COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2258 **Cir. Ct. No. 2011PR51**

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

IN RE THE ESTATE OF MICHAEL R. TILLISCH, JR.
A/K/A MICHAEL R. TILLISCH:

ERIC G. TILLISCH AND KATHRYN A. TILLISCH,

APPELLANTS,

V.

ELIZABETH J. TILLISCH,

RESPONDENT.

APPEAL from an order of the circuit court for Marathon County: ANN KNOX-BAUER, Judge. *Affirmed*.

Before Stark and Hruz, JJ., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Eric and Kathryn Tillisch appeal an order admitting the will of their father, Michael Tillisch, to probate. Eric and Kathryn

argue the will was not properly admitted because: (1) Elizabeth Tillisch, their stepmother and the proponent of the will, did not offer testimony from two witnesses to the will at the proof of will hearing; (2) the circuit court erroneously relied on a "Proof of Will" document submitted by Michael's attorney; (3) the court erroneously concluded the will was self-authenticating under WIS. STAT. § 856.16;[1] (4) the will refers to a trust, but the trust documents had not been produced before the proof of will hearing, and, accordingly, Eric and Kathryn had no opportunity to present evidence or conduct cross-examination regarding those documents; (5) the court failed to hold a hearing "allowing testimony about Michael's medical condition and lack of sound mind" at the time he executed the second amendment to the trust; and (6) the court should have allowed discovery of certain evidence pertaining to whether Michael was subject to undue influence when he signed the first amendment to the trust.

¶2 We conclude that, even if Eric and Kathryn are correct that the court erred by admitting the will to probate, any error was harmless. In addition, we conclude the trust documents are not part of Michael's will, and, accordingly, the validity of the trust documents is irrelevant to the issue of whether the circuit court erred by admitting the will to probate. We therefore affirm the order admitting the will to probate, albeit on different grounds from those relied on by the circuit court.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

BACKGROUND

¶3 Michael and his first wife, Marjorie, had three children—Eric, Kathryn, and Cal. Marjorie died in 1976, and Michael married Elizabeth about seven years later. They remained married until Michael's death on November 20, 2009.

¶4 On July 19, 2011, attorney Walter Lew filed a "Will of Michael R. Tillisch," dated February 28, 1997, with the Marathon County register in probate. The will provided:

> DISTRIBUTION. I give my entire estate, including any property over which I have a power of appointment to my Trustee under the Trust Agreement dated February 28, 1997, which I have executed with myself and my spouse as Trustees, to be added to the Trust property and administered in accordance with the terms of the Trust Agreement as amended or restated. If this Trust is not in existence at the time of my death, my residuary estate shall be held in Trust and administered in accordance with the terms and conditions of that agreement as amended or restated prior to my death as if set forth in its entirety herein.

The will was witnessed by attorney Lew and two others. In a letter accompanying the will, attorney Lew advised the register in probate that "there appears to be no estate whatsoever that needs to be probated in connection with the death of Mr. Tillisch and, therefore, I do not anticipate that any probate filing will be made."

¶5 On September 8, 2011, Eric and Kathryn, represented by their brother Cal, filed petitions for formal administration of Michael's estate.[2] They

[2] Cal subsequently filed an irrevocable disclaimer of "any and all interest, claim(s), inheritance or inheritance rights by, from or through this Estate to which I would otherwise have standing, claim or interest in to receive or possibly receive whether through Will, Trust, or intestacy in or from this probate Estate."

contested the will filed by attorney Lew, asserting its validity "ha[d] not been established." They later filed claims against the estate, asserting "there is no proven or established will, no proven or established trust and no appointment of a personal representative or determination of what assets belong to the estate or do not belong in the estate[.]" Eric and Kathryn further asserted Elizabeth had refused to produce any trust documents, and they moved to compel production of those documents.

¶6 A proof of will hearing was held on February 8, 2012. Attorney Lew was the only witness to testify. Following the hearing, attorney Lew filed a "Proof of Will" document with the circuit court, in which he averred that Michael signed the will on February 28, 1997, that he witnessed Michael's signature, and that Michael was of sound mind and was not acting under any restraint or undue influence.

¶7 The circuit court granted Eric and Kathryn's request to compel production of the trust documents in an order dated February 13, 2012. The court reasoned, "[WIS. STAT. §] 851.31 defines 'will' as including any document incorporated by reference. The decedent's will references in particular a trust dated February 28, 1997, and also any amendments, 'as if set forth in its entirety herein.' Therefore, the will includes the trust." The court ordered Elizabeth to provide Eric and Kathryn with copies of the trust agreement, as well as two amendments executed on October 8, 1998, and October 1, 2003.[3] Elizabeth moved for reconsideration, which the court denied.

[3] The October 8, 1998 amendment removed Cal as a beneficiary of the trust. The October 1, 2003 amendment changed the alternate trustee from one trust company to another.

