it was owned by "one or more of the subtrusts." Although the debtor submitted a ledger, the court concluded that the pages were inconsistent nor did the debtor explain who created the ledger, when, or for what purpose. Moreover, the court found no evidence that the property was transferred to any of the subtrusts — for that matter, the court found no evidence that any property was ever transferred to the subtrusts. In addition, the subtrusts were "self-settled" so the spendthrift provision was ineffective. The court determined that the debtor owned that property. The debtor appealed, but the Ninth Circuit appellate panel affirmed.

Subsequently, the trustee obtained the appointment of an Israeli bankruptcy trustee to administer the debtor's assets in Israel. The Israeli court eventually approved the sale of the vacation home for approximately $920,000 without an appearance from the debtor. Once again, the trustee disputed the debtor's contention that half of the property alleged to be owned by him was actually owned by one or more of the subtrusts. The trustee cited the Jerusalem land records showing the debtor as the owner of a 999-year lease term. The debtor conceded that the Jerusalem land records showed him as the sole owner but that nevertheless the proper title was in his name as trustee for the subtrusts. In addition to the same ledger produced in the previous case, the debtor claimed that the trusts had paid roughly $120,000 in maintenance fees, which evidenced the trusts' beneficial interest in the vacation home. The debtor did not seek to unwind the sale, but contended that the proceeds belonged to the subtrusts and thus were not part of the bankruptcy estate.

The trustee posited the same arguments he had made in the previous action. In addition, he asserted the Jerusalem land records.

The appellate panel rejected the debtor's claim about the maintenance expenses because, once again, the debtor had no corroboration or specificity about any such payments. Problematically, the debtor had listed as personal expenses a series of $2500 monthly payments for the vacation home. The appellate panel noted that any payments made by the subtrusts commenced after the bankruptcy filing. Nor did the debtor explain how those payments from the trusts proved ownership of the property.

Importantly, the appellate court upheld the bankruptcy court's reasoning that, even if the subtrusts owned the vacation home, the subtrusts were self-settled. This holding was consistent with applicable state law, which provided "that property held in a self-settled trust remains property of the settlor/trustee/beneficiary." The appellate panel did recognize that if, in a subsequent proceeding, the debtor timely produced sufficient evidence and rationale for the post-petition payments by the subtrusts, the subtrusts may be entitled to administrative expense claims against the estate.

Editors' Comment: Probate practitioners recognize that bankruptcy may impact estate planning, particularly with respect to inter vivos trusts. *Klein* serves as a reminder that proper record-keeping is always important. Moreover, the bankruptcy code generally defers to state law for issues involving the efficacy of self-settled trusts and spendthrift provisions.

- **Tax Apportionment Language Must Be Specific**

In *Matter of Townson*, 231 N.Y.S. 3d 786 (Sur. Ct. 2025), the settlor of two testamentary trusts died in 1994, survived by his wife and two children. His will created two QTIP trusts pursuant to an election on his estate's federal estate tax return — an GST-exempt trust funded with $1 million and a non-exempt GST trust with almost $8.8 million. The remainder beneficiaries of the exempt trust were his two children. The remainder beneficiaries of the non-exempt trust were his two children (one-third each) and his wife's four biological children (sharing the other third.) The wife and a bank served as co-trustees of both QTIP trusts. During her lifetime, his wife received all the income from the trusts.

In 2022, the wife engaged an attorney to draft an update to her will, which left the residue of her estate to her four children and included the following apportionment clause:

> I direct that my Executor *pay out my residuary estate, without apportionment*, all estate inheritance and like taxes imposed by the government of the United States, or any state or territory thereof, or by any foreign government or political subdivision thereof, in respect to all property required to be included in my gross estate for estate or like tax purposes by any such governments, *whether the property passes under this Will or otherwise, without contribution by any recipient of any such property.*
>
> (Emphasis in opinion.)

The wife died in 2023, survived by her four biological children, one of whom was appointed to serve as personal representative. The personal representative retained the wife's drafting attorney to assist with the administration of the estate. In December 2023, despite the tax apportionment language, the attorney sent a letter directing that the QTIP trusts pay over $4 million in federal and state taxes incurred by her estate and the trusts.

The settlor's children sought to have the wife's biological children, as her residuary beneficiaries, bear the brunt of the tax payments by having the taxes allocated against the wife's residuary estate.

