2017 IL App (1st) 160288-U

FOURTH DIVISION
June 29, 2017

Nos. 1-16-0288 and 1-16-0744, Cons.

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re ESTATE OF PHILIP L. ZEID, Deceased	)	Appeal from the
	)	Circuit Court of
(PAULA S. KLEIN ZEID, as Co-Trustee of the Philip L. Zeid Trust dated October 3, 2006, as amended, and FIFTH THIRD BANK, as Co-Trustees of the Philip L. Zeid Trust dated October 3, 2006, as amended,	)	Cook County.
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	No. 11 P 1656
	)	
PAULA S. KLEIN ZEID, individually and as a beneficiary of the Philip L. Zeid Marital Trust, and JASON I. ZEID, individually, and as Trustee and beneficiary of the Philip L. Zeid Family Trust,	)	Honorable
	)	Mary Ellen Coghlan,
Defendants-Appellees).	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court is affirmed in part and reversed in part; decedent's trust did not grant a specific bequest because the bequest was not subject to ademption; the plain language of decedent's trust did not allow the trustee to select a zero-value asset to fund the creation of a family trust.

¶ 2 Philip L. Zeid (Philip) created the Philip L. Zeid Trust (PLZ Trust) dated October 3, 2006. Philip died on February 9, 2011. Paula S. Klein Zeid (Paula) is Philip's surviving spouse, and Jason I. Zeid (Jason) is Philip's son from a prior marriage. According to Philip's will, the residue of his estate was to be distributed to the PLZ Trust. The PLZ Trust, as amended, set aside $1 million to fund the creation of the Philip L. Zeid Family Trust (Family Trust) with Jason as beneficiary, and allowed Jason to select assets of his choice to fund the trust. The residue of the PLZ Trust was for the creation of a marital trust with income payable to Paula during her lifetime. The parties filed cross-motions for summary judgment. Jason argued that the bequest to the Family Trust was a specific bequest and he could select assets with zero dollar valuation. Paula argued that the $1 million bequest to the Family Trust was a general bequest and that Jason could not select assets having zero-value to fund the Family Trust. The trial court ruled: 1) the bequest to the Family Trust was a specific bequest; and 2) the language of the PLZ Trust did not allow Jason to select assets to fund the Family Trust with a zero dollar value. For the following reasons we reverse the finding of the trial court that the $1 million bequest to the Family Trust was a specific bequest, and we affirm the trial court's judgment that the language of the PLZ Trust did not allow Jason to select assets with zero-value to fund the Family Trust.

¶ 3 BACKGROUND

¶ 4 In October 1991, prior to their marriage, Philip and Paula executed an antenuptial agreement which provided that upon his death Philip would create a trust and place $1 million of his assets therein for the benefit of Jason. The remainder of the estate would be transferred to a

trust in which income would be paid to Paula during her lifetime.

¶ 5 Philip created the Philip L. Zeid Trust dated October 3, 2006 (PLZ Trust). According to his will, the residue of his estate was to be distributed to the PLZ Trust. Section 3.1 of the PLZ Trust set aside $1 million for the creation of the Family Trust with Jason Zeid as beneficiary and listed two additional assets to be distributed to the Family Trust. Section 3.1 read as follows:

> "Upon my death, if Jason or any of his descendants survives me, the Trustee shall set aside the following assets as a separate trust known as the Philip L. Zeid Family Trust to be held and administered by this Article:
>
> (a) The sum of ~~Two~~ <u>One</u> Million Dollars ($~~2~~<u>1</u>,000,000);
>
> (b) All of my interest in Universal Scrap Metals, Inc.; and
>
> (c) All of my interest in USM Processing Ltd.
>
> Jason, if then living, shall have the right to select such assets as he desires to have to fund the Philip L. Zeid Family Trust, such assets to be valued as finally ascertained for federal estate tax purposes. In the event that Paula does not survive me, the remainder of the Trust Estate shall be distributed to the Philip L. Zeid Family Trust pursuant to this Article."

