COURT OF APPEALS
DECISION
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Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP145 **Cir. Ct. No. 2015PR1971**

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

IN THE MATTER OF THE KATHLEEN D'ACQUISTO IRREVOCABLE TRUST, UAD DECEMBER 15, 1992:

ANTHONY J. D'ACQUISTO,

APPELLANT,

V.

SANDRA LOCOCO AND GINA POKORNY,

RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed*.

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

¶1 STARK, P.J. Anthony D'Acquisto appeals an order granting a motion filed by his daughters, Sandra LoCoco and Gina Pokorny, to terminate the

Kathleen D'Acquisto Irrevocable Trust.[1] It is undisputed that, under the terms of the trust agreement as originally drafted, the Trust should have terminated in 2014, when Pokorny turned forty years old. However, D'Acquisto argues the trust agreement was modified by a 2013 document entitled "Directive to Continue as Trustee," which provided that D'Acquisto would continue to serve as trustee of the Trust for the remainder of his lifetime, or until he resigned.

¶2 We conclude the circuit court properly determined the 2013 Directive was ineffective to modify the trust agreement because it did not satisfy the statutory requirements for modification that were in effect at the time it was executed. We further conclude the 2013 Directive is not enforceable as a standalone contract. Finally, we reject D'Acquisto's arguments that LoCoco and Pokorny are barred from challenging the 2013 Directive's validity based on various equitable doctrines. For all of these reasons, we affirm the circuit court's order terminating the Trust.

BACKGROUND

¶3 The following facts are undisputed for purposes of this appeal. D'Acquisto and Kathleen D'Acquisto were married and had two daughters—LoCoco and Pokorny. On December 15, 1992, Kathleen D'Acquisto, as grantor, created the Trust for the benefit of LoCoco and Pokorny, who were the only two beneficiaries. The trust agreement named D'Acquisto as the sole trustee. Upon execution of the trust agreement, the following assets were placed in the Trust:

[1] Throughout the remainder of this opinion, we refer to Anthony D'Acquisto as "D'Acquisto." We refer to Kathleen D'Acquisto, where necessary, by her full name. We refer to the Kathleen D'Acquisto Irrevocable Trust as "the Trust."

(1) the D'Acquistos' home, located in Mequon; and (2) a commercial building, located in Milwaukee. At the time, the combined value of those properties was approximately $2 million. Kathleen D'Acquisto died in April 1993, approximately four months after executing the trust agreement.

¶4 The trust agreement contained the following provisions regarding disposition of the trust assets:

> The Trustee shall divide the trust property equally into two separate trust funds, one of the trust funds to be held for the primary benefit of [Pokorny], and the other to be held for the primary benefit of [LoCoco], and the Trustee shall hold, manage, and invest the trust property, and shall collect and receive the income, and after deducting all necessary expenses incident to the administration of the trusts, shall dispose of the corpus and income of the trusts as follows:
>
> (a) The Trustee shall pay the entire net income of each of the trusts, quarter annually, to the primary beneficiary of the trust, provided that there shall be paid over absolutely to the beneficiary at age 35 one half of the corpus of the trust for her benefit as it shall then exist, and provided that the balance of the corpus of the trust shall be paid over to the beneficiary at age 40.

The trust agreement granted D'Acquisto, as trustee, power to "do all things necessary or convenient for the orderly and efficient administration of the Trusts created hereunder and generally to have, manage and control the said trusts as fully as the Grantor might do herself with respect to the Trust property."

¶5 It is undisputed that, under the above provisions, D'Acquisto was charged with managing the Trust until his younger daughter (Pokorny) reached age forty, at which point all of the Trust's assets would have been distributed and the Trust would terminate. It is also undisputed that D'Acquisto did not make the

distributions required by the trust agreement when his daughters turned thirty-five in 2006 and 2009, respectively, and when LoCoco turned forty in 2011.[2]

¶6 In September 2013, D'Acquisto received an offer to purchase a commercial property located on Chicago Avenue in Milwaukee, which the Trust had purchased in 1994. The offer required D'Acquisto to confirm that he had the "corporate authority" necessary to sell the property. D'Acquisto consulted with an attorney, who concluded D'Acquisto did not have authority to sell the property without his daughters' consent because, given his daughters' ages, seventy-five percent of the Trust's assets should already have been distributed to them. The Chicago Avenue property was worth $10 million, which represented more than twenty-five percent of the Trust's assets.