The Surrogate cited the applicable state statute that would apportion the state tax burden between the residue and the QTIP trusts, unless "the decedent *specifically directs otherwise [in the] will.*" (Emphasis in opinion.) The court recognized that Internal Revenue Code section 2207(a)(1) provided similarly for apportionment of the federal taxes. The Surrogate also cited the House of Representatives report explaining the specific reference language in section 2207(a)(1) is not satisfied by less than specific language: "a general provision specifying that all taxes be paid by the estate is no longer sufficient to waive the right of recovery." Thus, "'[s]pecifically' has been held to mean an express reference to the QTIP trusts or to the provisions of the Code and/or [the state statute] referenced above."

According to the court, the "bottom line" in this case was whether the language in the wife's will was specific enough to comply with the state and federal statutory requirements. The court concluded that the language was not specific enough — not referencing the QTIP trusts or the applicable statutes.

The Surrogate buttressed its decision by noting the result if the QTIP trusts escaped tax apportionment: the wife's biological children, her residuary beneficiaries, would bear the brunt of an increased portion of the taxes, which was not likely her intent as to natural objects of her bounty.

Editors' Comment: As has been discussed on numerous occasions in the REPORTER, tax apportionment can have a critical impact on the testator's distributive scheme. Clear and express language in the document is the watchword, but particularly in the case of apportionment involving QTIP trusts, as demonstrated by the *Townson* opinion.

The opinion seemed to wrap itself around the intent axle by first noting that a testator's intent controls the construction of a will but that the statutes requiring specific language appeared to override any examination of intent. However, what the court was really saying was that, when a statute requires specific and express language, the use of or lack of that language serves as the polestar for determining intent in such a situation. Thus, when state or federal "statutes require words of specific indication of intent . . . 'magic words' referencing the QTIP trusts and/or the Code provisions are exactly what is required."

- **Once Again Court Grapples with Defining Interested Person**

In *Matter of Pedro*, __ N.E.3d __ (Mass. App. 2025) (2025 Westlaw 12579930), the sister-in-law of

a protected person whose conservator sought to sell his real estate sought to intervene in the proceeding. She contended that she was an interested person with standing. The case had a complicated history, including her involvement in alleged undue influence and fraud in the transfer of some of his real property and a bank account as well as participating in a number of settlement agreements. The applicable statutory definition of "interested person" was based on Uniform Probate Code section 1-201(23), which provides:

> Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.

Focusing on the last sentence of that section, the trial court concluded that the sister-in-law was not an interested person. However, the appellate court did not determine whether the trial court erred in its conclusion because any error would have been harmless, based on the appellate court's reasoning that, based on the underlying facts of the case, "his conclusion would have been the same had he found standing."

Editors' Comment: As discussed a number of times in the REPORTER, determining whether someone qualifies as an interested person under the ubiquitous UPC definition varies on a case by case basis. As the opinion aptly put it, "[t]he determination of whether someone is an interested person , and thus has standing to intervene or object, is generally a mixed question of fact and law."

Tax Report

- **Ordinary Income Allocated to Limited Partners in Name Only Is Subject to Self-Employment Tax**

In *Soroban Capital Partners LP v. Commissioner*, T.C. Memo. 2025-52 (May 28, 2025) ("Soroban II"), the Tax Court closed the loop on a self-employment tax case involving a Delaware limited partnership that operates as an investment firm. The partnership has one general partner (a limited liability company) and five limited partners, consisting of three individuals and two limited liability companies, each of which is wholly owned by one of the individuals. Thus, for federal income tax purposes, there are only three limited partners since the two LLCs are disregarded.

On its federal income tax return for 2016, the partnership reported about $2 million in net earnings from self-employment, and its 2017 return reported about $1.9 million in net earnings from self-employment. In both cases, while the reported amounts included the guaranteed payments made to the limited partners, the reported amounts did not reflect the limited partners' distributive shares of the partnership's ordinary income. In 2022, the IRS determined that the limited partners' distributive shares of the partnership's ordinary income should have been included, which brought the parties to the Tax Court.

Matter of Townson

[*1]

Matter of Townson

2025 NY Slip Op 25072

Decided on March 24, 2025

Surrogate's Court, Monroe County

Ciaccio, S.

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

Decided on March 24, 2025

Surrogate's Court, Monroe County

In the Matter of the Petition of Lisa Townson, Beneficiary of the Estate of Ann K. Townson, Under SCPA 1420 for the Construction of the Last Will and Testament of Ann K. Townson.

File No. 2023-2642/B

Aaron E. Connor, Esq. and Verley A. Brown, Esq., Pierro, Connor & Strauss, LLC, Latham, New York, Attorneys for Lisa Townson, Petitioner.