Although section 3.1 as originally drafted read "Two Million Dollars ($2,000,000)," Philip crossed out the "Two" and "2," and handwrote "One" and "1" to change the devise to Jason to only $1 million. Philip initialed next to the alterations. Section 7.1 of the PLZ Trust governs trustee powers, and provides that the trustee may

> "make any distribution or division of trust property in cash or in kind or both, or in undivided interests or in different assets or disproportionate interests in assets, but that the $2,000,000 specific bequest to Jason shall be funded with assets of his

> choice, which shall be valued as finally determined for federal estate tax purposes and no adjustment shall be made to compensate for a disproportionate allocation of unrealized gain for Federal income tax purposes; and to value the trust property and to sell any or part or all thereof in order to make division or distribution."

Though the typewritten language in Section 3.1 was altered by Philip to reflect only a $1 million bequest, Philip did not alter the language in section 7.1 where the Trust provides a "2,000,000 specific bequest to Jason."

¶ 6 In August 2010, Philip's estate planning attorney emailed Philip to inform him that the bequests of Universal Scrap Metals, Inc. and USM Processing Ltd. violated the antenuptial agreement. As noted above, the antenuptial agreement allows the Family Trust to take only $1 million in assets from the PLZ trust. Philip's estate planner again emailed him on November 19, 2010, advising him that a change in the PLZ Trust was "required in order to be consistent with [Philip's] existing Antenuptial Agreement." Philip replied to this email by asking: "The revision of my trust, Jason gets 1 million dollars upon my death, correct?" Philip's attorney replied "Yes." On November 30, 2010, Philip executed a First Amendment to the PLZ Trust, which altered section 3.1 of the PLZ Trust and reaffirmed all other Trust provisions. The amended section 3.1 read:

> "Upon my death, if Jason or any of his descendants survives me, the Trustee shall set aside the sum of One Million Dollars ($1,000,000) as a separate trust known as the Philip L. Zeid Family Trust to be held and administered pursuant to this Article.
>
> Jason, if then living, shall have the right to select such assets as he desires to have to fund the Philip L. Zeid Family Trust, such assets to be valued as finally

> ascertained for federal estate tax purposes. In the event that Paula does not survive me, the remainder of the Trust Estate shall be distributed to the Philip L. Zeid Family Trust pursuant to this Article."

In addition, the amendment stated that Philip reaffirmed and readopted the remaining provisions of the PLZ Trust. Article IV of the PLZ Trust created the Philip L. Zeid Marital Trust (Marital Trust), which reads as follows:

> "If Paula survives me, all the residue of my Trust Estate, wherever situated, including lapsed legacies, but expressly excluding any property over which I may have power of appointment at my death, I give to the Trustee hereafter named to be held and administered as a separate trust known as the Philip L. Zeid Marital Trust."

Section 4.3 of the PLZ Trust stated that the trustee was to "pay the income from the Trust Estate in convenient installments, at least quarterly, to Paula during her lifetime."

¶ 7 In February 2012, a valuation of the equity interests held by the PLZ Trust as of February 9, 2011 was completed. On January 25, 2013, the Internal Revenue Service sent an Estate Tax Closing Document to the executor of the estate notifying the estate that it owed $0 in tax. After the IRS accepted the valuations of the equity interests of the PLZ Trust, Jason sent a letter in March 2013 to Fifth Third Bank and Paula notifying them of his selections of assets to fund the Family Trust. In April 2013, Jason sent a corrected letter to the co-trustees with an updated list of assets he selected to fund the Family Trust. Jason selected four 50% interests in assets valued at zero dollars for estate tax purposes and $161.20 in cash, along with $999,838.80 in other assets to fund the Family Trust.

¶ 8 Subsequently, Fifth Third Bank and Paula, as co-trustees of the PLZ Trust (collectively,

the "Co-Trustees"), brought an action against Jason and Paula. In their amended complaint plaintiffs sought declaratory judgment on two counts: 1) whether the PLZ Trust funded the Family Trust as a general legacy; and, 2) whether Jason could select certain assets valued at zero dollars for estate tax purposes. Jason and plaintiffs filed cross-motions for summary judgment, and the trial court entered its order which held that the plain language of the PLZ Trust indicated Philip intended to create the Family Trust as a specific legacy and did not allow Jason to select assets with zero dollar value for estate tax purposes to fund the Family Trust. Jason timely filed his notice of appeal of the trial court's ruling on the second count of the complaint that the PLZ trust did not permit Jason to select zero-value assets to fund the Family Trust. Plaintiffs timely filed their notice of appeal from the court's ruling on the first count of the complaint that the Family Trust was funded by a specific bequest. We consolidated the two appeals for review.

