

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 22, 2010**

A. John Voelker  
Acting Clerk of Court of Appeals

**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.

**Appeal No. 2010AP122**

**Cir. Ct. No. 2009CV1744**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**JOANN SEEVERS WOLFGRAM,**

**PLAINTIFF-APPELLANT-CROSS-RESPONDENT,**

**v.**

**DAVID WOLFGRAM AND DIANE KRAWCZYK, AS CO-TRUSTEES OF THE  
JAMES H. WOLFGRAM REVOCABLE TRUST DATED APRIL 28, 1999,**

**DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.**

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APPEAL and CROSS-APPEAL from orders of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. Joann Seevers Wolfgram appeals and David Wolfgram and Diane Krawczyk as co-trustees of the James H. Wolfgram Revocable Trust cross-appeal from an order establishing the trust's monthly

obligation to Joann and requiring the establishment of an account for the benefit of Joann. The co-trustees also appeal from an order awarding Joann costs and attorney's fees. We affirm the circuit court orders in their entirety.

¶2 Joann and her late husband, James Wolfgram, had a marital property agreement. The controversy arises over a provision in that agreement addressing Joann's rights should James predecease her. At issue is the meaning of paragraph 13.A.(3)(b):

An additional sum, to be determined at the time of James' death, shall be placed in an interest bearing account or accounts. This sum shall be calculated by taking into account life expectancy and actuarial tables, and shall be computed so as to guarantee that the principal and earnings from this account or accounts shall provide Joann a monthly income in the amount of One Thousand Five Hundred and 00/100 (\$1,500.00) Dollars for the remainder of her life. The amount of the guaranteed monthly income to Joann shall be reduced by such sums as Joann receives from social security payments, it being the intent of James and Joann that Joann's total income, including social security and earnings from this account, be not less than One Thousand Five Hundred and 00/100 (\$1,500.00) Dollars per month. This sum may be increased, from time to time, by mutual agreement of the parties. The payments provided by this subparagraph shall continue until such time as Joann either voluntarily or involuntarily, begins residency in a nursing home or similar healthcare facility for a period of more than ninety (90) consecutive days.

¶3 Before his death, James established a Revocable Trust that included, in all material respects, this provision of the marital property agreement. At James' death, his children, David Wolfgram and Diane Krawczyk, became co-trustees of the trust. The co-trustees declined to establish the account contemplated by the provision or pay Joann what she believed was due under this provision.

¶4 Joann sued, and the co-trustees sought declaratory and summary judgment regarding the meaning of the provision. They urged the circuit court to construe the unambiguous language of the provision as requiring the trust to provide Joann with \$1500 per month reduced by the social security benefits she has or is receiving. Therefore, the co-trustees argued, the trust need only pay Joann the difference between those benefits and \$1500 per month.

¶5 Joann countered that the trust's obligation should be calculated based upon the difference between her social security benefits at the time of James' death and \$1500 per month, and her payment from the trust should not be reduced if those social security benefits increase. She claimed this was the intent of the parties at the time she and James signed the marital property agreement.

¶6 The circuit court held on summary judgment<sup>1</sup> that a plain reading of the provision required that Joann receive a guaranteed \$1500 per month and that the guaranteed monthly income from the trust should be reduced by Joann's social security benefits, even if those benefits increase over time. Therefore, the court ordered that Joann's monthly payment from the trust was the difference between \$1500 and the actual amount of Joann's social security benefits. The court ordered the co-trustees to establish an account to fund this obligation. Thereafter, the court awarded Joann costs. Joann appeals from the circuit court's

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<sup>1</sup> The circuit court noted that because both parties sought summary judgment, they agreed that there were no issues of fact. However, before the court ruled, Joann withdrew her summary judgment motion. Regardless of the posture of this matter at the time the circuit court ruled, we hold below that the circuit court correctly concluded that the agreement was unambiguous, which presented a question of law. *See Gardner v. Gardner*, 190 Wis. 2d 216, 240, 527 N.W.2d 701 (Ct. App. 1994). Therefore, construction of the agreement was properly decided as a matter of law on summary judgment. *Cf. Energy Complexes v. Eau Claire County*, 152 Wis. 2d 453, 466-67, 449 N.W.2d 35 (1989) (summary judgment inappropriate where contract is ambiguous and parties' intent is in dispute).

determination of the amount due her, and the co-trustees cross-appeal from the award of costs.

