COURT OF APPEALS
DECISION
DATED AND FILED

January 10, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP315 **Cir. Ct. No. 2012FA409**

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

IN RE THE MARRIAGE OF:

JUDITH MARIE GENZ,

PETITIONER-RESPONDENT,

V.

THOMAS H. GENZ,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for St. Croix County: EDWARD F. VLACK III, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Thomas Genz appeals that portion of a divorce judgment awarding his former spouse, Judith Genz, the parties' primary residence. Thomas argues a May 2008 deed unambiguously amended the parties' marital

property agreement, granting each party an undivided one-half interest in the home. We disagree and affirm.

BACKGROUND

¶2 Thomas and Judith were married in 1993. It was the second marriage for both parties. As relevant to this appeal, Judith came to the marriage with a residence and other real estate in Spring Valley, Wisconsin, and a revocable trust valued at $631,380.02. Thomas owned 200 acres of land in Spring Valley.

¶3 Prior to the marriage, the parties entered into a marital property agreement which identified their respective assets and debts and provided that, "[i]n general, all property or interests in property now owned by each party prior to the marriage … shall be owned and classified as that party's individual property." The agreement further provided that "[p]roperty titled in a party's sole name shall be classified and owned as that party's individual property." Article XVII, "Dissolution of the Marriage," provided that the parties' individual property would remain individual property upon their divorce and would not be subject to division, whereas their marital property would be divided equally. The marital property agreement further provided it could be revoked or amended only by a written agreement signed by both parties.

¶4 Shortly after Thomas and Judith were married, they constructed a residence on forty acres of Thomas's 200-acre Spring Valley property. The 200-acre parcel was classified as Thomas's individual property under the marital property agreement. Judith used approximately $500,000 from her trust fund, which was classified as her individual property, to pay for the home's construction. Proceeds from the sale of Judith's Spring Valley residence, which

was classified as her individual property, were also used to fund construction of the home.

¶5 On July 1, 1994, Thomas executed a quit-claim deed conveying the forty-acre parcel containing the parties' new residence to Judith. The deed contained the following language:

> The parties further mutually acknowledge and confirm that Grantee will be financing the construction of substantial improvements upon the above described premises and therefore acknowledge and confirm that said premises together with all improvements thereon shall be considered the individual property of Judith M. Genz.
>
> The parties further acknowledge and confirm that to the extent this conveyance may be considered contrary to the terms and conditions of their marital agreement, dated July 15, 1993, this document shall constitute an amendment thereto and the intent and purpose of this document shall prevail as to the above described premises; and for this singular purpose this document is also executed by Judith M. Genz.

¶6 On the same date, Thomas executed a quit-claim deed granting the remaining 160 acres from his 200-acre parcel to himself and Judith as tenants in common, with each holding an undivided one-half interest. The deed stated:

> In consideration of the respective contributions of the parties, they execute this deed for purposes of acknowledging and clarifying their respective interests in the above described parcel and further acknowledge and confirm that their respective one-half interest, in the above described parcel, is intended to be their individual property and further confirm and acknowledge that the management and control of the premises shall be shared equally by the parties hereto.
>
> The parties further acknowledge and confirm that to the extent this conveyance may be considered contrary to the terms and conditions of their marital agreement, dated July 15, 1993, this document shall constitute an amendment thereto and the intent and purpose of this document shall prevail as to the above described premises.

Attorney Robert Richardson drafted both of the July 1, 1994 deeds.

¶7 In 1997, Judith transferred some of the property she owned in Spring Valley to the Village of Spring Valley in exchange for a thirty-eight-acre parcel. That parcel was titled in Judith's name only and was therefore classified as her individual property under the marital property agreement. In 2005, Judith sold thirty of the thirty-eight acres she had received from the village. The remaining eight acres were adjacent to the forty-acre parcel containing the parties' home.

