

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 10, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2008AP98
STATE OF WISCONSIN**

Cir. Ct. No. 2006PR222

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE ESTATE OF GEORGE M. POTEMKOWSKI:

BUKURIJE “BULLA” ISMAILI, PERSONAL REPRESENTATIVE,

APPELLANT,

v.

DEPARTMENT OF VETERANS AFFAIRS LEGAL DEPARTMENT,

RESPONDENT.

APPEAL from an order of the circuit court for Kenosha County:
BARBARA A. KLUKA, Judge. *Affirmed.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Bukurije Ismaili, the personal representative of the Estate of George Potemkowski, appeals from an order dismissing her petition for formal administration of the estate. The circuit court determined that

Potemkowski had not established legal domicile in Wisconsin despite having been placed by the Department of Veterans Affairs (Department)¹ in a Kenosha County group home for more than thirty years prior to his death. Ismaili argues that the circuit court's findings are contrary to the evidence. We affirm the circuit court's order.

¶2 Potemkowski, who had served in the United States Air Force during the Korean War, suffered from mental and psychiatric problems that rendered him disabled. His care was managed by the Department. In 1968 a conservator was appointed by an Illinois court to manage Potemkowski's money. The LaSalle Bank served as conservator until Potemkowski's death. In 1974 the Department placed Potemkowski in a Kenosha County group home. Up until that placement, he had been a resident of Chicago, Illinois. Potemkowski remained in the Kenosha County group home until January 2006 when he was taken to the North Chicago Department of Veterans Affairs Medical Center in Lake County, Illinois for care and treatment. In March 2006, a guardian of the person was appointed for Potemkowski by a Lake County, Illinois court. Potemkowski died July 10, 2006, at the medical center.

¶3 Potemkowski's will of November 15, 2005, bequeathed all his property to Ismaili and named her the personal representative of his estate. For ten years Ismaili owned and operated the group home where Potemkowski lived. Ismaili petitioned the Kenosha County court for administration of the estate and distribution of more than \$120,000 to her. The LaSalle Bank questioned whether

¹ The Department argues that the appeal should be dismissed because the caption names the Department of Veterans Affairs Legal Department as the respondent and the legal department is not the proper respondent. The error in the caption does not deprive the court of jurisdiction.

the probate proceeding should be venued in Wisconsin or Illinois. The Department asserted that Potemkowski was domiciled in Illinois and objected to the jurisdiction of the Wisconsin circuit court. A hearing was held and testimony taken from Ismaili, a long-term employee at the group home, the attorney who drafted the will, Ismaili's husband, Potemkowski's social worker since 1994, and a doctor who evaluated Ismaili's ability to make informed decisions in August 2005 and February 2006. The circuit court found that Potemkowski did not make a choice to live in Wisconsin and that he was placed there by the Department. It found no evidence that Potemkowski ever made an informed or intentional decision to live in Wisconsin. It concluded that Potemkowski was not domiciled in Wisconsin and it vacated its previous order for formal administration of the estate.

¶4 Probate jurisdiction in Wisconsin exists if decedent was domiciled in Wisconsin. WIS. STAT. § 856.01(1) (2005-06).² “A domicile may be classified as a domicile by birth, a domicile by choice, or a domicile by operation of law.” *Daniels v. Draves*, 53 Wis. 2d 611, 614, 193 N.W.2d 847 (1972). Here it is undisputed that Potemkowski, by choice, was domiciled in Illinois before being placed in the Kenosha County group home. He had lived there before his military service and returned there after service.

¶5 “Once a domicile has been established, it is presumed to continue until a new domicile is created.” *Daniels*, 53 Wis. 2d at 615. The burden of proof is on the person claiming a change in domicile to prove it. *Id.* That Potemkowski

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

resided in Wisconsin for more than thirty years does not alone establish domicile in Wisconsin. *See id.* at 614-15 (“‘domicile’ includes residence but ‘residence’ does not necessarily include domicile”). To create a new domicile there must be an abandonment of the old domicile and the intention and establishment of a new domicile. *Lauterjung v. Ford*, 14 Wis. 2d 324, 327, 111 N.W.2d 77 (1961).

¶6 “The determination of a person’s domicile or of his choice of domicile involves the adjudication of questions of fact.” *Baker v. Department of Taxation*, 246 Wis. 611, 617, 18 N.W.2d 331 (1945). A circuit court’s findings of fact will not be set aside unless clearly erroneous. WIS. STAT. § 805.17(2).

A circuit court’s findings of fact are clearly erroneous when the finding is against the great weight and clear preponderance of the evidence. Under the clearly erroneous standard, “even though the evidence would permit a contrary finding, findings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the same finding.”

Royster-Clark, Inc. v. Olsen’s Mill, Inc., 2006 WI 46, ¶12, 290 Wis. 2d 264, 714 N.W.2d 530 (citation and quoted source omitted). We accept the inference drawn by the circuit court when more than one reasonable inference can be drawn from the evidence. *Bank of Sun Prairie v. Opstein*, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979).

¶7 The evidence established that from 1968 to 1974 Potemkowski was in a North Chicago treatment facility. He was under the care and control of the Department. Thus his move to the Kenosha County group home was a continuation of that placement by the Department. From the outset Potemkowski did not have the intent to abandon his Illinois domicile. He did not (because he could not) change the location of his bank account. He continued to return to Illinois for medical treatment. The Illinois court continued to review the

conservator's accountings. He never challenged the Illinois' court authority to act, even in the 2006 guardianship proceeding. Potemkowski did not have the option of selecting Wisconsin as his residence. That choice was made for him. There was no intent to change his domicile.

¶8 Ismaili points to testimony indicating that Potemkowski thought of the group home as his home and that he had no intention of ever leaving it. During his last hospital stay, Potemkowski expressed a desire to return to Ismaili's care. Those expressions are linked only to the person providing him care, Ismaili. He expressed a desire to remain with Ismaili. His expressions do not relate a desire to make Wisconsin his domicile or indicate an awareness that Ismaili's home was located in Wisconsin. They alone do not constitute the great weight and clear preponderance of the evidence so as require reversal of the circuit court's finding that Potemkowski did not chose to live in Wisconsin. *See Bank of Sun Prairie*, 86 Wis. 2d at 676 (reversal of the circuit court's finding is not required if there is evidence to support a contrary finding; rather, the evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence).

By the Court.—Order affirmed.

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

