

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 22, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-0424-FT

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

IN RE THE MATTER OF ESTATE OF
THOMAS J. BERUBE: DOLORES HAAS,

APPELLANT,

v.

ESTATE OF THOMAS J. BERUBE AND PRUDENTIAL
INSURANCE COMPANY OF AMERICA,

RESPONDENTS.

APPEAL from an order of the circuit court for Iron County:
PATRICK J. MADDEN, Judge. *Reversed and cause remanded.*

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

¶1 PER CURIAM. Delores Haas appeals from an order denying her motion for relief from the order transferring ownership of a Prudential Insurance

Company annuity contract.¹ Haas argues that because newly-discovered evidence would probably have changed the result, the circuit court misused its discretion by failing to grant her WIS. STAT. § 806.07(1)(b) motion for a new trial. Because Haas has met her burden of proving that the newly-discovered evidence would probably change the result, we conclude the circuit court erred by denying Haas's motion for relief. Accordingly, we reverse the order and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 On July 28, 1993, Thomas Berube submitted an application to Prudential for an annuity contract. The application named two of Thomas's sons, Leonard and Edward, as co-annuitants. The application further named Thomas as the contract owner and requested that ownership "revert back to annuitants in the event of the death of the owner." Consistent with the application, the July 30 annuity contract named Leonard and Edward as co-annuitants. Contrary to the application, however, the contract provided that ownership belonged to "Thomas J. Berube, Father of the First Annuitant, the Estate of Said Thomas J. Berube."

¶3 Thomas Berube died on November 12, 1996. Prudential intervened in the subsequent probate action to determine ownership of the annuity contract. At the hearing to determine ownership, neither party could produce the actual annuity contract. Rather, the parties had only the application for the annuity contract (naming Leonard and Edward as owners) and a computer-generated contract data sheet (naming Thomas Berube's estate as owner). Concluding that

¹ This is an expedited appeal under WIS. STAT. RULE 809.17 (1997-98). All statutory references are to the 1997-98 edition unless otherwise noted.

the disparity in ownership cited by the application and the data sheet created an ambiguity in the contract, the circuit court looked to extrinsic evidence to find that Leonard and Edward were owners of the annuity contract. Delores Haas, Thomas Berube's daughter, moved the court for reconsideration. Her motion was denied.

¶4 The parties subsequently located the annuity contract. Haas thereafter moved the court for relief from the circuit court's order pursuant to WIS. STAT. § 806.07. The court denied Haas's motion, and this appeal followed.

ANALYSIS

¶5 An appellate court's review of a circuit court's decision on a motion under WIS. STAT. § 806.07 is limited to the issue of whether the trial court erroneously exercised its discretion. *See State ex rel. Cynthia M.S. v. Michael F.C.*, 181 Wis. 2d 618, 624, 511 N.W.2d 868 (1994). WISCONSIN STAT. § 806.07(1)(b) provides in relevant part: "On motion and upon such terms as are just, the court ... may relieve a party or legal representative from a judgment, order or stipulation for the following reasons: ... (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3)." In turn, WIS. STAT. § 805.15(3) provides:

A new trial shall be ordered on the grounds of newly-discovered evidence if the court finds that:

- (a) The evidence has come to the moving party's notice after trial; and
- (b) The moving party's failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it; and
- (c) The evidence is material and not cumulative; and
- (d) The new evidence would probably change the result.

¶6 Each element of the statute must be met. *See Ritt v. Dental Care Assocs., S.C.*, 199 Wis. 2d 48, 79, 543 N.W.2d 852 (Ct. App. 1995).² Haas argues that because discovery of the annuity contract would probably change the result of the order, the circuit court erred by denying her motion for relief from the order. We agree. The cover sheet of the annuity contract stated: “The provisions on this and the following pages of this contract comprise the entire contract.” Within the contract, a provision entitled “Ownership and Control,” provided:

Except as we may state below, all rights of ownership and control under this contract will belong to the owner(s) shown here:

THOMAS J. BERUBE, FATHER OF THE FIRST ANNUITANT, THE ESTATE OF SAID THOMAS J. BERUBE.

While either of the Annuitants is living, the owner(s), with no one else’s consent, is entitled to any benefit and value, and to the exercise of any right and privilege granted by the contract or by us. But, if on the Annuity Date we are settling with an owner or someone else who is not an Annuitant we will have the right at that time to pay the net cash value in one sum.

Despite the annuity contract’s naming Leonard and Edward as co-annuitants, it gave all rights of ownership to the estate. We therefore conclude, without deciding, that the “Ownership and Control” provision, in conjunction with the language limiting the contract to its terms, satisfied the standard requiring that

² The estate contends that the annuity contract is merely cumulative evidence and would not have changed the result. We are not persuaded. The estate intimates, without reference to authority, that because the evidence consisted of boilerplate contract pages, it was somehow cumulative in nature. Because the provision limiting the contract to its terms was not before the circuit court in the original hearing, we conclude that the language was not cumulative in nature. Additionally, we note that the parties do not dispute that the annuity contract was discovered after the hearing and did not arise from a lack of diligence in seeking to discover it.

newly-discovered evidence would “probably change the result.” Accordingly, we reverse the order and remand for further proceedings consistent with this opinion.³

By the Court.—Order reversed and cause remanded.

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

³ We refrain from addressing any alternative arguments because only dispositive issues need be addressed. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983)

