

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 11, 2015

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2014AP1476

Cir. Ct. No. 2012CV602

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

MYRA B. SAROW,

PLAINTIFF-APPELLANT,

v.

MARVIN C. VIKE AND CONSTANCE M. VIKE,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Rock County:
BARBARA W. McCRORY, Judge. *Affirmed.*

Before Blanchard, P.J., Higginbotham and Kloppenburg, JJ.

¶1 HIGGINBOTHAM, J. This case involves a non-probate transfer of a farm to designated Transfer on Death (TOD) beneficiaries through the use of a TOD designation form (hereinafter TOD designation). The TOD designation, executed by Osmer Lyle (“Bud”) and Myra Sarow, names Bud’s daughter and

son-in-law, Constance (Connie) and Marvin Vike, as beneficiaries of a farm. Central to this dispute, Bud and Myra were both named on the TOD designation as the owners of the farm, even though it is undisputed that Myra was never an owner of the farm.

¶2 Myra appeals a judgment entered following a trial to the circuit court, declaring that under the TOD designation, ownership of the farm transferred to Connie and Marvin upon Bud's death. She also appeals the court's determination that Connie did not exert any undue influence over Bud in connection with the TOD designation. On appeal, Myra raises several arguments related to the validity and function of the TOD designation. For the reasons that follow, we reject all of Myra's arguments and, accordingly, affirm the circuit court.

BACKGROUND

¶3 On appeal the parties appear to agree that the pertinent facts are undisputed. Myra and Bud were married in July 1972. Shortly thereafter, Bud acquired title to the farm at issue by entering into a land contract with his parents. At the time of Bud's death in March 2012, Bud was the sole record title holder of the farm.

¶4 In 1996, Bud and Myra executed wills prepared by the law firm Brennan Steil, S.C., which provided for ownership of the farm to pass to the surviving spouse upon the death of either one of them. In 2009, Bud and Myra began discussing the disposition of the farm with Connie and Marvin in the event that Bud passed away before Myra. Connie testified that she had numerous conversations with Bud and Myra about the farm and that during these conversations Myra repeatedly stressed that she did not want to remain living on

the farm after Bud's death because she was not capable of taking care of the farm-related business.

¶5 In July 2010, Connie wrote a letter to Bud and Myra expressing her desire to retire with her husband on the farm "after the two of you are done with it; or, possibly get it in our name sooner, giving you both lifetime use of it." In her letter, Connie also encouraged Bud and Myra to update their wills "correctly and legally, very soon," if it was Bud's plan for ownership of the farm to pass to Connie and Marvin.

¶6 A few months later, Bud and Myra approached Connie to help them set up a meeting with Attorney John Steil for the purpose of updating their wills and other estate planning documents. Bud had been a client of the Brennan Steil law firm for over forty years. Prior to meeting with Attorney Steil, Connie met with Bud and Myra at their request to discuss their financial plans and to make a list of topics they wanted to discuss with Attorney Steil. Connie also assisted Bud and Myra, again at their request, in gathering and providing to Attorney Steil information that he would need to draft Bud and Myra's updated estate planning documents.

¶7 Before Bud and Myra executed the TOD designation at issue, they reviewed a first draft of a TOD designation prepared by Attorney Steil. In a letter accompanying the first draft of the TOD designation, Attorney Steil explained that this draft of the TOD designation granted Myra a life estate in the farm, so that, Myra "would be considered to be the owner of the farm for her lifetime in the event that [Bud] would predecease her." Attorney Steil further explained that, under this first draft of the TOD designation, at the time of both Bud's and Myra's deaths, title in the farm would transfer to Connie and Marvin as to a one-half

share, and to Bud's son, Roger, for the other one-half share. Attorney Steil did not copy the letter to Connie.

¶8 After Bud and Myra reviewed the first draft of the TOD designation, they expressed concerns to Attorney Steil about Myra's ability to manage the farm should Bud predecease her and the possible tax consequences Myra might face should she receive a life estate in the farm. Bud and Myra suggested changes and asked Connie to provide those changes to Attorney Steil in writing.

¶9 As a result, Attorney Steil revised the TOD designation. The revised designation, which is the version at issue here, eliminated Myra's life estate in the farm and named Connie and Marvin as the TOD beneficiaries. The revised TOD designation identified the owners of the farm as "[Bud] Sarow, and Myra B. Sarow, his wife (collectively, 'Owner')." In a letter accompanying the revised TOD designation, Attorney Steil stated that he believed that Connie and Marvin had an oral agreement with Myra that they would allow her to live on the farm as long as she wanted.

