COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1295 **Cir. Ct. No. 2004PR59**

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

IN RE THE ESTATE OF ROBERT R. GAVIC:

JORV R. GAVIC, JERI R. GAVIC QUY, JEAN L. GAVIC AND KARI JO DELANEY,

APPELLANTS-CROSS-RESPONDENTS,

V.

MARY GAVIC,

RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

¶1 PETERSON, J. This as an appeal and cross-appeal of an order regarding ownership of certain property owned by Robert Gavic before his death. The case is a dispute between Robert's children from an earlier marriage and his surviving wife, Mary Gavic, who is sole beneficiary of Robert's estate. The circuit court concluded that: (1) documents purporting to transfer stock to Robert's children were an invalid testamentary transfer, making the stock part of Robert's estate; and (2) the named beneficiary of one of Robert's individual retirement accounts (IRA) was a trust primarily benefiting his children, not his estate.

¶2 In the appeal, Robert's children argue the court erred in concluding the attempted stock transfer was an invalid testamentary transfer. They argue the transfer was a proper nonprobate transfer under WIS. STAT. § 705.20(1).[1] They also challenge the circuit court's jurisdiction over the matter. We conclude the children's jurisdictional challenge is without merit. However, we are unable to determine whether the attempted transfer was a valid nonprobate transfer absent findings of fact on the meaning of the two instruments involved. We therefore reverse the order on this issue and remand for further proceedings.

¶3 In the cross-appeal, Mary challenges the circuit court's finding that Robert intended his IRA beneficiary to be the trust. She argues Robert in fact intended the IRA beneficiary to be his estate. Because the court's finding is not clearly erroneous, we reject her arguments and affirm this portion of the order.

[1] WISCONSIN STAT. § 705.20 was renumbered WIS. STAT. § 705.10 effective April 10, 2006. 2005 Wis. Act 206 § 5. However, as the parties do, we refer to the statute as § 705.20 throughout. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

BACKGROUND

¶4 Robert died May 20, 2004. He was survived by his wife Mary and four children from an earlier marriage: Jorv Gavic, Jeri Quy, Jean Gavic, and Kari Delaney.

¶5 Robert left both a trust and a will.[2] Three of Robert's children are the trustees and remainder beneficiaries of the trust, and Mary is entitled to funds necessary for her "support and general welfare" from the trust during her lifetime. Mary is the sole beneficiary under the will.

¶6 Robert also left an IRA account with Robert W. Baird & Co. Robert had designated the trust as sole beneficiary of the IRA when he opened the account. However, Robert executed a change of beneficiary form in 1997. On the form, Mary was designated primary beneficiary of one percent of the IRA. The primary beneficiary of the other ninety-nine percent of the IRA was listed as "Estate" followed by the trust's tax identification number.

¶7 Finally, Robert left two documents related to stock in the Bank of Spring Green. The first was a document the parties refer to as a bill of sale. The bill of sale, dated May 24, 1978, purported to transfer Robert's bank stock to his four children for the sum of one dollar, subject to certain conditions. The bill of sale was witnessed by one person and recorded. The second document is a promissory note, dated January 12, 1983, under which Robert is entitled to $217,432. The promissory note does not explicitly reference the bill of sale, but

[2] Robert's estate plan actually included two trusts. Only one is the subject of this appeal.

apparently Robert transferred the bank stock in exchange for the note in January 1983.

¶8 Litigation on these issues began November 18, 2005, when Mary filed a "Petition For Accounting and to Terminate Trust" as part of the probate proceeding. The petition was served on Robert's four children by mail. It raised several issues related to the trust and Robert's estate, including the dispute over the correct beneficiary of the IRA, but did not mention the stock dispute.

¶9 At a December 6 hearing, the court took testimony from Ron Farley, Robert's advisor at Baird, on the circumstances surrounding Robert's IRA beneficiary change. Mary declined to present testimony on that issue, taking the position that the change in beneficiary form spoke for itself. After Mary raised additional issues, the court ordered written briefing, stating that it wanted to resolve the issues all together, and written briefs would allow the parties to narrow the issues for a possible future hearing.

