COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP898 **Cir. Ct. No. 2003PR58**

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

IN RE THE ESTATE OF GEORGE E. SKILLE:

CARRIE GUSTAFSON,

APPELLANT,

V.

BOYD SKILLE AND JEAN SKILLE,

RESPONDENTS.

APPEAL from an order of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Carrie Gustafson,[1] pro se, appeals a will construction. The issue is whether the decedent intended Boyd and Jean Skille each receive a separate share of his estate, or rather receive one share as husband and wife. We affirm the order of the circuit court concluding the decedent intended Boyd and Jean to receive one share each.

¶2 George Skille died testate on November 23, 2003,[2] and his one-page last will and testament provided at paragraph 2 as follows:

> 2. After all of my bills are paid and all of my property is sold, I would like the money to be divided equally among:
>
> | | |
> |---|---|
> | Boyd & Jean Skille | Chris Gustafson |
> | Georgia Gustafson | Carrie Gustafson |
> | Jack Gustafson | Sue Gustafson |
> | Bob Gustafson | Lief Skille |
> | Dick Gustafson | Sven Skille |

¶3 On December 14, 2006, a petition for construction of will was filed requesting the court to determine the number of shares into which the assets of the estate were to be divided. Following a hearing on January 8, 2007, at which none of the interested parties appeared, the court entered a written decision dated February 14, 2007. The circuit court concluded the decedent's use of the word "equally" required a division *per capita*, according to the number of individuals

[1] Carrie Gustafson, a granddaughter of the decedent, was not a party to the circuit court proceeding. However, as a beneficiary under the will, she qualifies as an aggrieved party for purposes of appeal. WIS. STAT. § 879.27(1) (2003-04), provides: "Any person aggrieved by any appealable order or judgment of the court assigned to exercise probate jurisdiction may appeal…." There is no dispute the circuit court's decision is an appealable order or judgment. The decision states: "This decision shall constitute the order of the court."

[2] Carrie, a non-resident attorney, was admitted pro hac vice on July 9, 2004, to appear and participate in the action as counsel for the personal representative. Many of the proceedings before the circuit court involved Betty Skille, the decedent's second wife, whom he married on January 24, 1992. Those proceedings are not the subject of this appeal.

listed in the will. Therefore, the court ordered the estate divided into eleven shares. Carrie now appeals, pro se. Neither the personal representative nor any other heir appeals the circuit court order.

¶4 The construction of a will involves a question of law which we decide de novo. ***Furmanski v. Furmanski***, 196 Wis. 2d 210, 214, 538 N.W.2d 566 (Ct. App. 1995). The court's task in construing a will is to determine the testator's intent, and the best indication of that is the language of the will itself. ***Lohr v. Viney***, 174 Wis. 2d 468, 480, 497 N.W.2d 730 (Ct. App. 1993). If an ambiguity exists in the will's language, we look to the surrounding circumstances at the time of the will's execution. ***Id.*** If an ambiguity still persists, we may resort to the rules of will construction and extrinsic evidence. ***Id.***

¶5 Here, the circuit court concluded the will was ambiguous. We agree. The decedent may have intended Boyd and Jean receive one share as husband and wife, or he may have intended each receive a separate share. The language suggests either disposition. However, resorting to surrounding circumstances or extrinsic evidence does not assist us in resolving the interpretation problem.[3]

[3] We note the parties attempted to place several documents before the circuit court at the time of the hearing. A letter brief submitted after the hearing by Attorney Katherine Stewart, for the personal representative, indicated that a layperson appeared at the hearing bearing a letter on behalf of Boyd Skille. Attorney Stewart objected to the admission of the letter on various grounds and the letter brief states the circuit court indicated Boyd's letter would be filed but not considered. Similarly, the letter brief submitted by Attorney Stewart discussed and appended purported excerpts from a deposition of Betty Skille, together with a purported will that Betty wrote for the decedent one year prior to his death. However, the purported will was not witnessed as required by WIS. STAT. § 853.03(2) (2003-04), nor is there any affidavit or other authentication accompanying the document. Moreover, there was no affidavit or other authentication accompanying the purported deposition excerpts of Betty Skille. Carrie attached the purported deposition excerpt to the appendix to her brief; however, Carrie does not cite or refer to the document in her arguments and in fact insists that "Judge Harrington properly did not look outside the will for evidence of George Skille's intent." We can find no indication the circuit court considered any of these documents in its decision and we shall not do so.

Neither party develops an argument concerning how the circumstances surrounding the execution or extrinsic evidence could shed light on the ambiguity and we will not abandon our neutrality to develop arguments. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). Indeed, Carrie concedes in her brief to this court that "[t]he evidence consists only of the will and sworn application for probate."

¶6 The circuit court resorted to the rules of will construction to resolve the ambiguity, and was correct in doing so. The circuit court observed in its decision that Wisconsin courts have "consistently held that when the language of a will directs that legatees shall take 'equally,' such language imports a division *per capita*." The circuit court relied on ***Will of Asby***, 232 Wis. 481, 486-87, 287 N.W. 734 (1939). In that case, our supreme court stated as follows:

> It also appears that the courts are practically unanimous in holding that when the language of a will directs that legatees shall take "equally" or "share and share alike," such language imports a division "*per capita*."

Id. at 487 (citations omitted).

¶7 We reach the same conclusion as the circuit court. We conclude the decedent's use of the word "equally" required a division according to the number of individuals listed in the will. There is nothing properly before this court to indicate a contrary intent which is required to overcome the general presumption of *per capita* division. *See* ***Mahon v. Security First Nat'l Bank***, 56 Wis. 2d 171, 176, 201 N.W.2d 573 (1972); *see also* ***Doheny v. Crawford***, 260 Wis. 9, 17, 49 N.W.2d 716 (1951).

¶8 Carrie argues the general rule of *per capita* division relied upon by the circuit court is inapt. Carrie insists no "*per stirpes/per capita* dilemma exists

in this case. George Skille's estate is to be divided among specific named persons. None of the estate is to be distributed to the issue or descendants of a specific person." Carrie insists that "a common sense reading" of the will demands the estate should be divided into ten shares rather than eleven. We are unpersuaded. Case law cited by Carrie does not support the proposition that the general rule of *per capita* distribution be limited to situations where a will provides for division among the issue or descendents of a specific person.

¶9 Carrie also argues that with the exception of "Boyd & Jean," each beneficiary is named individually on a separate line. Carrie insists that when a testator uses language in a particular way with respect to some legatees and not with respect to others, it may be presumed the testator intended to make a distinction between the two. Carrie relies upon ***Zens v. Ferdinand***, 7 Wis. 2d 577, 583, 97 N.W.2d 414 (1959), but that case is inapposite. Carrie cites no legal authority that overcomes the general rule pronounced in ***Asby*** that when the language of a will directs that legatees shall take "equally," such language imports a division *per capita.*

¶10 Carrie next argues the law prefers an interpretation in a will that keeps property in the normal channel of descent and benefits the heirs at law, relying upon ***Crow v. Marshall & Ilsley Bank***, 17 Wis. 2d 181, 186-87, 116 N.W.2d 106 (1962). Carrie notes that Jean Skille is not an heir at law. Respondents contend the rule of will construction proposed by Carrie has no application here. As respondents point out, Carrie overlooks the fact that another person not a blood relative is also named in the will, son-in-law Jack Gustafson.

Carrie does not reply to this argument,[4] and it is therefore deemed conceded. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

[4] Carrie filed no reply brief.