STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of the NORMAN A. DUKE TRUST.

UNPUBLISHED
December 20, 1996

MICHELE DUKE, DORIAN DUKE and DARRYL DUKE,

Appellants,

v

No. 187608
LC No. 94-237082

KAREN BONOMO DUKE,

Appellee.

Before: Taylor, P.J., and Markman and P. J. Clulo,* JJ.

PER CURIAM.

Appellants, the adult children of the late Norman A. Duke, testator, appeal as of right a probate court order holding that a marital trust established for appellee should be funded with fifty percent of the trust's assets without reduction for debts, administration expenses, and death taxes, and that decedent's will did not avoid the application of Michigan's Estate Tax Apportionment Act, MCL 720.11 *et seq.*; MSA 27.3178(167.101) *et seq.* We affirm.

The testator and appellee executed an antenuptial agreement on July 30, 1986. Among the terms of the agreement were the testator's promise that, after his death, appellee would be the lifetime income beneficiary of a trust funded by one-half of the decedent's assets at the time of his death reduced by the final expenses of his estate and all estate and death taxes. On March 17, 1988, the testator executed a revocable inter vivos trust and a will. The trust "adopted by reference" the antenuptial agreement, included a provision for paying estate taxes and other final expenses from the trust's principal, and separately provided for appellee to receive the income from 70% of the trust estate reduced by certain inter vivos transfers to her. The trust's residue was to be divided among the three appellants. Upon appellee's death, the spousal trust would terminate and its assets would be distributed

* Circuit judge, sitting on the Court of Appeals by assignment.

among the appellants or their issue. The testator amended the trust document three times. Although appellee's portion was reduced to fifty percent, a provision was added allowing the trustee to use any of the principal of the spousal trust if its income was insufficient for appellee's health, welfare, maintenance, or comfort. The testator also established a separate $200,000 trust for the care of his father.

The testator's will also specifically adopted by reference the antenuptial agreement but did not expressly incorporate the trust. The will directed that all administrative expenses and estate taxes be paid from the probate estate. It expressly stated that, other than certain specific bequests, the testator did not make any provisions for his wife "because of the terms of the antenuptial agreement, and because concurrently herewith I am executing an agreement of trust naming my spouse as beneficiary."

After the testator's death, the trustee, NBD Bank, petitioned the probate court, noting that the probate estate had assets of approximately $70,000 but the estate taxes would probably exceed $900,000, and requested a determination of the proper formula for funding the marital trust and whether the will directed against apportionment of estate taxes. The probate court concluded that the marital trust should be funded with fifty percent of the trust assets without any reduction for debts, administration expenses, or death taxes. The court further found that the testator's will did not avoid Michigan's apportionment statutes, and the estate taxes should be apportioned so that "each beneficiary is responsible for taxes on his or her own share."

Appellants contend that the probate court erred in ruling that the marital trust should be funded before expenses and taxes had been paid. They state that the testator had expressed his intent that all beneficiaries should share in the burden of estate taxes in the antenuptial agreement and trust agreement and to his attorney who had prepared all three documents. Appellants offer two alternatives on how this intent might be carried out. First they argue that the antenuptial agreement and trust document control the payment of estate taxes, and that both establish that the estate taxes should be paid from the trust principal before establishing the marital trust. Alternatively, appellants argue that testator's testamentary documents avoid the application of the state's apportionment statutes. The parties agree that if the statutes apply to determine the apportionment of taxes, the portion of the estate passing to appellee as the surviving spouse receives a spousal exemption, and no tax is apportioned to that part of the estate. If the statute is avoided, all beneficiaries will share in the estate taxes, according to the proportion of the estate received.

According to appellants, the antenuptial agreement sets and limits the portion of the estate appellee can take and should determine the outcome of this controversy. As support for their argument, they cite *Gionfriddo v Palatrone*, 26 Ohio Op 2d 158, 196 NE2d 162 (1964), in which a will referred to an antenuptial agreement. The probate court stated that it was of no importance whether the agreement was incorporated by reference "for even if not incorporated it is referred to in the Will and may be considered in construing the Will." *Id.* at 166.

Appellee argues that the antenuptial agreement was a contract that set a minimum death benefit the testator was required to provide to her if they were married at the time of his death and that he was free to dispose of the remainder of his estate in any way that he chose, including leaving her a larger

amount. We agree with appellee's position. Authority cited by appellant suggests this conclusion as well. In *Gionfriddo,* the court also found that the antenuptial agreement merely served to establish minimal gifts and to deprive the parties of their legal rights in the estates of their spouse. However, the agreement left each party free to dispose of his or her own property, including the right to leave more to the other spouse in his or her will than the antenuptial agreement required. *Id.* at 166-167.

Appellants further contend that, because the trust provision establishing that taxes and other expenses be paid from the trust principal precedes the provision establishing the marital trust, the testator intended that those expenses be paid first. The probate court did not accept this interpretation, and neither do we. The testator demonstrated his ability to clearly express his intent that taxes first be paid in the antenuptial agreement. He did not do so here.