¶8 In 2008, the parties hired attorney Richardson to assist them with their estate planning. On May 14, 2008, they created the Thomas H. Genz and Judith M. Genz Revocable Trust. As relevant to this appeal, Paragraph II.A. of the Trust provided that all marital property transferred to the Trust "shall be known as the 'marital property estate' and shall remain so classified after it is transferred to this Trust." Similarly, all individual property transferred to the Trust "shall be known as the 'individual property estate' of the Grantor who transferred the property and shall remain classified as that Grantor's individual property." Paragraph VII of the Trust, entitled "Revocation and Amendment," provided that, with respect to individual property, the Trust could be revoked during the grantors' joint lifetimes by a written instrument signed by the grantor who contributed the property to the Trust. Upon receiving a notice of revocation as to individual property, the trustee was to "promptly deliver to the contributing Grantor all or the designated portion of any individual property."

¶9 On the same date the Trust was created, Thomas and Judith executed a deed transferring six parcels of real estate to the Trust. The transferred property included the forty-acre parcel containing the parties' home and the contiguous eight-acre parcel, both of which were owned by Judith individually, as well as the

adjacent 160-acre parcel, which Thomas and Judith owned as tenants in common. After setting forth descriptions of the parcels being conveyed to the Trust, the deed stated:

> In consideration of the respective contributions of the parties, they execute this deed for purposes of acknowledging and clarifying their respective interests in the above described parcel and further acknowledge and confirm that their respective one-half interest, in the above described parcel, is intended to be their individual property and further confirm and acknowledge that the management and control of the premises shall be shared equally by the parties hereto.
>
> THE PARTIES further mutually acknowledge and confirm that to the extent this conveyance may be considered contrary to the terms and conditions of their marital property agreement, dated July 15, 1993, this document shall constitute an amendment thereto and the intent and purpose of this document shall prevail as to the above described premises.

¶10 Judith petitioned for divorce in August 2012. She subsequently provided Thomas with notice of revocation of the Trust. Pursuant to the Trust's terms, upon revocation, both Thomas and Judith were entitled to the return of the individual property they had contributed to the Trust. Judith therefore argued she was entitled to the parties' residence and the surrounding forty-eight acres, which, prior to their transfer to the Trust, were titled in her name only and were her individual property. Thomas, however, noted that the 2008 deed conveying those and other properties to the Trust stated the parties "acknowledge and confirm that their respective one-half interest, in the above described parcel, is intended to be their individual property[.]" Based on that language, Thomas argued the 2008 deed retitled the relevant forty-eight acres, such that Thomas and Judith each owned an undivided one-half interest. Thomas therefore asserted that, upon

revocation of the Trust, he was entitled to an undivided one-half interest in that property.

¶11 Following a contested divorce hearing, at which both parties presented evidence, the circuit court agreed with Judith that the disputed forty-eight acres retained their character as her individual property and therefore reverted to her upon revocation of the Trust. In a written decision, the court explained the "crux of this issue" was "the intent of the parties when they signed the deed on May 14, 2008, conveying real estate to the Revocable Trust," and, specifically, the intent of the language stating the parties "acknowledge[d] and confirm[ed] that their respective one-half interest, in the above described parcel, [was] intended to be their individual property[.]" The court noted identical language was used in the 1994 deed by which Thomas transferred his 160-acre parcel to himself and Judith as tenants in common. The court also observed that the quoted language from the 2008 deed referred to "the above described parcel," in the singular, but the deed actually conveyed six separate parcels to the Trust. The court asked, "So, … which of these *six parcels* is one to consider the 'above described *parcel*?'" The court further questioned why the 2008 deed stated "management and control of the premises shall be shared equally by the parties hereto," given that the Trust would in fact have the management and control of the property.

¶12 The circuit court also noted that both the 1994 deeds and the 2008 deed were prepared by attorney Richardson. The court observed the 1994 deeds "were very explicit about what real estate was being conveyed, what interests were being conveyed, and what interests were being created." The court reasoned, "One would think that if, in fact, in 2008 the parties intended to convey the individual title of Ms. Genz in the 48 acres to themselves as tenants in common,

with each owning an undivided one-half … interest, a deed would have been prepared to do exactly that or [the 2008 deed] would have said exactly that[.]"

