COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2975 **Cir. Ct. No. 2003IN201**

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

IN RE THE ESTATE OF MARIE A. PORATH:

BEVERLY DREWS,

APPELLANT,

V.

CAROL MARWEDE,

RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Beverly Drews appeals an order construing Marie Porath's will, which determined that a bequest of a sum of money to Beverly was a general bequest that abated because of insufficient assets. We affirm the order.

¶2 Marie's will was signed on August 22, 1997. At the time of her death on May 16, 2003, her assets included cash in the amount of $136.76, and an undivided one-half interest in her farm property. Marie's will provided, in article III, as follows:

> If my husband, Carl A. Porath, predeceases me, I give all of my property as follows:
>
> A. If I own an undivided one-half (1/2) interest in farm land located in the Northwest 1/4 of Section 17, Township 20 North, Range 17 East, in the Town of Menasha, Winnebago County, Wisconsin. I give my undivided one-half (1/2) interest in said farm to my daughter, CAROL MARWEDE, who already owns the other undivided one-half (1/2) interest.
>
> B. I give to my daughter, BEVERLY DREWS, the sum of Fifty Thousand Dollars ($50,000.00) or a sum equal to fifty (50%) percent of the appraised value in my estate of the undivided one-half (1/2) interest which I own in the above-described farm, whichever is greater.
>
> C. I give the sum of Ten Thousand dollars ($10,000.00) to TRINITY LUTHERAN CHURCH, NEENAH, WISCONSIN, or to its successor or successors.
>
> D. I give the sum of Two Thousand Dollars ($2,000.00) to each of my grandchildren, living at the time of my death.
>
> E. I give the sum of Ten Thousand Dollars ($10,000.00) to be divided equally between those of my great-grandchildren living at the time of my death.
>
> F. I give the sum of Five Hundred Dollars ($500.00) to my niece, SHERYL O'ROURKE LOUGHRIN, presently of Greendale, Wisconsin, or to her issue by right of representation. If she leaves no issue then this bequest is to lapse and become part of the residue of my estate.

It is undisputed that Marie's husband, Carl, predeceased her. It is also undisputed that there were insufficient assets at the time of Marie's death to satisfy all the transfers set forth in the will. The circuit court distributed the specific devise of the farm property to Carol Marwede pursuant to paragraph A of the will. The

court concluded that the bequests of sums of money that followed in paragraphs B through F were general bequests that abated because there was insufficient money in the estate to satisfy them. Beverly appeals.[1]

¶3 The construction of a will involves a question of law that we review without deference to the circuit court. ***Estate of Smith***, 224 Wis. 2d 673, 676, 591 N.W.2d 898 (Ct. App. 1999). Despite our de novo review, we value the analysis of the circuit court. ***Furmanski v. Furmanski***, 196 Wis. 2d 210, 214, 538 N.W.2d 566 (Ct. App. 1995). Our task in construing a will is to determine the testator's intent, and the best evidence of this is the language of the document itself. When the will is unambiguous, there is no need to look any further to ascertain the testator's intent. ***Smith***, 224 Wis. 2d at 676-77.

¶4 Beverly argues that the order construing the will is contrary to Marie's intent. Beverly asserts that when read in its entirety, the will evidences Marie's clear intent to treat her daughters equally. Beverly does not dispute that Marie intended to leave her one-half interest in the farm to Carol, as Carol already owned the other half of the farm. However, Beverly contends that abatement "would completely defeat Marie's estate plan" because Carol would receive the farm and Beverly would receive nothing. We disagree.

¶5 The plain language of Marie's will leaves the farm property to Carol and sums of money to Beverly and certain others. As the circuit court correctly noted, the bequest to Beverly does not provide that Carol takes the farm property

[1] Marie Porath's great-grandchildren were involved in the litigation in the circuit court, but have not appealed the circuit court order. The matter was decided on briefs. This appeal involves only Beverly.

subject to a lien in favor of Beverly, or that Beverly is to be paid upon sale of the farm. Marie's will gives no indication of the source of the sum of money for the bequest to Beverly. Paragraph B simply indicates that Beverly was to receive "the sum of" or "a sum equal to" certain amounts. Paragraphs A and B are not contingent upon each other. The only condition placed on the bequest of the farm property to Carol was that Marie own it at the time of her death. There was no condition that the estate be sufficiently funded to satisfy the cash bequests that followed.

