Appeal No. 2007AP1638 **Cir. Ct. No. 2005CV1871**

WISCONSIN COURT OF APPEALS
DISTRICT IV

ROBERT WILLIAM TENSFELDT, JOHN F. TENSFELDT AND CHRISTINE L. TENSFELDT,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

F. WILLIAM HABERMAN,

DEFENDANT-RESPONDENT,

ROY C. LABUDDE AND MICHAEL BEST & FRIEDRICH LLP,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

FILED

Apr. 3, 2008

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Dykman, Vergeront and Bridge, JJ.

This appeal and cross-appeal arise from a multi-claim lawsuit against two attorneys and their firm based upon estate planning services the attorneys provided to the plaintiffs' father. The children's central claims are that one attorney negligently failed to provide their father relevant advice about the effect of Florida law on his estate plans, while the other attorney aided and abetted their father in violating a stipulated provision of a Wisconsin divorce judgment which required that he execute and maintain a will in the children's favor. While we believe the negligent advice claim can be settled according to existing case law regarding third-party standing to raise a legal malpractice claim, the aiding and

abetting claim appears to raise several related issues of first impression in this state.

First, does a trial court have authority to incorporate into a divorce judgment a stipulation requiring a party to maintain a will in favor of an adult child? Assuming so, is such a stipulation thereafter enforceable only as a judgment or as contract to make a will, or both? In either case, should an attorney who drafts a will at his client's direction, which he knows violates the terms of such an incorporated stipulation, but who also advises the client that the will could potentially be challenged as a breach of contract, be excused from any third party liability under either a qualified immunity theory or some other good faith advice defense?

We anticipate that resolution of the first two questions will be significant to attorneys in both the family law and estate planning fields, while the entire bar has an interest in further clarifying the scope of an attorney's immunity from liability to third parties. Given the broad policy interests at stake here, as well as the special role the Wisconsin Supreme Court has always had in overseeing the duties and responsibilities of attorneys in this state, we certify this case to the Wisconsin Supreme Court pursuant to WIS. STAT. RULE 809.61 (2005-06)[1] for its review and determination.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

BACKGROUND

Although this case has a rather involved procedural history involving prior legal actions in two states, much of the background we set forth here is needed only to place the current issues in context. As we will discuss below, we believe the certified questions can be resolved as legal issues based on key facts which are undisputed for the purpose of summary judgment.

Robert and Ruth Tensfeldt divorced in Wisconsin in 1974. Their divorce judgment incorporated a stipulation, approved by the court, in which Robert[2] agreed to execute and keep in effect a will leaving outright to the couple's three adult children at least two-thirds of Robert's net estate in exchange for Robert receiving virtually all of the couple's property in the divorce. Robert remarried the following year to Connie Schroeder, who had three children of her own.

In 1980, Robert hired Attorney Roy LaBudde of Michael Best & Friedrich to do estate planning on his behalf. LaBudde was aware of the divorce judgment, and advised Robert that he could draft a will in compliance with the stipulation, negotiate a settlement with the children, or draft a will that failed to comply with the stipulation, leaving open the possibility that the children could attempt to challenge the will as violating the stipulation incorporated into the divorce judgment. Robert chose the third option and LaBudde followed Robert's direction to deliberately draft a will which failed to comply with the terms of the stipulation. Over the ensuing years, LaBudde drafted two successive wills for

[2] To avoid confusion among the many Tensfeldts involved in this case, we will refer to family members by their first names.

Robert which also violated the terms of the stipulation, and in addition helped him create a pour-over inter vivos trust into which property not transferred at the time of Robert's death would be held for Connie's benefit during her lifetime.

In 1999, after LaBudde had reduced the scope of his practice, Attorney F. William Haberman of Michael Best & Friedrich reviewed all of Robert's estate planning documents. Haberman advised Robert as to how he believed Robert's estate would be divided among his children, second wife and stepchildren under the existing documents.[3] Haberman was unaware, however—and thus failed to advise Robert—that a recent Florida Supreme Court case had held that a surviving spouse did not lose her interest in an inter vivos trust by electing against a pour-over will. *See* ***Bravo v. Sauter***, 727 So.2d 1103 (Fla. 4th DCA 1999). Thus, Robert decided to leave his estate plans unchanged at that time[4] without being advised that he could have added a clause to his trust stating that Connie would have no right to income under the trust if she elected against Robert's will.

