

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
WILLIAMS COUNTY

In the Matter of the Estate  
of Mary Yuko Tokunaga

Appellant

v.

Richard A. Levin,  
Tax Commissioner of Ohio

Appellee

Court of Appeals No. WM-09-006

Trial Court No. 20051030

**DECISION AND JUDGMENT**

Decided: February 19, 2010

\* \* \* \* \*

Brent L. Winzeler, for appellant.

Richard Cordray, Attorney General of Ohio, and Alan P. Schwepe,  
Assistant Attorney General, for appellee.

\* \* \* \* \*

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Williams County Court of  
Common Pleas, Probate Division, that denied the exceptions filed by the estate of Mary

Yuko Tokunaga to the Ohio Tax Commissioner's final determination of Ohio state taxes due. For the following reasons, the judgment of the trial court is affirmed.

{¶ 2} The following facts are relevant to the issue raised on appeal. Yoshiro Tokunaga ("Yoshiro") is the surviving spouse of Mary Yuko Tokunaga ("Mary"), who passed away on January 25, 2005. Prior to her death, Mary established an inter vivos revocable trust, naming herself as trustee. On September 5, 2005, Mary's estate executed a qualified disclaimer of certain assets from the trust. On April 24, 2006, the estate filed an estate tax return claiming a marital deduction of \$1,603,236.53, which resulted in there being no estate tax due, according to the estate's calculations. The tax return identified \$1,239,388.03 in assets from the election of September 5, 2005, as making up a portion of the claimed marital deduction. It further identified an additional \$363,848.49 in assets for the marital deduction which were not included in the September 5, 2005 election.

{¶ 3} On May 28, 2008, the Tax Commissioner of Ohio filed a certificate of Determination of Ohio Estate Tax for Additional Tax pursuant to R.C. 5731.27(B) and issued a deficiency assessment of \$109,443.74. The estate filed its exceptions on July 28, 2008. Upon consideration of briefs filed by both parties and oral arguments presented at a hearing held on March 31, 2009, the trial court overruled the exceptions filed by the executor of the estate and increased the estate tax liability in the amount of \$109,443.74, together with the appropriate interest. It is from that judgment that appellant, the estate of Mary Yuko Tokunaga, appeals.

{¶ 4} Appellant sets forth the following assignment of error:

{¶ 5} "The exceptions filed by the Appellant to the Final Determination of Ohio estate tax filed by the Executor of the Estate of Mary Yuko Tokunaga should have been granted by the Williams County, Ohio, Probate Court."

{¶ 6} The issue before this court is whether the trust contains language which meets the statutory requirement for the use of a qualified terminable interest property ("QTIP") election, which would allow the use of a marital deduction and thereby postpone payment of Ohio estate tax until the death of the surviving spouse. The Tax Commissioner asserts that the estate's September 5, 2005 disclaimer is not a valid QTIP election because Articles 5.1 and 5.2 of the Second Amendment to and Complete Restatement of the Mary Yuko Tokunaga 1994 Trust Agreement do not reserve *all* income from the trust to the surviving spouse as required by R.C. 5731.15(B). The Tax Commissioner argues that Articles 5.1 and 5.2 place restrictions on the income the surviving spouse receives in the event he should remarry without entering into a prenuptial agreement.

{¶ 7} In contrast, the estate submits that the language contained in the trust agreement provides that all income is payable to the surviving spouse for his lifetime in accordance with R.C. 5731.15(B)(3)(c)(i). The estate asserts that the restriction set forth in Article 4.2 of the Trust Agreement as amended and restated applies to principal payments only and that the language of the trust therefore does qualify under R.C. 5731.15(B)(3)(c)(i).

{¶ 8} R.C. Chapter 5731 imposes a tax upon the transfer of the assets of a decedent's estate. More specifically, R.C. 5731.15 creates a marital deduction for certain assets of the estate that transfer to the surviving spouse of the decedent. R.C. 5731.15(B) allows a marital deduction for a QTIP passing to a surviving spouse. In relevant part, R.C. 5731.15(B)(3)(c) defines a QTIP as property in which the surviving spouse of the decedent has a qualifying interest for life if " \* \* \* the surviving spouse is entitled to *all income* from the property, which income is payable annually or at more frequent intervals." (Emphasis added.)

{¶ 9} Article 3.3 of the decedent's trust agreement provides that all of the disclaimed property shall be controlled by Article 5 of the agreement: "The Trustee shall retain as Trust B to be administered pursuant to the provisions of Article V *any amount which my husband may disclaim* under the terms of the preceding paragraph \* \* \*." (Emphasis added.)

{¶ 10} Article 5 states, in pertinent part:

{¶ 11} "5.1 Payments. The Trustee shall pay to or apply for the sole benefit of my husband for his life, *subject to sooner termination* should he remarry without entering into a Prenuptial agreement prior to the remarriage \* \* \*." (Emphasis added.)

{¶ 12} As indicated, Article 5 restricts the surviving spouse's right to the income of the trust for his life. This remarriage/prenuptial agreement restriction, which must be considered in light of the surviving spouse's election, causes the claimed QTIP to fail as a marital deduction under R.C. 5731.15(B).

{¶ 13} Upon consideration of the foregoing, we find that the trial court did not err by overruling the exceptions of the executor to the Tax Commissioner's final determination of estate tax due and appellant's sole assignment of error is not well-taken.

{¶ 14} On consideration whereof, the judgment of the Williams County Court of Common Pleas, Probate Division, is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, J.

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JUDGE

Thomas J. Osowik, P.J.  
CONCUR.

\_\_\_\_\_  
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.