¶10 In her written submission, Mary argued five issues, including the IRA beneficiary and, for the first time, the bank stock dispute. The court resolved the issues in the parties' submissions at a February 21, 2006 hearing. The court first concluded it had probate jurisdiction over the bank stock dispute, reasoning that the question involved probate because the court would be required to decide whether the stock would be part of Robert's estate or would pass to the children as a nonprobate transfer.

¶11 After hearing argument from the parties, the court concluded the bill of sale was an invalid testamentary transfer, and the note therefore was part of the estate. Regarding the IRA beneficiary dispute, the court concluded the word

"estate" on the beneficiary form had been a mistake, and Robert had intended the trust to be the ninety-nine percent beneficiary of the IRA account.

DISCUSSION—APPEAL

¶12 In the appeal, Robert's children contend the court lacked subject matter jurisdiction, competency, and personal jurisdiction to adjudicate the bank stock dispute.[3] In the alternative, they argue the court erred in concluding Robert's attempt to transfer the stock to his children was testamentary. They argue the attempted transfer was in fact a valid nonprobate transfer at death under WIS. STAT. § 705.20(1).

¶13 We conclude the court had subject matter jurisdiction, the children waived their personal jurisdiction challenge by failing to raise the issue in the circuit court, and the children waived their competency objection by developing their argument for the first time in their reply brief in this court. On the merits, we conclude further fact finding is necessary in order to decide whether the stock was a valid nonprobate transfer under WIS. STAT. § 705.20(1).

I. Jurisdiction

¶14 Subject matter jurisdiction, competency, and personal jurisdiction are three discrete doctrines. Subject matter jurisdiction refers to the court's power

[3] The children also contend Mary had no standing to file the petition that led to the court's finding, citing ***Shovers v. Shovers***, 2006 WI App 108, 292 Wis. 2d 531, 718 N.W.2d 130. This argument is raised for the first time on appeal and is inadequately developed. We therefore do not address it. *See* ***Bishop v. City of Burlington***, 2001 WI App 154, ¶¶7-8, 246 Wis. 2d 879, 631 N.W.2d 656; ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

under the Wisconsin Constitution to hear a particular case. ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶8, 273 Wis. 2d 76, 681 N.W.2d 190. Because our constitution gives courts "original jurisdiction in all matters civil and criminal within this state," as a general rule circuit courts have subject matter jurisdiction "to entertain actions of any nature whatsoever." ***Id.*** (quoting WIS. CONST. ART. VII, § 8).

¶15 Competency refers to the court's statutory authority to exercise its jurisdiction. A court lacks competency when it fails to comply with a statutory mandate limiting the exercise of its subject matter jurisdiction. ***Id.***, ¶9. For example, a court always has subject matter jurisdiction over CHIPS proceedings. However, when it runs afoul of certain statutory time limits on its exercise of jurisdiction, it lacks competency to proceed. *See* ***In re B.J.N.***, 162 Wis. 2d 635, 654, 469 N.W.2d 845 (1991).

¶16 Unlike subject matter jurisdiction and competency, personal jurisdiction refers to the court's power to exercise jurisdiction over a given individual, as opposed to its power to exercise its jurisdiction over a given controversy. ***Manitowoc Western Co. v. Montonen***, 2002 WI 21, ¶8, 250 Wis. 2d 452, 639 N.W.2d 726; ***State v. Muentner***, 138 Wis. 2d 374, 382, 406 N.W.2d 415 (1987). While objections to a court's subject matter jurisdiction cannot be waived, objections to a court's personal jurisdiction and competency can. ***Mikrut***, 273 Wis. 2d 76, ¶27; ***Honeycrest Farms, Inc. v. Brave Harvestore Sys., Inc.***, 200 Wis. 2d 256, 261-63, 546 N.W.2d 192 (Ct. App. 1996).

