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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001142-MR

SARAH BLANTON; PAULINE
FRENCH; MARILYN WILLIAMS;
AND SHIRLEY SLEMMONS

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 08-CI-012392

PNC BANK, N.A.

APPELLEE

OPINION
REVERSING AND REMANDING

** ** *

BEFORE: COMBS AND LAMBERT, JUDGES; SHAKE,¹ SENIOR JUDGE.

LAMBERT, JUDGE: This appeal addresses the interpretation of provisions of a trust and a will related to the payment of federal estate and Kentucky inheritance taxes following the settlor's death. Four contingent beneficiaries under one trust

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

argue that these taxes should not have been taken from money used to fund that trust, while the trustee contends that it had no choice but to pay the taxes the way it did pursuant to the terms of the settlor's will. We have carefully reviewed the record and the parties' arguments, and we hold that the circuit court erred as a matter of law in holding that the trustee's actions with regard to the payment of death taxes were mandatory rather than discretionary. Therefore, we reverse the summary judgment.

In 1987, Raphael Avellar (the settlor) created a revocable trust, known as the Raphael Avellar Revocable Trust Agreement. He created a second restated version in 1996, naming PNC Bank, Kentucky, Inc., now PNC Bank, N.A., as the trustee (PNC Bank or trustee). During his life, the trustee was to pay the net income of the trust to the settlor and pay the principal to or for the benefit of his sister, Izabel Avellar Souza, for her support. The second restated trust also provided for the treatment and disposition of the trust estate at the time of the settlor's death.

On October 16, 1998, the settlor created a first amendment to the second restated trust, in which he altered the disposition and treatment of the trust at the time of his death. That document provided for different treatments of the net trust estate depending upon whether Izabel survived the settlor. Upon his death, the trust was to become irrevocable. If Izabel survived him, the trustee was to divide the net trust estate into two trusts, the Izabel Avellar Souza Trust (the Souza

Trust) and the Izabel Avellar Souza Charitable Remainder Unitrust (the Charitable Unitrust).

The Souza Trust was to be funded with the settlor's condominium on Willow Avenue in Louisville, Kentucky, its contents, as well as \$400,000.00 in cash or securities. This was to be held in trust for Izabel's benefit during her lifetime, and the trustee was to pay the net income from the Souza Trust to Izabel on at least a quarterly basis. The trustee was also authorized, at its discretion, to apply funds from the corpus of the Souza Trust to provide for her health, maintenance, education, and support, even to the point of exhausting its corpus.

The trustee was to retain the balance of the net trust estate to create the Charitable Unitrust, which was meant to benefit poor children in or graduating from public schools in Louisville and Jefferson County, Kentucky. The Charitable Unitrust also provided for the payment of funds to Izabel during her life. Each taxable year, the trustee was to pay Izabel 7% of the net fair market value of the Unitrust valued as of February 15th in quarterly installments.

Upon Izabel's death, the trustee was to distribute the principal remaining in the Souza Trust to several named beneficiaries. These beneficiaries included Pauline French and Shirley Slemmons, who were each to collect \$3,000.00. In addition, Sara A. Young (who we presume to be Sarah Blanton) was to collect \$100,000.00 if she was still employed by the settlor or Izabel at the time of the settlor's death. A later amendment added a \$3,000.00 bequest for Marilyn Williams. The second restated trust provided that in the event there was not

sufficient principal remaining to satisfy all of the bequests, each specific monetary request would be paid on a pro rata basis. Any excess principal would be added to the Charitable Unitrust.

At issue in this case is the effect of Item III(A), the provision of the second restated trust addressing the administration of the trust estate at the time of the settlor's death. That provision states in relevant part as follows:

1. If, after Settlor's death, Settlor's sister, IZABEL AVELLAR SOUZA, survives Settlor and Settlor does not have a probate estate or if said probate estate is insufficient to pay Settlor's funeral expenses, debts, the estate administration expenses, or to satisfy any bequests that Settlor may have made in his Will, then the Trustee shall upon demand of the Personal Representative of Settlor's estate (if received) apply so much of the principal of the IZABEL AVELLAR SOUZA TRUST (created hereinbelow) as is needed to pay the expenses, debts, legacies and taxes, hereinafter set forth. Any such payments may be made either directly or through the Personal Representative of Settlor's estate by way of advancement to or reimbursement of said Personal Representative.

