IN THE DISTRICT COURT OF APPEAL OF FLORIDA
IN AND FOR THE FOURTH DISTRICT

EVA TITA,

Appellant

v.

ESTATE OF JOHN P. TITA, ANDRE TITA, and SANDRA TITA

Appellees.
_____/

CASE NO. 4D21-1828

LT CASE NO. PRC18-4452

APPELLEES' ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellant EVA TITA will be referred to herein as “Appellant.” Appellees ANDRE TITA and SANDRA TITA, in their individual capacities, will be referred to collectively herein as “Appellees.” The lower court will be referred to as "the probate court." References to the Record on appeal will appear as "R.," followed by the corresponding page of the record.

STATEMENT OF THE CASE AND FACTS

John P. Tita (hereinafter "the decedent") died on September 14, 2018, a resident of Broward County, Florida. (R., 38). Appellant Eva Tita is the surviving spouse of the decedent and the mother of Appellees Andre Tita and Sandra Tita. (R., 24 - 31). The decedent executed a Last Will and Testament on April 18, 2017 (hereinafter "Will"). (R., 1 - 23). At the time of his death, the decedent owned a 43% interest in Layton Hills Properties, LLC, a Utah limited liability company (hereinafter "LHP"). (R., 868-870). In Article 2, Paragraph 2.1(e) of the Will, the decedent specifically devised his interest in LHP to two of his children, Andre and Sandra. (R., 3). This provision of the Will states:

> **(e) Specific Gift of LLC Interest**. I give all of my interests in the Layton Hills Properties, LLC, to my son, ANDRE TITA, and my daughter, SANDRA TITA, in equal shares. If any of them predecease me, the share of the deceased beneficiary will pass to that person's descendants who survive me, per stirpes. If one of the named beneficiaries predeceases me without descendants, their share shall lapse and pass equally to the remaining share. The main asset of the Layton Hills Properties, LLC, is real property located in Layton, Utah that has two buildings on the property with a legal description as follows:
>
> > A PART OF THE SOUTHWEST QUARTER OF SECTION 17, TOWNSHIP 4 NORTH, RANGE 1 WEST, SALT LAKE MERIDIAN; BEGINNING AT A POINT WHICH IS 1329.68 FEET EAST ALONG THE SECTION LINE AND 33.0 FEET NORTH FROM THE SOUTHWEST CORNER OF SAID SECTION 17, RUNNING THENCE NORTH 1 DEG 16 MIN EAST

> 515.0 FEET TO SOUTHWESTERLY RIGHT OF WAY LINE OF THE STATE HIGHWAY; THENCE SOUTHEASTERLY ALONG THE ARC OF A 5779.6 FOOT RADIUS CURVE TO THE RIGHT 367.20 FEET (LONG CHORD BEARS SOUTH 43 DEG 51 MIN 44 SEC EAST 367.13 FEET) ALONG SAID RIGHT OF WAY LINE; THENCE TWO COURSES ALONG THE EASTERLY LINE OF A 6 INCH CONCRETE CURB AS FOLLOWS; SOUTH 47 DEG 32 MIN 52 SEC WEST 91.53 FEET AND SOUTH 4 DEG 05 MIN 30 SEC EAST 188.87 FEET TO THE NORTH LINE OF 1000 NORTH STREET; THENCE WEST 211.73 FEET ALONG SAID NORTH LINE TO THE POINT OF BEGINNING.

> (the "Property"). If upon my death, the Property is not held in the Layton Hills Properties, LLC, then I give all of my interest in any entity holding the Property, or I devise the Property itself if not held in an entity, to the beneficiaries designated above subject to the same conditions as provided in this Article 2.1(e). (R., 4).

Appellant is the residuary beneficiary of the estate pursuant to Article 2, Paragraph 2.2 of the Will. (R., 4). The probate court admitted the decedent's Will to probate by Order dated February 20, 2020. (R., 741).