¶ 9 ANALYSIS

¶ 10 Plaintiffs argue section 3.1 of the PLZ Trust, as amended, provided a general bequest of $1 million to fund the Family Trust. Jason contends the bequest to the Family Trust in section 3.1 of the PLZ Trust, as amended, was a specific bequest and that the PLZ Trust allowed him to select zero-value assets to fund the Family Trust. Under section 2-1005 of the Illinois Code of Civil Procedure, a trial court's order on a motion for summary judgment "shall be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2016). Because this consolidated appeal arises from the trial court's order on cross-motions for summary judgment, our review is *de novo*. *Outboard Marine Corp. v. Liberty Mutual Life Insurance Co.*, 154 Ill. 2d 90, 102 (1992). "Summary judgment is appropriate when there are no genuine issues of material

fact and the moving party is entitled to judgment as a matter of law." *Id*. "Where, as here, the parties file cross-motions for summary judgment, they concede the absence of a genuine issue of material fact and invite the court to decide the questions presented as a matter of law." *Bank of America, N.A. v. Carpenter*, 401 Ill. App. 3d 788, 795 (2010). Though the present case concerns construction of a trust agreement, we "apply the same rules of construction that are applicable in construing wills." *First National Bank of Chicago v. Canton Council of Campfire Girls, Inc.*, 85 Ill. 2d 507, 513 (1981). "The object in construing a will is to determine the testator's intention and follow it as ascertained. *** The intention of the testator, when clearly expressed, must be given effect in preference to any surmise that he did not mean what he said or intended what he said to mean something else." *Gridley v. Gridley*, 399 Ill. 215, 221-2 (1948).

¶ 11 Family Trust Not Created by Specific Bequest

¶ 12 Plaintiffs maintain that the Family Trust was created by a general bequest, whereas Jason contends the devise to the Family Trust was a specific bequest. Bequests or devises may generally be grouped into either specific or general legacies. A general legacy is a bequest of personal property "payable out of the [estate's] general assets; the chief element of the gift being its value." *Baker v. Baker*, 319 Ill. 320, 324 (1925). Specific legacies, on the other hand, "single out the particular thing which the testator intends the donee to have, no regard being had to its value." *Id*. at 323. A specific legacy may be a bequest of a particular article of personal property or a monetary devise payable from a particular fund. Unlike general legacies, which are payable out of the general assets of the estate, the law of ademption applies to specific legacies: if the specified fund is depleted or the particular object is not in the estate, then the estate cannot make that payment or delivery to the devisee of the specific bequest. *Lenzen v. Miller*, 378 Ill. 170, 175 (1941). "The inclination of the courts is to hold legacies to be general or demonstrative

rather than specific, and to make a legacy specific the terms employed in the will creating such legacy must clearly require such a construction." *Id*.

¶ 13 As noted above, creation of the Family Trust was provided for in section 3.1 of the PLZ Trust. The amended section 3.1 read:

> "Upon my death, if Jason or any of his descendants survives me, the Trustee shall set aside the sum of One Million Dollars ($1,000,000) as a separate trust known as the Philip L. Zeid Family Trust to be held and administered pursuant to this Article.
>
> Jason, if then living, shall have the right to select such assets as he desires to have to fund the Philip L. Zeid Family Trust, such assets to be valued as finally ascertained for federal estate tax purposes. In the event that Paula does not survive me, the remainder of the Trust Estate shall be distributed to the Philip L. Zeid Family Trust pursuant to this Article."

Though the original PLZ Trust also granted specific bequests of interest in Universal Scrap Metals, Inc., and interest in USM Processing Ltd., the First Amendment removed those specific bequests leaving just the $1 million devise. The First Amendment failed to specify which particular objects or assets Philip devised to the Family Trust, though the amendment did provide that if Jason was then living he could choose particular funds for payment of the bequest.