a. The expenses of Settlor's last illness, funeral and interment, unpaid income and property taxes properly chargeable against his estate and expenses of administration of Settlor's estate; his legal debts; and legacies provided in Settlor's will.

b. All inheritance, estate and other similar taxes of the United States of America (except any generation-skipping tax imposed by Chapter 13 or any taxes imposed by reason of includability of any property under Section 2044 of the United States Internal Revenue Code of 1986, as may be amended), or any state or territory, imposed against Settlor's estate or the recipients thereof, whether passing by Settlor's will or otherwise, without reimbursement or contribution from any person.

c. If the trust estate holds United States Treasury Bonds which may be used at par to pay federal estate tax, then such bonds shall be used by the Trustee for the payment of Settlor's federal estate taxes provided above.

d. NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY, if the total amount of the above payments should exceed TWO HUNDRED THOUSAND DOLLARS (\$200,000.00) so that the purposes of the IZABEL AVELLAR SOUZA TRUST are (or, in the Trustee's opinion, appear to be) incapable of being fulfilled, then any and all charges to said trust, other than taxes, shall be paid "off the top" of, and prior to the funding of, the IZABEL AVELLAR SOUZA CHARITABLE REMAINDER UNITRUST in ITEM III(B).

e. The Trustee may pay the items mentioned above without requiring Settlor's Personal Representative to certify the necessity of paying such items, and whether or not there is a designated probate court appointed Personal Representative. All of the remaining Property after paying all such items listed above ("the Net Trust Estate") shall be divided and held in Trust in accordance with the following terms and conditions.

The trust document then went on to create the two trusts as set forth above.

The same day the settlor executed the second restated trust, he also executed his last will and testament, naming PNC Bank as the executor. In Article I, the settlor provided for the payment of taxes arising from his death:

A. I direct my Executor to pay from my estate all of my debts, funeral expenses, and costs of administration; provided, however, that my Executor shall not be hereby required to pay any secured indebtedness on property passing by reason of my death.

B. I direct that all estate, inheritance, succession, legacy, transfer and other death taxes or duties by

whatever name called (except the generation-skipping tax imposed by Chapter 13 and any Chapter 11 taxes imposed by reason of includability of any property in my gross estate under Section 2044 of the United States Internal Revenue Code of 1986, as amended) or any similar death taxes imposed under the laws of any jurisdiction, including any and all interest and penalties therein imposed under the laws of any jurisdiction by reason of my death, upon or with respect to any and all property which is required to be included in my gross estate for the purpose of such taxes, whether such property passes under or outside of this Will, shall be paid by my Executor out of the residue of my estate in the same manner as an expense of administration and shall not be prorated or apportioned among or charged against the respective devisees, legatees, beneficiaries, transferees, or other recipients of any such property or charged against any property passing or which may have passed to any of them, and my Executor shall not be entitled to reimbursement for any portion of any such tax from any such person.

C. Notwithstanding the foregoing paragraphs A and B, my Executor may, in its discretion, demand and receive payment from the principal of the Izabel Avellar Souza Trust created under the Raphael Avellar Revocable Trust Agreement (Second Restated), which trust is identified in ARTICLE II hereof, for all or any portion of such death taxes, the expenses of my last illness, funeral and interment, unpaid income and property taxes properly chargeable against my estate, expenses of administration of my estate, my legal debts and cash legacies made in this will or any codicil hereto. If the Izabel Avellar Souza Trust is insufficient to pay all such expenses or debts (not taxes) then the Executor may, in its discretion, demand and receive payment from the principal of the Net Trust Estate of the Raphael Avellar Revocable Trust Agreement (Second Restated) aforesaid for such expenses or debts, but not for any of the aforesaid taxes, all of which shall be paid from the Izabel Avellar Souza Trust aforesaid.

The settlor passed away on February 3, 2000, at the age of 92. His will was probated in Jefferson County, and PNC Bank was appointed as the executor pursuant to the terms of the will. Taxes the estate incurred as a result of his death totaled \$358,687.16 (\$290,954.16 in federal estate taxes and \$67,733.00 in Kentucky inheritance taxes). The trustee paid these taxes from the \$400,000.00 in cash or securities that was to fund the Souza Trust, and it ultimately paid \$41,312.84 into the Souza Trust on April 27, 2001. The record also reflects that PNC Bank claimed the value of the settlor's probate estate was \$42,088.43, excluding personal property; his funeral expenses were \$3,287.77; the estate administration expenses were \$55,242.92; and his debts totaled \$258,756.39 (of this debt amount, \$243,389.23 represented the settlor's personal liability on his condominium). Izabel passed away in January 2007, at which point the contingent beneficiaries were entitled to their bequests as set forth in the Souza Trust.

