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DISTRICT II

October 15, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2014AP599-FT
2014AP600-FT

In re the estate of Carol A. Lang: Roger Lang v. Jeanne Lang
(L.C. # 2011PR48)
In re the estate of Howard F. Lang: Roger Lang v. Jeanne Lang
(L.C. # 2013PR3)

Before Brown, C.J., Reilly and Gundrum, JJ.

Roger Lang appeals from a judgment distributing his parents' estates pursuant to their wills which provided for an equal division of property between three of their children. After the wills were admitted to probate, the trial court approved the personal representative's proposed distribution awarding each child a parcel of real estate and a portion of personal property equal to one-third of the estates' total value. Roger argues that the trial court misconstrued his parents' testamentary intent by dividing the real property into three portions rather than awarding the entire parcel to the three children as tenants in common. Pursuant to a presubmission conference

and this court's order of April 23, 2014, the parties submitted memorandum briefs. *See* WIS. STAT. RULE 809.17(1) (2011-12).¹ Upon review of those memoranda and the record, we affirm.

In 2011, Howard Lang died three days after his wife, Carol Lang, leaving a will which requested the appointment of the couple's daughter, Jeanne Lang, as personal representative. The will provided several specific bequeathals,² and directed "the remainder of my estate to be divided as follows: 1.) Charles Lang 33% 2.) Jeanne Lang 33% 3.) Roger Lang 33%" The will further provided:

I authorize my personal representative when qualified and acting, to sell and convey and to execute and deliver all proper instruments of sales, assignments and conveyances of any part or all of my property, real or personal, without obtaining any order of the court and without liability on the part of the purchaser or purchasers to see to the application of the purchase money and I direct this power of sale shall be in full force and effect until all of my property, whether real or personal, shall have been distributed in accordance with this will.

Jake Vande Zande appraised the estates' personal and real property, and Jeanne, in her capacity as personal representative, drafted a proposed distribution of the assets based on the appraisal. The estates' attorney moved the court to approve the proposed distribution, asserting that the proposal was "a compromise of hotly disputed issues" and was reached pursuant to the terms of a settlement letter drafted by Roger's attorney. At a hearing, the parties initially stated there was no objection to the proposed distribution. However, Roger soon expressed concern

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² The will bequeathed, to Roger Lang, Charles Lang, and Jeanne Lang, the estate's pony ride and equipment "in equal shares, share and share alike." Two guns were bequeathed to Roger and Charles and the will authorized specific monetary distributions to two additional children. These specific bequeathals are not at issue in this appeal.

about having to live so close to his two siblings when they were not getting along. His attorney told the court that he had discussed this concern with Roger and advised him that he was free to sell his parcel after the estates were closed. Roger acknowledged that he did not have an alternative proposal and the court adjourned the matter for thirty days to allow the beneficiaries to try and reach a mutually acceptable agreement.

The parties appeared thirty days later and Jeanne testified that she had devised the proposed distribution based on the values established in the Vande Zande appraisal. She testified that for a number of years, all three siblings had resided in separate homes on the property and that to sell the property would cause them hardship. She confirmed that the division of the real estate was initially proposed by Roger. Charles Lang testified that he agreed with the proposed distribution and considered it to be fair and equitable. During his testimony, Roger voiced his general dissatisfaction with the proposal but was unable to provide an alternative or to point to anything specifically inequitable.³ The court determined that the personal representative's proposal was the most fair and equitable way to distribute the estates consistent with the testators' intent. The court adopted the proposal and ordered the personal representative to distribute the estates.

Subsequently, the parties learned that due to the manner in which the Grand River ran through the property, the real estate could not be divided according to the terms of the court-adopted proposal. The estates' attorney informed the court that they hoped to reach an

³ Roger testified that he had wanted all of the personal property put up for auction so that they could each buy back what they wanted, but agreed that after discussing this option with his attorney, the personal representative's proposal was a safer alternative. Roger testified that as to the real estate division, he did not want his sister living next to him.

agreement wherein Roger would purchase additional land from Charles. Roger was no longer represented by counsel. The trial court scheduled another hearing to determine the land distribution issue and stated that if the parties could not reach an agreement, it would decide how to divide the land in a fair and equitable manner.

The parties appeared on June 5, 2013, and informed the court that no agreement had been reached. The personal representative provided a proposed distribution that accounted for the indivisible land. Roger, who was still unrepresented, told the court that “so far” he disagreed with the amended proposal. Roger did agree that they were trying to divide the estates into equal thirds and acknowledged that because the marshland was now indivisible, his share of the real estate was greater than Charles’ share. Roger testified that he did not want to give up the extra land in exchange for an equivalent monetary distribution because he believed this would reduce the value of his current parcel. Roger acknowledged that he had no proof that the new distribution would reduce the appraised value of his parcel and agreed that the Vande Zande appraisal was the only one presented to the court. The court concluded that it would adopt the new proposal, finding that it was “the most fair, equitable, reasonable and economical division of the property.” The trial court found that the proposal treated the three siblings equally and stated that though Roger did not like the proposal, he had not produced any alternatives or contradictory evidence, including evidence to support his assertion that it might decrease the appraised value of his existing property.

