COURT OF APPEALS
DECISION
DATED AND FILED

May 26, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1201 **Cir. Ct. No. 2006PR82**

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

IN RE THE ESTATE OF LILIA M. SFASCIOTTI:

ROBERT SFASCIOTTI,

APPELLANT,

V.

ESTATE OF LILIA M. SFASCIOTTI AND JP MORGAN CHASE BANK, PERSONAL REPRESENTATIVE,

RESPONDENTS,

MARY L. SFASCIOTTI AND GINEVRA CIURA, A/K/A JEAN CIURA,

INTERESTED PERSONS.

APPEAL from an order of the circuit court for Kenosha County: ALLAN B. TORHORST, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Robert Sfasciotti is the adult son of decedent Lilia Sfasciotti and a beneficiary under her will. Robert appeals from the probate court's order denying his objection to the inventory the personal representative (PR) filed. He challenged the inclusion and validity of two debt instruments listed as assets on the inventory, contending that they actually represented "conditional gifts" from his mother. We disagree with Robert and affirm.

¶2 Lilia died in February 2006, leaving three adult children: Robert and daughters Mary Sfasciotti and Ginevra Ciura. Lilia's will nominated Robert to act as her personal representative, and he filed a petition for administration of the estate. Mary objected that for reasons of fraud, concealment and conversion of estate property, Robert was "unsuitable" under WIS. STAT. § 856.23(1)(e) to be named PR.[1] Ginevra joined in Mary's objection. Robert filed a motion asking that the objection be stricken.

¶3 A hearing was held on Mary's and Ginevra's objection and Robert's motion.[2] The court examined various instances of Robert's alleged unsuitability as PR. For example, in October 1992 and August 1993 Robert issued to Lilia promissory notes indicating loans to him of $20,000 and $40,000, respectively. The 1992 mortgage note obligated Robert and his then wife, Tina, to repay Lilia

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

[2] Robert, a Wisconsin attorney, has a law practice in Kenosha. Initially before Kenosha county circuit judge Wilbur W. Warren III, Judge Warren recused himself so as not to have to determine "the honesty or dishonesty of any attorney who regularly practices before me." The matter was assigned to Racine county circuit judge Allan B. Torhorst who conducted this hearing and the remaining proceedings.

$20,000 in one payment within thirty days of demand. The 1993 mortgage note, which did not state a time for repayment, included a standard-form mortgage naming Robert as mortgagor and placing a $40,000 lien against his home to secure the debt to Lilia. Robert contended that the notes evidenced "conditional gifts" predicated on his divorcing Tina and never reconciling with her. At Mary's deposition, however, Robert denied the notes' existence.

¶4 As another example, Lilia appointed Robert her agent pursuant to a general durable power of attorney (POA) in August 2005. Acting under the POA, Robert withdrew approximately $168,000 from a savings account jointly owned by Lilia and Ginevra. The account apparently was closed in September 2005. On December 7, 2005, Robert wrote to Mary that he had begun reviewing Lilia's finances to determine whether she or Ginevra had "done something improper." He also told Mary that some of Lilia's joint accounts "permit the survivor to own the account as a matter of law [and] … permit the joint owner to withdraw funds without any restrictions from me as [POA]," an arrangement Robert said he "plan[ned] on having … corrected immediately."

¶5 The probate court concluded that "such conflicting personal interests" between Robert and the other beneficiaries, his "questioned management" of Lilia's property before and after his designation as POA, and his "transparent attempt" to disrupt or change Lilia's estate plan was "clear evidence" of his unsuitability to carry out the duties of PR. The court disqualified him.

¶6 Lilia's will, admitted to probate in October 2006, conveyed her estate in equal shares to Robert, Mary and Ginevra. In January 2007, the probate court issued its Order for Formal Administration and granted domiciliary letters to J.P. Morgan Chase Bank, N.A. ("Chase Bank") to act as corporate PR. Chase

Bank filed a probate inventory listing as probate assets the 1992 and 1993 debt instruments showing the $20,000 and $40,000 Robert allegedly owed the estate. Robert never made any payments.

