**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

December 12, 2000

**Cornelia G. Clark**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 99-2746**

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

---

**ALLAN J. PAYLEITNER AND MARY ANN WICK, AS TRUSTEES OF THE PAYLEITNER FAMILY TRUST UNDER INSTRUMENT DATED MARCH 25, 1988,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**TIMOTHY I. MAC GILLIS,**

**DEFENDANT-RESPONDENT.**

---

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 SCHUDSON, J. Allan J. Payleitner and Mary Ann Wick, as trustees of the Payleitner Family Trust, appeal from the trial court judgment

dismissing, with prejudice, the trust's complaint against Timothy I. Mac Gillis. Because the trustees failed to prove that Lillian E. Payleitner's loan to Mac Gillis was transferred to the Payleitner Family Trust, we affirm.

## BACKGROUND

¶2 In late December 1987 or early January 1988, Mac Gillis borrowed $5,000 from his grandmother, Lillian E. Payleitner, to help him purchase a home. In March 1988, Lillian created the Payleitner Family Trust. In mid- to late-1988, Mac Gillis signed, under seal, an original note (and two carbon copies) in which he promised to pay, to the order of the trust, $5,000 and "interest on the unpaid balance before maturity at the rate of 7.5% per year." Although the note did not specify a maturity date, it stated: "If not paid in full at the time of the demise of Lillian E. Payleitner the total amount becomes due and payable immediately." Mac Gillis left all copies of the note with Lillian.

¶3 From 1988 to 1993, Mac Gillis paid interest on the note to Lillian herself, not to the trust. In February or March of 1994, Lillian returned the original note to Mac Gillis. Lillian died on January 30, 1996. Shortly thereafter, Allan removed the carbon copies of the note from Lillian's apartment and attempted to enforce the note. In response, Mac Gillis wrote a letter to Allan in which he claimed that the payments he had made to Lillian had been applied to the balance due on the note, and that Lillian had forgiven the debt prior to her death.

¶4 The trustees subsequently sued Mac Gillis, claiming that he owed the trust "the principal sum of $5,000.00, together with interest (computed through April 30, 1998) of $1,639.75, in all the sum of $6,639.75 plus interest in the amount of $1.03 per day from May 1, 1998 to the date of Judgment." Their

complaint also demanded "reasonable attorneys fees, the costs and disbursements of [the] action and such other relief as may be deemed just and equitable."

¶5 Following a bench trial, the court concluded that Mac Gillis had no enforceable obligation to the trust. The trial court then dismissed the complaint with prejudice.

## DISCUSSION

¶6 The trustees contend that the only issue in this case should be whether Mac Gillis delivered the note to the trust.[1] To analyze their contention, we must refer to provisions of the version of Wisconsin's uniform commercial code in effect when Mac Gillis signed the note.

¶7 WISCONSIN STAT. § 403.104(1) (1987-88)[2] provided:

> Any writing to be a negotiable instrument within this chapter must:
>
> (a) Be signed by the maker or drawer; and
>
> (b) Contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this chapter; and
>
> (c) Be payable on demand or at a definite time; and
>
> (d) Be payable to order or to bearer.

[1] The trustees assert that the note made payable to the order of the trust and signed by Mac Gillis is a clear, unambiguous instrument and therefore must be enforced as written. They also argue that the note's validity is not affected by Lillian's failure to formally assign Mac Gillis's debt to the trust. Additionally, the trustees declare that Mac Gillis delivered the note by leaving it with Lillian, thus surrendering his control over it. Finally, the trustees maintain that "[t]here was no admissible evidence of [Lillian's] intent to forgive the debt and, in any event, once the Note was executed and delivered in favor of the Trust, she had no authority to forgive it."

[2] All references to the Wisconsin Statutes are to the 1987-88 version unless otherwise noted.