Blanton, French, Williams, and Slemmons (the plaintiffs), four of the contingent beneficiaries of the Souza Trust, filed suit against PNC Bank on November 20, 2008, based upon its maladministration of the trust estate. The plaintiffs alleged that PNC Bank failed to make required payments to them, proposed to pay only a portion of the required amounts, and unreasonably delayed paying those amounts. They alleged that PNC Bank breached its fiduciary duties to them by failing to fully fund the Souza Trust with \$400,000.00 in cash or securities and then failed to provide relevant and complete information they requested. In the prayer for relief, the plaintiffs requested a full accounting from

PNC Bank as the trustee, payment of the full amount of the bequests to them, as well as interest and attorney fees. In its answer, PNC Bank denied the claims in the complaint and requested a dismissal of the action. The parties then engaged in discovery as reflected by PNC Bank's responses to the plaintiffs' interrogatories and requests for production of documents.

On June 25, 2009, the plaintiffs moved for summary judgment, arguing that there were no genuine issues of material fact and that they were entitled to a judgment as a matter of law based upon PNC Bank's breach of its fiduciary duties to them as well as the nonparty beneficiaries under the Souza Trust. They contended that PNC Bank's decision to pay the death taxes from the specific bequest of \$400,000.00 to the Souza Trust to the benefit of the Charitable Unitrust, without notifying the beneficiaries or seeking approval from the court, represented a clear conflict of interest and breach of its fiduciary duties. In support of their arguments, the plaintiffs relied upon *Wiggins v. PNC Bank, Kentucky, Inc.*, 988 S.W.2d 498, 501 (Ky. App. 1998), for the proposition that where a conflict exists, a trustee must obtain court authorization before it may act to the detriment of one beneficiary over another pursuant to KRS 386.820(2) ("If the duty of the trustee and his individual interest or his interest as trustee of another trust, conflict in the exercise of a trust power, the power may be exercised only by court authorization . . . upon petition of the trustee."). Furthermore, the plaintiffs argued that the applicable provisions of the second restated trust did not require the payment of the taxes in the manner PNC Bank paid them, since the payment of taxes was not to be

considered when determining whether the taxes were to be paid from the Souza Trust.

PNC Bank responded to the plaintiffs' motion and filed a cross-motion for summary judgment, arguing that the circuit court should enter judgment in its favor. In support of his cross-motion, PNC Bank argued that the settlor's clear direction in his will, as well as the terms of the second restated trust, required it to pay the estate and inheritance taxes from the Souza Trust. It argued that it had no discretion in the payment of taxes, so, prior court approval would not be required. PNC Bank did, however, have discretion for the payment of expenses and debts, and it opted not to pay those amounts from the Souza Trust but from the net trust estate.

In response, the plaintiffs argued that the portion of the settlor's will calling for the use of trust property to pay his death taxes violated KRS 394.020, which limits what a testator may accomplish in a will. Based upon this statute, the plaintiffs contended that the settlor could not reach property placed in trust. Furthermore, they argued that the will conflicted with the trust language. Finally, they argued that the administration expenses as stated by PNC Bank were incorrect, and that by their calculations the probate estate itself had sufficient funds to pay the settlor's funeral expenses, debts, administration expenses, and bequests in the will.

On April 7, 2010, the circuit court entered an opinion and order granting summary judgment in favor of PNC Bank and denying the plaintiffs' motion for summary judgment. It held as follows:

The Court has reviewed Avellar's will and the trust and finds, as a matter of law, that PNC Bank is correct. The plain language of Article I, Section C of Avellar's will mandates the payment of the federal estate and state inheritance taxes from the Souza trust. Generally, "federal estate taxes and Kentucky inheritance taxes are required to be shared proportionately by all of the beneficiaries in the absence of a specific direction in the will." *Houghland v. Lampton*, 33 S.W.3d 536, 538 (Ky. App. 2000). This general rule does not prevent a testator from shifting the burden of taxation. *Gratz v. Hamilton*, 309 S.W.2d 181 (Ky. 1958). The testator's intention to shift this burden must be clearly expressed. 33 S.W.3d at 539. There is no question that Avellar's will clearly expressed his intent that all of the taxes should be paid from the Souza trust.

