COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1172 **Cir. Ct. No. 98-PR-58**

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

IN RE THE ESTATE OF EBBA ERICKSON:

CALVARY COVENANT CHURCH,

APPELLANT,

V.

MARIE NYQUIST, PERSONAL REPRESENTATIVE FOR THE ESTATE OF EBBA ERICKSON,

RESPONDENT.

APPEAL from an order of the circuit court for Pepin County: DANE F. MOREY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The Calvary Covenant Church appeals an order admitting to probate the 1992 will of Ebba Erickson. The church argues that the trial court erroneously admitted the 1992 will to probate because (1) it was barred

by estoppel and laches; (2) Marie Nyquist, a niece and heir under the will, should not have been permitted to testify; (3) Nyquist's testimony was insufficient to support the order for probate; and (4) as an interested party, Nyquist's testimony was barred by the deadman's statute. We affirm the order.

¶2 Erickson, a widow, died on December 22, 1998, at the age of ninety-two, leaving no children. This dispute arises from the determination of which of two wills should be probated as her final will. The first will, dated October 27, 1988, left $500 each to Nyquist, Carolyn Groves and Delores Hedin, to whom Erickson referred as her nieces. The residue of the estate was left to Erickson's brother and, if he did not survive her, to the church. Erickson's brother predeceased her. The second will, dated October 6, 1992, revoked all prior wills and left the estate to a pour-over trust created on the same date. The trust left the residue to Nyquist, Groves and Hedin.

¶3 Shortly after Erickson's death, Nyquist went to the bank where Erickson kept her safe deposit box. The bank manager conducted an inventory of its contents in Nyquist's presence, but did not permit her to remove any items until she had been appointed personal representative. The manager removed the 1988 will from the box and filed it with the court.

¶4 Nyquist observed a three-ring binder, labeled only as a trust, in the deposit box. She was not allowed to remove or inspect it. However, later she learned that a 1992 will was contained in the ring binder labeled as a trust document.

¶5 On June 30, 1999, Nyquist was appointed personal representative. In August, upon examining the 1992 trust document, she discovered that it

included the 1992 will. She immediately gave it to her attorney, who filed it with the court.

¶6 Also, in August 1999, counsel requested that potential heirs and beneficiaries consent to the probate of the 1992 will. The church did not consent, and in March 2000 filed its objection to probate claiming that the 1992 will was fraudulently executed.

¶7 In January 2001, Nyquist petitioned for admission of the 1992 will to probate. In February, the church filed a motion for summary judgment denying the admission of the 1992 will to probate on the grounds of estoppel or laches. Its motion was denied. In April, following an evidentiary hearing, the trial court admitted the will to probate over the church's objections. The church appeals.

1. Laches and Estoppel

¶8 The church argues that the trial court erroneously denied its motion for summary judgment on the issues of estoppel and laches. It claims that Nyquist discovered the second will in Erickson's safe deposit box on December 28, 1998, the same day she discovered the 1988 will. It contends that Nyquist delayed until August of 1999 to give the second will to her attorney. It further claims that considerable probate activities took place in the interim, resulting in costs and expenses to the estate and the church. The church concludes that it was entitled to summary judgment ruling that Nyquist was estopped from offering the later will because, with knowledge of the later will, she offered an earlier one for probate. We are unpersuaded.

¶9 When reviewing a summary judgment, we perform the same function as the trial court and our review is de novo. *See* ***Green Spring Farms v.***

Kersten, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08.[1] If the material facts or reasonable inferences are disputed, however, summary judgment will be improper. ***Sawyer v. Midelfort*,** 227 Wis. 2d 124, 159, 595 N.W.2d 423 (1999).

¶10 The defense of equitable estoppel consists of action or nonaction that, on the part of one against whom estoppel is asserted, induces reliance thereon by the other, either in action or nonaction, which is to his or her detriment. ***C&NW Trans. Co. v. Thoreson Food Prods.***, 71 Wis. 2d 143, 153, 238 N.W.2d 69 (1976). It is elementary, however, that the reliance on the words or conduct of the other must be reasonable. ***Id.*** at 154.

¶11 The church's arguments assert inferences, not undisputed facts. The record reveals at a minimum a dispute whether Nyquist knew that the trust document contained a later will when the earlier was offered for probate. The bank manager did not permit Nyquist to remove or inspect the trust document in the safe deposit box until after she was appointed personal representative in June 1999. Because the ring binder document was labeled a trust, it would be reasonable to infer that Nyquist did not know it contained a will until August 1999 when she first examined it.

¶12 The church argues, nonetheless, that Nyquist's response to interrogatories establishes that Nyquist discovered the 1988 will and the 1992 will simultaneously. Nyquist's response states: "The bank manager took the 1989

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Will stating that she would file it with the Court in Durand. I saw the Will & Trust dated 1992, however the bank manager said I could not take it out until I was appointed Personal Representative." Consequently, the church claims estoppel on the ground that Nyquist knew of the 1992 will but delayed giving it to her attorney until after the earlier will was admitted to probate.

