

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 26, 2016

Diane M. Fremgen
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. 2015AP54

Cir. Ct. No. 2013CV49

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**JUDITH HAUG, SPECIAL ADMINISTRATOR OF THE ESTATE OF
ROBERT GREVE,**

PLAINTIFF-APPELLANT,

v.

BARBARA GREVE,

DEFENDANT-RESPONDENT,

KENNETH GREVE,

DEFENDANT.

APPEAL from an order of the circuit court for Forest County:
LEON D. STENZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. Judith Haug, Special Administrator of the Estate of Robert Greve, appeals an order resolving the Estate’s action seeking a declaration of interest in property. Following an advisory jury trial, the circuit court determined that Robert Greve had contracted to devise certain real property if he still owned it at his death, and that the contract was enforceable in equity. The Estate argues the court erroneously determined that the contract was exempt from the statute of frauds, and that even if the statute of frauds did apply, the transaction should be enforced in equity. We conclude the contract was exempt from the statute of frauds, and affirm.

BACKGROUND

¶2 In 1960, Mildred Greve deeded a riverfront cabin to herself and her son, Robert, as joint tenants with rights of survivorship. At some point, a dispute developed between them, resulting in litigation. They signed a written settlement agreement in May 1964. The agreement provided that they would continue to own the cabin property as joint tenants and share equally in the expenses. In July 1972, Mildred deeded her interest in the cabin property to Robert, but she reserved a life estate “to enjoy the use of [the] property in connection with Robert Greve and his family.” The recorded deed also contained evidence of a contract, stating as follows:

And ... Robert Greve, as a part of the consideration for the grant of [the property], does agree to assume and pay the real estate taxes, utility bills and other expenses resulting from the use of the property, and ... Robert Greve does further agree that he will, in the event he owns the [property] at the time of his death, devise and bequeath [the property] to his children in equal shares.

Mildred signed the deed, but the deed included no signature line or signature for Robert.¹

¶3 Mildred died in February 1976. Robert and his first wife divorced in 1981. They had two children, Barbara Greve and Kenneth Greve. Robert married his second wife, Bernice Greve, in 1985. Robert executed a will in December 1999, leaving ninety-five percent of his estate to Bernice and the rest to his two children. There was no mention of the cabin property, where Robert and Bernice then resided. Robert died in January 2002. Bernice died in November 2012.

¶4 Following Bernice's death, a dispute arose as to ownership of the cabin property, leading to the present litigation. At the advisory jury trial, Barbara testified she was aware of the agreement between her father and grandmother that the cabin property was supposed to pass to her after her father died.² Additionally, Mildred's sister-in-law (Robert's aunt) testified she was present at two different conversations many years ago when both Robert and Mildred stated it was their intent that the cabin would one day belong to Robert's children.

¶5 After the advisory jury trial, the circuit court issued a lengthy decision and order, which observed, "The jury concluded that [Robert] and [Mildred] entered into an agreement that required [Robert] to leave the cabin

¹ A copy of the 1972 deed was, however, found in a safe deposit box, affixed by staple to the original 1964 settlement agreement signed by both Mildred and Robert. The 1972 deed further provided that Mildred's interest was being conveyed for "one dollar, and in settlement of the litigation and agreement entered into between the parties on May 20th, 1964, and the problems which arose because Robert Greve had and is making improvements in [the] property"

² Barbara testified she tried to investigate the matter of inheriting the cabin upon her father's death but was unsuccessful because he had a surviving spouse. Additionally, Kenneth transferred his interest in the cabin to Barbara during pendency of the litigation. We therefore refer only to Barbara for the remainder of this decision.

property to his children. Both parties accept that the jury verdict establishes that there was a contract to make a will.” The court further indicated the jury had applied the “clear and convincing evidence” standard, and the court agreed with the advisory verdict and adopted it.

