

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 27, 2018

Sheila T. Reiff
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP2304

Cir. Ct. No. 2015PR1731

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN THE MATTER OF THE SHIRLEY F. URYNOWICZ LIVING TRUST DATED
MARCH 16, 2007:**

**DAVID OBERHOFER, ANDREW OBERHOFER, KURT OBERHOFER AND MICHAEL
OBERHOFER,**

APPELLANTS,

v.

**VINCENT OBERHOFER, AS PERSONAL REPRESENTATIVE FOR THE ESTATE OF
HALLIE OBERHOFER,**

RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
DAVID L. BOROWSKI, Judge. *Reversed and cause remanded.*

Before Brennan, P.J., Brash and Dugan, JJ.

¶1 BRASH, J. David Oberhofer, Andrew Oberhofer, Kurt Oberhofer, and Michael Oberhofer (collectively “the Oberhofer sons”) appeal from an order of the trial court directing the distribution of trust assets to the estate of their mother, Hallie Oberhofer; the trial court had granted a motion for distribution made by their father, Vincent Oberhofer, as personal representative for the estate. The Oberhofer sons allege that a written request for the distribution of the funds, which was signed by Hallie before her death, was the result of undue influence or made under duress, or that Hallie was incompetent when she signed it. Thus, they contend that the trial court erred in granting Vincent’s dispositive motion without allowing discovery or conducting an evidentiary hearing on these issues. We agree, and therefore reverse and remand this matter to the trial court for further proceedings.

BACKGROUND¹

¶2 The trust at the center of this case was initially a living trust created in 2007 by Shirley Urynowicz (the “Trust”), Hallie’s sister. Shirley, who was widowed with no children and had not remarried, was the trustee and the beneficiary of the Trust at the time it was created. The Trust provided, however, that upon Shirley’s death, Hallie would be the primary beneficiary. The Trust also named secondary beneficiaries: the Oberhofer sons, along with two grandsons of Hallie’s.² The Trust did not include Vincent as a beneficiary, even though Hallie

¹ The facts and allegations discussed in this opinion were taken from affidavits submitted by the parties.

² The grandsons named as secondary beneficiaries are Justin Oberhofer and Brandon Oberhofer, the adult sons of a fifth Oberhofer son, Vincent Oberhofer, Jr., who is deceased.

and Vincent were married; the Oberhofer sons assert this was due to Shirley's dislike and distrust of Vincent.

¶3 Additionally, a few months before Shirley's death, Shirley resigned as trustee of the Trust and named David as the successor trustee. The Oberhofer sons contend that this was because Shirley believed that David could "stand up" to pressure from Vincent regarding control of the Trust assets. David contends that Vincent attempted to have David removed as successor trustee prior to Shirley's death, and have Hallie named the sole trustee instead. Shirley declined to do so.

¶4 Shirley died in July 2010 and the Trust became irrevocable.

¶5 The Trust provided for outright distribution to Hallie as the primary beneficiary upon Hallie's written request. However, the Trust also provided that any distribution not taken by Hallie could continue to be held in Trust until Hallie's death, at which time it would be distributed to the secondary beneficiaries. Additionally, distribution of the Trust assets was at the sole discretion of the trustee—David—although upon a written request by the beneficiary the Trust assets were required to be distributed.

¶6 Shortly after Shirley's death, the family—Hallie, Vincent, and the Oberhofer sons³—met to discuss the provisions of the Trust. The Oberhofer sons contend that Hallie made it clear at this meeting that she did not want the assets from the Trust; rather, it was her desire that the Trust assets remain in the Trust for

³ Kurt Oberhofer was not present at this family meeting due to travel complications, but was later informed of the discussion.

distribution to her sons and grandsons upon her death. The Oberhofer sons assert that Vincent did not agree with this decision.

¶7 As a result, Hallie and the Oberhofer sons entered into a verbal “Family Agreement,” in which they agreed that David would remain the trustee of the Trust and manage it throughout Hallie’s life. Additionally, they agreed that distributions would be made for Hallie’s medical care (she had been diagnosed with cancer) upon David’s receipt of evidence from Vincent and Hallie of financial need for distribution. It was further agreed that upon Hallie’s death, the Trust would be dissolved with its remaining assets to be distributed to the secondary beneficiaries—Hallie’s sons and grandsons—as provided in the Trust. David alleges that he had a disclaimer prepared by an attorney, at Hallie’s request, to memorialize the terms of the Family Agreement, but that Vincent would not allow Hallie to sign it.

¶8 In the years following the Family Agreement, David managed the Trust without taking a management fee. He received no written requests for distributions in those five years. There were, however, several verbal requests over the years for funds from the Trust. For example, Hallie twice asked for funds on behalf of Andrew; however, each time David, as trustee, declined the request, citing the Family Agreement. Andrew agreed that the funds should not be withdrawn from the Trust, pursuant to the terms of the Family Agreement. Hallie did not disagree with the decision to decline the request.

