[Cite as *Natl. City Bank v. de Laville*, 2009-Ohio-5725.]

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

National City Bank, Trustee

Plaintiff

v.

Stefani de Laville, et al.

Appellees

[Marianne Ballas - Appellant]

Court of Appeals No. L-08-1240

Trial Court Nos. 2004 ADV 1166
2004 ADV 1564

DECISION AND JUDGMENT

Decided: October 30, 2009

* * * * *

Thomas P. Dillon and David F. Waterman, for appellees.

Richard G. Farrar and Dennis P. Williams, for appellant.

* * * * *

WILLAMOWSKI, J.

{¶ 1} This is an appeal from a judgment issued by the Lucas County Court of Common Pleas, Probate Division, which determined the meaning of certain terms in

estate documents and denied appellant's motion to invoke a no contest clause. Because we conclude that the trial court's rulings were proper, we affirm.

{¶ 2} George P. Ballas ("George") was married to appellant, Marianne Ballas, in 1997. The couple entered into an antenuptial agreement. George had three children from a previous marriage, appellees, Stefani de Laville, Martina A. Nimphie, and Peter Ballas II, M.D. ("Ballas children"). In August 1997, George amended his estate plan, including Marital Trust A ("Trust") and Residual Trust B, to provide for the disbursement of his estate assets to Marianne and the Ballas children. In December 2002, George died.

{¶ 3} During the estate administration, National City Bank, the trustee of the Trust, sought a declaratory judgment in the Lucas County Probate Court to determine the meaning of several Trust provisions regarding the payment of taxes. Marianne and the Ballas children, beneficiaries under the Trust, were named defendants in the declaratory judgment action. The probate court initially determined, on summary judgment, that the Trust was to be assessed its share of the estate taxes. On appeal of that decision, this court reversed and remanded the case for the court to consider further evidence on the ambiguities found between certain Trust provisions. See *Natl. City Bank v. de Laville*, 170 Ohio App.3d 317, 2006-Ohio-5909.

{¶ 4} On remand, the trial court heard and considered testimony from the following witnesses:

{¶ 5} (1) Robert Mason, CPA, George's former treasurer and personal friend;

{¶ 6} (2) Marianne Ballas, George's surviving spouse;

{¶ 7} (3) Morton Bobowick, George's estate planning attorney who drafted the estate plan documents; and

{¶ 8} (4) Herbert L. Braverman, estate planning and probate attorney who testified regarding the no contest clauses issue.

{¶ 9} The court also heard portions of a video of George Ballas, created in August 1997, to address his intentions regarding the estate documents, including division of assets, tax issues, and the incontestability clause. The court found that the video and attorney Bobowick's testimony both indicated that George Ballas intended and understood that taxes would be paid out prior to any distribution into the marital trust portion of the Trust. Consequently, the court determined that the "extrinsic evidence presented clearly, specifically and unambiguously reveals that George P. Ballas, the grantor of the Trust, did intend that some portion of the estate taxes should be charged against the assets that will pass into Marital Trust A."

{¶ 10} Appellant now appeals from that judgment, arguing the following two assignments of error:

{¶ 11} "1. The trial court erred in its findings that the extrinsic evidence clearly, specifically and unambiguously reveals that George P. Ballas ('George'), the grantor of the trust did intend that some portion of estate taxes should be charged against the assets that will pass to the Marital Trust A.

{¶ 12} "2. The trial court erred in not enforcing the conditions, placed by the testator on his bequest to his heirs."

I.

{¶ 13} In her first assignment of error, appellant claims that the trial court erred in its determination regarding the testator's intent as to whether estate taxes were chargeable to the marital trust assets.

{¶ 14} The interpretation of wills is a question of law, and, thus, when determining intent and interpreting the terms of a testamentary trust, appellate courts apply a de novo standard of review. *Summers v. Summers* (1997), 121 Ohio App.3d 263, 267, citing *McCulloch v. Yost* (1947), 148 Ohio St. 675. "A fundamental tenet for the construction of a trust is to ascertain, within the bounds of the law, the intent of the grantor." *Natl. City Bank v. de Laville*, 6th Dist. No. L-05-1384, 2006-Ohio-5909, ¶ 28, citing *Domo v. McCarthy* (1993), 66 Ohio St.3d 312, 314. As a general rule, when the language of the trust agreement is unambiguous, a grantor's intent can be determined from the express terms of the trust itself. *McDonald & Co. Secs., Inc., Gradison Div. v. Alzheimer's Disease & Related Disorders Assn., Inc.* (2000), 140 Ohio App.3d 358, 363. Where the terms are ambiguous or where the grantor's intent is unclear, a court may consider extrinsic evidence to ascertain the grantor's intent. Id.

