COURT OF APPEALS
DECISION
DATED AND FILED

April 29, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1995 **Cir. Ct. No. 2008CV205**

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

MICHAEL R. GODLEWSKI, ANDREW J. GODLEWSKI, AND DOUGLAS W. GODLEWSKI,

PLAINTIFFS-APPELLANTS,

V.

GODLEWSKI LIVING TRUST, BY AND THROUGH ITS TRUSTEE, MARYLOU E. BUTLER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Monroe County: TODD L. ZIEGLER, Judge. *Affirmed*.

Before Dykman, P.J., Vergeront and Higginbotham, JJ.

¶1 VERGERONT, J. This is an action seeking an interpretation of the terms of the Godlewski Living Trust, established by Mary Godlewski, who was a resident of Illinois when she created the trust and at the time of her death. The

issue on appeal is whether the circuit court has personal jurisdiction over the trust. The circuit court concluded that personal jurisdiction over the trust by a Wisconsin court offends due process and dismissed the action. We agree and therefore affirm.

BACKGROUND[1]

¶2 Godlewski created the trust in 1996, a number of years after her husband died. She had been a resident of Illinois for many years, including when she created the trust and until her death in 2005. The trust was funded with her assets, which included personal property, financial accounts, her residence and a Wisconsin farm. All the assets except the farm were located in Illinois.

¶3 The farm is located in Monroe County, Wisconsin. It was purchased in 1961 and used as recreational property by Godlewski and her family. Godlewski made various trips to the farm over the years, with fewer trips after her husband died in 1976. After her husband died, Godlewski's son, Walter, lived at the farm with his family and he continued to do so after the farm was transferred to the trust in 1996. After the farm was transferred to the trust in 1996 until her death in 2005, Godlewski made approximately five trips to the farm.

¶4 Godlewski was named the trustee in the trust document and Marylou Butler, her daughter, was named successor trustee. Pursuant to the trust document, Butler became the trustee upon her mother's death. Butler has resided in Illinois

[1] The facts in this background section are from the court's findings of fact or from undisputed evidence presented at the evidentiary hearing.

for at least twenty-two years. Butler's contact with the farm was the same or similar to that of her mother.

¶5 In 2007 Walter died. His trust share had not yet been distributed and the issue arose how his share was to be distributed under the terms of the trust. Three of Walter's four children filed this action in Monroe County, Wisconsin, alleging that the trust provisions were contradictory on this point and seeking a declaration that the true intent of Godlewski was that Walter's share be distributed to his living descendants. The three plaintiffs are all residents of Wisconsin, apparently residing in Monroe County, and Walter's fourth child is also a resident of Wisconsin.

¶6 Approximately one week after the action was filed, the trust closed the sale of the farm. Butler, as trustee, sold the farm from Illinois and did not make any trip to Wisconsin. The proceeds from the sale were deposited in the trust's bank account in Illinois, which is the trust's only asset.

¶7 The trust, by Butler as trustee, moved to dismiss the action for lack of personal jurisdiction.[2] After an evidentiary hearing, the circuit court granted the motion. The court concluded that Wisconsin would have personal jurisdiction

[2] The trust also moved for dismissal or for a stay of proceedings on the ground of forum inconvenience. *See* WIS. STAT. § 801.63(3) (2007-08). The court concluded that the same evidence that established a violation of the due process clause established an inconvenient forum under § 801.63. Thus, the court stated, even if it were not to dismiss the action for lack of personal jurisdiction, it would stay proceedings in Wisconsin so that the matter could proceed in Illinois. Our conclusion that this action is properly dismissed for lack of personal jurisdiction makes it unnecessary to address the inconvenient forum argument.

over the trust under Wisconsin's long-arm statute, WIS. STAT. § 801.05 (2007-09),[3] but that asserting jurisdiction would offend due process.

DISCUSSION

¶8 The plaintiffs appeal, contending that the circuit court erred in failing to apply the presumption of constitutionality that is required once the court determines that there is personal jurisdiction under WIS. STAT. § 801.05. According to the plaintiffs, when this presumption is applied and the burden is properly placed on the trust to overcome the presumption, the correct conclusion is that the exercise of personal jurisdiction over the trust does not offend due process.

