COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3453 **Cir. Ct. No. 468-639**

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

IN THE MATTER OF THE TRUSTS CREATED UNDER THE JOHN T. KUESEL LIVING TRUST:

MARY ELLEN KUESEL, SARAH FAIR, ANN KUESEL, AND ANY MINOR BORN OR UNBORN HEIRS, BY THEIR GUARDIAN AD LITEM, JAMES E. COLLIS,

APPELLANTS,

V.

FIRSTAR TRUST COMPANY,

RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Mary Ellen Kuesel, the widow of John T. Kuesel, and their daughters, Sarah Kuesel Fair and Ann Kuesel, all trust beneficiaries of

the John T. Kuesel Living Trust (Kuesel Trust), appeal from an order for summary judgment dismissing their objections to the approval of accounts relating to four trusts created under the Kuesel Trust and managed by Firstar Trust Company. Because Firstar complied with both the terms of the trust investment management responsibilities and with Wisconsin's prudent investment rule, we affirm.

BACKGROUND

¶2 John T. Kuesel, by a trust agreement executed on January 8, 1971, created the John T. Kuesel Living Trust. Under the agreement, four trusts were created: (1) the Mary Ellen Kuesel Marital Trust (the "Marital Trust"); (2) the John T. Kuesel Family Trust (the "Family Trust"); (3) the John T. Kuesel Family Trust for the benefit of Sarah K. Fair, nee Kuesel, (the "Sarah Fair Trust"); and (4) the John T. Kuesel Family Trust for the benefit of Ann M. Kuesel (the "Ann Kuesel Trust"). The original trustees were attorney Dudley J. Godfrey and Firstar.

¶3 The trusts were funded in 1983, with values for the assets as of December 31, 1983. The Marital Trust was terminated in September 1992, by written consent of the trust beneficiaries and the funds were distributed to Mary Ellen. On May 17, 1995, Sarah became co-trustee of the Sarah Fair Trust. On June 5, 1995, Ann became co-trustee of the Ann Kuesel Trust. On July 22, 1996, Mary Ellen appointed herself co-trustee of the Family Trust, after the resignation of Dudley Godfrey.

¶4 In July 1997, Firstar filed a petition for approval of its trust accounts. The Kuesels filed objections as to both the management of the trust assets and the fees and costs requested. By stipulation, Firstar resigned as co-trustee on November 30, 1999, thereby making the Kuesels the sole trustees of their own

trusts. On December 11, 2001, the trial court signed an order granting summary judgment dismissing, in part, the objections.[1] The Kuesels now appeal.

ANALYSIS

¶5 The standards governing reviews of challenges to orders granting summary judgment are all too familiar to bear repeating at length. Suffice it to say, we review orders for summary judgments independently, utilizing the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We do however, value any analysis that the trial court has placed in the record. We shall affirm the trial court's decision granting summary judgment if the record demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (1999-2000).[2] As part of the summary judgment protocol, affidavits may be considered, but their content must be based upon personal knowledge and consist of admissible evidentiary facts. WIS. STAT. § 802.08(3). An affidavit supporting or opposing a motion for summary judgment is usually insufficient if it sets forth only opinion. ***Dean Med. Ctr., S.C. v. Frye***, 149 Wis. 2d 727, 732, 439 N.W.2d 633 (Ct. App. 1989). An "expert witness may not testify with regard to domestic law because it is within the exclusive responsibility of the trial judge to find and interpret the applicable law." ***Thorin v. Bloomfield Hills Bd. of Educ.***, 513 N.W.2d 230, 236 (Mich. Ct. App. 1994).

[1] The trial court has yet to approve Firstar's accounts, pending the results of this appeal.

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

¶6 The Kuesels claim the trial court erred in granting summary judgment to Firstar on two bases. They claim material issues of fact exist regarding (1) whether Firstar properly complied with its obligations under the trust agreement, and (2) whether Firstar reasonably performed its fiduciary duties as a trustee. We shall address each basis in turn.

A. Obligations Under Trust Agreement.

¶7 The Kuesels first contend the trial court erred in granting summary judgment in favor of Firstar because material issues of fact exist relating to the discharge of its responsibilities under the trust agreement executed by John Kuesel. We are not convinced.

¶8 The express purposes of the trust created under the trust document and the terms of obligation are quite forthright. Article IX, 9.4, provides, "The Grantor's purpose in creating this Trust is to conserve the principal of the Trust … and to achieve savings in Income Taxes and Death Taxes." Article X establishes, "In addition to any other powers that may be conferred upon them by law, and not by way of limitation of such powers, the Trustees … are expressly given the following powers." As pertinent to the issues of this appeal they include:

> 10.2. To invest and reinvest the trust estate in any property or undivided interests therein, wherever located, including bonds, notes, secured or unsecured, stocks of corporations, real estate, or any interest therein, interests in trust, including common trust funds, and life insurance contracts, *without being limited by any statute or rule of law concerning investments by trustees and regardless of any lack of diversification, risk or non-productivity;*
>
> ….
>
> 10.15. To retain any interest which the Grantor may have in any business, even though it may constitute all or a large portion of the trust estate, whether as a

> stockholder or security holder of a corporation, a partner, a sole proprietor, or otherwise, for any length of time ….