¶ 14 We find *Lenzen v. Miller* directly applicable to the present case. At issue in *Lenzen* was whether the decedent devised a specific legacy or a demonstrative legacy of money to the plaintiff. Demonstrative legacies share elements of specific and general legacies. Like a specific legacy, a demonstrative legacy is a bequest of money payable from a particular fund; however, a demonstrative legacy is similar to a general legacy in that if the specified fund fails, "resort may

be had to the general assets of the estate." *Lenzen*, 378 Ill. at 175; see also *Baker*, 319 Ill. at 324. In the decedent's will, the decedent devised $2,000 to the plaintiff to be paid by the executor after the mortgage on the decedent's farm matured. *Lenzen*, 378 Ill. at 173. However, the mortgage the testator referenced in his will was no longer in existence and the testator had already removed any cloud against title to his property. *Id*. at 174. The plaintiff brought suit for declaratory judgment to determine whether she was due a demonstrative legacy payable from the general residuary of the estate. *Id*. at 172-73. Our supreme court found that the testator left the plaintiff a demonstrative legacy because the testator intended the plaintiff to inherit a sum of money with the mortgage payments to stand as security for that payment. *Id*. at 177.

> "Where a bequest is of money and the wording of the will indicates an intention to bequeath the whole or a part of a particular fund, the test as to whether it is a specific or demonstrative legacy is whether the legacy is a gift of the specified fund or a gift of a specified sum with a specified fund to stand as security for its payment. If it falls within the former class and the fund fails during the lifetime of the testator, there is an ademption and the legatee takes nothing. If it comes within the latter class, the legacy does not fail although the fund may have been extinguished in the lifetime of the testator, but it is payable from the general assets of the estate on the same condition and terms of a general legacy." *Id*. at 176.

The PLZ Trust specified that the trustee shall set aside $1 million to fund the creation of the Family Trust. Jason, if living, was free to select any of the assets of the trust valued up to $1 million. There was no one asset specified after the amendment. Philip could have specified particular assets Jason could choose from. However, the PLZ Trust specified that Jason could

choose which assets he wanted, so long as they totaled $1 million. We note that some of the assets Jason chose to fund the Family Trust included cash. The fact that Jason could have selected from any asset in the PLZ Trust to fund the Family Trust is highly indicative of how the bequest primarily concerned the value of the assets rather than making a direct gift of those assets. *Id*. Further, the provision that the assets must be chosen based on their estate tax valuation gives proof that the primary consideration is the value of the assets rather than the uniqueness of the assets. While general and demonstrative legacies focus on the value of the gift, a specific legacy primarily focuses on the particular thing devised rather than its value. *Baker*, 319 Ill. at 324.

¶ 15 Jason argues that the bequest is specific because it cannot be satisfied from the general assets of the estate due to the PLZ Trust stating "Jason, if then living, shall have the right to select such assets as he desires to have to fund the Philip L. Zeid Family Trust." This position is not supported by any citation to authority. The bequest to the Family Trust in the First Amendment to the PLZ Trust cannot be a specific bequest because the $1 million is capable of being paid from the general assets of the trust estate. The First Amendment provided that "if Jason or any of his descendants survives me, the Trustee shall set aside the sum of One Million Dollars ($1,000,000) as a separate trust."

¶ 16 Moreover, the amendment provided that "Jason, if then living, shall have the right to select such assets as he desires." The amendment specifically contains a condition precedent on Jason's right to select assets he desires that Jason must be then living. "Where the condition is precedent, the legatory takes nothing till the condition is performed, and, consequently, has no right to come and demand the legacy." (Internal quotation marks omitted.) *Goff v. Pensenhafer*, 190 Ill. 200, 207 (1901). The condition that Jason is "then living" precedes the grant of his