¶9 Vincent also made multiple requests for funds for miscellaneous household and personal expenses. David declined these requests as well, citing the Family Agreement, which required that Hallie and Vincent show financial

need for the funds. Neither Hallie nor Vincent disagreed with these denials for distribution, either.

¶10 In the meantime, Hallie was being treated for cancer. Hallie continued to live at home, where Vincent cared for her, but she was eventually moved to hospice care in August 2015; her family believed that, at that point, her death was imminent. However, within a few weeks of being in hospice care her health showed a dramatic improvement, and she was moved out of hospice and into a nursing home.

¶11 Around that time, David received a letter from Attorney Mark D. Vaughn, Vincent and Hallie's estate planning attorney, dated September 2, 2015, requesting complete distribution of the Trust assets. The letter was countersigned by Hallie. However, David questioned the content of the letter. In the first place, Hallie's signature looked different: it "appeared weaker and more scrawled." Furthermore, the request was contrary to the terms of the Family Agreement which required Hallie and Vincent to provide evidence of financial need upon request for distribution. David believed that Hallie and Vincent were financially sound. Moreover, the Oberhofer sons assert that Hallie had never wavered from her desire that the funds remain in the Trust for the secondary beneficiaries, and had reiterated many times that she did not want or need the assets from the Trust for herself.

¶12 For those reasons, David asked his mother about the letter, both over the phone and in person. In both instances, David contends that Hallie denied knowing anything about the letter, and reiterated that she did not want money from the Trust.

¶13 As a result, David declined to distribute the Trust assets. There has never been any distribution of Trust assets made at any time.

¶14 Vincent, as power of attorney for Hallie, then initiated this action in October 2015, petitioning the trial court to order David, as the trustee, to distribute all of the Trust assets and terminate the Trust. Andrew submitted an affidavit that stated Hallie was aware of the lawsuit and did not agree with it, but felt there was nothing she could do about it.

¶15 The Oberhofer sons attempted to do discovery on this matter, including providing notice for taking Hallie's deposition. Vincent moved to quash the deposition, arguing that Hallie's medical condition was a basis to quash the notice. Furthermore, Vincent asserted that taking a deposition at that time would be premature because the trial court had not yet determined whether it would intervene in the matter.

¶16 In contrast, the Oberhofer sons filed a motion to compel, and moved for expedited relief due to Hallie's medical condition. In support of their argument, Michael, a physician specializing in radiology and internal medicine, filed an affidavit dated November 24, 2015. He stated that while Hallie was sometimes confused, her memory problems were limited to short-term recall. Michael had visited with Hallie approximately one week before the affidavit was written and found that she had showed no signs of confusion or dementia. However, he also stated, in his professional opinion, that at that time Hallie only had one to two months of "good health" remaining.

¶17 In response to the parties' motions, the trial court ordered an independent medical exam (IME) of Hallie to be conducted on January 2, 2016, at the nursing home where she was residing. The doctor who conducted the exam

found that Hallie “lack[ed] substantial mental capacity to reliably offer sworn testimony in the context of a deposition in this case.” At the time of the IME, Hallie was in a locked memory care unit at the nursing home because when she was initially moved to the home, she had engaged in “exit seeking” behavior; that behavior had since ceased. The court granted Vincent’s motion to quash.

¶18 Hallie died on March 13, 2016. Vincent continued this action as the personal representative of Hallie’s estate.

¶19 Vincent subsequently moved the trial court for distribution of the Trust funds. The Oberhofer sons responded that this dispositive motion was premature because they had not had the opportunity to conduct discovery. Furthermore, they argued that there were genuine issues of material fact that precluded granting the motion, specifically whether Hallie was coerced, under duress, or incompetent when she signed the written request letter. They also raised the issue of whether Hallie’s entering into the Family Agreement was a valid disclaimer. Nevertheless, the trial court granted Vincent’s motion without making any findings relating to those issues. This appeal follows.

DISCUSSION

¶20 The Oberhofer sons argue that the trial court erred in granting Vincent’s dispositive motion on an incomplete record that did not allow for the court’s consideration of evidence relating to material issues of fact.

¶21 The trial court’s decision to grant summary judgment is a question of law that this court reviews *de novo*. *Strasser v. Transtech Mobile Fleet Serv., Inc.*, 2000 WI 87, ¶28, 236 Wis. 2d 435, 613 N.W.2d 142. Summary judgment is appropriate only “if the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” WIS. STAT. § 802.08(2). In reviewing the granting of summary judgment, this court “construe[s] all facts and reasonable inferences in the light most favorable to the nonmoving party.” *Thomas ex rel. Gramling v. Mallett*, 2005 WI 129, ¶4, 285 Wis. 2d 236, 701 N.W.2d 523.