¶7 Robert filed an objection to the inventory, reiterating his position that the notes evidenced legally unenforceable conditional gifts. He asserted that the 1992 mortgage note, which he acknowledged drafting, was not enforceable because his mother gave him $20,000 in 1992 and then, upon giving him a second $20,000 gift in 1993, returned the original of the 1992 note to him. The 1993 note, he claimed, did not signify an additional $40,000 gift. Rather, it was meant to replace the 1992 note and represented the total two-part $40,000 gift.[3] Robert claimed the 1993 note was unenforceable because, having never reconciled with Tina, its terms were incomplete. Robert also argued that because Lilia returned the original 1992 note to him, did not record the mortgage, and did not mention the mortgage notes or any offset provision for them in her will, even she did not mean the notes to be enforced. Robert argued in the alternative that, even if the notes were found to be enforceable, either laches or the statute of limitations barred payment on them now. Finally, he argued that, if enforceable and if interest was proper, the twelve percent the inventory indicated was overstated and should be no more than the legal rate of five percent.

¶8 At the hearing on the objection, the court took judicial notice of the preliminary financial statement and marital settlement agreement filed in connection with Robert's 1993 divorce from Tina. The financial statement

[3] At the hearing on his objection, Robert sought to admit banking documents he claimed would corroborate that the total "gifts" were $40,000 rather than $60,000. The probate court refused to receive the exhibit because Robert did not produce the documents during discovery.

indicated that Robert owed Lilia a personal loan of $20,000. The agreement indicated that he would pay any indebtedness owed to Lilia. Chase Bank also put on the record an assertion Robert made at the initial hearing on the objection to his appointment as PR. Contradicting the notes now entered into evidence, Robert had told Judge Warren that there was not "one document here, one shred of evidence, nothing admissible that says anything" about his sisters' "allegations of some loan that I've not acknowledged."

¶9 The probate court found that the 1992 and 1993 notes each represented an "unconditional promise" to pay to Lilia "sums unaffected by any express condition subsequent." It also found that the 1992 note by its terms was due within thirty days of demand, the 1993 note was due upon demand, *see* WIS. STAT. § 403.108(1)(a), (b), and that Chase Bank's listing of the notes on the inventory represented due demand for payment, *see* ***Baker v. McLeod***, 216 Wis. 276, 284, 257 N.W. 177 (1934). The court concluded that under WIS. STAT. § 885.16, the dead man's statute, Robert's interest in the case rendered him an incompetent witness to testify about transactions or communications with Lilia.

¶10 Further, the probate court rejected Robert's claim that either laches or the statute of limitations barred the estate from seeking to enforce the notes. Holding Robert to be constructively aware of the law, the court found that his espoused position was intended to mislead Judge Warren and to divert or mislead the PR's legitimate discovery. The court thus denied his objection and approved the inventory as filed, but ordered interest at the statutory five percent rate. *See* WIS. STAT. § 138.04. Robert appeals.

¶11 We first clarify the standard of review. Relying on ***Wolf v. McAuliffe***, 71 Wis. 2d 581, 587, 239 N.W.2d 52 (1976), Robert contends that the

executor has the burden of proving the correctness of account items to which estate beneficiaries object. As Chase Bank points out, however, that aspect of ***Wolf*** involved a final accounting, not an inventory. *See* ***id.*** It long has been the law that an inventory is presumptive evidence of the facts stated therein. *See* ***Langenbach v. Barrett***, 201 Wis. 336, 338, 230 N.W. 141 (1930). The burden is upon the challenger to show any incorrectness of the inventory. ***Mullen v. Reinig***, 72 Wis. 388, 394, 39 N.W. 861 (1888); ***Batten v. Richards***, 70 Wis. 272, 277, 35 N.W. 542 (1887). The probate court correctly placed the burden on Robert.

¶12 Robert first contends that the estate's failure to produce the original notes precludes their inclusion in the inventory and denies the estate recovery. This argument goes nowhere. At the hearing on his objection to the probate inventory, Robert identified the original of the 1992 mortgage note. He argues that the estate cannot recover on it, however, because—since he held the original—the estate did not produce it. We reject this novel position out of hand.

¶13 We also reject Robert's claim that the lack of an original of the 1993 mortgage and note extinguishes his obligation under that instrument. He authenticated a photocopy of the 1993 mortgage and note at the hearing. Both bore his signature. He also conceded that he "probably" drafted them, and testified that the 1993 note was meant to replace the 1992 note, that he received $40,000 pursuant to the notes and that he made no payments to satisfy the debt. Documents from Robert's divorce disclose that he formally represented to the divorce court that he had loan obligations to Lilia. Even if the lack of an original rendered the note void, Robert's preexisting obligation is not discharged because the estate would be entitled to recover on the original consideration. *See* ***First Nat'l Bank of Antigo v. Larsen***, 146 Wis. 653, 658, 132 N.W. 610 (1911).