(Emphasis added.)

¶9 By way of preliminary consideration relating to the responsibilities and powers of the trustee, certain facts are uncontroverted. The end purpose of the trust agreement was to "conserve the principal" of the trust. This goal was not only achieved, but it was exceeded; the trust fund began at $1,611,071 and grew over seventeen years to $3,348,979, not counting distributions from the trusts of $2,012,762.

¶10 The primary purpose of the trusts created under the Trust Agreement was to provide sufficient income to the grantor of the trust's widow, Mary Ellen. For the seventeen-year period, she received an average of nearly $118,000 per year. There has been no challenge to the propriety of this amount of income distribution. To achieve these immediate goals, the Trust Agreement provided broad powers, without limitation of asset allocation, including real estate investments. After searching the record, we find nothing to suggest that Firstar violated the clearly expressed broad terms of its asset management responsibility. Therefore, we reject this portion of the Kuesels' claim of trial court error. It now remains for us to examine the application of the prudent person investment rule.

B. Prudent Person Rule.

¶11 Wisconsin's prudent person investment rule is embodied in WIS. STAT. § 881.01, and provides in pertinent part:

> [T]rustees may invest the funds of their trusts in accordance with the provisions pertaining to investments contained in the instrument under which they are acting, or in the absence of any such provision, then within the limits of the following standards:

> **(1)** In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for the benefit of another, a fiduciary shall exercise the judgment and care under the circumstances then prevailing, which persons of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital. Within the limitations of the foregoing standard, a fiduciary is authorized to acquire and retain every kind of property, real, personal or mixed, and every kind of investment, specifically including but not by way of limitation, bonds, debentures and other corporate obligations, stocks, preferred or common, and shares of investment companies and investment trusts, which persons of prudence, discretion and intelligence acquire or retain for their own account.

¶12 The underlying tenet of the Kuesels' claim against Firstar is that under this statute, a two-step analysis must be applied when challenging a trustee's asset management. First, the court must consider whether the trustee's conduct violated the terms of the trust instrument; and second, if there is no violation, the court must then determine whether the trustee acted consistently with the prudent person rule. The Kuesels then assert that the prudent person rule applies to all activities of the trustee. Applying this analysis, the Kuesels argue that because the grantor of the trust did not restrict the percentage of assets that could be invested in equities, Firstar should have acquired more equities of the same type it already held—ideally, funding the trust with 80-100% in equities. The argument continues that because the trust did not pursue such a strategy, it ought to be surcharged for what might have been.

¶13 Firstar disagrees and responds by asserting that by the very terms of the prudent person statute, the investment powers granted to the trustee in the trust instrument must prevail over the prudent person powers set forth in the statute. We need not, however, resolve this apparent conflict because we conclude, for the

reasons to be stated, that the asset management activities of Firstar did not violate the prudent person rule.[3]

¶14 The prudent person test under WIS. STAT. § 881.01 presents a mixed question of fact and law. ***In Estate of Ames v. Markesan State Bank***, 152 Wis. 2d 217, 232, 448 N.W.2d 250 (Ct. App. 1989). What the trustee did or did not do is a question of fact. ***Id.*** What a reasonable trustee would have done in the same circumstances is a legal question, which we review independently, placing value in any analysis set forth by the trial court. ***Id.***

¶15 The rule in this state is circumscribed by the circumstances existing at the time an investment decision is made. This approach is consistent with the generally accepted body of trust law, which holds that the prudence of a person's act is dependant upon circumstances "as they reasonably appear … at the time when he [or she] does the act and not at some subsequent time when his [or her] conduct is called in question." RESTATEMENT (SECOND) OF TRUSTS § 174, cmt. b (1959). When examining the contours of WIS. STAT. § 881.01, where no trust instrument was involved, our supreme court enunciated:

> In determining whether an investment, when made, is reasonable, the question to be resolved is not whether a greater return on the investment could have been realized; rather, the question to be resolved is whether under the circumstances then present, the administrator exercised the judgment and care that "… persons of prudence, discretion and intelligence exercise in the management of their own affairs[.]"

[3] Both parties cite ***In re Trust of Mueller v. Mueller***, 28 Wis. 2d 26, 135 N.W.2d 854 (1965), to support their respective positions as to the apparent conflict between the powers and obligations stated in a trust instrument and the public policy set forth in the statute. As stated above, we decline the invitation to resolve the issue.

