COURT OF APPEALS
DECISION
DATED AND FILED

April 28, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2822 **Cir. Ct. No. 2009PR38**

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

IN RE THE ESTATE OF LAURENCE A. BERG:

LAURA A. RAPP,

APPELLANT,

V.

MARY WELLER, KENNETH GARVES AND STATE OF WISCONSIN DEPARTMENT OF REVENUE,

RESPONDENTS.

APPEAL from an order of the circuit court for St. Croix County: EDWARD F. VLACK III, Judge. *Reversed in part and cause remanded with directions*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Laura Rapp appeals an order that, among other things, denied her request to withdraw as personal representative of Laurence Berg's estate.[1] Rapp argues the circuit court erroneously denied her request, because conflicts of interest rendered her unsuitable under WIS. STAT. § 857.15.[2] We agree. Accordingly, we reverse in part and remand, and we direct the circuit court to remove Rapp as personal representative.

BACKGROUND

¶2 This case involves conflicts of interest resulting from Rapp's appointments as personal representative for two estates. Rapp was appointed personal representative for her brother Laurence Berg's estate in November 2009. Rapp participated in mediation on January 9, 2012, and signed a settlement agreement on the estate's behalf. That agreement required Rapp's and Laurence's father, James Berg, to pay $120,000 to Laurence Berg's estate, which was to then be divided and paid to Mary Weller and Kenneth Garves. The agreement also included provisions for payments to the Internal Revenue Service and the Wisconsin Department of Revenue (DOR).

¶3 On January 23, 2012, Garves requested that the circuit court approve the settlement agreement. Rapp opposed the motion on behalf of Laurence Berg's estate, on multiple grounds. James Berg, who also participated in the mediation and signed the settlement agreement, died on March 20. On May 11, the circuit court entered a written order granting the motion to enforce the settlement

[1] Rapp raises additional issues that we do not reach, as explained later.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

agreement. Rapp moved for reconsideration on May 30 and later supplemented her motion.

¶4 On June 19, 2012, while still personal representative for Laurence Berg's estate, Rapp agreed to be appointed personal representative for James Berg, in Texas. On August 13, the circuit court entered a written order denying Rapp's motions for reconsideration and again upholding the enforceability of the settlement agreement. A proposed order was then submitted that directed Rapp, as personal representative of Laurence Berg's estate, to collect $120,000 from the James Berg estate. Additionally, a second proposed order required the Laurence Berg estate to pay $38,432.76 to the DOR within five days. The court received the proposed orders on August 27 and signed them on September 17. Meanwhile, unbeknownst to the circuit court, a nonspecific motion hearing had been scheduled for October 1.

¶5 On September 24, 2012, Rapp filed a letter objecting to the two orders, asserting her attorney was in the process of scheduling a hearing on them. Rapp contended that the order regarding the DOR was unnecessary and that both orders were inappropriate because they had not been proposed by the parties ultimately entitled to the funds. Additionally, Rapp sought to resign as personal representative of Laurence Berg's estate and be discharged on her personal representative's bond. At the October 1 hearing, Rapp asserted she could not comply with the order to collect $120,000 from James Berg's estate because the order created a conflict of interest, given her dual capacity as personal representative of both Laurence Berg's and James Berg's estates. The court denied Rapp's requests to resign and be discharged on her bond.

¶6 On October 8, 2012, Rapp moved for reconsideration of the September 17 orders. Following numerous additional filings by various parties, the court heard argument on April 8, 2013. Ultimately, the court entered a written order on October 7, 2013. The court denied Rapp's motions to reconsider the September 17, 2012 orders. Additionally, the court held there was "no conflict of interest … that would prevent [Rapp] from complying with the Court's order to collect $120,000.00 in accordance with the Settlement Agreement. … The conflict, if one exists, was created when she accepted the position as personal representative of the James Berg Estate." Further, the court indicated it was exercising its discretion to disallow Rapp's resignation as personal representative of Laurence Berg's estate. Rapp now appeals the October 7, 2013 order.