On April 8, 2021, Appellant filed her "Motion for Order Determining Disposition of Failed Devise," in which she sought an order from the probate court determining that the proceeds from the post-death buyout of the decedent's interest in LHP should be part of the residuary estate which passes to her, and that the specific devise of the LHP interest to Andre and

Sandra should fail. (R., 1160 - 1240). The operating agreement for LHP states, in pertinent part:

> Death Buy Out: Notwithstanding the foregoing provision of Section 8, the Members covenant and agree that on the death of any Member, the Company, at its option, by providing written notice to the estate of the deceased Member within 180 days of the death of the Member, may purchase, acquire, and redeem the interest of the deceased Member in the Company pursuant to the provision of Section 8.5. (R., 1167).

Appellees filed a response in opposition to Appellant's Motion, arguing that the devise of the decedent's interest in LHP did not fail, and that Appellees are entitled to inherit the proceeds from the buy-out of the decedent's interest in satisfaction of the decedent's devise of his interest in LHP to them. (R., 1248 - 1254).

The probate court entertained oral argument on May 11, 2021. (R., 1262 - 1265). On May 21, 2021, the probate court entered its Order on Motion for Order Determining Disposition of Failed Devise, ruling that the decedent's specific devise of his interest in LHP to Appellees did not fail as alleged by Appellant, and determining that Appellees are entitled to inherit the proceeds from the buy-out of the decedent's interest. (R., 1262 - 1265). On June 5, 2021, Appellant filed her notice of appeal. (R., 1266 - 1270).

SUMMARY OF THE ARGUMENT

The decedent died possessed of his interest in LHP, and validly devised that interest to Appellees. The decedent's devise of his interest in LHP to Appellees vested immediately at the time of the decedent's death. The post-death buy-out of the decedent's interest by LHP did not divest Appellees of their right to inherit the proceeds from the buy-out in place of the actual interest in LHP itself. Appellant's appeal is otherwise without merit, and accordingly, the order on appeal should be summarily affirmed.

STANDARD OF REVIEW

The standard of review of the probate court's statutory interpretation is *de novo*. See *Hill v. Davis*, 70 So.3d 572, 575 (Fla. 2011).

ARGUMENT

A. THE DECEDENT DIED POSSESSED OF HIS INTEREST IN LHP AND APPELLEES' RIGHTS THEREIN VESTED UPON THE DECEDENT'S DEATH.

At the time of the decedent's death, he held a 43% interest in LHP. The decedent's death is the event which vested Appellees with the decedent's interest in LHP. Florida Statutes § 732.514 states:

> Vesting of devises.—The death of the testator is the event that vests the right to devises unless the testator in the will has provided that some other event must happen before a devise vests.

The decedent's interest in LHP is listed as an asset of the estate on the Inventory. (R., 869). The LHP operating agreement provides the company with the option to purchase the interest of any deceased member from a deceased member's estate within 180 days of the death of such member. The operating agreement states:

> Death Buy Out: Notwithstanding the foregoing provision of Section 8, the Members covenant and agree that on the death of any Member, the Company, at its option, by providing written notice to the estate of the deceased Member within 180 days of the death of the Member, may purchase, acquire, and redeem the interest of the deceased Member in the Company pursuant to the provision of Section 8.5. (R., 1167).

The option to purchase the interest only comes into effect after the death of a member. Appellant incorrectly relies upon the fact that LHP decided to

exercise its option to purchase the decedent's interest from the estate as divesting Appellees from inheriting the decedent's interest in LHP or the cash proceeds from the buy-out. She fails to acknowledge that it was neither an act of the decedent, nor an action by the Personal Representative of the decedent's estate, nor any action by Appellees that resulted in the decedent's interest in LHP being converted to cash after the decedent's death. Rather, it was the unilateral action of LHP, which it could only take after the death of a member holding an interest, which resulted in the decedent's interest being converted to cash.[1] Furthermore, the operating agreement is silent as to the disposition of the buy-out proceeds, other than contemplating that the interest will be purchased from the estate of the decedent's member.[2] Finally, had the company failed to exercise its option to purchase the decedent's interest