¶17 We begin by determining which issues Robert's children have properly preserved. In order to preserve an issue for appeal, a party must raise it "with sufficient prominence such that the trial court understands that it is being

called upon to make a ruling." ***Bishop v. City of Burlington***, 2001 WI App 154, ¶8, 246 Wis. 2d 879, 631 N.W.2d 656. This rule is based on considerations of efficiency and fairness and on our reluctance to blindside circuit courts with reversals based on theories that did not originate in their forum. ***State v. Huebner***, 2000 WI 59, §§ 11-12, 235 Wis. 2d 486, 611 N.W.2d 727; ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476.

¶18 The children contend they raised a personal jurisdiction objection in their brief to the circuit court. The statement they rely on reads in its entirety: "Again, we question whether jurisdiction has been properly invoked. While [Robert's children] are interested persons in the estate, they are not defendants."[4] At the hearing on the issue, the circuit court asked counsel for Robert's children for argument on the jurisdictional objection. Counsel replied: "Well, perhaps the problem is that I'm simply out of my depth in the Probate Court. I'm used to litigation where you've got pleadings, and you've got plaintiffs, and you've got defendants, but you know who's who." Counsel for Mary replied that a separate civil action would be "somewhat of a distinction without a difference" because the proceedings going forward would be similar. The court then concluded that the bank stock dispute "is an issue for the Probate Court to resolve" and denied the children's jurisdictional objection.

¶19 Nothing in that exchange put the circuit court on notice that it was being asked to rule on a motion to dismiss for lack of personal jurisdiction. On appeal, the thrust of the children's personal jurisdiction argument is that Mary's

[4] In their brief, the children also noted this procedure was used by the litigants to resolve a similar problem in ***Reichel v. Jung***, 2000 WI App 151, ¶10 n.5, 237 Wis. 2d 853, 616 N.W.2d 118.

petition was served by mail and the issue regarding the bill of sale and note was raised for the first time in Mary's circuit court brief. We fail to see how the circuit court could have divined that the children were asking for a ruling on personal jurisdiction based on their brief and the explanation at the hearing.

¶20 Instead, the issue the children have properly preserved is whether Mary's claim can be heard as part of the probate proceeding. The children contend the court lacked both subject matter jurisdiction and competency to hear the stock transfer issue as part of the probate proceeding.

¶21 As for subject matter jurisdiction, the children acknowledge the holding in ***Mikrut*** that unless otherwise provided by law, circuit courts have subject matter jurisdiction "to entertain actions of any nature whatsoever." *See* ***Mikrut***, 273 Wis. 2d 76, ¶8; *see also* ***State v. Bush***, 2005 WI 103, ¶18, 283 Wis. 2d 90, 699 N.W.2d 80. The children do not provide any authority for the proposition that a circuit court is without power to adjudicate a dispute over whether property is properly part of an estate.

¶22 Rather, they argue the court never "invoked" its jurisdiction here. However, the children fail to provide any authority for the existence of their invocation requirement or an explanation of what a court must do to invoke its jurisdiction. Instead, the children reassert their arguments that the petition did not contain any mention of the bank stock dispute and that Mary filed the petition in her individual capacity, not as personal representative. These facts are relevant to personal jurisdiction, but the children do not explain how they are relevant to subject matter jurisdiction. In short, the children have failed to give any explanation of why this case does not fall within the court's constitutional

authority "to entertain actions of any nature whatsoever," and we divine none. *See* ***Mikrut***, 273 Wis. 2d 76, ¶8.

¶23 The children next argue the court lacked competency to adjudicate the stock dispute. A court lacks competency when it fails to comply with a statutory mandate related to exercise of its subject matter jurisdiction, and when the mandate is "central to the statutory scheme" of which is it a part. ***Id.***, ¶10. They contend the only procedure available to Mary was an independent action under WIS. STAT. § 879.63.

