COURT OF APPEALS
DECISION
DATED AND FILED

June 6, 2013

Diane M. Fremgen
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. 2012AP1730

Cir. Ct. Nos. 2010CV181
2010PR19

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

IN RE THE ESTATE OF DONALD J. POPP:

PAMELA A. BENNETT, DENNIS A. POPP, DUANE P. POPP, VALERIE J. BARTON, LINDA L. GILES AND DALEN R. POPP,

APPELLANTS,

V.

POPP FARMS LLC, FIRST NATIONAL BANK AT DARLINGTON, ALYCE POPP, LIVINGSTON STATE BANK, DAVID D. POPP, DOUGLAS E. POPP AND DANIEL T. POPP,

RESPONDENTS.

PAMELA A. BENNETT, DENNIS A. POPP, DUANE P. POPP, VALERIE J. BARTON, LINDA L. GILES AND DALEN R. POPP,

PLAINTIFFS-APPELLANTS,

V.

POPP FARMS LLC, ALYCE POPP, FIRST NATIONAL BANK AT DARLINGTON, LIVINGSTON STATE BANK, DAVID D. POPP, DOUGLAS E. POPP AND DANIEL T. POPP,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Lafayette County: WILLIAM D. JOHNSTON, Judge. *Affirmed*.

Before Higginbotham, Sherman and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. Six of Mary and Donald Popp's nine children sued to rescind Donald's sale, after Mary died, of 8.49 acres of the family farm to his second wife and of the remaining family farm acreage to a limited liability company that he had formed with his son Douglas. The six children sought to divide what they claimed to be Mary's undivided 50% interest in the entire acreage among the nine children, arguing that Donald possessed only a life estate in that 50% interest. They claimed that the quitclaim deeds by which Donald conveyed the two parcels of real estate actually conveyed not full title but only his life estate, which expired upon his death, thus leaving the nine children's interest in Mary's 50% share unencumbered by any claims of the purchasers or mortgagors. The circuit court found that pursuant to the unambiguous language of Mary's will, the holding in ***Borek Cranberry Marsh, Inc. v. Jackson County***, 2010 WI 95, 328 Wis. 2d 613, 785 N.W.2d 615, and WIS. STAT. § 706.10(4) (2011-12),[1] Donald conveyed full title to the real estate, leaving 50% of the

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

proceeds of the sales to be divided among the nine children. For the reasons stated below, we affirm.

Background

¶2 The facts relevant to resolution of the appeal are not disputed. At issue are 274 acres of farm real estate that Mary and Donald Popp owned as tenants in common. When Mary died, Donald held his 50% undivided interest in the farm and a life estate as to Mary's undivided 50% interest, accompanied by a power of sale and the directive to keep her 50% interest in the real estate or any proceeds from the sale of that real estate separate to be divided equally among their nine children. As Mary provided in her will:

> I give, devise and bequeath to [Donald] ... the use and benefit of all of my real estate for and during his life. In addition to said life use, he shall have the power to mortgage or sell any or all of said real estate at such prices and on such terms as seems prudent to him and may invest and reinvest the proceeds in any manner or form he chooses. However, he shall keep said real property or the proceeds from such property sold or the property purchased from reinvestment separate and apart from his own property....
>
> The remainder interest in said real estate is hereby willed in equal shares to our children ....

¶3 The judgment entered in Mary's estate provided:

> The balance of the estate (consisting of farm real estate), to Donald John Popp for his use and benefit during his lifetime with the power to mortgage or sell said property at such price and on such terms as to him seems prudent and may invest and reinvest the proceeds in any manner or form he chooses. He shall, however, keep said real property or the proceeds from such property sold or the property purchased from reinvestment separate and apart from his own property. He may, however, use of the principal if it becomes necessary for his care and support. The remainder interest in said property is assigned to [their nine children] in equal shares.

¶4 After Mary died, Donald remarried and lived with his second wife on an 8.49-acre parcel on the family farm. He conveyed the real estate and the house that they had built on it to his second wife by a quitclaim deed, for which his second wife paid $1,000. The deed provided that, "Grantor quit claims to Grantee the following described real estate ... EXCEPTING AND RESERVING unto the Grantor a life estate in the premises." Donald and his second wife executed a real estate mortgage on the property, which was refinanced after Donald's death.

¶5 Also after Mary died, Donald formed Popp Farms LLC with son Douglas and conveyed the remainder of the family farm (minus the 8.49 acres conveyed to his second wife) to the LLC by quitclaim deed. The deed provided that, "Grantor quit claims to Grantee the following described real estate ...." Pursuant to an operating agreement entered into by Donald and Douglas dated the same date as the quitclaim deed, Donald contributed the real estate and Douglas contributed $500, and Donald and Douglas each received certain membership units or shares in the LLC. Donald subsequently gifted 28.6% of the total value of his shares to Douglas, resulting in Douglas being responsible for operating and managing the farm and Donald being paid $36,000 annually. The agreement gave Douglas the right to purchase all of Donald's shares upon Donald's death for $675,000, by paying 5% down with the balance payable in twenty years. The LLC executed and refinanced certain mortgages before and after Donald's death.

