COURT OF APPEALS
DECISION
DATED AND FILED

June 25, 2002

Cornelia G. Clark
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. 01-2750 Cir. Ct. No. 94-PR-133A

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

IN THE MATTER OF THE TRUST UNDER THE WILL OF HARVEY W. TETZLAFF:

JAMES G. KIECKER,

TRUSTEE-APPELLANT,

V.

WISCONSIN LUTHERAN COLLEGE, WISCONSIN LUTHERAN CHILD & FAMILY SERVICE, INC., BETHESDA LUTHERAN HOME, FOX VALLEY LUTHERAN HIGH SCHOOL, BEAUTIFUL SAVIOR LUTHERAN CHURCH, ST. JOHN'S EVANGELICAL LUTHERAN CHURCH, LUTHERAN HOUR, TETZLAFF HEIRS, SALVATION ARMY, AFRICAN MEDICAL MISSIONS, THE LUTHERAN HOME, LUTHERAN SCHOOL FOR THE DEAF, AMERICAN CANCER SOCIETY, UNITED CEREBRAL PALSY OF NORTHEASTERN WISCONSIN, ST. MARK LUTHERAN CHURCH, AMERICAN DIABETES ASSOCIATION AND EAST FORK LUTHERAN NURSERY,

BENEFICIARIES-RESPONDENTS.

APPEAL from a judgment of the circuit court for Brown County: PETER NAZE, Judge. *Affirmed*.

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

¶1 CANE, C.J. James Kiecker appeals from a judgment[1] construing a testamentary trust established by Harvey Tetzlaff's will. The circuit court denied Kiecker's motion to distribute the trust's remaining assets to Tetzlaff's heirs. At issue was Tetzlaff's use of the phrase "residue of my estate" to distribute the trust residue's assets to a number of charities. Kiecker argued this language caused the gift to lapse and the residue should be distributed to Tetzlaff's heirs according to the laws of intestacy. The court determined the phrase was ambiguous and admitted extrinsic evidence to determine Tetzlaff's intent. After hearing this evidence, the court found Tetzlaff's intent was to distribute the residue among the charities. We conclude the language of the trust is inconsistent. In addition, the evidence supports the circuit court's finding that Tetzlaff's intent was to distribute the residue to the charities and therefore we affirm the judgment.

BACKGROUND

¶2 Harvey Tetzlaff died on March 24, 1994. Clause SIXTH of his will placed the residue of his estate into a trust for the benefit of his wife, Marjorie, who also served as the trustee.[2] The trust terminated upon Marjorie's death or

[1] Although the trial court labeled its decision as an order, we construe the decision to be a judgment pursuant to WIS. STAT. § 806.04(4). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] Tetzlaff had no children. In addition, clause THIRD and FOURTH gave Marjorie use of the household goods and home during her lifetime. Clause FIFTH provided for cash gifts to twenty-four of Tetzlaff's nieces and nephews.

remarriage. At termination, the trust provided for specific bequests to Tetzlaff's nieces and nephews in clause SIXTH (B), paragraphs 1-6, and a number of charities in paragraphs 7-24. Clause SIXTH (B) paragraph 25 reads: "All the residue of my estate shall be distributed equally among the beneficiaries provided in paragraphs (7) through (24), inclusive, of this SIXTH (B) Clause."

¶3 Marjorie died on April 18, 1999. The probate court named two of Tetzlaff's nephews, James and David Kiecker, as co-trustees to administer the dissolution of the trust. In January 2000, the Kieckers distributed the specific bequests as provided in paragraphs 1-24. In July 2001, James[3] moved the court to distribute the remaining trust assets pursuant to WIS. STAT. § 853.61(1)[4] and to determine Tetzlaff's heirs and their respective shares of the trust estate. Kiecker argued paragraph 25's language "residue of my estate" did not effectively dispose of the trust residue and under the statute, or alternatively, the laws of intestacy, the residue would go to Tetzlaff's heirs, who are his nieces and nephews named in clause SIXTH (B) paragraphs 1-6. Several of the charities objected and the court scheduled a will construction hearing.

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[3] David was killed in an automobile accident in October 2000. James continued to administer the trust alone.

[4] WISCONSIN STAT. § 853.61(1) provides:

> **Mandatory clauses; basic will with trust.** The Wisconsin basic will with trust includes the following mandatory clauses:
>
> **(1)** INEFFECTIVE DISPOSITION. If, at the termination of any trust created in the Wisconsin basic will with trust, there is no effective disposition of the remaining trust assets, then the trustee shall distribute those assets to the testator's then living heirs at law, their identities and respective shares to be determined as though the testator had died on the date of the trust's termination and according to the laws of the state of Wisconsin then in effect.

