 (Conn. 1962) (holding that the non-proration directive did not apply to taxes attributable to nontestamentary property such as inter vivos trusts); ***McLaughlin v. Green***, 69 A.2d 289, 290-91 (Conn. 1949) (holding that the directive that estate taxes be paid

from residue but which "makes no mention of" inter vivos trusts, was ambiguous as to the trusts, and, therefore, the statutory mandate of proration applied).

B. Use of the Terms "Property" and "Estate" Renders the Will Ambiguous

¶26 The brothers argue that the will is ambiguous as to its "direction for payment of estate taxes" because the will's use of the term "property" in Article I and the term "estate" in Article IV is not sufficiently specific. In so arguing, the brothers make the mistake that they warned this court against—they read the individual terms of the will in a vacuum. As explained below, we reject the brothers' attempts to find isolated ambiguities and to then extend such ambiguities to Article IV's clear and unambiguous directive against proration.

¶27 First, the brothers argue that the term "property" in Article I ("I give one-half of my property" to Henry) does not specify whether "property" refers to Ann's property before or after the estate taxes are subtracted from it. The brothers argue that because either interpretation is reasonable, the will is ambiguous with respect to proration and the statutory proration rule controls. However, the brothers point to no language in the will that supports their interpretation of the term "property" as meaning the property that remains after estate taxes are subtracted. Rather, other language in the will is plainly to the contrary. *See* ***Crump***, 140 A.2d at 144 (to determine the testator's intent, "we examine the language of the entire will").

¶28 As we concluded above, the phrase "without proration" clearly and unambiguously expresses an intent not to prorate the estate taxes among all of the beneficiaries. Thus, while "property," read in isolation might be ambiguous as to whether it means pre-tax or post-tax property, it is not ambiguous when read with the "without proration" directive in Article IV. When read in context, "property"

in Article I necessarily means pre-tax property, because only such an interpretation would be consistent with the directive in Article IV against proration.

¶29 We pause to address the brothers' citation to ***Cornell***, 334 A.2d 888, which we conclude does not support the brothers' argument that there is more than one reasonable interpretation of the term "property" in Article I. In ***Cornell***, article first of the will created a testamentary trust comprising "'one-third in value of all of my estate,'" with the surviving spouse being a life beneficiary. In the articles that followed, the will made additional bequests and directed that all estate taxes on the gifts in article second through article sixth be paid out of the "'residuary estate as an expense of the settlement of my estate.'" ***Id.*** at 890. The court ruled that the tax directive was "sufficient direction against the proration of taxes which are to be charged against the residuary estate" with respect to the bequests made in the specified articles. ***Id.*** at 893-94. But because the tax directive did not specifically include the bequest made in article first, and the rest of the will still did not clarify whether the bequest in article first was pre- or post-tax, the court found the intent with respect to the bequest in article first ambiguous and resorted to extrinsic evidence to determine the testator's intent. ***Id.*** at 891. The situation here is distinguishable from ***Cornell*** because the tax directive in Article IV of Ann's will does not limit its application to only certain articles of the will. The brothers identify no limitation such as that in ***Cornell*** to show that Ann intended the term "property," as used in Article I, to contravene the directive "without proration" in Article IV.

¶30 Second, the brothers argue that the will is ambiguous as to the source from which the estate taxes are to be paid, because the will's use of the term "estate" in Article IV is unclear whether it means the estate before or after the bequest to Henry is made. As stated above, Article IV reads in pertinent part:

> I direct that all estate, succession, inheritance and transfer taxes ... arising by reason of or assessed in any way in connection with my death, be paid out of my *estate* as an expense of administration, *without proration*.

(Emphasis added.) However, the brothers again ignore the clarifying language found in Ann's will.

¶31 As with the brothers' argument above regarding the term "property," the brothers' asserted interpretation of "estate" in Article IV directly contravenes the language in the same sentence of Article IV that provides that the taxes are to be paid "without proration." While the term "estate," read in isolation, could be ambiguous as to whether it means the estate before or after the bequest to Henry is paid, it is not ambiguous when read alongside the "without proration" directive in Article IV. Here, "estate" necessarily means the estate after the bequest to Henry, because only such an interpretation would be consistent with the "without proration" directive in the same sentence.

¶32 In sum, the brothers' alternative interpretations of the terms "property," as used in Article I, and "estate," as used in Article IV, are not reasonable because they contravene the clear and unambiguous directive that the taxes are to be paid "without proration."

C. Reference to Earlier Will

¶33 The brothers argue that the will is ambiguous as to how estate taxes are to be paid by comparing language in the will at issue here to language in an earlier will executed by Ann. However, while a court may resort to extrinsic evidence to explain ambiguous language, ***Cornell***, 334 A.2d at 891 ("A court may properly admit extrinsic evidence as an aid in ... 'explaining any language whose meaning the testator has left uncertain'" (quoted source omitted)), a court may not

use extrinsic evidence to create ambiguity; the ambiguity must exist in the language of the will itself. ***Corcoran v. Department of Soc. Servs.***, 859 A.2d 533, 548 (Conn. 2004). Courts "'may not stray beyond the four corners of the will where the terms of the will are clear and unambiguous.'" ***Bunting***, 760 A.2d at 993 (quoted source omitted). So, here, the brothers' resort to an earlier will to show that the will before us is ambiguous fails.

CONCLUSION

¶34 For the reasons stated, we conclude that the brothers fail to show that they are entitled to summary judgment on the issue whether, under Ann's will, the estate taxes should be paid from the residue of the estate or should be prorated among all beneficiaries in the will. Therefore, we affirm.

By the Court.—Order affirmed.

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