COURT OF APPEALS
DECISION
DATED AND FILED

April 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1134 **Cir. Ct. No. 2011PR60**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

IN RE THE ESTATE OF MILLICENT W. CHRISTIANSEN:

KIM CHRISTIANSEN AND LIESEL DANIELSON,

APPELLANTS,

V.

ROBERTA BRADFORD, RACHEL BRADFORD, COURTNEY BRADFORD, DAIN BRADFORD, JAN GORDON, STEPHEN VAGASKY, ERIC FISTLER, MATTHEW CHRISTIANSEN, ALEX CHRISTIANSEN, ROSELLA HENDRICKSON, CAROL PEARSON, ROBERT LYTLE, PLANNED PARENTHOOD OF WISCONSIN, LAVAUGHN TRONNIER, SOUTHERN POVERTY LAW CENTER OF ALABAMA, PRESCOTT FOUNDATION, TWIN CITIES PUBLIC TELEVISION AND MEGHAN COOLEY,

RESPONDENTS.

APPEAL from an order of the circuit court for Pierce County: JAMES J. DUVALL, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Kim Christiansen and Liesel Danielson ("Christiansen") appeal an order in favor of various beneficiaries ("Bradford") in this will contest. Christiansen contends the circuit court erroneously considered extrinsic evidence when interpreting the will. He argues the will unambiguously requires his sister's share to be reduced by $100,000. He further argues the amount of that reduction, together with the amount of several others required by the same article, must be distributed to a trust for his children pursuant to the will's residuary clause. We agree, reverse, and remand for the circuit court to enter an order directing the personal representative to act in accordance with this opinion.

BACKGROUND[1]

¶2 Millicent Christiansen died testate in 2011. Millicent had four children: Dana Wallace, Jan Gordon, Margaret Kelly, and Kim Christiansen.[2] Dana and Margaret predeceased Millicent and left surviving children. Kim also had three living children (Millicent's grandchildren) at the time of Millicent's death: Matthew Christiansen, Alex Christiansen, and Liesel Danielson. Shortly after Millicent's death, the estate's guardian petitioned for formal administration.

[1] As an initial matter, we observe that Christiansen's factual assertions are supported only by citations to his appendix rather than to the record. This is improper. *See* WIS. STAT. RULE 809.19(1)(d); ***United Rentals, Inc. v. City of Madison***, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322. We admonish counsel that future violations of the Rules of Appellate Procedure may result in sanctions. *See* WIS. STAT. RULE 809.83(2).

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] As we have indicated, we will refer to the parties collectively by the last names "Christiansen" and "Bradford." Because many of the parties to this litigation share last names, we refer to individuals by their first name.

¶3 Millicent's will, dated October 28, 2003, was admitted to probate. Articles One and Two of the will provide for the payment of funeral and administrative expenses, and make specific bequests to individuals and institutions, respectively. Article Three divides the "balance" of the estate in quarters, and deducts specified sums from three of the four shares:

> **Issue Survive.** I hereby give the balance of my estate as follows:
>
> (A) Should I still own an interest in Pine Coulee Enterprises, a Wisconsin Limited Partnership, then 13.41% of said partnership **and** twenty-five percent (25%) of the balance of my estate shall be given to my daughter, Dana A. Wallace, or to her issue by right of representation, less the sum of One Hundred Thousand and 00/100 Dollars ($100,000.00).
>
> (B) Twenty-five percent (25%) of my estate to my daughter, Jan M. Gordon, or to her issue by right of representation.
>
> (C) Twenty-five percent (25%) of my estate to my daughter, Margaret L. Kelly, or to her issue by right of representation, less the sum of Forty Six Thousand and 00/100 Dollars ($46,000.00).
>
> (D) I am not unmindful of my son, Kim F. Christiansen, but do not desire that he inherit under the terms of this Will but rather that the remaining twenty-five percent (25%) of my estate be given to my Trustee hereinafter named below to be administered and distributed in accordance with ARTICLE FOUR for the children of my son, Kim F. Christiansen, who are Matthew Christiansen, Liesel Danielson and Alex Christiansen. This portion, however, shall be reduced by the sum