WISCONSIN STAT. § 403.108 clarified that "[i]nstruments payable on demand include those payable at sight or on presentation and those in which no time for payment is stated." "An instrument which by its terms is otherwise payable only upon an act or event uncertain as to time of occurrence is not payable at a definite time even though the act or event has occurred." WIS. STAT. § 403.109(2). WISCONSIN STAT. § 403.110(1) provided, in relevant part:

> An instrument is payable to order when by its terms it is payable to the order or assigns of any person therein specified with reasonable certainty …. It may be payable to the order of:
>
> ….
>
> (e) An estate, trust or fund, in which case it is payable to the order of the representative of such estate, trust or fund or his successors.

¶8 The note at issue is properly classified as a negotiable instrument because: (1) Mac Gillis signed it; (2) it contains Mac Gillis's unconditional promise to pay $5,000; (3) it is payable on demand; and (4) it is payable to the order of the trust. When Mac Gillis signed the note, "delivery" of a negotiable instrument was defined as "voluntary transfer of possession." WIS. STAT. § 401.201(14). Mac Gillis does not dispute the trustees' contention that he delivered the note to Lillian. As Mac Gillis correctly points out, however:

> [A]t the time [he] delivered the Note to Lillian, the trustees had neither lent the money to [him], nor obtained from Lillian the right to repayment of the loan. In order for the trustees to become the owner of the receivable or the Note evidencing the receivable, Lillian still needed to complete delivery of the asset to the trustees.

¶9 As the supreme court explained:

> The generally accepted rule is that in every gratuitous transfer of title from one person to another there must be an actual or constructive delivery of the subject matter of the gift or transfer. The cases recognize as essential elements in these matters: (1) Intention to give;

> (2) delivery; (3) end of dominion of donor; (4) creation of dominion of donee.

***Madison Trust Co. v. Skogstrom***, 222 Wis. 585, 588, 269 N.W. 249 (1936). A gratuitous transfer requires the existence of all four elements. ***Giese v. Reist***, 91 Wis. 2d 209, 218, 281 N.W.2d 86 (1979). Additionally, "the alleged donee of a gift has the burden of proving that a gift was made." ***Id.***

¶10 Relying on ***Sorenson v. Friedmann***, 34 Wis. 2d 46, 55, 148 N.W.2d 745 (1967), the trustees contend that "[t]he form of delivery necessary to support a gift depends upon the nature of the property and the situation of the parties." They also cite ***Sorenson*** for the proposition that "[s]trict requirement of actual delivery is relaxed to foster liberality in upholding inter vivos gifts." ***Id.*** at 56. The trustees rely on ***Northwestern Mutual Life Insurance Co. v. Wright***, 153 Wis. 252, 140 N.W. 1078 (1913), for their contention that "[d]elivery may be found even though the donor retains physical possession of the property and the donee has no knowledge of the transfer." ***Id.*** at 256. Thus, the trustees claim:

> In this case, Lillian's intent to make a gift to the Trust is established by her undisputed request to MacGillis that he sign a note to the Trust which she recently created. Lillian's delivery to the Trust and end of dominion over the Note, under the circumstances of this case, is at least presumptively established by Lillian making the Note readily available to her trustee son who treated the Note for all purposes as an asset of the Trust and testified, with no contrary testimony in the record, that he could have physically taken the Note into his possession at any time. He chose to leave it in the physical custody of his mother …. Allan Payleitner's acceptance of the Note as an asset of the Trust is confirmed by his including it as an asset of the Trust for tax purposes.
>
> ….
>
> Contrary to the thinking of the trial court and the argument of MacGillis, the fact that the interest payments were given to Lillian and deposited into Lillian's account is not probative evidence that the Note was not intended to be effective. Allan Payleitner as trustee determined to give his mother the benefit of the interest payments. As trustee, he

> even endorsed the checks to her account. Mr. Payleitner is not a professional trustee. If he erred in thinking it proper to give his elderly mother some spending money out of the assets of the Trust, even though she was not a designated beneficiary of the Trust, does this really establish lack of intent to make the Note enforceable by the Trust? The far more compelling inference from the interest payments is that the Note was considered by all parties to be effective since otherwise no interest payments would have been due at all.

(Record references omitted.) We are not persuaded by the trustees' argument.

