COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP615 **Cir. Ct. No. 2013CV15**

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

CHARLES POLER, PERSONAL REPRESENTATIVE OF THE ESTATE OF LOUIS THUNDER,

PLAINTIFF-APPELLANT,

V.

GERALD JACOBSON, SR. AND SHEILA HOULE,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Forest County: FRED W. KAWALSKI, Judge. *Affirmed*.

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

¶1 PER CURIAM. Charles Poler, personal representative of the Estate of Louis Thunder (Estate), appeals a summary judgment in favor of Gerald Jacobson, Sr., and Sheila Houle. The Estate argues the circuit court erroneously

construed the provisions of two power-of-attorney documents. We reject the Estate's argument and affirm.

BACKGROUND

¶2 Louis Thunder opened an individual savings account at Associated Bank in 1995. On November 5, 2004, Thunder executed a Wisconsin Basic Power of Attorney for Finances and Property (basic POA) appointing Gerald Jacobson, Sr. as his agent. The basic POA authorized Jacobson to conduct various banking business on Thunder's behalf, was effective immediately, and was to continue in effect even if Thunder became disabled or incapacitated. However, the document also contained limitations of power, including that Jacobson may not "[c]hange any beneficiary designation of any … payable on death account … whether directly or by … rollover to another … account[,]" or make gifts. At that time, Thunder did not hold any payable on death accounts.

¶3 Approximately one month later, on December 8, Thunder modified the Associated Bank account to make it payable on death to Sheila Houle. At the same time, Thunder executed a power of attorney with respect to the account (account POA), naming Jacobson as agent. In contrast to the basic POA, the account POA contained no restrictions regarding the beneficiary designation. Rather, the account POA granted Jacobson full authority over the account and authorized him to "request withdrawal or payment of any sums on deposit … to any third party or to the agent …."

¶4 In May 2007, Thunder was declared incompetent. In January 2009, Jacobson transferred $200,000 from the savings account into a certificate of

deposit (CD) account, naming Thunder, Jacobson, and Houle as joint account holders.[1] Houle later signed the documents for the CD account as a "depositor." Thunder died in April 2011. The following month, at Houle's direction, Jacobson withdrew $202,960.11 from the CD account and deposited it into a joint account in the names of Agnes Menomin and Virginia Jacobson.

¶5 The Estate filed the present action seeking recovery of $200,000 from Jacobson for breach of fiduciary duty. After Houle was added as an additional defendant, the parties each moved for summary judgment. The circuit court determined the two POAs conflicted because the basic POA would prohibit Jacobson's transfer of the payable-on-death savings account to the joint CD account, whereas the account POA would permit the transfer. Relying on ***Russ v. Russ***, 2007 WI 83, ¶36, 302 Wis. 2d 264, 734 N.W.2d 874, the court determined it could look to extrinsic evidence to resolve the conflict.

¶6 Jacobson's and Houle's affidavits explained that Menomin had lived with Thunder since 1959 and is Houle's grandmother; Virginia is Houle's mother.[2] Houle wanted to provide for her grandmother and mother and believed she was acting according to Thunder's wishes. Jacobson averred he had transferred the payable-on-death savings account to the joint CD account based on the advice of Associated Bank employees, in order to earn a higher interest rate. He further claimed that the purpose of the joint status of the account was to preserve the

[1] Jacobson actually transferred the funds into two identical certificate of deposit accounts. This distinction is immaterial.

[2] Gerald Jacobson is Houle's father and, according to the account POA, was Thunder's nephew.

interests of the respective parties; Thunder as owner, Houle as death beneficiary, and Jacobson as agent.

¶7 The circuit court concluded that, in light of the broader authority granted in the subsequent account POA, Thunder must have either not read or not understood the limiting provisions of the basic POA, or forgot about provision 12.d. regarding payable-on-death beneficiaries. Further, it held, "In order to harmonize both documents, this Court concludes that it must reform the [basic POA] by deleting that specific restriction regarding [payable-on-death] accounts." The court then determined that, based on the averred facts, Jacobson had not engaged in self-dealing or fraud. Additionally, the court observed:

> Finally, even if self[-]dealing were to occur, the aggrieved party would be Ms. Houle and not the Estate. There is no evidence of any kind, which would lead to the inference that Mr. Thunder intended these funds to be part of his Estate. Accordingly, the Estate would receive a windfall if [it] were to prevail.

The Estate appeals.

DISCUSSION

¶8 The Estate argues the circuit court erroneously granted summary judgment dismissing the action. Summary judgment is appropriate when "there is no genuine issue as to any material fact and … the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).[3] We review grants of summary judgment de novo. ***Donaldson v. Urban Land Interests, Inc.***, 211 Wis. 2d 224, 229-30, 564 N.W.2d 728 (1997).

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶9 The Estate presents a morass of arguments.[4] We observe at the outset that the Estate does not argue there are any disputed issues of material fact, and it agrees Jacobson was authorized to modify the payable-on-death beneficiary of the savings account. However, the Estate argues that the basic POA and account POA do not conflict, and that, therefore, the circuit court could not consider extrinsic evidence.

¶10 The Estate argues the two POAs did not conflict because the account POA merely constituted a modification of the basic POA. The Estate claims there was a modification because Thunder and Jacobson each signed both POAs. The Estate argues that when a modification is unambiguous, it is impermissible to resort to extrinsic evidence of the parties' intent. The Estate asserts the account POA unambiguously modified the basic POA's provision 12.d. with regard to the savings account.

¶11 Jacobson responds that the account POA could not be a modification because it did not reference the basic POA and the Estate cites no other evidence suggesting an intention of modification. The Estate replies, without elucidation, that specific reference to the prior document was unnecessary because "a written contract can be modified orally."