> of One Hundred Thousand and 00/100 Dollars ($100,000.00).[3]

(Some formatting altered.) Article Four governs the administration of the trust for Kim's children, and Article Five contains administrative provisions applicable to both the personal representative and trustees. Article Six then provides:

> **Trustees.** If one or more of my descendants survive me, all of the rest of the property which I own at my death shall be transferred to U.S. BANK, NATIONAL ASSOCIATION, (Eau Claire Office) Eau Claire, Wisconsin, as Trustee, to be retained and managed and distributed by them under the provisions of ARTICLE FOUR herein.[4]

Articles Seven, Eight, Nine, and Ten, variously, identify the personal representative, set forth the powers of the personal representative and trustee, and define select terms in the will.

¶4 A dispute immediately arose as to whether Dana was entitled to any portion of the estate under Article Three (A). The personal representative took the position that because Millicent no longer owned any interest in Pine Coulee Enterprises at her death, the entire Article Three (A) bequest lapsed and what would have been Dana's share passes through the residuary clause in Article Six. Kim's children agreed with that interpretation. Jan and others believed Dana's twenty-five percent share was not contingent upon Millicent still owning an interest in Pine Coulee Enterprises. The circuit court ruled that according to state

[3] Article Three also describes what effect the sale of stock used as collateral for a loan is to have upon the bequest to Kim's children under Article Three. This provision does not appear relevant to this appeal and has been omitted.

[4] Article Four also contains several provisions relating to the trustee and trust corpus. These provisions do not appear relevant to this appeal and have been omitted.

records, Pine Coulee Enterprises was still in existence, satisfying the precondition to Dana receiving under Article Three (A). That ruling has not been appealed.

¶5 The circuit court held an evidentiary hearing to resolve the following two issues relevant to this appeal.[5]

¶6 First, some of the beneficiaries argued the $100,000 reduction to Dana's share under Article Three (A) should be ignored entirely, as it was designed as payment for Dana's previously sold 13.41 percent interest in the now-worthless Pine Coulee Enterprises. Others, including Kim's children, argued the reductions to the shares under Articles Three (A), (C), and (D) should all be treated the same, as it was not evident from the will that these reductions were tied in any way to other transactions.

¶7 Second, some beneficiaries, recognizing that the deductions under Article Three had to go somewhere, argued the deducted amounts should be "added into the estate and divided per the fractional interests of Article [Three]." The personal representative, and Kim's children, argued any sums left over after the Article Three bequests were to be disposed of through the residuary clause, Article Six, and placed in trust for Kim's children.

¶8 With respect to the first issue, the circuit court concluded that, according to the testimony adduced at the hearing, the $100,000 reduction to

[5] The circuit court also considered testimony from this hearing in resolving whether Dana's Article Three (A) share was contingent on the existence of Pine Coulee Enterprises. We need not address whether it was appropriate to use extrinsic evidence in interpreting that provision, since that portion of the ruling has not been appealed. *See* ***Patrick Fur Farm, Inc. v. United Vaccines, Inc.***, 2005 WI App 190, ¶8 n.1, 286 Wis. 2d 774, 703 N.W.2d 707 (court of appeals decides cases on the narrowest possible grounds).

Dana's share was related to a transaction intended to insulate Pine Coulee Enterprises' real estate assets from Dana's oncoming bankruptcy. Dana's parents, fearing the property would have to be sold to satisfy creditors, purchased Dana's interest for $100,000. When Pine Coulee Enterprises' assets were subsequently sold, Dana received less than the other children, because she owned a smaller portion of the business. Because Dana "never got her [thirteen] percent back," the court determined it would be unreasonable to reduce her share by $100,000. However, the court found the reductions to Margaret's and Kim's shares unambiguous.

