

INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

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CASE-MIS No.: TAM-150279-10

SBSE Estate and Gift Tax
SE:S:SP:EG:W:G1

Taxpayer's Name:
Taxpayer's Address:

TIN:
Date of Death:
Date of Conference:

LEGEND

Decedent =
Spouse =
Children =

Date 1 =
Date 2 =
Date 3 =
State =
Statute =
Cite 1 =

Cite 2

Cite 3 =

Cite 4 =

Cite 5 =

Cite 6 =

Cite 7 =

Cite 8 =

Cite 9 =

Cite 10 =

Cite 11 =

Cite 12 =

Cite 13 =

Cite 14 =

Cite 15 =

Cite 16 =

Cite 17 =

Cite 18 =

ISSUE

Whether the language “it is my desire” in Article III of Decedent’s Last Will and Testament (Will) is to be given mandatory construction as passing the described property interests to the Decedent’s children as specific bequests, thereby reducing the marital deduction under § 2056 of the Internal Revenue Code and increasing the taxable estate, taking into consideration the rules of abatement under Statute in regard to Decedent’s debts and obligations.

CONCLUSION

The language “it is my desire” in Article III of Decedent’s Will is to be given mandatory construction as passing the described property interests to the Decedent’s children as specific bequests, thereby reducing the marital deduction under § 2056 and increasing the taxable estate, taking into consideration the rules of abatement under Statute in regard to Decedent’s debts and obligations.

FACTS

Decedent died testate on Date 1, survived by Spouse and Children. Article I of Decedent's Will appoints fiduciaries, and Article II provides that Decedent does not intend to exercise any powers of appointment Decedent has at death. Article III provides in its heading that it is a "statement of intent" concerning certain assets and states as follows:

To the extent that I own any equity interest at my death in any of the following closely held investments, i.e. [Assets], it is my desire that such equity interests be retained and that each of them be distributed so that all such equity interests are ultimately owned in equal shares by [Children]. If any of them are deceased, it is my desire that the decedent's share of such equity interests be owned equally by such decedent's children.

Article IV and Article V of Decedent's Will contain specific bequests to Spouse. Both articles use the language "I give, devise and bequeath to. . .", "I request, but do not require. . .", and "I further request, but do not require. . ." Article VI makes a bequest to Spouse using the language "I give. . ." Article VII makes specific bequests using the phrases "I give", "I give . . . to use during [Spouse's] lifetime", "I give, devise and bequeath", and "I direct". Article VIII disposes of tangible personal property not otherwise disposed of under the Will and uses the language "I give" and "I direct". Article VIII also provides as follows:

I may prepare a memorandum where I suggest to the person named above my desires with respect to the distribution of personal property named in the memorandum. Such memorandum is merely a suggestion to such person, who shall be the absolute owner of the property and shall be under no obligation to comply with my desires.

Article IX of Decedent's Will contains additional specific bequests including monthly amounts payable for the life of certain individuals. Article IX uses the phrases "I give" and "I give, devise and bequeath". Article IX also specifically provides that the Executor "may, exercising [the] Executor's sole and absolute discretion" purchase an annuity contract to satisfy certain bequests.

Article X of Decedent's Will creates a Family Trust for the benefit of Decedent's Children. Article X uses the language "I give all of the rest, residue and remainder of my property. . ." Spouse does not have an interest in Family Trust.

Article XIII contains provisions relating to the payment of debts, expenses and taxes. With respect to certain provisions in Article XIII, Executor is given “absolute discretion” or “sole discretion”.

Article XVI provides that the headings used in the Will are for convenience only and do not affect or modify the provisions of the Will. Article XVI also provides that Decedent’s Will is to be construed and administered in accordance with the laws of State. Decedent was a resident of State at the time of Decedent’s death.

We have been asked to determine whether the language “it is my desire” included in Article III of Decedent’s Will is mandatory or precatory. If the language is mandatory, Article III is a specific bequest of Assets to Decedent’s Children. If the language is precatory, Assets will pass under Article X as part of the residue of Decedent’s Estate.

Estate includes substantial debt obligations owed by Decedent at death, and State’s rules of abatement in Statute are applicable. Under these rules, if the language in Article III constitutes a specific bequest, the amount that passes to Spouse will be reduced together with the amount of Estate’s marital deduction under § 2056. On the other hand, if the language is precatory, Assets will pass under the Article X residuary provision. Under Statute, the debt obligations will eliminate the residue and the remaining debt will be counted against the specific bequests. Under these circumstances, Estate’s marital deduction will be greater.

