

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 98-3319

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN RE THE ESTATE OF JOHN R. (A/K/A JUAN R.)
FERNANDEZ:**

STEVEN R. FRANKE,

APPELLANT,

v.

**UNIVERSAL SURETY COMPANY, ROGER A. FERNANDEZ
AND CONTINGENT REMAINDERMEN, BY STEVEN P.
DOYLE, GUARDIAN AD LITEM,**

RESPONDENTS.

APPEAL from an order of the circuit court for La Crosse County:
MICHAEL J. MULROY, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

PER CURIAM. Steven R. Franke, personal representative for the estate of John R. Fernandez, appeals from an order limiting the court's jurisdiction

in this probate proceeding and releasing the bond posted by Universal Surety Company. The court also directed the transfer of property in the estate to Roger A. Fernandez, John's son. The issue is whether the trial court properly exercised its discretion in so ordering. We affirm.

John Fernandez died in 1992, leaving assets in his home state of Florida, the country of Spain, and Wisconsin. His heirs include his son, Roger, his daughter, Rosa Smits, and Rosa's four children. John's will left Roger a life estate in his Wisconsin and Spanish real estate, and a one-half interest in the income from his personal property. The will also appointed Roger as his personal representative. His remaining property went to Smits and her children.

Roger commenced the probate proceeding in Florida and was appointed personal representative. His inventory of property listed John's Florida real estate and all personal property wherever located, including cash in Wisconsin bank accounts.

Roger also petitioned the La Crosse County Circuit Court for an ancillary probate proceeding to deal with the Wisconsin real estate, which he valued at \$42,000. The court appointed Roger personal representative and required him to post a \$43,000 bond from United Surety. The bond provided that it would remain in effect unless voided once Roger performed his duties.

Roger did nothing to advance either proceeding for several years. In September 1996, on Smits' motion, the Wisconsin court removed him as the ancillary personal representative, and replaced him with Franke. Franke subsequently discovered that a large amount of money was missing from the Wisconsin bank accounts, without explanation. Consequently, Franke petitioned for the forfeiture of University Surety's bond to partially compensate for the

missing assets. Franke also petitioned for the sale of the real estate and the use of the proceeds to generate income for the estate. The court determined, however, that it should limit its jurisdiction solely to the Wisconsin real estate. Because the value of that property exceeded the \$43,000 bond, the court also granted University Surety's motion to release the bond. Finally, the court directed Franke to convey to Roger his life estate in the property. Franke appeals from those orders. He contends that each constitutes an erroneous exercise of the trial court's discretion.

Section 868.03, STATS., authorizes a Wisconsin court to accept ancillary jurisdiction in a probate proceeding commenced and pending in the decedent's state of domicile. The court may also deny the application for "ancillary letters" if the estate may be settled conveniently without it. Section 868.03(3). "No nonresident shall be granted ancillary letters unless the nonresident gives an administration bond." Section 868.03(4), STATS. A person aggrieved by the personal representative's maladministration may bring an action on the bond. *See* § 878.07(1)(c), STATS.

The parties agree that the court administers and implements these provisions using its discretion. We affirm discretionary decisions if the trial court examines the relevant facts, applies a proper standard of law and reaches a reasonable conclusion using a demonstrated rational process. *See Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

The trial court properly refused jurisdiction over the Wisconsin bank accounts. The trial court reasoned that jurisdiction should not extend because the Florida court had already taken jurisdiction over the accounts, and this ancillary proceeding was intended solely to deal with the real estate asset. We reject

Franke's contention that these reasons were inadequate to support the court's discretionary decision. The record contains no evidence that the Florida court was incapable or unwilling to address the issue of the accounts, if petitioned to do so, nor that the Wisconsin court was a superior forum for resolving the dispute. At best, it was a more convenient forum for Smits and that fact, without more, does not compel a different result.

The trial court properly released the bond. Having limited jurisdiction to the real estate, no reason existed to maintain the bond. It was ordered solely to cover administration of the real estate, and there was no evidence of Roger's maladministration of that asset. The parties stipulated that the value of the real estate has increased to more than the value of the bond, and the court reasonably determined that the bond served no further purpose.

The trial court properly ordered Franke to convey Roger's interest in the real estate. Franke petitioned the court to sell the real estate to cover Fernandez's alleged dissipation of the bank accounts. He further asserted that given Fernandez's dissipation of the bank accounts "it is not likely that the real estate in which he now holds a life estate is going to be preserved for the benefit of those grandchildren." We see no reason why the Florida court cannot determine whether Fernandez maladministered the estate, and if so, why it cannot order the Wisconsin real estate sold, or transferred to the remaindermen.

In effect, Franke was asking the trial court to speculate as to future events, and make its decision based on that speculation. That the trial court reasonably declined to do.

On September 16, 1999, we received a letter from attorney Daniel T. Flaherty who is representing Smits and the grandchildren. The letter asserts that

Roger Fernandez has absented himself from the United States, and does not correspond with his attorneys in La Crosse. Flaherty also asserts that waste is being committed on the real estate in La Crosse. He asks that we enter an order to preserve the existing state of affairs pursuant to § 806.08(5), STATS. We decline to do so. Were we to consider such an order, we would be required to determine facts. We are precluded from making factual findings. *See Wurtz v. Fleischman*, 97 Wis.2d 100, 107 n.3, 293 N.W.2d 155, 159 n.3 (1980). Appellant should address his concerns to the trial court in Wisconsin or the trial court in Florida.

By the Court.—Order affirmed.

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