¶7 D'Acquisto's attorney therefore prepared a document entitled "Directive to Continue as Trustee," which LoCoco, Pokorny, and D'Acquisto signed on September 26, 2013. The Directive stated:

> WE, SANDRA G. LOCOCO and GINA M. POKORNY, as beneficiaries of the Kathleen D'Acquisto Irrevocable Trust, dated December 15, 1992 ("Trust"), acknowledge the prudent financial management that our father, Anthony J. D'Acquisto, has performed as Trustee over the Trust. In recognition of this prudent financial management, we would like our father, Anthony J. D'Acquisto, to continue as Trustee of the Trust. Therefore, we appoint Anthony J. D'Acquisto, to continue as Trustee of the Trust for his lifetime, or until he resigns, it being our intention to leave the Trust assets intact and under the control of Anthony J. D'Acquisto as Trustee for his lifetime or until he resigns.

[2] D'Acquisto asserts the Trust paid LoCoco's and Pokorny's federal and state personal income tax obligations for the years 2001 through 2008. However, he does not dispute that the specific distributions required by the trust agreement when his daughters reached ages thirty-five and forty were not made.

Below this language was a separate section entitled "Acceptance of Trustee," which stated, "I, ANTHONY J. D'ACQUISTO, hereby accept and agree to continue to act as Trustee of the Trust for my lifetime or until I resign." Following execution of the 2013 Directive, D'Acquisto sold the Chicago Avenue property for $10 million on December 19, 2013.

¶8 Just under two years later, in December 2015, LoCoco and Pokorny filed a petition seeking to terminate the Trust.[3] LoCoco and Pokorny later moved the circuit court to confirm the termination requested in their petition, and D'Acquisto filed two affidavits in opposition to their motion. On July 18, 2016, following a hearing, the circuit court granted LoCoco and Pokorny's motion and ordered the Trust terminated.

¶9 In so doing, the court began by addressing which version of Wisconsin's trust code applied to the 2013 Directive.[4] The court noted the legislature had enacted a new trust code on December 13, 2013.[5] Although the

[3] LoCoco's and Pokorny's motivations for filing this petition are disputed. D'Acquisto intimates that his daughters filed the lawsuit because they do not like his new wife, whom he married in November 2014. LoCoco and Pokorny concede they are "suspicious" of D'Acquisto's new wife, but they assert they have legitimate grounds to be suspicious. For instance, they assert they were not invited to D'Acquisto's wedding and did not learn of his marriage until several months after it occurred. They also contend the marriage "triggered dramatic changes in [D'Acquisto's] behavior, including significantly decreased communication with them." They further assert D'Acquisto began making "alarming statements regarding the Trust" following his marriage, indicating that he "resented the creation of the Trust, and that it was his intention that [they] receive no assets from it." Although disputed, LoCoco's and Pokorny's motivations for filing this lawsuit are ultimately irrelevant to the issues raised in this appeal.

[4] Wisconsin's trust code can be found at WIS. STAT. ch. 701 (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[5] We generally refer to the version of the trust code that was enacted in December 2013 as "the new trust code." We refer to the version that existed before December 2013 as "the old trust code."

court acknowledged the new trust code expressly stated it was applicable to trusts existing on July 1, 2014, the court concluded the validity of the 2013 Directive should be analyzed using "the provisions of the Trust Code as it existed on September 26, 2013, the day the Directive was signed"—i.e., the old trust code.

¶10 The circuit court further concluded the 2013 Directive was invalid under the old trust code, explaining:

> [T]he old version of the Trust Code only allowed for modification of a trust by written consent of the settlor and all beneficiaries and in a few other specific cases not relevant to this discussion. The old version of the Trust Code also did not allow for nonjudicial settlement agreements. In this case, the settlor, Kathleen D'Acquisto, died prior to the preparation of the Directive. Consequently, she did not consent to any modification of the Trust.
>
> Therefore, because the settlor did not consent to the alleged modification of the Trust, and because the alleged modification does not fit any of the other scenarios detailed in WIS. STAT. § 701.13 (2011-2012), the Court holds the Directive did not effectively modify the Trust.

¶11 D'Acquisto subsequently moved the circuit court to stay or vacate its order terminating the trust, arguing the court had sua sponte applied Wisconsin's old trust code to the 2013 Directive without giving the parties an opportunity to argue that point. Although the court concluded the parties had previously raised the issue of which version of the trust code applied, it agreed to stay its order terminating the trust "in an overabundance of fairness," and it gave the parties an opportunity to more fully brief two issues: (1) which version of the trust code applied; and (2) whether the 2013 Directive was enforceable as a standalone contract.

