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 REPLY BRIEF

GEORGE J. TAYLOR
Florida Bar No. 102878
george.taylor@brinkleymorgan.com
BENJAMIN SUNSHINE
Florida Bar No. 112754
benjamin.sunshine@brinkleymorgan.com
BRINKLEY MORGAN
100 SE 3rd Avenue, 23rd Floor
Fort Lauderdale, Florida 33394
Telephone: 954-522-2200
Facsimile: 954-522-9123
Attorneys for Appellant

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I. The vesting of the Decedent's membership interest in Layton Hills was contingent upon Layton Hills exercising its buy-out right pursuant to Section 8.5 of Layton Hills' operating agreement.

Andre and Sandra first argue that because the Decedent died owning a membership interest in Layton Hills, his membership interest vested to Andre and Sandra at the time of his death. This argument is belied by the fact that the vesting of the Decedent's membership interest in Layton Hills was contingent upon and suspended until Layton Hills made a decision regarding its right to buy-out the Decedent's membership interest in Layton Hills.

This Court's decision in *TeGrotenhuis v. Rice*, 744 So. 2d 1057 (Fla. 4th DCA 1999) is instructive on this point. Therein, this Court opined on the distinction between a contingent and a vested devise as follows: "When 'the element of futurity is annexed to the substance of the gift, rather than the enjoyment of it, vesting is suspended and the gift is contingent.'" *Id.* at 1058 (*quoting Travis v. Ashton*, 23 So. 2d 725, 726 (Fla. 1945)). An example of a contingent devise is where the devise is predicated upon the existence of property after the specific condition precedent is satisfied. *See Carvel v. Godley*, 939 So. 2d 204, 207 (Fla. 4th DCA 2006); *see also Story v. First Nat'l Bank and Trust Co.*, 156 So. 101, 105 (Fla. 1934) ("An estate is

contingent if, in order for it to become a present estate, the fulfillment of some condition precedent other than the determination of the preceding freehold estates is necessary.").

Here, the vesting of the Decedent's membership interest in Layton Hills did not occur at his death. Instead, the vesting of the Decedent's membership interest in Layton Hills was contingent because it was controlled by Section 8.5 of Layton Hills' operating agreement. Section 8.5 of Layton Hills' operating agreement gave Layton Hills the express right to purchase the Decedent's membership interest from his estate as follows:

> 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).

Until Layton Hills made a decision regarding its option to purchase the Decedent's membership interest in Layton Hills, the vesting of the Decedent's membership interest in Layton Hills was suspended. In other words, the Decedent's ability to devise his membership interest to Andre and Sandra was conditioned on Layton Hills not exercising its right to buy his membership interest. Accordingly, the fact that the Decedent died owning a membership interest in Layton Hills is of no consequence and does not

mandate the vesting of the Decedent's membership interest in Layton Hills to Andre and Sandra.

II. The conversion of the Decedent's membership interest in Layton Hills into cash was a change in substance, not form, because it resulted in a change in ownership.

Next, Andre and Sandra argue that the conversion of the Decedent's membership interest in Layton Hills into cash should not foreclose their ability to inherit the cash proceeds as opposed to the actual membership interest. For support, Andre and Sandra argue that the conversion of the Decedent's membership interest into cash was a change in form, not substance, and rely on *In re Estate of Watkins*, 284 So. 2d 679 (Fla. 1973) and *McPhee v. Estate of Bahret*, 501 So. 2d 1319 (Fla. 2d DCA 1986).

Andre and Sandra's reliance on *Watkins* and *McPhee* is misplaced for two reasons. First, both *Watkins* and *McPhee* address the devise of securities. Here, the Decedent attempted to devise his membership interest in Layton Hills, a Utah limited liability company, to Andre and Sandra. A membership interest in a limited liability company is not a security. In fact, the Florida legislature has identified 23 separate items that fall within the definition of a security, which does not include a membership interest in a limited liability company. *See* Florida Statutes § 517.021(22); *see Young v. Progressive Se. Ins. Co.,* 753 So.2d 80, 85 (Fla. 2000) ("Under the principle

of statutory construction, *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of another.").

Second, assuming *arguendo* that a membership interest in a limited liability company is a security, *Watkins* and *McPhee* still have no application here. In both cases, the securities at issue merely changed forms. In *Watkins*, the security at issue, stock in Amerada Petroleum Corporation, simply changed to stock in Amerada Hess Corporation because of a merger between Amerada Petroleum Corporation and Hess Oil and Chemical Corporation. *See Watkins*, 284 So. 2d at 680. Similarly, in *McPhee*, the security at issue, stock in AT&T, merely changed to stock in Bell South because of AT&T's reorganization. *See McPhee*, 501 So. 2d at 1320.

