COURT OF APPEALS
DECISION
DATED AND FILED

May 11, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1053 **Cir. Ct. No. 2009CV953**

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

JOHN J. LIPPERT,

PLAINTIFF-APPELLANT,

V.

JAMES R. LIPPERT AND JEFFREY G. LIPPERT,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. John Lippert appeals from an order dismissing his complaint for a review and accounting of the actions of his brother, James R. Lippert (Jim), while acting for their father, James G. Lippert (James), under a durable power of attorney (DPOA) nominating Jim as the agent. John's claims for

conversion, undue influence, and breach of fiduciary duty against Jim and his brother Jeffrey Lippert were also dismissed. We affirm the order dismissing John's action and deny the motion to have the appeal declared frivolous.

¶2 In 2007, Jeffrey lived with James and was a co-owner of the home they shared on Lake Beulah in East Troy. Jim lived nearby. John and his sister lived away from Lake Beulah. James's wife had passed away in 2004. All of James's children were concerned about their aging father's health, ability to maintain a household and perform daily tasks, and the assistance he would need. In the summer of 2007, they discussed at a family meeting how to provide their father with assistance. They agreed that Jim would handle James's financial matters and Jeffrey would continue to provide daily living assistance as a resident of the household. On October 30, 2007, James executed a DPOA naming Jim his agent for financial matters and Jeffrey as the alternate agent.

¶3 In July 2009, after family relationships became strained and volatile, John petitioned the court under WIS. STAT. §§ 243.07(6r) and 243.10(8) (2007-08)[1] to review Jim's conduct as James's agent. An amended petition in January 2010 added Jeffrey as a party. The amended complaint asserted a claim of undue influence by Jim and Jeffrey over James with respect to 2007 and 2009 wills and estate documents, breach of the fiduciary duty Jim and Jeffrey owed to James, and conversion by Jim's and Jeffrey's conduct in expending and disposing of assets and property belong to James without his permission and contrary to his

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted. The provisions in WIS. STAT. ch. 243 relating to uniform power of attorney were repealed and recreated in WIS. STAT. ch. 244 (2009-10). 2009 WI Act 319 (eff. Sept. 1, 2010). Sections 243.07(6r) and 243.10(8) were recreated in WIS. STAT. § 244.16 (2009-10) with significant changes.

interests. John sought a review and accounting of the performance of the agents under the DPOA, the removal of Jim and Jeffrey as agents, appointment of a conservator or other fiduciary, and disgorgement of improperly obtained or converted funds.

¶4 Jim moved for summary judgment. His motion was based on his attorney's affidavit pointing out that the parties stipulated to James's evaluative capacity and competence, that James had not revoked the DPOA, that the financial records were provided to James's attorney, and that subsequent to turning over the financial records, James executed a Waiver, Consent and Approval, which ratifies and affirms the actions of his agent and expresses James's agreement that his agent performed in accordance with the terms of the DPOA.[2] James appeared at the motion hearing and filed an Acknowledgment of Voluntariness, which ratified the Waiver, Consent and Approval he had previously signed. James spoke to the court and asked that the action be dismissed. The circuit court ruled that James's satisfaction with the accounting that he reviewed with his attorney was dispositive. It found nothing but suspicions of improper conduct and, therefore, "the threshold basis for reviewing the files has not been met." John's action was dismissed in its entirety as were pending counterclaims.

¶5 The parties disagree about the standard of review. John argues that questions of law are presented regarding the interpretation of WIS. STAT. §§ 243.07(6r) and 243.10(8) and whether findings of fact can be made on unsworn

[2] The Waiver, Consent and Approval also acknowledged James's receipt of a copy of an accounting of his agent's performance from October 30, 2007, through October 6, 2009.

in-court statements.[3] Citing ***Taylor v. State Highway Commission***, 45 Wis. 2d 490, 494, 173 N.W.2d 707 (1970), a case dealing with the circuit court's authority to dismiss an action for failure to prosecute, Jim and Jeffrey contend that a circuit court's decision to dismiss an action is discretionary. We reject both parties' positions on the standard of review because the case neither involves the interpretation of a statute nor dismissal for failure to prosecute. The case was dismissed on a motion for summary judgment. We review the circuit court's grant of summary judgment using the same methodology as the circuit court. ***Estate of Sheppard v. Schleis***, 2010 WI 32, ¶15, 324 Wis. 2d 41, 782 N.W.2d 85. We need not recount this well-known methodology in full. Summary judgment is proper if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. *See* ***id.***; WIS. STAT. § 802.08(2). To make a prima facie showing for summary judgment, a moving defendant must show a defense which would defeat the plaintiff. ***Voss v. City of Middleton***, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991).

¶6 John argues that under the plain language of WIS. STAT. §§ 243.07(6r) and 243.10(8),[4] he had an absolute right to the requested review and

[3] John does not develop an argument that the circuit court improperly relied on unsworn statements. We need not consider arguments broadly stated but not specifically argued. ***Fritz v. McGrath***, 146 Wis. 2d 681, 686, 431 N.W.2d 751 (Ct. App. 1988).

[4] WISCONSIN STAT. § 243.07(6r)(a) provides in part:

> An interested party may petition the court assigned to exercise probate jurisdiction for the county where a principal is present or the county of the principal's legal residence to review whether the agent is performing his or her duties in accordance with the terms of the durable power of attorney executed by the principal. If the court finds after a hearing that the agent has not been performing in accordance with the terms of the durable power of attorney, the court may do any of the following ….

(continued)

that no threshold showing of impropriety was necessary. He also contends that the feelings or desires of the principal, James, are neither pertinent nor dispositive. We need not address these points.

