

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

December 8, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**No. 98-2933**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN RE THE ESTATE OF CECELIA G. PITZ, DECEASED:**

**ROSEMARIE PITZ AND KATHLEEN PITZ,**

**APPELLANTS,**

**v.**

**BERNARD PITZ,**

**RESPONDENT.**

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APPEAL from a judgment of the circuit court for Winnebago County: THOMAS S. WILLIAMS, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Rosemarie Pitz and Kathleen Pitz (hereinafter Rosemarie) appeal from a judgment closing their mother's probate estate. They

challenge the court's valuation of property given to Bernard Pitz, their brother, and whether that valuation complied with the terms of their mother's will. We affirm.

¶2 In a warranty deed dated February 26, 1990, Cecelia G. Pitz, Rosemarie's mother, conveyed a 2.6 acre portion of a 12.45 acre property to Bernard and his wife. Cecelia died on March 1, 1992. Article VI of her April 24, 1991 will contains the following clause relating to this conveyance:

I give to each of my children, Rosemarie Pitz, Kathleen Pitz and Elizabeth Pitz, a sum equal to the estimate fair market value of the real estate described below, land value only without value of improvements, per the real estate tax bill for the calendar year prior to the calendar year of my death. The transfer of real estate to Bernard M. Pitz and Nancy J. Pitz, his wife, by warranty deed dated February 26, 1990 ... [legal description omitted] was a gift. Such gift is an advance to my son, Bernard Pitz. The value of this gift established as an advance is determined to be real estate, land value only, without value of improvements, per the real estate tax bill for the calendar year prior to the calendar year of my death. The bequests made under this Article are intended to equalize the distribution to each of my children.

¶3 Rosemarie contends that the circuit court was required to construe the will because there is a latent ambiguity: the will provides for valuation of Bernard's parcel by a tax bill. However, there is no real estate tax bill solely for the 2.6 acre parcel. In the absence of a separate tax bill, Cecelia's tax bill valuation method cannot be effectuated. Therefore, Rosemarie argues, Cecelia's intent to treat her children equally must govern, and an appraisal is the best method for valuing Bernard's parcel.

¶4 Bernard contends that there is no ambiguity in the will because Cecelia directed that the real estate tax bill would be used to value his property. A

1991 tax bill exists for the entire 12.45 acres, and the value of Bernard's 2.6 acres can be derived from that tax bill.

¶5 The construction of a will is a question of law which we determine without deference to the circuit court. *See Furmanski v. Furmanski*, 196 Wis.2d 210, 214, 538 N.W.2d 566, 567 (Ct. App. 1995). Our task in construing a will is to determine the testator's intent, and the best evidence of this is the language of the document itself. *See Lohr v. Viney*, 174 Wis.2d 468, 480, 497 N.W.2d 730, 735 (Ct. App. 1993). Intent is determined from the language of the will itself, considered in light of the circumstances surrounding the testator at the time of the will's execution. *See Madison Gen. Hosp. Med. & Surgical Found., Inc. v. Volz*, 79 Wis.2d 180, 186, 255 N.W.2d 483, 486 (1977).

¶6 We look first to the language of the will, which is the best evidence of the testator's intent. *See id.* at 187, 255 N.W.2d at 486. "A latent ambiguity exists where the language of the will, though clear on its face, is susceptible of more than one meaning when applied to the extrinsic facts to which it refers." *Id.* (quoted source omitted). If an ambiguity exists, we may then refer to the circumstances surrounding its execution. *See id.*

¶7 Our review of the language of Cecelia's will leads us to conclude that it contains a latent ambiguity. Cecelia's scheme to value Bernard's property by use of the real estate tax bill was complicated by the absence of a separate tax bill for Bernard's parcel. Therefore, while her intention to use the real estate tax bill is clear, this intention is frustrated under the facts of this case because a tax bill does not exist solely for Bernard's 2.6 acres. The matter is also complicated by Cecelia's statement that "[t]he bequests made under this Article are intended to equalize the distribution to each of my children." Her statement regarding equal

treatment is arguably at odds with a decision to value Bernard's property using a tax bill, rather than an appraisal.

