COURT OF APPEALS DECISION DATED AND FILED

February 13, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

NOTICE

Appeal No. 2016AP2157

Cir. Ct. No. 2013IN120

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

IN RE THE ESTATE OF JEROME J. TROFKA:

ESTATE OF JEROME J. TROFKA, BY ITS PERSONAL REPRESENTATIVE, DOROTHY E. MCALLISTER,

APPELLANT,

V.

JOHN CHRISTMAN,

RESPONDENT.

APPEAL from an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed*.

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

¶1 SEIDL, J. The Estate of Jerome J. Trofka, by its personal representative Dorothy E. McAllister, appeals an order interpreting the provisions of Trofka's "Last Will and Testament" pertaining to a real estate parcel. We conclude the circuit court correctly interpreted the will and, therefore, affirm.

BACKGROUND

¶2 Trofka owned approximately forty acres of real estate in Brown County. In July 1995, Trofka conveyed approximately 3.8 acres from the south one-half of the real estate to his sister's daughter, Jennifer Marcusen. Trofka's "Last Will and Testament," dated December 5, 2000, nevertheless described Trofka's property as a forty-acre parcel, and provided, in relevant part:

> ONE: I give and bequeath to my niece, JENNIFER MARCUSEN, daughter of my sister, Dorothy E. McAllister, the South One-Half (S-1/2) of that part of the following described real estate which I own at my death, to-wit:
>
> The Southwest Quarter of the Northwest Quarter (SW-1/4 NW-1/4) of Section Fifteen (15), Township Twenty-Five (25) North, of Range Twenty (20) East, containing forty (40) acres, more or less, according to Government survey, except right-of-way across the Southeast corner as described in Warranty Deed recorded in Volume 164 of Deeds on page 276, Brown County Register of Deeds Records.
>
> TWO: I give and bequeath to my nephew, JOHN CHRISTMAN, son of my sister, Evelyn Trofka Christman, the North One-Half (N-1/2) of that part of the following real estate which I own at the time of my death, to-wit:

The will then repeated the forty-acre legal description noted above.

¶3 Trofka passed away on May 5, 2013. McCallister, in her capacity as the Estate's personal representative, filed the underlying motion for interpretation of the will, asserting that the whole of the property owned by Trofka at the time of his death should be equally divided between Marcusen and Christman. After a hearing, the circuit court determined that, under the plain language of the will, whatever part of the south half of the property Trofka owned at the time of his death was to be conveyed to Marcusen, and whatever part of the north half of the property Trofka owned at the time of his death was to be conveyed to Christman. The Estate now appeals.

DISCUSSION

¶4 As an initial matter, Christman, citing ***Moon v. Cullen***, 205 Wis. 648, 238 N.W. 845 (1931), asserts that McCallister, in her capacity as personal representative, lacks standing to appeal the circuit court's order because she is merely advocating to protect her daughter's interest to Christman's detriment. We are not persuaded. In ***Moon***, our supreme court noted that foreign jurisdictions have held: "As the administrator does not represent any particular heir, it is generally held that he is not aggrieved if some heirs receive less than they are entitled to by the order of distribution and, consequently, the administrator has no right to appeal." ***Id.*** at 651-52. The court, however, acknowledged this remained an "open question" in Wisconsin, and it ultimately determined that a "decision thereof" was not necessary under the facts of that case. ***Id.*** at 652. Because the quoted language is limited by context, Christman's reliance on ***Moon*** is misplaced.

¶5 As recognized by our supreme court in ***Carpenter v. First Nat'l Bank & Trust Co.***, 232 Wis. 481, 489, 287 N.W. 734 (1939), there is "a difference between the administrator's interest in the distribution of an estate and an executor's interest in the construction of a will." McCallister, as personal representative, "succeeds to the interest of the decedent in all property of the decedent." WIS. STAT. § 857.01 (2015-16).[1] She is "the representative of the testator and is charged with the duty of seeing that the will is probated and its provisions carried into effect." ***Carpenter***, 232 Wis. at 489 (quoting ***Cowan v. Beans***, 155 Wis. 417, 418, 144 N.W. 1129 (1914)). Thus, McCallister is charged with the duty of seeing that Trofka's intentions, "as [she] in good faith believes them to be, are carried into effect." ***Id.*** at 489-90. That McCallister's interpretation of the will is in conflict with that of a beneficiary does not deprive her of the standing to appeal the circuit court's interpretation if she, in good faith, believes the court's interpretation is inconsistent with Trofka's intentions.[2]

¶6 Turning to the will's interpretation, the purpose of will construction is to ascertain the testator's intent. ***Madison Gen. Hosp. Med. & Surgical Found., Inc. v. Volz***, 79 Wis. 2d 180, 186, 255 N.W.2d 483 (1977). Because the language of the will is the best evidence of the testator's intent, we look to it first; if there is no ambiguity or inconsistency in the will's provisions, there is no need for further inquiry into the testator's intent. ***Id.*** at 187. However, if an ambiguity or inconsistency exists in the will's language, we look to the surrounding circumstances at the time of the will's execution. ***Id.*** If an ambiguity or inconsistency still persists, we may resort to the rules of will construction and extrinsic evidence. ***Id.*** Ambiguity exists where the will's language is subject to two or more reasonable interpretations, either on its face or as applied to the

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

[2] We have been given no reason to question that the appeal is being maintained in good faith.

extrinsic facts to which it refers. ***Lohr v. Viney***, 174 Wis. 2d 468, 480-81, 497 N.W.2d 730 (Ct. App. 1993).

¶7 We conclude that the will provision at issue in this appeal is clear and unambiguous. The will divided the property into two separate and distinct parcels based upon the government survey—a north half and a south half—to be given to two distinct beneficiaries. Although Trofka had already given Marcusen 3.8 acres, leaving Trofka approximately 36.2 acres to bequeath, the will continued to describe the subject real estate as a forty-acre parcel. Thus, Trofka's obvious intent was to divide equally the forty-acre property between the two beneficiaries, with the north half going to Christman and the south half going to Marcusen. The 3.8-acre gift to Marcusen was clearly an advance against her inheritance of the south half of the forty-acre parcel. Had Trofka intended an equal distribution of the entire remaining property, as the Estate posits, the will would have described the whole of the property without the 3.8 acres that had already been gifted.

¶8 Citing ***Bank of Sturgeon Bay v. Schoenbrunn***, 54 Wis. 2d 657, 660, 196 N.W.2d 662 (1972), the Estate nevertheless contends the circuit court erroneously reformed the language of the will. That case, however, is distinguishable on its facts. There, the circuit court added language to the will in an attempt to fix a mistake in the will's drafting. In rejecting the circuit court's reformation of the will, our supreme court held "that wills must not be reformed even in the case of demonstrable mistake." ***Id.*** Here, there is no claim of a mistake in drafting. Contrary to the Estate's assertion, the circuit court read the will as it was written. Because the circuit court properly discerned Trofka's intent from the face of the will, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.