¶12 Following further briefing, the circuit court denied D'Acquisto's motion to vacate the court's order terminating the Trust. The court concluded its decision to apply the old trust code was proper, reasoning that, although the new trust code indisputably applied to *trusts* in existence on July 1, 2014, there was no indication the legislature intended the new trust code to apply retroactively to *events*—like the execution of the 2013 Directive—that occurred before that date.

¶13 The circuit court also rejected D'Acquisto's argument that the 2013 Directive was enforceable as a standalone contract. First, the court concluded the 2013 Directive was not a valid contract because LoCoco and Pokorny "did not make any promise to leave the assets intact in the Trust." Rather, they merely "indicated their 'intention' to leave the Trust assets intact." Second, the court concluded that, even if the 2013 Directive was a valid contract, it was not enforceable because it did not comply with the old trust code's requirements for modifying a trust. The court reasoned, "[I]f the legislature wanted parties to be able to modify a trust through a standalone contract, the Trust Code would have spelled out that desire." Instead, the legislature "very explicitly laid out each scenario in which a trust could be modified under the Old Trust Code," and those scenarios did not include modification via a standalone contract.

¶14 The circuit court entered a final written order on January 13, 2017. D'Acquisto now appeals.

DISCUSSION

I. The old trust code applies to the 2013 Directive.

¶15 On appeal, D'Acquisto renews his argument that the 2013 Directive's validity should be assessed using the new version of Wisconsin's trust

code—i.e., the version enacted in December 2013. We disagree and instead conclude, as a matter of law, that the new trust code cannot be retroactively applied to the 2013 Directive. *See* ***Matthies v. Positive Safety Mfg. Co.***, 2001 WI 82, ¶15, 244 Wis. 2d 720, 628 N.W.2d 842 (stating that whether a statute has retroactive effect involves the construction of a statute in relation to a particular set of facts, which is a question of law that we review independently).

¶16 As a general rule, statutes are applied prospectively, rather than retrospectively. *See* ***Rock Tenn Co. v. LIRC***, 2011 WI App 93, ¶13, 334 Wis. 2d 750, 799 N.W.2d 904; *see also* ***Gutter v. Seamandel***, 103 Wis. 2d 1, 17, 308 N.W.2d 403 (1981) (stating statutes are generally "to be construed as relating to future and not to past acts"). However, retroactive application is proper under two circumstances: (1) if the statute in question is remedial or procedural in nature, rather than substantive; or (2) if the text of the statute, by its express language or by necessary implication, reveals that the legislature intended the statute to apply retroactively. ***Rock Tenn Co.***, 334 Wis. 2d 750, ¶13 (citing ***Snopek v. Lakeland Med. Ctr.***, 223 Wis. 2d 288, 294, 588 N.W.2d 19 (1999)). Neither of these circumstances is present in this case.

¶17 First, the changes to the trust code that are at issue in this case are indisputably substantive, rather than remedial or procedural. Under the old trust code, modification of a trust was possible: (1) "[b]y written consent of the settlor and all beneficiaries of a trust or any part thereof," *see* WIS. STAT. § 701.12(1) (2011-12); (2) "pursuant to [the trust's] terms or otherwise in accordance with law," *see* § 701.12(3) (2011-12); or (3) by court action, under certain circumstances, *see* § 701.13 (2011-12). Conversely, the new trust code permits modification of a noncharitable irrevocable trust "upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a

material purpose of the trust." WIS. STAT. § 701.0411(2)(b). The new trust code also allows interested parties to enter into binding, nonjudicial settlement agreements, without the settlor's consent, "with respect to any matter involving a trust." WIS. STAT. § 701.0111(3).

¶18 By changing the ways in which a trust can be modified, the new trust code altered the rights of trust settlors and beneficiaries. As the circuit court correctly noted, "[S]ettlors have lost the right to prevent the modification of a trust they created, and beneficiaries have correspondingly gained the power to modify a trust without the settlor[']s consent." The relevant provisions of the new trust code are therefore substantive, in that they "establish[] the rights and duties of a party," rather than simply establishing "the manner and order of conducting suits or the mode of proceeding to enforce legal rights." *See* ***Trinity Petroleum, Inc. v. Scott Oil Co.***, 2007 WI 88, ¶41, 302 Wis. 2d 299, 735 N.W.2d 1 (quoting another source).

¶19 D'Acquisto does not dispute that the new trust code's provisions regarding trust modification are substantive, rather than procedural. Instead, D'Acquisto argues the new trust code retroactively applies to the 2013 Directive because the legislature expressly indicated the new trust code should have retroactive effect. *See* ***Rock Tenn Co.***, 334 Wis. 2d 750, ¶13. In support of this argument, D'Acquisto relies on WIS. STAT. § 701.1205(1), which provides that, with limited exceptions not applicable here, the new trust code "is applicable to a trust existing on July 1, 2014, as well as a trust created after such date." D'Acquisto argues this language clearly indicates the legislature intended the new trust code to apply retroactively to trusts—like the one at issue in this case—that were in existence on July 1, 2014.