The plaintiffs moved the circuit court to alter, amend, or vacate its opinion and order pursuant to Kentucky Rules of Civil Procedure (CR) 59.05, pointing out the discretionary language contained in the will with regard to the payment of taxes and requesting that the court explain its reasons for rejecting their other arguments. PNC Bank objected to the motion, arguing that the circuit court properly entered summary judgment in its favor pursuant to the language of the will and second restated trust. The circuit court denied the motion on May 25, 2010, and specifically considered the plaintiffs' argument regarding the limited ability of PNC Bank to exercise its discretion. The court determined that the language of the will gave PNC Bank, as the executor, the discretion to pay expenses from the net

trust estate, but no discretion as to the payment of death and inheritance taxes, which were to be paid from the Souza Trust. As such, the court determined that *Wiggins* could be distinguished from this case and that KRS 386.020(2) did not apply. This appeal follows.

On appeal, the plaintiffs (now the appellants) argue that the circuit court erred when it ignored the language of the trust, but only relied upon the language of the will addressing the payment of taxes associated with the settlor's death; that the circuit court misinterpreted the will and erred in its application; and that based upon the terms of the trust, they are entitled to a summary judgment.

In *Ladd v. Ladd*, 323 S.W.3d 772, 776 (Ky. App. 2010), this Court described the standard of review in summary judgment appeals:

The standard of review on appeal when a trial court grants a motion for summary judgment is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, “an appellate court need not defer to the trial court’s decision and will review the issue de novo.” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

While there do appear to be some disputed issues of fact in this case, namely the size of the probate estate and the amount of administration expenses, etc., none of those factual issues is material. Rather, this appeal addresses a pure legal question. “The construction as well as the meaning and legal effect of a written instrument,

however compiled, is a matter of law for the court.” *Morganfield Nat. Bank v. Damien Elder & Sons*, 836 S.W.2d 893, 895 (Ky. 1992).

In this case, we are charged with interpreting language in the settlor’s will and trust documents. In doing so, we must determine what he intended: “[T]he intention of the testator as gathered from the four corners of the instrument must prevail unless it is contrary to some positive provision of law or public policy.”

Graham v. Jones, 386 S.W.2d 271, 273 (Ky. 1965).

We know of no reason why rules applicable to the construction of wills should not apply to the construction of trust agreements. In each it is the endeavor of the courts to determine the intention of the maker of the instrument from the words used in the paper. A well-known rule of construction in wills is, every part and clause of the paper must be read in connection with all other parts, and if possible all parts must be given effect.

Dep’t of Revenue v. Kentucky Trust Co., 313 S.W.2d 401, 404 (Ky. 1958).

The appellants’ first argument addresses the circuit court’s reliance upon the language of the will regarding the payment of taxes rather than upon the language of the trust. They argue that all four of the conditions set forth in Item III(A)(1) of the trust were not met, meaning that the trustee could not seek payment of the taxes from the Souza Trust. On the other hand, PNC Bank asserts that the language of the trust was silent as to the payment of taxes if Izabel survived her brother and the other three conditions set forth in that provision of the trust were not met. Accordingly, the language of the will would govern the payment of taxes.

Generally, federal estate taxes and Kentucky inheritance taxes are to be paid out of the shares received by the beneficiaries, “unless the will of the decedent directs to the contrary.” *Gratz v. Hamilton*, 309 S.W.2d 181, 182 (Ky. 1958). However, the testator may elect to shift the burden for the payment of taxes to some other entity of his choice: “The testator’s intent controls in this regard [which] should be ascertained from the four corners of the will.” *Houghland v. Lampton*, 33 S.W.3d 536, 539 (Ky. App. 2000). Furthermore, “all the words used by him must be given effect and no word is to be rejected as meaningless if by any reasonable construction it may be made consistent and significant.” *Gratz*, 309 S.W.2d at 182.

