COURT OF APPEALS
DECISION
DATED AND FILED

May 22, 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. 2016AP2184 **Cir. Ct. No. 2015CV36**

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

DEBRA JAMES, AS TRUSTEE,

PLAINTIFF-RESPONDENT,

V.

ESTATE OF ROBERT WICKE,

DEFENDANT-APPELLANT,

NORMAN JOHN WICKE,

DEFENDANT-THIRD-PARTY
PLAINTIFF-RESPONDENT,

V.

DEBRA JAMES, INDIVIDUALLY,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Taylor County: PATRICK J. MADDEN, Judge. *Affirmed*.

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

¶1 PER CURIAM. The Estate of Robert Wicke[1] appeals a grant of summary judgment in favor of Debra James, the trustee of certain trusts established by Norman Wicke and approved by the circuit court in a prior Taylor County case. Each of the trusts contained an in terrorem clause that required a beneficiary to forfeit his or her share if he or she, directly or indirectly, contested or opposed the validity of the instrument or continued any legal proceedings to set aside the instrument. The circuit court concluded Robert had forfeited his share in two trusts by challenging them in the prior case. That challenge included Robert's filing of an appeal from an adverse judgment, in which we rejected Robert's arguments on the merits, and his petitioning the Wisconsin Supreme Court for review of our decision. We conclude the circuit court properly granted Debra's summary judgment motion, and we therefore affirm.

BACKGROUND

¶2 In Taylor County Circuit Court case No. 2012GN10, Norman petitioned the circuit court to appoint Debra as conservator of his estate. Debra

[1] Robert Wicke died while this litigation was pending in the circuit court, and his estate was substituted as a party. We refer to the parties and others involved in this matter by their first names to avoid confusion.

was subsequently issued letters of conservatorship. In connection with that litigation, Norman signed an affidavit averring he had spent "'several years' after his wife's death 'reconfiguring his assets and beneficiary designations' in a manner he believed was fair to all of his children." *See* ***James v. Wicke***, No. 2014AP78, unpublished slip op. ¶5 (WI App Oct. 7, 2014) (***Wicke I***). Norman ultimately developed an asset preservation plan that reflected his wish not to distribute his estate in equal shares to his children, who included Debra, Robert, Norman John Wicke, and others. *See* ***id.***, ¶¶4-5.

¶3 On July 22, 2013, Debra petitioned the circuit court for approval of the asset preservation plan. The petition proposed to divest Norman of certain assets so that he could qualify for care assistance from the United States Department of Veterans Affairs. Debra proposed to accomplish this by establishing several irrevocable trusts. Robert was a beneficiary of two of the proposed trusts, Wicke Investment Trust I and Wicke Investment Trust II.

¶4 The petition identified each trust's distribution provisions as implementing the estate plan that Norman had created over the years. Each of the trusts contained the following in terrorem clause, located in § 10.03 of the relevant trust instrument:

> If, after receiving a copy of this Section, any person, in any manner, directly or indirectly, attempts to contest or oppose the validity of this agreement (including any amendment to this agreement), or commences, continues, or prosecutes any legal proceeding to set this agreement aside, then such person shall forfeit his or her share, cease to have any right or interest in the property, and shall, for purposes of this agreement be deemed to have predeceased me.

¶5 Robert received draft copies of the Wicke Investment Trust I and Wicke Investment Trust II approximately one week before a scheduled court

hearing on the petition in August 2013. He retained counsel and ultimately filed an objection to the proposed asset preservation plan. On October 21, 2013, the circuit court approved the plan over Robert's objection. Norman executed the trust instruments shortly thereafter, on November 4, 2013.

¶6 Robert appealed the circuit court's decision. He requested a stay pending appeal, which the circuit court denied. We ultimately affirmed the court's decision to approve the plan and rejected each of Robert's appellate arguments. *See* ***Wicke I***, No. 2014AP78, ¶¶7-15. Robert filed a petition for review with the Wisconsin Supreme Court on November 24, 2014. The supreme court denied review on February 10, 2015.