¶20 We agree with D'Acquisto that WIS. STAT. § 701.1205(1) unambiguously states the new trust code applies to *trusts* that were in existence on July 1, 2014. Nothing in § 701.1205(1), however, states the new trust code applies retroactively to *events* that occurred prior to July 1, 2014, that were related to trusts established before that date. *See* ***Landgraf v. USI Film Prods.***, 511 U.S. 244, 269-70 (1994) (stating retroactive application occurs when a new statutory provision "attaches new legal consequences to events completed before its enactment"). We agree with LoCoco and Pokorny that D'Acquisto's argument "confuses *prospective* application to an existing Trust, on the one hand, with *retroactive* application to events relating to the Trust that occurred prior to July 1, 2014, on the other." The express language of § 701.1205(1) demonstrates that the legislature intended the former, but the statute does not clearly indicate—either by its express language or by necessary implication—that the legislature intended the latter.

¶21 Our prior decision in ***Ngaboh-Smart v. Thompson***, No. 2012AP2674, unpublished slip op. (WI App Feb. 20, 2014), illustrates this point.[6] In February 2012, Ngaboh-Smart filed a small claims lawsuit against Thompson, who had been her landlord from August 2010 to August 2011. ***Id.***, ¶¶2-3. Ngaboh-Smart alleged that, in September 2011, Thompson violated a City of Madison ordinance setting forth certain steps a landlord must take before withholding a tenant's security deposit. ***Id.***, ¶¶3-4. The circuit court agreed Thompson had violated the ordinance. ***Id.***, ¶4.

[6] *See* WIS. STAT. RULE 809.23(3)(b) (permitting citation of authored, unpublished opinions issued on or after July 1, 2009, for persuasive value).

¶22 On appeal, Thompson argued WIS. STAT. § 66.0104 (2011-12), applied retroactively to bar Ngaboh-Smart's claim. ***Ngaboh-Smart***, No. 2012AP2674, unpublished slip op. ¶7. That statute provided, in relevant part, "No city, village, town, or county may enact an ordinance that places requirements on a residential landlord with respect to security deposits … that are additional to the requirements under administrative rules related to residential rental practices." Sec. 66.0104(2)(b) (2011-12). The statute further provided, "If a city, village, town, or county has in effect on December 21, 2011, an ordinance that is inconsistent with sub. (2), the ordinance does not apply and may not be enforced." Sec. 66.0104(3) (2011-12).

¶23 Thompson argued the plain language of WIS. STAT. § 66.0104(3) (2011-12), unambiguously prohibited anyone from bringing an action to enforce an inconsistent ordinance "on or after the statute's effective date of December 21, 2011." ***Ngaboh-Smart***, No. 2012AP2674, unpublished slip op. ¶12. Although we conceded the statute had an effective date of December 21, 2011, we noted the "establishment of effective dates does not determine whether a statute will apply retroactively. All statutes have effective dates." ***Id.***, ¶15 (quoting another source). Contrary to Thompson's position, we concluded the statutory language specifying an effective date did not "clearly show that the legislature intended to bar a claim, like Ngaboh-Smart's, that had ripened before the effective date." ***Id.***, ¶16. In other words, the statute did not "clearly indicate[] a legislative intent that the statute apply retroactively to bar a claim like Ngaboh-Smart's." ***Id.***, ¶25.

¶24 We concluded in ***Ngaboh-Smart*** that the relevant statute prohibited local governments from enacting inconsistent ordinances after the statute's effective date and barred them from enforcing inconsistent ordinances that existed as of that date, but it did not bar enforcement based on events that occurred before

the statute's effective date. *See* ***id.***, ¶16. We reach a similar conclusion here. WISCONSIN STAT. § 701.1205(1) clearly provides that the new trust code applies to trusts existing on July 1, 2014, as well as trusts created after that date; however, it does not clearly indicate that the new trust code applies to events, such as the signing of the 2013 Directive, that occurred before July 1, 2014.

¶25 In summary, it is undisputed that the relevant provisions of the new trust code are substantive, rather than procedural. In addition, D'Acquisto has not pointed to any language in the new trust code that clearly demonstrates, either expressly or by necessary implication, that the legislature intended the new trust code to apply to events that occurred before July 1, 2014. Under these circumstances, the general rule of prospective application applies. *See* ***Rock Tenn Co.***, 334 Wis. 2d 750, ¶13. Accordingly, the new trust code does not apply to the 2013 Directive, the validity of which must instead be analyzed using the old trust code.