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[1]Appellant improperly characterizes the devise of the LHP interest as a "failed devise." However, pursuant to Florida Statutes § 732.604, a devise fails when the named beneficiary predeceases the decedent and Florida Statutes § 732.603 does not apply. The decedent's specific devise of his interest in LHP is not a failed devise, as the form of the asset changed subsequent to the decedent's death as a result of the buy-out.

[2]The operating agreement contains a detailed procedure for the completion of a buy-out of the interest of a deceased member after the company exercises its option to purchase which requires the participation of the personal representative of the deceased member's estate. (R., 1172).

in LHP after his death, Appellees would indisputably have inherited the decedent's interest.

Since the decedent died possessed of an interest in LHP, Appellees' rights to inherit that interest vested immediately at the decedent's death, pursuant to Florida Statutes § 732.514 and the decedent's specific devise in his Will. The change in the form of the asset after death, through no act on the part of the decedent, did not defeat the decedent's intent to devise his interest in LHP to Appellees. Appellees are therefore entitled to receive the cash proceeds of the buy-out, in satisfaction of the devise of the LHP interest to them, and Appellant is not entitled to any portion thereof.

B. SINCE THE DECEDENT DIED POSSESSED OF HIS INTEREST IN LHP, THE POST-DEATH BUY-OUT BY THE COMPANY DID NOT DIVEST APPELLEES OF THEIR RIGHT TO INHERIT THE INTEREST REGARDLESS OF ITS FORM.

The post-death conversion of the decedent's interest in LHP into cash as a result of the company's election to exercise its option to purchase his interest from his estate after his death does not divest Appellees of their rights to the cash proceeds, as opposed to the actual interest itself. Since the decedent died possessed of his interest in LHP, Appellees' rights to the decedent's interest vested at death pursuant to Florida Statutes § 733.514,

regardless of when the interest was distributed to them by the estate. The conversion of the interest into cash, after the decedent's death but before the interest was distributed to Appellees, changed only the form, but not the substance, of the asset that the decedent specifically devised to Appellees in his Will. Appellees are therefore entitled to inherit the cash proceeds from the buy-out in satisfaction of the decedent's specific devise of his interest in LHP to them. Appellant's claim to the proceeds is not supported by law.

This is not a case of first impression. The Florida Supreme Court resolved this same issue in *In Re Estate of Watkins*, 284 So.2d 679 (Fla. 1973). In *Watkins*, the decedent specifically devised her stock in Amerada Oil to the American School of Classical Studies. The decedent's will left the residuary of the estate, specifically including any preferred stock, to her mother. At the time of the decedent's death, she held 400 shares of Amerada Oil stock. Shortly prior to the decedent's death, Amerada merged with Hess, forming Amerada Hess Corporation. As a result of the merger, Amerada shares were converted into preferred shares of the new company, thereafter being convertible into common stock one year after the merger, all of which took place subsequent to the decedent's death. The Personal Representative of the decedent's estate petitioned the probate court for instructions as to

whether the preferred stock should be distributed to the American School of Classical Studies or to the decedent's mother.

The Supreme Court in *Watkins* ruled that the preferred stock should be distributed to the specific devisee and not the residuary devisee, reasoning that " ...when there is no act on the part of the testator manifesting a change of intent, there is no ademption of the property bequested if it is in existence or can be traced." *Id.* at 681. The Court relied upon well-settled precedent, stating:

> This Court in *In Re Vail's Estate* held:
> '. . . In *Hurt v. Davidson*, 130 Fla. 822, 178 So. 556, 557, we said that 'while a will becomes effective at the death of a testator, the description of property specifically bequeathed must be applied to property as of the date of the will * * *.' '. . . That a stock split-up is a mere change in form and not in substance, and that additional shares so acquired pass under a specific bequest of the original shares, is too well settled for contradiction. . . .
> '(4) A specific bequest of stock also generally carries with it, for the same reasons, the results of corporate reorganizations, mergers, dissolutions, and other corporate structural alterations when the interest represented by the bequest can be traced through succeeding transactions. . . *Id.*

Subsequently, the Second District followed *Watkins* in *McPhee v. Estate of Bahret*, 501 So.2d 1319 (Fla. 2d DCA 1985), where the Court determined that a specific devisee of AT&T stock was also entitled to receive BellSouth stock that the decedent acquired as a result of the reorganization of AT&T, as part

of the specific devise of the AT&T stock. The lower court had awarded the BellSouth stock to the residuary devisee instead of the specific devisee of the AT&T stock. In *McPhee*, the Court reasoned that *Watkins* applied such that the beneficiary should receive the substance of the devise notwithstanding a change in form, stating

> [h]ere, the testator never manifested a change of intent; he merely selected between certain options imposed upon him by AT&T and only the form of his original investment changed. This, we think, supports the appellant's position that it was the decedent's intention to devise to her the economic substance of the AT&T stock. *Id.* at 1321.

The material facts of *Watkins* are the same as those in the case at bar, and the difference between stock in a corporation and an interest in a limited liability company is neither relevant, persuasive, nor controlling. Specifically, in both instances, the decedent died possessed of an asset which they specifically devised in their respective wills, which changed in form but not substance after the decedent's death, through no act of the decedent and without any indication of any change in the decedent's testamentary intent. The Court in *Watkins* determined that the decedent's testamentary intent was clear, and that notwithstanding the post-death change in the form of the asset, the decedent's intent applied to the substance of the asset, thereby enforcing the specific devise of the Amerada stock in its new form to the specific

devisee. This same rationale was correctly applied by the probate court in the case at bar, since through no act of the decedent, the company elected to change the form of the decedent's interest in LHP into cash after the decedent's death, and after the specific devise vested. In the case at bar, the decedent did not express any specific intent to devise any portion of his interest in LHP to Appellant.[3]

This Court, on authority of *Watkins* and its precedent and progeny, should summarily affirm the probate court's determination that Appellees are entitled to the cash proceeds resulting from the buy-out of the decedent's interest in LHP after his death.

C. CONTRARY TO APPELLANT'S ARGUMENT, THE TERMS OF THE LHP OPERATING AGREEMENT DO NOT DIRECT THE DISPOSITION OF THE DECEDENT'S INTEREST IN LHP UPON HIS DEATH, SO APPELLEES ARE ENTITLED TO THE PROCEED OF THE BUY-OUT.

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[3]In fact, in the case at bar, the decedent's intent regarding his devise of his interest in LHP to Appellees and not to Appellant is crystal clear. In his Will, the decedent specifically contemplated the possibility that the underlying real property owned by LHP could be held by him outside of LHP at the time of his death. Appellant may argue that because the decedent did not also address the possibility of his interest in LHP being converted to cash in his Will, he did not intend for Appellees to inherit the cash proceeds under the circumstances. This argument, however, ignores the immediate vesting of devises pursuant to Florida Statutes § 733.514.

Appellant incorrectly argues that the LHP operating agreement defeats the decedent's ability to devise his interest in LHP to Appellees. However, even a cursory review of the operating agreement proves otherwise. The operating agreement does not direct who should receive the decedent's interest in LHP upon his death, nor does it contemplate the proceeds from the buy-out of the decedent's interest being paid to anyone specifically, other than to the decedent's estate. While the operating agreement could have functioned as a will substitute with respect to a member's in LHP, it clearly does not, as it does not specifically direct who receives any member's interest upon their death. The only mention of death in the operating agreement relates to the company's buy-out option of a deceased member's interest, which is not specific to the decedent, but rather, applies to all members.