The appellants also offer the affidavit of the testator's attorney, who drafted all three documents, which states that the testator intended to tax each beneficiary according to the percentage of the estate received. However, the apportionment statutes control the portion of estate taxes paid by beneficiaries unless the testator clearly expresses a contrary intent in his will. *In the Matter of the Estate of Roe,* 169 Mich App 733, 739; 426 NW2d 797 (1988). While a court will attempt to carry out the intent of the testator as nearly as possible, that intent "is to be gleaned from the will itself unless an ambiguity is present. The law is loath to supplement the language of such documents with extrinsic information." *In the Matter of the Maloney Trust,* 423 Mich 632, 639; 377 NW2d 791 (1985). Although the provision in the testator's will providing that all estate taxes should be paid from his probate estate cannot be followed because there are not sufficient probate assets, the will is not ambiguous. "Testimony of the scrivener of a mistake in drafting a will or of an intention of testator different from that expressed in the will is not admissible, in the absence of ambiguity or mistake appearing upon the face of the will." *Burke v Central Trust Co,* 258 Mich 588, 592; 242 NW 760 (1932).

Appellants next argue that the probate court erred in ruling that the testator's will does not avoid the Michigan Estate Tax Apportionment Act. Two published Michigan cases have construed this act. In the first, *Detroit Bank & Trust Co v Grunewald,* 26 Mich App 495; 182 NW2d 628 (1970), the trustee of an irrevocable inter vivos trust petitioned the circuit court to determine its obligation to pay federal or state estate taxes from trust funds. This Court held that under the apportionment statutes, "the right to alter or omit apportionment may be exercised by will only. [W]here the directive clause of a trust conflicts with the unambiguous language of a will, the language of the will controls and payment of taxes should be made in accordance with the will." *Id.* at 499.

In the second case, *In the Matter of the Estate of Roe, supra,* the personal representative of the estate petitioned the probate court to determine whether estate taxes should be apportioned according to Michigan's apportionment statute or whether the residue of decedent's trust should pay the taxes. The probate court determined that the estate taxes should be apportioned, because the decedent stated specifically that she was not providing for payment of taxes in her will and was ambiguous about her intent to incorporate by reference her trust. On appeal, the petitioner argued that the intent of the testator that estate taxes be paid out of the trust residue should prevail over application of the apportionment statute. This Court noted that the construction urged by the petitioner was "not

consistent with the law. The law in Michigan provides that 'unless the will provides otherwise' taxes are to be apportioned. . . . [The] right to alter or omit apportionment may be exercised by will only." *Id.* at 738-739. There is a strong policy in favor of apportionment and the burden of proof rests with those arguing against it. *Id.* Although "the will states that the decedent has provided for the payment of estate taxes, the will does not inform how. The will does not 'otherwise provide.' The will does not 'provide' nor does it 'direct a method.'. . . Appellant has failed to carry its burden against apportionment." *Id.*

We find that the probate court did not err in holding that testator's will did not avoid the application of the statute. Whether testator specifically incorporated the trust into his will is not relevant because the trust language also is insufficient to avoid apportionment. To direct against apportionment, "the words, or combination of words, used in the will [must] sufficiently indicate an intention against apportionment. In cases of doubt the burden of the taxes must be left where the law places it." *In re Ogburn's Estate*, 406 P2d 655, 658 (Wyo, 1965). A clause sufficient to avoid apportionment should expressly state "(1) what gifts or beneficiaries are freed of the burden of taxes, (2) what taxes are affected, and (3) where the burden of taxes is shifted." *Id.*[1] Neither the testator's will or his trust meets these criteria, therefore application of the apportionment statutes was not avoided.[2]

Finally, appellants' claim that they are entitled to an evidentiary hearing on the meaning of the testamentary documents. We disagree. The probate court determined that the case could be tried on the basis of briefs and oral arguments because it presented only legal questions. Appellants did not object to this decision below and will not be heard to protest now. See *Living Alternatives v DMH*, 207 Mich App 482, 484; 525 NW2d 466 (1994).

Affirmed.

/s/ Clifford W. Taylor
/s/ Stephen J. Markman
/s/ Paul J. Clulo

[1] Moreover, appellee's portion of the estate is not subject to federal estate taxes, pursuant to IRC 2056(a), which allows a taxable estate to be reduced by the value of any interest in property passing to the surviving spouse.

[2] Appellee also correctly notes that, under the state apportionment statute, the marital trust is not subject to estate or inheritance taxes. This Court discussed the legislative intent in enacting apportionment statutes in *In re Roe Estate, supra* at 738: "The aim of an apportionment statute is to promote the presumed intent of most testators by enacting a 'burden on the recipient' rule as opposed to a burden on the residue, in order to ensure an equitable allocation of the burden of the tax among those actually affected by that burden." Thus, the apportionment statute specifically provides for allowances for any exemptions granted, such as for spouses. Moreover, the "exemption or deduction allowed by reason of

the relationship of any person to the decedent. . . shall inure to the benefit of the person bearing such relationship. . . ." MCL 720.15(b); MSA 27.3178(167.105)(b).