II. The 2013 Directive is invalid under the old trust code.

¶26 As noted above, under the old trust code, a trust could be modified "[b]y written consent of the settlor and all beneficiaries." WIS. STAT. § 701.12(1) (2011-12).[7] Here, it is undisputed LoCoco and Pokorny consented to modification of the Trust by signing the 2013 Directive, but it is also undisputed that Kathleen D'Acquisto, the Trust's settlor, passed away approximately twenty years before

[7] We also noted above that the old trust code permitted modification of a trust "pursuant to its terms or otherwise in accordance with law." WIS. STAT. § 701.12(3) (2011-12). D'Acquisto does not develop any argument that the 2013 Directive was permissible under § 701.12(3) (2011-12). Nothing in the trust agreement permitted LoCoco and Pokorny, as beneficiaries, or D'Acquisto, as trustee, to modify the agreement's terms.

the 2013 Directive was executed. We agree with the circuit court that these undisputed facts demonstrate the 2013 Directive was invalid as a modification of the Trust under § 701.12(1) (2011-12), because Kathleen D'Acquisto did not consent to the modification.[8]

¶27 D'Acquisto argues for the first time on appeal that Kathleen D'Acquisto consented to future modifications of the Trust, including the 2013 Directive, by including a merger provision in the trust agreement. By failing to raise this argument in the circuit court, D'Acquisto forfeited his right to raise it on appeal. *See* ***Tatera v. FMC Corp.***, 2010 WI 90, ¶19 n.16, 328 Wis. 2d 320, 786 N.W.2d 810. We could reject D'Acquisto's argument on this basis alone. Nevertheless, we also conclude his argument fails on the merits.

¶28 The merger provision in the trust agreement grants the trustee the power, after Kathleen D'Acquisto's death, "to merge the assets of any trust hereunder with those of any other trust, by whomsoever created, having substantially the same terms." However, the 2013 Directive did not "merge" the Trust with any other trust. It expressly refers to the "Kathleen D'Acquisto Irrevocable Trust, dated December 15, 1992," and no other. Although D'Acquisto asserts the combined effect of the merger provision and the 2013 Directive was to "creat[e] a new trust containing substantially the same terms as the Trust Agreement," nothing in the 2013 Directive indicates the signatories intended to create a "new" trust. The 2013 Directive defined the term "the Trust" as "the Kathleen D'Acquisto Irrevocable Trust, dated December 15, 1992." It then stated

[8] "The interpretation and application of a statute to an undisputed set of facts are questions of law that we review independently." ***McNeil v. Hansen***, 2007 WI 56, ¶7, 300 Wis. 2d 358, 731 N.W.2d 273.

LoCoco and Pokorny "appoint[ed]" D'Acquisto "to continue as Trustee of the Trust for his lifetime, or until he resigns." D'Acquisto similarly "agree[d] to continue to act as Trustee of the Trust." By its express text, the 2013 Directive indicates an intent to continue the existing trust, not create a new trust.

¶29 Moreover, the merger provision permits the Trust to be merged only with another trust "having substantially the same terms." The 2013 Directive differs substantially from the original trust agreement in one crucial respect: while the original trust agreement required distribution of all of the Trust's assets and termination of the Trust when Pokorny turned forty, the 2013 Directive extended the Trust's termination date until D'Acquisto's death or his resignation as trustee. Thus, even if the 2013 Directive could be construed as accomplishing a "merger," that merger would be invalid under the trust agreement's merger provision because the terms of the 2013 Directive are not substantially similar to those of the trust agreement. For these reasons, the merger provision's presence in the trust agreement does not demonstrate that Kathleen D'Acquisto consented to the modifications contained in the 2013 Directive.

¶30 In addition to the provisions discussed above, the old trust code permitted modification of trusts by court action in certain other situations. *See* WIS. STAT. § 701.13 (2011-12). First, § 701.13 listed several specific circumstances in which a court could act to modify or terminate a trust, none of which are present in the instant case. Sec. 701.13(1)-(5) (2011-12). Section 701.13 then further provided, "Nothing in this section shall … limit the general equitable power of a court to modify or terminate a trust in whole or in part." Sec. 701.13(6) (2011-12).

