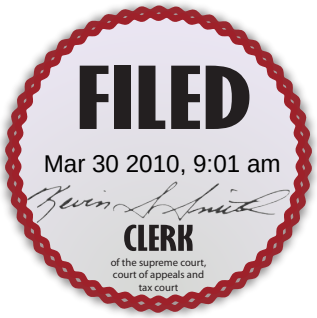

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IN THE
COURT OF APPEALS OF INDIANA

THE ESTATE OF BRIAN R. THORNHILL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A04-0908-CV-489
	)	
DALE BLOOM Personal Representative	)	
of the Estate of Amie Thornhill, and	)	
CHRISTINE THORNHILL,	)	
	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Phillip E. Houk, Judge
Cause No. 02D01-0902-PL-41

March 30, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

The Estate of Brian Thornhill ("Brian's Estate") appeals the Allen Superior Court's entry of summary judgment in favor of Dale Bloom, in his capacity as the personal representative of Amie Thornhill's Estate, and Christine Thornhill (collectively "the Appellees"). Brian's Estate raises several arguments, which we consolidate and restate as:

> I. Whether the trial court correctly concluded that Brian's Estate is responsible for its apportioned share of taxes resulting from the probate of Norma Thornhill's estate;
>
> II. Whether the Appellees's claims against Brian's Estate are barred on the grounds of claim preclusion; and,
>
> III. Whether genuine issues of material fact concerning the amount of taxes apportioned to Brian's Estate preclude the entry of summary judgment.

Concluding that the trial court properly entered summary judgment in favor of the Appellees, we affirm.

Facts and Procedural History

Norma Thornhill and Robert Thornhill had three children: Amie, Christine, and Brian. Robert predeceased Norma and died in 1996. Norma died in 2002, and her will was admitted to probate on August 1, 2003. On the same date she executed her will, Norma also executed a trust agreement. Under the terms of the trust agreement, Amie and Christine each received forty percent of the residue of the trust and Brian received the remaining twenty percent.

Amie served as the personal representative of Norma's estate until her death in 2007. A. Dale Bloom ("Bloom") is the personal representative of Amie's estate. Christine was appointed as the successor personal representative of Norma's estate and

was named the trustee of Brian's share of Norma's trust. In 2003, the trust had assets totaling approximately $3.25 million. A significant percentage of those assets is a 99.7 percent interest in the Thornhill Family Limited Partnership.

On April 8, 2004, Amie filed a federal estate tax return and Indiana inheritance tax return for Norma's estate. The net taxable estate on both tax returns was over $4.9 million. Ultimately, the total federal estate tax paid was $2,091,274, and the total Indiana Inheritance tax paid was $299,574.68. Norma's gross estate lacked the wherewithal to pay the federal and state tax liability. The taxes were therefore paid with trust assets, and specifically, the Thornhill Family Limited Partnership obtained a loan to pay the taxes. The loan was personally guaranteed by Aime and Christine.

On December 21, 2007, Christine filed the closing statement for Norma's estate. The statement indicated that all state and federal taxes had been paid. Brian Thornhill died testate on November 8, 2008. Wells Fargo Bank, N.A. was appointed as the Estate's personal representative. On January 27, 2009, Bloom, as the personal representative of Amie's estate, filed a claim in Brian's Estate in the amount of $114,108.19 seeking contribution for the payment of the federal estate and Indiana inheritance taxes. Christine also filed a separate claim for the same amount. Wells Fargo disallowed the claims, and the claims were consolidated and set over for trial.

Wells Fargo filed a motion for summary judgment on March 18, 2009. A hearing was held on June 22, 2009. On August 3, 2009, the trial court issued an order entering summary judgment in favor of Appellees Bloom and Christine, and entered a judgment

against Brian's Estate in the amount of $49,856.73. The trial court concluded in pertinent part:

> 1. [Brian's Estate] has argued that this action is barred by the doctrine of res judicata and various statutory authorities. [Brian's Estate's] argument however presumes that when a third party pays the inheritance taxes, that a contribution action must be brought by that party in the estate proceeding. The Court does not find any authority which would limit a third party's contribution action to an action brought in the estate.
> 2. The requirements of IC 29-1-7.5-4(a)(3) are not dispositive as to the issues presented, because at the time the Closing Statement was filed, the estate taxes had in fact been paid (albeit by a third party) and the right of contribution against Brian Thornhill was not a liability of the Estate of Norma G. Thornhill, rather it is a debt of Brian Thornhill.
> 3. Similarly, IC 29-1-7.5-7, which is a statute of repose as to claims in an estate, is not applicable. This is because the right of contribution against Brian Thornhill was not a liability of the estate of Norma Thornhill. Therefore, IC 29-1-7.5-7 does not bar the present action.
> 4. The assets of the Norma Thornhill estate were not sufficient to pay the full tax liability. While the assets of Norma Thornhill Trust may have been utilized to pay the tax liability of the estate, the express language of the trust document does not make such payment mandatory. (The Trustee "*may*, in the Trustee's discretion pay, out of the Trust, the debts of the Grantor, the estate and inheritance taxes". Evidence, p. 73 emphasis added.)