Robert died in 2000 and the estate was probated in Florida, where Robert and Connie were then living. Robert's children filed a claim for an outright two-thirds of the estate pursuant to their parents' divorce settlement, on

[3] Haberman advised Robert that Connie would receive property in Florida worth $1.2 million and property in Wisconsin worth $600,000. Robert's children would receive the maximum amount that could pass tax-free. The remainder of the estate, projected at about $6.5 million, would pour into Robert's trust. Connie would receive the trust income for life, then upon her death, each of Connie's three children would receive $600,000. The assets remaining after taxes would go to Robert's three children.

[4] In early 2000, Robert amended the trust document to reduce the amount to be distributed to Connie's children to $300,000 each. Robert also directed Haberman to draft documents that would transfer certain stock to his children, but he died before he could execute the transfer documents.

the theory that their father had breached a contract to make a will. Connie then elected to exercise her Florida statutory right to 30% of Robert's estate, and also asserted the right to take income from the remaining amount of the estate poured over into the trust. Connie argued the children's contract claim was barred by the statute of limitations and the children argued that Connie's election was untimely and that the recent Florida case had been wrongly decided. The parties litigated these questions to the Florida Court of Appeals. Connie eventually prevailed on the timeliness of her election, which was also found to have precedence over the children's contract claim (although the court found the claim was not time-barred). Connie also obtained an award of $444,000 in attorney fees to be paid from Robert's children's share of the estate. The parties settled their remaining probate disputes in Florida.

Robert's children then filed the present Wisconsin action against LaBudde, Haberman and Michael Best & Friedrich (collectively, the attorneys), raising multiple theories of liability including legal malpractice, aiding and abetting the violation of a judgment, conspiracy to violate a judgment, intentional interference with the children's inherence, and intentional interference with a contract. On summary judgment, the court held that LaBudde was liable for intentionally aiding and abetting the violation of a divorce judgment and that Haberman had violated the standard of care for estate planners by failing to advise Robert of Connie's right to "double dip" under Florida law. However, the court further held that there was no admissible evidence showing that Robert would have altered his estate plan had he been properly advised about Florida law. Thus, the court concluded, Robert's children could not demonstrate that they had suffered any harm as a result of Haberman's omission and lacked standing to maintain a legal malpractice claim against him. The court therefore ordered

Haberman dismissed from the action and directed that the matter proceed to trial on the issue of damages against LaBudde.

Robert's children appealed Haberman's dismissal from the action and we granted leave for LaBudde and Michael Best & Friedrich to cross-appeal the non-final ruling that LaBudde is liable to the adult children of his client for aiding and abetting his client's execution of a will in violation of the divorce judgment. **This certification focuses solely on the issues raised in the cross-appeal relating to whether the trial court properly found that LaBudde was liable as a matter of law for aiding and abetting.**

DISCUSSION

"[A] person is liable in a civil action for aiding and abetting if: (1) the person undertakes conduct that as a matter of objective fact aids another in the commission of an unlawful act; and (2) the person consciously desires or intends that his conduct will yield such assistance." ***Winslow v. Brown***, 125 Wis. 2d 327, 336, 371 N.W.2d 417 (Ct. App. 1985). The trial court found that violating a divorce judgment was an unlawful act punishable by contempt under WIS. STAT. § 785.01(1)(b), and that LaBudde's act of drafting the will aided Robert in violating the judgment and was a conscious attempt to do so.