¶6 Because the Estate argued the contract was invalid for failure to comply with the statute of frauds, *see* WIS. STAT. §§ 706.001, 706.02, the court’s decision then addressed “the effect of the verdict and the availability of equitable relief.”³ Ultimately, the court held that the contract to make a will was enforceable under several rationales. The court first determined the contract was proven by clear and convincing extrinsic evidence under WIS. STAT. § 853.13(1)(d), was breached by Robert, and was exempt from the statute of frauds under WIS. STAT. § 706.001. Alternatively, the court determined that, even if the statute of frauds was applicable, the contract was enforceable in equity pursuant to the exclusions set forth in WIS. STAT. § 706.04(1) and (2).⁴ The court concluded Mildred’s part performance allowed the court to reform the contract under § 706.04(1) by adding Robert’s signature. The court held the contract was also enforceable under § 706.04(2) due to unjust enrichment. The Estate now appeals.

³ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

⁴ The circuit court rejected an argument, however, that the contract to make a will was enforceable based on equitable estoppel under WIS. STAT. § 706.04(3).

DISCUSSION

¶7 The Estate argues the circuit court erred with respect to all three of its alternative rationales for enforcing Mildred and Robert’s contract to make a will. The Estate contends the lack of Robert’s signature on the deed renders the contract unenforceable for failure to comply with the statute of frauds. *See* WIS. STAT. § 706.02(1).⁵ We conclude the circuit court properly determined the contract was enforceable because it was exempt from the statute of frauds under WIS. STAT. §§ 853.13(1)(d) and 706.001.⁶ The interpretation and application of a statute to undisputed facts presents a question of law subject to de novo review. *McNeil v. Hansen*, 2007 WI 56, ¶7, 300 Wis. 2d 358, 731 N.W.2d 273.

¶8 Wisconsin’s probate code is found in WIS. STAT. chs. 851 through 882; WIS. STAT. ch. 853 is titled, “WILLS.” WISCONSIN STAT. § 853.13(1) provides:

⁵ As relevant here, WIS. STAT. § 706.02(1) provides: “Transactions under s. 706.001(1) shall not be valid unless evidenced by a conveyance that satisfies all of the following: ... (d) Is signed by ... each of the grantors; and (e) Is signed by ... all parties, if a lease or contract to convey”

⁶ Accordingly, we do not reach the Estate’s arguments concerning the circuit court’s alternative rationales or Haug’s renewed argument that the contract was enforceable based on equitable estoppel under WIS. STAT. § 706.04(3). *See State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive). While we need not discuss the court’s alternative rationales, we are inclined to agree the contract was enforceable in equity under one or more of the exceptions set forth in § 706.04.

Contracts. (1) A contract to make a will or devise,^[7] not to revoke a will or devise or to die intestate may be established only by any of the following:

- (a) Provisions of a will stating the material provisions of the contract.
- (b) An express reference in a will to a contract and extrinsic evidence proving the terms of the contract.
- (c) A valid written contract, including a marital property agreement under s. 766.58(3)(e).
- (d) Clear and convincing extrinsic evidence.

The Estate does not dispute that Barbara established, by “clear and convincing extrinsic evidence,”⁸ the existence of a contract between Mildred and Robert to make a will, and consequently satisfied WIS. STAT. § 853.13(1)(d).

¶9 We therefore turn to components of the statute of frauds. WISCONSIN STAT. § 706.001 provides:

Scope and construction. (1) Subject to the exclusions in sub. (2), this chapter shall govern every transaction by which any interest in land is created, aliened, mortgaged, assigned or may be otherwise affected in law or in equity.

⁷ “‘Devise’, when used as a noun, means a testamentary disposition of any real or personal property by will. ‘Devise’, when used as a verb, means to dispose of any real or personal property by will.” WIS. STAT. § 851.065; *see also* WIS. STAT. § 851.002 (“The definitions in ss. 851.01 to 851.31 apply to chs. 851 to 882.”).

⁸ We note another chapter of the probate code gives the following definitions:

(1) “Extrinsic evidence” means evidence that would be inadmissible under the common law parole evidence rule or a similar doctrine because the evidence is not contained in the governing instrument to which it relates.

(2) “Governing instrument” means a will; a deed; ... a contract; ... or any other dispositive, appointive, or nominative instrument that transfers property at death.

WIS. STAT. § 854.01(1), (2).