The appellants contend that the settlor could not reach the trust via his will to direct the payment of taxes with non-probate property. They cite to KRS 394.020, which states, “[a]ny person of sound mind and eighteen (18) years of age or over may by will dispose of any estate, right, or interest in real or personal estate that he may be entitled to at his death, which would otherwise descend to his heirs or pass to his personal representatives, even though he becomes so entitled after the execution of his will.” By this statute, the appellants claim that the settlor could not alter the trust (or *inter vivos* contract) with his will because the trust was not a part of his probate estate capable of being disposed of by his will. They also rely upon *University of Louisville v. Liberty National Bank & Trust Co.*, 499 S.W.2d 288, 290 (Ky. 1973), for the rule of construction that “language in a will cannot be rejected as surplusage if by any reasonable construction it can be given

significance.” We agree with PNC Bank that neither the statute nor this case has any bearing on the case before us because both the will and the trust addressed the payment of taxes associated with the settlor’s death, meaning that the settlor did not improperly provide direction for the payment of taxes in his will.

Appellants spend considerable time in their brief discussing the interpretation of the trust language regarding the administration of trust estate after the settlor’s death. They point out that all four of the conditions necessary to trigger payment of the funeral expenses, debts, estate administration, and taxes through the Souza Trust were not met. The four conditions were: 1) Izabel survived the settlor; 2) the probate estate was insufficient to pay the settlor’s funeral expenses, debts, estate administration expenses, and any bequests in the will; 3) the trustee made a demand of the personal representative for funds from the Souza Trust to pay for the expenses, debts, taxes, and legacies; and 4) the \$400,000.00 in cash or securities was transferred from the net trust estate to the Souza Trust. The only condition that was satisfied was that Izabel survived the settlor.

However, as PNC Bank points out, the trust is silent as to the treatment of taxes and other expenses when the conditions set forth in Item III(A)(1) are not met. At that point, the will would certainly control. In the first paragraph of Article I, the terms of the will direct PNC Bank, as the executor, to pay all of the debts, funeral expenses, and administration costs from the probate estate. The second paragraph directs PNC Bank to pay any taxes out of the residue of the

estate, which would consist of the rest of the property that remained after satisfaction of the payments in Article I. The will then went on in Article 1 to provide:

C. Notwithstanding the foregoing paragraphs A and B, *my Executor may, in its discretion*, demand and receive payment from the principal of the Izabel Avellar Souza Trust created under the Raphael Avellar Revocable Trust Agreement (Second Restated), which trust is identified in ARTICLE II hereof, for all or any portion of such death taxes, the expenses of my last illness, funeral and interment, unpaid income and property taxes properly chargeable against my estate, expenses of administration of my estate, my legal debts and cash legacies made in this will or any codicil hereto. If the Izabel Avellar Souza Trust is insufficient to pay all such expenses or debts (not taxes) then the Executor may, in its discretion, demand and receive payment from the principal of the Net Trust Estate of the Raphael Avellar Revocable Trust Agreement (Second Restated) aforesaid for such expenses or debts, but not for any of the aforesaid taxes, all of which shall be paid from the Izabel Avellar Souza Trust aforesaid. [Emphasis added.]

This provision gave PNC Bank, as the executor, the discretionary power to seek payment of the taxes, expenses, debts, and legacies from the Souza Trust. If the Souza Trust was not large enough to satisfy these payments, PNC Bank had discretion to seek payment for all but the taxes through the net trust estate. Any taxes would have to be paid from the Souza Trust.

While we do not find any error in either PNC Bank's or the circuit court's reliance on or application of the will language to provide for the payment of expenses and taxes, we do find error in the circuit court's holding that PNC Bank's actions were entirely mandated by the language of the will.

KRS 386.820(2) addresses conflicts of interest in trust situations and provides that, “[i]f the duty of the trustee and his . . . interest as a trustee of another trust, conflict in the exercise of a trust power, the power may be exercised only by court authorization . . . upon petition of the trustee.”² This Court in *Wiggins*, *supra*, interpreted this statute and stated:

Generally, a trustee owes the duty of “*uberrima fides*, or utmost fidelity” to the beneficiaries of a trust. *Bryan v. Security Trust Co.*, 296 Ky. 95, 99, 176 S.W.2d 104, 107 (1943). According to *Black’s Law Dictionary* 299 (6th ed. 1990), a conflict of interest exists in “[a] situation in which regard for one duty tends to lead to disregard of another.” Such a situation presented itself to PNC when it was faced with the choice of whether to invade the corpus of the Schlegel trust, since either the remainder beneficiaries of that trust or the remainder beneficiaries of the Moesser trust would have their interests affected by PNC’s decision. The action taken by PNC to invade the corpus of the Schlegel trust had significant financial consequences for the remainder beneficiaries of both the Schlegel trust and the Moesser trust and presented a clear conflict of interest for PNC as it could not act with “utmost fidelity” toward the remainder beneficiaries of both trusts. Court authorization pursuant to KRS

386.820(2) was required before the power of encroachment could be exercised.

