COURT OF APPEALS
DECISION
DATED AND FILED

October 16, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP568 **Cir. Ct. No. 2012CV585**

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

GILBERT MITCHELL, SHARON MITCHELL, JONATHAN MCCORMICK AND SUSAN MCCORMICK,

PETITIONERS-APPELLANTS,

V.

MICHAEL J. WELSCH, JAMES C. WELSCH AND ALAN D. WELSCH,

RESPONDENTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Spouses Ralph and Lillian Small held an ownership interest in a limited partnership until their deaths, when the interest was

transferred to Michael, James, and Alan Welsch, Lillian's adult sons from a former marriage. Sharon Mitchell and Susan McCormick and their spouses appeal from the judgment transferring the interest. Mitchell and McCormick are Ralph's nieces (we will refer to them and their spouses collectively as "the nieces"). The nieces contend the circuit court failed to consider the Smalls' donative intent, reformation of a document, and unjust enrichment. We reject the nieces' arguments and affirm.

¶2 In 1991, the Smalls executed a trust agreement for the Ralph C. Small and Lillian M. Small Revocable Trust. Exhibit A of the agreement transferred to the trust:

> All property, real, personal, or mixed, (subject to any liens or encumbrances) now owned by RALPH C. SMALL and LILLIAN M. SMALL, whether held in the apparent form of sole ownership, partnership, joint tenancy, tenancy in common or in any other manner whatsoever ….

Property transferred to the trust included the Smalls' ownership interest in Field View Limited Partnership. The Partnership owned real estate in Illinois.

¶3 In August 2000, the Smalls executed an Amendment in Whole of the Trust. Article Seven of the amendment provided a means by which the Smalls could pass assets free of trust. It stated that, upon the death of the surviving Trustor, items listed on the attached Exhibit B would pass free of trust "to the persons whose names are written opposite the item." Exhibit B was blank. Article Seven further provided:

> Any remaining portion of the Trust Estate which may become subject to this Article Seven, including any amounts added thereto by the Last Will and Testament of either Trustor, shall be distributed in equal shares to the children of Trustor, LILLIAN M. SMALL, JAMES C. WELSCH, MICHAEL J. WELSCH, and ALAN D. WELSCH.

¶4 At the same time that she and Ralph executed the amendment, Lillian executed a general durable power of attorney (POA). Lillian authorized her agent to "transfer any of my property to trustees for my benefit or for the benefit of members of my immediate family upon the terms my Agent shall think desirable, and to fund any living trust I have established." She designated Ralph as her agent and her son, James, as her first contingent agent.

¶5 In 2001, the Smalls executed an untitled document, the text of which states in its entirety:

> Upon the death of both Ralph C. Small and Lillian M. Small, any remaining proceeds from the sale of the land from the FIELDVIEW LIMITED PARTNERSHIP shall be equally divided between,
>
> Sharon and Gilbert Mitchell
>
> [The Mitchells' address and telephone number]
>
> Susan and John McCormick
>
> [The McCormicks' address and telephone number]

The document was notarized but not witnessed or attached to the trust documents or exhibits. Like the parties, we will call this "the notarized document."

¶6 As of 2009, the Smalls owned an 11.4083 percent interest in the Partnership. In 2009 and 2010, niece Sharon Mitchell and her husband paid cash calls to the Partnership on the Smalls' behalf. In February 2010, the Smalls executed a promissory note promising to repay the $4564 total "upon sale of all or part of the property" owned by the Partnership.

¶7 Ralph died in 2010 and James became the agent under the POA. In that capacity, he executed a Certificate and Assignment by which Lillian assigned the entire percentage interest she currently held individually in the Partnership to

herself as sole trustee of the Trust. Lillian died in early 2011. The property remained unsold.

¶8 The nieces filed an action against the Welsches seeking a declaratory judgment that the notarized document was an enforceable transfer to the nieces of the Smalls' interest in the proceeds from the sale of the Partnership real estate and would be incorporated into Exhibit B of the Revocable Trust, thus requiring that the land sale proceeds would be distributed to them. They also sought to have the 2010 promissory note declared enforceable against the Smalls' trust assets.

¶9 The Welsches cross-filed their own motions for summary judgment and declaratory relief. They asked that the complaint be dismissed, that the Smalls' former ownership interest in the Partnership be transferred to the Welsches pursuant to the terms of the trust, and that the 2010 promissory note be declared an invalid and unenforceable obligation of either the trust or themselves.