¶11 The circuit court findings included the following: (1) Lillian loaned Mac Gillis $5,000 without reducing the loan to writing, and no specific repayment terms were established at the time of the loan; (2) Lillian created the trust after she had made the loan, but before Mac Gillis had made any principal or interest payments; (3) after the creation of the trust, Lillian asked Mac Gillis to sign the note; (4) the trust was the payee on the note; (5) the note specified a 7.5% annual interest rate; (6) Mac Gillis signed three copies of the note; (7) "[a]t the time of the signing and for some considerable period after that," Lillian retained all three copies of the note; (8) all of Mac Gillis's interest payments between 1988 and 1993 were made directly to Lillian; (9) the three interest checks in evidence, which were made payable to the order of Lillian, "were deposited or negotiated in a way that provided the proceeds of the interest payments directly to Lillian"; (10) Lillian "returned the original instrument" to Mac Gillis; (11) the trust was not a party to the transaction between Lillian and Mac Gillis; and (12) the only "evidence of a formal agreement to transfer the asset to the trust" was Allan's "ambiguous participation and negotiation of the checks that were the interest proceeds." These findings are supported by the record and therefore are not clearly erroneous. Accordingly, we must uphold them. *See* WIS. STAT. § 805.17(2) (1997-98) ("Findings of fact shall not be set aside unless clearly erroneous, and due regard

shall be given to the opportunity of the trial court to judge the credibility of the witnesses.").

¶12 Based on these findings and others mentioned in its oral decision, the trial court concluded that Allan's "ambiguous participation and negotiation of the checks that were the interest proceeds" was not sufficient evidence to "accomplish a delivery of the asset by Lillian to the trust," and that no enforceable obligation existed between Mac Gillis and the trust. The trial court was correct.

¶13 We review the trial court's conclusion of law *de novo*. ***First Nat'l Leasing Corp. v. City of Madison***, 81 Wis. 2d 205, 208, 260 N.W.2d 251 (1977). The trust document provides:

> [Lillian] reserves the right to add to the trust estate (from time to time) by transferring to the Trustees such additional property *as she shall elect to transfer*; and upon receipt thereof by the Trustees all such additional property shall become and be subject to all of the terms and conditions of this agreement.

(Emphasis added.) The trust document also specifies that "[t]he trust estate shall be retained, administered and disposed of hereunder, in trust, for the benefit of [Lillian's] issue." Lillian was not a designated beneficiary of the trust.

¶14 The record reveals that the three checks in evidence (issued to Lillian by Mac Gillis as interest payments) were deposited into Lillian's personal account, not into the trust account. The record contains no evidence that Mac Gillis made any additional payments on the note from the time at which he issued a check to Lillian for an interest payment on December 31, 1993, until Lillian's death in 1996.

¶15 To establish that Lillian gratuitously transferred to the trust her right to repayment of the loan, the trustees were required to prove: (1) Lillian's

intention to make a gift; (2) Lillian's actual or constructive delivery to the trust; (3) termination of Lillian's dominion; and (4) creation of dominion in the trust. ***Giese***, 91 Wis. 2d at 218. The trustees failed to do so. Accordingly, we affirm the trial court's dismissal of their complaint.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.

¶16 WEDEMEYER, P.J. *(dissenting).* I write separately because I conclude that the promissory note signed by MacGillis was clear and unambiguous, and therefore must be enforced as written.

¶17 Here, the note in question clearly states that, "Timothy I Mac Gillis … promises to pay to the order of Lillian E. Payleitner Family Trust … the sum of $5,000.00." MacGillis signed the document. The note was presented by the trust in an unaltered condition, without any indication on the original document itself that the debt had been cancelled. Thus, there is a presumption that the note is valid. *See* ***Auer v. Johnson***, 258 Wis. 223, 225, 45 N.W.2d 696 (1951); ***Shannon v. Hoffman***, 256 Wis. 593, 596, 42 N.W.2d 268 (1950). The trial court also found that the note was never delivered to the trust. I disagree. The record demonstrates that the trust treated the loan as an asset of the trust, that the trust had access to the promissory note at all times, and that the language of the note itself clearly provides that the loan was being transferred to the trust.