¶14 Robert next claims the probate court should have applied laches because the estate's thirteen-year delay in prosecuting the mortgage notes he thought represented gifts was unreasonable and prejudicial. Again we disagree.

¶15 Laches is an equitable doctrine, distinct from a statute of limitations, whereby a party may lose its right to assert a claim by not making it promptly. *See* ***Zizzo v. Lakeside Steel & Mfg. Co.***, 2008 WI App 69, ¶7, 312 Wis. 2d 463, 752 N.W.2d 889. Its three elements are (1) unreasonable delay by the party seeking relief, (2) lack of knowledge or acquiescence by the party asserting laches that a claim for relief was forthcoming, and (3) prejudice to the party asserting laches caused by the delay. ***Id.*** The grant or denial of equitable relief is within the sound discretion of the trial court. ***Hall v. Liebovich Living Trust***, 2007 WI App 112, ¶10, 300 Wis. 2d 725, 731 N.W.2d 649.

¶16 We are persuaded, as was the probate court, that Robert's situation is unlike the party asserting laches in ***Zizzo***. Zizzo proactively brought a declaratory judgment action to discharge a mortgage his now-deceased parents made sixteen years earlier, but never made payments on. ***Zizzo***, 312 Wis. 2d 463, ¶1. This court concluded that the unreasonable delay prejudiced Zizzo because, with those on his side of the disputed transaction dead, he had no way to obtain information that would allow him to assert any defenses to the mortgage. ***Id.***, ¶21. Robert, by contrast, is a seasoned attorney who drafted the notes himself and, during Lilia's life, used them in another proceeding as evidence of debt. He cannot credibly claim surprise that the notes would be demanded at some point. Moreover, a suit upon a note is not an equitable action. Laches does not bar recovery in an action at law. *See* ***Cook v. Cook***, 252 Wis. 126, 131, 30 N.W.2d 714 (1948).

¶17 Robert contends the preclusive effect of WIS. STAT. § 885.16, the dead man's statute, favors the application of laches because of the prejudice caused by witness availability. This argument does not sway us.

¶18 The dead man's statute is rooted in the belief that it is better public policy to protect the estate from possible fraudulent claims than to allow testimony of the living which cannot be counteracted or refuted by the decedent's testimony. ***First Nat'l Bank of Janesville, v. Ecke***, 16 Wis. 2d 480, 486, 114 N.W.2d 803 (1962). Therefore, a witness with a present, certain and vested interest in the outcome of the proceeding is deemed incompetent to testify in his or her own behalf. ***Bethesda Church v. Menning***, 72 Wis. 2d 8, 12, 239 N.W.2d 528 (1976). The test of the disqualifying interest is whether the witness will gain or lose by the direct legal operation and effect of the judgment, or the record will be legal evidence for or against the witness in some other action. ***Id.*** Robert plainly stood to gain if permitted to testify that the transactions with his deceased mother were gifts. Accepting Robert's argument that WIS. STAT. § 885.16 favors applying laches would undo the protection inherent in the dead man's statute.

¶19 Robert's statute of limitations argument likewise fails. He points to WIS. STAT. § 403.118(2), enacted in 1995, which bars an action to enforce a note if either principal or interest on the note has not been paid for a continuous period of ten years. Robert argues that if § 403.118(2) had been in effect in 1992, it would have barred enforcement of the notes. Even so, he posits, it addresses the reality that holders of "stale family notes" often lack the intent to enforce.

¶20 The fact remains, however, that WIS. STAT. § 403.118(2) was not the law in 1992 or 1993. Besides, the probate code governs this action. *See* WIS. STAT. § 854.02. "If an heir owes a debt to the decedent, [WIS. STAT. §] 854.12

governs the treatment of that debt." WIS. STAT. § 852.12. "[T]he debtor heir may not defend on the basis that the debt was discharged in bankruptcy or on the basis that the relevant statute of limitations has expired." Sec. 854.12(1)(b).

¶21 Finally, Robert details through his and third-party testimony the, by all accounts, significant legal services and home care he provided to his mother without charge. He contends those benefactions should offset any debt. While laudable, such services are presumed to have been performed gratuitously. *See* ***Brooks v. Steffes***, 95 Wis. 2d 490, 501, 290 N.W.2d 697 (1980). Similarly, testimony that his mother was financially generous to her children without expecting repayment on other occasions does not counteract the documentary evidence before the court that enforceable loans were made on these occasions.

By the Court.—Order affirmed.

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