DISCUSSION

¶7 Rapp argues the circuit court erroneously denied her request to resign as personal representative of Laurence Berg's estate. The removal of personal representatives is governed by WIS. STAT. § 857.15, which provides:

> The judge may accept the written resignation of any personal representative. When a personal representative is adjudicated incompetent, disqualified, unsuitable, incapable of discharging the personal representative's duties, or is a nonresident of this state who has not appointed a resident agent to accept service of process …, the court shall remove the personal representative. When any personal representative has failed to perform any duty imposed by law or by any lawful order of the court or has ceased to be a resident of the state, the court may remove the personal representative. When grounds for removal appear to exist, the court on its own motion or on the petition of any person interested shall order the personal representative to appear and show cause why the personal representative should not be removed.

"Whether to remove a personal representative for these statutory reasons is a matter within the court's discretion." ***Bell v. Neugart***, 2002 WI App 180, ¶28, 256 Wis. 2d 969, 650 N.W.2d 52 (holding court did not erroneously exercise its discretion by failing to remove personal representative with a personal conflict of interest).[3]

¶8 Relying on case law interpreting WIS. STAT. § 856.23—concerning qualification to be appointed as personal representative in the first instance, as opposed to subsequent removal—Rapp asserts the circuit court's removal decision is subject to de novo review.[4] Instead, because the court's decision was discretionary pursuant to ***Bell***, we review the court's decision for an erroneous

[3] ***Bell v. Neugart***, 2002 WI App 180, ¶28, 256 Wis. 2d 969, 650 N.W.2d 52, cited ***Holzhauer v. Zartner***, 183 Wis. 506, 515, 198 N.W. 363 (1924), as the sole basis of its statement that WIS. STAT. § 857.15 is subject to a court's discretion. However, ***Zartner*** predated enactment of the present statute by forty-seven years, and applied a statute that provided: "Or shall … become insane or otherwise incapable or unsuitable to discharge the trust, the county court *may* remove such executor." ***Holzhauer***, 183 Wis. at 509 (quoting WIS. STAT. CH. 310, § 3803 (1923) (emphasis added)); *see also* 1969 Wis. Laws, ch. 339, § 26 (effective Apr. 1, 1971).

Unlike the permissive statute considered in ***Holzhauer***, WIS. STAT. § 857.15 variously uses both "may" and "shall." "Shall" is typically interpreted as being mandatory, particularly when the legislature also uses "may" in the same statute. *See* ***Karow v. Milwaukee Cnty. Civil Serv. Comm'n***, 82 Wis. 2d 565, 571, 263 N.W.2d 214 (1978). Additionally, because both parties in ***Bell*** agreed the statute was discretionary, the court did not consider the question in the first instance. *See* ***Bell***, 256 Wis. 2d 969, ¶¶26-27.

Were it a matter of first impression, we would conclude "shall" is mandatory and a court would lack discretion to not remove a personal representative if he or she were "adjudicated incompetent, disqualified, unsuitable, incapable of discharging the personal representative's duties, or … a nonresident of this state who has not appointed a resident agent to accept service of process." *See* WIS. STAT. § 857.15. However, we cannot overrule, modify, or withdraw language from a prior published opinion. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

[4] Rapp cites ***Klauser v. Schmitz***, 2003 WI App 157, ¶7, 265 Wis. 2d 860, 667 N.W.2d 862, which states: "The interpretation and application of the statutory basis for disqualification of a personal representative as 'unsuitable for good cause shown' present questions of law we review *de novo.*" (quoting WIS. STAT. § 856.23).

exercise of discretion. We will sustain a discretionary act if the court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶9 We conclude it was unreasonable for the circuit court not to remove Rapp as personal representative. First, this case is unlike any prior cases, where parties have sought involuntary removal of a personal representative due to a perceived conflict of interest or other ground for removal. *See, e.g.*, ***Bell***, 256 Wis. 2d 969, ¶9; ***Holzhauer v. Zartner***, 183 Wis. 506, 515, 198 N.W. 363 (1924). Rather, not only did Rapp not object to removal, she actively sought it. This factor weighs substantially in favor of removing Rapp.