¶9 Second, the court found Articles Three and Six were ambiguous because they contained competing language. The court concluded Millicent intended her four children to share her estate equally. Using what it labeled the concept of "hodgepodge," the circuit court determined the reductions to Margaret's and Kim's shares should be "added back into the balance of the estate and divided four ways. In other words, it does not [pass] to Kim's children under [Article Six]." Christiansen appeals.

DISCUSSION

¶10 Christiansen first asserts that Article Three (A) unambiguously requires a $100,000 deduction from Dana's twenty-five percent share of the estate, and the circuit court consequently erred by eliminating that deduction based on extrinsic evidence of testator intent. This argument requires us to apply well-settled principles of will construction, which we set forth below.

¶11 "The purpose of will construction is to ascertain the testator's intent." ***Lohr v. Viney***, 174 Wis. 2d 468, 480, 497 N.W.2d 730 (Ct. App. 1993). This is determined from the language of the will, which is the best evidence of

intent. ***Madison Gen. Hosp. Med. & Surgical Found., Inc. v. Volz***, 79 Wis. 2d 180, 186-87, 255 N.W.2d 483 (1977). Thus, we begin with the will's language; "if there is no ambiguity or inconsistency in the will's provisions, there is no need for further inquiry into the testator's intent." ***Lohr***, 174 Wis. 2d at 480 (citing ***Volz***, 79 Wis. 2d at 187). Only when the language gives rise to ambiguity or inconsistency is it appropriate to look at the circumstances surrounding the will's execution or consider extrinsic evidence. ***Id.***

¶12 Ambiguity exists where the will's language is subject to two or more reasonable interpretations, either on its face or as applied to the extrinsic facts to which it refers. ***Id.*** at 480-81. "When determining whether an ambiguity or inconsistency exists in the will's language, we look at the will not as a group of independent phrases, but rather as an entire instrument." ***Id.*** at 481. The construction of a will, and by extension the existence of ambiguity, is a question of law we review without deference to the trial court. *See* ***Firehammer v. Marchant***, 224 Wis. 2d 673, 676, 591 N.W.2d 898 (Ct. App. 1999).

¶13 The will in this case is fairly straightforward, though not a model of draftsmanship. Article One directs the personal representative to pay administrative and funeral expenses, and all allowable claims against the estate. Article Two makes specific bequests to individuals and institutions, and states that if any of those individuals or institutions predecease Millicent, then that "particular bequest shall be added to the balance of my estate and shall be distributed" according to Article Three. Article Three provides that "the balance of [Millicent's] estate" is to be divided equally among her four children, except that Kim's share will instead be placed in a trust for the benefit of his children. Article Three further directs that specific amounts be deducted from Dana's, Margaret's, and Kim's children's shares.

¶14 Here, it is apparent the circuit court found the reduction to Dana's share ambiguous, because it considered extrinsic evidence when interpreting the provision. Specifically, the circuit court determined the $100,000 deduction was related to Dana's bankruptcy and her interest in Pine Coulee Enterprises—a fact which is not evident from the face of the document. *See* ***Hase v. Radenz***, 155 Wis. 46, 48, 143 N.W. 1050 (1913) (testator's purpose can be "given vitality only so far as it can be read reasonably out of the will"). The circuit court, recognizing that Dana's share of Pine Coulee Enterprises was worthless by the time Millicent died, concluded Dana "doesn't get the [thirteen] percent of anything, but that her share is not reduced by the $100,000."

¶15 This construction by the circuit court was improper. The will, interpreted logically and according to its language, is clear. Whatever is left after the payment of Article One expenses and Article Two bequests forms the "balance" of Millicent's estate under Article Three. Dana is entitled to twenty-five percent of that, "less the sum of One Hundred Thousand and 00/100 Dollars ($100,000.00)." That portion of Article Three (A) at issue on appeal is unambiguous.

