COURT OF APPEALS
DECISION
DATED AND FILED

January 18, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP119 **Cir. Ct. No. 2009PR38**

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

IN THE MATTER OF THE ESTATE OF LAURENCE BERG:

JAMES A. BERG,

PETITIONER-APPELLANT,

V.

MARY WELLER, KENNETH GARVES AND ESTATE OF VICKI L. GARVES-BERG,

RESPONDENTS.

APPEAL from an order of the circuit court for St. Croix County: EDWARD F. VLACK III, Judge. *Reversed*.

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 HOOVER, P.J. James Berg appeals a probate order requiring him to pay into court nontestamentary property consisting of life insurance and 401(k)

retirement account proceeds he received following his son's death. The order required that the property be held to cover the estate's debts in the event the estate's funds were inadequate, pursuant to WIS. STAT. § 859.40.[1] Berg appeals, arguing the statute's requirements were not satisfied because (1) the tort claims giving rise to the estate's alleged deficiency were not "allowed," and (2) the nontestamentary proceeds were not "liable for the payment of debts." *See* ***id.*** We conclude the tort claims were allowed, but the life insurance and 401(k) proceeds were not liable for the payment of those debts. We therefore reverse.

BACKGROUND

¶2 Berg's son and daughter-in-law, Laurence Berg and Vicki Garves-Berg, died together in a plane crash along with a friend, Brett Weller. Laurence was the pilot. A National Transportation Safety Board investigation of the crash concluded Laurence operated an airplane that was not certified for icing conditions, Laurence failed to prepare the parachute system before flight, and Laurence's failure to maintain control of the airplane was the probable cause of the accident.

¶3 No tort actions were commenced, but three claims were filed against Laurence's Estate based on tort theories. In June 2009, Weller's wife, Mary, filed a claim asserting that Laurence negligently operated the airplane, resulting in Weller's death. Mary sought compensation for pecuniary loss, loss of society and companionship, and funeral expenses. Her claim indicated the amount was "undetermined." In July, Kenneth Garves filed two claims, on behalf of himself

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

and Garves-Berg's Estate. Garves's claim was for wrongful death, loss of society and companionship, and loss of benefits and contributions. Garves-Berg's Estate's claim was for wrongful death, conscious pain and suffering, emotional distress, and medical, hospital, and funeral expenses. Both claims also indicated the amount was "undetermined."

¶4 In April 2010, Mary petitioned the court, pursuant to WIS. STAT. § 859.40, to order that the nontestamentary proceeds of Laurence's life insurance and retirement account be made available to his Estate for the payment of debts. The petition further asserted that Mary's claim had not been contested and was therefore deemed allowed. Laurence's Estate responded in May that because Mary had failed to specify any amount, her claim was "incomplete and/or contingent, and is still subject to challenge." At the same time, the Estate also filed objections to Mary's and Garves's claims, but not to the claim by Garves-Berg's Estate. In June and July, all three claims were amended by specifying an amount of claim. Mary's claim specified $2,000,000, and each of Garves's claims specified $500,000. In August, Laurence's Estate disallowed the two previously objected-to claims.

¶5 The circuit court, however, concluded Laurence's Estate had "allowed for purposes of [WIS. STAT.] § 859.40" all three claims by failing to object within sixty days.[2] *See* WIS. STAT. § 859.13. The court further determined the Estate would be unable to pay all of its debts if it were ultimately found liable

[2] The court determined the amendments of the claims "change[d] nothing because those random numbers" were "speculative."

for the alleged torts. Thus, it ordered Berg to pay into the court all of the nontestamentary proceeds he received. Berg now appeals.

DISCUSSION

¶6 Berg argues the circuit court misapplied WIS. STAT. § 859.40 when it ordered him to pay into court the nontestamentary proceeds he received from Laurence's life insurance policies and 401(k) retirement account. Section 859.40 provides:

> Whenever there is reason to believe that the estate of a decedent as set forth in the inventory may be insufficient to pay the decedent's debts, *a creditor whose claim has been allowed* may, on behalf of all, bring an action to reach and subject to sale *any property not included in the inventory,*[3] *which is liable for the payment of debts*. The creditor's action shall not be brought to trial until the insufficiency of the estate in the hands of the personal representative is ascertained; if found likely that the assets may be insufficient, the action shall be brought to trial.

