COURT OF APPEALS DECISION DATED AND FILED

October 2, 2003

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. 03-1235-FT

Cir. Ct. No. 00-PR-000371

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

IN RE THE ESTATE OF DORIS M. FRANK:

GEORGE H. FRANK, JR.,

APPELLANT,

V.

ESTATE OF DORIS M. FRANK AND WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

RESPONDENTS.

APPEAL from an order of the circuit court for Rock County: JOHN W. ROETHE, Judge. *Reversed and cause remanded with directions*.

Before Deininger, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. George H. Frank, Jr., appeals a probate order directing that certain real estate be sold at fair market value, notwithstanding a clause in the will allowing a sale to him on specific terms. The dispositive issue is

whether certain findings were supported by the record. We conclude they were not, and we reverse.

¶2 The will of decedent Doris M. Frank grants to her son George the right to purchase her farm from the executor of her estate for $30,000. Encore Senior Living, LLC, submitted a claim against the estate for approximately $33,000, and the State of Wisconsin Department of Health and Family Services submitted one for approximately $226,000. The administration of the estate was initially informal, but George, who was then also personal representative, sought formal proceedings on the issue of exercising his option to purchase the farm. At the hearing, George's attorney described the inventoried assets of the estate as consisting of the farm, with a listed worth of approximately $170,000, and a small amount of cash. Counsel for the estate said there had been a market analysis showing the farm's value at $250,000 to $470,000.

¶3 The quandary presented by these facts is that the claims against the estate plainly exceed its non-farm assets, thus raising the possibility that the farm must be sold to pay the claims, leaving George no opportunity to exercise his option. At the hearing, George's attorney proposed that George be allowed to pay off the claims in some manner, and then exercise his option on the property, without an open sale for fair market value. He further proposed that if George was unable to obtain financing or otherwise pay off the claims, the personal representative should then sell only so much of the land as necessary to pay the claims, and then allow him to exercise his option on the remainder of the land.

¶4 Counsel for Encore and the estate stated that they did not object if George was allowed to exercise his option, so long as claims were paid. Counsel for the department did not state a position on this point. Two of the other heirs

appeared without counsel and asked the court to order a sale at fair market value, with any amount remaining after payment of claims to be distributed equally among the heirs. However, they cited no legal authority for this result.

¶5 The circuit court ruled without taking evidence. It noted that the will was drafted in 1961, and that it "looks to the court like" the option amount of $30,000 was fair market value in 1961. It then stated: "Whatever the testator's intent was, it's quite apparent to the Court that the testator intended that Mr. Frank pay fair market value for the property …." The circuit court further stated that it would have to order the property sold at fair market value because "[t]here's no other way that the debts here can be paid off." The circuit court concluded that the option clause yields to the clause directing that debts be paid first, and therefore the option clause is rendered "nugatory." In addition, the circuit court said that any money remaining after the sale would be distributed under the residuary clause in the will. The circuit court did not address George's proposal to pay off the claims and then exercise the option.

¶6 On appeal, the estate and department appear as respondents. All parties agree that WIS. STAT. § 860.11 (2001-02)[1] is applicable to this situation. Subsection (1) of that statute provides that "if the will … contains provisions which restrict the freedom of the personal representative to sell … property, the personal representative breaches the personal representative's duty to the persons interested if the personal representative sells … the property other than in

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

accordance with the restrictions," except as provided in sub. (4). Subsection (4) provides that if the will contains such a limitation,

> and the personal representative is unable to pay the allowances, expenses of administration and claims while complying with the limitations in the will, the court shall order the personal representative to sell … the property in accordance with the appropriate terms and conditions of an order made after petition and hearing on notice given under s. 879.03 to all persons interested and all creditors of the estate.

¶7 Subsection (1) makes it clear that the testator's intent to place restrictions on the sale of property must be implemented when possible. In this case, the circuit court found that $30,000 was fair market value when the will was made but there is no evidence in the record to support this finding. Similarly, the circuit court found, solely from the face of the will, that the decedent's intent was that George pay fair market value for the farm. We question the basis for this finding as well. A testator's intent is first to be ascertained from the language of the will. *See* ***Caflisch v. Staum***, 2000 WI App 113, ¶6, 235 Wis. 2d 210, 612 N.W.2d 385. The language of the present will appears unambiguous. The will does not give George an option at "fair market value" but states a specific dollar amount. If the testator meant fair market value, she could easily have said so. Because Doris never changed or revoked her will, it presumably stated her intent not only in 1961 but also for the remainder of the time she retained testamentary capacity, possibly up to her death nearly forty years later. We conclude that there is no basis in the present record to conclude that her intent was anything other than to give George an option to purchase the farm for $30,000.

¶8 As noted by the circuit court and the respondents on appeal, the will provides that the decedent's debts should be paid before any distribution to beneficiaries. It does not say what should happen to the option if the claims

exceed the value of non-farm assets, but WIS. STAT. § 860.11(4) addresses precisely this situation. The statute provides that a personal representative can disregard the restriction on sale of property only if the personal representative is "unable to pay the allowances, expenses of administration and claims while complying with the limitations in the will." In this case, the circuit court concluded that the only way claims could be paid was to order a sale at fair market value. However, neither the circuit court nor any interested party identified a factual or legal flaw in George's proposal to pay the claims and exercise his option. The proposal has at least the potential to allow the personal representative to pay all claims and still comply with the farm-sale restriction in the will. If the personal representative is able to pay the claims while still complying with the restriction, § 860.11(1) requires it to do so. Nothing in the statute, the will, or anything cited by the respondents on appeal limits a personal representative to using only the inventoried assets of the estate to pay claims.[2]

¶9 The estate argues that George failed to provide evidence that the farm had a value in excess of the claims, that he would be financially able to pay the claims, or that there would be any benefit to the estate in allowing him to proceed as he proposed. We note, initially, that it is not clear whether the circuit court was prepared to take testimony. The circuit court did not ask whether the parties had testimony or evidence to offer, and it apparently did not believe it necessary to take evidence before making its ruling. In any event, we do not agree that an evidentiary showing is necessary for a court to accept George's proposal and to provide him with time to pay the claims, although a court would, of course,

[2] Moreover, we note that nothing appears to prevent George from paying the claimants directly and having them withdraw their claims against the estate.

not be prohibited from taking evidence to resolve a relevant factual dispute. Here, however, no party or the court raised any specific dispute or objection for George to meet with an evidentiary showing. As for the asserted lack of a showing of a benefit to the estate, the personal representative's statutory duty is to comply with the testator's restriction when possible, and we conclude that George need not show any additional benefit to the estate beyond the potential to make compliance with the will possible.

¶10 The estate also argues that George waived his option by not exercising it within a reasonable time. The estate concedes that this argument is based on facts not of record, and we therefore disregard it. The estate argues further that George's plan benefits him, but not the other residuary heirs. That may be true, but that is because the will itself favors George over the other heirs.

¶11 Finally, we turn to the specific relief sought on appeal. George asks us to detail how the option should be exercised. We decline to set specific terms. We conclude only that the circuit court erred in its interpretation of the will and in the application of WIS. STAT. § 860.11 by failing to consider George's proposal. Accordingly, we reverse the order for the sale of the land at fair market value. George must be given a reasonable opportunity to render the estate able "to pay the allowances, expenses of administration and claims while complying with the limitations in the will." Section 860.11(4). We express no opinion on his proposal for partial sale of the land if he is unable to pay the claims, other than to note that § 860.11(4) allows the court to order the sale of the property on "appropriate terms and conditions."

By the Court.—Order reversed and cause remanded with directions.

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