¶9 The question whether a Wisconsin court has personal jurisdiction over the trust involves a two-step analysis. The first step is determining whether the trust is subject to jurisdiction under Wisconsin's long-arm statute, WIS. STAT. § 801.05. ***Kopke v. A. Hartrodt S.R.L.***, 2001 WI 99, ¶8, 245 Wis. 2d 396, 629 N.W.2d 662. If it is, the second step is to determine whether the exercise of jurisdiction comports with the requirements of due process. ***Id.*** When, as here, there has been an evidentiary hearing, we accept the circuit court's findings of fact unless they are clearly erroneous. ***State ex rel. N.R.Z. v. G.L.C.***, 152 Wis. 2d 97, 103, 447 N.W.2d 533 (1989). The plaintiffs here do not challenge any of the circuit court's findings as clearly erroneous. We review de novo the legal question whether the statute and the constitution, when applied to these facts, permit personal jurisdiction. ***Id.***

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

¶10 Regarding the first step—Wisconsin's long-arm statute—the trust does not contend the circuit court erred in concluding there was personal jurisdiction under WIS. STAT. § 801.05. The court concluded that the requirements of § 801.05(1)(d) were met. That section provides that a court of this state has jurisdiction in an action "whether arising within or without this state, against a defendant who when the action is commenced … [i]s engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise." The court also concluded that the requirements of § 801.05(6)[4] relating to real property were met, although it did not specify the subsection.

¶11 Because the trust does not dispute the circuit court's conclusion, we assume without deciding that there was compliance with either WIS. STAT. § 801.05(1)(d) or § 801.05(6) and move on to the second step—due process.

[4] WISCONSIN STAT. § 801.05(6) provides:

> Local property. In any action which arises out of:
>
> (a) A promise, made anywhere to the plaintiff or to some 3rd party for the plaintiff's benefit, by the defendant to create in either party an interest in, or protect, acquire, dispose of, use, rent, own, control or possess by either party real property situated in this state; or
>
> (b) A claim to recover any benefit derived by the defendant through the use, ownership, control or possession by the defendant of tangible property situated within this state either at the time of the first use, ownership, control or possession or at the time the action is commenced; or
>
> (c) A claim that the defendant return, restore, or account to the plaintiff for any asset or thing of value which was within this state at the time the defendant acquired possession or control over it.

¶12 In ***Kopke***, the supreme court stated:

> The Due Process Clause of the Fourteenth Amendment limits the exercise of jurisdiction by a state over a nonconsenting nonresident…. Compliance with the statute presumes that due process is met, subject to the objecting defendant's opportunity to rebut. Thus, when jurisdiction is found pursuant to the statutory analysis, the defendant may dispute the presumption of compliance with due process requirements articulated by the Supreme Court….
>
> Due Process analysis presents two inquiries. The first inquiry is whether the defendant "purposefully established minimum contacts in the forum State." On this question, the plaintiff carries the burden. If this inquiry is answered affirmatively, then the defendant's forum-state contacts "may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'"

Kopke, 245 Wis. 2d 396, ¶¶22-23 (citations omitted).

¶13 In deciding whether the assertion of jurisdiction would comport with fair play and substantial justice, the court is to consider these five factors: "(1) the forum state's interest in adjudicating the dispute; (2) the plaintiff's interest in obtaining convenient and effective relief; (3) the burden on the defendant; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and, (5) the shared interest of the several States in furthering fundamental substantive social policies." ***Kopke***, 245 Wis. 2d 396, ¶39 (citation omitted). In this second inquiry of the due process analysis, the burden shifts to the defendant. ***Id.***, ¶23 (citing ***Burger King Corp. v. Rudzewicz***, 471 U.S. 462, 477 (1985)).[5]

[5] The plaintiffs appear to be of the view that, after compliance with the long-arm statute has been established, the burden shifts to the defendant to show that jurisdiction fails to comport with due process requirements of the Fourteenth Amendment. However, the supreme court in ***Kopke v. A. Hartrodt S.R.L.,*** 2001 WI 99, ¶¶22-23, 245 Wis. 2d 396, 629 N.W.2d 662, expressly (continued)

¶14 On the first due process inquiry here, the circuit court concluded that the trust had purposefully established minimum contacts in the forum state. The contact that fulfilled this requirement, the court concluded, was the trust's ownership of the farm at the time the action was filed. The court also considered the visits of Godlewski and Butler to the farm after the trust was established. The trust does not challenge the court's conclusion on minimum contacts. We therefore assume without deciding that the trust's ownership of the property at the time this action commenced and Godlewski's and Butler's visits to the farm after the trust was established suffice to establish the requisite minimum contacts.

¶15 We next turn to the second inquiry of the due process analysis, which is the issue disputed by the parties. Because our review is de novo, we need not decide whether the circuit court failed to assign the burden to the trust on this component of the due process inquiry. Instead, we undertake our independent application of the five factors to the facts in this case, bearing in mind that the trust carries the burden of presenting considerations that make jurisdiction unreasonable despite the minimum contacts.

