

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 8, 2004

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. 03-1430
STATE OF WISCONSIN**

Cir. Ct. No. 94PR000156

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE ESTATE OF OTTO PAWLISCH:

HANS S. PAWLISCH,

APPELLANT,

v.

**THE OTTO V. PAWLISCH TRUST FOR
CARL O. PAWLISCH, THOMAS J. PAWLISCH,
JOHN A. PAWLISCH, AND DAVID J. PAWLISCH,**

RESPONDENTS.

APPEAL from an order of the circuit court for Sauk County:
PATRICK J. TAGGART, Judge. *Affirmed.*

Before Deininger, P.J., Vergeront and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. Hans S. Pawlisch appeals from an order of the circuit court determining that, pursuant to a testamentary trust established by Otto V. Pawlisch, Hans is not the issue of Otto's son, Carl O. Pawlisch. Hans

argues that the circuit court erred in its focus on him as an adopted party and that the relationship between Carl and him qualifies as “issue” under the terms of the trust. We disagree and affirm the order.

FACTS

¶2 The essential facts are undisputed. In September 1995, Hans’ uncle, Carl, then a sixty-six-year-old man, adopted Hans Pawlisch, who was then forty-seven years old. One of the reasons Carl adopted Hans was so Hans could claim the proceeds of a trust established for Carl’s benefit under the Last Will and Testament of Otto V. Pawlisch, Carl’s father and Hans’ grandfather.

¶3 Otto V. Pawlisch had three children, all sons: Carl, born in 1929; Paul, born in 1931; and James, born in 1932. Paul Pawlisch is Hans’ biological father. Paul was married at an early age and Hans was born in 1948 when Paul was seventeen years old. Hans lived with both his biological parents for several months but his parents’ marriage ultimately ended in annulment. Hans then lived with his biological mother until approximately 1957, when he was about nine years old. During the summers of 1953-1956, Hans stayed in the Reedsburg, Wisconsin, household of his grandparents, Otto and Anna Pawlisch. During these years, Carl did not live with Otto and Anna but was either attending Antioch College in Ohio or serving in the Air Force. Carl may have resided with Otto and Anna during the summer of 1956 while Hans stayed there. After his 1956 summer visit with his grandparents, Hans returned to his biological mother’s home.

¶4 Following a custody dispute, from the summer of 1957 through the summer of 1959, Hans lived with Otto and Anna in their Reedsburg home. During this two-year period, either one or the other of his biological parents or his grandparents had legal custody and physical placement of him. Within the

Pawlich household, Carl became a father figure to Hans, teaching him sports and helping him with schoolwork. Hans was often left in Carl's care. During this same two-year period when Hans lived with Otto and Anna, Carl attended the University of Wisconsin-Madison; Carl kept an apartment in Madison from 1956 until his graduation in 1958 or 1959. However, while attending UW-Madison, Carl was a frequent visitor to Otto and Anna's home and he listed their home as his residence for purposes of school records. Carl and Hans maintained a close relationship. Shortly after graduation, Carl moved to Illinois to attend graduate school.

¶5 In 1959, when Hans was approximately eleven years old, he moved with his father, Paul, his stepmother, Helen, and his half-brother, Curt, to Texas, where they lived as a family until 1964. Hans continued to spend summers in Reedsburg with Otto and Anna and also visited Carl in Chicago, Illinois.

¶6 In 1964, Hans, again with Paul, Helen and Curt, moved to Whitefish Bay, Wisconsin, where Hans graduated from high school in December 1965. Hans began attending the University of Wisconsin-Milwaukee. Hans moved out of his family's home in March 1966 when he was eighteen years old. During his adulthood, Hans continued to have a close relationship with Carl and, in fact, Hans lived with Carl in Alaska for a period of time during 1969 and 1970 when Hans was approximately twenty-one or twenty-two years old.

¶7 Anna Pawlich died in 1984. On December 23, 1992, Otto executed two separate documents. One was the Last Will and Testament of Otto v. Pawlich (the Will). At the time Otto executed his Will in 1992, and at the time of his death two years later, Otto had five grandchildren: Hans and Curt, biological

children of Paul, and Thomas, John and David, the three children of James. Carl had no children.