(2) Excluded from the operation of this chapter are transactions [by] which an interest in land is affected:

(a) By act or operation of law; or

(b) By will; or

....

(3) This chapter shall be liberally construed, in cases of conflict or ambiguity, so as to effectuate the intentions of parties who have acted in good faith.

The circuit court determined Mildred and Robert’s contract to make a will was exempt from the statute of frauds under § 706.001, reasoning as follows:

This case is concerned with a contract to make a will. The contract itself did not create any interest in land. Robert had full authority to sell the property during his lifetime. As stated above, the defendants acquired no interest in the property by virtue of the 1972 deed. Any interest in land would have been created by the will required pursuant to the contract. This was not a contract to convey real estate at some time in the future; it was a contract to create a will to bequeath certain real property Robert may have owned at his death. Section 706.001(2)(b) excludes from the operation and conditions of § 706.02 those interests in land affected by will.

We agree and adopt the circuit court’s rationale.

¶10 The Estate also does not take issue with this rationale concerning WIS. STAT. § 706.001. Rather, the Estate argues WIS. STAT. § 853.13(d)’s clear-and-convincing-evidence rule is inapplicable to Mildred and Robert’s contract, which preceded the creation and effective date of that statutory provision. The Estate asserts that, under prior common law, the statute of frauds applied to contracts to make a will to transfer real property.

¶11 WISCONSIN STAT. § 853.13(1)(d) was created by § 141 of 1997 Wis. Act 188 (the “Act”). Section 233 of the Act states: “**Initial applicability.**

(1) This act first applies to deaths occurring on January 1, 1999, except with respect to irrevocable governing instruments executed before that date.” The contract to make a will was created in 1972, Mildred died in 1976, and Robert died in 2002.

¶12 There is no dispute that, in the first instance, the Act would apply because Robert’s death occurred after January 1, 1999. The Estate argues the Act is nonetheless inapplicable because Mildred and Robert’s agreement became irrevocable upon Mildred’s death in 1976. We reject this argument and, again, agree with the circuit court, which stated: “Robert’s obligation was to leave the property to [Barbara] only if he still owned it on his death. Had he transferred or conveyed the property prior to his death, the defendants would have no claim. Once Robert died still owning the property, the agreement became irrevocable”⁹

¶13 Had Robert agreed, without exception, to will the cabin property to Barbara, we would agree with the Estate that the provisions of the Act would not apply. Those are not, however, the facts presented. Because after Mildred’s death Robert retained the unilateral authority, under the terms of the agreement, to

⁹ While the contract at issue in this case appears somewhat peculiar, we observe for the purpose of context that the current probate code specifies a procedure for accomplishing the ends sought by Mildred and Robert. Under WIS. STAT. § 705.15, owners of real property may record a deed with a transfer-on-death provision. Such a provision “does not affect ownership of the property until the owner’s death” and may be “canceled or changed at any time by the sole owner or all then surviving owners, without the consent of the beneficiary, by executing and recording another deed” WIS. STAT. § 705.15(3).

convey the property to anyone at any time, his promise to convey to Barbara was revocable until his death in 2002.¹⁰

¶14 Citing case law and statute, the Estate argues Robert could not unilaterally convey the cabin property, because it became homestead property when he moved into the cabin with his second wife in 1988. We summarily reject this argument. Any transfer limitations or encumbrances on his property were unrelated to the contract, and are therefore irrelevant to whether the agreement was unilaterally revocable. For the above-stated reasons, we conclude the contract to make a will was enforceable because it was exempt from the statute of frauds under WIS. STAT. §§ 853.13(1)(d) and 706.001.

By the Court.—Order affirmed.

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

¹⁰ Neither party addresses the meaning of the term “irrevocable.” We observe WIS. STAT. ch. 854 of the probate code provides the following definition:

“Revocable,” with respect to a disposition, provision, or nomination, means one under which the decedent, at the time referred to, was alone empowered, by law or under the governing instrument, to change or revoke, regardless of whether the decedent was then empowered to designate himself or herself in place of a former designee, and regardless of whether the decedent then had the capacity to exercise the power.

WIS. STAT. § 854.01(3).