Estate of Kugler v. VanRossum, 117 Wis. 2d 314, 322, 344 N.W.2d 160 (1984) (citation omitted). Again, where no trust instrument was involved, we concluded:

> The test for a breach of a trustee's fiduciary duty is not whether, in hindsight, a more lucrative investment could have been made measured from the standpoint of safety, value, income or tax consequences. Rather, the question is whether, *under the circumstances then prevailing*, a prudent man would have acted differently.

Ames, 152 Wis. 2d at 232 (emphasis in original).

¶16 The facts and circumstances of Firstar's investment activities are not in dispute. The time frame is from 1984 to 1999, when, by stipulation, Firstar relinquished its trusteeship. Throughout this period of time, the average annual rates of return were 9.3% for the Marital Trust, 12.6% for the Family Trust and 13.1% for the Sarah Fair and Ann Kuesel Trusts. In comparison, the "Fixed Fund" managed by the State of Wisconsin Investment Board had an annualized rate of return of 12% for the years 1981-2000.

¶17 The asset allocation for equities in the Sarah Fair and Ann Kuesel Trusts, which is the core basis for criticism supporting this appeal, ranged from 41.7% in 1984 to 71.3% in 1998. In comparison, Wisconsin's "Fixed Fund" ranged from 30% in 1984 to 55% in 1998. During this same period of time, the percentages of equities held in all personal trusts by United States trust companies show equity investment of 49.3% in 1984 to 70% in 1998.

¶18 Thus, it is evident, based on the foregoing undisputed facts, that the investment strategy and management of the trust funds in question were well within the range of state and national practice and experience. Further, we note that during the 1980's, considered in their entirety, the equity market did not

significantly outperform the bond and money markets, but did experience negative results in 1981 and 1987.

¶19 We further are not persuaded by the Kuesels' claim that Firstar unreasonably retained a piece of commercial real estate located in Janesville, Wisconsin. The Kuesels contend that Firstar failed to exercise reasonable judgment by retaining this property and if Firstar would have sold the property, the trusts would have increased their value by over $1.7 million. They claim that until the mortgage was paid off in 1991, the property generated less than $2,000 each year for the Marital and Family Trusts. We reject their contention.

¶20 This commercial real estate housed a Sentry food store. John Kuesel, the grantor of the trust, purchased the site in 1971. The transaction involved a "triple net lease" with Sentry, which expires in 2006. Contrary to the Kuesels' representation, the net rent prior to 1991 was $4,000, shared by the Marital and Family Trusts. It is undisputed that in 1991, when the mortgage on the property was finally liquidated, the amount of rent increased to $39,000 annually. Once the mortgage was paid off, equity began to build from $235,000 in 1983 to $500,000 in 1999. Interest was deductible and depreciation generated advantageous tax benefits. In 2006, when the Sentry lease expires, the reversionary value of the property if sold, calculated on the basis of its discounted future cash flow, will be $753,000.

¶21 The trust instrument clearly empowered the trustee to retain real estate whether productive or not. No one claims this commercial property was not productive. The uncontested material facts speak for themselves. We conclude that retention of this asset was not an exercise of unreasonable judgment.

¶22 When the trial court, in its oral decision, rejected the Kuesels' claim of lack of reasonable judgment in asset management and allocation, its succinct analysis was correctly based both in logic and precedent. First, referring to the trust instrument, it correctly characterized the trust's main purpose to conserve the trust principal so that it was there when the beneficiaries needed it. That purpose was fulfilled. Next, borrowing language from the prudent investor rule, the court determined that the "safety" of the assets, and their ability to generate income, had been maintained. Lastly, relying on precedent, it declined to adopt hindsight as a guiding principle for evaluating asset management, particularly when there was no showing of asset dissipation.

¶23 In the ***Matter of Jane Bradley Uihlein Trust v. Ferguson***, 142 Wis. 2d 277, 417 N.W.2d 908 (Ct. App. 1987), we rejected a claim for equitable adjustment of asset allocation. In reaching our decision relating to the trustees' management of the assets, we opined that "'[w]hat might have been' is purely speculative, and not a logical or sound basis to intervene in the trustees' discretionary acts." ***Id.*** at 287. Here, in examining the reasonableness of Firstar's asset allocation, the economic and financial circumstances that existed in the late 1970's and during the 1980's must be considered, as well as the booming 1990's, with a view to the purpose of the trusts and the prudent investment rule. In both applications, the undisputed material facts ineluctably draw us to the conclusion that the asset allocation met the calls of the trust instrument and comported with

the public policy set forth in the prudent person rule of WIS. STAT. § 881.01. Therefore, the trial court did not err in granting summary judgment.[4]

By the Court.—Order affirmed.

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

[4] The Kuesels raise numerous alleged administrative errors, which they assert may require a refund of trustee fees. We conclude this issue is prematurely raised because the trial court purposely withheld the approval of accounts and fees until this appeal is decided.