Anthony J. Adams, Esq. and Mallory K. Smith. Esq., Adams Leclair LLP, Rochester, New York, Attorneys for James S. Reed, as Executor of the Estate of Ann K. Townson, Respondent.

Svetlana K. Ivy, Esq., Lippes Mathias LLP, Rochester, New York, Attorneys for JPMorgan Chase Bank, N.A., as Co-Trustee, Respondent.
Christopher S. Ciaccio, S.

The issue, brought to the Court as a will construction proceeding pursuant to SCPA §1420(1), is whether the estate's fiduciary may apportion estate taxes across the residuary estate and QTIP trusts, where language in the Will directing the taxes to be paid from solely the "residuary estate" lacks specific reference to statutory language authorizing tax apportionment or the QTIP trusts.

Facts

The facts are uncomplicated and not the subject of any dispute.

Petitioners Lisa C. Townson ("Lisa") and Winslow W. Townson ("Winslow") are the biological children of Schuyler C. Townson ("Schuyler"). They are remainder beneficiaries of two Qualified Terminable Property ("QTIP") trusts established pursuant to their father's Will.

The Respondents are James S. Reed as the executor of the estate of his mother Ann [*2]Townson, Schuyler's wife. Schuyler died in 1994, survived by his wife Ann and by his children Lisa and Winslow. Ann was not the mother of Lisa and Winslow. JPMorgan Chase is also a respondent, as co-trustee of the QTIP trusts.

Schuyler's Will was drafted by attorney Ralph J. Code, III, and provided that the two trusts were to be established for the benefit of his wife Ann, and for the benefit of his children Lisa and Winslow, and partially for the benefit of Ann's four biological children.

Of the two QTIP trusts, both established after Schuyler's death by an election on the estate's Federal Estate tax return, one was a "GST-Exempt" QTIP trust and was funded with $1,000,000.00. The remainder beneficiaries of that trust are Lisa and Winslow, in equal shares.

The second trust, a "non-GST" QTIP trust, was funded with $8,782465.11. The remainder beneficiaries of the non-GST QTIP trust are Lisa Townson (one-third), Winslow Townson (one-third), and Ann's four biological children (collectively one-third).

Schuyler's Will named his wife Ann and Chase Lincoln Bank N.A. (predecessor to JP Morgan Bank) as co-trustees of both QTIP trusts. From 1994 to September 2023, she collected all income from the trusts.

In 2022 attorney Ralph J. Code, III drafted Ann an updated Will, which she executed on September 2, 2023. She included in the Will a clause apportioning the taxes to be paid upon her death as between her estate and the QTIP trusts. It reads as follows:

> "I direct that my Executor *pay out my residuary estate, without apportionment*, all estate inheritance and like taxes imposed by the government of the United States, or any state or territory thereof, or by any foreign government or political subdivision thereof, in respect to all property required to be included in my gross estate for estate or like tax purposes by any such governments, *whether the property passes under this Will or otherwise, without contribution by any recipient of any such property"*

(emphasis added).

Ann died in September 2023. She was survived by son James S. Reed (the executor of her estate) and his siblings, all Ann's biological children from a prior marriage.

James, as executor of the estate, retained attorney Code to represent the estate. In December 2023, Code sent a memorandum directing the trustee of the QTIP trusts to pay over 4 million dollars in federal and state taxes then due, notwithstanding the language in the Will regarding tax apportionment.

This will construction proceeding followed. The children of Schuyler seek to have Ann's biological children, the beneficiaries of her residuary estate, pay the entire tax burden incurred by the estate and the trusts.

Analysis

Apportionment of an estate's state and federal tax burden as between the residuary estate and marital deduction trusts is the favored outcome and the preferred policy choice (*see Matter of Priedits,* 132 AD3d 769, 770-71 [2d Dept 2015], citing *Matter of Shubert,* 10 NY2d 461, 471 [1962]).

New York Estate, Powers and Trusts Law ("EPTL") § 2-1.8 (d-1) (1) (A) provides that the estate is "entitled" to apportion the state tax burden between the residuary estate and the [*3]marital deduction trusts ("QTIP" trusts), but not "if the decedent *specifically directs otherwise by will*" (EPTL § 2-1.8 [d-1] [1] [B] [emphasis added]).

Similarly, the Internal Revenue Code ("IRC") § 2207A (a) (1) provides that the "decedent's estate shall be *entitled* (emphasis added) to recover" from the QTIP trusts taxes attributable to the assets in the trusts but "may otherwise direct" if the decedent in his Will "specifically indicates an intent to waive any right of recovery under this subchapter with respect to such property" (IRC § 2207 [a] [2]).