¶8 The other document drafted at the time of the Will was the Otto V. Pawlisch Trust for the Benefit of Carl O. Pawlisch (hereinafter known as the Farm Trust). The Farm Trust was established upon execution, into which Otto transferred 94.5 acres of land in Sauk County and \$88,000 cash. The Farm Trust was established for Carl's lifetime with the trust assets remaining at Carl's death to be distributed to the issue of Otto's son, James, by right of representation.

¶9 Otto died in 1994. Otto's Will made several specific bequests, including a bequest of \$30,000 to one grandchild: Hans. No other grandchild received a bequest. The Will divided the residue of Otto's estate into equal shares, one for each of Otto's three sons, with the provision that if any son were to predecease Otto, that son's share should be distributed to his surviving issue. The Will directed that if all of Otto's sons survived him, Paul and James would receive their shares outright and a trust would be established to hold Carl's share (hereinafter Carl's Trust); Carl's Trust was to be administered as provided in the Will. Carl was not given the right to appoint or designate a beneficiary of the trust proceeds.

¶10 Article V, Section 2 of the Will states:

Upon the death of Carl O. Pawlisch, the balance of the trust assets shall be paid and distributed to the issue of Carl O. Pawlisch by right of representation, or if there be no then living issue of Carl O. Pawlisch, then the balance of trust assets shall be paid and distributed to the issue of my son, James T. Pawlisch, by right of representation, or if there be no such issue then to my issue by right of representation.

Otto's Will does not define "issue." The Farm Trust defines "issue" as follows: "The term 'issue' includes all descendants, whether born or adopted before or after this instrument is executed." Otto's Will does not refer to the Farm Trust nor does the Farm Trust refer to the Will.

¶11 Carl adopted forty-seven-year-old Hans on September 9, 1995, after Otto's death. Hans testified that the adult adoption took place because "[f]irst of all, ... there always was a close relationship, a father/son relationship between Carl and me. Two, Carl wanted an heir and I was illegitimate; and three, Carl saw in the adoption the possibility to re-coop and bequest the portion of his life estate."

¶12 After Carl's death on August 16, 2002, the Trustee of Carl's Trust petitioned the circuit court for an order directing the disposition of the proceeds of Carl's Trust. Hans claimed an interest in the proceeds of Carl's Trust as the "issue" of Carl. Thomas, John and David Pawlisch claimed an interest as the issue of James.

¶13 The circuit court found that Otto's intent, apparent from the language of the Will, unambiguously required that the proceeds of Carl's Trust be distributed to Thomas, John and David. An Order Approving Accounts and Terminating Trust was entered April 29, 2003. Hans appeals.

DISCUSSION

¶14 Hans argues that the circuit court erred by focusing on the question of whether Otto intended that Hans receive the residual balance of the Farm Trust. Rather, Hans argues, the appropriate question under the circumstances presented in this case is whether Otto intended to allow Carl to adopt someone, thereby creating "issue." Hans maintains that his relationship with Carl qualifies him as

“issue” under the terms of the Will. We conclude the trial court posed the proper question and we determine that Hans is not “issue” under Otto’s Will.

¶15 The construction of a will presents a question of law that we review independently, without giving deference to the circuit court’s decision. *McGuire v. McGuire*, 2003 WI App 44, ¶10, 260 Wis. 2d 815, 660 N.W.2d 308. Despite this de novo standard of review, we value the circuit court’s analysis. *Furmanski v. Furmanski*, 196 Wis. 2d 210, 214, 538 N.W.2d 566 (Ct. App. 1995).

¶16 The overriding objective of will construction is to ascertain the testator’s intent. *Furmanski*, 196 Wis. 2d at 215. Intent is determined from the language of the will itself, considered in light of the circumstances surrounding the testator when the testator executed his or her will. *State v. Barr*, 78 Wis. 2d 254, 258, 253 N.W.2d 901 (1977). The “surrounding circumstances” include the amount and character of the testator’s estate, family relationships, the testator’s attitude toward his various next of kin and the testator’s relationship with persons who claim to be objects of the testator’s bounty. *See generally Breese v. Bennett*, 7 Wis. 2d 422, 96 N.W.2d 712 (1959).