¶31 D'Acquisto argues that, here, the circuit court should have exercised its "general equitable power," as recognized in WIS. STAT. § 701.13(6) (2011-12), to modify the trust agreement to be consistent with the 2013 Directive. D'Acquisto notes LoCoco and Pokorny signed the 2013 Directive, which unambiguously permitted D'Acquisto to remain as trustee until his death or resignation. He further notes that, approximately two years later, LoCoco and Pokorny moved the circuit court to terminate the Trust, arguing the 2013 Directive was invalid because they had no authority to modify the trust agreement. D'Acquisto contends that, in the interim, LoCoco and Pokorny benefitted from the 2013 Directive because it facilitated the sale of the Chicago Avenue property, which resulted in $10 million being placed in the Trust. D'Acquisto argues that, under these circumstances, equity "screams out for [LoCoco and Pokorny] to be held to" the 2013 Directive's terms. More specifically, he asserts the circuit court should have upheld the 2013 Directive based on the equitable doctrines of estoppel, waiver, laches, or unclean hands.

¶32 D'Acquisto's argument regarding WIS. STAT. § 701.13(6) (2011-12), fails for at least two reasons. First, as LoCoco and Pokorny observe, the equitable doctrines D'Acquisto cites are defenses. *See* ***Forest Cty. v. Goode***, 219 Wis. 2d 654, 681-82, 579 N.W.2d 715 (1998); ***D'Angelo v. Cornell Paperboard Prods. Co.***, 33 Wis. 2d 218, 228, 147 N.W.2d 321 (1967). LoCoco and Pokorny argue:

> D'Acquisto cites no authority that a court can modify a trust pursuant to the assertion of a defense. The proper way to seek to modify a trust by court order is to file a petition seeking that affirmative relief. If D'Acquisto thought grounds for a modification existed, he had more than two years in which to do so.

D'Acquisto does not respond to LoCoco and Pokorny's argument that equitable defenses do not provide a basis to modify a trust under § 701.13(6) (2011-12). We

therefore deem that point conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶33 Second, LoCoco and Pokorny cite authority supporting the proposition that a court's equitable power to modify a trust is restricted to situations in which a modification is necessary to effectuate the settlor's intent, particularly in the face of unforeseen circumstances. *See, e.g.*, ***Stanley v. Stanley***, 223 Wis. 345, 353, 269 N.W. 550 (1936); ***Mathiowetz v. Stack***, 217 Wis. 94, 102, 258 N.W. 324 (1935); RESTATEMENT (SECOND) OF TRUSTS § 167 (AM. LAW INST. 1959). LoCoco and Pokorny argue the modification set forth in the 2013 Directive was not necessary to effectuate Kathleen D'Acquisto's intent or to address any unforeseen circumstances. Indeed, they contend the 2013 Directive actually frustrates Kathleen D'Acquisto's clear intent, as expressed in the original trust agreement, that the trust assets should be fully distributed and the Trust should terminate as of Pokorny's fortieth birthday. D'Acquisto does not respond to LoCoco and Pokorny's argument that modification of the Trust would be inappropriate under WIS. STAT. § 701.13(6) (2011-12), because it is not necessary to effectuate the settlor's objectives or address unforeseen circumstances. Again, arguments not refuted are deemed conceded. ***Charolais Breeding Ranches***, 90 Wis. 2d at 109.

III. The 2013 Directive is not enforceable as a standalone agreement.

¶34 For the foregoing reasons, we agree with LoCoco, Pokorny, and the circuit court that the 2013 Directive was not a valid modification of the trust agreement under the old trust code. However, D'Acquisto argues, in the alternative, that the 2013 Directive is nevertheless enforceable as a standalone agreement. Specifically, he argues the 2013 Directive "can be deemed an

independent agreement creating a separate trust," pursuant to WIS. STAT. § 701.0407.

¶35 There are at least three problems with this argument. First, D'Acquisto cites no authority in support of the proposition that trustees and beneficiaries can circumvent the statutory requirements for modifying a trust by entering into standalone agreements among themselves. As LoCoco and Pokorny point out, if that were the case,

> trustees and beneficiaries always could agree among themselves to all sorts of things that are contrary to the terms of a trust and to settlor intent. For instance, beneficiaries and trustees could conspire to allow distributions greater than permitted under the trust instrument. Or they might contract to terminate the trust prematurely. Similarly, trustees wishing to extend their control over trust asserts might exert leverage over beneficiaries—particularly those over whom the trustee wields authority—to extract an agreement to continue the trust. Wisconsin trust law permits the amendment of an irrevocable trust only under limited circumstances for just these reasons—to protect settlor intent and to prevent such abuses.

Moreover, as the circuit court noted, "if the legislature wanted parties to be able to modify a trust through a standalone contract, the Trust Code would have spelled out that desire."