As noted by counsel for JPMorgan, the House of Representatives Report accompanying the amendment of IRC § 2207A in 1997 states that "The bill provides that the right of recovery with respect to QTIP is waived only to the extent that language in the decedent's will or revocable trust specifically so indicates (e.g., by a specific reference to QTIP, the QTIP trust, section 2044, or section 2207A)" and that " . . . a general provision specifying that all taxes be paid by the estate is no longer sufficient to waive the right of recovery (HR Rep 105-148, 613-614 [1997]).

"Specifically," has been held to mean an express reference to the QTIP trusts or to the provisions of the Code and/or the EPTL referenced above.

In *Matter of Honig (Kirsch),* Surrogate Pettit held that the language in the decedent's will directing taxes to be paid from "*the principal of such trust, or trusts, as applicable, holding such assets,* in the manner provided by law" (emphasis added), was not specific enough to waive the "tax obligation attributable to the Sub-Trusts for which a marital deduction was previously taken by decedent" (72 Misc 3d 823, 840 (Sur Ct, Albany County 2021)

Prior to August 5, 1997, Internal Revenue Code § 2207A (a) (2) provided for apportionment unless "the decedent otherwise directs by will." Cases decided under this decidedly less-specific language also held that reference to the QTIP trusts of the statutory provisions was required to waive tax apportionment.

In *Matter of Gordon* Surrogate Renee Roth, the (then and now) much-respected authority on all matters trust and estate, held, in a case of first impression following the passage of the federal Economic Recovery Act of 1986 that created marital deduction trusts, that a tax exoneration clause that did not specifically mention the QTIP trusts failed to exclude the trusts from their share of the estate tax burden. "The basis for requiring express mention of a QTIP trust is the presumption that most testators do not intend to apply a general tax exoneration clause to QTIP property" (*Matter of Estate of Gordon*, 134 Misc 2d 247, 252 [Sur Ct, New York County 1986]).

She noted as well that the New York State Legislature had followed the lead of Congress and amended EPTL 2-1.8. "The recent amendment of EPTL 2—1.8 . . . is a similar attempt to protect the testator's presumed intent and prevent inadvertent alterations of tax apportionment clauses" (*Matter of Gordon*, 134 Misc 2d at 252).

In *Matter of Kramer*, the court, affirming a decision also by Surrogate Roth, declined to give effect to a tax exoneration clause because it failed to reference the QTIP trusts in question (*Matter of Kramer*, 203 AD2d 78, 79 [1st Dept 1994]).

The issue here then, is whether the language in Decedent's Will regarding tax apportionment is "specific" enough to comply with the statutory requirement of a specific direction found in EPTL § 2-1.8 (d-1) (1) (A), and a specific "indication of intent" (Internal Revenue Code § 2207A (a) (1).

It is not. Where a waiver of apportionment against a QTIP trust is sought, EPTL § 2-[*4]1.8(d-1) (1) (A) and Internal Revenue Code § 2207A (a) (2) govern the result and mandate strict compliance with the direction to "specifically direct otherwise."

The failure in a will or trust to specifically refer to the QTIP trusts (and/or the Code and/or EPTL sections) leaves the fiduciary of the estate the authority and the right - the entitlement, to use the statutory language - to seek contribution from the trusts for the payment of taxes. The language in decedent Ann Townson's Will is "one of the formbook examples of tax exoneration clauses that evolved before there were QTIPs. The post-ERTA draftsman, on the other hand, is advised to use totally different language to apportion QTIP taxes" (*Matter of Gordon*, 134 Misc 2d at 252).

Where the will or trust lacks the language (perhaps not explicitly but certainly as implicitly as can be) required by the statutes, the intent of the testator is not the primary issue. The determinative factor is whether the tax exoneration clause references the QTIP trusts and/or the statutory language by which the QTIP trusts were created.

To the extent that intent is an issue at all, courts have considered whether directing that the residuary estate pay the entire tax would result in an obvious inequity.

Thus, in *Kramer* the court pointedly referred to the fact that tax exoneration would result in less money flowing to the testator's own natural daughter. In *Gordon* the court acknowledged that tax exoneration would "totally wipe out" the charitable bequest in the residuary estate.