[4] The Estate's table of contents sets forth three argument headings, the first of which contains seven subheadings. However, the Estate's subsequent "statement of issues presented" sets forth five issues, the latter four of which are confounding "if not" or "if so" statements. The table of contents headings, statements of issues presented, and general presentation of argument are, collectively, incomprehensible. To the extent we overlook any arguments the Estate attempted to make, we deem them inadequately developed. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (court of appeals may disregard undeveloped arguments); *see also* WIS. STAT. RULE 809.19(1)(a), (e) (requiring argument to conform to the statement of issues presented and table of contents).

¶12 The Estate's argument is meritless. The Estate offers no evidence that Thunder intended the account POA to be a modification of the basic POA, and it has no basis to assert there was an oral modification. Indeed, the only way the Estate could demonstrate an oral modification would be to introduce extrinsic evidence of intent—the very thing the Estate is arguing against. Further, the basic POA expressly indicates how it could be changed:

> If you wish to change your basic power of attorney for finances and property, you must complete a new document and revoke this one. You may revoke this document at any time by destroying it, by directing another person to destroy it in your presence or by signing a written and dated statement expressing your intent to revoke this document.

(Capitalization modified.) The basic POA does not permit oral modification; nor does it permit written modification. Rather, it explicitly requires that it be revoked and replaced.

¶13 In its reply brief, the Estate's argument shifts to reliance on ***O'Leary v. Sterling Extruder Corp.***, 533 F. Supp. 1205 (E.D. Wis. 1982). This case was first cited in Jacobson's response brief, in which Jacobson merely asserted the case provided inadequate guidance concerning whether the conflicting POAs could be construed together, because certain factors identified in that case were satisfied here while others were not.[5]

¶14 The Estate argues that, rather than representing a single agreement that could be construed together, the two POAs were separate agreements that must be interpreted independently. However, this appears contrary to its argument

[5] Jacobson did not even provide a full case citation, much less pinpoint cites.

that the second POA modified the first.[6] In any event, the Estate then argues, "Should this Court determine the two powers of attorney to be separate agreements, the position of [Jacobson] [sic] an ambiguity is created by considering provision 12d must be rejected." It explains that, because the POAs are separate agreements, the basic POA "is not a factor in construing" the account POA and therefore, "[e]xtrinsic evidence of … Thunder's intent … cannot be considered." We reject the Estate's argument because it is inapprehensible, appears to be contradictory, and is presented for the first time in its reply brief. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981) (court of appeals need not resolve issues raised for the first time in a reply brief). Moreover, unlike ***O'Leary***, here the two documents concern the same subject matter, so they are properly construed together.

¶15 Accordingly, the Estate fails to demonstrate the trial court erroneously determined the two POAs conflicted. As best we can discern, all of the Estate's arguments rely on the premise that the basic POA and account POA do not conflict, and that, therefore, the circuit court could not consider extrinsic evidence. We have rejected the Estate's premise. Accordingly, we need not further consider the Estate's arguments. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

[6] The heading of the Estate's ***O'Leary*** argument in its reply brief is: "The second power of attorney modifies the first power of attorney because of the narrow subject matter." *See* ***O'Leary v. Sterling Extruder Corp.***, 533 F. Supp. 1205 (E.D. Wis. 1982). Yet, it then argues there were two separate agreements because the POAs concern different matters.

¶16 Nonetheless, we briefly address the Estate's argument that, while Jacobson was authorized to move funds out of the payable-on-death savings account and into a new account with no payable-on-death beneficiary, he was not permitted to create a joint account. The Estate's long and convoluted argument eventually concludes that the joint CD account should be treated as a single account in Thunder's name—which would then go to the Estate. We need not, however, set forth the Estate's labyrinthal argument in its entirety. The apparent crux of the argument is that the following language in the account POA applied to Houle's designation as joint account holder: "No present or future ownership or right of survivorship is conferred by this designation." (Capitalization modified.)

¶17 The Estate's argument, unsupported by citation to the record, is frivolous. The Estate's partial quote is excerpted from the following language of the account POA:

> The person whose signature appears above is hereby designated agent (attorney-in-fact) for the account identified above upon the terms and conditions set forth in this card. Transactions regarding this account/certificate of deposit may be made by the agent named herein. *No present or future ownership or right of survivorship is conferred by this designation.* The authority of the agent is exercisable notwithstanding the subsequent disability or incapacity of any depositor. This card includes additional terms below.
>
> **Caution** – All depositors to account affected must sign below for valid designation[.]

(Capitalization modified; italics added.) When considered in context, it is undebatable that the Estate's excerpt applies only to the person designated as agent. Further, it would be absurd to conclude a POA would preclude a joint

account holder from having present or future rights in an account. The Estate's argument thus fails.[7]

By the Court.—Judgment affirmed.

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

[7] As part of its convoluted argument, the Estate also argues the circuit court erroneously relied on ***Russ v. Russ***, 2007 WI 83, ¶36, 302 Wis. 2d 264, 734 N.W.2d 874, to consider extrinsic evidence because the facts were different. However, the Estate also acknowledges that ***Russ*** stated it covered the present fact situation, "where a power of attorney agent actively uses his or her authority to create a joint account with the principal[.]" *See* ***id.*** Immediately after that statement, ***Russ*** held, "The prohibition against the admissibility of extrinsic evidence of the parties' intent to allow the making of gifts, as set forth in [***Praefke v. American Enterprise Life Insurance Co.***, 2002 WI App 235, ¶20, 257 Wis. 2d 637, 655 N.W.2d 456], would not apply in *such* cases." (Emphasis added.) Thus, we must reject the Estate's assertion that the ***Praefke*** bright-line rule would apply here to prohibit consideration of extrinsic evidence.