¶7 Debra filed the present action on April 16, 2015, seeking to enforce the in terrorem clause against Robert and Norman John.[2] Debra and Robert each filed motions for summary judgment. The circuit court held a nonevidentiary hearing, at which it concluded that Norman made "reasonable, rational decisions," that the in terrorem clauses were "very straightforward," and that Robert's conduct in challenging the trusts in the earlier case was a violation of those clauses.[3] It subsequently entered a written judgment consistent with those conclusions, adding that Robert further violated the in terrorem clause by pursuing his appeal and

[2] The circuit court concluded Norman John had violated the in terrorem clause. Norman John did not appeal. Although he is identified in the case caption as a respondent to Robert's appeal, this matter was taken under submission without his having filed briefs.

[3] Robert makes much of the fact that the circuit court referred to the in terrorem clause as a "no soup for you" provision, referring to the popular 1995 Seinfeld episode titled "The Soup Nazi." Essentially, Robert argues the circuit court erred because the court's shorthand reference was the sum total of its entire reasoning in granting summary judgment. To the contrary, the court set forth a comprehensive written order in which it recited the undisputed facts and then set forth its legal conclusions based on those facts.

petitioning the Wisconsin Supreme Court for review in the prior case. The court also declared that Robert lacked probable cause for any of his challenges to the trusts. Consequently, he was deemed to have predeceased Norman for purposes of the trusts. Robert now appeals.

DISCUSSION

¶8 We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. We need not restate that well-established methodology here. *See* ***Tews v. NHI, LLC***, 2010 WI 137, ¶41, 330 Wis. 2d 389, 793 N.W.2d 860. Suffice it to say that a party is entitled to summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2) (2015-16).[4]

¶9 The parties disagree about what it means to "receive[] a copy of this Section" under the in terrorem clauses. According to Robert, it was necessary that he receive copies of the final, signed trust documents. Debra, on the other hand, asserts it was sufficient that Robert received a copy of the section's text—any copy will do, presumably, as long as the same text was ultimately included in the executed documents.[5] Thus, Robert contends that the draft copies of the clauses he received in August 2013 were insufficient, while Debra contends those copies

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

[5] This latter point was only implied in Debra's argument, as she does not argue a beneficiary would forfeit his or her share under an in terrorem clause if the copy of the clause received by the beneficiary differed from the clause contained within the executed document.

sufficiently put Robert on notice of the consequences of a potential challenge to the trusts, even if the trust instruments were signed later.

¶10 Questions of trust construction involve ascertaining the settlor's intent. ***Furmanski v. Furmanski***, 196 Wis. 2d 210, 215, 538 N.W.2d 566 (Ct. App. 1995). "The language of the document is the best evidence of the … settlor's intent." ***Id.*** If there is no ambiguity in the document, we need not look further as to what the settlor's actual intent may have been. ***Id.*** The interpretation of trust documents presents a question of law. ***Id.*** at 214.

¶11 The plain language of the trusts' in terrorem clauses shows that Debra's interpretation is correct. The in terrorem clauses apply if the beneficiary "receive[s] a copy of this Section" and goes on to take certain actions contesting the relevant trust. Debra correctly notes that the clauses do "not state that a party must receive a fully executed copy of the Trusts, or require that the copy be authenticated, conformed, or otherwise presented in any special manner." Robert's assertion that the in terrorem clauses did not apply because he did not receive copies of the executed trust documents is contrary to § 10.03's statement that only a "copy of this Section" is necessary.

¶12 Robert next argues he did not impermissibly contest or litigate the validity of the trusts after they were executed so as to forfeit his shares by virtue of the in terrorem clauses. In Robert's view, there is a distinction between challenging the *validity* of a trust and challenging the *establishment* of a trust. Robert argues he was doing the latter because he challenged only the "draft" trusts before they were approved by the circuit court. As such, he asserts he did not violate the in terrorem clauses.