The conversion of a stock because of a merger or reorganization is a change in form, not substance, because it results "in no gains for the stockholder, nor any loss, but simply a change in the form of evidence of his corporate ownership." *In re Howard's Estate*, 393 So. 2d 81, 83 (Fla. 4th DCA 1981). In fact, the law regarding a conversion of a security as a result of a merger and reorganization is codified in Florida's Probate Code. *See* Florida Statutes § 732.604(1)(c) ("If the testator intended a specific devise of certain securities rather than their equivalent value, the specific devisee is entitled only to: [s]ecurities of another entity owned by the testator as a result

of a merger, consolidation, reorganization, or other similar action initiated by the entity.").

Here, the conversion of the Decedent's membership interest in Layton Hills into cash was a change in substance, not form. The Supreme Court of Florida's decision in *In re Vail's Estate*, 67 So. 2d 665 (Fla. 1953) is instructive on this point. Therein, the Supreme Court of Florida held that it is "well settled" that a devisee "is not entitled to a cash dividend" because "[w]hen a dividend is paid in cash, the ownership of the corporate assets is changed; the company owns less, and the shareholder owns more, or something essentially different, through its value be no greater." *Id.* at 668-69. Like a cash dividend, the conversion of the Decedent's membership interest into cash was a change in substance because it resulted in a change in ownership from the Decedent to Layton Hills, and what remained, fungible cash, does not evidence ownership in anything. This change in substance eliminated the very thing left to Andre and Sandra in the Decedent's will—the gift failed. Therefore, the cash proceeds from buy-out of the Decedent's membership interest in Layton Hills become part of the residue.

III. The disposition of the Decedent's membership interest in Layton Hills is controlled by Layton Hills' operating agreement.

Lastly, Andre and Sandra argue that they are entitled to the cash proceeds from the buy-out because Layton Hills' operating agreement does

not direct the disposition of the Decedent's membership interest after his death. This argument misses the mark because Section 8.5 of the operating agreement guides the disposition of the Decedent's membership interest in Layton Hills as follows:

> 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).

Andre and Sandra go on to argue that Eva's reliance on *Blechman v. Estate of Blechman*, 160 So. 3d 152, 159 (Fla. 4th DCA 2015) and *Murray Van & Storage, Inc. v. Murray*, 364 So. 2d 68, 69 (Fla. 4th DCA 1978) is erroneous. Specifically, they argue that *Blechman* and *Murray* have no application here because those cases do not address the disposition of the cash proceeds of a decedent's interest in a company.

The fact that *Blechman* and *Murray* do not directly deal with the disposition of the cash proceeds of a decedent's interest in a company is irrelevant. *Blechman* and *Murray*, along with *Finlaw v. Finlaw*, 320 So. 3d 844 (Fla. 2d DCA 2021), stand for the proposition that where contracting parties agree on the disposition of property upon death, that agreement will control over a testamentary disposition of the property. Applied here, the

Decedent's ability to devise his membership interest in Layton Hills to Andre and Sandra in his will was nullified when Layton Hills executed its right to buy-out the interest under Section 8.5 of the operating agreement, which caused the gift to Andre and Sandra to fail. This failed devise, like all failed devises, passes according to the residuary clause of the will.

Conclusion

For the foregoing reasons, this Court should vacate the order on the motion for order determining disposition of failed devise and direct the lower court to enter an order determining that the proceeds from the buy-out become part of the residue.

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 December, 2021, to: Scott A. Weiss, Esq., Scott A. Weiss, P.A., 12 SE 7th Street, Suite 707, Fort Lauderdale, FL 33301.

BRINKLEY MORGAN
Attorneys for Appellant
100 SE 3rd Avenue, 23rd Floor
Fort Lauderdale, Florida 33394
Telephone: 954-522-2200
Facsimile: 954-522-9123

By: /s/ *George J. Taylor*
GEORGE J. TAYLOR
Florida Bar No. 102878
BENJAMIN SUNSHINE
Florida Bar No. 112754

Primary: george.taylor@brinkleymorgan.com
benjamin.sunshine@brinkleymorgan.com
Secondary: cristina.rivera@brinkleymorgan.com
paulette.roma@brinkleymorgan.com

CERTIFICATE OF COMPLIANCE

I certify that this Reply 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 1540 words.

By: /s/ *George J. Taylor*
GEORGE J. TAYLOR
Florida Bar No. 102878