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states that, although compliance with the long-arm statute creates a presumption that the requirements of due process have been met, the burden does not shift from the plaintiff to the defendant on the *first* inquiry of the due process analysis; the burden on that inquiry remains with the plaintiff. For this reason, the supreme court in ***Kopke*** disagreed with our statement in ***Marsh v. Farm Bureau Mutual Insurance Co***., 179 Wis. 2d 42, 53, 505 N.W.2d 162 (Ct. App. 1993), that, after compliance with the statute has been established, the burden shifts to the defendant to show that jurisdiction fails to comport with due process requirements of the Fourteenth Amendment. ***Kopke,*** 245 Wis. 2d 396, ¶22 n.7. It is after the plaintiff has carried the burden to show the requisite minimum contacts that the burden shifts to the defendant for the *second* due process inquiry. ***Id.***, ¶23. Because the trust does not dispute the circuit court's conclusion that it had purposefully established minimum contacts in the state, any misunderstanding by the plaintiffs on the burden for the first due process inquiry is not relevant to this appeal. For the same reason, we need not explore any complexities arising from the proposition that compliance with the statute creates a presumption in the plaintiff's favor but does not, at that point, shift the burden to the defendant.

¶16 The first factor is Wisconsin's interest in adjudicating the dispute over the construction of the trust agreement. We conclude this interest is minimal. The trust agreement was executed in Illinois and provided that "this agreement and the trusts created under it shall be construed, regulated and governed by and in accordance with the laws of the State of Illinois." Of the nine beneficiaries who will be affected by the outcome of this action, four are Wisconsin residents (Walter's four children) while five are Illinois residents (Butler, Godlewski's other two children, and her two grandchildren). There are no policies or laws of Wisconsin applicable to a construction of the trust agreement that would give Wisconsin an interest in its resolution.

¶17 The Wisconsin real estate has a tenuous connection to this action. Although the trust owned the real estate at the time this action was filed—the relevant time period for determining personal jurisdiction—its sale soon thereafter demonstrates just how peripheral the farm is to this action. The trust agreement provisions at issue do not concern the real estate, and there is no contention that the trust could not sell the real estate, as Butler has done.

¶18 The plaintiffs assert simply that Wisconsin "has an interest in protecting its residents who are beneficiaries of the trust." However, they do not explain what interest Wisconsin has in adjudicating the construction of a trust agreement created in Illinois, governed by the laws of Illinois, with an Illinois trustee, and with Illinois as well as Wisconsin beneficiaries, where the trust's contact with Wisconsin—the farm—is not relevant to the issue the plaintiffs seek to resolve. The plaintiffs have provided no case law that would articulate a state's interest in these circumstances. The cases that conclude that Wisconsin has an interest in providing a forum reach this conclusion based on very different circumstances. *See, e.g.*, ***Madison Consulting Group v. South Carolina***, 752 F.2d

1193, 1209 (7th Cir. 1985) (Wisconsin has an interest in offering its residents legal avenues for enforcing contracts with nonresidents); ***Kopke***, 245 Wis. 2d 396, ¶40 (Wisconsin has an interest in providing its citizens with a forum to adjudicate "claims arising here," where the plaintiff was injured while loading products in Wisconsin); ***State v. Advance Mfg. Consultants***, ***Inc.***, 66 Wis. 2d 706, 719, 225 N.W.2d 887 (1975) (Wisconsin has an interest in providing a forum in which residents can sue non-residents for fraud under WIS. STAT. § 100.18); ***Druschel v. Cloeren***, 2006 WI App 190, ¶17, 295 Wis. 2d 858, 723 N.W.2d 430 (Wisconsin has an interest in providing a forum for damages arising out of a transaction in which a Wisconsin corporation was purchased); ***Precision Erecting, Inc. v. M&I Marshall & Ilsley Bank***, 224 Wis. 2d 288, 298, 592 N.W.2d 5 (Ct. App. 1998) (Wisconsin has an interest in adjudicating a dispute where seventeen of the third-party defendants are Wisconsin corporations and the contract was negotiated and performed in Wisconsin).

¶19 The only interest of the State of Wisconsin we can identify here is a general interest in providing a forum for its residents. This is an interest that would appear to exist in every case filed in Wisconsin by a Wisconsin resident. Thus, we do not give it significant weight in our analysis of the first factor.

¶20 The second factor is the plaintiffs' interest in obtaining convenient and effective relief. An obvious consideration here is where the plaintiff resides compared to where litigation would take place if Wisconsin did not exercise jurisdiction. The court found that the Monroe County Courthouse is approximately 250 miles away from Summit, Illinois, where an Illinois action would be venued. No doubt it is more convenient for the plaintiffs not to have to travel to Summit, Illinois.

