

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 21, 1998

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. 96-3138

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE ESTATE OF LUCILLE C. BOEMER,
DECEASED:**

PAUL BOEMER,

CLAIMANT-APPELLANT,

V.

MARY LU DAVIS AND CAROLE RIEMER,

**CO-PERSONAL REPRESENTATIVES-
RESPONDENTS.**

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID V. JENNINGS, JR., Reserve Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Paul Boemer appeals from the probate court judgment denying his \$900,000 claim against his mother's estate. The court

concluded that his claim was barred by the nonclaim statute. Boemer argues that the probate court erred in denying his claim because: (1) his claim sounds in tort and thus, under § 859.02(2)(a), STATS., was not subject to the September 30, 1995 deadline, which was set pursuant to § 859.01, STATS.; (2) he never received notice of the September 30, 1995 deadline for filing claims; (3) the probate court had common law and statutory authority to re-open its June 1995 order setting the September 30, 1995 deadline for filing claims; and (4) the estate should be "estopped by the acts and omissions of the co-administrators . . . with respect to asserting the September 30, 1995 deadline for [him] to file his claim." We affirm.

I. BACKGROUND

Paul Boemer's mother, Lucille Boemer, a/k/a Mary Lucille Boemer, died on May 23, 1995. A petition for probate of her will was filed on June 30, 1995. On that date, the probate court entered an order setting a hearing on the petition for July 31, 1995. The order also provided that creditor claims against the estate must be filed on or before September 30, 1995, or be barred.

On July 6, 1995, an employee of the law firm handling the estate mailed a copy of the "Order Setting Time to Prove Will and Heirship" and of the "Notice to Creditors" to Boemer. The "Notice to Creditors" was also published on July 10, 17, and 24, 1995.

On July 25, 1995, Paul Boemer and two of his three siblings, Richard and Carole, filed an objection to the petition for probate of the will. At that time, Attorney Ronald Jaskolski filed a notice on behalf of Paul, Richard and Carole, objecting to their sister Mary Lu's appointment as personal representative of the estate. The notice also requested that all documents subsequent to the

"Order Setting Time to Prove Will and Heirship" and the "Notice to Creditors" be sent to Jaskolski.

On November 16, 1995, the will was admitted to probate. The court then appointed attorneys and co-personal representatives for the estate. On December 29, 1995, Boemer filed a claim against the estate, alleging that in 1986 the decedent lent him \$20,000 and, in return, in an unwritten agreement, he pledged 2,304 shares of stock as collateral for the loan. In his claim, Boemer asked for the return of the shares of stock or payment of \$900,000, their estimated value. In response, Carole and Mary Lu, the appointed co-personal representatives, objected to the claim on the basis that it was barred by the September 30, 1995 claims deadline. On June 25, 1996, Boemer filed a motion to extend the time for filing claims. On September 30, 1996, the probate court entered a "Judgment on Claims," and denied Boemer's \$900,000 claim.

II. ANALYSIS

Many of Boemer's arguments require interpretation and application of the Probate Code to undisputed facts, thus presenting questions of law, which we decide independently of the circuit court's determination. *See Truttschel v. Martin*, 208 Wis.2d 361, 364-65, 560 N.W.2d 315, 317 (Ct. App. 1997). Findings of fact will not be set aside unless clearly erroneous, and due regard shall be given to the probate court's assessment of witnesses' credibility. *See* § 805.17(2), STATS.

Boemer first argues that his "claim against his mother's estate sounds in . . . common law 'tort' principles and accordingly is, to that extent, under § 859.02(2)(a), WIS. STATS., not even subject to the June, 1995 order's September 30, 1995 deadline for filing claims against the estate." Boemer is incorrect.

Boemer's claim is based on an alleged contract he entered into with his mother. Under § 859.01, STATS., Boemer had to file his creditor claim against his mother's estate by the court-assigned deadline of September 30, 1995, or it would be barred. *See* § 859.01.¹ Attempting to recast his breach of contract claim as a tort claim for conversion, Boemer contends that his claim survives, under § 859.02(2)(a), STATS.² His attempt fails, however, because a late claim, even if based in tort, is not timely, and therefore, “the failure relieves the court of all responsibility to protect the rights of the claimant and the claimant shall not be granted any of the protection under s. 859.21.” Sections 859.45(1) & (2), STATS.³

¹ Section 859.01, STATS., provides:

Time for filing claims. When an application for administration is filed, the court, or the probate registrar under informal administration proceedings, shall by order set a date as the deadline for filing a claim against the decedent's estate. The date shall not be less than 3 nor more than 4 months from the date of the order.

