IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE,
WEST PALM BEACH, FL 33401

CASE NO.: 4D21-1828

L.T. No.: PRC18004452

EVA TITA

Appellant

v.

ESTATE OF JOHN P. TITA, et al.

Appellee

APPELLANT'S INITIAL BRIEF

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INTRODUCTION

In Florida, a decedent's attempt to devise his membership interest by will is nullified when an operating agreement eliminates the decedent's ability to devise that same interest. Here, the decedent attempted to devise his membership interest by will; however, his ability to devise that same interest was eliminated by the company's operating agreement. Was the Decedent's attempted devise nullified?

Under Florida law, a technical term used in a will should be given its legal definition unless it is obviously used by the testator in a different sense. Here, the testator used the technical term "interest" to devise his 43% membership interest in a limited liability company to his son and daughter in equal shares. Should the technical term "interest" used in this context be given its legal definition?

SUMMARY OF THE FACTS

I. Introduction to the parties.

The appellant, Eva Tita ("Eva"), is the surviving spouse of John Tita ("Decedent") and the sole beneficiary of the estate's residue. The appellees are Andre Tita ("Andre") and Sandra Tita ("Sandra"), two of Eva and the Decedent's children.

II. The Decedent's membership interest in Layton Hills.

The Decedent owned a 43% membership interest in Layton Hills Properties LLC ("Layton Hills), a Utah limited liability company. (R. 250-251, 1161).[1] The membership interest is controlled by an operating agreement that gives the company the express right to buy out a deceased member's interest in the company. (R. 1170-1172). Specifically, Section 8.5, *Death Buy Out* provides:

> 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. 1171).

III. The Decedent's attempt to devise his membership interest in Layton Hills.

In Article 2.1(e) of his last will and testament ("Will"), the Decedent devised his 43% membership interest in Layton Hills to Andre and Sandra. (R. 3-4). Here is the language he used in the Will:

> **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

[1] Citations to the Record on Appeal dated July 7, 2021 in Case No. 4D21-1828 shall be designated by an "R" followed by the page number(s).

> 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. (R. 3).

The main asset of Layton Hills is real property in Layton, Utah. (R. 3-4, 1207). The Will provided two narrow alternative dispositions if the Decedent's membership interest did not exist. First, if the real property was not owned by Layton Hills at the Decedent's death, all the Decedent's interest in the entity that owned the real property should be given to Andre and Sandra. (R. 3-4). Second, if the real property is not owned by an entity, the Decedent's interest in the real property should be given to Andre and Sandra. (R. 3-4). Notably absent from the Will is an alternative disposition of the Decedent's membership interest if the company exercises its right to buy out that interest. (R. 3-4).

IV. The Florida probate proceeding.

After the Decedent's passing on September 14, 2018, Andre and Sandra, as the nominated co-personal representatives of the estate, filed a petition for administration on October 3, 2018. (R. 24-31). The petition was later amended. (R. 44-49). For reasons not germane to this appeal, Eva and her son, Michael Tita, objected to the amended petition for administration, which prevented the admission of the Will and the

appointment of personal representatives. (R. 52-68, 69-72, 190-210, 255-260). On February 11, 2019, the lower court appointed Douglas F. Hoffman as the Curator of the estate ("Curator") to administer the estate during the pendency of the objections to amended petition for administration. (R. 112-113).

V. The inventory of the Estate.

On March 27, 2020, the Curator filed his inventory of the estate. (R. 868-870). It accurately listed the Decedent's 43% interest in Layton Hills, subject to a potential buyout by the company and a Utah court's decision on the enforceability of the operating agreement. (R. 869). The value listed: unknown/undetermined. (R. 869).

VI. The Utah litigation concerning the enforceability of the operating agreement.

During the administration of the estate, there was litigation in Utah regarding the enforceability of Layton Hill's operating agreement (the "Utah Litigation).[2] On October 3, 2019, the plaintiffs in the Utah Litigation moved for partial summary judgment. (R. 1205-1236). On June 17, 2020, the

[2] The case is styled *Michael R. Tita, an individual, and Eva R. Tita, an individual, vs. Layton Hills Properties, LLC, a Utah limited liability company, the Estate of John P. Tita, Sr., Andre J. Tita, an individual, and Sandra R. Tita, an individual*, Civil No. 180908933, Third District Court in and for Salt Lake County, State of Utah.

Utah court granted the plaintiff's motion (R. 982-985) and held the following:

> Pursuant to Utah Code Ann. § 48-3a-113(2), the Estate of John P. Tita, Sr. (the "Estate") is deemed to have assented to the "Operating Agreement," effective December 9, 2011, of Layton Hills Properties, LLC (the "Company").
>
> The Company has exercised its option to purchase and redeem the interest of deceased member John P. Tita, Sr. from the Estate in accordance with the "Death Buy Out" provision of the Operating Agreement, Section 8.5, which is enforceable.
>
> A determination of the membership interest's value and the closing will proceed in the manner specified in Section 8. (R. 983).