¶10 Additionally, the conflicts of interest in this case are dissimilar to those in past cases where personal representatives were deemed suitable despite a conflict. For example, in ***Bell***, the personal representative had a personal conflict with the estate. The personal representative had two joint bank accounts with the decedent and declined to bring the account funds into the estate. ***Bell***, 256 Wis. 2d 969, ¶1. The decedent's children asserted the funds were not true joint accounts and sought the personal representative's removal. ***Id.*** The circuit court ultimately managed the conflict by appointing a special administrator with authority over the bank accounts until the dispute was resolved. ***Id.***, ¶9. We determined that although it might have been preferable to immediately remove the personal representative, at least temporarily, the failure to do so was not an erroneous exercise of discretion. ***Id.***, ¶29.

¶11 Similarly, in ***Klauser v. Schmitz***, 2003 WI App 157, ¶1, 265 Wis. 2d 860, 667 N.W.2d 862, we determined it was premature to disqualify the testator's

chosen personal representative due to a potential conflict of interest. The personal representative intended to exclude from the estate funds held in joint accounts with the deceased. ***Id.***, ¶4. We concluded the circuit court erroneously disqualified the personal representative for two reasons. First, the long-standing policy underlying the disqualification statute—as opposed to the removal statute at issue here—was that the testator's selection of a personal representative should be honored whenever possible, particularly when any potential conflicts of interest were known or foreseeable to the testator.[5] ***Id.***, ¶¶8-11. Second, we recognized there was a statutory framework in place for addressing disagreements regarding the makeup of an estate. ***Id.***, ¶14 (citing WIS. STAT. § 858.09). We explained:

[5] The distinction between initial disqualification as personal representative and subsequent removal is long standing. In 1924, our supreme court explained:

> [I]t must be borne in mind that the power of appointment and the power of removal are conferred by two entirely different statutes. The common law as to the qualification of executors is thus stated …:
>
> "At common law all persons might be appointed as executors who were mentally capable of executing the duties of the trust … or were not specially disqualified. This signified that all persons except idiots and lunatics were competent to act as executors; and that neither infancy, nonresidence, coverture, intemperance, improvidence, ignorance, vice, dishonesty, nor any degree of moral guilt or delinquency disqualified one for the office."
>
> Although this rule has been quite generally modified by statutes in this country, the testamentary nomination will not be disregarded by the courts unless the person named in the will is disqualified by the statute. … Except for very cogent reasons the courts follow the maxim "whom the testator will trust so will the law."
>
> The tendency of the courts to regard the nomination by the testator as so largely mandatory may be due in part to the fact that statutes give the power of removal.

Holzhauer, 183 Wis. at 512 (citations omitted).

"Thus, a court can address concerns related to possible conflicts of interests and, where appropriate, require that accounts, like those here, be included in an estate. Significantly, however, a court can do so without disturbing the decedent's designation of a personal representative."

¶12 Rapp's conflicts of interest here were neither of a type manageable by the circuit court, nor foreseeable by the testator. Rapp's conflicts stemmed not from any direct interest in Laurence Berg's estate or assets, but from her fiduciary duties to the James Berg estate and her personal interest as an heir of the James Berg estate. The circuit court could not manage the conflicts because it could not exert any authority over Rapp vis-à-vis the James Berg estate. Also because the conflicts concerned the James Berg estate, Laurence Berg could not have anticipated them. Thus, the conflicts are not diminished by Laurence Berg's intent in selecting Rapp as his personal representative.