{¶ 15} In this case, Morton Bobowick, the decedent's estate plan attorney, testified that the estate plan documents were, in fact, drafted deliberately to ensure that estate taxes would be paid first, so that all beneficiaries would share this burden. He noted that this was not his customary estate plan directive, and that it was George's intention that the estate documents would be in accord with the antenuptial agreement. Although the trust

contains an ambiguous clause which purports to give discretion to the trustee in the payment of taxes, both the marital trust and antenuptial agreements include the same language, that disbursement of funds would occur *after* the payment of "estate, inheritance, legacy, or succession taxes."

{¶ 16} Our review of George's video recording also reveals that his overriding intention was to be fair to all his heirs and to prevent disputes over the estate after his death. In the video, George states that Marianne Ballas is to receive one third of his estate and "her share of any estate taxes;" the Ballas children are to share equally the remaining two thirds. George restates and emphasizes these proportions several times during the video portions. In addition, he references the antenuptial agreement, his understanding of its terms, and how it affects the other estate plan documents. George notes that the estate plan was set up to comply with the antenuptial agreement and in the same proportions as Ohio's intestacy law, which provides that a surviving spouse is entitled to one third of a decedent's after-tax estate.

{¶ 17} Although Robert Matson and Marianne Ballas testified generally as to George's financial philosophy and his relationships with his children, neither participated in or had personal knowledge of the estate planning meetings or documents. When weighed against George's video and testimony of the estate planning attorney who actually talked with George and drafted the documents in response to his wishes, we conclude that the evidence heavily weighs in favor of the interpretation set out by the trial court. Moreover, imposing the entire tax burden on the Ballas children's share would

then change the proportion of the division of the assets, ultimately giving the spouse more than a one-third portion. In light of George's clear intention to leave one-third of his estate to his wife and two-thirds to his children, the logical conclusion is that he clearly intended that all heirs share any tax burden. Therefore, we conclude that the trial court did not err in its determination that estate or other taxes are to be paid prior to the division of the assets and disbursement into the trusts.

{¶ 18} Accordingly, appellant's first assignment of error is not well-taken.

II.

{¶ 19} In her second assignment of error, appellant contends that the trial court erred in finding that the incontestibility clause of the testator's will was not applicable to the proceedings regarding the interpretation of the terms of the trust.

{¶ 20} R.C. 2101.24(A)(1)(k) authorizes a probate court to "construe wills." Where a beneficiary has not initiated an action to contest the *validity* of a will or a "no contest" clause, or has otherwise filed defensive pleadings, a "no contest" clause has not been invoked, and the beneficiary does not forfeit his or her interest. See *Modie v. Andrews*, 9th Dist. No. C.A. 21029, 2002-Ohio-5765, ¶ 25, citing *Moskowitz v. Federman* (1943), 72 Ohio App. 149, and *Kirkbride v. Hickok* (1951), 155 Ohio St. 293, 302. Defensive pleadings, such as filing exceptions to inventory, objections to the sale of probate assets, or even a motion to remove a fiduciary, do not constitute contests to the validity of a will. See *Modie v. Andrews*, supra; *In the Matter of the Estate of Riber v. Peters* (Oct. 27, 1982), 12th Dist. Nos. 81-CA-27, 81-CA-28.

{¶ 21} In this case, as we previously determined, the provisions of the trust and antenuptial agreement were intended to be construed together, but contained an ambiguity regarding the payment of taxes. The Ballas children, as beneficiaries, were defendants in the declaratory judgment action filed by the trustee bank, and were permitted to respond to that action. They did not seek to set aside, break, or invalidate any provisions. Rather, they asked the probate court to exercise its power to construe the terms of the trust and other estate documents, to ensure that the grantor's true intentions were carried out.

{¶ 22} In addition, Herbert Braverman, an experienced estate planning attorney, testified that filing an answer and cross-claim in the declaratory action was a challenge to the trustee's action, not to the estate plan itself. Therefore, we conclude that the trial court properly denied appellant's motion to enforce the no contest clause.

{¶ 23} Accordingly, appellant's second assignment of error is not well-taken.

{¶ 24} The judgment of the Lucas County Court of Common Pleas, Probate Division, is affirmed. Appellant is ordered to pay the costs of this appeal 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.

Peter M. Handwork, P.J.

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JUDGE

Thomas J. Osowik, J.

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JUDGE

John R. Willamowski, J.
CONCUR.

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JUDGE

Judge John R. Willamowski, Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.