COURT OF APPEALS
DECISION
DATED AND FILED

December 18, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3143 **Cir. Ct. No. 02-PR-92**

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

IN RE THE ESTATE OF MICHAEL G. OTTEN:

KATHRYN OTTEN, KORTNEY K. OTTEN, AND ANDREW M. OTTEN,

APPELLANTS,

V.

NORTH CENTRAL TRUST COMPANY AND ESTATE OF MICHAEL G. OTTEN,

RESPONDENTS.

APPEAL from an order of the circuit court for La Crosse County: DALE T. PASELL, Judge. *Affirmed.*

Before Deininger, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Several appellants appeal an order construing the will in the estate of Michael G. Otten. The issue is whether the circuit court

correctly determined that a will provision regarding death-related taxes is ambiguous, that extrinsic evidence did not clarify the ambiguity, and that, therefore, the provision has no effect. We affirm the circuit court.

¶2 The issue was first raised in a brief filed by the trustee for the testamentary trust, North Central Trust Company, in support of its petition for construction of the will. The first sentence of the will provision is grammatically mangled. The entire provision follows:

> ARTICLE II. I direct that the payment of all inheritance, transfer, estate and similar taxes (including interest and penalties) assessed or payable by reason of my death on any property or interest in property which is included in my estate for the purpose of computing such taxes. My personal representative shall not require any recipient of such property or interest in such property to reimburse my estate for taxes paid under this paragraph.

The circuit court concluded the provision is ambiguous, incomplete, "nonsensical," and "meaningless," and therefore should not be given effect, thus leaving payment of those taxes wherever the law ordinarily places that responsibility. The result, we are told, is that the appellants, who are beneficiaries of certain life insurance policies, may become responsible for paying those taxes on the life insurance proceeds.

¶3 We first address the standard of review and the accuracy of certain factual assertions made by the respondents. The circuit court took extrinsic evidence, primarily in the form of testimony by the attorney who drafted the will. The respondents argue that because the circuit court made findings as to intent, our review should be deferential to those findings. We disagree.

¶4 The drafting attorney testified that he prepared a preliminary draft of a will for the decedent in August 2000; that he had expected to have further

discussion with the decedent about the will, but this never occurred; and that he was "quite shocked" to learn later that the decedent had executed the draft will. As to the tax provision, the attorney testified that when the draft was sent, he had not yet discussed this provision with the decedent, and that it was a form provision he inserted in the will with the intention of later reviewing the estate tax issues with the decedent.

¶5 The respondents assert that the court found and the evidence showed that the decedent had "formed no intent" with respect to tax allocation. We reject this interpretation of the record. The drafting attorney did not claim to know whether the decedent had an intent on this subject when the decedent executed the will. The attorney testified only that he himself did not discuss the subject with the decedent. The circuit court noted this testimony in making its oral decision, but did not make any finding as to the decedent's intent, or lack of intent, or otherwise make any link between the attorney's testimony and the court's conclusion.

¶6 Even after hearing extrinsic evidence, the court ultimately concluded that the will was ambiguous. This was implicitly a finding that the extrinsic evidence failed to clarify the decedent's intent, and that the only evidence of that intent remained the executed will itself, which the court determined was insufficiently clear to convey intent. Thus, the court's conclusion was not based on extrinsic evidence or on findings of disputed facts, but simply on its reading of the document and its conclusion that extrinsic evidence did not shed light on intent. As the appellants note, construction of a will is a question of law that we review independently. ***Firehammer v. Marchant***, 224 Wis. 2d 673, 676, 591 N.W.2d 898 (Ct. App. 1999).

¶7 Turning to the merits, the appellants argue that even though the first sentence of Article II does not say who should pay the death-related taxes, the only reasonable reading is that the estate shall pay them, because the second sentence bars the estate from seeking reimbursement for those payments. They argue that the term "reimburse" could be an accurate description only if the estate itself was going to be paying the taxes under the first sentence. We conclude, however, that the provision is ambiguous. Although the will clearly attempts to make some provision with respect to death-related taxes, it fails to state who is to pay those taxes. The estate is only one possible choice. If the court must speculate who the intended payer is, the provision is ambiguous.

¶8 The appellants also argue that, even if one concludes the first sentence is a nullity, the second sentence, standing alone, remains unambiguous and can be applied. We disagree. This argument might have merit if the second sentence provided simply that the estate cannot seek reimbursement for death-related taxes *the estate* pays. However, the provision bars the estate from seeking reimbursement for taxes "paid under this paragraph." Thus, the second sentence applies only to taxes that have been paid as provided in the first sentence. Because we have concluded that the first sentence fails to unambiguously direct who pays the taxes, the second sentence does not add to the mix.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (2001-02).