² Section 859.02(2)(a), STATS., provides, in pertinent part:

859.02 Limitation on claims. . . .

(2) A claim against a decedent's estate that is not filed on or before the date set under s. 859.01 is not barred if:

(a) It is a claim based on tort

³ Section 859.45 provides, in relevant part:

Tort claims. (1) FILED WITHIN TIME LIMITED. If a claim based on a cause of action in tort or for contribution resulting from a cause of action in tort is filed on or before the deadline for filing a claim under s. 859.01 or 859.21 or a continuance is secured under s. 859.03, the claimant will receive the same protection in regard to payment as a claimant who has filed a claim which was required to be filed.

(2) NOT FILED WITHIN TIME LIMITED. A cause of action against a decedent in tort or for contribution resulting from a cause of action in tort is not defeated by failure to file the claim or commence or continue an action against the personal

(continued)

Section 859.45(2), STATS., permits tort claims against an estate that are made absolute through court-approved settlement or adjudication provided that a certified copy of the settlement or judgment is filed in the court in which the estate is being administered prior to the approval of the final account. This was not done here. Accordingly, under the statute, "the estate may be distributed as though the claim did not exist." Section 859.45(2).

Pursuant to § 859.01, STATS., the probate court, on application for administration, must, by order, set the deadline for filing claims not less than three months and not more than four months from the date of the order. Here the court set September 30, 1995 as the final date for filing claims. Therefore, even if Boemer had a tort claim against his mother, he was not entitled to pursue it after he failed to file his claim by the September 30, 1995 deadline.

Boemer next argues that his December 1995 claim was not barred by the September 30, 1995 deadline because "it cannot be adjudicated as a matter of law that he was given the requisite notice [of the deadline]." Boemer, however, has failed to establish the circumstances required by § 859.02(2)(b)1-3, STATS.,

representative on or before the deadline for filing a claim under s. 859.01 against an estate, *but the failure relieves the court of all responsibility to protect the rights of the claimant and the claimant shall not be granted any of the protections under s. 859.21. If the claim is made absolute through court approved settlement or adjudication and a certified copy of the settlement or judgment is filed in the court in which the estate is being administered prior to the approval of the final account, it shall be paid prior to the distribution of the estate, otherwise the estate may be distributed as though the claim did not exist.* After the final account has been approved, a claimant whose claim has been made absolute through court approved settlement or through adjudication may proceed against the distributees, but no distributee may be liable for an amount greater than that allowed under s. 859.23

(Emphasis added.)

that would have excused his non-compliance. Further, his failure to comply with § 859.48(2)(b), STATS., renders his claim unenforceable.

Section 859.02(2)(b), STATS., excuses non-compliance with the filing deadline if either the personal representative did not give notice at least thirty days prior to the cutoff date, or the claimant did not have actual notice that the estate proceeding was pending and of the court in which that proceeding was pending at least thirty days prior to the cutoff date. *See* § 859.02(2)(b)1-3, STATS.⁴ Under § 859.48(4), STATS., the claimant bears "the burden of establishing by the greater weight of the credible evidence that all of the circumstances under

⁴ Section 859.02(2)(b), STATS., provides:

(2) A claim against a decedent's estate that is not filed on or before the date set under s. 859.01 is not barred if:

....

(b) All of the following circumstances exist:

1. On or before the date set under s. 859.01, the personal representative knew, or in the exercise of reasonable diligence should have known, of the existence of the potential claim and of the identity and mailing address of the potential claimant.

2. At least 30 days prior to the date set under s. 859.01, the personal representative had not given notice to the potential claimant of the final day for filing his or her claim and the court in which the estate proceeding was pending.

3. At least 30 days prior to the date set under s. 859.01, the claimant did not have actual knowledge that the estate proceeding was pending and of the court in which that proceeding was pending.

