COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 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. 2016AP2491 **Cir. Ct. No. 2012CV3621**

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

DAVID MACLEISH, HAYDEN MACLEISH, KAY MACLEISH AND ROBIN MACLEISH,

PLAINTIFFS-APPELLANTS,

V.

BOARDMAN & CLARK LLP, QUALE HARTMANN, S.C., CONTINENTAL CASUALTY COMPANY AND ONEBEACON INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: JOSANN M. REYNOLDS, Judge. *Affirmed*.

Before Sherman, Blanchard and Kloppenburg, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. David MacLeish, Hayden MacLeish, Kay MacLeish, and Robin MacLeish (collectively, the MacLeish children) appeal a summary judgment dismissing their legal malpractice action against Boardman & Clark, LLP, Quale Hartman, S.C., Continental Casualty Company, and OneBeacon Insurance Company (collectively, the Respondents). The MacLeish children alleged in their complaint that Attorney Forrest Hartmann, an attorney formerly associated with Boardman & Clark, was negligent in the manner in which he administered the estate of their father, Charles MacLeish, in 1984.[1] The circuit court granted summary judgment in favor of the Respondents on the ground that the summary judgment evidence does not show that the MacLeish children may proceed with this legal malpractice action against the Respondents. For the reasons discussed below, we affirm.

BACKGROUND

¶2 The following facts are undisputed. Charles died in April 1984. Charles's will at the time of his death was drafted in 1967 by Attorney James Hill, who is now deceased. Charles's will provided as follows:

> LAST WILL AND TESTAMENT
> of
> CHARLES MacLEISH
>
> I, Charles MacLeish, of the Town of Caledonia, Columbia County, Wisconsin, do make, publish and declare this instrument as my Last Will and Testament.

[1] In their complaint, the MacLeish children also alleged that the attorney who drafted Charles's will was negligent in failing to draft the will in a manner that expressly called for the assets of Charles's estate to be placed in a testamentary trust. However, the circuit court dismissed the complaint in its entirety, and the MacLeish children do not discuss the drafting attorney's alleged negligence in their brief on appeal. Therefore, we deem the MacLeish children to have forfeited this issue in the circuit court and abandoned it on appeal.

> FIRST: I direct the payment of my just debts and funeral expenses.
>
> SECOND: All the rest, residue and remainder of my property I give, devise and bequeath to my beloved wife, Thelma MacLeish, to use the income and so much of the principal as she may need for her care, comfort and support during her lifetime, meaning and intending hereby to give to my wife, Thelma MacLeish, the life use of the income and so much of the principal as she may need.
>
> THIRD: At the death of my wife, Thelma, I direct that the remainder of my estate in existence at that time be placed in trust until my youngest child shall have completed his college education through a Bachelor's degree or indicated in writing to the trustee that he did not desire any further education, at which time said trust shall terminate and the remainder of my estate shall be divided equally between my four children.
>
> FOURTH: I nominate and appoint my beloved wife, Thelma MacLeish, executrix of this my Last Will and Testament and request of her that she employ the firm of Hill, Miller & Quale in the settlement of my estate.
>
> IN WITNESS WHEREOF, I have hereunto set my hand and seal this 1st day of the February, 1967.
>
> [Signature of Charles MacLeish and witness signatures.]

¶3 Attorney Hartmann, a former law partner of Attorney Hill, handled the administration of Charles's estate.[2] Attorney Hartmann advised Thelma "to claim full use of a [federal estate tax] marital deduction" for Charles's estate. At that time, there was no limit on the federal marital deduction. Thelma followed Attorney Hartmann's advice. She treated all of the assets of Charles's estate as though they passed directly to her and she claimed a federal estate tax marital deduction for all those assets. The effect at the time was that the assets of

[2] At some point, Attorney Hartmann became a partner in the law firm of Quale Hartmann, S.C., which later merged into the law firm currently known as Boardman & Clark.

Charles's estate were not subject to federal estate tax in 1984, but would be subject to taxation upon Thelma's death.

¶4 Thelma died in February 2008. Thelma's estate, which included those assets that passed from Charles's estate to Thelma which were then remaining, incurred a federal estate tax of $261,343.

