DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN THE MATTER OF THE ESTATE OF: ROSANNE L. MCGATHY, Deceased.	No. 1 CA-CV 09-0022 DEPARTMENT C
MARIANNE WALDOW, as personal representative of THE ESTATE OF ROSANNE L. MCGATHY, Deceased; MARY McGATHY; DAVID RHODES; WILLIAM RHODES; MICHAEL McGATHY; ERIN McGATHY, Appellees, v. JAMES M. LAPORTA, Appellant.	**MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. PB 2007-090525

The Honorable Kirby D. Kongable, Commissioner

VACATED AND REMANDED

Law Offices of Bill King, P.C. — Scottsdale
By William L. King
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By Bradley S. Hahn
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By Mark E. House
Attorney for Appellees McGathy and Rhodes

B R O W N, Judge

¶1 James M. LaPorta ("LaPorta") appeals the trial court's order directing that non-probate transfers relating to his daughter's estate must bear a pro rata share of estate taxes in accordance with a New York statute requiring apportionment. For the following reasons, we vacate the court's order and remand for further proceedings.

BACKGROUND

¶2 Decedent Rosanne McGathy ("Decedent") died on or about July 15, 2007, and resided in Maricopa County, Arizona, at the time of her death. In 1997, Decedent executed a Last Will and Testament (the "Will") in New York, where Decedent resided at the time of the Will execution. The Will left all tangible personal property and real property used as residences to her husband, William McGathy, whom she later divorced in 2001. The Will also provided that if her husband predeceased[1] her, the sum

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[1] Under both Arizona and New York probate statutes, a divorced spouse is treated as predeceased, revoking any revocable dispositions of property. Ariz. Rev. Stat. ("A.R.S.") § 14-2802(A) (2005) ("A person who is divorced from the decedent . . . is not a surviving spouse[.]"); N.Y. Est. Powers & Trusts Law ("EPTL") § 5-1.4(b)(1) (McKinney 2011) ("Provisions of a governing instrument are given effect as if the former spouse

of $150,000 was to be set aside in separate trusts for her father, LaPorta, and for her mother-in-law, Mary McGathy. The Will divided the residual estate amongst various charitable organizations and other individuals, including David Rhodes, William Rhodes, Michael McGathy, and Erin McGathy, relatives of the decedent's former spouse (these individuals are referred to hereinafter as "Appellees").

¶3 In 2005, Decedent relocated from New York to Arizona, sold her New York property, and purchased real property in Arizona. Decedent never revoked the Will or executed another will.

¶4 In July 2007, LaPorta believed Decedent died intestate. He filed a Petition for Informal Appointment of Personal Representative and was appointed. Several months later, after the Will was located and admitted to probate, Marianne Waldow was appointed Personal Representative of the estate.

¶5 In February 2008, Waldow filed a petition for instructions (the "Petition") seeking clarification from the trial court as to the administration and distribution of the estate. Specifically, Waldow requested guidance as to: (1) whether New York or Arizona law should be applied to determine

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had predeceased the divorced individual as of the time of the revocation.").

the proper beneficiaries under the Will; and (2) whether, due to the silence of the Will on the issue, estate taxes relating to non-probate transfers should be apportioned or paid from the residuary estate without apportionment.

¶6 At a hearing on the Petition, Waldow informed the court that she took no position as to how the devisees should be identified or how estate taxes must be paid. Without objection, the court concluded that devisees of the Will should be determined pursuant to New York law. The court then granted additional time for filing of responses regarding the payment of estate taxes.

¶7 LaPorta, as the beneficiary of non-probate assets consisting of a life insurance policy, an Arizona residence passing by joint tenancy with right of survivorship, and a life insurance annuity contract, asserted that the court should apply Arizona law, which would direct the residuary estate to pay all estate tax obligations. Appellees countered that the court should apply New York law, which would apportion estate taxes between the probate and non-probate assets.

¶8 The trial court concluded that because Decedent executed the Will when she was domiciled in New York, and before she owned any property in Arizona, "it would be the intention of the deceased that New York law would apply to issues affecting the administration and distribution of the [D]ecedent's estate."

The court then ordered that all non-probate transfers should bear a pro rata share of the estate taxes, pursuant to New York law. *See* N.Y. EPTL § 2-1.8(a) (McKinney 2011). LaPorta timely appealed and we have jurisdiction pursuant to A.R.S. § 12-2101(J) (2003).[2]

DISCUSSION

¶9 Determination of the source of payment of estate taxes requires reference to relevant provisions of the Internal Revenue Code (the "Code") as well as applicable state law. The Code imposes liability for the payment of federal estate taxes on the executor. I.R.C. § 2002 (West 2011). The liability applies to both probate and non-probate property as the gross estate. Treas. Reg. § 20.2002-1 (West 2011). In determining the apportionment of taxes, in the event of conflict with state law, federal law preempts. *Riggs v. Del Drago*, 317 U.S. 95, 102 (1942). Therefore, regardless of our decision concerning which state law should apply, federal law may provide tax recovery, or apportionment, against the beneficiary who receives certain

[2] Originally we dismissed this appeal for lack of jurisdiction, concluding that a tax payment order was interlocutory and not appealable under A.R.S. § 12-2101(J). *In re Estate of McGathy v. LaPorta*, 1 CA-CV 09-0022, (decision order filed Feb. 22, 2010). The supreme court granted a joint petition for review and vacated the decision order, holding that § 12-2101(J) "permits appeal of the final disposition of each formal proceeding instituted in an unsupervised administration." *In re Estate of McGathy*, 226 Ariz. 277, ___, ¶ 17, 246 P.3d 628, 631 (2010). Therefore, we now consider the merits of the appeal.

assets unless the decedent's will specifically provides otherwise.[3]

¶10 Whether the estate taxes for non-probate assets should be apportioned presents a question of law that we review de novo. *In re Estate of Fogleman*, 197 Ariz. 252, 256 n.4, ¶ 8, 3 P.3d 1172, 1176 n.4 (App. 2000); *Bill Alexander Ford, Lincoln Mercury, Inc. v. Casa Ford, Inc.*, 187 Ariz. 616, 618, 931 P.2d 1126, 1128 (1996) (standard of review on choice of law issues is de novo).

