**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

November 25, 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. 97-2910**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II/IV**

---

**IN THE MATTER OF THE TRUST CREATED UNDER THE LAST WILL AND TESTAMENT OF MARION A. TALLMADGE, DECEASED:**

**HARROLD J. MCCOMAS AND WAYNE R. LUEDERS, CO-TRUSTEES,**

**APPELLANTS-CROSS-RESPONDENTS,**

**V.**

**LOREN TALLMADGE, BENEFICIARY,**

**RESPONDENT-CROSS-APPELLANT,**

**LAURA TALLMADGE,**

**RESPONDENT-(IN T.CT.).**

---

APPEAL and CROSS-APPEAL from an order of the circuit court for Waukesha County: PATRICK L. SNYDER, Judge. *Modified and, as modified, affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

VERGERONT, J. Harrold McComas and Wayne Lueders, co-trustees of the W. David Tallmadge Trust, appeal the trial court's construction of the Last Will and Testament and Codicil of Marion Tallmadge, which created the trust. The disputed provision concerns the trustees' obligations with respect to Loren Tallmadge, the minor daughter of David Tallmadge. Loren cross-appeals, contending that the trial court erroneously determined the trustees had fulfilled their duties to her under the trust as construed by the trial court and also contending that the court erred in denying her relief under § 701.06(4), STATS.,[1] which governs claims for the support of children of trust beneficiaries. We conclude that the trial court erroneously construed the will to include David's dependents as primary beneficiaries, and that Loren, like David's other issue, belongs instead to the secondary class of beneficiaries. With the trustees' obligations thus construed, Loren does not present an argument that they have not fulfilled their duties to her. We also conclude that the trial court did not erroneously deny Loren relief under § 701.06(4). We therefore affirm the trial

[1] Section 701.06(4), STATS., provides:

> (4) CLAIMS FOR CHILD SUPPORT. Notwithstanding any provision in the creating instrument or subs. (1) and (2), upon application of a person having a valid order directing a beneficiary to make payment for support of the beneficiary's child, the court may:
>
> (a) If the beneficiary is entitled to receive income or principal under the trust, order the trustee to satisfy part or all of the claim out of part or all of payments of income or principal as they are due, presently or in the future;
>
> (b) In the case of a beneficiary under a discretionary trust, order the trustee to satisfy part or all of the claim out of part or all of future payments of income or principal which are to be made pursuant to the exercise of the trustee's discretion in favor of such beneficiary.

court's order dismissing her petition, although we reach a different conclusion on the correct construction of the will and codicil than did the trial court.

## BACKGROUND

Marion Tallmadge's Last Will and Testament and Codicil (collectively, the will) created a trust out of the residue of her estate, designated as the W. David Tallmadge Trust. David was Marion's only surviving child. Paragraph A of the fifth article of the codicil is the subject of this appeal. It provides:

> (A) So long as my son shall live, the trustees shall pay to or apply for the benefit of my son such part of the annual net income from his trust fund as the disinterested and non-subordinate trustee or trustees shall, after a thorough consideration of the expenditures made by him within the current year for his support, maintenance and other necessities and the support, maintenance, education, travel and other necessities of those dependent on him for support, deem wise and expedient and in his best interests. Any part or all of the balance of the annual net income of the trust fund may, in the discretion of the disinterested and non-subordinate trustee or trustees, be paid over and distributed to or applied for the benefit of the issue of my son, or one or more of them, each for his undivided account, in such proportions as the disinterested and non-subordinate trustee or trustees may deem advisable. The balance of the net income of the trust fund not so paid over to or applied for the benefit of the issue of my son, as aforesaid, may be added to any subsequent income payments from such fund and, until so distributed, may be regarded for all purposes as part of the principal of such fund, subject, in the discretion of the disinterested and non-subordinate trustee or trustees, to again being regarded as income and being distributed at any later date to any person or persons to whom current income of the trust fund may be distributed.

Paragraph B of this article permits the trustees to distribute payments from the principal of the trust to David during his lifetime, and is not at issue.