Appellant's App. pp. 6-7. Brian's Estate now appeals and additional facts will be provided as necessary.

Standard of Review

The purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law. Bushong v. Williamson, 790 N.E.2d 467 (Ind. 2003). On appeal, our standard of review is the same as that of the trial court. Summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to

judgment as a matter of law. Olds v. Noel, 857 N.E.2d 1041 (Ind. Ct. App. 2006). "All inferences from the designated evidence are drawn in favor of the nonmoving party." Hartman v. Keri, 883 N.E.2d 774, 777 (Ind. 2008).

I. Apportionment of Taxes to Norma's Heirs

Brian's Estate argues that the trial court erred when it concluded that the tax liability of Norma's estate should be apportioned among the beneficiaries of her estate and trust. The parties agree that there are no genuine issues of material fact concerning this issue, and therefore, we review the trial court's judgment de novo.

As the parties note in their briefs, there is a presumption of apportionment of Indiana Inheritance Taxes, but the presumption may be rebutted by will or trust. In re Estate of Meyer, 702 N.E.2d 1078, 1080 (Ind. Ct. App. 1998), trans. denied. Similarly, Indiana Code section 29-2-12-2 provides for equitable apportionment of Federal Estate Taxes.[1]

> *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 . . . .

Ind. Code § 29-2-12-2 (emphasis added).

Brian's Estate argues that Norma's will "unambiguously directs that transfer taxes are not to be apportioned." Appellant's Br. at 10. Norma's will was a "pour over" will, which specifically referred to the trust. Brian's Estate therefore asserts that the

[1] For apportionment purposes, the term "will" includes "a trust or other instrument governing the distribution of assets following an individual's death." See Ind. Code § 29-2-12-1.5 (1994).

documents "should be read together as a statement of Norma's intent. Read together, the Will and Trust unambiguously provide that transfer taxes in Norma's estate are not to be apportioned among the beneficiaries." Id. at 12. Brian's Estate argues that the provisions of the will and trust are not conflicting and "when read in context with the Will, the terms of the Trust should be considered a clause which gives the trustee discretion to facilitate the payment of taxes." Id. at 13.

We agree with Brian's Estate that the following language from Norma's will contains language rebutting the presumption of apportionment.

> All inheritance, estate or succession taxes, including interest and penalties, payable by reason of my death, shall be paid out of and be charged generally against the principal of my residuary estate *without reimbursement from any person*.

Appellant's App. p. 164 (emphasis added).

Norma's trust, executed on the same date as the will, does not contain any provision concerning the apportionment of taxes. However, the trust does grant the trustee discretion to pay the taxes out of the trust assets.

> On the death of the Grantor, the Trustee may, in the Trustee's discretion, pay, out of the trust, the debts of the Grantor, the estate and inheritance Taxes, including interest and penalties, arising because of the Grantor's death . . . . The Trustee may pay any such taxes directly or, alternatively, in the sole discretion of the Trustee, distribute such sums to the Personal Representative as shall be necessary to pay all or any portion of such taxes.

Appellant's App. p. 171.

The Appellees argue that Norma's will and trust contain conflicting provisions, but that "Norma's Will clearly provides that, in the administration and disposition of Trust assets, the terms of the Trust controls." Appellees' Br. at 7. Norma's will states:

> I will, devise and bequeath the balance of my residuary estate, being all real and personal property, wherever situated, in which I may have any interest at the time of my death, not otherwise effectively disposed of to the Successor Trustee pursuant to the terms of that certain trust agreement designated as The Norma G. Thornhill Revocable Trust, signed earlier simultaneous herewith and bearing the same date as this Will of which I am the Grantor and the Trustee. Said assets, if any, are to be combined with other assets of the Trust which are being held and administered as part thereof and to be distributed as a part of that trust, according to the terms thereof and any amendments made to said Trust prior to my death.

Appellant's App. p. 165. Relying on that provision of Norma's will, and the lack of a provision rebutting apportionment in Norma's trust, the Appellees claim that Brian's Estate "is responsible for payment of his ratable share of Death Taxes relating to property he received from the gross taxable estate, less a credit for the net proceeds of Norma's residuary probate estate." Id.

We agree with the Appellees that there is a conflict between Norma's will and trust because the will contains a provision that rebuts the presumption of apportionment, but the trust does not.