"right to select such assets as he desires." In the alternate instance where Jason predeceased Philip, this devise would not lapse. Rather, the language of the amendment provides the gift would still be made for the benefit of Jason's descendants if Jason had predeceased Philip. If Jason has descendants and predeceased Philip, the Trustee is still authorized to set aside $1 million to fund the Family Trust, only with no direction as to which assets to fund it with. Where Jason would predecease Philip and the condition precedent for his right to choose assets to vest is not met, there is no reason why his descendants would inherit that right of choice of assets. The amendment does not provide that "Jason and his heirs" shall have the right to choose whichever assets they desire totaling $1 million. Because the gift does not lapse, the trustee must make some choice as to which assets from the general trust estate will fund the Family Trust to comply with the dictate of the PLZ Trust. A specific legacy, however, is only payable from the particular fund specified—if the particular fund cannot make payment on the bequest, the bequest is adeemed and cannot be paid out from the general estate. *Lenzen*, 378 Ill. at 177. Philip's bequest to fund the Family Trust necessarily could not be a specific legacy because it was capable of being paid from the general estate. *Id*.

¶ 17 Relying on *Harris Trust & Savings Bank v. Donovan*, 145 Ill. 2d 166, 172 (1991), the trial court found that the language in section 7.1 of the PLZ Trust stating "$2,000,000 specific bequest to Jason" indicated Philip intended a "specific bequest." We disagree. The trial court focused on ensuring the language "specific bequest to Jason" was not construed as surplusage. "If possible, the court should construe the will or trust so that no language used by the testator is treated as surplusage or rendered void or insignificant." *Id*. However, *Donovan* did not concern the distinction between a specific legacy and a general legacy; rather, it concerned whether the settlor disinherited his illegitimate child by defining children in his trust as "lawful blood

children." *Id*. at 173. The *Donovan* court made clear that "[t]he first purpose in construing a trust is to discover the settlor's intent from the trust as a whole." *Id*. "The rule being that before a will may be construed as creating a specific bequest the words used by the testator must clearly indicate an intention to create a specific legacy." *Lenzen*, 378 Ill. at 176. Section 7.1 of the PLZ Trust uses the term "specific bequest" to refer to the funding of the Family Trust even though the PLZ Trust contains no provisions indicative of a specific legacy. Furthermore, the PLZ Trust, as executed on October 3, 2006, contained gifts of specific assets. However, the First Amendment altered that bequest to the Family Trust so that it was only $1 million, and no longer conveyed interest in USM Processing Ltd. or Universal Scrap Metals, Inc. Therefore, the First Amendment removed the language in section 3.1 containing any specific legacy.

¶ 18 The trial court found additional support for its position that the bequest to the Family Trust was a specific legacy by relying on *Feder v. Luster*, 54 Ill. 2d 6, 10 (1973) for the proposition that because Philip used the language "upon my death," he intended a specific legacy to fund the Family Trust. We find *Luster* inapposite to the present case. At issue in *Luster* was whether the testator's language "upon my death" indicated that the devisee was entitled to the property at the moment of the testator's death. *Id*. at 12. The testator was the sole beneficiary in a land trust, and the testator devised that beneficial interest to the plaintiff with the direction "that upon my death, my trustees convey the fee simple title of the real estate" to plaintiff. *Id*. at 10. After the testator died, the defendant executor took possession of the property devised to the plaintiff and collected rents without paying those rents to the plaintiff. *Id*. at 8. Our supreme court found that because the testator's will devised the property to the plaintiff using the language "upon my death," the testator intended the plaintiff to inherit the property from the moment of the testator's death, and therefore the plaintiff was entitled to the rental income on the

property the executor collected from the moment of the testator's death. *Id*. at 12. Whether the devise was a specific legacy was not at issue in *Luster*. The parties in *Luster* agreed the bequest was a specific bequest. The disagreement concerned *when* the devisee became entitled to the property. *Id*. As noted above, the language used in section 3.1 of the PLZ Trust was: "Upon my death, if Jason or any of his descendants survives me, the Trustee shall set aside the sum of One Million Dollars ($1,000,000) as a separate trust known as the Philip L. Zeid Family Trust." *Luster* provides no guidance on how this language can be construed as a specific bequest.

¶ 19 Jason argued other language in the PLZ Trust supports the trial court's position that Philip intended to make a specific bequest to the Family Trust. The PLZ Trust specifies that "no adjustment shall be made to compensate for a disproportionate allocation of unrealized gain for Federal income tax purposes." Jason maintains this instruction only has meaning if the bequest was intended to be a specific bequest. However, Jason fails to provide any authority supporting this position. Moreover, this language can be found in all manner of trust agreements in sections outlining trustee powers. See, *e.g.*, 11 Illinois Forms Legal & Business § 34:43 (2016). There is nothing unique about this language to specific bequests, and we have found no authority supporting how this language indicates a specific bequest.