¶6 Proceedings for the probate of Donald's estate were commenced after his death, and the six children who are appellants here filed claims against the estate asserting their rights as remainder beneficiaries. The same six children subsequently commenced a separate civil action requesting a declaration of their interests in Mary's undivided 50% interest in the family farm, against the three

remaining children, Donald's second wife, Popp Farms LLC, and the two lenders with mortgages on the two parcels conveyed to the second wife and the LLC.

¶7 The parties moved for summary judgment in the civil action. The circuit court denied all summary judgment motions, indicating that issues of material fact existed as to Mary's intent, which necessitated a hearing and presentation of evidence, "and if there is no proof of her intent, then I have to do an interpretation of the language of the will." Finding also that the claims in the estate case and the civil action were the same, the court consolidated the two cases. The court then held an evidentiary hearing on the construction of Mary's will, at the conclusion of which the plaintiffs' counsel informed the court that a judicial determination of the legal effect of the quitclaim deeds that Donald used to convey real estate to his second wife and the LLC would assist the parties in preparing for the upcoming jury trial.

¶8 The circuit court issued a written decision finding that the grant of authority to Donald in Mary's will was "clear and unambiguous" and determining that Donald's quitclaim deeds passed full title to the conveyed property, holding that: "the interest that [Donald] transferred by quit claim deed was fee title. Upon sale, Mary's life use granted Donald in the real estate ended and attached to the proceeds from that sale ...." After further briefing and a hearing on the defendants' motions for supplemental relief, the court dismissed all claims, except for "any claim against any proceeds that Donald received" against the estate. The court entered judgment in favor of defendants, finding that the plaintiffs, six of the nine children, had no interest in the ownership of the conveyed real estate and that the mortgages on the real estate were valid. The six children settled their remaining claims against the estate prior to trial. Those six children now appeal.

Discussion

¶9 The six Popp children argue that under ***Meister v. Francisco***, 233 Wis. 319, 327-28, 289 N.W. 643 (1940), Mary's will gave Donald only a life estate interest in her 50% of the farm real estate, and his quitclaim deeds conveyed only that life estate interest as to her share of the farm, so that half of the conveyed real estate reverted to Donald's estate upon his death. Their argument falls under the weight of superseding case law, the governing statute, and the plain language of Mary's will and Donald's quitclaim deeds.

¶10 The construction of a will and the construction of a deed are questions of law reviewed de novo on appeal. ***Furmanski v. Furmanski***, 196 Wis. 2d 210, 214, 538 N.W.2d 566 (Ct. App. 1995) (construction of testamentary document is question of law reviewed without deference to trial court); ***Edlin v. Soderstrom***, 83 Wis. 2d 58, 69, 264 N.W.2d 275 (1978) (construction of deed is question of law unless there is ambiguity requiring resort to extrinsic evidence, in which case question becomes one of fact). For both a will and a deed, when the language is plain and unambiguous, the court is to ascertain the testator's or parties' intent from that language. ***Lohr v. Viney***, 174 Wis. 2d 468, 480, 497 N.W.2d 730 (Ct. App. 1993) (language of will is best evidence of testator's intent); ***Rikkers v. Ryan***, 76 Wis. 2d 185, 188, 251 N.W.2d 25 (1977) (language of deed is primary source of intent of parties). When a will is unambiguous, there is no need to look any further to ascertain the testator's intent, as it is clearly stated in the will. ***Lohr***, 174 Wis. 2d at 480. The rule is the same for an unambiguous deed. ***Rikkers***, 76 Wis. 2d at 188 (extrinsic evidence may not be referred to in order to show intent of parties where deed is susceptible to only one interpretation).

¶11 In this case, none of the parties argue that the relevant provisions in Mary's will and judgment are ambiguous. To the contrary, and as the circuit court found, the plain language of Mary's will and judgment clearly and unambiguously gave Donald the unrestricted power to sell the real estate that comprised Mary's 50% undivided interest, and required only that the proceeds of any sales, less that part used for his necessary care and support, remain separate to later be divided among their nine children. The quitclaim deeds were similarly clear and unambiguous, with the plain language conveying the real estate described in the deeds, and reserving a life estate as to the 8.49-acre parcel sold to Donald's second wife. As explained below, under WIS. STAT. § 706.10(3) and ***Borek***, 328 Wis. 2d 613, ¶23, the quitclaim deeds did not need to contain any language specifying that the sales conveyed full title; rather they were presumed to do so unless they contained limiting language specifying otherwise. We agree with the circuit court that upon sale by quitclaim deed, Donald's life estate interest under Mary's will and judgment expired and Mary's 50% undivided interest in the sold property passed on to the children as the remaining proceeds of the sale.

