

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 17, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 03-1471
STATE OF WISCONSIN**

Cir. Ct. No. 00CV000438

**IN COURT OF APPEALS
DISTRICT II**

**IN THE MATTER OF THE WALTER A. DEI REVOCABLE
LIVING TRUST, DATED OCTOBER 6, 1995:**

DONALD DEI,

PETITIONER-APPELLANT,

V.

BYRON DEI,

TRUSTEE-RESPONDENT.

APPEAL from an order of the circuit court for Washington County:
DAVID C. RESHESKE, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

¶1 BROWN, J. This case involves a challenge to the actions of Byron Dei in his capacity as trustee of the Walter A. Dei revocable living trust. Donald Dei, Byron's brother and a trust beneficiary, argues the trial court erred in denying

his request for additional payments to the income beneficiaries of the trust and for removal of Byron as the trustee and appointment of a corporate trustee. We conclude that Byron has carried out the trust's stated purpose and intent and has not acted with bad faith, fraudulently or arbitrarily, in his administration of the trust assets. Therefore, we may not interfere with his exercise of discretion in his management of the trust or relieve him of his duties as trustee. We affirm.

¶2 The facts are undisputed and brief. On October 6, 1995, Walter executed a will and created a revocable living trust. During his lifetime, Walter was the trustee of the trust and retained total control. Walter died in April 1996, survived by his two sons, Byron and Donald, Byron's wife Lucille and eleven grandchildren. The trust provides that the line of succession of trustees is Byron, then Lucille Dei, then Donald, then James, then Laura Waehler. In accordance with the terms of the trust, Byron was appointed trustee of the trust upon Walter's death and has acted continuously in that capacity since that time. The total value of the trust as of June 2002 is \$1,163,671.21. Trust assets consist of real estate, including several rental properties, and stocks and bonds.

¶3 The trust, in pertinent part, provides:

1. Statement of Intent & Purpose. The purpose of this trust is to hold all of my real estate so that the income can be divided between my sons and then their wives after their deaths. After both of my sons and their wives have died, that all of the principal shall be divided among my grandchildren in equal shares, per capita.
2. Payment of Income. All of the net income from this trust at least annually shall be distributed and divided into two shares and paid as follows:
 - a. One-half shall be paid to my son Donald Dei for as long as he lives....

- b. One-half shall be paid to my son Byron Dei for as long as he lives....

¶4 In August 2000, Donald commenced this action by filing a Petition for Accounting of Trust and Other Relief. He argued that Byron had breached his fiduciary duty as trustee. Donald took issue with the manner in which Byron handled the improvement and rental of the real estate, with Byron's management of the stocks and bonds and with Byron's accounting of the trust. Donald requested, among other things, that the court direct Byron to immediately pay to Donald trust income and remove Byron as trustee and appoint a corporate trustee. In a well-reasoned decision, the trial court denied Donald's petition. Citing *Brookhouse v. Koos*, 269 Wis. 478, 492-93, 69 N.W.2d 598 (1955), the trial court explained that in Wisconsin a court may interfere only with the bad faith, fraudulent, or mere arbitrary action of a fiduciary and that Byron's actions did not satisfy this standard. This appeal followed.

¶5 As he did before the trial court, Donald presents several challenges to Byron's administration of the trust assets. Donald argues that Byron's conduct is not measured by whether Byron acted in bad faith, fraudulently or arbitrarily, but rather by whether Byron exercised reasonable judgment in his management of the trust assets.

¶6 The resolution of this case fundamentally hinges on an interpretation of the terms of the trust. "In construing a trust, whether created by a will or by another instrument, the language thereof should be so construed as to give effect to the intention of the testator or settlor, if that intention may be ascertained from the language of the will or other instrument, considered in the light of the surrounding circumstances." *Welch v. Welch*, 235 Wis. 282, 306-07, 290 N.W. 758 (1940). In

considering the actions of Byron as trustee of the trust, his powers are also to be taken from the language of the trust:

It is the rule in this state that when under a will a fiduciary is granted absolute or conclusive powers and discretions, the test of “reasonableness” or “reasonable judgment” is not applicable. A court may not exact the standard of “reasonable judgment” from such fiduciary invested with such authority. The court may interfere only with the bad faith, fraud, or mere arbitrary action of such fiduciary.