¶ 20 The trial court also found that even if Philip's intent was not apparent from the plain language of the trust, the extrinsic evidence supported his intent to devise a specific legacy to the Family Trust. We disagree. Our supreme court has held:

> "It is well established that the intention of the testator which courts will carry into effect is that expressed by the language of the will. This language will be interpreted in view of the circumstances surrounding the testator and evidence will be received to show those circumstances, but it will not be permitted to

> import into the will an intention different from that expressed by its language, however clearly such different intention may be made to appear." *Lenzen*, 378 Ill. at 177.

The trial court maintained that the circumstances surrounding the creation of the First Amendment indicated Philip's intent to comply with the terms of his antenuptial agreement, and that he therefore intended the Family Trust to be funded through a specific legacy. Philip's antenuptial agreement provided that Philip would leave only $1 million to his son Jason, and the remainder to a marital trust for the benefit of Paula. The initial version of the PLZ Trust contained bequests of $1 million and also Philip's interest in two companies to the Family Trust. Philip executed the First Amendment to comply with the antenuptial agreement so that the bequest to the Family Trust did not exceed $1 million. He removed the specific bequests of the interest in Universal Scrap Metals, Inc. and USM Processing Ltd., and thus any language indicative of a specific legacy. Further, when Philip asked his attorney if the amendment would comply with the antenuptial agreement, Philip wanted to ensure that "The revision of my trust, Jason gets 1 million dollars upon my death, correct?" Philip's attorney replied "Yes." Philip's email did not display concern for any particular assets to fund the Family Trust with, but rather that the value of assets funding the Family Trust totaled $1 million. As explained above, specific legacies are the bequest of a particular thing with no inclination towards its value, while general legacies primarily concern the value of the bequest. *Baker*, 319 Ill. at 323-24. Because the circumstances surrounding the execution of the First Amendment show Philip's primary concern was the value of the bequest, and no particular asset was bequeathed to the trust, we reverse the trial court's finding that the Family Trust is funded with a specific legacy.

¶ 21 <u>The Plain Language of the PLZ Trust Does Not Allow Jason to Select Zero-Value Assets to Fund the Family Trust</u>

¶ 22 The trial court found that the plain language of the PLZ Trust prevented Jason from selecting "zero-value" assets to fund the Family Trust. Jason maintains that the trial court erred in concluding he could not select assets valued at zero dollars for estate tax purposes to fund the Family Trust. The First Amendment of the PLZ Trust made clear that "Jason, if then living, shall have the right to select such assets as he desires to have to *fund* the Philip L. Zeid Family Trust, such assets to be valued as finally ascertained for federal estate tax purposes." (Emphasis added.) Based on the plain language of the PLZ Trust, we conclude Jason was only allowed to select assets that could "*fund*" the Family Trust. Zero-value assets cannot "*fund*" the Family Trust because they do not furnish money to the Family Trust. "When interpreting a trust, a court's goal is to ascertain the settlor's intent using the same principles as those used to interpret a will, namely, by examining the plain and ordinary meaning of the words used in the instrument within the context of the entire document." *Ruby v. Ruby*, 2012 IL App (1st) 103210, ¶ 19. Black's Law Dictionary defines the verb "fund" as: "To furnish money to (an individual, entity, or venture), esp. to finance a particular project." Black's Law Dictionary (10th ed. 2014). Because our primary goal in interpreting the PLZ Trust is to give meaning to its plain language, we find that Jason's selection of assets was limited to assets that could "fund" or add money to the Family Trust. An asset with zero-value does not add money to the trust. We noted earlier that the bequest to the Family Trust was reduced from $2 million to $1 million. We also noted earlier that two specific assets were removed in the First Amendment. We find Philip's intent was to be sure that the Family Trust had assets of $1 million and no more. Philip's intentions would be carried out when assets valued at $1 million were used to fund the Family Trust.