The ruling confirmed the enforceability of the operating agreement and the buyout of the Decedent's 43% membership interest from the Estate. (R. 983). This ruling impacted the administration of the Estate because, on June 27, 2019, the lower court entered an order memorializing the parties' agreement that the Utah court's decision on the enforceability of the operating agreement shall be binding on the estate. (R. 250-252).

VII. The appointment of personal representatives.

By December 16, 2020, all objections to the amended petition for formal administration were voluntarily resolved. (R. 602, 1107, 1108-1110).

On December 17, 2020, the lower court appointed Andre and Sandra as the co-personal representatives. (R. 1123-1124).

VIII. The buyout of the membership interest under the operating agreement trumps the attempt to devise that same interest by Will.

On April 8, 2021, Eva filed her motion for order determining disposition of failed devise. (R. 1160-1240). In the motion, Eva argued that the buyout in the operating agreement, exercised by the company, trumped the Decedent's attempt to devise his membership to Andre and Sandra. In support of that proposition, she cited two cases from the Fourth District Court of Appeal: *Blechman v. Estate of Blechman*, 160 So. 3d 152, 159 (Fla. 4th DCA 2015); *Murray Van & Storage, Inc. v. Murray*, 364 So. 2d 68, 69 (Fla. 4th DCA 1978). Importantly, Andre and Sandra did not challenge Eva's argument that the buyout provision in the operating agreement trumps the Decedent's attempt to devise his membership interest to Andre and Sandra. (R. 1248-1254).

IX. A summary of the competing positions before the lower court.

Eva argued that the company's buyout of the Decedent's membership interest caused the devise of that same interest to Andre and Sandra to fail. (R. 1164). Therefore, the failed devise causes the proceeds from the buyout to pass to Eva as the sole beneficiary of the residue. In

opposition, Andre and Sandra argued the gift of the interest did not fail because the Decedent intended to give his interest—whatever that may be—to Andre and Sandra. (R. 1251-1252). Consequently, the devise survives and the proceeds from the sale of the membership interest should be given to Andre and Sandra.

X. The lower court's order that is the subject of this appeal.

The lower court entered its order on the motion for order determining disposition of failed devise. (R. 1262-1265). The lower court found, based on the plain language in the Will, that the Decedent's intent was clear: his interest in Layton Hills—whatever it may be—should be devised to Andre and Sandra. (R. 1263). That determination, which impermissibly expanded the legal definition of membership interest to include the proceeds from the sale of that same interest, is the source of the present controversy before this Court. (R. 1266-1270).

SUMMARY OF ARGUMENT

The lower court's conclusion that the proceeds from the buyout of the Decedent's membership interest should be devised to Andre and Sandra should be reversed for two reasons:

1. The disposition of the Decedent's membership interest in Layton Hills is controlled by the Operating Agreement, which nullifies the competing disposition in the Will.

2. In this context, "interest" is a legal term of art, and can only mean one thing: the Decedent's membership interest in Layton Hills—not the proceeds from the buyout of that same interest.

STANDARD OF REVIEW

De novo is the standard of review of a trial court's decision based on the interpretation of the language of a will. See *SPCA Wildlife Care Ctr. v. Abraham*, 75 So. 3d 1271, 1275 (Fla. 4th DCA 2011); *see also Reno v. Hurchalla*, 283 So. 3d 367, 369 (Fla. 3d DCA 2019) ("A trial court's interpretation of the text of a last will and testament or trust instrument is reviewed de novo."). Under these circumstances, an appellate court is free to reassess the language of the will and arrive at a different conclusion from the trial court. *See Dows v. Nike, Inc.*, 846 So. 2d 595, 601 (Fla. 4th DCA 2003).

ARGUMENT

I. The Decedent's membership interest in Layton Hills cannot be devised because its disposition is controlled by the company's operating agreement.

Under Florida law, an agreement that specifically addresses the disposition of property on death, will defeat a testamentary disposition of that same property. *Blechman v. Estate of Blechman*, 160 So. 3d 152, 159 (Fla. 4th DCA 2015); *Murray Van & Storage, Inc. v. Murray*, 364 So. 2d 68, 69 (Fla. 4th DCA 1978); *see also, Finlaw v. Finlaw*, 320 So. 3d 844, 848 (Fla. 2d DCA 2021) (explaining that "where contracting parties expressly agree on the disposition of property upon death, that agreement generally controls over a testamentary disposition of the property.").

Blechman is instructive on this point. In *Blechman*, this Court determined that the decedent's attempt to devise his membership interest was nullified because the operating agreement eliminated the decedent's ability to devise that same interest. *Blechman*, 160 So. 3d at 158-59. Here, the Decedent's ability to devise his membership interest to Andre and Sandra was conditioned on Layton Hills not exercising its right under the operating agreement to buy out that same interest. Layton Hills eliminated the Decedent's ability to devise his membership interest when it exercised its right and bought out that interest under the operating agreement.