¶4 At the hearing, the court determined that WIS. STAT. § 853.61(1) did not apply because Tetzlaff's will was not the Wisconsin basic will with trust. In addition, the court found the phrase, "residue of my estate," as used in the trust, was ambiguous and admitted extrinsic evidence to determine Tetzlaff's intent. The charities offered the drafter's testimony and three of Tetzlaff's prior wills. The drafter testified it was Tetzlaff's intent to give the trust residue to the charities and admitted he should have used a phrase such as "trust estate" instead. In addition, Tetzlaff's prior wills contained similar distributions, and the drafter testified it had been Tetzlaff's intention to give the trust residue to the charities in these wills as well. Kiecker did not offer any evidence at the hearing. The court determined it was Tetzlaff's intent to give the trust residue to the various charities.[5] Kiecker appeals.[6]

DISCUSSION

¶5 The construction of a testamentary document presents a question of law. ***In re Estate of Furmanski***, 196 Wis. 2d 210, 214, 538 N.W.2d 566 (Ct. App. 1995). We review questions of law independently without deference to the decision of the trial court, although we benefit from its analysis. ***Id.*** The purpose of will construction is to ascertain the testator's intent. ***In re Estate of Ganser***, 79

[5] In its judgment, the court determined one of the named charities had since ceased to exist and left no successor organization, causing the gift to lapse into the trust residue.

[6] In addition, Candice Rosenberg, one of Teztlaff's nieces, filed a pro se brief on behalf of all the Tetzlaff heirs. Those of her arguments that are susceptible to appellate review are substantially the same as those of Kiecker. In addition, she argues the children of David Kiecker are not entitled to their father's share of the trust residue. The Kiecker children filed a non-party response brief to Rosenberg's claim. Because we conclude the Tetzlaff heirs are not entitled to the trust residue, we need not address this issue. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

Wis. 2d 180, 186, 255 N.W.2d 483 (1977). Because the language of the will is the best evidence of the testator's intent, we look to it first; if there is no ambiguity or inconsistency in the will's provisions, there is no need for further inquiry into the testator's intent. ***Id.*** at 187. When determining whether an ambiguity or inconsistency exists in the will's language, we view the will not as a group of independent phrases, but rather as an entire instrument. ***Estate of Farber***, 57 Wis. 2d 363, 370, 204 N.W.2d 478 (1973). If an ambiguity or inconsistency exists in the will's language, we look to the surrounding circumstances at the time of the will's execution. ***Ganser***, 79 Wis. 2d at 187. If an ambiguity or inconsistency still persists, we may resort to the rules of will construction and extrinsic evidence. ***Id.***

¶6 Kiecker argues the court erred by finding the phrase "residue of my estate" ambiguous. He says the court relied almost wholly on the phrase's location in the document when it made its determination of ambiguity. Kiecker suggests the language is clear and does not control the disposition of the trust residue. Instead, Kiecker suggests it is a failed attempt to dispose of the estate's residue, which had already been used to fund the trust. Because there is no provision for the distribution of the trust residue, he argues the gift fails and passes by intestacy. He does not challenge the court's finding the extrinsic evidence overwhelmingly points to Tetzlaff's intention to give the residue to charity. Instead, Kiecker claims there was no need to resort to extrinsic evidence at all.

¶7 The court, Kiecker argues, took this approach because it did not consider how the will would have been carried out had Marjorie died first. Under this scenario, Kiecker claims, the will's language would have properly distributed the estate's residue because that is all that would have been left after the specific distributions were made; no trust would ever be created. According to Kiecker, the court's construction is a will reformation, which cannot be used to correct a

drafter's mistake. *See* ***Estate of Sneeberger***, 54 Wis. 2d 657, 660, 196 N.W.2d 662 (1972).