¶8 On June 11, 2014, Eric and Kathryn filed a motion to compel discovery, seeking production of Michael's estate planning file, which they argued was relevant to the issue of undue influence. They also sought the right to continue the deposition of attorney Lew, who had asserted attorney-client privilege in response to a number of questions at his original deposition. Eric and Kathryn argued continuation of attorney Lew's deposition was necessary to determine whether Michael was competent when he signed the second amendment to the trust. Elizabeth opposed the motion to compel discovery and moved for admission of Michael's will to probate.

¶9 On September 16, 2014, the circuit court entered an order denying Eric and Kathryn's motion to compel and admitting the will to probate. The court reasoned Eric and Kathryn had failed to provide an evidentiary basis for the court to conclude Michael was not competent to sign either the will or the second amendment to the trust, and, even assuming he was not competent to sign the second amendment, that amendment only changed the alternate trustee designation and did not affect any other provisions of the will or trust. The court also stated there was no evidence in the record to support a conclusion that Michael was unduly influenced. Finally, the court reasoned that attorney Lew "filed with the court a Proof of Will, and the will itself is self-authenticating pursuant to [WIS. STAT. §] 856.16." Eric and Kathryn now appeal.

DISCUSSION

¶10 Eric and Kathryn's appellate arguments fall into two general categories: arguments relating to the will itself, and arguments relating to the trust documents.

¶11 With respect to the will, Eric and Kathryn argue the will was improperly admitted to probate because Elizabeth failed to present testimony from two witnesses to the will at the proof of will hearing. Eric and Kathryn observe that WIS. STAT. § 853.03(2)(am) states a validly executed will must be signed "by at least 2 witnesses[.]" They cite case law stating, "[E]xcept where modified by statute, the law is that all of the subscribing witnesses to a will must be produced unless the impossibility of producing them is made to appear." ***Will of Johnson***, 175 Wis. 1, 6, 183 N.W. 888 (1921). Here, attorney Lew was the only witness to testify at the proof of will hearing. Eric and Kathryn assert there is no evidence in the record that it was impossible to produce the other two individuals who witnessed the will. They therefore argue the circuit court erred, as a matter of law, by admitting the will to probate without the testimony of at least two witnesses.

¶12 Eric and Kathryn also argue the circuit court erred by relying on attorney Lew's "Proof of Will" document as a basis to admit the will to probate because, under WIS. STAT. § 856.15(1), that type of document can only be used to admit an uncontested will. Eric and Kathryn further argue the court erred by concluding the will was self-authenticating under WIS. STAT. § 856.16 because that statute did not go into effect until May 12, 1998, over one year after the will was signed. *See* 1997 Wis. Act 188, § 177.

¶13 Assuming, without deciding, that the circuit court erred by admitting Michael's will to probate for the reasons argued by Eric and Kathryn, we conclude any error was harmless. Under the harmless error rule, we will not reverse a judgment unless "the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment[.]" WIS. STAT. § 805.18(2).

> For an error "to affect the substantial rights" of a party, there must be a reasonable possibility that the error

> contributed to the outcome of the action or proceeding at issue. ***State v. Dyess***, 124 Wis. 2d 525, 543, 547, 370 N.W.2d 222 (1985); *see also* ***Town of Geneva v. Tills***, 129 Wis. 2d 167, 184-85, 384 N.W.2d 701 (1986) (noting that the standard set forth in ***Dyess*** applies in civil cases as well as criminal cases). A reasonable possibility of a different outcome is a possibility sufficient to "undermine confidence in the outcome." ***Dyess***, 124 Wis. 2d at 544-45 (quotation omitted).

Martindale v. Ripp, 2001 WI 113, ¶32, 246 Wis. 2d 67, 629 N.W.2d 698.

¶14 Here, any error in admitting the will to probate was harmless because, as far as Eric and Kathryn are concerned, it makes no practical difference whether the will is admitted. Under the terms of the will, all property in Michael's estate is to be distributed to the trust. Thus, the result of admitting the will to probate is that Eric and Kathryn receive nothing. Conversely, if the circuit court had refused to admit the will to probate, Eric and Kathryn would be entitled to shares of Michael's estate under the law of intestate succession. *See* WIS. STAT. § 852.01(1). However, at the proof of will hearing, attorney Lew testified that Michael "put everything into the name of the trust" before he died and the estate therefore had "no assets[.]" In the more than three years since Eric and Kathryn petitioned for formal administration of Michael's estate, they have not presented any evidence to dispute attorney Lew's testimony. Because the estate has no assets to transfer, even under intestate succession Eric and Kathryn would receive nothing. Consequently, the result is the same regardless of whether the will is admitted to probate.