Under the Florida Probate Code, "if a devise other than a residuary devise fails for any reason, it becomes part of the residue." Florida Statute § 732.604. When Layton Hills exercised its right under the operating agreement—and bought out the Decedent's membership interest—it voided the gift of that same interest to Andre and Sandra. The nullification of that devise causes the proceeds from the buyout of that interest to become a part of the residue.

II. The Decedent's intent is clear when the technical term interest used in the Will is accorded its legal definition.

If the "provisions of the will are clear and unambiguous, [the trial court] need not engage in judicial construction; rather [the trial court will] apply the provisions according to their plain and ordinary meaning." *Barley v. Barcus*, 877 So. 2d 42, 44 (Fla. 5th DCA 2004); *see also Aldrich v. Basile*, 136 So. 3d 530, 535 (Fla. 2014) ("It has been well established that 'in construing a will the intention of the testator is the controlling factor and it should be gleaned from the four corners of the will unless the language employed by the testator is ambiguous, in which case the testimony of competent witnesses may be received and considered as an aid to the court in its quest for the testator's intent.'"). This Court has held that it is error for a trial court to engage in judicial construction of a will unless the

trial court first concludes that a will is ambiguous. *See In re Estate of Riggs*, 643 So. 2d 1132, 1134 (Fla. 4th DCA 1994).

Here, it was error for the lower court to engage in judicial construction of the term "interest" in the Will. In Article 2.1(e) of the Will, the Decedent made a specific gift of all his interest in the limited liability company to Andre and Sandra. The term "interest" is a technical term, and therefore, it should be accorded its legal definition. *See Timmons v. Ingrahm*, 36 So. 3d 861, 864 (Fla. 5th DCA 2010) ("In determining the intent of the settlor, a technical term used in a trust instrument should be accorded its legal definition, unless obviously used by the settlor in a different sense."). In the context of a limited liability company, the term "interest" is a membership interest in a limited liability company. Utah Code § 48-3a-1001(16)(e); Florida Statute § 605.0102(29)(e). Importantly, Utah and Florida law do not expand the definition of membership interest to include the proceeds from a buyout of that interest.

"The law of wills is calculated to avoid speculation as to the testator's intent and to concentrate upon what he said rather than what he might, or should, have wanted to say." *In re Pratt's Estate*, 88 So. 2d 499, 504 (Fla. 1956). Greater weight is given to the words chosen by the testator versus the words not used or his silence. *Grant v. Bessemer Tr. Co. of Fla., Inc.*

ex rel. Grant, 117 So. 3d 830, 836 (Fla. 4th DCA 2013). Here, the Decedent used the technical term "interest" when referencing the membership interest devised to Andre and Sandra. He did not use interest or the proceeds from the sale of that interest.

Defining interest as a membership interest in a limited liability company causes the devise to Andre and Sandra to fail because there is no membership interest to give them—it was bought out by the company. Because of the failed devise, the proceeds from the buyout become part of the residue under Florida Statute § 732.604.

Ironically, Andre and Sandra cited *In re Watkins' Estate*, 284 So. 2d 679, 680 (Fla. 1973) in support of their argument that the devise did not fail and the value of the Decedent's membership interest should be traced. That same case was also relied on by the lower court in its order. The irony is threefold: *Watkins* is a case dealing with securities—not an interest in a limited liability company. *Id*. The law concerning a change in securities is codified in Florida Statute § 732.605 and is inapplicable here. Next, in *Watkins,* the testatrix devised her shares in a corporation, *or the proceeds therefrom*, to a charity. *Id*. That or similar language was not used by the Decedent in his Will. Finally, the Florida Supreme Court viewed the evolution of the shares from common to preferred stock as a

change in form not a change in substance. *Id*. at 681. Here, the conversion of a membership interest to proceeds from the buyout is a change in substance, not a change in form.

CONCLUSION

The Decedent lost his ability to devise his membership interest to Andre and Sandra when the company exercised its right to buy out that same interest under the operating agreement, which nullified the attempted devise, causing the proceeds from the buyout to become part of the residue.

The technical term "interest" used in the Decedent's Will means his membership interest in Layton Hills; however, that interest was eliminated when the company bought out the interest under the operating agreement. That act caused the devise to fail; the proceeds from the buyout become part of the residue.

This Court should vacate the order on motion for order determining disposition of failed devise and direct the lower court to enter an order determining that the proceeds from the buyout become part of the residue.

Alternatively, if this Court finds the term "interest" ambiguous, Appellant requests that the matter be returned to the lower court, where the

testimony of competent witnesses may be received and considered as an aid to the lower court to determine the Decedent's intent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished via electronic service of the Florida Courts E-Filing Portal on this 30th day of September, 2021, to: Scott A. Weiss, Esq., Scott A. Weiss, P.A., 12 SE 7th Street, Suite 707, Fort Lauderdale, FL 33301.

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CERTIFICATE OF COMPLIANCE

I certify that this Initial Brief complies with the font and word count requirements set forth in Rule 9.045(b) and Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure as it has been prepared in Arial 14-point font and contains 2,792 words.

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