Wiggins, 988 S.W.2d at 501.

The appellants have argued throughout this case that PNC Bank violated this statute when, as trustee for both the Souza Trust and the Charitable Unitrust, it

² KRS 386.820(1) permits “a court of competent jurisdiction for cause shown and upon petition of the trustee or affected beneficiary and upon appropriate notice to the affected parties to relieve a trustee from any restrictions on his power that would otherwise be placed upon him by the trust or by this chapter.”

opted to pay the taxes through the Souza Trust to the detriment of the contingent beneficiaries rather than through the net trust estate without first notifying them or seeking court approval. PNC Bank argued and the circuit court held that seeking payment for the taxes through the Souza Trust was mandated by the final sentence of the will's provision. We disagree with this conclusion.

In the order denying the appellants' CR 59.05 motion, the circuit court held that the language of the will was mandatory regarding the payment of taxes from the Souza Trust. While it did note that PNC Bank had discretion to demand payment from the net trust estate, it declared as mandatory the portion stating that "but not for any of the aforesaid taxes, all of which shall be paid from the Izabel Avellar Souza Trust aforesaid." However, this is not, in our view, the operative point in deciding whether PNC Bank's actions were mandatory or discretionary. Rather, the key point for this analysis was PNC Bank's decision to seek payment for all of these expenses from the Souza Trust as opposed to the estate or residue. The will clearly provides that PNC Bank "may, in its discretion, demand and receive payment from the principal of the Izabel Avellar Souza Trust . . . for all or any portion of such death taxes" as well as other final expenses, unpaid income and property taxes, administration expenses, debts, and legacies. Once PNC Bank, in its capacity as executor, but while also acting as the trustee, made the discretionary decision to seek payment through the Souza Trust, only then did the language of the will mandate that the death taxes had to be paid from the Souza Trust.

Therefore, PNC Bank's initial action in opting to seek payment from the Souza

Trust was discretionary. Because its action in doing so had significant financial consequences for the contingent beneficiaries of the Souza Trust, as in *Wiggins*, PNC Bank had to first comply with KRS 386.820(2) and seek court approval before using amounts meant to fund the Souza Trust for the payment of the death taxes. The circuit court erred as a matter of law in holding otherwise.

Based upon our holding, we need not address the language in the trust concerning the administration of the trust estate when the settlor died. However, it appears that the language employed in both the will and the trust was needlessly complicated, making it difficult at best to discern the intent of the settlor and reach a decision in this matter.

For the foregoing reasons, the Jefferson Circuit Court's summary judgment and order denying the CR 59.05 motion are reversed, and this matter is remanded for further proceedings in accordance with this opinion.

COMBS, JUDGE, CONCURS.

SHAKE, SENIOR JUDGE, CONCURS IN RESULT AND FILES
SEPARATE OPINION.

SHAKE, SENIOR JUDGE. I concur in result only. Although it does not explicitly state so, the majority opinion leaves open the option to permit payment of the taxes from the Charitable Unitrust. Both the will and the trust are consistent in precluding PNC from payment of taxes from the Charitable Unitrust.

In addition, in order for this matter to be properly concluded, the trial court or jury must first make further factual determinations. If the probate estate

had sufficient assets to pay the death taxes of the decedent, then PNC had two options: 1) PNC could have paid the taxes entirely from the probate estate; or 2) PNC could have notified Appellants and sought court authorization to pay taxes from both the probate estate and the Souza Trust. If indeed the probate estate was insufficient to pay the taxes, then inquiry must be made into PNC's management of Souza's interest in both the Souza Trust and the Charitable Unitrust. PNC was explicitly authorized to encroach into the Souza Trust to the point of extinction. However, if it can be shown that PNC impaired the interests of the Appellants by depleting the Souza Trust by its failure to provide Souza with the designated 7% fair market value of the Charitable Trust, then any encroachments against the Souza Trust should be restored therein for distribution to the Appellants.

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