(Emphasis added.) Berg argues the statute's requirements were not satisfied because (1) the tort claims giving rise to the Estate's alleged deficiency were not "allowed," and (2) the nontestamentary proceeds were not "liable for the payment of debts." These arguments involve statutory construction and application to an undisputed set of facts, which present questions of law subject to our independent review. *See* ***State v. Piddington***, 2001 WI 24, ¶13, 241 Wis. 2d 754, 623 N.W.2d 528.

[3] The inventory is to include all of the decedent's property that is "subject to administration." *See* WIS. STAT. §§ 858.01, 858.07.

Whether the claims were allowed

¶7 Berg concedes there was no objection to any of the three tort-based claims within sixty days, as required by WIS. STAT. § 859.13. Nonetheless, Berg argues it was improper for the circuit court to then deem the three claims allowed, when neither liability nor damages had been established. Alternatively, Berg contends the claims should only be deemed allowed "to the extent of their original demand—which is zero."

¶8 We reject Berg's arguments. The statute prescribing the form of claims requires identification of the claim amount only "if ascertainable." *See* WIS. STAT. § 859.13. Further, claims against an estate may be filed "whether due or to become due, absolute or contingent, liquidated or unliquidated." *See* WIS. STAT. § 859.02.[4] When, as here, there has been no timely objection to a claim, the

[4] Additionally, we take notice of WIS. STAT. § 859.21, titled "Contingent claims." That statute provides:

> If the amount or validity of a claim cannot be determined until some time in the future, the claim is a contingent claim regardless of whether the claim is based on an event which occurred in the past or on an event which may occur in the future. [C]ontingent claims which cannot be allowed as absolute must, nevertheless, be filed in the court and proved in the same manner as absolute claims. If allowed subject to the contingency, the order of allowance shall state the nature of the contingency. If the claim is allowed as absolute before distribution of the estate, it shall be paid in the same manner as absolute claims of the same class. In all other cases the court may provide for the payment of contingent claims in any one of [four] methods: ....

Here, both the "amount [and] validity of [the] claim[s] cannot be determined until some time in the future." *See* ***id.*** Thus, by definition, they are contingent claims. *See* ***id.*** As WIS. STAT. § 859.21 explains, contingent claims can be "allowed." WISCONSIN STAT. § 859.40 refers broadly to a "creditor whose claim has been allowed," without distinguishing between absolutely and contingently allowed claims. Thus, that statute may be applied to both types of claims.

only logical result is that the claim must be deemed allowed, regardless of whether liability or an amount has been established. Further, it would be nonsensical to construe *any* claim against an estate as a demand for zero dollars, much less a claim that, as allowed by statute, indicates the amount is undetermined. We therefore agree with the circuit court that the claims were "allowed for purposes of [WIS. STAT.] § 859.40."

Whether the nontestamentary proceeds were liable for the payment of debts

¶9 Berg further contends the nontestamentary life insurance and 401(k) proceeds he received following his son's death were not "liable for the payment of debts." *See* WIS. STAT. § 859.40. We agree.

¶10 Generally, WIS. STAT. § 766.55 addresses the payment of spouses' obligations. However, subsection (8) provides: "After the death of a spouse, property is available for satisfaction of obligations as provided in s. 859.18." That statute, in turn, provides:

> At the death of a spouse, property, including the proceeds of or property exchanged for that property, that but for the death of the spouse would have been available under s. 766.55(2) for satisfaction of an obligation continues to be available for satisfaction, except as provided in subs. (3) to (5).

WIS. STAT. § 859.18(2). This brings us to exceptions found under subsec. (4):

> (a) If the decedent spouse was the only ... incurring spouse under s. 766.55(2)(b) to (d), the following property is not available for satisfaction of the obligation:
>
> ....
>
> 3. Deferred employment benefits arising from the decedent spouse's employment.