¶21 As for other circumstances we should consider in analyzing the second factor, Wisconsin cases do not appear to provide extended discussion of this factor. To the extent we can find guidance in Wisconsin cases, we see that courts have considered: the plaintiff's particular circumstances (severe injuries) as favoring Wisconsin for providing a convenient remedy,[6] whether the relief would be equivalent in both jurisdictions because of the law that would be applied,[7] and location of witnesses.[8] To this list we add consideration of factors other than location of witnesses that may make litigation in Wisconsin more efficient or less costly from the plaintiff's perspective.

¶22 As we have already explained, the trust will be interpreted under Illinois law whether this case is litigated in Wisconsin or Illinois. As for the witnesses, the circuit court found that, while there might be witnesses from Wisconsin, the majority of witnesses, including the attorney who drafted the trust documents, reside in Illinois. The plaintiffs appear to dispute this finding, because they assert that the three of them and two other Wisconsin residents will be witnesses and so the number of witness is equal. However, they do not make a developed argument that the circuit court's finding is clearly erroneous. For that matter, they do not explain what relevant testimony any Wisconsin resident has to present on Godlewski's intent regarding the trust provisions at issue.

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[6] ***Kopke***, 245 Wis. 2d 396, ¶41.

[7] ***Marsh***, 179 Wis. 2d at 58, *disagreed with on other grounds by* ***Kopke***, 245 Wis. 2d 396. *See* ***supra***, ¶13 n. 5.

[8] *See* ***id.***; ***Druschel v. Cloeren***, 2006 WI App 190, ¶17, 295 Wis. 2d 858, 723 N.W.2d 430.

¶23 The trust argues that it will be less efficient for the plaintiffs to litigate this action in Wisconsin than in Illinois. First, the trust argues that all of the trust property is now located in Illinois. According to the trust—and the plaintiffs do not dispute this—although the Wisconsin judgment will be entitled to full faith and credit in Illinois, it will need to be enforced by an action in an Illinois court, adding an extra layer of procedure.

¶24 Second, the trust argues, Butler, as the trustee and beneficiary, and the four other Illinois beneficiaries are necessary parties to this action, but a Wisconsin court lacks personal jurisdiction over them. In contrast, an Illinois court would have personal jurisdiction over the three plaintiffs/beneficiaries and the five Illinois beneficiaries, and would be without personal jurisdiction over only one Wisconsin beneficiary. The trust argues that the Wisconsin court's lack of personal jurisdiction over so many necessary parties and the out-of-state residence of the majority of the witnesses will make the procedure for conducting discovery and subpoenaing witnesses more cumbersome because of the additional procedures that must be followed for parties and witnesses who reside outside of Wisconsin. *See, e.g.*, WIS. STAT. § 804.05(3)(b)3. & 4. and § 887.26.

¶25 The plaintiffs reply that an Illinois court would have the same difficulty with the four non-Illinois beneficiaries. However, three of the four are the plaintiffs, who would be bringing the action in Illinois and therefore would be parties. The plaintiffs acknowledge the additional procedures for enforcing a Wisconsin judgment and subpoenaing and deposing out-of-state witnesses but, they contend, this does not result in "an unusual inconvenience or extreme burden that rise to the level of unconstitutionality."

¶26 In their arguments, the plaintiffs appear to be focusing on whether the additional procedures required if the action is tried in a Wisconsin court—because of the Illinois residency of a majority of the witnesses and the necessary parties and the location of all the trust assets in Illinois—are a significant burden on the trust, and the plaintiffs contend it is not. However, the focus on the second factor is how *the plaintiffs'* interests in convenient and effective relief are served by having a Wisconsin court rather than an Illinois court adjudicate this case. The plaintiffs do not articulate why a Wisconsin court will provide more effective relief for them. We see no basis for concluding that Illinois will not provide relief that is at least as effective, if not more so, than Wisconsin. While it is more convenient for the plaintiffs not to have to travel to Illinois, there is no evidence that traveling to Illinois for the trial imposes any particular burden on them. We conclude the plaintiffs' interest in convenient and effective relief is only minimally furthered, if at all, by litigating this action in Wisconsin rather than Illinois.

¶27 The third factor is the burden on the trust. The court found that there would be expenses to the trust in getting the Illinois witnesses to a Wisconsin trial and that Butler has physical problems that would make it difficult for her to travel to Wisconsin. It concluded there would be a significant burden on the trust if the case was litigated in Wisconsin.