¶ 23 Jason argues the plain language of the PLZ Trust indicates he may choose any asset to place in the Family Trust so long as the sum of those assets totals $1 million. While Jason may

select any asset to fund the Family Trust, Jason may not choose assets that do not "fund" the Family Trust. So long as the asset furnishes money to the Family Trust, based on the estate tax valuation, Jason may select the asset to fund the Family Trust. However, if the asset does not "fund" (furnish money to) the Family Trust, then the plain language of the PLZ Trust does not support Jason's position that he could choose as many zero-value assets as he wanted to place into the Family Trust.

¶ 24 Jason argues that a finding preventing him from selecting zero-value assets to fund the Family Trust modifies and misinterprets the language of the PLZ Trust. We disagree. The plain language of the PLZ Trust only supports a finding that Jason could select assets that would furnish money to the Family Trust based on the estate tax valuation. The plain language of the PLZ Trust does not support his contention that he could select assets to place into the Family Trust that fail to furnish the Family Trust with money toward the $1 million bequest.

¶ 25 Jason argues the language of the PLZ Trust supports his ability to select zero-value assets for estate tax purposes to fund the Family Trust because nothing distinguishes the zero-value assets he selected from any other asset. We disagree. Assets that do not furnish money to the Family Trust cannot "fund" the Family Trust.

¶ 26 Jason contends assets fluctuate in value over time, concluding that not considering the tax burden contravenes the intent of the PLZ Trust to fund the Family Trust with $1 million. He further argues that not considering the tax implications for the Family Trust would result in the Family Trust not receiving $1 million, as the PLZ Trust intended. Whether the assets change in value, or even whether they would be valued differently other than for estate tax purposes, is irrelevant. The PLZ Trust explicitly limited the bequest to the Family Trust to $1 million as valued for estate tax purposes, not some other metric of valuation. Our guiding principle in

interpreting the PLZ Trust is to effectuate the settlor's intent "and the first guide to that intent is the plain and ordinary meaning of the words used in creating the trust. [Citation.]" *Bollman v. Pehlman*, 352 Ill. App. 3d 1203, 1205 (2004). Jason himself argues that we "should not consider extrinsic evidence" to interpret the language of the PLZ Trust. There is no ambiguity in the language "Jason, if then living, shall have the right to select such assets as he desires to have to fund the Philip L. Zeid Family Trust, such assets to be valued as finally ascertained for federal estate tax purposes." Jason may select any assets that can "fund" the Family Trust under the estate tax valuation, but Jason is not given the right to select assets that cannot "fund" the Family Trust. "When the language of the document is clear and unambiguous, a court should not modify or create new terms." *Ruby*, 2012 IL App (1st) 103210, ¶ 19.

¶ 27 Jason argues that if he cannot select zero-value assets to fund the Family Trust then no party could select zero-value assets. Jason waived this argument by not raising it at trial. *Board of Trustees of the Harvey Police Pension Fund v. City of Harvey*, 2017 IL App (1st) 153095, ¶ 23. His argument is also not convincing. Jason was limited to selecting assets that could "fund" the Family Trust, not just any asset. No similar limitation was placed on the Marital Trust because that was to be paid from the remainder of the PLZ Trust estate. The PLZ Trust expressed how the Marital Trust would include "all the residue of my Trust Estate, wherever situated, including lapsed legacies." There is a presumption that "a testator intends the residuary clause to include that portion of his estate not otherwise devised or disposed of." *Gridley*, 399 Ill. at 227. Assets that could not "fund" the Family Trust under the estate tax valuation metric would fall into the residuary because they represented the remainder of the estate not disposed of. The creation of the Marital Trust was not limited to assets that could "fund" the Marital Trust.

¶ 28 We find that the language of the PLZ Trust, as amended, indicates that the Family Trust was not funded through a specific bequest, therefore we reverse the trial court's finding of a specific bequest. Further, we affirm the trial court's finding that zero-value assets cannot "fund" the Family Trust because under the plain language of the PLZ Trust zero-value assets do not furnish money to the Family Trust.

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons the judgment of the circuit court of Cook County is affirmed in part and reversed in part.

¶ 31 Affirmed in part, reversed in part.