¶16 Our holding in that respect is buttressed by the circuit court's finding that the deductions to Margaret and Kim's children's shares are unambiguous. The reduction clauses are identical except with respect to amount. We cannot perceive how the circuit court concluded the clause applicable to Dana's share is ambiguous while finding nearly identical provisions elsewhere unambiguous.

¶17 The circuit court appears to have been less concerned about the language of the document than ascertaining what Millicent would have wanted given the diminished value of Pine Coulee Enterprises. "It is, however, error to

construe a will to find an unexpressed intent of the testator when the terms of the will are unambiguous on their face and clearly express the testator's purpose." ***Board of Trs. of Beloit College v. Farrow***, 29 Wis. 2d 506, 513, 139 N.W.2d 72 (1966). Neither we nor the beneficiaries are permitted to rewrite the will so as to effect a distribution other than that provided by the testator. ***Sattell v. Brenner***, 15 Wis. 2d 527, 531, 113 N.W.2d 420 (1962). This is true even if the will appears to result in inequality; a court cannot "distort its construction to accomplish its own idea of what is equitable." ***Woehler v. Bohnert***, 215 Wis. 108, 111, 254 N.W. 103 (1934). Regardless of Pine Coulee Enterprises' worthlessness, the will clearly and unambiguously directs that $100,000 be deducted from Dana's share, and it cannot be construed in any other fashion.

¶18 Article Three creates residue—potentially $246,000 from the reductions to Dana's, Margaret's, and Kim's children's shares—and the question remains how that residue must be distributed.[6] Christiansen asserts the residue should be distributed under Article Six, which he claims is the will's residuary clause. Bradford argues the circuit court correctly determined Articles Three and Six conflict, and properly channeled the residue back through Article Three to carry out Millicent's manifest intention that her estate be divided evenly among her children.

¶19 We conclude the dispute as to whether Articles Three and Six conflict, and whether Article Six is effective as a residuary clause, is controlled by

[6] "'The residuum of an estate is that part of it left after paying the debts of testator, the expenses of administration, and the specific, demonstrative and general bequests and devises given in a will.'" ***McCarville v. McWilliams***, 78 Wis. 2d 328, 333, 254 N.W.2d 277 (1977) (quoted source omitted).

McCarville v. McWilliams, 78 Wis. 2d 328, 254 N.W.2d 277 (1977). There, the testator bequeathed one-third of the personal property in his estate to his wife. ***Id.*** at 329. The will's fifth clause then indicated that specified sums should be given to certain individuals, and that these bequests represented "[t]he remaining two-thirds … of the personal property in my estate." ***Id.*** at 331. However, the specific bequests did not actually add up to two-thirds of the decedent's estate; there was property left over, which was not specifically disposed of by the fifth clause. ***Id.***

¶20 The circuit court in ***McCarville*** concluded the fifth clause acted as a residuary clause, with each of the clause's named beneficiaries sharing the excess on a pro rata basis. ***Id.*** at 330. On appeal, our supreme court rejected this construction. It observed that no particular words are necessary to create a residuary clause, and that a residuary clause may incorporate general or specific legacies. ***Id.*** at 332. However, general and specific bequests will be treated as such, and not as a residuary legacy. ***Id.*** Further, the fifth clause failed as a residuary clause because it lacked a provision for the residuum. ***Id.*** at 333.

¶21 Here, it is evident from the language of the will that Millicent intended Article Three to make general bequests to her children or their kin. Because Article Three makes general bequests, it would be inappropriate to treat the same provisions as a residuary clause. *See* ***id.*** at 332. It would also be inappropriate to treat Article Three as a residuary clause because, like the clause in ***McCarville***, it does not include a residuary provision, and is therefore incomplete. *See* ***id.*** at 333.