¶10 Attorney Steil met with Bud and Myra, with Connie present, and explained the terms of the revised TOD designation. At the meeting, Steil impressed upon Bud and Myra that the farm would transfer to Connie and Marvin upon Bud's death and that Myra would have no legal interest in the farm. At the conclusion of the meeting, Bud and Myra expressed satisfaction with their estate plans, including the revised TOD designation, and signed the documents. After signing the documents and before everyone left the meeting, Myra again expressed her intent to no longer reside on the farm if Bud predeceased her.

¶11 When Bud died on March 6, 2012, he was still the sole owner of the farm. Shortly after his death, Myra, and Connie and Marvin jointly, each filed

with the register of deeds separate competing documents claiming ownership of the farm. Specifically, on March 13, 2012, Myra filed a new TOD designation pertaining to the farm that named herself as the owner. On this designation Myra checked a box that stated “[t]he sole purpose of this instrument is to revoke all previous TOD beneficiary designations.” On March 19, 2012, Connie and Marvin filed with the county register of deeds a different form titled “Transfer on Death to Beneficiary” declaring their interest in the farm as beneficiaries based on the TOD designation that had been prepared by Attorney Steil and signed by Bud and Myra. Myra then initiated this lawsuit asking the circuit court to determine her ownership interest in the farm. She later amended her complaint to include allegations of undue influence against Connie. Connie and Marvin filed a counterclaim seeking a declaration that they own the farm.

¶12 The case was tried to the circuit court. In a written decision, the court found that Myra had no marital property interest in the farm, that the TOD designation executed by Bud and Myra was valid, and that Myra could not revoke it. The court also concluded that the TOD designation was not the result of undue influence and that reformation of the TOD designation to grant Myra a life estate, as reflected in the first draft of the TOD designation, was not warranted.

¶13 Myra moved for reconsideration, and in a written decision denying the motion, the court clarified that it had determined that Bud had solely owned the farm, and therefore he had the authority to transfer the farm upon his death. The court summarized its conclusion that the “TOD validly transferred the property to [Connie and Marvin] when Bud passed away because Bud was the sole owner of the property and he signed a valid TOD prior to his death.” Based on the above, the court concluded that the farm passed to Connie and Marvin at Bud’s death. Myra appeals.

DISCUSSION

1. The Validity of the TOD Designation

¶14 Myra argues that the TOD designation executed by Bud and Myra is invalid on its face. Specifically, Myra contends that because she did not own the farm at the time the TOD designation was executed, identifying her as an owner of the farm on the TOD designation rendered the designation invalid. She points out that only three categories of owners are permitted to make non-probate transfers to beneficiaries under the statute that authorizes TOD designations, WIS. STAT. § 705.15(1) (2013-14)¹: a sole owner, multiple owners by way of survivorship marital property, or joint tenancy. Myra argues that because she does not fall within any of the three categories of ownership under the statute, the fact that she was identified as an owner on the TOD designation renders it invalid. We disagree with Myra based on our interpretation of § 705.15(1), as we now explain.

¶15 We begin our analysis with the language of WIS. STAT. § 705.15. Statutory interpretation presents a question of law that we review de novo. *Fuchsgruber v. Custom Accessories, Inc.*, 2001 WI 81, ¶10, 244 Wis. 2d 758, 628 N.W.2d 833. If the meaning of the statutory language is plain, our inquiry stops there. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

¶16 Attorney Steil used a standard form to draft the TOD designation; the form is based on the language of WIS. STAT. § 705.15. Section 705.15(1)

¹ All references to the Wisconsin statutes are to the 2013-14 version unless otherwise noted.

governs the non-probate transfer of real property on death, and provides in pertinent part:

An interest in real property that is solely owned, owned by spouses as survivorship marital property, or owned by 2 or more persons as joint tenants may be transferred without probate to a designated TOD beneficiary . . . on the death of the sole owner or the last to die of the multiple owners.

Thus, § 705.15(1) unambiguously permits the non-probate transfer of real property only by a sole owner, by spouses as survivorship marital property, or by joint tenancy.