¶24 We reject the children's argument, for two reasons. First, they do not develop any argument based on the Wisconsin Statutes until their reply brief. We generally do not consider arguments raised for the first time in reply briefs, and decline to do so here.[5] *See* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995). Second, they fail to explain how WIS. STAT. § 879.63 is "central to the statutory scheme" of the probate code. Such a showing is necessary in order to establish a lack of competency. ***Mikrut***, 273 Wis. 2d 76, ¶10.

[5] We are particularly unwilling to decide this issue without an opportunity for Mary to be heard in view of what may be conflicting authority interpreting WIS. STAT. § 879.63. *Cf.* ***In re Ruediger v. Sheedy***, 83 Wis. 2d 109, 122, 264 N.W.2d 604 (1978) (term "action" in § 879.63 refers only to civil actions) and ***Templeton v. Moccero***, 168 Wis. 2d 313, 316, 483 N.W.2d 310 (Ct. App. 1992) (treating objection to inventory as "action" under § 879.63); *see also* ***Bell v. Neugart***, 2002 WI App 180, ¶33, 256 Wis. 2d 969, 650 N.W.2d 52 (Section 879.63 applies whenever a person is "seeking to collect property for the estate, when the personal representative is not acting to do so.").

II. The bank stock dispute

¶25 The circuit court concluded the bill of sale and note were an invalid testamentary transfer. The parties agree the attempted transfer is not valid under the statute of wills, WIS. STAT. § 853.03, and therefore can be given effect only as a nonprobate transfer under WIS. STAT. § 705.20(1). That statute provides:

> A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary.

The parties disagree over whether the bill of sale is "of a similar nature" to a deed of gift. They also disagree over whether the terms in the bill of sale can be considered "a provision … in … [a] promissory note." Both ask us to decide this issue as a matter of law.

¶26 We disagree with the way the parties have framed the issue. While the parties cast their arguments in terms of statutory interpretation, their arguments are also based on conflicting interpretations of the bill and note. If extrinsic evidence is necessary to construe the meaning of an ambiguous instrument, the meaning of the instrument is a question of fact we cannot resolve on appeal. *See* ***Management Comp. Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 177-78, 557 N.W.2d 67 (1996). We conclude this issue cannot be resolved without fact findings on the meaning of the two instruments, and therefore reverse the order and remand for the necessary findings.

¶27 The parties first dispute whether the bill of sale is "of a similar nature" to a deed of gift. A deed of gift is a deed "executed and delivered without

consideration." BLACK'S LAW DICTIONARY 445 (8th ed. 2004). Although the term "deed" typically refers to title to land, deeds of gift have been also been used in Wisconsin to transfer personal property. *See* ***id.*** at 444 (defining deed); ***John v. John***, 153 Wis. 2d 343, 349-50, 450 N.W.2d 795 (Ct. App. 1989) (transfer of stock); ***Budge v. Hawley***, 254 Wis. 202, 204, 36 N.W.2d 64 (1949) (transfer of government bonds).

¶28 While no Wisconsin case contains a detailed discussion of deeds of gift, numerous cases from other jurisdictions contain examples of their use as an estate planning device. Generally, the grantor will use the deed of gift to transfer title to property to a third party, such as the grantor's children, during the grantor's lifetime. Often the grantor will reserve a life estate. *See* ***Maitland v. Allen***, 594 S.E.2d 918, 919 (Va. 2004); ***Rudolf Nureyev Dance Found. v. Noureeva-Francois***, 7 F. Supp. 2d 402, 415 (S.D.N.Y. 1998); ***Herring v. McLemore***, 286 S.E.2d 425, 426 (Ga. 1982). One commentator notes that prior to a 1964 revision of the Internal Revenue Code, a similar arrangement was often used to gift art to nonprofits. The donor would grant the nonprofit title to the art, using a deed of gift, but reserve a life estate. This would allow the donor to enjoy the art during his or her lifetime but take an immediate tax deduction. *See* Ralph E. Lerner, *Legal Aspects of Owning Art and Other Valuable Personal Property*, in VALUATION, TAXATION AND PLANNING TECHNIQUES FOR SOPHISTICATED ESTATES 2004, at 13-14, 16 (PLI Estate Planning and Administration Course Handbook Series No. D-327, 2004).