LAW AND ANALYSIS

Section 2056(a) provides that the value of a decedent’s taxable estate shall be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property that passes or has passed from the decedent to the surviving spouse.

The rules of construction of wills and trusts under State law are well settled. If the language of a trust is unambiguous and expresses the intent of the settlor, it is unnecessary to construe the instrument because it speaks for itself. Cite 1; Cite 2. The intent of the settlor must be ascertained from the language used within the four corners of the instrument. Cite 3. The court must focus on the testator’s intent, and, in so doing, the intent must be drawn from the will, not the will from the intent. The court focuses not on what a testator may have intended to write, but the meaning of the words actually used. Courts must not redraft wills to vary or add provisions under the guise of construction of the language of the will to reach a presumed intent. Cite 4; Cite 5; Cite 6.

A court should give effect to every part of the instrument if the language is reasonably susceptible to a harmonious construction. Cite 7. If possible, the court should construe the instrument to give effect to all provisions so that no provision is rendered meaningless. Cite 8.

Under State law, a testator is presumed to have been familiar with the ordinary and natural meaning of the words used in the will. When a testator uses the same words in different parts of a will with reference to the same subject matter, it is presumed that the testator intended the words to have the same meaning unless the context indicates the testator used the words in a different sense. The court must presume the testator intended every word he used to have a meaning, and the court must give common words their plain meaning unless the context indicates they were used in another sense. Cite 9; Cite 10.

State law also is clear that unambiguous language cannot be diminished by a subsequent clause. At issue in Cite 11 is whether a will provision granting a wife a life estate with a power of disposition is restricted by the provision appointing her co-executor. In holding that the wife held a general power of appointment, the court stated:

[A]n express bequest or devise cannot be cut down by a subsequent clause of doubtful meaning and an estate granted in plain and unequivocal language in one clause of a will therefore cannot be lessened or cut down by a subsequent clause, unless the language therein is as clear, plain and unequivocal as that in the first grant. Id. at 495.

Although it is true that some words in their ordinary meaning are precatory, the same words are often construed as mandatory when used in a will, or when it appears from the context of the entire document that the words are an expression of the testator's intent to dispose of property. Cite 12; Cite 13. State law has long recognized that such words as "wish" and "desire" evidence the intention of a testator to dispose of property and may be given mandatory construction. Cite 14. In Cite 15, the court held:

In determining whether particular words are to be construed as precatory or mandatory, the Court will look to the expressed intent of the testator, as found from the context of the will and surrounding circumstances; and words which are precatory in their ordinary meaning will nevertheless be construed as mandatory when it is evident that such was the testator's intent. Where words of recommendation, request, desire, and the like are used in direct reference to the disposition of the testator's own property and show

a clear intent to make such disposition without the intervention of any act by the first donee, they are ordinarily regarded as imperative and testamentary rather than precatory. Further, distinctions have been drawn between expressions of desire directed to beneficiaries, to executors, and to trustees. A wish directed to a beneficiary is generally regarded as precatory, unless the words clearly express the testator's intention to the contrary; but where the words are addressed to an executor, they are more often regarded as mandatory, or at least prima facie mandatory. Id. at 239.

To pass title, testator need only use language sufficiently clear and unequivocal to show an intention that the property designated pass to the beneficiary named in the will. Cite 16.

In this case, Decedent's Will is replete with expressions of various directions and commands. That Decedent knew how to use clear and express language to effect Decedent's intentions is demonstrated throughout Decedent's Will.

Article III provides:

To the extent that I own any equity interest at my death in any of the following closely held investments, i.e. [Assets], it is my desire that such equity interests be retained and that each of them be distributed so that all such equity interests are ultimately owned in equal shares by [Children]. If any of them are deceased, it is my desire that the decedent's share of such equity interests be owned equally by such decedent's children.