¶11 LaPorta and Appellees agree that the Will is silent as to the apportionment of estate taxes among beneficiaries of non-probate transfers, but they disagree regarding the trial court's application of New York law.[4] LaPorta does not challenge the court's determination that the Decedent intended that New York law would apply to issues affecting administration of her

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[3] *See, e.g.,* I.R.C. § 2206 (West 2011) (life insurance); I.R.C. § 2207 (West 2011) (general power of appointment); I.R.C. § 2207A (West 2011) (qualified terminable interest property); I.R.C. § 2207B (West 2011) (retained life estate, requires specific reference to the section to waive); I.R.C. § 2603(b) (West 2011) (generation skipping transfers, requires specific reference to section to waive). Because this issue has not been raised by either party, we do not address whether LaPorta may be obligated, under federal law, to pay the requisite portion of estate taxes regardless of the state law applied.

[4] Other non-probate transferees, Michael and Julie Farris, argued that a reasonable reading of Article Eight of the Will provides that the residuary is to pay estate taxes. However, they did not appeal the trial court's order directing apportionment of taxes.

estate. He argues, however, that the court erred in applying New York's statutory law because New York courts apply the rule that payment of taxes is determined by the law of the state where the decedent was domiciled at the time of his or her death. Appellees counter that the "default rule" in New York is that non-probate transfers must bear the proportionate share of the estate taxes.[5] *See* N.Y. EPTL § 2-1.8(a) (stating that unless the testator directs otherwise by will, taxes should be "equitably apportioned among the persons interested in the gross tax estate"). Appellees concede that if Arizona law governs, the estate taxes for non-probate transfers will not be apportioned. *See Sanders v. Boyer*, 126 Ariz. 235, 240, 613 P.2d 1291, 1296 (App. 1980).

¶12 Here, we assume, as have the parties and the trial court, that New York law governs the *general* administration and

[5] We note that both parties have failed to provide us with briefs that comply with the letter or the spirit of our appellate rules. LaPorta's brief does not include any citations to the record nor does it set forth his contentions as to why the trial court erred. *See* ARCAP 13(a). Instead, his brief makes only general assertions purportedly supported by a lengthy string citation of New York authorities, with no explanation or discussion of any of the cases. Notwithstanding these deficiencies, we are able to discern LaPorta's argument——that New York law applies the law of the decedent's domicile. Appellees, on the other hand, utterly fail to acknowledge LaPorta's argument regarding the law of the decedent's domicile. Nor do Appellees address any of the authorities cited in LaPorta's brief. In any event, we address this appeal based on our independent review of the record and applicable New York law.

distribution of Decedent's estate. However, under New York law, the *specific* question of apportionment of estate taxes is controlled by the law of the decedent's domicile. *See Will of Dow*, 55 A.D.2d 323, 329, 390 N.Y.S.2d 721, 726 (N.Y. App. Div. 1977) (recognizing that absent testamentary expression to the contrary, construction and interpretation of the will, including apportionment of estate taxes, is to be governed by the domicile at death); *In re Huntington's Trust*, 14 A.D.2d 312, 316, 220 N.Y.S.2d 664, 667 (N.Y. App. Div. 1961) (noting the "established doctrine that the New York courts must apply the law of Connecticut, the domicile of Mr. Huntington, in the construction of the Will and the determination of the matter of the apportionment of the estate taxes"); *In re Gato's Estate*, 276 A.D. 651, 655, 97 N.Y.S.2d 171, 175 (N.Y. App. Div. 1950) (stating that New York applies the domiciliary law of the decedent for apportionment of estate taxes), *order aff'd*, 93 N.E.2d 924 (N.Y. 1950). Because it is uncontroverted that the Decedent's domicile at death was Arizona, the trial court erred in determining that New York law governs the question of apportionment. Instead, whether the estate taxes for non-probate transfers are subject to apportionment is controlled by Arizona law.

¶13 We also reject Appellees' argument that estate taxes for non-probate transfers must be apportioned based on

Decedent's intent that New York law govern the administration and distribution of her Will. Decedent chose to relocate to Arizona and lived here until she died. Thus, our conclusion is consistent with Decedent's intent. As we have explained, New York law follows the law of the decedent's domicile, which in this case, is Arizona.[6] Appellees have not directed us to any language in the Will or any other evidence supporting the notion that Decedent intended that the law of the decedent's domicile would not be applied to her estate.

[6] Appellees argue further that the residual estate "would likely be exhausted" if it is used to pay the estate taxes, but a review of the documents submitted by Waldow shows otherwise. Additionally, it is not clear that these calculations account for the possibility that some of the non-probate assets would be apportioned regardless of the state law applied because of the application of federal law, as discussed *supra,* n.3.

CONCLUSION

¶14 For the foregoing reasons, we vacate the trial court's order finding that the non-probate transfers are to bear a proportional share of the estate taxes and we remand for further proceedings consistent with this decision.

/s/
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MICHAEL J. BROWN, Judge

CONCURRING:

/s/
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PATRICK IRVINE, Presiding Judge

/s/
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DONN KESSLER, Judge