COURT OF APPEALS
DECISION
DATED AND FILED

October 20, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1034

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

IN THE MATTER OF THE GUARDIANSHIP OF LOUELLA T.: DANIEL K. T., JR.,

APPELLANT,

V.

SARA K. L.,

RESPONDENT.

APPEAL from an order of the circuit court for Price County: DOUGLAS T. FOX, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIUM. Daniel K.T., Jr., appeals an order granting Sara K.L.'s motion for summary judgment. He contends the trial court erred by concluding that a valid and binding stipulation was not reached at the hearing on September 10, 1997. We conclude that the trial court's finding that the parties did

not reach a valid and binding stipulation was not clearly erroneous and therefore affirm.

This action centers around the proceeds of a revocable living trust created by Daniel K.T., Sr., into which he transferred all the assets he and his wife, Louella T., had acquired during their marriage. The trust's purpose was to provide for the health, support and maintenance of first, his wife, and second, his daughter, Sara. The trust's income was to be distributed to his wife and, upon her death, the trustee was to distribute a fund of $20,000 in trust for his granddaugher, Julie L. The residue was to be used to establish a trust for the benefit of Sara. Daniel, Sr., intentionally made no bequest to his son, Daniel, Jr.

While Daniel, Sr., was still alive, Daniel, Jr., petitioned for the guardianship of Louella, who was suffering from Alzheimer's disease. Daniel, Sr., cross-petitioned for guardianship for either himself or Sara. The court appointed Daniel, Sr., as guardian, with Sara to succeed when Daniel, Sr., was no longer willing or able to serve as guardian. Daniel, Sr., died in May of 1997. Sara was appointed as guardian of Louella's person. Attorney Thomas Naleid was appointed as the guardian of her estate.

Naleid filed an augmented marital property estate election pursuant to § 861.11, STATS., on Louella's behalf. Factual disputes existed as to the character and classification of various assets comprised in Daniel, Sr.'s, trust. A hearing was held on September 10, 1997, before referee Timothy Vocke to determine the extent of Louella's interest in the trust for the purposes of the election. Roger Gierhart, whom the referee believed to be the attorney of record for the trust, failed to appear at the hearing, and therefore Vocke held the trust in default.

The parties, who had appeared before Vocke, then engaged in settlement discussions off the record, later reconvening before the trial court. They began to enter on the record an agreement to amend the trust. The terms of the proposal were: 50% of net trust income to be distributed to Louella; 50% of net trust income to be distributed to Sara; the trust principal to remain intact subject to payment of the death of settlor fee, annual corporate trustee fees, reimbursement to Sara for previously paid expenses, guardian ad litem fees for Louella, guardian ad litem fees for the Estate of Louella, and court fees for the appointed referee; and upon the death of Louella the trust principal to be distributed to Daniel, Jr. (25%), Julie ($20,000), and the remainder to Sara.

At the hearing, Naleid noted that Julie, as a beneficiary of the trust, was not present and had no opportunity to object to the agreement. He suggested that the court provide her a limited period of time to make an objection. Robert Kasieta, Sara's attorney, informed the court that Sara made it very clear to him that she would not be willing to enter into the agreement if Julie had substantial problems with it. Kasieta emphasized that Sara gave him strict instructions that he could not enter into an agreement until she could confer with Julie. Kasieta further stressed that he did not have the authority to enter an agreement regarding the capacity of Daniel, Jr., to assign an interest in the trust. The court agreed to establish a thirty-day time period for Kasieta to "communicate with his client and [Julie] and to inform the parties and the Court by letter … if there is objection what it is and suggestion as to how he proposes to proceed or if there is no[] objection confirming that, and that should take care of it." Kasieta mailed a letter of objection to the court within the thirty-day time period.

Louella died on November 25, 1997. Under § 61.11(5), STATS., Louella's right to elect ceased upon her death.[1] Sara subsequently filed a motion for summary judgment dismissing Louella's election against the estate because the trial court had not yet approved it. Daniel, Jr., opposed the motion, arguing that there was a valid and enforceable settlement agreement to amend the trust entered into at the September 10 hearing. Daniel, Jr., appeals the trial court's order granting summary judgment.

Daniel, Jr.'s, principal argument on appeal is that the parties entered into a valid and binding settlement agreement to amend the trust. He contends that the settlement agreement was contingent on an objection by Julie and because she did not personally object, the agreement is binding. The intent of the parties to enter into a contract presents a question of fact. ***Jos. Schlitz Brewing Co. v. Milwaukee Brewery Worker's Pension Plan***, 3 F.3d 994, 999 (7th Cir. 1993). A trial court's factual findings will not be set aside unless they are clearly erroneous, § 805.17(2), STATS., and when more than one inference can be drawn from credible evidence, we must accept the inference drawn by the trier of fact. ***Mentzel v. City of Oshkosh***, 146 Wis.2d 804, 808, 432 N.W.2d 609, 611 (Ct. App. 1988). Our obligation is to search the record for any credible evidence that under any reasonable view supports the trial court's decision. ***Stan's Lumber, Inc. v. Fleming***, 196 Wis.2d 554, 565, 538 N.W.2d 849, 853 (Ct. App. 1995). The trial court heard Daniel, Jr.'s, arguments and rejected them, finding that the parties had not entered into a binding agreement. We conclude that the trial court's decision that the stipulation entered at the hearing was not an enforceable settlement agreement was not clearly erroneous.