¶7 Even if review should unquestionably be conducted upon application of an interested party and the principal's desire to avoid it is not controlling, the court is not precluded from considering whether the review will result in any remedy. *See* ***PRN Assocs. LLC v. State Dep't of Admin.***, 2009 WI 53, ¶49, 317 Wis. 2d 656, 766 N.W.2d 559 (dismissal proper where, even if all of the plaintiff's factual and legal allegations are true, there is no remedy that the plaintiff can receive). James's ratification and affirmation of all actions taken by his agent precludes the circuit court from finding "that the agent has not been performing in accordance with the terms of the durable power of attorney." James, the principle, declared that the agent had acted in accordance with the powers conferred by him given or as if originally authorized by him. *See* ***Estate of Bydalek v. Metropolitan Life Ins.***, 220 Wis. 2d 739, 746, 584 N.W.2d 164 (Ct. App. 1998) (Ratification is "[t]he affirmance by a person of a prior act which did not bind him, but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." (Citation omitted.)). Without a finding that the agent had not performed in accordance with the terms of the DPOA, the circuit court could not order any of the statutory remedies.[5] James's ratification essentially rendered any review of the agent's performance

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WISCONSIN STAT. § 243.10(8) is nearly identical. There is no question that John is an "interested party." *See* WIS. STAT. § 851.21(1)(a).

[5] James passed away on August 16, 2010, while this appeal was pending. To the extent that John sought to rescind the powers of the agent under the DPOA and the appointment of a conservator, such relief is moot upon James's death.

moot. *See* ***PRN Assocs.***, 317 Wis. 2d 656, ¶49; ***Warren v. Link Farms, Inc.***, 123 Wis. 2d 485, 487, 368 N.W.2d 688 (Ct. App. 1985) (an issue is moot when its resolution will have no practical effect on the underlying controversy).

¶8 Additionally, the complaint alleged that James was competent. The parties' stipulated that James was presently of sound mind and fully competent and that he retained full power to execute documents, including financial powers of attorney. James had not and did not intend to revoke the DPOA. The principal retains the right to direct the agent. James could have undone anything the circuit court put in place.[6]

¶9 John characterizes James as a vulnerable individual and suggests that James's ratification and statement to the court were nothing more than the desire to bring harmony to the family situation. John contends that the issue is whether James was coerced by Jim and Jeffrey. Although the amended complaint alleged undue influence with respect to James's will, the pleadings did not make this an action challenging James's competency. If John believed his father was subject to undue influence, he needed to file a guardianship action under WIS. STAT. ch. 54, but he did not do so. John cannot make a factual issue of James's competency to ratify the acts of his agent. As noted above, the parties stipulated that James was competent. Thus, James was entitled to make a decision or a choice between fractions of his children that he believed appropriate to end family discord. *See* ***Estate of Bydalek***, 220 Wis. 2d at 749 (recognizing that competent persons sometimes ignore important matters, but that the product of conduct taken by a

[6] The current statute provides: "Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney." WIS. STAT. § 244.16(2) (2009-10).

person with a rational mind must be adhered to). Even accepting John's view that his stipulation was conditioned on his father being given adequate time to review documents, nothing in the summary judgment record creates a dispute of fact that James did not have adequate time to review the documents with his attorney. James's affirmation and ratification of the acts of his agent terminates the necessity of any review of his agent's performance.

¶10 John argues that his "civil" claims for undue influence, breach of fiduciary duty, and conversion survive dismissal of the petition for review of the agent's performance under the DPOA and that the circuit court was not limited by "probate" jurisdiction.[7] This argument is raised for the first time on appeal. We do not address it directly. *See* ***Evjen v. Evjen***, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992).

¶11 We affirm the circuit court's dismissal of the remainder of John's claims on grounds different than those relied on by the circuit court. *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995). We conclude that John lacked standing on his other claims. Standing requires a personal stake in the outcome of a controversy. ***City of Waukesha v. Salbashian***, 128 Wis. 2d 334, 350, 382 N.W.2d 52 (1986). "Whether a party has standing is a question of law." ***Polan v. DOR***, 147 Wis. 2d 648, 658, 433 N.W.2d 640 (Ct. App. 1988).

[7] The circuit court determined that its jurisdiction had been invoked as a probate court and sitting as a probate court it could not consider any cause of action other than the request to review the agent's conduct under WIS. STAT. §§ 243.07(6r) and 243.10(8).

¶12 "[A] will does not create any enforceable right in a beneficiary of that will until the testator has died." ***Eisenberg v. Eisenberg***, 90 Wis. 2d 620, 630, 280 N.W.2d 359 (Ct. App. 1979). Thus, John had no standing to bring an undue influence claim to invalidate wills not yet subject to probate.

¶13 John's claim for conversion alleged that the conversion of James's assets affected him and his sister as James's heirs. James's potential heirs had no interest in his property while he was alive and still in control of the disposition of his property. *See* ***Shovers v. Shovers***, 2006 WI App 108, ¶37, 292 Wis. 2d 531, 718 N.W.2d 130 (even upon the death of a person, heirs do not obtain legal title to the property but are only beneficially interested in the estate and possess an equitable title subject to administration and payment of debts, and have no right to bring an action relating to such assets). John lacked standing to assert a conversion claim.

¶14 No fiduciary duty was owed by James's agent to John. John lacked standing to assert on James's behalf that a fiduciary duty owed to James had been breached. Further, James ratified his agent's conduct thereby rendering moot any claim of a breach of fiduciary duty.

¶15 Jim and Jeffrey move for an award of costs and attorney fees under WIS. STAT. RULE 809.25(3) on the ground that John's appeal is frivolous. John opposes the motion. Even though the appeal demonstrates that the litigation was ineffectual to address the family discord presented by the facts, we are not persuaded that it is in whole frivolous. The motion to declare the appeal frivolous is denied.

By the Court.—Order affirmed.

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