¶36 Second, we reject D'Acquisto's assertion that the 2013 Directive constitutes a binding contract. "A contract is a series of mutual promises." ***Ristow v. Threadneedle Ins. Co.***, 220 Wis. 2d 644, 653, 583 N.W.2d 452 (Ct. App. 1998). By signing the 2013 Directive, D'Acquisto "agree[d] to continue to act as Trustee of the Trust." However, LoCoco and Pokorny did not promise anything in return. They did not, as D'Acquisto contends, promise to leave the Trust's assets intact

and under his control for the remainder of his lifetime or until he resigned. Rather, they simply stated it was their "intention" to do so.

¶37 Third, there is no support for D'Acquisto's assertion that the 2013 Directive created a new trust under WIS. STAT. § 701.0407. As noted above, nothing in the text of the 2013 Directive indicates that the signatories to that document intended to create a new trust. Moreover, while D'Acquisto asserts the 2013 Directive created a new trust under § 701.0407, that provision is found in the new trust code, which we have already determined does not apply retroactively to the 2013 Directive. In any event, § 701.0407 pertains to the creation of oral trusts. D'Acquisto does not explain why that statute is applicable to the 2013 Directive, which is indisputably a written document, rather than an attempt to create an oral trust.

¶38 D'Acquisto next argues that, even if the 2013 Directive is not enforceable as a standalone contract, it should nevertheless be given effect because LoCoco and Pokorny ratified it by their subsequent conduct. Ratification is "the confirmation of a previous act done either by the party himself or by another." ***Estate of Bydalek v. Metropolitan Life Ins. Co.***, 220 Wis. 2d 739, 746, 584 N.W.2d 164 (Ct. App. 1998) (quoting *Ratification*, BLACK'S LAW DICTIONARY (6th ed. 1990)). As D'Acquisto points out, the doctrine of ratification has long been recognized in Wisconsin law and has been applied in a variety of settings, including cases involving trusts. *See* ***id.*** Here, D'Acquisto argues LoCoco and Pokorny ratified the 2013 Directive after signing it by: (1) using it to close on the sale of the Chicago Avenue property; (2) keeping the Trust's assets intact, without requesting any distributions; and (3) allowing D'Acquisto to continue managing the Trust's assets.

¶39 In response, LoCoco and Pokorny observe that, although ratification has been used in cases involving trusts, it has never been applied in the manner D'Acquisto advocates in this case—that is, to modify a trust contrary to both the original trust agreement's terms and the applicable trust code. D'Acquisto does not cite any legal authority supporting the proposition that a trustee and beneficiaries can modify a trust by ratification. Instead, the cases D'Acquisto cites demonstrate that, in the context of trust law, ratification has been applied to prevent beneficiaries from challenging actions taken by trustees where the beneficiaries ratified those actions by their subsequent conduct. *See* ***Hallin v. Hallin***, 228 Wis. 2d 250, 263, 596 N.W.2d 818 (Ct. App. 1999) ("[A]fter a breach of trust has occurred, a beneficiary may expressly or impliedly express satisfaction with the trustee's action and thereby prevent himself from claiming thereafter that it was illegal." (quoting another source)).

¶40 That is not the situation presented by this case. LoCoco and Pokorny are not challenging any action D'Acquisto took as trustee, including the 2013 sale of the Chicago Avenue property. Their petition merely sought to terminate the trust, according to the express terms of the original trust agreement. Again, D'Acquisto cites no authority for the proposition that, by signing the 2013 Directive and not challenging it for two years, LoCoco and Pokorny could circumvent both the original trust agreement and the applicable trust code, neither of which granted them unilateral authority to modify the Trust. Under these circumstances, we reject D'Acquisto's argument that the 2013 Directive is enforceable pursuant to the doctrine of ratification.

IV. The equitable defenses D'Acquisto raises do not render the 2013 Directive enforceable.

¶41 Finally, D'Acquisto argues that, even if the 2013 Directive is invalid under the old trust code and is not enforceable as a standalone contract, LoCoco and Pokorny should nevertheless be barred from challenging its validity based on the equitable doctrines of estoppel, waiver, laches, and unclean hands. D'Acquisto contends that probate courts are courts of equity, and courts of equity "only aid those with clean hands, and do not protect those who slept on their rights."