¶10 After substantial briefing by the parties, the circuit court observed that it was undisputed that the Smalls implicitly signed the notarized document in their capacity as trustees and that "the interest in question was part of the property that was the corpus of the trust." It concluded that: (1) there was no evidence to support the nieces' argument to incorporate the notarized document into the trust; (2) despite not being a business transaction or possessing attributes of the types of instruments listed in WIS. STAT. § 705.10(1) (2011-12),[1] the notarized document was sufficiently similar to a promissory note to qualify as a nonprobate transfer at death; (3) what transferred was the proceeds of the sale, and, as there had been no

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

sale at the time of Lillian's death, there was nothing to convey; (4) when and if the property was sold, the proceeds would pass through the trust to the Welsches, Lillian's sons; and (5) the 2010 promissory note was a valid obligation "enforceable according to its terms." The nieces appeal.

¶11 The grant or denial of a declaratory judgment is within the circuit court's discretion. ***Bellile v. American Family Mut. Ins. Co.***, 2004 WI App 72, ¶6, 272 Wis. 2d 324, 679 N.W.2d 827. But where, as here, the exercise of such discretion turns upon a question of law, we review the question independently. *See* ***id.***; *see also* ***Cohn v. Town of Randall***, 2001 WI App 176, ¶7, 247 Wis. 2d 118, 633 N.W.2d 674 (interpreting documentary evidence presents a question of law). We also review summary judgment decisions independently of the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We need not repeat the oft-stated methodology. *See* ***id.*** at 315-16. Suffice it to say we must apply the standards of WIS. STAT. § 802.08 in the same manner as did the circuit court. *See* ***Green Spring Farms***, 136 Wis. 2d at 315-16.

¶12 The nieces' appeal rests upon their belief that the circuit court erred in not making a factual record on donative intent, although they concede that it was not raised, briefed or argued below. They reason that, since the other Partnership partners were Ralph's, not Lillian's, family members, the Smalls intended to distribute to them, as Ralph's nieces, the Smalls' *interest* in the land even though the notarized document refers only to *proceeds from the sale of the land*.[2] They ask that we reform the notarized document to reflect the donative

[2] Interestingly, the nieces' complaint alleges that the notarized document transferred to them upon the Smalls' deaths "the remaining proceeds from the sale of the land owned by the Field View Limited Partnership …."

intent they assert lies within. They similarly contend that the notarized document is ambiguous and should be construed so as to prevent the unjust enrichment of the Welsches.

¶13 One drawback of this argument is that the nieces did not raise the issues of donative intent, reformation, and unjust enrichment below. Failure to do so deprives the other party of the opportunity to attempt to meet the issue, the circuit court of the opportunity to address it, and this court of the benefit of the circuit court's analysis. That is why we generally do not consider issues raised here for the first time. *See* ***Arsand v. City of Franklin***, 83 Wis. 2d 40, 55, 264 N.W.2d 579 (1978).

¶14 That principle aside, the nieces still do not prevail. "The construction of a testamentary document presents a question of law." ***Furmanski v. Furmanski***, 196 Wis. 2d 210, 214, 538 N.W.2d 566 (Ct. App. 1995). The paramount object in trust construction is to ascertain the settlor's intent. ***Id.*** at 215. As the language of the document is the best evidence of that intent, we look there first. ***Id.*** If the language is not ambiguous, we need not look elsewhere for what might have been the settlor's actual intent. ***Id.***

¶15 As noted, the trust's Exhibit A transferred to the trust the Smalls' interests in all of their property. The later notarized document equally divided between the nieces "any remaining *proceeds from the sale of the land from* the FIELDVIEW LIMITED PARTNERSHIP" (emphasis added). There was no sale and thus no proceeds. Exhibit B of the trust, on which specific bequests could have been listed, remained blank. Nothing in the record before us shores up the nieces' claim that the Smalls intended the notarized document to be incorporated into Exhibit B. It does not refer to Exhibit B or to the trust, nor does it state it is

an amendment or a revocation. Per the unambiguous terms of the trust, the remaining portion of the trust estate "shall be distributed in equal shares" to Lillian's children, the Welsches.

¶16 Finally, the nieces assert that the notarized document supersedes the trust as a nonprobate transfer at death under WIS. STAT. § 705.10(1). That the circuit court agreed in principle is to no avail and we need not pass on whether we agree. The court concluded that the document's status as a nonprobate transfer at death permitted the transfer to the nieces of the Smalls' interest in the proceeds of the sale of the land from the Partnership. Whether or not the court was correct in applying § 705.10(1), there was no sale, so there was nothing to transfer.

By the Court.—Judgment affirmed.

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