> The interpretation, construction, or legal effect of a will is a question to be determined by the court as a matter of law. In construing the language of a will, our primary focus is upon the intent of the testator. We look to the four corners of the will and the language used in the instrument in determining the testator's intent. Also, the will in all its parts must be considered together. When construing the language of a will, the court should strive to give effect to every provision, clause, term, or word if possible.

Carlson v. Sweeney et al., 895 N.E.2d 1191, 1197 (Ind. 2008) (internal citations omitted); see also Univ. of S. Ind. Found. v. Baker, 843 N.E.2d 528, 532 (Ind. 2006) (stating that our primary purpose in construing a trust instrument is to ascertain and give effect to the settlor's intent). "'[A] general intent in a will is to be carried into effect at the expense of

any particular intent,' and . . . 'when there are conflicting intents, that which is the most important must prevail.'" Carlson, 895 N.E.2d at 1197 (citations omitted).

Norma executed a "pour over" will, and once the residuary estate "poured over" into The Norma G. Thornhill Revocable Trust, the terms of Norma's will were satisfied. For this reason, and under the plain language of Norma's will quoted above concerning the administration and disposition of trust assets, we agree with the Appellees that Norma intended that the terms of the trust control. Because the trust does not contain any provision rebutting the presumption of apportionment of taxes, we conclude that the trial court correctly determined that the Federal Estate taxes and Indiana Inheritance taxes should be apportioned. See I.C. § 29-1-12-1; In re Estate of Meyer, 702 N.E.2d at 1080.

Brian's Estate also argues that "Amie, as personal representative and trustee, disregarded Norma's Will. No portion of the probate estate was used to pay the tax." Appellant's Br. at 15. However, whether there were assets available in the estate to pay a portion of the estate and inheritance taxes is not relevant to the issue of whether the rebuttable presumption of apportionment applies. Moreover, Brian's Estate concedes that Amie, as the trustee and personal representative, acted within the discretion granted by Norma's will and trust documents, when she took "into consideration the assets of the Trust and estate, and [paid] the transfer taxes from the Trust so that the personal representative would not be required to liquidate items such as jewelry to pay the taxes." Appellant's Br. at 14.

II. Claim Preclusion

Next, Brian's Estate argues that the Appellees' claims are barred under the doctrine of claim preclusion. Brian's Estate asserts that any claim for contribution of taxes should have been brought in Norma's Estate and specifically contends that "when Christine filed her Closing Statement and did not address or identify the alleged claim against Brian for contribution she prevented Brian from addressing the issue within the context of his mother's estate." Appellant's Br. at 21 ("[W]hen a beneficiary receives a closing statement from a personal representative, that beneficiary should be able to consider that pleading to be a comprehensive and accurate rendering of the status of the estate administration."). The Appellees argue that this argument finds no support in Indiana law and that the right of contribution against Brian's Estate was not a liability of Norma or her Estate. We agree.

The doctrine of res judicata operates to preclude the litigation of matters that have already been litigated. In re Adoption of Baby W., 796 N.E.2d 364 (Ind. Ct. App. 2003), trans. denied. The principle of res judicata is divided into two branches: claim preclusion and issue preclusion. Id. "Claim preclusion is applicable when a final judgment on the merits has been rendered and acts to bar a subsequent action on the same claim between the same parties." Perry v. Gulf Stream Coach, Inc., 871 N.E.2d 1038, 1048 (Ind. Ct. App. 2007). When a party argues that claim preclusion applies, four factors must be present: "(1) the former judgment was rendered by a court of competent jurisdiction; (2) the former judgment was rendered on the merits; (3) the matter now at issue was, or

could have been, determined in the prior action; and (4) the controversy adjudicated in the former action was between parties to the present suit or their privies." Id.

Indiana Code section 29-2-12-3 provides that the "personal representative of decedent's estate or the person paying the federal estate tax imposed upon said estate . . . shall be entitled to recover such tax so paid proportionately from each . . . beneficiary[.]" See also Cook v. Cook, 92 Ind. 398 (1884) ("Where one of several heirs pays the debt of his ancestor, he has a right in equity to contribution from his co-heirs. Where one of two residuary legatees incurs an expense in protecting the joint interest, and his act is beneficial to both, justice requires that he should be reimbursed by his co-legatee to the extent of the expense incurred on his account.") (citation omitted).

Failing to acknowledge section 29-2-12-3, Brian's Estate cites to statutes that require payment of estate and inheritance taxes by the personal representative from the assets of the estate. See Reply Br. at 8 (citing Ind. Code § 29-2-12-6). Indiana Code section 29-2-12-6 does require the personal representative to "deduct the amount of federal estate tax apportioned to each heir or beneficiary, if such personal representative is in possession of sufficient property distributable to such heir or beneficiary . . . ." But, the parties agree that the assets of Norma's estate were insufficient to pay the federal estate and Indiana inheritance taxes. We are therefore not persuaded by Brian's Estate's argument that Amie and Christine, who served as Norma's personal representatives, had an obligation to withhold Brian's share of the apportioned tax from the assets of Norma's estate.