¶7 To resolve the parties' dispute, the circuit court had to construe the provision in the trust. Construction presents a legal question that we decide independently of the circuit court. *Furmanski v. Furmanski*, 196 Wis. 2d 210, 214, 538 N.W.2d 566 (Ct. App. 1995). We determine whether the language of the trust is ambiguous. *Id.* at 215. If the language is not ambiguous, we look no further to determine intent. *Id.*

¶8 We agree with the circuit court that the provision unambiguously requires the result the court reached: Joann's \$1500 monthly income from the trust is subject to reduction by her social security benefits. The provision unambiguously requires that "[t]he amount of the guaranteed monthly income to Joann shall be reduced by such sums as Joann receives from social security payments." The provision unambiguously expresses the intent "that Joann's total income, including social security and earnings from this account, be not less than" \$1500 per month.

¶9 On appeal, Joann argues that there is evidence of a contrary intent, i.e., that her monthly payment should not be reduced by increasing social security benefits. Extrinsic evidence of the parties' intent may be considered only if the provision is ambiguous. See *Seitzinger v. Community Health Network*, 2004 WI 28, ¶22, 270 Wis. 2d 1, 676 N.W.2d 426. As we have held, the provision is not ambiguous, and therefore extrinsic evidence is not appropriate.

¶10 The co-trustees argue that before commencing this action, Joann waived her request to establish a separate account under this provision. The co-trustees premise their argument upon Joann's counsel's January 16, 2008 letter. In

that letter, Joann’s counsel stated that “[w]ithout waiving the entitlement to receive that payment ..., my client is not requesting that a separate fund be established to guarantee payments at this time.” The letter clearly stated that Joann’s willingness to forego a separate fund was limited to “this time.” Joann did not waive her claim to have the trust create the account contemplated by the provision.

¶11 On cross-appeal, the co-trustees argue that the circuit court should not have awarded Joann costs because she was not the prevailing party. Joann argued in the circuit court that she was the prevailing party because the circuit court ordered the trust to make payments and establish an account for her as required by the provision. The court agreed with Joann and awarded her \$500 in attorney’s fees. The co-trustees objected and argued that attorney’s fees should not exceed \$300 because the value of the property at issue was under \$5000. *See* WIS. STAT. § 814.04(1)(a) (2007-08).<sup>2</sup> The circuit court found that the amount in dispute was at least \$5000.

¶12 We agree with the circuit court that Joann prevailed on the question of whether she was entitled to receive payments under the provision and to have an account established to make those payments, even if she did not prevail on her interpretation of how the payments should be calculated. Therefore, costs were properly awarded.

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<sup>2</sup> WISCONSIN STAT. § 814.04(1)(a) (2007-08) provides in pertinent part:

When the amount recovered or the value of the property involved is greater than the maximum amounts specified in s. 799.01(1)(d), attorneys fees shall be \$500; when it is equal to or less than the maximum amount specified in s. 799.01(1)(d), but is \$1,000 or more, attorneys fees shall be \$300; when it is less than \$1,000, attorneys fees shall be \$100.

¶13 The co-trustees next argue that Joann should not have been awarded more than \$300 in attorney's fees. We agree with the circuit court that Joann recovered property in this case because the circuit court ruled that she was entitled to payments and the establishment of an account for her benefit. Joann was awarded property, and therefore attorney's fees were appropriate under WIS. STAT. § 814.04(1)(a).

¶14 We also agree with the circuit court that the value of the property at issue exceeds \$5000. Under the circuit court's ruling, the trust was liable to Joann from her husband's death and thereafter. While the co-trustees argue that Joann's recovery did not exceed \$3200 (the amount due Joann through 2009), the court's ruling granted Joann a recovery into subsequent years. Based on this ruling, the court reasonably found that Joann recovered in excess of \$5000. Therefore, the court properly awarded Joann \$500 in attorney's fees. WIS. STAT. § 814.04(1)(a).

*By the Court.*—Orders affirmed.

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