Appellant cites *Blechman v. Estate of Blechman*, 160 So. 3d 152, 159 (Fla. 4th DCA 2015) in support of her argument. In *Blechman*, this Court considered whether the terms of an operating agreement which specifically directed the disposition of a decedent's membership interest in a company at death controlled over the decedent's pour-over Will and Trust. The Court held that because the operating agreement specifically addressed the disposition of the decedent's interest upon death, the operating agreement functioned as

a will substitute, like a beneficiary designation, and therefore controlled over the Will and Trust. The facts of the case at bar are completely different, and therefore, *Blechman* is neither persuasive nor controlling. In *Blechman*, the controlling operating agreement expressly stated that the decedent's interest would "...immediately vest[s] in the deceased Member's then living children..." This Court held that the "immediate vesting" was explicitly intended to "steer" the membership interest "...away from the probate estate..." *Id.* at 159. The provision in the operating agreement at issue in *Blechman* is equivalent to a beneficiary designation, resulting in the interest vesting outside of probate administration, and therefore, not controlled by the decedent's Will.

The facts of the case at bar are different than those in *Blechman*. In the case at bar, the operating agreement does not function as a will substitute, as it does not specifically direct who receives the decedent's interest in the company, or the cash proceeds from the buy-out, unlike the operating agreement in *Blechman.* Therefore, the holding of *Blechman* is inapplicable to the facts at bar.

Appellant also mistakenly relies on *Murray Van & Storage, Inc. v. Murray*, 364 So. 2d 68, 69 (Fla. 4th DCA 1978), in support of her position. In *Murray*, the issue before the Court was limited to whether or not a buy-out

provision of an operating agreement prevailed over the disposition in the decedent's will. This Court held that under the specific facts of *Murray*, which are distinguishable from the facts at bar, it did, and therefore, the membership interest could be purchased by the corporation from the decedent's estate. The holding of the Court in *Murray* was that once the buy/sell option was exercised by the company, the terms of the will could not prevent the buyout. *Murray* did not address the issue of which beneficiaries received the proceeds from the sale.

Both *Blechman* and *Murray* are distinguishable and do not apply to the facts at bar. In fact, either case would support the ruling of the probate court, since the LHP operating agreement does not contain a specific disposition of the proceeds from the buy-out of a deceased member's share. Appellant has otherwise failed to cite any authority that suggests that Appellees' rights to the decedent's interests in LHP did not vest at the time of his death. Appellant has also failed to cite any authority that suggests that a post-death change in the form of an asset deprives a specific devisee of the right to receive the asset in its new form. Appellant has failed to establish that the LHP operating agreement has any provision which directs who receives the proceeds of the buy-out of the decedent's interests. Finally, Appellant cannot distinguish

Watkins or *McPhee*. Appellees' devise of the decedent's interest in LHP vested immediately upon the decedent's death. The post-death buy-out did not divest Appellees of the decedent's interest - the buy-out merely changed the form of the asset from a membership interest into cash. Appellees must receive the cash proceeds from the buy-out in satisfaction of the decedent's devise of his interest in LHP to them. Appellant's appeal is without merit and the probate court must be affirmed.

CONCLUSION

The decedent specifically devised his interest in LHP to Appellees. The fact that the company exercised its option to purchase the decedent's interest from the estate after the decedent's death did not change the decedent's testamentary intent to leave Appellees his interest in the company, regardless of form. The probate court properly rejected Appellant's attempt to claim the proceeds from the buy-out of the decedent's interest for herself. This court, relying upon well-settled precedent, should summarily affirm the flawless decision of the probate court, and in so doing, uphold the decedent's clear testamentary intent to benefit Appellees with his interest in LHP.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail to the following parties on this 15th day of November, 2021:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the above computer-generated pleading complies with the font requirements of Fla. R. App. P. 9.045(b). This document is prepared in Arial 14-point font.

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