Brian's Estate also contends that Amie and Christine should have addressed the issue for contribution for the payment of taxes in the Closing Statement of Norma's estate. Indiana Code section 29-1-7.5-4 provides that a personal representative may close an estate by filing a verified statement stating that he or she has

> [f]ully administered the estate of the decedent by making payment, settlement, or other disposition of all claims which were presented, expenses of administration and estate, inheritance, and other death taxes, except as specified in the statement. If any claims remain undischarged, the statement shall:
>
> (A) state whether the personal representative has distributed the estate, subject to possible liability, with the agreement of the distributees; or
>
> (B) detail other arrangements which have been made to accommodate outstanding liabilities.

Contrary to Brian's Estate's argument, under section 29-1-7.5-4, the personal representative for Norma's estate was not required to resolve the Thornhill Family Partnership's and/or Norma's trust's claim for contribution of taxes against Brian and/or his estate before filing the closing statement for Norma's estate. The personal representative did what she was required to do by paying the federal estate and Indiana inheritance taxes. Norma's estate did not have sufficient assets to pay the taxes, and therefore, those taxes were paid from trust assets, namely the Thornhill Family Partnership. Consequently, the claim of contribution rests not with Norma's estate, but with Norma's trust and/or the Thornhill Family Partnership.[2]

[2] We observe that Bloom, as the personal representative of Amie's estate, filed a claim against Brian's Estate, and Christine Thornhill, filed her claim against Brian's Estate in her individual capacity, and not in her capacity as the Trustee of Norma's estate. See Appellant's App. pp. 12, 81. Any issues concerning the standing of these parties to raise their claim of right of contribution was not raised in the trial court, and therefore, we do not address the issue of standing on appeal.

As we noted above, Indiana Code section 29-2-12-3 provides that the "personal representative of decedent's estate or the person paying the federal estate tax imposed upon said estate . . . shall be entitled to recover such tax so paid proportionately from each . . . beneficiary[.]" Therefore, we reject Brian's Estate's argument that the right of contribution for taxes should have been resolved during the probate of Norma's estate.[3] Because the Appellees' claims for right of contribution against Brian's Estate could not have been determined in a prior action, the doctrine of claim preclusion is not applicable to the facts and circumstances before us.

III. Brian's Estate's Apportioned Share of Taxes

Finally, in their cross-appeal, the Appellees claim that the trial court miscalculated Brian's Estate's apportioned share of the taxes attributable to Brian's receipt of an annuity payment in the amount of $117,356.27.[4] The trial court and the Appellees included in their respective calculations a credit, equaling the amount of the net proceeds of Norma's residuary probate estate applied against the net taxable estate, or

[3] We also are not persuaded by Brian's Estate's argument that the claims filed against Brian's Estate are time barred pursuant to Indiana Code section 29-1-7.5-7, which provides that "the claim of any claimant . . . to recover from a distributee who is liable to pay the claim, and the right of any heir or devisee, . . . to recover property improperly distributed or the value thereof from any distributee is forever barred at the later of (a) three (3) years after the decendent's death, or (b) one (1) year after the closing statement is filed." We agree with the Appellees that the statute is inapplicable because "a claim in contribution to recover apportionment of death taxes does not constitute an action to recover property improperly distributed or the value therof." Appellees' Br. at 12.

[4] Brian's Estate argues that there is an issue of genuine material fact as to the amount of taxes that should be apportioned to the estate. Specifically, the Estate argues that because there is a cash balance of $165,048.67 remaining in Norma's estate, those assets should be utilized to offset or pay the tax attributable to Brian's interest. In making the argument, Brian's Estate does not acknowledge that the taxes for the property Brian received have already been paid by Norma's Trust. Because Brian's Estate is liable for his apportioned share of the taxes on the property Brian received, the fact that there is a cash balance remaining in Norma's estate is irrelevant.

$192,960.66. In their calculation, the Appellees have subtracted the credit from the total federal estate tax paid. The trial court applied the credit after determining the total tax due on the annuity payment received by Brian. We conclude that the trial court's calculation of Brian's Estate's apportioned share of the taxes is correct.

Conclusion

The trial court properly concluded that Norma's trust document controls and applied the presumption of apportionment. Also, the Appellees' claim against Brian's Estate was not barred on the grounds of claim preclusion. Finally, as to the Appellees' cross-appeal, the trial court correctly calculated the taxes owed by Brian's Estate. For all of these reasons, we conclude that the trial court properly entered summary judgment in favor of the Appellees and correctly calculated all relevant tax liabilities.

Affirmed.

BARNES, J., and BROWN, J., concur.