¶13 As Robert correctly notes, the trusts had not been established at the time he filed his brief objecting to the asset preservation plan in Taylor County Circuit Court case No. 2012GN10. Even so, we do not agree that, for purposes of the in terrorem clauses, there is a meaningful distinction between challenging the establishment of a trust versus challenging the trust's validity, and Robert provides no compelling reason or authority showing otherwise. A preemptive challenge to the trusts was, at a minimum, an "indirect" attempt to oppose the trusts' validity, one that brought the beneficiary's actions within the scope of the in terrorem clauses if the attempt persisted at the time the trusts went into effect.[6]

¶14 Robert asserts the trusts were not created until the Wisconsin Supreme Court denied his petition for review in connection with Taylor County Circuit Court case No. 2012GN10. Contrary to Robert's arguments, the trusts became effective at the time they were signed by the settlor—namely, on November 4, 2013. Although Robert cites a treatise for the proposition that an appeal "suspends a judgment and deprives it of its finality," that is not the rule in Wisconsin. Rather, as a general rule, an appeal does not stay the execution or enforcement of the judgment or order appealed from. *See* WIS. STAT. § 808.07(1).

¶15 A circuit court may stay its decision and order pending appeal. WIS. STAT. § 808.07(2). Robert requested such relief from the circuit court in the prior case, which the court denied on October 29, 2013. Norman signed the trust

[6] Robert also argues that he never contested the trusts that were actually executed, suggesting there was a distinction between the conservator's asset preservation plan and the trusts Norman eventually established. To the contrary, the sole purpose of the asset preservation plan was to create the trusts to which Robert objected. Ultimately, Robert fails to explain how the trusts were different from the asset preservation plan, or why it should matter that the conservator, not Norman, petitioned for approval of the trusts in Taylor County Circuit Court case No. 2012GN10, especially when the trusts were indisputably executed by Norman.

documents shortly thereafter. Robert subsequently maintained his appeal and then petitioned the Wisconsin Supreme Court for review of our decision, all in an effort to invalidate the trusts. This conduct fell squarely within the in terrorem clause.[7]

¶16 In his reply brief in this appeal, Robert argued it was "undisputed" he never received notice that the trusts were signed until Debra filed the present action. Naturally, this assertion caused us to question whether such a fact was truly undisputed (Robert provided no record citations for this assertion), and, if so, whether an in terrorem clause could be enforced against a beneficiary who did not know that the clause had gone into effect. We requested supplemental briefing on these issues.

¶17 Based upon the parties' supplemental submissions, we conclude that we need not resolve whether Robert required notice of the trust instruments' executions for the in terrorem clauses to work a forfeiture of Robert's shares. As an initial matter, Robert failed to raise in the circuit court the issue that he lacked notice that the trusts had been signed.[8] Instead, Robert repeatedly argued that the

[7] To the extent Robert argues his challenges to the trusts were merely procedural, such an argument is without merit. Even procedural challenges to the trusts arguably sufficed as "indirect" attempts to invoke the legal process to have the trust instruments set aside. That notwithstanding, Robert's brief in the earlier appeal clearly argued there was no justification for having multiple trusts and he opposed the "creation and funding with Norman's assets of the six irrevocable trusts."

[8] Robert argues his "lack of knowledge of the signed trusts was raised in the trial court." However, the record citation he provides is to a page in his summary judgment brief that does not include any argument whatsoever regarding his knowledge as to whether the trust instruments had been signed. Instead, he merely maintained in that filing, as he did consistently before the circuit court, that he had never received a signed copy of the trust instruments.