¶17 Otto established Carl’s Trust via his Will stating:

I have directed that if my son, Carl O. Pawlisch, is living at my death that his share of my residuary estate be held in trust in accordance with the terms hereafter set forth.

....

Section 2. Upon the death of Carl O. Pawlisch, the balance of the trust assets shall be paid and distributed to the issue of Carl O. Pawlisch by right of representation, or if there be no then living issue of Carl O. Pawlisch, then the balance of trust assets shall be paid and distributed to the issue of my son, James T. Pawlisch, by right of representation, or if there be no such issue then to my issue of right of representation.

The provision in the Will establishing Carl's Trust does not define "issue."

¶18 Hans first argues that we should apply the definition of "issue" provided in the Farm Trust to the Will because the two documents were created and executed on the same day and therefore should be construed together. Consequently, Hans argues, the Farm Trust's definition of "issue" trumps the definition of "issue" set forth in WIS. STAT. § 851.51(3).¹ "Issue," as defined in

¹ The statutory law in effect when the Will was executed was WIS. STAT. § 851.13 (1991-92), which defined "issue" as follows:

"Issue" means children, grandchildren, great-grandchildren, and lineal descendants of more remote degrees, including those who occupy that relation by reason of adoption under s. 851.51 and nonmarital children and their lineal descendants to the extent provided by s. 852.05.

WISCONSIN STAT. § 851.13 (1991-92) cross-referenced WIS. STAT. § 851.51(3) (1991-92), which provided as follows:

CONSTRUCTION OF A CLASS GIFT AS INCLUDING ADOPTED PERSONS. A gift of property by will, deed or other instrument to a class of persons described as issue, lawful issue, children, grandchildren, descendants, heirs, heirs of the body, next of kin, distributees or the like includes a person adopted by a person whose natural child would be a member of the class or issue of the adopted person, if (a) the instrument does not expressly exclude adopted persons, (b) the conditions for membership in the class are otherwise satisfied, and (c) the adopted person was a minor at the time of adoption, or was adopted after having been raised as a member of the household by the adoptive parent from the child's 15th birthday or before. Unless the instrument expressly provides otherwise such a gift excludes a natural child and his issue otherwise within the class if the child has been adopted and would cease to be a child of his natural parents under sub. (2) for purposes of inheritance from the testator. This subsection applies to all wills, deeds, trusts or other instruments executed on or after April 1, 1971.

The current statute, WIS. STAT. § 854.21(1) (2001-02), includes similar provisions. It states, in relevant part:

(continued)

the Farm Trust, “includes all descendants, whether born or adopted before or after this instrument is executed.” Hans would qualify as Carl’s “issue” under this definition. We do not agree, however, that the definition of “issue” in the Farm Trust applies to the Will.

¶19 We agree with Hans that generally instruments executed together and relating to a common transaction are to be construed together. *See O’Connor Oil Corp. v. Warber*, 30 Wis. 2d 638, 646, 141 N.W.2d 881 (1966). However, the Farm Trust and the Will do not relate to a common transaction. The Will is a testamentary document that disposes of Otto’s assets at his death. The Farm Trust is an irrevocable nontestamentary trust, established and funded during Otto’s lifetime. The fact that the Farm Trust and the Will were executed the same day does not make the Farm Trust a part of the Will nor does it indicate that the two documents were related to a common transaction. We cannot apply the definition of “issue” contained in the Farm Trust to Carl’s Trust in the Will, as the only commonalities between the two are the date they were drafted. Consequently, we

ADOPTED PERSONS. (a) Except as provided in par. (b) or sub. (7), a gift of property by a governing instrument to a class of persons described as issue, lawful issue, children, grandchildren, descendants, heirs, heirs of the body, next of kin, distributees or the like includes a person adopted by a person whose birth child would be a member of the class, and issue of the adopted person, if the conditions for membership in the class are otherwise satisfied and any of the following applies:

1. The transferor is the adoptive parent or adopted child.
2. The adopted person was a minor at the time of adoption.
3. The adopted person was raised as a member of the household by the adoptive parent from the child’s 15th birthday or before.

are left with a testamentary trust that does not define “issue” but provides that, upon Carl’s death, the balance of the trust assets shall be paid and distributed to Carl’s “issue.”