¶17 Significant here, the language of the statute permits, in broad terms, the transfer of real property by TOD designation where the name of the sole owner of the property is listed on the TOD designation, and does not by its terms invalidate a transfer where other names appear as purported but not actual owners, as in this case. Nor, so far as the parties alert us, are we aware of closely related statutes that would invalidate the TOD designation under the facts and circumstances of this case. Therefore, based on our reading of WIS. STAT. § 705.15(1) and the application of that statute to the facts of this case—that is, that Bud was the sole owner of the farm to be transferred to Connie and Marvin by the TOD designation—we conclude that the TOD designation is valid and effectuates a transfer of the farm to Connie and Marvin upon Bud’s death.²

² Myra also argues that if the TOD designation is valid, she should be treated as an “owner” because she is identified as an owner on the TOD designation. However, Myra provides no legal basis for us to conclude that she should be treated as an “owner” of the farm when the record shows that she is not an owner of the farm.

In addition, Connie and Marvin argue that a latent ambiguity exists in the TOD designation so that extrinsic evidence may be used to prove Bud’s intent in regard to transferring the farm after Bud dies. However, we need not and do not address the issue of whether a latent

(continued)

2. Undue Influence

¶18 In her amended complaint Myra alleged that Connie exerted undue influence over Bud in the drafting and execution of the TOD designation. The undue influence claim was tried and the court concluded that the evidence did not support Myra's claim. Myra now argues that the circuit court misapplied the test for undue influence.

¶19 Undue influence may be proved by the application of a four-element test or a two-element test. *See Rahr v. East Wis. Trustee Co.*, 88 Wis. 2d 199, 214, 277 N.W.2d 143 (1979). The circuit court utilized the two-element test and the parties agree that the two-element test applies in this case. For these reasons, we review the court's decision under the two-element test.

¶20 Under the two-element test, the objector has the initial burden of proving two factors: (1) a confidential relationship existed between the testator and beneficiary, *and* (2) the existence of suspicious circumstances surrounding the document at issue. *Johnson v. Merta*, 95 Wis. 2d 141, 155, 289 N.W.2d 813 (1980). If the objector establishes *both* elements, then a rebuttable presumption of undue influence arises and the burden shifts to the proponent of the document at issue to prove otherwise. *Id.* at 155-56. That is, for the objector, here Myra, to carry her initial burden, she must prove that both elements of the two-element test are present. If an objector fails to establish the existence of both elements, the burden of rebutting the presumption of undue influence is not placed on the

ambiguity exists because, as we have concluded, the TOD designation is valid and properly effectuates a transfer of the farm to Connie and Marvin at Bud's death.

proponent of the document at issue and the objector's claim of undue influence fails.

¶21 Myra contends that the circuit court failed to properly apply the two-element test to the evidence to establish undue influence. Myra argues that the court failed to first determine whether she established the two required elements, and instead, the court simply determined that she failed to prove undue influence without first determining whether a rebuttable presumption of undue influence arose. We disagree.

¶22 Based on our reading of the circuit court's written decision, there is no doubt that the court properly applied the two-element test by focusing on the second element, suspicious circumstances, when it reached a conclusion that was not in Myra's favor. Although the court did not explicitly refer to the element of suspicious circumstances, it is implicit from the court's decision, which we examine below, that it considered this element and concluded that suspicious circumstances did not exist. It does not matter that the court did not address the first element, the existence of a confidential relationship, under the test we describe above. *See id.*

¶23 The suspicious circumstances portion of the test is satisfied by "proof of fact such as the activity of the beneficiary in procuring the drafting and execution of the [TOD] or a sudden and unexplained change in the attitude of the testator, or some other somewhat persuasive circumstance." *Onderdonk v. Keepman*, 81 Wis. 2d 687, 702, 260 N.W.2d 803 (1978) (quoted source omitted). The fundamental question is "whether the free agency of the testator has been destroyed." *Hamm v. Jenkins*, 67 Wis. 2d 279, 294-95, 227 N.W.2d 34 (1975) (quoted source omitted).

¶24 The circuit court made several factual findings pertinent to the suspicious circumstances element. The express findings that support the court's decision are as follows.

¶25 **Connie's activities in procuring the drafting and execution of the TOD designation.** Connie played a role in Bud and Myra's estate planning. She made the initial appointment with Attorney Steil and participated in the meetings with Attorney Steil, Bud, and Myra. Bud and Myra were already familiar with the Brennan Steil law firm. Attorney Steil went over the documents with Bud and Myra. Bud and Myra understood the content and effect of the documents.