¶18 Allan J. Payleitner, one of Lillian's sons, was co-trustee of the trust. He testified during the trial that he filed annual tax returns for the trust based on the trust's assets, which included the MacGillis note. Allan also testified that he was aware of the note, and could have taken possession of it at anytime. He did not take possession of it because Lillian kept it in a safe file. When Allan retrieved the note from the file after Lillian's death, it appeared to be in the same condition, and all three copies of the note were in tact.

¶19 In order to avoid payment on the note, MacGillis needed to show that the $5,000 was paid in full, or show some other credible evidence that the note had been cancelled. He did not do so. Instead, the trial court allowed MacGillis and his mother to give testimony, contrary to what the note unambiguously provides. This was an erroneous exercise of discretion, and testimony in that regard should be disregarded. The testimony admitted was contrary to WIS. STAT. § 885.16, which prohibits MacGillis, and any interested party from offering favorable testimony about conversations with Payleitner about the transaction.

¶20 When a written contract is unambiguous, it must be enforced as written. *See* ***Erickson v. Gundersen***, 183 Wis. 2d 106, 117, 515 N.W.2d 293 (Ct. App. 1994). "Parol evidence" may not be used to contradict the express language of the written contract. *See* ***Caulfield v. Caulfield***, 183 Wis. 2d 83-92, 515 N.W.2d 278 (Ct. App. 1994). Here, the document is clear on its face. It requires MacGillis to pay the $5,000 to the trust, and if the full amount is not paid by the time of Payleitner's death, the full amount becomes due and payable immediately.

¶21 Based on MacGillis's testimony, the trial court implicitly found that Payleitner forgave the debt before her death. The trial court based this finding on an inference arising from Payleitner giving the original note back to MacGillis. The trial court found that this occurred in December 1993, although MacGillis testified that this occurred in January, February or March of 1994. These findings are clearly erroneous. Despite its attempt not to rely on MacGillis's testimony about Payleitner's intent, this finding about forgiveness has no basis without the erroneously admitted testimony. The fact that Payleitner gave MacGillis the original, but kept the copies, does not give rise solely to the inference that the trial court found. Rather, this act alone raises several permissible inferences.

Payleitner might have decided that MacGillis should have the document as he was a party to it. The fact that no alterations were made to the document, such as "paid in full" or "debt cancelled," support this other inference. Further, the fact that Payleitner kept the copies in tact in her filing cabinet also supports this other inference. If Payleitner intended to cancel the debt, why not tear up and throw away the original and all the copies?

¶22 The bottom line is that the trial court's inference is based on MacGillis's testimony about his grandmother forgiving the debt. This was improper, and constitutes an erroneous exercise of discretion. This testimony, allowed in despite the deadman's statute, still would not relieve MacGillis of his obligations under the note. Payleitner no longer owned the note and, therefore, she could not forgive the debt. The trust was the owner and, therefore, any forgiveness of the debt should have been secured from the trust, through its trustees. The trial court also attempted to base its decision on its belief that the note was never assigned to, or delivered to, the trust. I disagree.

¶23 Delivery may be actual or constructive. *See* ***Estate of Balkus***, 128 Wis. 2d 246, 253-54, 381 N.W.2d 593 (Ct. App. 1985) ("A constructive delivery occurs only when the maker indicates an intention to make the instrument an enforceable obligation against him or her by surrendering control over it ….") MacGillis executed the note and left it with his grandmother, thereby surrendering control over the note. The fact that the trust never actually took possession of the note under the facts and circumstances here is not determinative. The trust reported the note as a trust asset. The document itself clearly states that MacGillis was agreeing to repay the $5,000 loan to the trust. He understood that that was the purpose for signing the document, and he treated the note as if it was an enforceable obligation by making interest payments on the debt. Based on the

foregoing, I conclude that the trial court's finding that the note was never delivered to the trust was clearly erroneous.

¶24 I would reverse the trial court, and order that the note be enforced as written.