¶20 Hans argues in the alternative that he qualifies as Carl’s “issue” pursuant to WIS. STAT. §§ 851.13 and 851.51(3) (1991-92). Under § 851.51(3) (1991-92) an adopted person is “issue” only if the instrument does not expressly exclude adopted persons, the conditions for membership in the class are otherwise satisfied *and*, most significantly here, the adopted person was a minor at the time of the adoption *or* was adopted after having been raised as a member of the household by the adoptive parent from the child’s fifteenth birthday or before. Hans was not a minor at the time of the adoption; he was forty-seven years old.

¶21 According to Hans, he and Carl enjoyed a close father/son-like relationship; outsiders thought they were, in fact, father and son; and the time Carl and Hans spent together on Otto and Anna’s farm fulfills the requirements of WIS. STAT. § 851.51(3) (1991-92) that he was raised as a member of the household by the adoptive parent from the child’s fifteenth birthday or before. Again, we disagree.

¶22 The time Carl and Hans spent together does not meet the requirements of WIS. STAT. § 851.51(3) (1991-92). Hans focuses on the time periods when he lived with Anna and Otto. He lived with them from the summer of 1957 through the summer of 1959. However, during this two-year period, either one or the other of his biological parents or his grandparents, not Carl, had legal custody and physical placement of him. Moreover, during that time, Carl attended the University of Wisconsin-Madison, where he kept an apartment from

1956 until his graduation in 1958 or 1959. Shortly after graduation, Carl moved to Illinois to attend graduate school.

¶23 Hans also stayed in Anna and Otto's household during the summers of 1953-1956 and during most summers of his childhood. However, during these time periods, Carl did not live with Otto and Anna but was either attending Antioch College in Ohio or serving in the Air Force. The only time Carl may have resided with Otto, Anna, and Hans was during the summer of 1956. However, after Hans' 1956 summer visit with his grandparents, he returned to his biological mother's home.

¶24 While Carl and Hans may have, for brief periods of time, been members of the same household, the household in question was not the household of the adoptive parent, Carl; the household was Otto's and Anna's. Carl never had legal custody or physical placement of Hans. Carl did not have the authority to make major decisions about Hans' upbringing. Carl did not pay any of the expenses of the household in which Hans resided. Carl and Hans simply enjoyed a close uncle/nephew relationship, wherein Carl occasionally babysat Hans while Otto and Anna worked, helped Hans with his homework and scouting projects, taught Hans to play sports, introduced Hans to classical music and opera and taught Hans geology, history and archeology. While Carl's relationship with Hans is commendable, it does not rise to the level of "raising" Hans as a member of Carl's household. We conclude Hans does not meet the standards of WIS. STAT. § 851.51(3) (1991-1992) and therefore does not qualify as Carl's "issue" under the terms of the Will.

¶25 We are also persuaded that Otto did not intend for Hans to receive more than the \$30,000 bequeathed to him, even should Carl adopt him. The

circumstances surrounding the Will support our conclusion. Hans was one of several grandchildren and Hans was the only grandchild to receive a specific bequest. If Otto wanted Hans to receive more through the Will, it is only logical to presume that Otto would have specifically provided for more. We reject Hans' argument that Otto must have been aware of Hans' close relationship with Carl and therefore must have suspected Carl would eventually adopt Hans. Hans urges us to speculate about Otto's intent without any factual foundation, an invitation we choose not to accept. The most reasonable interpretation of Otto's intent is that since Hans was the only grandchild to receive a specific inheritance, Otto must have intended the \$30,000 to be the extent of his bequest to Hans.

CONCLUSION

¶26 The definition of "issue" as provided in the Farm Trust does not apply to the Will because the Will and Farm Trust are two completely separate documents, unrelated to a common transaction. Hans does not meet the statutory definition of "issue" applicable at the time the Will was drafted. Thus, Hans is not Carl's "issue" per the terms of Otto's Will. Furthermore, Otto did not intend for Hans to receive more than the \$30,000 specifically bequeathed to him. We therefore affirm the order of the circuit court awarding the remainder of Carl's Trust to James' issue: Thomas, John and David.

By the Court.—Order affirmed.

Not Recommended for publication in the official reports.

