

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 4, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 94-3149

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

In the Matter of the Estate of
Victor C. Schwartz, Deceased:

ANNE E. SCHWARTZ, Personal
Representative of the Estate,

Appellant,

v.

PEARL ELODA SCHWARTZ,

Respondent.

APPEAL from an order of the circuit court for Waukesha County:
DAVID L. DANCEY, Reserve Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

SNYDER, J. This is an appeal from an order that awarded rugs and runners as household furnishings to Pearl Eloda Schwartz, the widow of Victor C. Schwartz, and required the estate to reimburse Pearl for part of

Victor's funeral expenses. We conclude that the award of the household furnishings under § 861.33, STATS., was not clearly erroneous and that the trial court had the authority to direct the payment of the funeral expenses claim. Accordingly, we affirm.

Victor and Pearl were married on November 18, 1988, and Victor died testate on May 9, 1993. Victor's last will, dated December 29, 1992, left \$25,000 to Pearl and the balance of the estate to his only child and designated personal representative, Anne E. Schwartz. The will was admitted to probate after Pearl withdrew objections to the will and to Anne's appointment as personal representative.

As Victor's surviving spouse, Pearl selected certain articles of Victor's personal property under § 861.33, STATS., which included, inter alia, three Persian/Kirman rugs with runners.¹ Pearl contends that the articles were

¹ Section 861.33(1), STATS., provides in relevant part:

- (a) ... [I]n addition to all allowances and distributions, the surviving spouse may file with the court a written selection of the following personal property, which shall thereupon be transferred to the spouse by the personal representative:

....

3. Household furniture, furnishings and appliances;

....

- (b) The selection in par. (a) may not include items specifically bequeathed except that the surviving spouse may in every case select the normal household furniture, furnishings and appliances necessary to maintain the home. For this purpose antiques, family heirlooms and collections which are specifically bequeathed are not classifiable as normal household furniture or furnishings.

eligible for selection as household furnishings because they were used in the Schwartz home for Victor's comfort and convenience.

In the estate's inventory, the rugs and runners, valued at \$70,000, were classified as Victor's solely-held investments rather than as household furnishings. Contending that investment property is not selectable under § 861.33, STATS., the estate objected to the transfer of the articles to Pearl.

The estate argues that there was a total failure of proof that the rugs were used by Victor for his convenience and comfort, that the rugs were obtained by Pearl for her own enjoyment rather than Victor's, and that Victor was in poor health and not living in the home when the rugs and runners were present.

Whether property selected by a surviving spouse under § 861.33, STATS., represents household furnishings or the decedent's solely-owned investments is a question of fact. Findings of fact will not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Section 805.17(2), STATS.

The term "household furniture" as used in a statute concerning a surviving spouse's right of selection describes furniture used by the deceased for his or her convenience and comfort rather than for commercial purposes. See *Greatens v. Bosse*, 247 Wis. 44, 47, 18 N.W.2d 335, 336 (1945).² A statute

² In 1945, two cases addressed the rights of a surviving spouse under § 313.15, STATS., 1945, to distribution of the decedent's personal property. *Greatens v. Bosse*, 247 Wis. 44, 18 N.W.2d 335 (1945), held that the decedent's furniture in a summer home not used by the widow were articles of household furniture subject to the widow's claim. *Gibbon v. Pengelly*, 247 Wis. 616, 20 N.W.2d

providing for a surviving spouse's selection of personal property of the decedent is entitled to a liberal construction in favor of the survivor. *See id.*

It is undisputed that the rugs were purchased and delivered to the Schwartz home between May and July 1991. Pearl testified that she and Victor together shopped for and purchased the rugs and runners; that the rugs and runners were used in the home after July 1991 and prior to Victor's death; and that Victor lived in the home from the time the rugs and runners were delivered until his stroke on November 4, 1991, and again during the summer of 1992. Pearl further testified that the rugs and runners were in everyday use in the home and had never been offered for sale.

Pearl's daughter, Kristina Anzini, testified that she visited the Schwartz home after the rugs and runners had been purchased and observed that the rugs were in normal household use, and that during two of her visits, Victor was living at the home. Photographs depicting the placement and use of the rugs and runners as testified to by Pearl and Anzini were received into evidence.