....

The extent of the discretion conferred upon the trustee depends primarily upon the manifestation of intention of the settlor. The language of the settlor is construed strictly so as to effectuate the purposes of the trust. The mere fact that the trustee is given discretion does not authorize him to act beyond the bounds of a reasonable judgment. The settlor may, however, manifest an intention that the trustee’s judgment need not be exercised reasonably, even where there is a standard by which the reasonableness of the trustee’s conduct can be judged. This may be indicated by a provision in the trust instrument that the trustee shall have “absolute” or “unlimited” or “uncontrolled” discretion. These words are not interpreted literally but are ordinarily construed as merely dispensing with the standard of reasonableness. In such a case the mere fact that the trustee has acted beyond the bounds of a reasonable judgment is not a sufficient ground for interposition by the court, so long as the trustee acts in a state of mind in which it was contemplated by the settlor that he would act. But the court will interfere if the trustee acts in a state of mind not contemplated by the settlor. Thus, the trustee will not be permitted to act dishonestly, or from some motive other than the accomplishment of the purpose of the trust, or ordinarily to act arbitrarily without an exercise of his judgment.

Brookhouse, 269 Wis. at 492-93 (citation omitted).

¶7 As **Brookhouse** instructs, the beginning of our inquiry is with the terms of the trust itself. If the trust evinces an intent upon the part of the settlor to

confer upon the trustee discretion to act beyond the bounds of reasonable judgment, then the trustee's actions will be upheld unless it is proven that they were taken in bad faith, fraudulently or were arbitrary. The construction of a trust presents a question of law, which we review independently without deference to the trial court. *Furmanski v. Furmanski*, 196 Wis. 2d 210, 214, 538 N.W.2d 566 (Ct. App. 1995).

¶8 Contrary to Donald's assertions, the revocable living trust manifests an intent on Walter's part to confer upon the trustee, in this case Byron, broad powers and discretions. The trustee is clothed with the power "to manage real estate with all the rights and powers as if *individually owned*," "to make allocations of charges and credits as between principal and income as in the *Trustee's sole discretion* may appear to be proper," "to sell, mortgage, lease or convey real or personal property for such prices, for such purposes, in such manner, and upon such terms and conditions as may *appear to the Trustee to be proper*," "to exercise all rights, options, and privileges pertaining to securities as may appear to it to be proper." (Emphasis added). This language clearly grants the trustee absolute discretionary powers. Thus, we conclude, as did the trial court, that the *Brookhouse* standard controls this case.

¶9 The record is devoid of proof that Byron has acted with bad faith, fraudulently or arbitrarily in his administration of the trust assets. It is clear from the plain language of the trust that Walter intended for the trust principle to remain in real estate and be preserved and the value increased for the benefit of the grandchildren. Byron has performed those tasks in his management of the trust assets. Byron has made improvements to the property as he has deemed necessary, doing the work himself in an effort to save money. Although Byron has allowed members of his family to rent the properties, the record fails to

establish that the rent he charged was unreasonably low. Furthermore, Byron considered the stock he retained as a viable investment for the trust and the record does not demonstrate otherwise. Finally, in determining the correct amount of net income for distribution, Byron relied on the advice of an attorney whom the trial court found “well versed” and “competent” in tax law.

¶10 As the trial court rightly observed, this case really boils down to Donald’s dissatisfaction with Walter’s decision to appoint Byron as trustee. It is not the function of this court to second guess that decision. For this reason, we also reject Donald’s request for litigation expenses and attorney’s fees in this matter. *McElligott v. Murray*, 65 Wis. 2d 440, 457, 222 N.W.2d 885 (1974) (costs of appeal may be paid out of the trust inasmuch as the appeal was taken in good faith and the questions were worthy of presentation to this court). We affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