¶22 Hence, there is no conflict between Articles Three and Six. Article Three devises a percentage of the estate's balance to each child, minus certain specified sums, which are then distributed through Article Six to the trust for

Kim's children. This construction is not only consistent with the language used, but harmonizes the will's provisions. *See* ***Staaben v. Jabs***, 57 Wis. 2d 363, 370, 204 N.W.2d 478 (1973) ("The various provisions [of a will] should be construed so as to be consistent with one another rather than conflicting."); *see also* ***Lindsay v. Lindsay***, 260 Wis. 19, 22, 49 N.W.2d 736 (1951).

¶23 Bradford argues construing Article Six as a residuary clause leads to absurd results because the share for Kim's children is reduced under Article Three, and then returned to the children's trust under Article Six. Essentially, Bradford asserts that funneling the Article Three deductions through Article Six renders the $100,000 deduction applicable to Kim's children's share meaningless.

¶24 We recognize our construction of the will results in the deduction to Kim's children's share being placed in trust for their benefit. We will avoid a construction of a will that results in patent absurdity. *See* ***Petit v. Petit***, 246 Wis. 620, 622, 18 N.W.2d 339 (1945). However, Bradford's construction is even more problematic. Bradford's construction not only ignores ***McCarville*** and well-settled rules of will construction, but it results in its own absurdity. If Article Three functions as a residuary clause, the $246,000 residue will be divided into four equal shares and once again subject to the deductions in Article Three.[7] The

[7] At least, that is the effect absent the circuit court's application of "hodgepodge," which we assess later in this opinion. *See infra*, ¶25.

net effect is that Jan would receive nearly all the residue.[8] If Millicent had intended that Jan receive the residue, she would have said so. We will not rewrite the will to create language that is not there. *See* ***Firehammer***, 224 Wis. 2d at 676.

¶25 The circuit court's reliance on what it called "hodgepodge" was also misplaced. "Hotchpot" is the proper term for what the circuit court desired to do, but has no applicability to testamentary proceedings. Hotchpot is "[t]he blending of items of property to secure equality of division, esp. as practiced either in cases of divorce or in cases in which advancements of an intestate's property must be made up to the estate by a contribution or by an accounting." BLACK'S LAW DICTIONARY 755 (8th ed. 2004). Intestacy is the very foundation of the doctrine of advancements; "[w]here, however, the deceased leaves a will, it must be assumed that any and all advancements have been duly considered by the testator, and that the distribution of his estate … in accordance with the will represents his wishes in the matter …." ***Sipchen v. Sipchen***, 180 Wis. 504, 509, 193 N.W. 385 (1923). Further, we presume the testator intended to dispose of the entire estate, and will adopt a construction that avoids any portion of the estate passing through intestacy. *See* ***Garrett v. McQuillen***, 124 Wis. 2d 25, 36, 368 N.W.2d 633 (1985). Our construction of Millicent's will as making general bequests under Article

[8] If we assume the residue equals the amount of all Article Three deductions ($246,000), then the amount of each quarter share is $61,500. In that scenario, Dana and Kim's children would receive nothing, as their share would be entirely subject to the $100,000 deduction under Articles Three (A) and (D). Margaret would receive $15,500 ($61,500 – the $46,000 Article Three (C) deduction), and Jan would receive her full share. This creates a residue of $169,000; the amount of each quarter share would then be $42,250. Jan would again receive her full share, and the remainder would be residue again subject to the Article Three deductions. This would continue ad infinitum, although at some point the residue would become too small to feasibly divide.

Three, with the residue passing into trust under Article Six, is in accord with this rule.

¶26 In sum, we conclude the circuit court erroneously relied upon extrinsic evidence of intent when construing the will at issue. The will's terms unambiguously direct that each child or their kin receive one-quarter of the estate's remaining property, after payment of expenses and general bequests under the first two articles. Dana's, Margaret's, and Kim's children's shares are subject to certain deductions, which become residue and are disposed of under Article Six. We reverse and remand for the circuit court to enter an order directing the personal representative to act in accordance with this opinion.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.