¶42 Be that as it may, "[e]ven when sitting in equity, a court must nonetheless follow the law." ***Bloom v. Grawoig***, 2008 WI App 28, ¶11, 308 Wis. 2d 349, 746 N.W.2d 532. "Although equity gives the court power to achieve a fair result in the absence of or in conjunction with a statute, equity does not allow a court to ignore a statutory mandate." ***Id.*** Here, the circuit court correctly concluded the 2013 Directive was invalid because it did not comply with the old trust code's requirements for modifying a trust. We agree with LoCoco and Pokorny that the court was not free to ignore those statutory requirements and instead conclude, based on equitable considerations, that the 2013 Directive was enforceable.

¶43 D'Acquisto's equitable arguments also fail for other reasons. D'Acquisto cites four different equitable doctrines—estoppel, waiver, laches, and unclean hands—each of which have distinct elements. However, he does not set forth the elements of waiver, laches, or unclean hands, much less explain how the facts of this case relate to those elements. D'Acquisto's arguments regarding waiver, laches, and unclean hands are therefore underdeveloped. *See* ***State v.***

Flynn, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (court of appeals "will not decide issues that are not, or inadequately, briefed").

¶44 D'Acquisto's reply brief contains slightly more detail regarding his argument that estoppel bars LoCoco and Pokorny from challenging the 2013 Directive. As D'Acquisto notes, Wisconsin courts have invoked estoppel "in situations where the action or nonaction of one party induces another party's reliance thereon, either in the form of action or nonaction, to the latter party's detriment." ***Peterman v. Midwestern Nat'l Ins. Co.***, 177 Wis. 2d 682, 699, 503 N.W.2d 312 (Ct. App. 1993). Thus, for estoppel to apply in the instant case, D'Acquisto must show that he detrimentally relied on LoCoco and Pokorny's action or nonaction—presumably, their signing of the 2013 Directive and their subsequent failure to challenge that directive for approximately two years.

¶45 We agree with LoCoco and Pokorny that D'Acquisto cannot make this showing. D'Acquisto has failed to present any evidence or argument indicating that failing to enforce the 2013 Directive either has harmed or will harm him in any legally cognizable way. D'Acquisto does not allege that he has any monetary or property interest that has been or will be affected by failing to enforce the 2013 Directive. He simply argues he "love[s] managing the Trust" and it is "one of the few joys [he has] in [his] life at this time." He does not cite any authority, however, supporting the proposition that his personal enjoyment in performing his duties as trustee gives rise to a legally protectable interest in remaining trustee after the Trust should have terminated, pursuant to the trust agreement's express language.

¶46 Although D'Acquisto emphasizes that he has significantly increased the value of the Trust's assets during his tenure as trustee, he does not explain why

that fact gives him an enforceable interest in extending his control over the Trust. Trustees have a duty to manage and invest trust assets as a prudent investor would. *See* WIS. STAT. § 881.01(3)(a). D'Acquisto does not cite any authority indicating that fulfilling that duty—or even performing it extraordinarily well—gives a trustee a legally protected interest in remaining trustee after the trust was supposed to terminate.

¶47 To the extent D'Acquisto argues the sale of the Chicago Avenue property establishes that he detrimentally relied on the 2013 Directive, that argument fails as well. If LoCoco or Pokorny had sued D'Acquisto for breach of fiduciary duty in connection with the sale of the Chicago Avenue property, or if the purchaser sought to avoid the transaction on the basis that D'Acquisto lacked authority, estoppel based on the 2013 Directive would likely be a defense. However, no party is attempting to avoid that transaction—or any other—on the grounds that D'Acquisto lacked authority as trustee to execute it. LoCoco and Pokorny simply asked the circuit court to terminate the Trust, pursuant to the clear terms of the original trust agreement. Under these circumstances, the sale of the Chicago Avenue property does not establish detrimental reliance on D'Acquisto's part.

¶48 In addition, D'Acquisto suggests that equity favors enforcing the 2013 Directive because LoCoco and Pokorny benefitted from it, in that it facilitated the sale of the Chicago Avenue property. We disagree. LoCoco and Pokorny did not benefit from the 2013 Directive; they benefitted from their beneficial interest in the Trust. The Trust always held the Chicago Avenue property—and all of its other assets—for LoCoco's and Pokorny's benefit. Regardless of whether the Trust retained possession of the Chicago Avenue

property or sold it, either the property or the proceeds from its sale belonged (in the sense of beneficial ownership) to LoCoco and Pokorny.

CONCLUSION

¶49 To summarize, we conclude the old trust code applies to the 2013 Directive. We further conclude the 2013 Directive was not a valid modification of the Trust under the old trust code. We also conclude the 2013 Directive is not enforceable as a standalone contract, it cannot be enforced pursuant to the doctrine of ratification, and it is not enforceable under the various equitable doctrines D'Acquisto raises. We therefore affirm the circuit court's order terminating the Trust.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.