¶13 The circuit court therefore concluded the 2008 deed "did convey the described parcels to the Revocable Trust, but did not change the title to the 48 acres, which remained solely in the name of Ms. Genz." The court then observed that, under the parties' marital property agreement, individual property "is to remain the individual property of the owner." Accordingly, the court awarded the parties' home and the surrounding forty-eight acres to Judith, "without being subject to division."

DISCUSSION

¶14 On appeal, Thomas argues the circuit court misinterpreted the 2008 deed conveying the relevant property to the Trust. "Our first step in construction of a deed is to examine what is written within the four corners of the deed, for this is the primary source of the intent of the parties." ***Rikkers v. Ryan***, 76 Wis. 2d 185, 188, 251 N.W.2d 25 (1977). If a deed's language is unambiguous—that is, susceptible to only one interpretation—interpretation of the deed presents a question of law that we review independently. *See* ***id.*** The threshold question of whether a deed is ambiguous also presents a question of law for our independent review. ***Konneker v. Romano***, 2010 WI 65, ¶23, 326 Wis. 2d 268, 785 N.W.2d 432. If a deed is ambiguous, extrinsic evidence may be considered to determine the parties' intent. ***Id.***, ¶26. The interpretation of an ambiguous deed presents a question of fact. ***Id.***, ¶23.

¶15 The parties' arguments regarding the 2008 deed focus on the two paragraphs quoted above at paragraph 9. Thomas argues those paragraphs show that the 2008 deed "clearly and unambiguously amended the marital property

agreement" by granting each party an undivided one-half interest in the property that was conveyed to the Trust. However, we conclude the 2008 deed is ambiguous. While the deed does state that the parties "acknowledge and confirm that their respective one-half interest, in the above described parcel, is intended to be their individual property," it uses the term "above described parcel" in the singular. The 2008 deed actually conveyed six separate parcels to the Trust, and nothing in the deed clarifies which of those six parcels is "the above described parcel." Notably, in addition to the forty-eight acres surrounding the parties' residence, the deed also conveyed to the Trust the contiguous 160-acre parcel, which Thomas and Judith owned as tenants in common. Thus, an alternative, reasonable interpretation of the language Thomas cites is that the term "the above described parcel" in the 2008 deed referred to the 160-acre parcel, rather than to the forty-eight acres surrounding the parties' residence.

¶16 After considering extrinsic evidence, the circuit court found that the parties did not intend the 2008 deed to "change the title to the 48 acres, which remained solely in the name of Ms. Genz."[1] That finding is not clearly erroneous. *See* WIS. STAT. § 805.17(2).[2] As the circuit court noted, attorney Richardson prepared both the 2008 deed and the 1994 deed that conveyed Thomas' 160-acre parcel to Thomas and Judith as tenants in common. The court correctly observed

[1] While the circuit court did not expressly state it was making a factual finding regarding the parties' intent, it is evident based on the entirety of the court's decision that the court made such a finding. *See* ***State v. Pallone***, 2000 WI 77, ¶44 n.13, 236 Wis. 2d 162, 613 N.W.2d 568, *overruled on other grounds by* ***State v. Dearborn***, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97 ("Even if the circuit court does not make an explicit factual finding, we assume that the court made the finding in a manner that supports its final decision.").

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

that the 1994 deed was "very explicit about what real estate was being conveyed, what interests were being conveyed, and what interests were being created." Specifically, the 1994 deed expressly indicated it was conveying "to Thomas H. Genz and Judith M. Genz, husband and wife, as tenants in common, each an undivided one-half (½) interest" in the subject property. Conversely, the only grantee identified in the 2008 deed was the Trust. Given that the 2008 and 1994 deeds were drafted by the same attorney, we agree with the circuit court that "[o]ne would think that if, in fact, in 2008 the parties intended to convey the individual title of Ms. Genz in the 48 acres to themselves as tenants in common … a deed would have been prepared to do exactly that …."