¶26 **Sudden and unexplained change in Bud's attitude.** The court summarized conflicting testimony regarding Bud's intent for the transfer of the farm. The court found Jim Wilke's testimony to be the most credible. Wilke, a neighbor of Bud and Myra's, testified that Bud told Wilke that he wanted the farm to go to Connie. The court also found Attorney Steil's testimony to be credible. Attorney Steil testified that Bud said that he was surprised to learn that the farm passed to Myra under his 1996 will. Steil also testified that Bud thought the farm was to go to Connie and Roger and that Bud wanted the farm to stay on his side of the family.

¶27 **Other Persuasive Circumstances: Connie's share of the estate.** The court attempted to consider whether Connie received a disproportionate share of Bud's estate in comparison to what Myra received. It concluded that Myra did not provide any information regarding the farm's value or the assets that she received; therefore, it could not reach a conclusion on this point.

¶28 Based on the above findings, which readily support a determination that the element of suspicious circumstances was not met, and the court's

statements in its decision addressing Myra's motion for clarification, the court concluded that the evidence did not show that Connie had exerted undue influence on Bud in regard to the TOD designation. Thus, to the extent that Myra argues that the court erred when it concluded that she failed to establish the presence of suspicious circumstances, we disagree. Based on the facts found by the court and summarized above, we conclude that the record supports the court's decision that Myra failed to establish the presence of suspicious circumstances; therefore, its conclusion that she failed to meet her initial burden and its ultimate rejection of her undue influence claim was not against the great weight and clear preponderance of the evidence.

3. Revocation of the TOD Designation

¶29 Myra appears to argue that if the TOD designation is valid, she properly revoked it.³ However, she does not explain how a non-owner can revoke a TOD designation under WIS. STAT. § 705.15(3). Under § 705.15(3), a TOD designation can be revoked "by the sole owner or all then surviving owners." Here, the circuit court determined that Bud solely owned the property and that Myra never had a marital property interest or any other interest in the farm. Myra has not appealed this portion of the circuit court's decision. Therefore, as a non-owner, Myra cannot revoke the TOD designation under the plain language of WIS. STAT. § 705.15(3).

³ Myra may have abandoned her argument that she can revoke the TOD designation in her reply brief. However, because we are not clear on the point, we briefly discuss this as an argument.

4. Reformation of the TOD Designation

¶30 Myra argues that if we conclude that the TOD designation is valid, then we should conclude that it must be reformed. Although Myra does not clearly indicate how the TOD designation should be reformed, she appears to contend that the circuit court erroneously exercised its discretion when it failed to reform the TOD designation to grant her a life estate to the farm. We reject this argument.

¶31 Reformation is an equitable remedy and, “[i]n equity cases, the test on review is whether the findings made are contrary to the great weight and clear preponderance of the evidence.” *First Nat’l Bank of Kenosha v. Scalzo*, 70 Wis. 2d 691, 700, 235 N.W.2d 472 (1975). Here, the circuit court correctly explained that reformation of a document is appropriate if the document does not express the parties’ intent “because of the mutual mistake of the parties, or because of the mistake of one party coupled with fraud or inequitable conduct of the other.” *Hennig v. Ahearn*, 230 Wis. 2d 149, 174, 601 N.W.2d 14 (Ct. App. 1999). Applying the above principles, we conclude that the pertinent facts support the circuit court’s refusal to reform the TOD designation.

¶32 The circuit court first found that no fraud or inequitable conduct existed based on its conclusion that Connie did not exert any undue influence over Bud to sign the TOD designation. Myra does not direct our attention to any other conduct by the beneficiaries, Connie and Marvin, that would indicate fraud or inequitable conduct to warrant reformation of the TOD designation.

¶33 Moreover, the circuit court found that the TOD designation was not the product of a mutual mistake. The court credited Attorney Steil’s testimony and concluded that Bud intentionally did not grant Myra a life estate through the

TOD designation. Of particular importance to the court was Attorney Steil's testimony that Myra was concerned that she would not be able to manage the farm alone, and that because the life estate would be an asset to Myra, she might be prevented from receiving Medicare in the future if necessary. Based on this evidence, we conclude that the court's decision to deny Myra's request to reform the TOD designation was a proper exercise of the court's discretion.

CONCLUSION

¶34 For the reasons discussed, we affirm the circuit court.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