¶13 Although Nyquist responded that she saw the 1992 will and trust document in the safe deposit box, her response is inadequate to establish as a matter of law that she understood at that time what the document contained. Because it is undisputed that the document was labeled "Ebba C. Erickson Trust" and that the bank manager would not let her remove or inspect it, it is reasonable to infer that her response refers to what she later learned.

¶14 The existence of conflicting inferences will defeat a motion for summary judgment. Also, "[e]quitable defenses such as estoppel, laches, and unclean hands depend entirely upon the factual context in which they are raised …." ***Becker v. Becker***, 66 Wis. 2d 731, 734, 225 N.W.2d 884 (1975). "[I]t is … a rare case when summary judgment can be granted in an action defended on equitable grounds." ***Id.*** We conclude that the church failed to demonstrate as an undisputed fact that Nyquist discovered the two wills simultaneously. That Nyquist offered for probate an earlier will does not estop her from petitioning to admit the subsequent will to probate. *See* ***In re Estate of Yahn***, 258 Wis. 280, 283, 45 N.W.2d 702 (1951). Mere lapse of time does not prevent the probate of a will. ***In re Estate of Helgert***, 29 Wis. 2d 452, 460, 139 N.W.2d 81 (1966). Even without counter-affidavits from Nyquist, the church's failure to produce sufficient evidentiary facts to support a prima facie case entitled the trial court to properly deny its summary judgment motion. *See* ***Walter Kassuba, Inc. v. Bauch***, 38 Wis. 2d 648, 655-56, 158 N.W.2d 387 (1968).

¶15 We further conclude that the church is not entitled to summary judgment based upon laches. Laches is an equitable defense based on the plaintiff's unreasonable delay in bringing suit under circumstances in which the delay is prejudicial to the defendant. ***Sawyer***, 227 Wis. 2d at 159. The successful assertion of laches requires that the defendant prove (1) the plaintiff unreasonably delayed in bringing the claim, (2) it lacked any knowledge that the plaintiff would assert the right on which the suit is based, and (3) it is prejudiced by the delay. ***Id.*** If any single element is missing, laches will not be applied and the claim is allowed to proceed. ***Id.***

¶16 The record fails to show an unreasonable delay. In August 1999, upon learning of the 1992 will, counsel notified interested parties and requested their consent to admit the will to probate. It is apparent that by August 1999 the church knew that Nyquist would assert the right to probate the 1992 will. Consequently, laches should not be applied to bar probate of the will.[2]

2. Nyquist's testimony

¶17 Next, the church contends that the trial court erroneously permitted Nyquist to testify over foundation and secondary-evidence rule objections when two subscribing witnesses were, without explanation, not produced at the hearing. We are unpersuaded. The church's argument ignores the fact that the 1992 will

[2] Included under its heading of estoppel and laches the church also argues that an order admitting a will to probate is a judgment, and that the judgment "is *res judicata* and may not be revoked excepting during a one-year period following its entry." The church nonetheless concedes that such rule does not apply here because the earlier will was not formally admitted to probate, but rather informally admitted by the probate registrar. *See* WIS. STAT. § 865.01 (administrative action of probate registrar is not action of the court). In light of the church's concession, we do not address this argument further.

contains an attestation clause where the signing witnesses attested to all the requirements for a valid will. Our supreme court has stated:

> The form of wills and the requirements for legal execution thereof are subject to legislative control. It is the policy of the courts to sustain a will as legally executed if it is possible to do so consistently with the requirements of the statute. This court has no power to substitute its judgment for that of the legislature as to the essentials of a will and it cannot lower the statutory requirements prescribed, nor can it add any other conditions.

In re Estate of Dejmal, 95 Wis. 2d 141, 153, 289 N.W.2d 813 (1980) (quoting ***In re Estate of White***, 273 Wis. 212, 214, 77 N.W.2d 404 (1956)).

¶18 The formal requirements for the valid execution of a will have been set out in WIS. STAT. § 853.03. That section reads as follows:

> Every will in order to be validly executed must be in writing and executed with all of the following formalities:
>
> (1) It must be signed by the testator, by the testator with the assistance of another person with the testator's consent or in the testator's name by another person at the testator's direction and in the testator's conscious presence.
>
> (2) It must be signed by 2 or more witnesses, each of whom signed within a reasonable time after witnessing any of the following:
>
> (a) The signing of the will as provided under sub. (1).
>
> (b) The testator's implicit or explicit acknowledgement of the testator's signature on the will, within the conscious presence of each of the witnesses.
>
> (c) The testator's implicit or explicit acknowledgement of the will, within the conscious presence of each of the witnesses.

¶19 A duly executed will creates a presumption of validity. ***In re Estate of Malnar***, 73 Wis. 2d 192, 193, 243 N.W.2d 435 (1976). Once the due execution is established, the burden shifts to the will contestant to establish any invalidity.