The will was probated in Waukesha County and has been administered by the probate division of the circuit court of that county. Loren is the minor daughter of David and Laura Tallmadge, David's estranged third wife. Loren lives with her mother in California. At the times relevant to this dispute, David has been incarcerated in California. Laura initiated a petition for construction of the trust and to compel support in the circuit court of Waukesha County on her own behalf and in her capacity as legal guardian for Loren. The petition asked for a finding that the trustees were obligated under the terms of the trust to pay for the benefit of Laura and Loren amounts that the California courts had ordered as child and spousal support; that the trustees were obligated by § 701.06(4)(a), STATS., to pay the child support payments for Loren's benefit; and that the will entitled not only David, but also Laura and Loren, as persons dependent upon David for support, to priority over that of David's adult children.

After a trial to the court, the court entered written findings of fact and conclusions of law, and an order denying the petition. The court construed Paragraph A to create two categories of income beneficiaries, the first consisting of David and those dependent upon him for support and the second consisting of the issue of David. The court found that Loren was a dependent of David, and Laura was a dependent to the extent that there is a California court order for her spousal maintenance. The court also found that the trust was discretionary and the trustees had declined to make child or spousal payments for appropriate reasons, those being: the Charles E. Albright Trust was a non-discretionary trust available for those purposes; Loren had received some distributions from the Tallmadge

Trust;[2] there was a dispute between Laura and David; and Laura was not protected by § 701.06(4), STATS. The court noted that, although it was dismissing the petition, it would consider Loren's renewed request for child support payments from the Tallmadge Trust, if those sums were not available from the Albright Trust or another source.

The trustees appealed the trial court's construction of the will, and Loren cross-appealed the court's decision that the trustees acted appropriately in refusing to make the child support payments and in its decision to dismiss the petition without ordering the trustees to make the child support payments under § 701.06(4), STATS. Laura has been voluntarily dismissed as a party to the appeal and cross-appeal.

## DISCUSSION

We first consider the trustees' contention that the trial court erroneously construed Paragraph A because the first category of beneficiaries under that paragraph consists only of David, not his dependents, and Loren is included only in the second class of beneficiaries along with his other issue. The construction of a testamentary document presents a question of law, which we review de novo. ***Furmanski v. Furmanski***, 196 Wis.2d 210, 214, 538 N.W.2d 566, 567 (Ct. App. 1995). The object of will or trust construction is to determine the intent of the testator or settlor. ***Id.*** at 215, 538 N.W.2d at 568. We determine the intent from the language of the document itself, considered in light of the

[2] In its ruling from the bench, the court found that the trustees were making distributions to Loren of $5,000 per year plus a year-end distribution. The trustees submitted evidence at trial showing that between 1991 through the first quarter of 1997, the trustees distributed between $19,000 and $37,000 to Laura, guardian of Loren, each year.

circumstances surrounding the testator or settlor at the time the document was executed. ***Id.*** The language of the document is the best evidence of the testator's or settlor's intent, and we therefore look first to the language of the document. ***Id.*** If there is no ambiguity in the language of the document, there is no need to look further to determine the testator's or settlor's actual intent. ***Id.***

We conclude that the language in the first sentence of Paragraph A unambiguously provides that the trustees have an obligation, as they "deem wise and expedient and in his best interests" to pay net trust income only to David or apply it for only his benefit. It is true that in deciding what is "wise and expedient and in his best interests," the trustees have an obligation to consider the "expenditures made by him within the current year for his support, maintenance and other necessities and the support, maintenance, education, travel and other necessities of those dependent upon him for support." However, that does not impose on the trustees a duty to treat David's dependents the same as David: it does not make his dependents primary beneficiaries, as David is. Loren is included under the second sentence of Paragraph A, under which the trustees have the discretion to make distributions from the balance of the net trust income to, or for the benefit of, David's issue.

In its comments from the bench, the trial court focused on the language that provides for "apply[ing] for [David's] benefit" the net trust income, and the language that the trustees must consider his expenses for the current year, for not only his support, but also for the "support, maintenance, education, travel and other necessities of those dependent on him for support." It is this language that, in the trial court's view, obligates the trustees to treat David's dependents as primary beneficiaries, giving them a priority over his other issue. Loren emphasizes this argument on appeal.