[1] Section 861.11(5), STATS., provides: "If the surviving spouse dies before filing a written election under sub. (1) or to approval by the court of an election filed by a guardian or guardian ad litem, the right to election ceases with death."

The unambiguous language cited in the court record evinces an intent of the parties to place their *prospective agreement* on the record. Moreover, the record demonstrates that the parties did not yet have a meeting of the minds as to all the terms of the agreement. Sara, through her attorney, Kasieta, made it clear that her assent was conditioned on Julie's approval of the agreement. Kasieta stressed at the hearing that:

> *[M]y client made it very clear to me that she would not be willing to enter into this agreement if her daughter had a substantial problem with it*. The representation she made to me is that she does not believe that Julie L. as a beneficiary of the trust would likely have a problem but she very much wants to avoid additional issues arising between her and Julie so *she gave me strict instructions I was not to do this unless she could first check with Julie* about her agreement or disagreement with this proposal. (Emphasis added.)

Kasieta further emphasized that he did not have the authority to agree to Daniel, Jr.'s, ability to assign an interest in the trust:

> I do not have the authority on the last point raised by counsel regarding the capacity of [Daniel], Jr. to in some testamentary capacity assign an interest in the trust. I do not anticipate that to be a problem, and I will represent to the Court that I will recommend that as a point of approval for my client, however I do not have the authority to enter into that at this time.

There can be no binding agreement when Kasieta expressly states on the record that he has no authority from his client to enter into the agreement. Furthermore, because Kasieta did not have full authority from his client, the trial court decided to give him thirty days to conduct an independent evaluation and object to the agreement. The trial court stated:

> Back on the issue then of the question of Julie L[.]'s position and the effect that might have on Sara L[.]'s

> position and the question of the power of appointment of Daniel Jr. over any entitlement provided under this agreement, I think rather than entering some kind of written order and providing for notice of that it might be simpler if I can just ask Mr. Kasieta to communicate with his client and Ms. L[.] and to inform the parties and the Court by letter … if there is objection what it is and suggestion as to how he proposes to proceed or if there is not objection confirming that, and that should take care of it.

Because Sara objected within the time frame set by the court, the stipulation is unenforceable.

Daniel, Jr., argues that the unambiguous language, as set forth in the record, requires *Julie* to *object to* the settlement within thirty days and, because she did not personally object, the stipulation is binding. We disagree. First, it was well understood that Sara's assent to the stipulation was conditioned on her daughter's approval.[2] Thus, the court directed Kasieta to communicate with both his client and her daughter. The court informed *Kasieta* that *he* should notify the parties in writing within thirty days if there was an objection to this agreement. The court did not advise the parties that Julie had to personally object on her own behalf. Kasieta represents Sara and not her daughter. Julie was not even a formal party to the agreement. Consequently, Kasieta could only object on behalf of his client and not Julie. Second, the thirty-day time frame was not based solely on Julie's approval of the stipulation. The trial court also granted the continuance for

[2] In addressing the need for a continuance, the court stated that, "I understand you are characterizing your client's assent to the agreement as conditioned upon the assent of Julie …." And later, "Back on the issue then of the question of Julie L[.]'s position and the effect that might have on Sara L[.]'s position …."

Kasieta to discuss with Sara whether she approved Daniel, Jr.', receipt of 25% of the trust principal.[3]

We, further, reject Daniel, Jr.'s, argument that the failure of the condition and the voiding of the settlement should cause the proceedings to relate back to the circumstances existing at the date of the agreement. Daniel, Jr., cites no authority for this proposition. *See* ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980) (arguments unsupported by reference to legal authority will not be considered). Furthermore, the case cited by Daniel, Jr., ***In re Gibson's Estate***, 7 Wis.2d 506, 96 N.W.2d 859 (1959), merely allows a trial court to modify or amend a judgment to make it conform to what the court actually pronounced and not to what the court ought to or intended to adjudge. ***Id***. at 515, 96 N.W.2d at 864. Here, the trial court did not intend to approve the stipulation until the thirty-day continuance expired.

Alternatively, Sara asserts that the stipulation was not valid because a compromise between beneficiaries to amend a trust is invalid in the absence of trustee approval. We agree. Generally, a trust cannot be amended without the consent of all the parties in interest. 76 AM.JUR.2D Trusts § 90 (1992). Thus, agreements to amend the trust between either the beneficiaries only, or the trustee and less than all the beneficiaries are ineffective, absent court approval. ***Id***.; ***In re Estate of McCoy***,118 Wis.2d 128, 131-32, 345 N.W.2d 519, 522 (Ct. App. 1984). A court may, however, modify the terms of a trust when such a modification is necessary to effectuate the trustor's ultimate purpose in creating the trust. ***Id***. We

[3] Daniel, Jr., further contends that Sara engaged in judicial manipulation by extending the settlement negotiations and delaying Louella's election proceedings. We conclude, however, that because Sara withdrew her assent before her mother died, there was no intentional manipulation on her behalf.

conclude that because all the interested parties were not present at the hearing to consent to the stipulation, it was invalid. The trial court did not have the authority to approve the amendments without all the parties' consent, unless the modification was necessary to effectuate Daniel, Sr.'s, intent. Here, the amendment goes against his intent; it provides for 25% of the principal to go to Daniel, Jr., who was intentionally excluded from receiving any of the trust's proceeds.

By the Court.—Order affirmed.

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