Id. Where an attestation clause is present, there is a presumption of proper execution that "need not be supported by affirmative memory of witnesses, but, to defeat the will, [the presumption] must be overcome by evidence to the contrary." ***In re Will of Maresh***, 177 Wis. 194, 197, 187 N.W. 1009 (1922). Here, the will contains the following attestation clause:

> The foregoing instrument, consisting of four (4) typewritten pages, was on the day of the date hereof signed, published, and declared by Ebba C. Erickson as, and for, his [sic] Last Will and Testament, in the presence of us, the undersigned, who at his request and in his sight and presence, and in the sight and presence of each other, have hereunto subscribed our names as witnesses, and hereby certify that said Ebba C. Erickson was and is of sound and disposing mind and memory.

The attestation clause, along with Nyquist's testimony that Erickson was alert until the time of her death, constitutes prima facie evidence of the will's proper execution. The church offered no evidence of fraud, mental incompetence or undue influence to counter the presumptive evidence of the proper execution of the will.

¶20 The church points to shortcomings in the form document that constitutes the will and trust, such as errors in grammar and superfluous language. We are satisfied that the careless draftsmanship errors fail to rebut the presumption of validity. The church offers no authority that these kinds of drafting errors should invalidate the will. The church also complains that the attestation clause was signed by John P. Schmelzle and Karen Blake and that Schmelzle was convicted of attempting to practice law without a license. The church offers no authority for invalidating the will on this ground, nor that it goes to the issues of testatrix competence or understanding of the will she signed. The church offers no suggestion of fraudulent conduct in connection with execution of the will, or that

Erickson was misled as to its contents. As a result, the church fails to demonstrate reversible error.

3. Sufficiency of Testimony

¶21 Next, the church argues that Nyquist's testimony was insufficient to support the admission of the 1992 will to probate. The church contends that in addition to the requirements that the will be in writing, signed and properly witnessed under WIS. STAT. § 853.03, case law requires that the testator must be competent and aware of the will's contents.

¶22 At the hearing, Nyquist testified that she was familiar with Erickson's signature and that it was Erickson's signature on the 1992 will. She also testified that based upon her observations of Erickson over the years, she believed that Erickson was competent.

¶23 If the will has been duly executed, it is presumed that the testatrix understood the contents of the document she signed. ***Estate of Malnar***, 73 Wis. 2d at 199. The presumption that a will is valid when duly executed falls where the evidence indicates that the testatrix did not know the contents of the instrument at the time of its execution. ***In re Estate of Barnes***, 14 Wis. 2d 643, 649-50, 112 N.W.2d 142 (1961). The church offered no evidence to counter the presumption of validity and relies on conjecture to question the will's validity. Further, the attestation clause creates a strong presumption of validity that can only be overcome by clear evidence. ***In re Will of Zych***, 251 Wis. 108, 114, 28 N.W.2d 316 (1947). Lacking evidence to the contrary, the trial court properly concluded that the will was duly executed.

4. Deadman's Statute

¶24 Finally, the church argues that the trial court erred when it permitted Nyquist to testify over its objection on competency grounds under WIS. STAT. § 885.16, also known as the deadman's statute.[3] The deadman's statute provides that an interested party is incompetent to testify about a "course of conduct between himself and the deceased which may constitute a transaction." ***Johnson v. Mielke***, 49 Wis. 2d 60, 71, 181 N.W.2d 503 (1970). The church argues that because Nyquist was a nonsubscribing witness, having an interest in the will, she may not testify about conduct on the part of the decedent from which inference may be made that a transaction occurred.

¶25 We agree with the trial court's interpretation. Wisconsin case law provides that the deadman's statute must be strictly construed and, whenever

[3] WISCONSIN STAT. § 885.16, entitled: " Transactions with deceased or insane persons," provides:

> No party or person in the party's or person's own behalf or interest, and no person from, through or under whom a party derives the party's interest or title, shall be examined as a witness in respect to any transaction or communication by the party or person personally with a deceased or insane person in any civil action or proceeding, in which the opposite party derives his or her title or sustains his or her liability to the cause of action from, through or under such deceased or insane person, or in any action or proceeding in which such insane person is a party prosecuting or defending by guardian, unless such opposite party shall first, in his or her own behalf, introduce testimony of himself or herself or some other person concerning such transaction or communication, and then only in respect to such transaction or communication of which testimony is so given or in respect to matters to which such testimony relates. And no stockholder, officer or trustee of a corporation in its behalf or interest, and no stockholder, officer or trustee of a corporation from, through or under whom a party derives the party's interest or title, shall be so examined, except as aforesaid.

possible, not be applied to bar testimony. ***Hunzinger Constr. Co. v. Granite Resources Corp.***, 196 Wis. 2d 327, 333-34, 538 N.W.2d 804 (Ct. App. 1995). The trial court's construction and narrowing of Nyquist's testimony conforms to the current treatment of the deadman's statute. Limiting Nyquist's testimony to her observations of Erickson's actions relating to her mental competency is consistent with the plain language of the statute and a narrow application. The trial court did not permit Nyquist to testify about communications or transactions between herself and Erickson. The distinction drawn by the trial court clearly gives proper effect to the statute itself and the case law disfavoring a broad application.

By the Court.—Order affirmed.

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