However, we cannot agree with this construction. The payment to David or application of funds for his benefit is to be made after a "thorough consideration of the expenditures made by him within the current year for his support … and the support … of those dependent on him for support." The explicit condition is that David is expending for his dependents, and the trustees take those expenditures into account in deciding how much to pay to David or apply to his benefit. While the trustees may make payments on David's behalf rather than paying him directly, that authority is also tied to a consideration of David's expenditures for his support and for his dependents' support within the current year.

The trial court's comments also indicate it perceived good reasons for treating David's minor, dependent child differently from his adult children, and Loren repeats this point on appeal. But our task is to construe the language of the will. That language does treat David's dependent issue differently than it treats his non-dependent issue to the extent that David's expenditures for his dependent issue's support are to be considered by the trustees in carrying out their duties to David under the first sentence of Paragraph A. However, all David's issue are treated the same by the plain terms of the will in that the trustees have the discretion to make distributions to them from the balance of the annual net income, after fulfilling their duty to David. Of course, the fact that an issue is a minor and is not being supported by David may properly enter into the trustees exercise of their discretion under the second sentence of Paragraph A. But we cannot conclude that the will imposes on the trustees a duty to give priority to David's dependent issue over his non-dependent issue.

On her cross-appeal, Loren argues that the trial court erred in ruling that the trustees had fulfilled their duty to make distributions to Loren. As we

understand this argument, it is premised on the trial court's ruling that Loren, as a dependent, was a primary beneficiary along with David under the first sentence of Paragraph A. Loren does not argue that the trustees have not fulfilled their duty if Loren is not a primary beneficiary. Since we have concluded that she is not, we do not consider this argument further.

Loren's second argument on cross-appeal is that the trial court erroneously denied her claim for relief under § 701.06(4), STATS. In its oral decision, the trial court reasoned that the statute authorizes it to order the relief Loren seeks but does not require it to do so. The court stated that it was reluctant to invade this trust if there were other funds available for child support, but it was fully prepared to do so if there were not. The court was aware that there were efforts to obtain payments for the court-ordered child support from the Albright Trust and was of the view "that would come through." However, in the event it did not, the court made it clear that it would consider a reapplication of Loren's request under § 701.06(4) for an order for payment from the Tallmadge Trust. Loren contends that § 701.06(4) does not permit a court to require that a claimant exhaust other means of satisfying the child support order before granting relief.

Before the appellate briefing was completed, the trustees filed a motion to dismiss Loren's cross-appeal on the ground that the statutory issue was moot because the Milwaukee County Circuit Court entered an order on September 3, 1997, providing that the Albright Trust shall pay child support arrears, as well as David's court-ordered monthly child support commencing August 1997, if not paid by him voluntarily or recovered from other sources. In

an order dated April 22, 1998, we declined to dismiss the cross-appeal, and instructed the parties to address the mootness issue in their briefs.[3]

The trustees assert in their responsive brief on the cross-appeal that they understand that as a result of the order entered by the Milwaukee County Circuit Court all past due child support owed to Loren has been paid, her monthly court-ordered support continues to be paid, and neither the Albright trustees nor David is seeking to overturn that order. Loren has argued, however, that there is no guarantee that these payments will continue, and if we do not decide the correctness of the trial court's application of § 701.06(4), STATS., she may be precluded from making this same argument should she need to apply to the court for payment from the Tallmadge Trust under § 701.06(4) at some future time. Because it appears that there has been and continues to be litigation concerning David's child support obligations and whether he is meeting them, and because we cannot conclude on this record that the payments from the Albright Trust will continue until Loren is no longer a minor, we address the § 701.06(4) issue.

