**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**April 26, 2017**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2016AP865** **Cir. Ct. No. 2014PR148**

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

---

**IN RE THE ESTATE OF ANN H. MCMASTER DEWEY:**

**ROBERT A. WILMOT,**

**APPELLANT,**

**V.**

**JOHN MCMASTER, SARAH MCMASTER AND AMY MCMASTER,**

**RESPONDENTS.**

---

APPEAL from an order of the circuit court for Walworth County: KRISTINE E. DRETTWAN, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Attorney Robert A. Wilmot appeals pro se from an order ruling that a conflict of interest makes him unsuitable to act as personal

representative (PR) of the estate of the decedent, Ann H. McMaster Dewey. *See* WIS. STAT. § 856.23(1)(e) (2015-16).[1] We agree and affirm.

¶2 Dewey's financial planner, Timothy Bultman, referred her to his friend Wilmot for estate planning. Dewey and Wilmot met in October 2012. Before that meeting, Wilmot did not know Dewey, had done no legal work for her, had no knowledge of her assets or how she acquired them, and did not know any of her three children or six stepchildren. The will Wilmot drafted nominated Bultman as PR and Wilmot as alternate if Bultman was unwilling or unable to serve. Dewey signed the will in March 2013. After she apparently misplaced it, Wilmot had her sign another, identical except for the dates, in October 2013.

¶3 Dewey died in August 2014. When Bultman declined to serve as PR, Wilmot was appointed. John, Amy, and Sarah McMaster, Dewey's children from her first marriage, objected to the admission and probate of the will and to Wilmot's appointment. They asked that Sarah be named PR.

¶4 The objections to the admission and probate of the will either were dismissed at summary judgment or through a settlement agreement. Trial was to the court on the McMasters' remaining claim, that Wilmot has a conflict of interest in acting as PR for a will he drafted and named himself PR. The court agreed, found him "unsuitable for good cause shown," and ordered that domiciliary letters be issued to Sarah. Wilmot appeals.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶5 WISCONSIN STAT. § 856.23 identifies the reasons for which a nominated PR may be disqualified. Only subsec. (1)(e), allowing disqualification if the court considers the nominee "unsuitable for good cause shown," applies here. While unsuitability ultimately is a question of law that we review de novo, "'there must be a measure of discretion in determining whether the particular conflict of interest is serious enough to prevent appointment'" of the nominee. ***Klauser v. Schmitz***, 2003 WI App 157, ¶7, 265 Wis. 2d 860, 667 N.W.2d 862 (citation omitted). "The burden to demonstrate an erroneous exercise of discretion rests with the appellant." ***Winters v. Winters***, 2005 WI App 94, ¶18, 281 Wis. 2d 798, 699 N.W.2d 229.

¶6 The right to make a will and have its provisions enforced is constitutionally guaranteed. ***Biart v. First Nat'l Bank of Madison***, 262 Wis. 181, 191, 54 N.W.2d 175 (1952). To give effect to this right, the testator's intent governs when a court construes will provisions. ***Schmeling v. Devroy***, 109 Wis. 2d 154, 157, 325 N.W.2d 345 (1982). Accordingly, we must give great weight to Dewey's intent as expressed in her will. *See* ***id.***

¶7 The will is silent as to Dewey's intent. It recites the PR nominees but in no way indicates that they were Dewey's choice. "[C]ompeting policies—one protecting the constitutional right to make a will and have its provisions enforced and the other[] discouraging client solicitation …—must be balanced to yield a result that best carries out the purposes behind each policy." ***Id.*** at 160.

¶8 We are guided by two state supreme court cases. ***State v. Gulbankian***, 54 Wis. 2d 605, 196 N.W.2d 733 (1972), arose from ethics violations filed against two attorneys for solicitation of business after naming themselves in numerous wills as the executors of the estate and/or the probate attorneys. ***Id.*** at

607. The Gulbankians, Armenian immigrants, claimed they named themselves at the behest of their clients, many of them of Armenian descent with limited English skills. ***Id.*** at 609. The court emphasized that an attorney must take care not to "intimate or suggest or solicit, directly or indirectly, his [or her] employment as the possible attorney to assist the executor in the probate of the estate or his [or her] appointment as executor." ***Id.*** at 612. It also stated, however, that:

> [i]n those fairly rare cases where a client, because of the unusual familiarity of the attorney with the testator's business or family problems or because of a relationship which transcends the ordinary client-attorney relationship, asks his attorney to act as executor or to provide for his employment to probate the estate, there is no solicitation.