Section 859.02(2)(b), STATS., was enacted in 1989 in response to the United States Supreme Court decision in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988), in which the Court held that a known creditor's due process rights were violated by a statutory bar on claims if the only notice to creditors was publication. *See id.* at 487-89; *Sears, Roebuck & Co. v. Plath*, 161 Wis.2d 587, 592, 598, 468 N.W.2d 689, 691, 693 (1991); *see also* 89 Wis. Act 96, § 8.

s. 859.02 (2) (b) existed." *See* § 859.48(4), STATS. The record establishes that Boemer failed to meet his burden.

The facts are undisputed. According to the record of the probate court hearing, Boemer knew that his mother had died, and that a "Petition for Probate of the Estate" had been filed. He also knew the court in which the estate was proceeding. In fact, Boemer appeared before that court on July 25, 1995, when he and his siblings filed an objection to the petition for probate of their mother's will. Boemer's sworn testimony, his appearance, and his signed objection serve as evidence to defeat his reliance on § 859.02(2)(b)3, STATS.

Evidence also established that on July 6, 1995, the lawyer for Mary Lu Davis, the then-personal representative, mailed notice of the deadline to Boemer. Boemer acknowledges the receipt of correspondence from the law firm. Indeed, in his affidavit, he concedes: "[h]e did . . . sometime in the summer of 1995 receive at his home an envelope from [the] law firm, which had been mailed to his prior home's address. However, he never opened that envelope at that time and indeed, still had not opened it." Boemer's concession refutes his contention that he never received notice of the deadline. Accordingly, the probate court properly rejected Boemer's contention of no notice under § 859.02(2)(b), STATS.

In addition, the probate court properly denied Boemer's claim because he failed to comply with the provisions of § 859.48(2)(b), STATS.⁵

⁵ Section 859.48, provides, in relevant part:

Claims of creditors without notice. (1) A claim not barred by s. 859.02 (1) because of the operation of 859.02 (2) (b) may be enforced only as provided in this section.

(continued)

Boemer's filing of his objection in the probate court on July 25, 1995 is evidence of his actual knowledge of the estate proceedings. Nevertheless, he waited until December 29, 1995 to file his claim against the estate. Pursuant to § 859.48(2)(b), STATS., Boemer should have filed his claim within thirty days of the filing of his objection. His failure to either establish the circumstances in § 859.02(2)(b)1-3, STATS., or comply with the statutory mandates of § 859.48(2)(b), renders his claim unenforceable.

Boemer also claims that the probate court had authority to reopen its order and extend the deadline to encompass his December 31, 1995 claim. Relying on cases predating the current statute, Boemer contends that the probate court had authority to extend the time for filing claims. We disagree. The authorities Boemer cites were decided under the old statute, § 313.03, STATS., and its predecessors. The former statute authorized the court to extend the deadline for filing claims in certain circumstances. *See* § 313.03. Under the current probate code, however, the court has no such authority. *See* § 859.01, STATS.; *see also* 2 James B. MacDonald, WISCONSIN PROBATE LAW § 9:26 (8th ed. 1996).

Boemer also argues that the court's authority under § 879.31, STATS., allows the probate court to supersede the deadline requirement of

(2) The claimant shall file the claim in the court in which the estate is administered within one year after the decedent's death and within 30 days after the earlier of the following:

(a) The date that the personal representative gives notice to the potential claimant of the deadline for filing a claim against the estate under s. 859.01 or this section and of the court in which the estate is administered.

(b) The date that the claimant first acquires actual knowledge that the estate is being or was administered and of the court in which the estate is administered.

§ 859.01, STATS. He contends that § 879.31 authorizes the extension of the nonclaim statute's deadline on claims. We disagree.

Section 879.31, STATS.,⁶ was created not to supersede the time limits of the statute, but to provide greater uniformity and consistency in the appeals process. *See* 1983 Wis. Act 219, § 41. As the Legislative Council Note explains:

This section formerly allowed the trial court discretion to extend the appeal deadline and is repealed for greater uniformity and consistency. The new statute allows aggrieved persons who cannot appeal to move the trial court for relief from the judgment and empowers the probate court to grant such relief as in other civil actions and proceedings.

