COURT OF APPEALS DECISION DATED AND FILED

May 21, 2002

Cornelia G. Clark
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. 01-2634

Cir. Ct. No. 00 CV 6885

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

KATHLEEN M. TAYLOR, BRYAN S. GARRITY, PEGGY ANN SMITH AND MARK R. POKRZYWINSKI,

PLAINTIFFS-APPELLANTS,

V.

MARSHALL & ILSLEY TRUST COMPANY AND THOMAS N. TUTTLE, JR.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Hoover, JJ.

¶1 PER CURIAM. Dolores A. Pokrzywinski's godchildren appeal from the trial court's granting of summary judgment in favor of Marshall & Ilsley

Trust Company and Thomas N. Tuttle, Jr.[1] The trial court concluded that Marshall & Ilsley and Tuttle were not negligent in the establishment or administration of Pokrzywinski's trust. The godchildren claim that Marshall & Ilsley and Tuttle were negligent because they breached their duties to: (1) fund Pokrzywinski's trust with all of her assets; and (2) inform Pokrzywinski that her marriage would invalidate her estate plan. We affirm.

I. BACKGROUND

¶2 Dolores A. Pokrzywinski contacted Marshall & Ilsley Trust Company in April or May of 1998 to establish a trust. Jennifer Torti, a certified public accountant for Marshall & Ilsley, met with Pokrzywinski on May 11, 1998. Pokrzywinski told Torti that she wanted to establish a trust because she could no longer manage her finances. Torti explained how a revocable trust worked, the services Marshall & Ilsley would provide, and the fees for the services. Torti also suggested that Pokrzywinski consult an attorney to set up a pour-over will and recommended Attorney J. Patrick Ronan.

¶3 Torti and Thomas N. Tuttle, Jr., a trust administrator, met with Pokrzywinski on May 14, 1998, to establish the trust. Pokrzywinski told Torti and Tuttle that she wanted to place her Smith Barney brokerage account and her Marshall & Ilsley bank accounts into a trust so that Marshall & Ilsley could pay her bills and manage her investments. Pokrzywinski signed the trust documents and the Dolores A. Pokrzywinski Revocable Trust was established.

[1] Pokrzywinski's godchildren are: Kathleen M. Taylor, Bryan S. Garrity, Peggy Ann Smith, and Mark R. Pokrzywinski.

¶4 Article I of the trust provided:

> The Grantor transfers to the Trustee the assets described in Schedule A attached, receipt of which is acknowledged by the Trustee, together with any additional assets which may be deposited by the Grantor or any other person, in trust, for the purposes and upon the terms set forth below.

There was no Schedule A; however, according to Pokrzywinski's instructions, Marshall & Ilsley transferred the Smith Barney brokerage account and Pokrzywinski's Marshall & Ilsley bank accounts into the trust.

¶5 Article IV of the trust imposed further duties upon the trustee, Marshall & Ilsley:

> The Trustee shall keep all assets safely; collect income and the proceeds of sales, maturities and redemptions; distribute net income and principal as directed by the Grantor. Grantor's instructions, whether in verbal, written or electronic form, to the Trustee, if believed to be genuine, shall be binding. The Trustee shall provide the Grantor with periodic accounting statements and a summary of Trust income for tax purposes.

Finally, Article VII of the trust indicated that the remaining assets would be distributed to Pokrzywinski's estate upon her death.

¶6 J. Patrick Ronan met with Pokrzywinski on May 19, 1998, to discuss estate planning. Pokrzywinski told Ronan that she wanted some of her property to pass to specific charities and the remainder of her property to pass to her godchildren. Ronan told Pokrzywinski that a pour-over will, in conjunction with the trust, would allow Pokrzywinski to realize her plan and that "regardless of her situation[,] including whether she married or not married, [the] Trust would distribute [her assets] to those heirs as she so desired."

¶7 Accordingly, Ronan executed an amendment to Article VII of Pokrzywinski's trust that left the residue of the trust to four of Pokrzywinski's godchildren. Ronan also executed a pour-over will that would transfer Pokrzywinski's non-trust assets into the trust upon Pokrzywinski's death: "I give the residue of my estate to the Trustees of the DOLORES A. POKRZYWINSKI REVOCABLE TRUST."