In response, the estate refers generally to testimony in the record showing that Pearl obtained the rugs for her enjoyment and not Victor's, that Victor lived outside the home during the period the rugs were present, and that when he was in the home the rugs and runners were an obstacle to him rather than a comfort and convenience because of his poor health. The estate does not

(..continued)

558 (1945), held that a diamond brooch and a diamond necklace were clearly investments and therefore not subject to the widow's claim.

cite to the record for the referenced testimony. We will not sift the record to locate support for a party's contention. *Keplin v. Hardware Mut. Casualty Co.*, 24 Wis.2d 319, 324, 129 N.W.2d 321, 323 (1964).

The trial court found that the rugs and runners were household furnishings because they “were used in the maintenance of the home ... at the time that the rugs were laid down in 1992³ until the death of the decedent” and that “[Victor] lived there on and off during that period, albeit quite briefly.”⁴ We conclude that the trial court's factual finding that the rugs and runners were articles of household furniture for the convenience and comfort of Victor while Victor was in the home is not clearly erroneous.

We next turn to Pearl's claim for reimbursement of funeral expenses. The applicable statute, § 859.49, STATS., states:
The reasonable expense of the last illness and funeral may, if properly presented, be paid by the personal representative of the estate of a deceased spouse and if so paid shall be allowed as a proper expenditure even though the surviving spouse could have been held liable for the expense.

³ It is undisputed that the rugs and runners were purchased in 1991. Schedule G of the inventory filed by the estate lists the items as:

(3) Persian/Kirman Rugs with Runners \$70,000
Purchase in May, June and July 1991.

⁴ Victor suffered a stroke on November 4, 1991, and was hospitalized or in nursing homes for most of the time after that, returning to the home only intermittently.

Pearl's claim is for \$3000 that she paid to the Becker-Ritter Funeral Home as a funeral expenses advance. Contending that the trial court's order to pay the claim was contrary to the plain language of § 859.49, STATS., which states that payment is within the personal representative's discretion, the estate argues that the trial court lacked authority to require that payment be made to Pearl.⁵

Citing a 1906 case, Pearl contends that the estate is primarily liable for Victor's funeral bill. "[T]he general current of authority is to the effect that estates of all persons are made primarily liable for funeral expenses." *Schneider v. Estate of Breier*, 129 Wis. 446, 449, 109 N.W. 99, 100 (1906).

The application of a statute to a particular set of facts is a question of law that we review independent of the trial court's determination. *Artis-Wergin v. Artis-Wergin*, 151 Wis.2d 445, 452, 444 N.W.2d 750, 753 (Ct. App. 1989). The terms of § 859.49, STATS., are permissive in nature. *Stromsted v. St. Michael's Hosp.*, 99 Wis.2d 136, 145 n.8, 299 N.W.2d 226, 231 (1980). While we agree that the statute allows personal representatives discretion in the payment of last illness and funeral expenses, we disagree that such exercise of discretion is unfettered or final.

The discretion at issue must be measured against the statutory duties of personal representatives in ch. 857, STATS. Section 857.03(1), STATS., requires that "[t]he personal representative shall ... pay and discharge out of the

⁵ The estate's trial contentions that the claim was barred under § 859.02, STATS., and that the claim was excessive are not raised on appeal.

estate all ... claims allowed by the court, *or such payment on claims as directed by the court.*" (Emphasis added.)

The trial court found that there was nothing in the record that would foreclose Pearl from recovering her funeral expenses contribution under § 859.49, STATS., and that the \$3000 advance came from Pearl's own funds. We are satisfied that the trial court had authority to review the personal representative's exercise of discretion under § 857.03(1), STATS., and to direct that the personal representative pay the funeral expenses claim.

Further, we note that the trial court's order that the claim be paid is consistent with the first provision of Victor's will, which states, "*I authorize the payment of the expenses of my last illness and funeral and all of my legal debts, if any, as soon after my decease as conveniently may be.*" (Emphasis added.) It is well settled that a testator's intent should be afforded paramount importance. *See Madison Gen. Hosp. Medical & Surgical Found. v. Volz*, 79 Wis.2d 180, 186, 255 N.W.2d 483, 486 (1977).

Because the trial court's finding that the rugs and runners were selectable articles under § 861.33, STATS., was not clearly erroneous and because the trial court had authority to require that the personal representative pay the funeral expenses claim, we affirm.

By the Court. – Order affirmed.

Not recommended for publication in the official reports.