¶6 As such, the language of the will, if given its ordinary meaning, is consistent with the circuit court's determination that the bequest of the farm property to Carol was a specific bequest. A specific bequest is "a gift by will of a particular thing, or specified part, of the testator's estate, which is so described as to be capable of being distinguished from all others of the same kind." ***Estate of Haberli***, 41 Wis. 2d 64, 69, 163 N.W.2d 168 (1968) (citation omitted). The farm property was identified in the will by legal description and available to be distributed to Carol. It is a specific bequest of Marie's one-half interest in the farm property.

¶7 The issue thus becomes whether the circuit court correctly determined that the bequests of sums of money in paragraphs B through F were general bequests. A general bequest is one that confers a general benefit but not a specific asset. It is characterized by the fact that it does not attempt to dispose of any specific article or be made a charge on such item, but it is payable generally from the estate. ***Will of Weed***, 213 Wis. 2d 574, 578, 252 N.W.2d 294 (1934). As Professor Howard Erlanger discusses in his handbook for practitioners:

> A "general" transfer is one that confers a general benefit but not a specific asset; for example, the transfer of $10,000.

Howard S. Erlanger, *Wisconsin's New Probate Code, a Handbook for Practitioners*, 120 n.167, University of Wisconsin Law School (1998).

¶8 Marie's will does not specify an asset that would confer the sum of money bequested to Beverly, nor is the sum of money "charged" to a specific asset. Rather, it is simply the transfer of a sum not less than $50,000. In ***Korn v. Friz***, 128 Wis. 428, 429, 107 N.W. 659 (1906), the court was presented with the following will provision: "I will, devise, and bequeath to my son William Korn my farm [description omitted] *upon the express condition*, however, that he shall pay to my daughter, Phillipina Steele, the sum of five thousand ($5,000.00) dollars within one year after the death of my said wife …." The ***Korn*** court concluded the testator intended that out of his farm should be paid $5,000 to his daughter. Since the son was to take possession immediately upon the death of his mother and was not required to make payment to his sister until afterwards, the court concluded this was a condition subsequent that conferred upon the sister the right to a lien or "charge" for the sum of $5,000. ***Id.*** at 436.

¶9 We have no similar declaration in the will we are presently considering. By contrast, Marie's will simply indicates an intention that Beverly and various others receive sums of money. The will does not direct Carol to pay the sums of money, nor is the farm property devised "subject to," "expressly conditioned upon," or "contingent upon" Beverly or the others receiving the monetary sums. The will could have been drafted as such, but it was not. The court "can neither make a will for the testator nor distort its construction to accomplish its own idea of what is equitable." ***Will of Richter***, 215 Wis. 108, 111,

254 N.W. 103 (1934).[2] The circuit court correctly concluded that the bequest to Beverly was a general bequest.

¶10 Abatement involves the reduction of a legacy because of insufficient assets in the estate to pay all debts, charges and legacies in full. Under the common law, when an estate was "inadequate to meet the calls of the bequests in the will, and no provision having been made by the testatrix as to where the burden of the deficiency should lie, the loss must be borne by those who share in the estate under the general legacies." ***Will of Weed***, 213 Wis. at 578. WISCONSIN STAT. § 854.18[3] now codifies the order of abatement.[4] Section 854.18(1)(a)3, provides that general bequests shall abate prior to specific bequests.

¶11 Marie's will in paragraph A makes a specific bequest of the farm property to Carol. The will then makes general bequests of sums of money to Beverly and various others in paragraphs B through F. Marie's will does not set forth an order of abatement should the estate be inadequately funded. Failure to provide for a contingency in a will is an omission rather than an ambiguity. *See* ***Trust of Pauly***, 71 Wis. 2d 306, 310, 237 N.W.2d 719 (1976). Since the assets of

[2] We do not determine in this case whether the will is inequitable. As Carol points out in her brief, had the farm been devalued by environmental contamination or otherwise, Beverly could receive at least $50,000 under Beverly's interpretation of the will, while Carol could be entitled to no compensation.

[3] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[4] The circuit court and the parties have proceeded under WIS. STAT. § 854.18. This statute was part of the new probate code enacted as 1997 Wis. Act 188, which is based upon the Uniform Probate Code abatement provisions for transfers under wills, and is similar to the provisions under prior law for Wisconsin wills contained in WIS. STAT. § 863.11 (1995-96). "The primary difference from prior law is that the provisions are expanded to cover all governing instruments, not just wills." Howard S. Erlanger, *Wisconsin's New Probate Code, a Handbook for Practitioners*, 119, University of Wisconsin Law School (1998).

the estate are insufficient to satisfy all the bequests, and the will lacked an abatement provision, the general bequests were subject to statutory abatement pursuant to WIS. STAT. § 854.18(1)(a). We agree with the circuit court in so holding.

By the Court.—Order affirmed.

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