¶5 In 2012 the MacLeish children, who are the remainder beneficiaries under the terms of Charles's will, and the sole beneficiaries of Thelma's estate, brought the present legal malpractice action against the Respondents. The MacLeish children alleged that the $261,343 federal estate tax on Thelma's estate "was entirely avoidable" if, in 1984, the then maximum federal unified transfer credit had been utilized as to Charles's assets through a "bypass trust."[3] Relevant to this appeal, the MacLeish children alleged that the law firm of Boardman & Clark was negligent in the following ways: (1) probating Charles's estate without setting up a trust upon the assets of Charles's estate, which was "suggested by the language of the will"; (2) failing to administer Charles's estate "in such a way that the personal exemption was exhausted"; (3) failing to administer Thelma's estate "as if her interest in the assets she inherited from Charles were limited to a life interest"; and (4) failing to "remedy[] the situation once it was discovered that the

[3] A bypass trust is a type of irrevocable trust used to pass assets from parents to children at the time of the second parent's death and it is generally structured in a way that the children will not have to pay taxes on those assets in excess of the current estate tax exemption that is still available to the estate of the first spouse to die. *See* 1A WIS. PRAC., Methods of Practice § 23:25 (5th ed); *see also* BUSINESS TRANSACTION SOLUTIONS § 20:25. A qualified terminable interest property (QTIP) trust, is a type of bypass trust. In a QTIP trust, the surviving spouse receives all the income from the trust's assets for life and the trust, can, but does not have to, pay any of the trust's principal to the surviving spouse. The principal in a QTIP trust is often left to someone else, usually children. 1A WIS. PRAC., Methods of Practice § 23:25 (5th ed).

assets of Charles[‘s estate] had grown in value to make Thelma[‘s] [e]state taxable.”

¶6 Following various procedural matters and proceedings not relevant here,[4] the circuit court granted summary judgment in favor of the Respondents. The court determined that the MacLeish children had failed to show that they could proceed with their claims as third party beneficiaries of the will, because there is no evidence that Attorney Hartmann’s actions in administering Charles’s estate thwarted Charles’s testamentary intent. The MacLeish children moved the circuit court for reconsideration, which the court denied. The court subsequently entered a judgment dismissing the MacLeish children’s complaint in its entirety. The MacLeish children appeal.

DISCUSSION

¶7 The MacLeish children contend that the circuit court erred in determining on summary judgment that they failed to present evidence that could support a viable legal malpractice action against the Respondents based on Attorney Hartmann’s alleged negligence during the administration of Charles’s estate in 1984.

¶8 We review a circuit court’s decision to grant or deny summary judgment de novo. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if there is no genuine issue of

[4] These include a prior order of summary judgment in favor of the Respondents based on a damages issue, which this court reversed on appeal. *See* ***MacLeish v. Boardman & Clark LLP***, No. 2014AP575, unpublished slip op. (WI App Mar. 5, 2015).

material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2015-16).

¶9 Generally, only an attorney's clients may sue that attorney for malpractice. ***Beauchamp v. Kemmeter***, 2001 WI App 5, ¶7, 240 Wis. 2d 733, 625 N.W.2d 297. This means that generally, "an attorney is not liable to third parties for negligent acts committed within the scope of the attorney-client relationship." ***Id.*** However, our supreme court has established an exception to the requirement of an attorney-client relationship between the plaintiff and defendant in an attorney malpractice action. *See* ***Auric v. Continental Cas. Co.***, 111 Wis. 2d 507, 512, 513, 331 N.W.2d 325 (1983). The supreme court has held that an attorney can be liable to a party named in a will if the attorney was negligent in drafting or supervising the execution of the will, but only if the attorney's negligence "thwarted the decedent's clear intent." ***Tensfeldt v. Haberman***, 2009 WI 77, ¶73, 319 Wis. 2d 329, 768 N.W.2d 641; *see also* ***Auric,*** 111 Wis. 2d at 512.[5]

¶10 The MacLeish children do not argue or cite this court to any legal authority that in Wisconsin, a third party beneficiary may also bring a legal malpractice action against an attorney who is negligent in the manner in which the