¶8 Pokrzywinski married Leonard Rush, Sr., on September 5, 1998. By operation of law, Pokrzywinski's marriage impliedly revoked her will. *See* WIS. STAT. § 853.11(2).[2] Tuttle was aware that Pokrzywinski and Rush were going to be married and was informed of the marriage after it took place. Rush also informed Ronan that he and Pokrzywinski had married. Pokrzywinski died on October 1, 1998.

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[2] WISCONSIN STAT. § 853.11(2) (1995-1996) provides:

> SUBSEQUENT MARRIAGE. A will is revoked by the subsequent marriage of the testator if the testator is survived by the testator's spouse, unless:
>
> (a) The will indicates an intent that it not be revoked by subsequent marriage or was drafted under circumstances indicating that it was in contemplation of the marriage or makes provision for issue of the decedent; or
>
> (b) Testator and the spouse have entered into a contract before or after marriage, which complies with ch. 766 and which makes provision for the spouse or provides that the spouse is to have no rights in the estate of the testator.

In May of 1998, WIS. STAT. § 853.11(2) was amended. Under the amendment, a pre-marriage will is no longer automatically revoked upon marriage. 1997 Wis. Act 188, § 137. The amendment, however, applies to deaths occurring on or after January 1, 1999, with the exception of irrevocable instruments executed before that date. 1997 Wis. Act 188, § 233(1). Pokrzywinski died before January 1, 1999, and her trust was revocable; thus, the earlier version of the statute applies.

¶9 At the time of Pokrzywinski's death, approximately forty percent of her assets, or $416,205, had been transferred to the revocable trust. Because Pokrzywinski's marriage impliedly revoked her will, she died intestate. Pokrzywinski had no children; thus, the remaining assets, or about sixty percent of her estate, passed to her husband, Rush.

¶10 Pokrzywinski's godchildren filed a suit against Marshall & Ilsley and Tuttle. They claimed that Marshall & Ilsley was negligent because it breached a duty to transfer all of Pokrzywinski's assets into the trust. They also claimed that Marshall & Ilsley was negligent because it breached a duty to warn Pokrzywinski that her marriage to Rush would impliedly revoke her will and invalidate her estate plan.[3]

¶11 Marshall & Ilsley and Tuttle moved for summary judgment. The trial court granted the motion. It determined that Marshall & Ilsley's and Tuttle's duties as trustees were limited to the scope of the powers given to them by the trust. Thus, the court concluded that Marshall & Ilsley and Tuttle did not have a duty to fund the trust with all of Pokrzywinski's assets because the only duty created by the trust was a duty to distribute the assets upon Pokrzywinski's death. The court also determined that the godchildren's failure-to-warn claim was unsuccessful. It concluded that the godchildren could not prove the elements of causation or damages because they could not show that Pokrzywinski's "intent after marriage was the same as when she drafted the pour-over will."

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[3] Pokrzywinski's godchildren also filed a breach-of-contract claim against Marshall & Ilsley and Tuttle. The godchildren did not, however, discuss this issue in their appellate brief. Accordingly, it is waived. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (contentions not briefed are waived).

II. ANALYSIS

¶12 Our review of the trial court's grant of summary judgment is *de novo*, and we apply the same standards as did the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315–317, 401 N.W.2d 816, 820–821 (1987). First, we examine the pleadings to determine whether a proper claim for relief has been stated. ***Id.***, 136 Wis. 2d at 315, 401 N.W.2d at 820. If the complaint states a claim and the answer joins the issue, our inquiry then turns to whether any genuine issues of material fact exist. ***Id.*** WISCONSIN STAT. § 802.08(2) (1999-2000) sets forth the standard by which summary judgment motions are to be judged:[4]

> The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

¶13 First, the godchildren claim that Marshall & Ilsley was negligent because it breached a duty to identify and transfer all of Pokrzywinski's assets into the trust.[5] We disagree.

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[4] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

[5] The godchildren further argue that Marshall & Ilsley had a duty to fund Pokrzywinski's trust with all of her assets because its advertising brochure "warrant[ed] and represent[ed]" that [Marshall & Ilsley] ha[d] "special expertise in acting as trustee for revocable trusts, and insur[ed] customers of proper asset management, estate and tax advice and planning, and avoidance of probate." While Marshall & Ilsley may have made these representations, we fail to see how the representations create a duty to transfer all of Pokrzywinski's assets into the trust when the terms of the trust are clear that the assets are to be transferred only at Pokrzywinski's direction.