¶8 Because there is a latent ambiguity in Cecelia's will arising from the tax bill valuation and equal distribution provisions, it was necessary for the circuit court to take evidence regarding Cecelia's intent and the circumstances under which she executed her will. *See id.*

¶9 After an evidentiary hearing, the circuit court found that Bernard's warranty deed was not recorded until April 14, 1992,<sup>1</sup> after Cecelia died. The real estate tax bill for 1991, the calendar year prior to Cecelia's death, covers the entire 12.45 acre property, including the 2.6 acres given to Bernard. Attorney Timothy Kuehl, who drafted Cecelia's will, testified that Cecelia selected the tax bill method even though counsel explained to her that the assessor's valuation could be high or low. The tax bill valuation provision was a way to determine how to treat her children equally.

¶10 The court found that Cecelia was aware that the tax bill might not reflect fair market value. The court found that a true equalization of bequests would have required a date of death valuation by appraisal, rather than a value set by the town assessor as of the first day of the year before Cecelia's death. However, testimony indicated that Cecelia had chosen the tax bill method of valuation with knowledge that the tax bill value could be higher or lower than the actual value. The court noted that Cecelia had successfully objected to the 1985 assessment and had also challenged the 1991 assessment. The court found that

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<sup>1</sup> Cecelia sanctioned the delay in recording the warranty deed due to a dispute regarding the south lot line of the 12.45 acre parcel and a legal description error.

“[t]here is no question that she knew that the tax bill might not reflect fair market value.”

¶11 The court also found that Cecelia’s intent to use the tax bill valuation method precluded the use of later appraisals, “either those using date of death values or that of Mr. Neer [Rosemarie’s expert] which purported to value as of 1/1/91. It also precludes reliance on the transfer tax valuation of \$10,000.”

¶12 These findings are not clearly erroneous. *See* § 805.17(2), STATS. In light of these findings, we reject Rosemarie’s argument that Cecelia’s equal distribution clause governs the resolution of the will’s latent ambiguity. The court found that Cecelia intended to value Bernard’s property using a tax bill method, regardless of the possible difference in value between the tax bill and an appraisal.

¶13 Having upheld the circuit court’s finding that Cecelia intended to value Bernard’s parcel using the 1991 tax bill, we turn to the circuit court’s determination of the value of Bernard’s parcel. The court found that apportioning the 1991 value of the 12.45 acres, \$35,848, between Bernard’s 2.6-acre parcel and the balance of the 12.45 acres would give effect to Cecelia’s intent to value Bernard’s parcel using the 1991 tax bill. The court accepted the valuation provided by Diane Wagner, the assessor who performed the 1991 assessments for the Town of Black Wolf.

¶14 Wagner testified that all property in the Town of Black Wolf was reassessed and brought up to full value as part of the 1991 assessment. Wagner did not know that 2.6 acres had been carved from the 12.45 acre parcel because

the warranty deed and certified survey map for Bernard's parcel were not recorded until April 1992, well after she performed the 1991 assessment.<sup>2</sup>

¶15 In order to value Bernard's 2.6 acres for this case, Wagner broke the 12.45 acre property into its component lakefront and non-lakefront parts and used a weighted acreage value of \$8500 per acre for lakefront property and \$1150 per acre for the remainder of the property. Based upon the 1991 tax bill, Wagner valued the 2.6 acres at \$12,844. The circuit court awarded that amount to each of Cecelia's daughters pursuant to Cecelia's direction that the children be treated equally.

¶16 Because Wagner's assessment was the only one consistent with Cecelia's intent to use the 1991 tax bill to value Bernard's 2.6 acres, the circuit court did not err in accepting it. The court's valuation of Bernard's property at \$12,844 is supported by Wagner's testimony and is not clearly erroneous. *See* § 805.17(2), STATS.

*By the Court.*—Judgment affirmed.

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

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<sup>2</sup> We note that at the time of the 1991 assessment, the 2.6 acres had been conveyed to Bernard but the warranty deed had not been recorded. Therefore, there was no way for the assessor to know that a different approach to valuation might be warranted. Because Cecelia sanctioned the delay in recording the deed, we will not visit this lack of information upon the assessor or the circuit court's findings regarding valuation.