[5] The circuit court relied on ***Tensfeldt v. Haberman***, 2009 WI 77, 319 Wis. 2d 329, 768 N.W.2d 641, for the "thwarted the decedent's clear intent" rule. In their principal brief on appeal, the MacLeish children assert, without making any reference to ***Tensfeldt,*** that the standard for determining whether they could prevail is found in a five-factor balancing test referenced in ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 322-23, 401 N.W.2d 816 (1987). However, after the Respondents provide a supported argument that the court in ***Green Spring Farms*** limited application of the five-factor test to different contexts than is presented here, the MacLeish children fail to make explicit reference to *either* ***Tensfeldt*** or ***Green Spring Farms*** in their reply brief (a fact somewhat obscured by their failure to include a table of contents for their reply brief), implicitly conceding that we may rely on ***Tensfeldt***, and therefore we do not reference the five-factor test further. *See* ***United Co-op. v. Frontier FS Co-op.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in reply brief to argument made in response brief may be taken as concession).

attorney administered an estate, as opposed to the manner in which an attorney drafted a will. The MacLeish children seem to presuppose that they can. However, while cited case law does not specifically extend such liability to administration of the decedent's estate, such an extension would appear to be consistent with the holding, and is implied by the following language in ***Auric***: "In this state, there is a constitutional right to make a will and *to have it carried out* according to the testator's intentions." ***Auric,*** 111 Wis. 2d at 513 (emphasis added). Whether or not the exception can be extended to administration of an estate does not determine the outcome here. Accordingly, we will assume, without deciding, that the same exception can be extended to the administration of a decedent's estate where negligence thwarts the decedent's clear testamentary intent.

¶11 The Respondents contend that summary judgment in their favor is appropriate because the summary judgment evidence establishes that Charles's "clear intent" was not "thwarted" by Attorney Hartmann's alleged negligence in administering Charles's estate and, thus, the MacLeish children may not proceed with their legal malpractice claim.

¶12 The MacLeish children's arguments on appeal are generally difficult to follow. To the extent that we do not address an argument that the MacLeish children intend to make, we reject that argument as insufficiently briefed to this court. However, as best we understand their arguments, the MacLeish children intend to argue that the will is evidence that Charles's "clear intent" was "thwarted" by Attorney Hartmann's alleged negligence in administering Charles's estate. More specifically, they appear to argue that the will provided that the assets of Charles's estate be placed in a QTIP trust in which the assets of the estate were given to the MacLeish children, subject to a life estate interest in those assets

by Thelma. Thus, the MacLeish children apparently intend to argue that during the administration of Charles's estate, Attorney Hartmann negligently failed to construe the will as though it created this testamentary trust, and instead construed the will as bequeathing Charles's entire estate to Thelma outright. They further appear to argue that Charles's intent was frustrated by Attorney Hartmann's negligence in administering Charles's will because upon Thelma's death, Thelma's estate included the entirety of Charles's estate rather than just a life interest in Charles's estate, which resulted in the children receiving a "dramatically reduced" inheritance from their father because Thelma's estate owed an estate tax of $231,343, which would have been avoided had the assets of Charles's estate been placed in a trust and available estate tax credits utilized. In summary, the children argue that the attorney failed to properly construe Charles's will as creating a trust—with the assets of the estate being given to the children, and a life interest in those assets given to Thelma—and as a result some, or possibly all, of the assets of Charles's estate remaining at the time of Thelma's death, were not sheltered from federal estate taxes upon Thelma's death, as the assets could have been.

¶13 For the reasons explained below, we conclude that Charles's will did not create a trust, as argued by the MacLeish siblings, and therefore by definition the attorney's failure to read the will as creating a trust could not have thwarted any clear intent of Charles.

¶14 Where, as here, the relevant facts are undisputed, the interpretation of a will presents a question of law, which we review de novo. ***Caflisch v. Staum***, 2000 WI App 113, ¶6, 235 Wis. 2d 210, 612 N.W.2d 385. Our task in construing a will is to determine the testator's intent, and the best evidence of this is the language of the will itself. ***Id.*** If the language of the will is clear and

unambiguous, that language controls and we will not look beyond that language to construe the will. ***Morkin v. Clancy***, 56 Wis. 2d 100, 104, 201 N.W.2d 599 (1972). The parties do not argue that Charles's will is ambiguous, and we agree that it is not. Accordingly, we look only to the language contained in Charles's will.