¶13 Further, Rapp's conflicts caused undue delay and costs because of her unwillingness or inability to act upon the settlement agreement and the court's orders. The court offered no reasons for declining to remove Rapp, aside from the fact she created the conflicts herself by accepting the position as personal representative of James Berg's estate when she was already the personal representative of Laurence Berg's estate. However, neither the court nor any party has cited any authority suggesting a personal representative should be deemed suitable and denied removal just because he or she created any conflicts. Rather, a willingness to create or maintain conflicts of interest is an additional consideration favoring removal.

¶14 Garves and the DOR contend, respectively, that the circuit court properly exercised its discretion in not removing Rapp because it "refused to allow

Rapp to walk away from this mess," and "her willful conduct should not be rewarded by allowing her to avoid her responsibilities." We reject any argument that Rapp should not be removed as personal representative due to unsuitability because doing so would reward her or relieve her of any responsibility. Generally, it seems incongruous to suggest that a personal representative who fails to perform his or her duties or has committed wrongs against the estate should be allowed to remain in his or her position, much less be forced to remain.

¶15 Nonetheless, in light of the parties' concerns, we ordered supplemental briefs on the issues of Rapp's continuing liability and the circuit court's continuing authority over Rapp in the event she is removed as personal representative. Rapp and the DOR submitted substantial authority indicating the court would not lose authority and Rapp would not be relieved of liability; we find that authority convincing.[6] As the DOR explains, in part:

> It has long been established law that removal of a personal representative—or the acceptance of their resignation—does not deprive the court of jurisdiction over the personal representative. [***Hovden v. First Nat'l Bank***], 213 Wis. 439, 250 N.W. 845 (1933). The personal representative's liability remains until the estate is fully administered and there has been a final accounting. ***Newcomb v. Ingram***, 211 Wis. 88, 95, 243 N.W. 209 (1932). Both of these cases refer back to ***Wallber v. Wilmanns***, 116 Wis. 246, 249, 93 N.W. 47 (1903).

¶16 For the foregoing reasons, we conclude the circuit court erroneously exercised its discretion by failing to remove Rapp for unsuitability caused by the personal and fiduciary conflicts of interest concerning another estate and related

[6] Weller's supplemental brief took no position, but clarified she did not intend to imply in her primary brief that Rapp's removal would have either divested the court of jurisdiction over Rapp or permitted Rapp to evade liability.

failures to act. On remand, the circuit court shall remove Rapp as personal representative.

¶17 Rapp raises additional issues, which partially overlap with her arguments in favor of removal. Broadly, Rapp seeks reversal of the September 17, 2012 orders directing her to collect from the James Berg estate and to make payment to the DOR. We conclude Rapp forfeited her right to appeal those orders.

¶18 In her reply brief, Rapp explains she "has not argued or implied that her motions for reconsideration from the September 17, 2012, orders were timely under WIS. STAT. § 805.17. They were not." Rapp instead contends the circuit court retained authority under WIS. STAT. § 806.07 to entertain the reconsideration motion beyond the § 805.17(3) twenty-day deadline. Rapp did not, however, file a § 806.07 motion or present any argument based on that statute in the circuit court, and the court did not cite that statute or the applicable standards in its decision denying Rapp's motion.

¶19 Rapp did not appeal the September 17, 2012 orders. Her December 2013 notice of appeal did not identify the September 17, 2012 orders, nor could it because the filing of a reconsideration motion did not extend the deadline for appeal of the underlying order, *see* ***Continental Cas. Co. v. Milwaukee Metro. Sewerage Dist.***, 175 Wis. 2d 527, 533-35, 499 N.W.2d 282 (Ct. App. 1993), and the ninety-day appeal deadline had long since expired. *See* WIS. STAT. § 808.04(1). We lack jurisdiction to review an appeal brought after the ninety-day deadline. *See* WIS. STAT. RULE 809.10(1)(e).

¶20 No WIS. STAT. RULE 809.25 costs allowed to any party.

By the Court.—Order reversed in part and cause remanded with directions.

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