¶8 We disagree with Kiecker's interpretation of the will. First, it is permissible for the court to consider the location of a will clause; in fact, it would seem to be necessary when looking at the will as an entire instrument. *See* ***Farber***, 57 Wis. 2d at 370. In addition, Kiecker makes no legal argument why the trial court should have considered what would have happened had Marjorie died first. Kiecker suggests if Tetzlaff had died after Marjorie, all of his assets would go directly to the family members and the charities. Clause THIRD, Kiecker argues, would provide for the distribution of most of the estate if Marjorie predeceased Harvey. We disagree with Kiecker's reading. This clause gave Marjorie the use of the household goods during her lifetime. If she predeceased Harvey, the clause provided that "this bequest shall lapse and the items shall be sold and the proceeds thereof distributed to the residual beneficiaries provided in clause SIXTH (B) hereinafter." Clause THIRD only controlled the distribution of the household goods. Clause SIXTH placed the estate's residue into the trust, regardless of who died first. Unfortunately, the will also distributes the estate's residue upon the trust's termination.

¶9 We conclude the will is inconsistent.[7] While the phrase's location in the trust section of the will strongly suggests that Tetzlaff intended to distribute the trust's residue to the charities, when viewed as a whole, the will is inconsistent. By its plain language, it seeks to dispose of the estate's, not the

[7] While the circuit court found the language to be ambiguous, we believe the will is more properly described as inconsistent. The analysis for resolving both of these problems is the same. See ***In re Estate of Lohr***, 174 Wis. 2d 468, 481, 497 N.W.2d 730 (Ct. App. 1993).

trust's, residue in two places: at the beginning of clause SIXTH and in paragraph 25 of clause SIXTH. The first clause pours the estate residue over into a trust, and the second seeks to dispose of the estate residue by dividing it among a number of charities.

¶10 When a will is inconsistent or ambiguous, we may look beyond the face of the document into the surrounding circumstances at the time of execution to determine the testator's intent. ***In re Estate of Lohr***, 174 Wis. 2d 468, 481, 497 N.W.2d 730 (Ct. App. 1993). Our goal in examining these circumstances is to determine the reasonable meaning of the words used from the testator's point of view. ***Id.*** at 484. If it is known that the testator regularly considered a word to have a certain meaning at the time of execution, then we will interpret the will accordingly. *See* ***Estate of Gehl***, 39 Wis. 2d 206, 214, 159 N.W.2d 72 (1968). Here, the only circumstance hinting at how Tetzlaff normally used the words "residue of my estate" at the time of execution is his inconsistent use of the phrase in his will, which sheds no light on his intentions.

¶11 If after examining the surrounding circumstances the ambiguity or inconsistency persists, we may resort to extrinsic evidence to determine the testator's intent. ***Lohr***, 174 Wis. 2d at 484. The drafting attorney's testimony is admissible as extrinsic evidence. ***Id.*** at 485. In addition, prior wills, whether executed or not, can also be admitted as evidence of the testator's intent. ***Estate of Steffke***, 48 Wis. 2d 45, 52, 179 N.W.2d 846 (1970). At the construction hearing, the charities offered the testimony of the attorney who drafted the will. He said it was Tetzlaff's intent to distribute the trust residue among the charities, and that he should have used different language to accomplish this goal. The charities also presented three of Tetzlaff's prior wills, two of which were prepared by the drafter. These prior wills all made similar charitable distributions, and the

two prepared by the drafter used "residue of my estate" or "rest of my estate" in what appears to be the trust's residuary clause. Kiecker did not offer any evidence at the hearing and, on appeal, does not contest the sufficiency of the extrinsic evidence in proving Tetzlaff's intent.

¶12 We agree the evidence is sufficient to show Tetzlaff intended to distribute the trust residue to the charities. It appears the drafter simply used the wrong phrase in an attempt to distribute the trust residue. Having prepared prior wills for Tetzlaff, the drafter was very likely to know Tetzlaff's wishes, especially because these prior documents are all similar in their plan. The court did not reform the will, as Kiecker suggests. It gave effect to Tetzlaff's intention to give his trust residue to charity. The court did not err in its construction of the will.

¶13 For the first time on appeal, Kiecker also challenges the will's validity and asks this court to remand for a hearing to determine whether the will was properly signed and witnessed. "We normally will not review an issue raised for the first time on appeal." ***Mathewson v. Mathewson***, 135 Wis. 2d 411, 418, 400 N.W.2d 485 (Ct. App. 1986). Further, we note the proper time to challenge a will's execution is when it is admitted to probate. Although Kiecker correctly points out a court may vacate an order admitting a will to probate beyond the time for appeal if the order was induced by fraud, Kiecker does not allege the will execution was in any way fraudulent. *See* ***In re Estate of Kennedy***, 74 Wis. 2d 413, 420, 247 N.W.2d 75 (1976). We decline to grant his request for a hearing on the will's execution formalities.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.