LaBudde first disputes whether drafting a will which failed to comply with a stipulation in a divorce judgment to create a will in favor of adult children was an unlawful act. He offers several theories for his position. He contends that such a stipulation is unenforceable because case law generally bars using a divorce judgment for estate planning that benefits adult children. *See* ***Estate of Edwin H. Barnes III v. Hall***, 170 Wis. 2d 1, 13, 486 N.W.2d 575 (Ct. App. 1992); *cf.* ***Rintelman v. Rintelman***, 118 Wis. 2d 587, 348 N.W.2d 498

(1984) (discussing whether estoppel might apply). He notes that a provision of the judgment at issue here specified several portions of the judgment that could be punishable by contempt, but did not include a violation of the will stipulation in that list. He claims that, even if the will stipulation was initially enforceable as part of the divorce judgment, the general 20-year statute of limitations on judgments under WIS. STAT. § 893.40 rendered it unenforceable by the time Robert died. Alternatively, LaBudde suggests that such a will stipulation could be treated as an enforceable contract separate from the divorce judgment itself. He points out that treating a stipulation in a divorce judgment to create a will as a contract would avoid any statute of limitations problem and allow it to be enforced after the testator's death no matter how long after the divorce.

Even if the stipulation was enforceable and drafting a noncomplying will was an unlawful act, LaBudde still maintains he should bear no liability for aiding and abetting under the circumstances of this case. Again, he offers several overlapping theories.

The general rule in this state is that "an attorney is not liable to third parties for acts committed in the exercise of his duties as an attorney." ***Yorgan v. Durkin***, 2006 WI 60, ¶27, 290 Wis. 2d 671, 715 N.W.2d 160. There are, however, several exceptions to this qualified immunity rule premised on policy considerations. Perhaps the most well-established exception occurs in the estate planning context, where the named beneficiary of a will may have a cause of action against an attorney who negligently drafted or executed the will, thus failing to effectuate the testator's intent. ***Id.***, ¶27 n.9 (citing ***Auric v. Continental Cas. Co.***, 111 Wis. 2d 507, 512, 331 N.W.2d 325 (1983), and ***Beauchamp v. Kemmeter***, 2001 WI App 5, ¶9, 240 Wis. 2d 733, 625 N.W.2d 297). That exception, which is at issue on the portion of the appeal dealing with Haberman,

does not appear to be directly relevant to the cross-appeal because it is undisputed that LaBudde drafted the will at his client's direction.

However, another exception to qualified immunity applies when an attorney "acts in a malicious, fraudulent or tortious manner which frustrates the administration of justice or to obtain something for the client to which the client is not justly entitled." ***Strid v. Converse***, 111 Wis. 2d 418, 429, 331 N.W.2d 350 (1983). The trial court relied on this exception when it determined that LaBudde was not entitled to qualified immunity, reasoning that it was not "fairly debatable" whether the will violated the terms of the stipulation and that knowingly violating a stipulation which had been incorporated into a divorce judgment frustrated the administration of justice. *See* ***id.***

LaBudde argues on his cross-appeal that, even if it was not fairly debatable whether the will violated the terms of the stipulation, it *was* fairly debatable whether that stipulation was enforceable as a judgment. Absent such enforceability as a judgment, LaBudde asserts there would be nothing inherently tortious or fraudulent about drafting the will at issue here. This argument largely tracks the reasons LaBudde asserts that he did not commit an unlawful act. That is, even if it is ultimately determined that the will stipulation was enforceable as part of the judgment, LaBudde claims he could still have operated under a good faith belief that the will stipulation would be treated as a contract and could not be enforced by contempt proceedings. He analogizes his situation to that covered by the RESTATEMENT (SECOND) OF TORTS § 772 (1979), which recognizes a "truthful information" or "honest advice" defense against third party liability for interference with a contract.

Finally, even if it is determined that the will stipulation was enforceable as a judgment and LaBudde lacked any good faith basis to believe otherwise, LaBudde still maintains it would be bad public policy to impose liability. He argues that an attorney should bear liability only for tortious conduct based on acts committed outside the scope of the legal representation. He points out that there is a split among other jurisdictions on the similar question whether to impose liability against attorneys for aiding and abetting liability for their client's breach of a fiduciary duty.

In sum, this case presents a number of significant issues regarding the enforceability of a stipulation in a divorce judgment to maintain a will in favor of an adult child, and the circumstances under which an attorney who assists a client in violating such a stipulation faces liability for doing so. We believe that the Wisconsin Supreme Court is in the best position to balance the competing policy concerns required to decide the scope of attorney liability in this area. Accordingly, we certify the present appeal to the Wisconsin Supreme Court.