¶12 The will in ***Meister***, like Mary's will here, gave the surviving spouse a life estate plus the unrestricted power to sell the real estate, with the remaining principal to be converted into cash and distributed to others. ***Meister***, 233 Wis. at 321. The surviving spouse sold some of the land by quitclaim deed to another. ***Id.*** at 322. The court held that the quitclaim deed conveyed only the spouse's life estate, explaining that the common law required that a quitclaim deed must contain "apt words" expressly stating that the grantor was exercising the power to sell ("'to dispose of the fee'"), and that "an ordinary quitclaim deed" without those words conveys only the grantor's interest, which in that case was a life estate. ***Id.*** at 327-28 (quoted source omitted). This common law has since been abrogated by

the court's subsequent application of a statute, now numbered WIS. STAT. § 706.10(3), which the ***Meister*** court did not reference.

¶13 The Wisconsin Supreme Court ruled in ***Borek*** that WIS. STAT. § 706.10(3), which has in substance remained unchanged since 1878, dispenses with the common law rule that a grantor must use special words of inheritance when conveying an estate in fee: "the [original] statute abrogated the common law rule by providing: 'In all conveyances of land hereafter made in this state, words of inheritance shall not be necessary in order to create or convey a fee ....'" 328 Wis. 2d 613, ¶17-20 (quoted source omitted). The statute now reads, "In conveyances of lands words of inheritance shall not be necessary to create or convey a fee, and every conveyance shall pass all the estate or interest of the grantor unless a different intent shall appear expressly or by necessary implication in the terms of such conveyance." WIS. STAT. § 706.10(3). The statute applies to all deeds. ***Borek***, 328 Wis. 2d 613, ¶21 (statute applies to "'every grant of lands or any interest therein'") and n.10 (statute applies to "*all* deeds") (emphasis in original). The ***Borek*** court also held that the statute "provides that every transfer of an interest in land conveys full title to that interest ... unless the conveyance [clearly] evinces a different intent." ***Id.***, ¶23.

¶14 The six Popp children point to no language that clouds Donald's power to sell under Mary's will and judgment. Nevertheless, they argue that the power of sale was not an interest in real estate that Donald could convey, that all that Donald could convey by quitclaim deed was his life estate interest, and that ***Borek*** neither applies here nor changed the law in ***Meister***. None of their arguments have merit.

¶15 As explained above, the court in ***Borek*** interpreted the statute, WIS. STAT. § 706.10(3), which the court in ***Meister*** did not consider; applied that statute to all deeds; and ruled that, contrary to the common law, deeds require no "apt words" (***Meister***, 233 Wis. at 327) to convey full title, but rather convey full title unless they contain words stating or expressly implying otherwise. ***Borek***, 328 Wis. 2d 613, ¶¶17, 22 n.10, 23. ***Borek*** applies here because this case concerns conveyances of land by quitclaim deeds. Under WIS. STAT. § 706.10(3) and ***Borek***, a conveyance "include[s] both a grant of land and the conveyance of an interest in land." 328 Wis. 2d 613, ¶20. Here, the quitclaim deeds conveyed land, not Donald's life estate interest or his power to sell, but his and Mary's tenant in common interests in the land itself. Under WIS. STAT. § 706.10(3) and ***Borek***, 328 Wis. 2d 613, ¶23, and pursuant to Donald's unrestricted power to sell the farm real estate, his quitclaim deeds conveyed full title to that real estate.

¶16 Because we have concluded that Donald's quitclaim deeds conveyed full title pursuant to his unrestricted power to sell, we need not reach the six Popp children's arguments as to why they should have been granted summary judgment as a matter of law on the ground that Mary's undivided 50% interest was neither conveyed nor able to be mortgaged, or that the conveyances were not necessary for his care and support.

¶17 The six Popp children also argue that even if Donald did convey full title, then factual issues as to whether he exceeded his powers under Mary's will and judgment should have proceeded to trial. Specifically, they contend that Donald's conveyances were not sales but gifts, due to inadequate consideration, that the conveyances should therefore be voided because Donald exceeded his powers under Mary's will and judgment, and that he did not keep the proceeds separate.

¶18 The case against the estate was scheduled for trial after the circuit court issued its decision construing the will and the quitclaim deeds, and the circuit court noted that the issues identified by the six Popp children were for the jury in the upcoming trial against the estate: "[I]f you are saying ... that it was more of a gift or tax planning or estate planning or avoidance ... that would be the issue ... for the jury," and "claim[s] against any proceeds that Donald received would have to go back into the estate." Accordingly, consistent with the six Popp children's arguments, the factual disputes remaining after the circuit court's legal decision were set for trial. However, the parties settled the remaining claims against the estate before trial, thereby failing to preserve for appellate review any issues related to those factual disputes.

Conclusion

¶19 We affirm the circuit court's judgment in favor of the respondents for the reasons stated above.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.