¶29 In this case, the bill of sale purports to transfer to Robert's children "all stock in the Bank of Spring Valley and Gavic Services Inc. Holding Company, owned by [Robert] as of the date of the instrument, subject to the following." The bill then lists five terms. The fourth term states that the "sale

shall be considered as a gift to [the children] to take effect upon the death of" Robert. The fifth states that Robert "specifically" retains a life estate in the stock "and all proceeds and other benefits derived from the ownership of said stock."

¶30 These seemingly conflicting terms permit two possible meanings of the bill of sale. First, the bill could be read as transferring an immediate ownership interest in the stock to Robert's children in 1978, with Robert reserving himself a life estate and benefits from the stock. Under this interpretation, the bill retains some distinct similarities to the deeds of gift discussed in ***Maitland***, ***Rudolf Nureyev***, and ***Herring***. This interpretation of the bill of sale is implicit in the children's argument that the bill of sale was "in substance" a deed of gift.

¶31 However, the bill could also be read, consistent with the fourth term, as simply a "gift … to take effect" upon Robert's death. In other words, under the terms of the bill nothing is transferred until Robert dies. The terms in the bill are merely instructions on what to do with the stock at that point. Under this interpretation of the bill, fewer similarities to a deed of gift exist. Mary takes this position, arguing the bill "was a note stating that, upon death, ownership of the stock should go to Robert's children."

¶32 The interpretational difficulties multiply when one attempts to read the bill of sale in conjunction with the promissory note. The children argue Robert's attempted transfer was a valid nonprobate transfer because "what started out being a bill of sale ended up being a promissory note," and a promissory note is one of the instruments listed in WIS. STAT. § 705.20(1). This argument assumes the terms in the bill of sale were incorporated into the note, but the record does not contain any explanation, other than assertions in briefs, of the relationship between the two instruments. Like the arguments regarding the meaning of the bill of sale,

we have no way to evaluate this argument without knowing what the two documents meant.

¶33 In sum, we are unable to make the comparisons the parties ask us to make without knowing what lies on both sides of the equation. On remand, fact findings on the meaning of the two instruments are necessary. At a minimum, the findings should include what property interest, if any, the bill of sale transferred in 1978. They also should include the meaning of the note and whether the note altered any of the parties' rights under the bill of sale. On remand, the circuit court may in its discretion order whatever proceedings it deems necessary to resolve this issue, including discovery, motions for summary judgment, or an evidentiary hearing.

DISCUSSION—CROSS-APPEAL

¶34 In her cross-appeal, Mary challenges the circuit court's finding that Robert intended the trust to be beneficiary of his IRA.

¶35 The parties agree the IRA beneficiary form is ambiguous and the circuit court was correct to consider extrinsic evidence in order to determine Robert's intent. When extrinsic evidence is used to construe an ambiguous instrument, its meaning is a question of fact. *See* ***Management Comp. Servs.***, 206 Wis. 2d at 177-78. The circuit court's findings of fact will not be set aside unless clearly erroneous. WIS. STAT. § 805.17.

¶36 In this case, the circuit court had to resolve the contradiction on the IRA beneficiary form between the word "estate" as named beneficiary and the trust's tax identification number on the following blank. The court concluded the

word "estate" was a mistake, and Robert in fact intended the trust to be the IRA beneficiary.