The proper construction of a statute is a question of law, which we review de novo. *See* ***Lincoln Sav. Bank, S.A. v. DOR***, 215 Wis.2d 430, 441, 573 N.W.2d 522, 526 (1998). The aim of all statutory construction is to discern the intent of the legislature. ***Id.*** We begin with a reading of the language of the statute, and if that is not ambiguous, our task is to apply that language to the task at hand. ***Id.***

[3] The trustees also argued in support of their motion to dismiss that the first issue Loren raises on her cross-appeal is moot because of the Milwaukee County Circuit Court order. In our order denying the motion to dismiss, we stated our disagreement with this contention, and for that reason we have addressed the first issue on cross-appeal without discussing mootness.

We agree with the trial court that § 701.06(4)(b), STATS., does not require a court to order trustees to satisfy a child support order, but rather provides that the court "may" so order under the conditions established in the statute. Section 701.06(4). The ordinary meaning of "may" is permissive. *See* ***City of Wauwatosa v. County of Milwaukee***, 22 Wis.2d 184, 191, 125 N.W.2d 386, 389 (1963).[4] *See also* ***Grohmann v. Grohmann***, 180 Wis.2d 690, 695, 511 N.W.2d 312, 314 (Ct. App. 1993), *aff'd on other grounds*, 189 Wis.2d 532, 525 N.W.2d 621 (1995) (§ 701.06(4)(b) "grants courts the authority to order trustees to satisfy a child support obligation directly from discretionary payments that the trustees have decided to authorize"). Therefore, the question before us is whether the trial court properly exercised the discretion granted it by the statute. We affirm discretionary decisions if the trial court considered the relevant facts, applied the correct law, and used a rational process to reach a reasonable result. *See* ***State v. Gudenschwager***, 191 Wis.2d 431, 440, 529 N.W.2d 225, 229 (1995).

We conclude that the trial court properly exercised its discretion in requiring Loren to first request satisfaction of the child support order from the Albright Trust. The court correctly recognized that the trustees of the Tallmadge Trust had discretion concerning distributions to Loren. Based on the evidence presented,[5] the court considered it likely that the Albright Trust would make the court-ordered payments, and there was in fact a court order issued to that effect within three months of entry of this trial court's decision. It is reasonable for a

[4] Although it is possible for "may" to be construed as mandatory, that is only if the statute demands such a construction in order to carry out the legislative intent. ***Schmidt v. Dep't of Resource Dev.***, 39 Wis.2d 46, 53, 158 N.W.2d 306, 310 (1968). That is not the case here.

[5] McComas testified that the Albright Trust was a mandatory income distribution trust with about $200,000 of income each year. He further testified that under the statute governing such trusts, the child support payments in question could be obtained from it.

court ruling on an application under § 701.06(4), STATS., to consider whether there are other sources to satisfy the court-ordered child support obligation.

We reject Loren's argument that the court's decision is inconsistent with the purpose of the statute. The purpose of the statute, evident from its plain language, is to provide a means of satisfying court-ordered child support obligations that does not depend on direct payment by the parent, when the parent is the beneficiary of a trust. The trial court's decision is consistent with this purpose because it permits Loren to reapply if the Albright Trust does not satisfy her claim. Section 701.06(4), STATS., does not require that courts order trustees to satisfy claims regardless of other means available, and we may not read such a requirement into the statute.

Loren describes the effect of the trial court's decision as "placing an unreasonable legal and financial burden on the child," and permitting the "deadbeat parent" to "win a war of attrition." It may be that in some circumstances, a court's decision that a claimant under § 701.06(4), STATS., must first seek other resources for satisfaction of a child support order would be unreasonable, but that is not the case here.

In summary, we agree with the trustees that the trial court erroneously construed the first sentence of Paragraph A to include David's dependents as primary beneficiaries of the trust, along with David. It is the second sentence of Paragraph A, not the first, which governs the trustees' duties with respect to Loren and to David's other issue. Loren does not advance an argument that the trustees have not fulfilled their duty to her under the instrument as we have construed it. We also conclude that the trial court properly interpreted § 701.06(4), STATS., and properly exercised its discretion in denying Loren's

statutory claim but permitting her to reapply. We therefore modify the trial court's decision concerning the construction of Paragraph A, and, as modified, affirm the order dismissing Loren's petition.

*By the Court.*—Order modified and, as modified, affirmed.

Not recommended for publication in the official reports.