(continued)

¶14 The existence and the scope of a legal duty are questions of law that we review without deference to the trial court. ***Kramschuster v. Shawn E.***, 211 Wis. 2d 699, 703, 565 N.W.2d 581, 583 (Ct. App. 1997). Generally, the nature and the extent of the duties of the trustee are determined by the terms of the trust. *See* ***Saros v. Carlson***, 244 Wis. 84, 88, 11 N.W.2d 676, 679 (1943) ("It is a trustee's paramount duty to … comply with the terms of the trust."); RESTATEMENT (SECOND) OF TRUSTS § 164 (1959) ("The nature and extent of the duties and powers of the trustee are determined by … the terms of the trust."). In this case, Marshall & Ilsley's duty to collect Pokrzywinski's assets was clearly spelled out in Article I of the trust:

> The Grantor transfers to the Trustee the assets described in Schedule A attached, receipt of which is acknowledged by the Trustee, together with any additional assets which may be deposited by the Grantor or any other person, in trust, for the purposes and upon the terms set forth below.

Marshall and Ilsley's duties were further spelled out in Article IV of the trust:

> The Trustee shall keep all assets safely; collect income and the proceeds of sales, maturities and redemptions; distribute net income and principal as directed by the Grantor…. The Trustee shall provide the Grantor with periodic accounting statements and a summary of Trust income for tax purposes.

The godchildren also argue that "[Marshall & Ilsley's] actions in transferring certain assets to [the] trust estop it from now claiming that it had no duty to do so." We disagree. There are three elements in a claim for equitable estoppel: (1) action or nonaction that induces; (2) reliance by another; (3) to his or her detriment. ***Gabriel v. Gabriel***, 57 Wis. 2d 424, 429, 204 N.W.2d 494, 497 (1973). "Proof of estoppel must be clear, satisfactory and convincing, and is not to rest on mere inference or conjecture." ***Id.***, 57 Wis. 2d at 428, 204 N.W.2d at 497. Again, the terms of the trust are clear that the assets were to be transferred at Pokrzywinski's direction. There is no evidence that any action on the part of Marshall & Ilsley or Tuttle induced Pokrzywinski to believe otherwise.

Nowhere does it say that Marshall & Ilsley was required to collect *all* of Pokrzywinski's assets and deposit them into the trust. Rather, under the terms of the trust, the assets were to be deposited at the direction of the Grantor, Pokrzywinski.

¶15 Here, Pokrzywinski directed Marshall & Ilsley to deposit her Smith Barney brokerage account and her Marshall & Ilsley bank accounts into the trust. That it did. There is no evidence that Pokrzywinski directed Marshall & Ilsley to place any other assets into the trust. Accordingly, Marshall & Ilsley acted in accordance with the terms of the trust and we see no duty to transfer all of Pokrzywinski's assets into the trust.[6]

¶16 The godchildren, however, rely upon ***Estate of Erlien v. Erlien***, 190 Wis. 2d 400, 527 N.W.2d 389 (Ct. App. 1994), to argue that Marshall & Ilsley was required to collect all of Pokrzywinski's assets because, under Wisconsin law, a trustee is required to undertake duties that are not specifically included in the

[6] The godchildren also argue that the terms of Pokrzywinski's trust should be construed against the drafter, Marshall & Ilsley, because they are ambiguous. The godchildren claim that it is unclear from the language of the trust what assets were to be transferred because Schedule A was never attached and because Pokrzywinski's instructions on the transfer of assets were not clear. We disagree. The terms of a contract are ambiguous when they are "capable of being understood by reasonably well-informed persons in either two or more senses." ***Security Sav. & Loan Ass'n v. Wauwatosa Colony, Inc.***, 71 Wis. 2d 174, 179, 237 N.W.2d 729, 732 (1976) (quoted source omitted). "A clause is not ambiguous, however, merely because its language is generally enough to encompass more than one option." ***Wilke v. First Fed. Sav. & Loan Ass'n***, 108 Wis. 2d 650, 654, 323 N.W.2d 179, 181 (Ct. App. 1982). Here, Article I of the trust provided that assets could be transferred by two means: under Schedule A or by the direction of the grantor. Article IV of the trust further provided that the Grantor's instructions were to be binding whether "verbal, written, or electronic." Thus, it is clear from these two provisions that the assets were to be transferred under Schedule A or under Pokrzywinski's directions, whether written or oral. Here, Pokrzywinski orally requested that her Smith Barney brokerage account and her Marshall & Ilsley bank accounts be transferred into the trust. There is no evidence that she directed Marshall & Ilsley to place any other assets into the trust. Accordingly, we see no ambiguity in the terms of the trust or in Pokrzywinski's directions on the transfer of assets.