¶37 Mary argues this finding is clearly erroneous, for four reasons. First, she argues it is contrary to the provision in Robert's will purporting to give the IRA to Mary. Mary asserts that the will is "the best available evidence of Robert's intent." However, the IRA beneficiary designation overrode the will provision. WIS. STAT. § 705.20(1)(a). While the will provision was relevant and supported Mary's position, it was not conclusive evidence. As fact finder, the court was free to weigh the conflicting evidence and make its own conclusions about what evidence was most persuasive. ***Hottenroth v. Hetsko***, 2006 WI App 249, ¶19, 727 N.W.2d 38. The court chose to credit the testimony of Ron Farley, the financial advisor who prepared the change of beneficiary form. Farley explained the change was intended to give Mary one percent beneficiary status in order to reduce the minimum required disbursements from the IRA.[6]

¶38 Mary next asserts that the court erred because both Robert and his son Jorv were experienced attorneys who "undoubtedly understood the legal significance of the term 'estate'" and "surely would have noticed that the estate was designated the beneficiary of the IRA." The circuit court found this argument unpersuasive, stating:

[6] The parties dispute whether Farley testified as to Robert's intent or his own intent. While Farley did not directly state what Robert intended, he did testify the change in beneficiary was initiated by Baird, not Robert. According to Farley, Baird recommended the change because it would reduce the minimum amount Robert would be required to withdraw from the IRA each year, and Robert eventually agreed to the proposal. A fair inference from this testimony—in particular the testimony that Baird initiated the change—was that Robert's intent, as well as Baird's, was simply to reduce the minimum IRA disbursements.

> [M]uch is made out [of] the fact that, you know, these are attorneys looking at the estate, and so forth. But unfortunately, attorneys happen to be human … sometimes you see what you want to see. If you don't think there's a change, you don't really pay attention.

The court acted within its authority as fact finder when it rejected Mary's argument that attorneys would surely have noticed the change and accepted Farley's testimony as true instead. *See* ***id.***

¶39 Third, Mary argues the court erred when it relied on Jorv's affidavit. In his affidavit, Jorv stated he was present when Mary and Robert signed the change of beneficiary form in 1997, and Mary indicated she understood that the trust was ninety-nine percent beneficiary and she was one percent beneficiary. In its oral decision, the court noted that Mary did not contradict Jorv's account of the meeting.

¶40 However, at the circuit court Mary never argued the court could not consider Jorv's affidavit as evidence. In fact, Mary used it to support her argument that Jorv or Robert would have noticed a mistake, pointing out that "Jorv's affidavit talks about an hour-long meeting and this one-page document which, in the center, lists the Estate as the beneficiary." On appeal, Mary renews the same argument, again relying on Jorv's affidavit. Mary cannot have it both ways. By failing to object to the affidavit, and by relying on the affidavit as evidence at the circuit court, she waived her argument that the court could not consider it as such. *See* ***Schonscheck***, 261 Wis. 2d 769, ¶10.

¶41 Finally, Mary questions the court's assertion that the change

> would substantially change the estate plan. [The change] would have other consequences of a tax nature, also, and it would not be something that one would do very lightly. And there's no indication that that major of a change was in the offing.

Mary argues the court erred because nothing in the record indicates the change would have had estate tax implications, and because the change would have had no impact on the nonprobate nature of the transfer. *See* WIS. STAT. § 705.20(1)(c).

¶42 Mary misreads the court's statement. The major change the court was referring to was leaving the IRA to Mary instead of Robert's children, not changing the IRA from probate property to nonprobate. The IRA, which is currently worth over $500,000, was a substantial part of Robert's estate. Changing the IRA beneficiary to the estate would have dramatically skewed the distribution of assets toward Mary and away from Robert's children.

¶43 Similarly, a fair reading of the court's statement regarding tax implications is that it was unlikely Robert would have made such a substantial change without some consideration of potential tax implications. While nothing in the record allowed the circuit court to discover whether in fact there were any such implications, the court's point is a valid one: one would expect such a substantial change in Mary's favor to be a more conspicuous event than what actually occurred.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions. Costs to appellants-cross-respondents.

Not recommended for publication in the official reports.