Roger retained counsel and filed a motion to reopen the estates to allow for the sale of real property. The motion alleged that the property division was inequitable in that the parcels awarded to Roger and Charles “have little to no income producing potential, while [Jeanne’s] parcel has historically produced enough income to support the other parcels....” Attached was

the affidavit of Adam Hahn, a family farmer, opining that he had reviewed the proposed real property division and that based on his experience as a farmer, “merely valuing the land on an appraisal basis and not considering income production has resulted in an inequitable distribution of the property, to the detriment of Roger and Charles Lang.” The trial court construed the motion as one for reconsideration and, after considering the parties’ memoranda, entered a written decision determining that the reconsideration motion was untimely, and that despite ample opportunity, Roger had never before argued that an income-based approach should have been considered as part of the appraisal. The trial court denied the motion, concluding that reconsideration was an improper means by which to attempt to introduce new evidence that could have been introduced at the original hearings, and that “a judgment needs to be entered to provide finality, promote judicial economy, and allow the issue to be brought to an end.” On December 12, 2013, the court entered its final probate judgment distributing the estates.

On appeal, Roger contends for the first time that the trial court fundamentally misconstrued the language of his parents’ wills. He argues that his parents intended for all three children to co-own the real estate as tenants in common, and that the trial court’s judgment dividing the real estate into parcels defeats their testamentary intent.⁴ Roger asks this court to independently construe his parents’ wills, *see Holy Family Convent of Manitowoc v. DOR*, 157 Wis. 2d 192, 195, 458 N.W.2d 579 (Ct. App. 1990), and conclude that Howard and Carol Lang intended that their real property should pass to the beneficiaries as tenants in common. The

⁴ In support, Roger represents the testamentary language as providing for the distribution of the estate “to [the three beneficiaries] in equal shares, to share and share alike,” and contends that this evinces an intent to have the farm “pass as an intact parcel of land so that each heir can “share and share alike” in the enjoyment of the whole property [.]”

estates disagree with Roger's premise, pointing out that in the trial court, "[n]o party to this case ever challenged the decedent's will which devised the residual estate equally among the three beneficiaries...." The estates argue that "[t]here is no question of will construction nor was that a question ever presented to the trial court [,]" and that the trial court's findings "should be sustained unless against the great weight and clear preponderance of the evidence." *Velk v. Lewandowski*, 53 Wis. 2d 500, 506-07, 192 N.W.2d 844 (1972).⁵

We conclude that the trial court's judgment properly effectuated the clear testamentary intent of Howard and Carol Lang. "Where language of a will is clear and unambiguous, that language controls and there is no occasion for judicial construction." *Morkin v. Clancy*, 56 Wis. 2d 100, 104, 201 N.W.2d 599 (1972) (citation omitted). Here, the wills evinced the decedents' intent to divide the estates' remainder, including any cash, personal property and real estate, into three equal portions, and this was never questioned in the trial court. The "share and share alike" language on which Roger now rests his appellate argument applied only to the bequeathal of the pony ride and equipment. Beyond the specific bequeathals, the will was concerned with ensuring that each of the three Lang children received thirty-three percent of the value of the remainder, and authorized the personal representative to effectuate this intent through the "power of sale." To this end, the will authorized the personal representative to sell, assign or convey "any part or all of [the] property, real or personal"

⁵ A more modern statement of this standard is that an appellate court will not overturn a trial court's factual findings unless clearly erroneous. See *State v. Martwick*, 2000 WI 5, ¶18 n.8, 231 Wis. 2d 801, 604 N.W.2d 552 (explaining that cases which apply the "great weight and clear preponderance" test may still be relied on and cited because the two tests are essentially the same) (citation omitted).

We further conclude that the trial court's findings concerning the value of the estates' real and personal property were not clearly erroneous. WIS. STAT. § 805.17(2). The trial court properly relied on the Vande Zande appraisal to determine and assign values, and to divide the total value of the remainder into three equal portions. Knowing that all three children lived on the farm, it was perfectly reasonable to appraise each homestead and then distribute the cash and personal property to ensure that each child received thirty-three percent. Roger has not provided any reason for this court to question the trial court's factual determinations concerning the appraised values or the equality of the three distributions.

Similarly, the trial court properly exercised its discretion in denying Roger's reconsideration motion. *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853 (a decision on a party's motion for reconsideration is reviewed under the erroneous exercise of discretion standard). The motion was untimely and improperly sought to use reconsideration as a vehicle to argue for the first time that the appraisal should have included an income-based land valuation. *Id.*, ¶46 (a party may not use a motion for reconsideration to introduce new evidence that could have been presented earlier) (citation omitted).

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. § 809.21.

Diane M. Fremgen
Clerk of Court of Appeals