trust document. Thus, they argue the duty to gather assets and transfer them to a trust is so basic that it does not need to be "spelled out" in the trust document. We disagree. While the godchildren are correct in stating that a trustee has duties not included in the trust document, the rule does not apply here, where the trustee's duties are specifically included in the trust document, for the reasons set forth below.

¶17 In ***Erlien***, we concluded that the trustee of a testamentary trust has a duty to ensure that the personal representative of an estate transfers all property to the trust to which the beneficiaries are entitled. ***Erlien***, 190 Wis. 2d at 417–419, 527 N.W.2d at 394–395. We recognized this duty based upon statutory provisions governing testamentary trusts: WIS. STAT. § 701.16(1) and WIS. STAT. § 856.29.[7] ***Id.***

¶18 In contrast, Pokrzywinski established an *inter vivos* revocable trust. As noted above, Marshall & Ilsley's duty to fund Pokrzywinski's trust was defined by the terms of the trust. Thus, we need not resort to statutory or other extrinsic authority. *See* RESTATEMENT (SECOND) OF TRUSTS § 164 (1959) (the nature and extent of a trustee's duties are determined by the nature of the trust relationship "in the *absence of* any provision in the terms of the trust") (emphasis added). Accordingly, ***Erlien*** is distinguishable and we decline to impose a duty upon Marshall & Ilsley to collect all of Pokrzywinski's assets absent such a provision in the trust. *See* **Scott v. Quarles**, 197 Wis. 327, 330, 222 N.W. 235, 237 (1928)

[7] Testamentary trust property is created by a will. ***Estate of Rice v. County of Monroe***, 187 Wis. 2d 659, 669–670, 523 N.W.2d 168, 172 (Ct. App. 1994). The trust property is included in the decedent's gross estate and distributed to the trust during the probate of the estate. ***Id.***, 187 Wis. 2d at 670, 523 N.W.2d at 172.

("[C]ourts in the exercise of equity powers may not enlarge, modify, or defeat the terms of the trust, saving and excepting only in cases where it shall appear that it is necessary to preserve the corpus of the trust.").

¶19 Second, the godchildren rely upon ***McCoy v. First Wisconsin National Bank***, 142 Wis. 2d 750, 419 N.W.2d 301 (Ct. App. 1987), to argue that a trustee has a duty to warn a grantor of "easily identifiable impediments or pitfalls." *See* ***id.***, 142 Wis. 2d at 757, 419 N.W.2d at 305. Thus, the godchildren argue that Marshall & Ilsley had a duty to warn Pokrzywinski that her marriage to Rush impliedly revoked her will and invalidated her estate plan. Again, we disagree.

¶20 In ***McCoy***, Elizabeth McCoy established an *inter vivos* trust with the First Wisconsin National Bank. ***Id.***, 142 Wis. 2d at 751, 419 N.W.2d at 303. The trust provided that when McCoy died, the corpus of the trust would transfer to the executor of McCoy's will or the administrator of McCoy's estate. ***Id.***, 142 Wis. 2d at 751–752, 419 N.W.2d at 303. At a meeting with the Bank and the Wisconsin Academy of Sciences, Arts, and Letters, McCoy told the Bank's trust officers that she wanted the corpus of her trust to go to the Academy. ***Id.***, 142 Wis. 2d at 752, 419 N.W.2d at 303. After the meeting, McCoy wrote a letter to the Academy's president confirming that the corpus of her trust was to pass to the Academy. ***Id.*** McCoy then sent a copy of the letter to the Bank. ***Id.*** The Bank put the letter in McCoy's file, but did not contact McCoy or take any action to amend the trust. ***Id.***

¶21 McCoy died intestate and her estate claimed the corpus of the trust under the terms of the trust agreement. ***Id.***, 142 Wis. 2d at 753, 419 N.W.2d at 303. The trial court held that the trust had not been effectively amended; thus, the corpus of the trust could not pass to the Academy. ***Id.***. We concluded that the