Article III provides that certain Assets be retained and distributed in equal shares to Decedent's Children, and provides survivorship rights to Decedent's grandchildren should any of Decedent's Children be deceased. As discussed above, there is considerable authority that the word "desire" is often used as mandatory language, particularly where used to address an executor. Article III is an instruction to the Executor. In subsequent articles where Decedent intended Executor to have discretion, the language clearly reflects Decedent's decision to grant such discretion. For example, Article IX provides that "Executor may, exercising . . . sole and absolute discretion" and Article XIII provides that "Executor shall have absolute discretion". No discretion is given to Executor in Article III. Similarly, in articles where Decedent wanted to express Decedent's preference to a beneficiary but grant the beneficiary discretion, the language is explicit and clear by the use of such phrases as "I request, but do

not require”, “I further request, but not require”, and “I suggest”. Article III contains no such words of discretion. To the contrary, in articles where no discretion is given, Decedent used strong words of command such as “I give, devise, and bequeath”, “I give”, and “I direct”. Decedent’s use of “I desire” in Article III is consistent with such words of command.

As noted above, State law provides that when the same words appear in different parts of an instrument, it is presumed that the settlor intended the words to have the same meaning. In both Article III and Article VIII, Decedent refers to Decedent’s “desires”. Unlike Article VIII where Decedent refers to Decedent’s “desires” but clearly provides there is no obligation to comply with those desires, Article III contains no such language. Article VIII clearly evidences Decedent’s awareness of the effect of the language used in Article III in that in Article VIII Decedent states that the Article VIII “desires” are “merely a suggestion”. If Decedent intended the Article III “desires” merely to be a suggestion, Decedent certainly would have so stated as in Article VIII. Such a clear contrast in language indicates that Decedent intended the use of the phrase “it is my desire” in Article III to be mandatory.

The conclusion that Article III is a specific bequest gives effect to every part of Decedent’s Will and is supported by a reading of the four corners of the document. Article III is the first specific bequest and is followed by specific bequests in Articles IV through IX. As in the other specific bequests, Article III uses words of command and provides survivorship rights to Decedent’s grandchildren should any child of Decedent predecease Decedent. Article X logically follows with the creation of a trust of the rest, residue and remainder of Decedent’s property. There is no mention of Assets elsewhere in Decedent’s Will. Given the specificity with respect to other assets enumerated in Decedent’s Will, it is unlikely that Decedent failed to specifically address such important assets.

Decedent’s Estate argues that Article III is simply an expression of Decedent’s “hopes” regarding Assets. Estate contends that Decedent recognized that Assets might have to be sold, or at least pledged, in order to pay taxes, debts and expenses of administration of Estate so, in order to provide Executor with instructions and flexibility, Decedent chose to express Decedent’s “hopes” in Article III in the form of precatory language. As such, Estate argues, Article III is merely a preamble or preface and reflects Decedent’s intent that Assets be a part of the residuary estate under Article X of the Will. We disagree.

It is well settled under State law that, if the specific language used by a settlor is clear, it is unnecessary to construe the instrument as a whole because the language speaks for itself. Courts must not redraft instruments to vary or add provisions under the guise of construction of the language to reach a

presumed intent. Article III is a separate article consistent with the format found in Articles IV through IX in which Decedent also makes specific bequests. Article III is an instruction to Executor that clearly identifies Decedent's children as beneficiaries and that provides survivorship rights for Decedent's grandchildren. There is simply no language within the four corners of Decedent's Will to indicate that Article III is a preamble or to support the argument that Assets described in Article III are to be disposed of under Article X. To allow such a construction of Decedent's Will effectively permits a specific clause in Decedent's Will to be reduced by a subsequent general clause that itself fails to specifically mention the same property. State law does not permit such redrafting of a will under the guise of construction.

Citing Cite 17 and Cite 18, Decedent's Estate also argues that the contrast between the dispositive language used in Articles IV through IX with the language used in Article III cannot be ignored. Reliance on Cite 17 and Cite 18 is misplaced. As discussed above, State law makes a distinction between situations where property is devised using words of desire or request and where language is employed subsequent to a dispositive provision but addressed to a beneficiary expressing a decedent's request regarding how the property will be used or disposed of at some future time.

Finally, Decedent's estate notes that (1) Decedent's Will is a revision of a prior will executed on Date 3, and drafted by a different scrivener, and that a comparison of both wills is necessary to understand Decedent's estate plan and determine whether Article III is mandatory or precatory, and (2) an affidavit from the drafter of the Date 3 Will, as well as other affidavits, should be considered in making any determination.

We have not been asked, and therefore do not address, if and/or to what extent extrinsic evidence is admissible under State law. We note only that, as indicated above, we believe that the language within the four corners of Decedent's Will is clear and speaks for itself. Extrinsic evidence cannot alter language in a will and the intent of the testator must be found from the words in the will.

CAVEAT:

A copy of this technical advice memorandum is to be given to the taxpayer(s). Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.