¶17 Attorney Richardson's testimony at the contested divorce hearing further supports the circuit court's finding regarding the parties' intent. On direct examination, attorney Richardson testified that, under the terms of the Trust, the parties' marital property "was to be continued as marital[,] and if they had individual it was continued as individual property." The following exchange then occurred on cross-examination:

> Q: … did [Thomas and Judith] tell you that they wanted to amend the terms of their prenuptial agreement with respect to the property described in [the 2008 deed]?
>
> A. Yes, but that doesn't change the classification of the property. The deeds … in '94 determined the classification as opposed to individual versus tenants in common.
>
> Q. Right, but, [the 2008 deed] says that we are amending our prenuptial agreement with respect to this property, right? That's what the language says?
>
> A. It says this document shall prevail, yes.
>
> Q. Yes. So in other words, regardless of title to this property, these parties said to you, Mr. Richardson, we want to make clear, this property, based upon our

> contributions respectably, is equal property regardless of the title. That's what this document says, correct?
>
> A. No, I would disagree with that.
>
> Q. Well, it indicates that, again, we are amending our prenuptial agreement and were saying that we want it made clear that we each have an undivided one-half individual interest in this property. That's what you drafted into this document, correct?
>
> A. No. I don't think that says that.

¶18 Attorney Richardson further testified he understood when he drafted the 2008 deed that the parties owned the 160-acre property as tenants in common, with each owning an undivided half as individual property, and Judith owned the parcel containing the parties' residence as individual property. He testified the 2008 deed "was intended to clarify and affirm that, that they owned a properties individual property [sic]. … All of the interest that each owned was their individual property, they had some as tenants in common but as a common owner 50/50, each ownership interest was individual property." Attorney Richardson's testimony strongly suggests the parties did not intend the 2008 deed to change the classification of the forty-eight acres surrounding the parties' residence from Judith's individual property to property held by Judith and Thomas as tenants in common.

¶19 Thomas argues the language from the 2008 deed stating the deed constituted an amendment to the parties' marital property agreement demonstrates the parties' unambiguous intent to amend those terms in the marital property agreement relating to the classification of property. He contends the circuit court's interpretation of the 2008 deed rendered the deed's language regarding amendment of the marital property agreement superfluous.

¶20 We disagree. As the circuit court noted, the 2008 deed may have included the language stating it constituted an amendment to the marital property agreement because "the terms of the Revocable Trust may [have been] different than the [marital property] agreement." More specifically, as Judith observes on appeal, the relevant language may have been added to the 2008 deed "to clarify that, to the extent that the terms of the Trust regarding management and control of the property in the Trust may be different from the terms of the Marital Property Agreement, the Trust document would control." Simply put, there are other reasons, unrelated to the classification of property, why the parties may have decided to include the language regarding amendment of the marital property agreement in the 2008 deed. Thus, contrary to Thomas' argument, the circuit court's conclusion that the parties did not intend the 2008 deed to change the classification of the forty-eight acres does not render the deed's language regarding amendment of the marital property agreement superfluous.

¶21 For the reasons discussed above, the circuit court correctly found the parties did not intend the 2008 deed to change the classification of the parties' residence and the surrounding forty-eight acres. It is undisputed that, before that property was transferred to the Trust, it was titled in Judith's name alone. Under the parties' marital property agreement, the property was therefore classified as Judith's individual property. Pursuant to the Trust's terms, the property remained classified as Judith's individual property after it was transferred into the Trust. The Trust further provided that, upon revocation of the Trust, individual property was to be returned to the party who contributed it. The marital property agreement, in turn, provided that on dissolution of the parties' marriage, all individual property would remain the property of its owner and would not be

subject to division. Based on these provisions, the circuit court properly awarded the parties' residence and the surrounding forty-eight acres to Judith.[3]

By the Court.—Judgment affirmed.

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

[3] Thomas notes the marital property agreement contained an additional provision stating that, upon dissolution of the parties' marriage:

> No agreement is made as to the ultimate disposition of the parties' residence .... Such disposition shall be as the parties subsequently agree, but if they fail to agree then as determined to be equitable by the Court having jurisdiction of the dissolution of their marriage.

The circuit court did not analyze this provision when awarding the parties' residence to Judith. Instead, the court reasoned that, under the provision of the marital property agreement governing the disposition of individual property, "individual property is to remain the individual property of the owner." Thomas does not develop any argument on appeal that the circuit court should have instead applied the language quoted above. We will not abandon our neutrality to develop that argument for him. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82.