Bank breached its duty of vigilance when it failed to advise or warn McCoy that the letter was insufficient to amend the trust. ***Id.***, 142 Wis. 2d at 757, 419 N.W.2d at 305. We made this determination based upon: (1) the Bank's knowledge of McCoy's intent to make the Academy the trust beneficiary, which was clearly revealed at a meeting and in a letter; (2) the language of the trust agreement, which required "an 'instrument in writing delivered to the Trustee'" to amend the trust; and (3) the Bank's expertise in trust matters. ***Id.*** Thus, we concluded that: "the Bank had a duty to at least warn McCoy regarding easily identifiable impediments or pitfalls if her intent was to make the Academy the beneficiary of her trust upon her death, an intent not found in the trust document." ***Id.***

¶22 This case, however, is distinguishable from ***McCoy***. First, in ***McCoy***, we determined that the Bank had a duty to warn of easily identifiable impediments or pitfalls because the grantor made her intent to amend the trust agreement clear—she clearly made her wishes known to the Bank at a meeting and subsequently submitted a letter to the bank confirming her desire to amend the trust. In contrast, Marshall & Ilsley had no notice, written or otherwise, that Pokrzywinski wished to amend any part of her trust or estate plan. Here, the only knowledge that Marshall & Ilsley had was the minimal knowledge that Pokrzywinski had married. This simply does not rise to the level of knowledge that the Bank had in ***McCoy***. Accordingly, it does not follow that Pokrzywinski's marriage created an easily identifiable impediment or pitfall of which Marshall & Ilsley had a duty to warn.

¶23 Moreover, there was no language in Pokrzywinski's trust that required Marshall & Ilsley to inform Pokrzywinski of possible problems with her estate plan. Indeed, such language would require Marshall & Ilsley to dispense legal advice and engage in the unauthorized practice of law. *See* ***Doe v. Condon***,

532 S.E.2d 879, 882 (S.C. 2000) ("Whether a will or trust is appropriate in any given situation is a function of legal judgment."); ***Green v. Huntington Nat'l Bank***, 212 N.E.2d 585, 587–588 (Ohio 1965) (bank that provided legal advice on estate planning engaged in the unauthorized practice of law). Pokrzywinski's attorney, Ronan, drafted Pokrzywinski's will and told Pokrzywinski that "regardless of her situation[,] including whether she married or not married, [the] trust would distribute [her assets] to those heirs as she so desired."[8] Marshall & Ilsley had no duty to warn Pokrzywinski that her marriage would invalidate her estate plan and the trial court properly granted Marshall & Ilsley's and Tuttle's motion for summary judgment.[9]

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[8] Prior to filing this case, the godchildren entered into a settlement agreement stipulating that Pokrzywinski's will was "validly executed in conformity with Section 853.03."

[9] In light of our conclusion that Marshall & Ilsley and Tuttle did not have a duty to warn Pokrzywinski about the consequences of marriage on her estate plan, we will not discuss whether the godchildren can prove the elements of causation and damages. ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed); ***State v. Holland Plastics Co.***, 111 Wis. 2d 497, 504–505, 331 N.W.2d 320, 324 (1983) (appellate court may address an issue raised but not resolved in the trial court where the trial court disposed of the case on a separate basis). Furthermore, we will not discuss the godchildren's contention that the affidavits Marshall & Ilsley submitted to support its reply brief on summary judgment should be disregarded because the affidavits are not necessary to this decision. ***Gross***, 227 Wis. at 300, 277 N.W. at 665.

Finally, the godchildren claim that issues of fact exist, precluding summary judgment, because their experts opine that Marshall & Ilsley and Tuttle breached their duties to transfer all of Pokrzywinski's assets and to warn Pokrzywinski of the effect marriage would have on her estate plan. We disagree. "[T]he only 'expert' on domestic law is the court." ***Wisconsin Patients Comp. Fund v. Physicians Ins. Co.***, 239 Wis. 2d 360, 367 n.3, 620 N.W.2d 457, 460 n.3 (Ct. App. 2000) (citations omitted). Accordingly, the expert opinions do not raise genuine issues of material fact.

By the Court.—Judgment and order affirmed.

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