In *Matter of Patouillet*, in a case involving a non-testamentary disposition under EPTL 2—1.8 (d) (2), Surrogate Wells held that petitioner's assertions in their will construction proceeding would "result in the decedent's sisters receiving nothing," and that he was " [c]ertain it is that decedent did not intend to draw a meaningless dispositive document to mock her beneficiaries" (internal quotation and citation omitted) (*Matter of Patouillet*, 158 Misc 2d 473, 477 [Sur Ct, Onondaga County 1993], *affd* 207 AD2d 1043 [4th Dept 1994]).

Here, if the trusts were exonerated from paying any of the tax, Ann's biological children, the beneficiaries of the residual estate, would have to pay an increased amount of tax, thus negatively impacting "the natural objects of her bounty" (*Matter of Weltz*, 16 AD3d 428, 429 [2d Dept 2005]), something she was not likely to do [FN1] .

Petitioners argue that no "magic words" are required to give effect to the tax exoneration clause exempting the QTIP trusts from any of the tax burden. The intent of the testator is dispositive, they argue, and they cite among other cases to *Matter of Priedits* (132 AD3d 769, 770-71 [2d Dept 2015]) and *Eisenbach v. Schneider* (140 Wash. App. 641, 655 [2007] [employing the "magic words" metaphor]).

However, *Priedits* is inapplicable, as it involves a wife's elective share, not a QTIP trust. The case was governed by EPTL 2-1.8 (c), which states all estate tax payments must be equitably apportioned among recipients of estate assets "[u]nless otherwise provided in the will or non-testamentary instrument (EPTL 2—1.8 [c])"

The phrase "otherwise provided" is not the same as "decedent *specifically directs otherwise by will*" (EPTL § 2-1.8 (d-1) (1) (B) and it is distinct from "specifically indicates an [*5]intent to waive (IRC § 2207A (a) (2).

Several of the other cases cited by petitioner are also irrelevant, as they do not involve QTIP trusts and were decided based on different sections of the EPTL than is at issue here.

The cases from other state jurisdictions, notably *In re Estate of Miller* (230 Ill.App.3d 141 [1992]) and *Eisenbach v. Schneider* (140 Wash. App. 641, 655 [2007]), are of course not binding but are also not persuasive.

In *Miller* the court made the point that section (B) (a) (2) of (IRC) 26 USCA 2207, applicable to tax apportionment involving a retained life estate, has a provision that requires specific reference to the Code provision in order to effectuate tax exoneration, so that if Congress had intended §2207A to read to require a reference to the Code in any clause of a will or trust that sought to exonerate the QTIP trusts from apportionment, it could have done so.

However, as of 2022, when Ann wrote her will, 26 USCA 2207A had been amended so that it reads exactly as 26 USCA 2207B (tax apportionment is waived when the document "specifically indicates an intent to waive any right of recovery under this subchapter with respect to such property" (IRC § 2207A [a] [2]; IRC § 2207B [a] [2]).

In *Eisenbach v. Schneider* (140 Wash. App. 641, 655 [2007]), the court found that failure to reference the QTIP trusts or the Code provisions in a clause apportioning the taxes on a *pro rata* basis did not constitute a waiver of the tax exoneration precisely because, the court noted, unlike in *Kramer*, the clause was not a "general pay-all-taxes" clause. In other words, the testators, husband and wife, had expressed a specific intent when they divvied up the tax obligation *pro rata*.

Of course, it is an axiom of estate and trust practice that will construction prioritizes the testator's intent (*Matter of Fabbri,* 2 NY2d 236 [1957]) and that the "primary objective in construing a will, of course, is to ascertain the decedent's intent so that the will's purpose may be effectuated (*Matter of Colbert*, 210 AD2d 616, 617 [3d Dept 1994], citing *Matter of Carmer*, 71 NY2d 781, 785 [1988]). "Intent should be discerned, if possible, from a reading of the will itself as an entirety" (*Colbert* at 617).

Here, however, federal law created the tax-planning entities known as QTIP trusts, and federal law has dictated the circumstances under which tax apportionment can be exercised or waived, a scheme New York adopted. When the federal and New York statutes require words of specific indication of intent and (in the case of the Code) a reference to the subchapter, "magic words" referencing the QTIP trusts and/or the Code provisions are exactly what is required.

Counsel for Respondent shall file a proposed Order.

Dated: March 24, 2025
Rochester, New York
Hon. Christopher S. Ciaccio
Surrogate's Court Judge

Footnotes

Footnote 1: Exactly how much the record does not state. Ann's children would still receive something, because collectively, they are one-third beneficiaries of the QTIP trusts. However, the $4 million tax, should it come out of the residuary estate (to which all of Ann's children are entitled) would likely be a large financial hit.