***Id.*** at 610. While the court was concerned the public might suspect self-promotion, it concluded that, given the attorney-client language and ethnic affinity, it could not infer that the Gulbankians' self-designation as executors or to be retained as probate attorneys rose to the level of solicitation. ***Id.*** at 609, 612.

¶9 ***Schmeling*** built on the ***Gulbankian*** self-designation caveat. A testator was firm in his desire to have Schmeling as the attorney to probate his estate, as Schmeling knew well the client's business affairs, property, and wishes on matters that could arise during probate, having represented and advised him for years. ***Schmeling***, 109 Wis. 2d at 155-56. The testator thus predicated the appointment of his primary or alternate PR on the nominees' agreement to retain Schmeling as the attorney to probate his estate; if they would not, he wanted the court to appoint a PR willing to do so. ***Id.*** at 156. Schmeling included this language in the will provision nominating the PR:

> This preferential designation of Todd J. Schmeling as the attorney to probate my estate is made as an expression of my intent and desire as to the manner in which I wish my affairs to be settled, and without any solicitation,

> suggestion or influence on the part of Todd J. Schmeling whatsoever.

***Id.*** Because the will clearly expressed the testator's intent, it was not against public policy for Schmeling to name himself as attorney to probate the estate. ***Id.*** at 158, 162; *see also* ***Biart***, 262 Wis. at 192 ("Anything designed to defeat the intent of the testator is against public policy." (citation omitted)).

¶10 Here, Wilmot testified that Dewey declined to nominate as PR either her children, two of whom live out of state, or a bank or other institution. He notes that, this is essentially the first will in which he named himself as PR,[2] that he handled six other "extraordinarily sensitive and critical" legal matters for Dewey between October 2012 and March 2013, and is adamant that Dewey, unprompted, designated him as alternate PR. Lawyers must avoid both actual and the appearance of attorney solicitation of work, however. *See* ***Schmeling***, 109 Wis. 2d at 161; *see also* ***Gulbankian***, 54 Wis. 2d at 612. The court found that the only evidence of non-solicitation was Wilmot's own "self-serving statements."

¶11 The court made clear what did not factor into its decision. It did not consider that the specific and residual beneficiaries agreed in the settlement that Sarah should be the PR; that Sarah would serve without payment, while Wilmot would get paid "quite a bit of money"; that the family does not like or trust Wilmot; and that the family believes it knows better how to manage and dispose of their mother's real estate holdings and assets. The court was correct; none of these are proper considerations. *See* ***State ex rel. First Nat'l Bank & Trust Co. of Racine v. Skow***, 91 Wis. 2d 773, 781, 284 N.W.2d 74 (1979).

[2] Wilmot agreed to be alternate PR in a will he drafted for a friend. The man then designated someone else in a later will.

¶12 What the court did base its ruling on were these facts: Dewey was referred by her financial advisor, Wilmot's friend; except for a few phone calls between Wilmot and Dewey to set an appointment, attorney and client first met in October 2012; Dewey signed the will just five months later; until they met, Wilmot did not know Dewey, her family situation, or anything about her estate or affairs; apart from Wilmot's testimony, there was "no good evidence" of non-solicitation; and missing in this "standard attorney-client relationship" was the "substantial kind of relationship" cases like ***Gulbankian*** and ***Schmeling*** require. Looking to ***Schmeling***, the court noted that "one way to really get around the implication of a conflict is [to] put it in the will … that there was no solicitation." We disagree with Wilmot that the court overread ***Schmeling***'s teaching.[3]

¶13 The trial court properly exercised its discretion, as it "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). We conclude Wilmot was "unsuitable for good cause shown," and affirm his disqualification.

*By the Court*.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited under RULE 809.23(3)(b).

[3] Wilmot criticizes the trial court's reliance on "non-precedential dicta" in ***Schmeling v. Devroy***, 109 Wis. 2d 154, 325 N.W.2d 345 (1982). This court may not dismiss as dicta language from a supreme court opinion. ***Zarder v. Humana Ins. Co.***, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682.