1983 Wis. Act 219, § 41.

The legislature has specifically set the limits for setting time for filing claims. *See* § 859.01, STATS. Exceptions to these limits are listed in § 859.02(2), STATS., and Boemer's remedies are delineated in § 859.48, STATS. Under § 879.31, STATS., the probate court could have granted relief to Boemer if he had established that he was so entitled under § 806.07, STATS.⁷ Here, the

⁶ Section 879.31, STATS., provides:

879.31 Relief from judgment or order. On motion, notice to adverse parties and hearing, the court may relieve a party or legal representative from a judgment or orders of the court or the party's stipulation as provided in s. 806.07.

⁷ Section 806.07, STATS., provides, in pertinent part:

806.07 Relief from judgment or order. (1) On motion and upon such terms as are just, the court may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:

- (a) Mistake, inadvertence, surprise, or excusable neglect;
- (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3);

(continued)

record reveals that Boemer never made such a showing. Consequently, the probate court did not have to grant him relief. *See O'Neill v. Buchanan*, 186 Wis.2d 229, 232-36, 519 N.W.2d 750, 751-52 (Ct. App. 1994) (probate court need not reopen order or judgment if claimant failed to "make a showing under § 806.07, STATS., sufficient to reopen the case").

Finally, Boemer claims that "the estate can be estopped by the acts and omissions of the co-administrators sisters . . . with respect to asserting the September 30, 1995 deadline for [him] to file his claim." Claiming that he was induced into delaying the filing of his claim by his sister and an attorney for the estate, he contends that the common-law theories of waiver or equitable estoppel should apply to the estate. We are not persuaded.

Under Wisconsin law, no one can waive the probate court's deadline. *See Marshall & Ilsley Bank v. United Bank of Madison*, 68 Wis.2d 101, 107, 227 N.W.2d 680, 684 (1975). In *Marshall & Ilsley Bank*, the personal representative for the estate asked a creditor to refrain from filing a claim. *See id.* at 104, 227 N.W.2d at 682. The creditor was essentially given assurances by the personal representative and the attorney for the estate that the debt would be paid and that any time limit to file claims would be waived. *See id.* at 104-05, 227 N.W.2d at 682-83. The estate then gave a written guaranty that the claim would be repaid. *See id.* On review, the supreme court concluded that the guaranty was not valid

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- (c) Fraud, misrepresentation, or other misconduct of an adverse party;
 - (d) The judgment is void;
 - (e) The judgment has been satisfied, released or discharged;
 - (f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;
 - (g) It is no longer equitable that the judgment should have prospective application; or
 - (h) Any other reasons justifying relief from the operation of the judgment.

and that the claim was barred. *See id.* at 107, 227 N.W.2d at 684. The court explained that the strict deadline established by a nonclaim statute is to promote the prompt administration of estates and to enable beneficiaries to receive their property free from adverse claims. "[I]n view of this purpose no one has the power to waive the provisions of this [nonclaim statute] because if [he or she] could it would be within the power of anyone to waive provisions of law intended for the benefit of others." *Id.* at 108, 227 N.W.2d at 684. Accordingly, the probate court properly rejected Boemer's waiver argument. *See MacDonald, supra*, § 9:26.

Boemer's equitable estoppel argument also is without merit. "[T]he right to assert equitable estoppel does not arise unless the party asserting it has acted with due diligence. A lack of diligence on the part of the party claiming estoppel is fatal." *Rascar, Inc. v. Bank of Oregon*, 87 Wis.2d 446, 453-54, 275 N.W.2d 108, 112 (Ct. App. 1978) (citations omitted). In addition, we may refuse to give effect to an equitable estoppel claim "where the parties were equally well informed as to the essential facts or where the means of knowledge were equally open to them." *Monahan v. Wisconsin Dep't of Taxation*, 22 Wis.2d 164, 169, 125 N.W.2d 331, 333 (1963) (internal quotation marks and quoted source omitted).

Here, Boemer not only has failed to exercise due diligence, but he also has slept on his rights: (1) he failed to open and read correspondence from the law firm he knew was probating the estate; (2) he never inquired whether his claim was due even though he was well aware that the estate was being probated; and (3) despite his objection to the appointment of his sisters as the co-personal representatives of the estate, he relied on one of their alleged statements and sat on

his claim. Consequently, we conclude that the probate court correctly rejected Boemer's request for an extension on the basis of estoppel.

By the Court.—Judgment affirmed.

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

