COURT OF APPEALS
DECISION
DATED AND FILED

January 13, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2033-FT **Cir. Ct. No. 2007PR72**

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

IN THE MATTER OF THE FRANCES A. CLINE TRUST:

JOANNE DURCHSLAG, CILI DURCHSLAG, CINDI DURCHSLAG AND JILL BERTOLDO,

APPELLANTS,

V.

BENEFICIARY INTERNATIONAL ASSOCIATION FOR CLEAR THINKING,

RESPONDENT.

APPEAL from a judgment of the circuit court for Oneida County: MARK A. MANGERSON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Joanne Durchslag, Cili Durchslag, Cindi Durchslag and Jill Bertoldo (collectively "the Durchslags") appeal a summary judgment

granted in favor of the International Association for Clear Thinking. The Durchslags argue the circuit court erred by deciding the matter on summary judgment. Alternatively, the Durchslags challenge the court's construction of the subject trust.[1] We reject the Durchslags' arguments and affirm the judgment.

BACKGROUND

¶2 This case involves a dispute over the proper construction of the Frances A. Cline Restated Revocable Trust. Cline established the trust in February 1972, restated the trust in April 1987, and amended the trust a total of nine times, most recently in March 1992. The trust provides, in relevant part, that "Twenty-three and four-tenths percent (23.4%) [of the trust residue] shall be distributed to the INTERNATIONAL ASSOCIATION FOR CLEAR THINKING … if that association is in existence at the time of the Grantor's death." Cline died on November 27, 2004. As trustee, Marshall & Ilsley Trust Company filed a petition to distribute the trust assets and terminate the trust.

¶3 The Durchslags, named beneficiaries of the trust, objected to M&I's petition, arguing the Association was not "in existence" at the time of Cline's death. After a hearing, the court granted summary judgment in favor of the Association and this appeal follows.

DISCUSSION

¶4 This court reviews summary judgment decisions independently, applying the same standards as the circuit court. ***Smith v. Dodgeville Mut. Ins.***

[1] This is an expedited appeal under WIS. STAT. RULE 809.17 (2005-06).

Co., 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶5 The Durchslags argue the circuit court erred by deciding the matter on summary judgment. At the hearing, the Durchslags indicated "it may be appropriate for an evidentiary hearing if it becomes an issue as to whether the Court wants to know if [the Association] is still operating or in existence in some sort of actual capacity." Ultimately, after hearing both parties' arguments, the court suggested this was a "de facto summary judgment situation" and asked whether the parties disagreed. The Durchslags' counsel responded: "I would concur with that. I think this case – the status is summary judgment in that the Court certainly could enter a ruling today which would resolve the entire matter if the Court believes it has facts before it to do so."

¶6 In spite of their concession, the Durchslags now claim summary judgment was inappropriate because the trust is ambiguous and there are material facts in dispute. We are not persuaded. By effectively stipulating to disposition of the matter by summary judgment, the Durchslags waived their present challenge. In any event, the Durchslags have failed to identify a dispute of fact *material* to the core inquiry of this case—namely, construction of the term "in existence."

¶7 The construction of a testamentary document presents a question of law that we review independently. ***Furmanski v. Furmanski***, 196 Wis. 2d 210, 214, 538 N.W.2d 566 (Ct. App. 1995). The object of will or trust construction is to determine the intent of the testator or settlor. ***Id.*** at 215. We determine the intent from the language of the document itself, considered in light of the

circumstances surrounding the testator or settlor at the time the document was executed. ***Id.*** The language of the document is the best evidence of the testator's or settlor's intent, and we therefore look first to the language of the document. ***Id.*** If there is no ambiguity in the language of the document, there is no need to look further to determine the testator's or settlor's actual intent. ***Id.***

¶8 Here, the Durchslags argue the trust is ambiguous because the term "in existence" is susceptible to more than one reasonable interpretation. The Durchslags claim the term "in existence" actually means a "vibrant and active" existence. The Durchslags' attempt to attach qualifying adjectives to the term "existence," however, does not render the trust's language ambiguous. The term "in existence" means just that. As the court properly noted, if Cline had wanted to attach some sort of qualitative requirement to the subject term, she could have done so.

¶9 Based on the undisputed facts, the court reasonably concluded the Association was "in existence" at the time of Cline's death. Although the Durchslags contend the Association is "little more than a shell of its former self with no substantial, material or regular activities," the Association remains incorporated in Kentucky while maintaining an office and a toll-free number in Wisconsin. The Association receives orders for information and literature, its library maintains 500 to 1,000 volumes, and it has assets of $150,000 to $200,000. Although the court acknowledged the Association was not functioning as it was at the height of its existence, the trust document did not require the Association to operate at any particular level of success to qualify for the allotted distribution. Because the Association was in existence under the clear terms of the trust, we affirm the judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).