Indeed, despite our express instruction to address record support for Robert's "undisputed" assertion regarding when he received notice that the trusts were signed, Robert's supplemental brief provides no such record citation supporting his claim that he was not aware the trusts had been executed before this case was commenced. We agree with Debra that this omission alone would defeat any "notice" argument for Robert.

in terrorem clauses were not effective against him unless he had received final, signed copies of the trust instruments. But whether the in terrorem clauses required that Robert receive signed copies of the trust instruments is a different issue than whether Robert knew the trust instruments had been executed and nonetheless persisted in contesting the trusts. Arguments raised for the first time on appeal are generally deemed forfeited. ***Northbrook Wis., LLC v. City of Niagara***, 2014 WI App 22, ¶20, 352 Wis. 2d 657, 843 N.W.2d 851.

¶18 In any event, whatever notice requirement may arguably exist with respect to the execution of a trust instrument containing an in terrorem clause, it was undisputedly satisfied here. In July 2014, while his first appeal was pending before this court, Robert filed an affidavit in Taylor County Circuit Court case No. 2014CV68, in which he averred that Debra was named the trustee "in each of the irrevocable trusts dated November 14, 2013."[9] We take judicial notice of this court document, which establishes that, at least as of July 2014, Robert was aware the trusts had been executed. *See* WIS. STAT. § 902.01(6); ***State v. Johnson***, 181 Wis. 2d 470, 487 n.8, 510 N.W.2d 811 (Ct. App. 1993). Thereafter, he persisted in prosecuting his appeal and petitioned the Wisconsin Supreme Court for review of our adverse ruling, in violation of the in terrorem clauses.

¶19 Robert also argues it would violate public policy to enforce the in terrorem clauses against him. He reasons that because Debra was required to provide him notice of her petition to establish the trusts under WIS. STAT. § 54.22(4)(b), he had a "fundamental right" to contest the establishment of the

[9] We agree with Debra's assessment that the "November 14, 2013" date appears to be a typographic error.

trusts, and application of the in terrorem clauses would violate that "right." Notwithstanding the fact that § 54.22 does not contain a paragraph (4)(b),[10] this argument is a nonstarter. Even if Robert had the "fundamental right" he claims, the in terrorem clause does not foreclose the exercise of that right. Nothing in the in terrorem clause forbids Robert from challenging the trusts; he merely did so subject to the potential application of the in terrorem provision.

¶20 In this vein, it is important to note that the legislature has, by statute, enumerated circumstances in which application of an in terrorem clause would violate public policy. WISCONSIN STAT. § 854.19 states: "A provision in a governing instrument that prescribes a penalty against an interested person for contesting the governing instrument or instituting other proceedings relating to the governing instrument may not be enforced if the court determines that the interested person had probable cause for instituting the proceedings." Robert argues he had probable cause to challenge the trusts merely because the "power of a court to authorize the creation and funding of such trusts [for the purpose of allowing the settlor to qualify for Veterans Administration benefits] … was unknown at the time of Debra's petition."

¶21 We agree with Debra that, whatever the meaning of "probable cause" under WIS. STAT. § 854.19—and Robert offers numerous definitions—it, at a minimum, required Robert to provide a legal basis arguably sufficient to overcome Norman's statutory authority to create the trusts. In the prior appeal, we held that under the "unambiguous language of WIS. STAT. § 54.76(3), court

[10] WISCONSIN STAT. § 54.22 was last amended in 2005, prior to which it also did not contain a paragraph (4)(b). *See* 2005 Wis. Act 387, § 400. We are uncertain to which statute Robert intended to reference when citing § 54.22(4)(b).

approval of the asset preservation plan was unnecessary. Whether the circuit court had legal authority to approve the plan is therefore irrelevant." ***Wicke I***, No. 2014AP78, ¶11. We declined to review the other issue Robert raised because he had failed to raise it in the circuit court and the plain error doctrine did not apply. ***Id.***, ¶¶12-15. Robert has never alleged that Norman was incompetent or otherwise unfit to dispose of his assets in the manner of his choosing. Accordingly, we agree with the circuit court's conclusion that Robert lacked probable cause to challenge the trusts.

By the Court.—Judgment affirmed.

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