> 4. Proceeds of a life insurance policy insuring the life of the decedent spouse, if the proceeds are not payable to the decedent's estate and not assigned to the creditor as security or payable to the creditor.

WIS. STAT. § 859.18(4)(a)3.-4.

¶11 Here, Laurence, the decedent spouse, was the "only ... incurring spouse under [WIS. STAT. § 766.55(2)(cm)]." *See* WIS. STAT. § 859.18(4)(a). Paragraph 766.55(2)(cm) refers to "[a]n obligation incurred by a spouse during marriage, resulting from a tort committed by the spouse during marriage[.]" Laurence was the allegedly negligent pilot in the various tort claims against his Estate, thus he was the incurring spouse.

¶12 Because the WIS. STAT. § 859.18(4)(a) condition is satisfied, the two exceptions in subds. 3. and 4. for deferred employment benefits and life insurance proceeds apply. There is no dispute that Laurence's 401(k) account constituted deferred employment benefits,[5] or that his life insurance was neither payable to his Estate nor assigned to any creditors. Therefore, none of the nontestamentary proceeds Berg received were liable for the payment of the three tort claims that were contingently allowed against Laurence's Estate. Consequently, the circuit court erred when, relying on the tort claims, it ordered that the nontestamentary proceeds be made available for payment of the Estate's debts under WIS. STAT. § 859.40.

[5] Further, we note: "A 401(k) plan is a type of tax-qualified deferred compensation plan ...." IRS, Topic 424 - 401(k) Plans (last updated December 22, 2011), http://www.irs.gov/taxtopics/tc424.html.

¶13 Mary argues, however, that WIS. STAT. § 859.18 and its exceptions are inapplicable because Laurence's spouse perished with him.[6] According to Mary's interpretation, that section "assumes that one spouse survives the other and proscribes what assets are protected from the creditors of the deceased spouse," presumably because it includes references not only to "spouse," but to "decedent spouse" and "surviving spouse." *See* WIS. STAT. § 859.18(3), (4). Thus, Mary asserts:

> Under the statute governing simultaneous deaths, Vicki Garves-Berg is considered to have predeceased Laurence Berg. *See* WIS. STAT. § 854.03. A "spouse" is "one's husband or wife ...," and "surviving spouse" is a "spouse who outlives the other spouse." BLACK'S LAW DICTIONARY (9th ed. 2009). Since Vicki Garves-Berg is presumed to have predeceased Laurence Berg, Laurence Berg was not a "spouse" at the time of his death and there was no "surviving spouse" requiring protection by WIS. STAT. § 859.18.

¶14 Mary's argument fails for multiple reasons. First, none of the portions of WIS. STAT. § 859.18 that we rely on even refer to the "surviving spouse" or nondecedent "spouse." Second, WIS. STAT. § 854.03 does not dictate that Garves-Berg must necessarily be considered to have predeceased Laurence for all purposes. Rather, that lengthy statute contains multiple conditions and exceptions, and its application varies as to each asset, depending on the language of the applicable statute or governing instrument that transferred the property. *See* WIS. STAT. § 854.03(1), (5). Indeed, it does not apply to section 859.18 because that statute does not explicitly "require[] the individual to survive an event." *See* WIS. STAT. § 854.03(1). Third, the term "surviving spouse" does not mean a

[6] Garves and Garves-Berg's Estate present a similar, minimally developed argument in their joint brief.

spouse who outlives the other. Instead, that term is specially defined by WIS. STAT. § 851.30, which explains that "'surviving spouse' means a person who was married to the decedent at the time of the decedent's death."[7] There is no dispute that Laurence and Garves-Berg were married when their plane crashed.

By the Court.—Order reversed.

Not recommended for publication in the official reports.

[7] The WIS. STAT. § 851.30 "surviving spouse" definition applies to § 854.03 because "[t]he definitions in ss. 851.01 to 851.31 apply to chs. 851 to 882." WIS. STAT. § 851.002.