¶15 A trust requires the following three elements: (1) A trustee, who holds the trust property and is subject to equitable duties to deal with it for the benefit of another; (2) a beneficiary, to whom the trustee owes equitable duties to deal with the trust property for his benefit; and (3) trust property, which is held by the trustee for the beneficiary. ***Wisconsin Medical Society, Inc. v. Morgan***, 2010 WI 94, ¶62, 328 Wis. 2d 469, 787 N.W.2d 22; *see* ***Sutherland v. Pierner***, 249 Wis. 462, 467, 24 N.W.2d 883 (1946) (describing these elements); *see also* WIS. STAT. § 701.0402(1) (2015-16). The person who establishes a trust, commonly referred to as the settlor, ***McMahon v. Standard Bank and Trust Co.***, 202 Wis. 2d 564, 568, 550 N.W.2d 727 (Ct. App. 1996), does not have to use the words "trust" or "trustee." *See, e.g.*, ***In re Wadleigh's Estate***, 250 Wis. 284, 26 N.W.2d 667 (1947). However, the settlor must express intent to impose on the intended trustee enforceable duties with regard to the trust property for the benefit of the intended beneficiary or beneficiaries of the trust. *See* ***id.*** at 288-89.

¶16 As quoted above, Charles's will provided in relevant part:

> All the rest, residue and remainder of my property I give, devise and bequeath to my beloved wife, Thelma MacLeish, to use the income and so much of the principal as she may need for her care, comfort and support during her lifetime, meaning and intending hereby to give to my wife, Thelma MacLeish, the life use of the income and so much of the principal as she may need.

Neither this language nor any other language in the will manifests an intent by Charles that a trustee be appointed, that the assets of Charles's estate be held by a trustee for the benefit of Thelma, or that enforceable duties with respect to those assets be imposed upon a trustee. Instead, Charles's will gave Thelma absolute power over disposition of the assets of Charles's estate. The word "trust" appears in the will, but only and clearly in connection with events postdating Thelma's passing.

¶17 In ***In re: Zweifel's Will***, the supreme court concluded that a trust was not created where language of a will gave the testator's widow absolute power of disposition over the testator's assets during the widow's lifetime. *See* ***In re Zweifel's Will***, 194 Wis. 428, 436 (1927). The testator's will in ***In re Zweifel's Will*** provided that his surviving spouse had the absolute power to dispose of the assets of his estate during the surviving spouse's lifetime, and that upon the surviving spouse's death, the residue of the testator's estate would be divided between various legatees. ***Id.*** The supreme court concluded that the testator intended to give the surviving spouse a life estate with absolute power to dispose of the assets of the testator's estate, but subject to the future estate of the remainder beneficiaries. ***Id.***

¶18 The language in Charles's will directing the disposition of the assets of his estate is similar to the language of the will at issue in ***In re: Zweifel's Will.*** Charles's will provided that Thelma had absolute power to dispose of the assets of Charles's estate during her lifetime, and upon her death the residue of Charles's estate would be divided among the MacLeish children. We conclude that like the testator in ***In re: Zweifel's Will,*** Charles intended to give Thelma a life estate with absolute power to dispose of the assets of Charles's estate, but subject to the future estate of the MacLeish children. *See* ***id.***

¶19 The MacLeish children's argument that Charles's intent was "thwarted" depends on their assertion that Charles's will directed that the assets of Charles's estate be placed in a trust, with a life interest in those assets in Thelma. Having concluded that Charles's will does not create such a trust, we conclude that the MacLeish children have failed to point to evidence on summary judgment that Charles's intent was thwarted by Attorney Hartmann's alleged negligence in administering Charles's estate, and that they have thus failed to show that they may proceed with the present action. *See* ***Tensfeldt***, 319 Wis. 2d 329, ¶73. As far as we can discern, our conclusion that the will did not create a trust defeats all arguments that the MacLeish children intend to raise in this appeal. Accordingly, we affirm summary judgment in favor of the Respondents.

CONCLUSION

¶20 For the reasons discussed above, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).