¶28 The plaintiffs acknowledge there would be some burden on the trust but contend that inconvenience and costliness do not constitute a denial of a defendant's due process right, relying on ***Stayart v. Hance***, 2007 WI App 204, ¶29, 305 Wis. 2d 380, 740 N.W.2d 168. We stated in ***Stayart*** that inconvenience does not necessarily mean that due process rights are violated, but we did not respond to that defendant's argument on cost. ***Id.*** In this case, the expenses of

litigation would be paid by the trust, thus diminishing the trust assets available to divide among the beneficiaries, no matter how the court construes the terms of the trust. The amount remaining in the trust's account is not large. Butler testified she decided to make some distributions because the account was insured only up to $100,000; she estimated that, at the time of the hearing, approximately $150,000 remained in the trust's account. The court's implicit finding that the trust would need to expend more to litigate this case in Wisconsin than in Illinois is not clearly erroneous.[9] In these circumstances we conclude it is appropriate to consider the increased expense for the trust as a burden on the trust.

¶29 As for Butler's difficulty in traveling because of various recent and anticipated future surgeries, we disagree with the plaintiffs that this is insignificant. While it is true that whoever has to travel for this litigation—whether to Illinois or to Wisconsin—will experience some inconvenience, the health problems of Butler are more than the ordinary inconveniences of such travel. We note that not only is Butler the trustee and a beneficiary, but it appears she is the person, besides the drafting attorney, most likely to have evidence of Godlewski's intent.

¶30 We also disagree with the plaintiffs' argument that the availability of videoconferencing removes the need for the Illinois witnesses to travel to Wisconsin and, thus, Butler does not need to travel and the estate can limit its expenses. The same could be said for witnesses of both parties in most cases. In the absence of contrary authority, we conclude the burden on the defendant should

[9] We say "implicit" because the court did not expressly state that the expenses to the trust would be more if the case were litigated in Wisconsin than in Illinois, although that is the only reasonable inference from its findings of fact and conclusions of law.

be assessed assuming that the witnesses that have relevant testimony will appear in person, which is how most cases are tried.

¶31 We conclude that the increased expense of a trial in Wisconsin rather than Illinois creates a burden on the trust, as does Butler's difficulty in traveling to Wisconsin. Together these create a burden that, while not extreme, is significant and is greater than the plaintiffs' interests in having the action tried in Wisconsin.

¶32 The fourth factor and the most significant one in this case is the interstate judicial system's interest in obtaining the most efficient resolution of the controversy. This factor weighs heavily in favor of jurisdiction in Illinois. As we have already discussed, the laws of Illinois will apply, most of the witnesses are in Illinois, and the procedure in Wisconsin will be less efficient than in Illinois because of the greater number of witnesses and beneficiaries residing in Illinois and the location of the trust assets in Illinois. In addition, the court found that, if there are any probate proceedings for Godlewski, Illinois will have jurisdiction over them.

¶33 As for the fifth factor—the shared interests of the several states in furthering fundamental social policies—the circuit court concluded that this involved essentially the same considerations relevant to the fourth factor and favored jurisdiction in Illinois. The plaintiffs challenge this conclusion. While acknowledging that this factor is not as "pivotal" as the other four factors because "this case does not revolve around evaluating public policy," the plaintiffs assert that this factor favors jurisdiction in Wisconsin because of the important social policy in allowing Wisconsin residents to file their claims in Wisconsin courts. This argument is a repetition of plaintiffs' argument on the first factor—Wisconsin's interest in adjudicating this dispute—and we have already addressed

it. Whatever the meaning of this fifth factor, we conclude it is not intended to repeat the first factor.

¶34 The trust offers a number of policy interests, not mentioned by the circuit court, that, it contends, support jurisdiction in Illinois under this fifth factor. We conclude the record and the arguments are not sufficiently developed for further discussion on this point. Accordingly, we do not consider the fifth factor in our analysis.

CONCLUSION

¶35 Based on our analysis of the first four factors, we conclude the trust has met its burden of establishing that, notwithstanding the minimum contact of owning the Wisconsin farm property and Godlewski's and Butler's visits after the trust was created, Wisconsin's exercise of jurisdiction over the trust in this action does not comport with fair play and substantial justice. The interest of Wisconsin in adjudicating the dispute over the terms of the trust is minimal and the interest of the plaintiffs in convenient and effective relief is only minimally furthered, if at all, by litigating the action in Wisconsin. On the other hand, the burden on the trust if the action were to be litigated in Wisconsin is significant and the interest of the interstate judicial system in obtaining the most efficient resolution of the controversy heavily favors Illinois. Accordingly, we affirm the circuit court's order dismissing the complaint for lack of personal jurisdiction.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.