¶22 The interpretation of trust provisions is a question of law that we review *de novo*. See *Uihlein v. Uihlein*, 11 Wis. 2d 219, 225, 105 N.W.2d 351 (1960) (“The general principles governing the interpretation of a trust instrument are the same whether created *inter vivos* or by will.”); *Estate of Larson v. Larson*, 196 Wis. 2d 231, 234, 538 N.W.2d 802 (Ct. App. 1995) (the interpretation of will provisions is a legal question that this court reviews *de novo*).

¶23 In reviewing trust provisions, the language of the trust “should be construed so as to give effect to the subjective intent of the settlor.” *State v. Barr*, 78 Wis. 2d 254, 258, 253 N.W.2d 901 (1977). “Where there is no ambiguity inherent in the trust document, that intention may be ascertained from the language of the trust document itself, considered in light of the circumstances surrounding its drafting.” *Id.*

¶24 The Trust provisions that are pertinent here are set forth in Article Nine of the Trust, regarding distribution of the Trust funds upon Shirley’s death. Hallie was the sole primary beneficiary of the Trust at the time of Shirley’s death and, as such, the Trust assets were directed to be distributed to Hallie “outright and free of trust” upon Shirley’s death. However, the Trust also provided, in Section 4 of Article Nine:

[W]henever a total or partial distribution of trust principal is authorized or required to be made outright and free of trust by a provision of this Article ... to any beneficiary, my Trustee shall have the power, in its sole and absolute discretion, to retain such distribution in trust....

Still, the subsections of Section 4 direct the trustee to distribute the Trust principal and income to the beneficiary at any time “at the beneficiary’s written direction.” In other words, Hallie, as the primary beneficiary, at any time during her life could request in writing that David, the trustee, distribute the Trust assets.

¶25 In their argument against the distribution of the Trust funds to Hallie’s estate, the Oberhofer sons assert that no written request for distribution had been made by Hallie in the five years between entering into the Family Agreement in July 2010 and receiving the letter prepared by Attorney Vaughn in September 2015. To the contrary, the Oberhofer sons contend that Hallie had always maintained her support of the terms of the Family Agreement, repeatedly stating that she did not want or need funds from the Trust. Furthermore, the letter from Attorney Vaughn was written around the time that Hallie had been moved out of her home and into hospice care. In that context, and with that timing, the Oberhofer sons raised the issue of whether Hallie had been subject to undue influence or duress, or was possibly incompetent when she signed that letter.

¶26 These are fact-driven issues. *See, e.g., Johnson v. Merta*, 95 Wis. 2d 141, 154-57, 289 N.W.2d 813 (1980) (where the court analyzed a claim of undue influence); *Wurtz v. Fleischman*, 97 Wis. 2d 100, 108, 293 N.W.2d 155 (1980) (“the question of whether duress existed in a particular transaction is a matter of fact”); *Kainz v. Ingles*, 2007 WI App 118, ¶¶16-21, 300 Wis. 2d 670, 731 N.W.2d 313 (where the court analyzed the standard of review on a competency claim). Yet, the trial court here made no findings with regard to these

claims, even though the Oberhofer sons briefed the issues and submitted affidavits in support of their arguments.

¶27 These claims are directly relevant to whether the Trust assets can be distributed. As provided in Article Nine of the Trust, distribution required a written request by Hallie; if that written request is found to be invalid, then the Trust assets are not to be distributed. The affidavits submitted by the Oberhofer sons contain sufficient facts and inferences that can be drawn from those facts to call into question the letter's validity. That question is material to the issue of whether the Trust assets should be distributed to Hallie's estate, and requires fact-finding to resolve.

¶28 Accordingly, the Oberhofer sons have raised a genuine issue of material fact that precludes summary judgment. *See* WIS. STAT. § 802.08(2); *Gramling*, 285 Wis. 2d 236, ¶4. We therefore reverse and remand this matter to the trial court to determine whether the written request for distribution submitted by Attorney Vaughn, as signed by Hallie, was valid.

¶29 We note that the Oberhofer sons also raised the issue of whether the Family Agreement constitutes a valid verbal disclaimer of the Trust assets by Hallie, as well as the applicability of the Dead Man's Statute. We do not reach those issues here, based on our conclusion that further fact-finding is necessary for this entire matter. However, we believe that these issues will need to be addressed on remand in order for this matter to be fully resolved. Additionally, evidence relating to Shirley's intent in drafting the Trust—specifically, that she left Vincent out of the Trust completely, and later named David as the successor trustee—is also appropriately considered by the trial court on remand.

¶30 In sum, the trial court's preemption of the Oberhofer sons' attempts at discovery resulted in this matter not being fully litigated because genuine issues of material fact were not addressed. Thus, the court's granting of Vincent's motion for distribution, which was dispositive of the case, was made in error. Consequently, this matter is reversed and remanded for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.