¶15 In their reply brief, Eric and Kathryn argue the estate's assets "ha[ve] not been determined under the law." They therefore contend they were not required to put forth any evidence that the estate has assets. We disagree. Elizabeth made it clear throughout the circuit court proceedings that she believed

there were no assets in the estate. Attorney Lew specifically testified to that fact at the proof of will hearing. After an issue was raised regarding the estate's assets, Eric and Kathryn had a duty, at the very least, to investigate the issue and affirmatively allege, based on some evidence, that there were assets in the estate.[4] Because they failed to do so, there is no basis in the record for us to disregard attorney Lew's testimony and instead conclude the estate has assets.

¶16 The same harmless error analysis also applies to Eric and Kathryn's arguments regarding the trust documents. Eric and Kathryn argue that, because Michael's will incorporates the trust, the validity of the trust documents is relevant to whether the court properly admitted the will to probate. However, we have already concluded that it makes no difference whether the court erred by admitting the will because the estate has no assets to transfer. Eric and Kathryn may seek to challenge the trust documents in a separate action, but, in the context of this probate action, it simply makes no difference whether the trust documents are valid.

¶17 Moreover, Eric and Kathryn's arguments regarding the trust documents rely on the circuit court's conclusion, in its February 13, 2012 order, that the trust documents are part of the will under WIS. STAT. § 851.31 because the will incorporates them by reference. Section 851.31 provides, "Unless the context or subject matter indicates otherwise, 'will' includes a codicil and any document incorporated by reference in a testamentary document under s. 853.32 (1) or (2)." The circuit court did not specify whether its conclusion that Michael's will

[4] Eric and Kathryn's motion to compel discovery, discussed above in paragraph 8, did not seek any information regarding the estate's assets.

incorporated the trust documents was based on WIS. STAT. § 853.32(1) or (2). We conclude, as a matter of law, that the will did not incorporate the trust documents under either subsection. *See* ***State v. W.R.B.***, 140 Wis. 2d 347, 351, 411 N.W.2d 142 (Ct. App. 1987) ("The application of a statute to a particular set of facts presents a question of law which we decide without deference to the trial court."); ***Furmanski v. Furmanski***, 196 Wis. 2d 210, 214, 538 N.W.2d 566 (Ct. App. 1995) (Construction of a will presents a question of law for our independent review.).

¶18 WISCONSIN STAT. § 853.32(1) provides:

> INCORPORATION.
>
> (am) A will may incorporate by reference another writing or document if all of the following apply:
>
> 1. The will, either expressly or as construed from extrinsic evidence, manifests an intent to incorporate the other writing or document.
>
> 2. The other writing or document was in existence when the will was executed.
>
> 3. The other writing or document is sufficiently described in the will to permit identification with reasonable certainty.
>
> 4. The will was executed in compliance with s. 853.03 or 853.05.

¶19 Michael's will fails to meet the first requirement for incorporation under this subsection—it does not manifest an intent, either expressly or as construed from extrinsic evidence, to incorporate the trust documents. The "distribution" provision of the will includes two sentences, both of which refer to the trust. The first sentence gives Michael's "entire estate … to my Trustee under the Trust Agreement dated February 28, 1997[.]" Although this sentence refers to

the trust, it does not expressly incorporate the trust documents by reference. The second sentence of the distribution provision states, "If this Trust is not in existence at the time of my death, my residuary estate shall be held in Trust and administered in accordance with the terms and conditions of that agreement as amended or restated prior to my death as if set forth in its entirety herein." This sentence expresses an intent to incorporate the trust documents, but only in one specific situation—if the trust is not in existence at the time of Michael's death. There is no evidence in the record that the trust did not exist when Michael died. Consequently, the second sentence of the distribution provision does not, under the present circumstances, expressly manifest an intent to incorporate the trust documents. In addition, the record is devoid of extrinsic evidence that Michael intended the will to incorporate the trust documents.

¶20 WISCONSIN STAT. § 853.32(2)(a), in turn, states, "A reference in a will to another document that lists tangible personal property not otherwise specifically disposed of in the will disposes of that property if the other document describes the property and the distributees with reasonable certainty and is signed and dated by the decedent." The only provision of the trust that refers to tangible personal property is a provision dealing with the distribution of personal belongings upon the death of a donor. However, that provision does not describe the property with reasonable certainty. Rather, it generally refers to the deceased donor's "clothing, jewelry, automobiles, tools, recreation and hobby items, household equipment and furnishings of every nature, kind and description[.]" These vague references are not sufficiently specific to meet the standard for incorporation by reference set forth in § 853.32(2).

¶21 Elizabeth argues the instant appeal is frivolous and warrants the imposition of sanctions against Eric, Kathryn, and their attorney. An appeal is

frivolous if it "was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another" or if "[t]he party or the party's attorney knew, or should have known, that the appeal … was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." WIS. STAT. RULE 809.25(3)(c). In order to impose sanctions for a frivolous appeal, we must conclude the entire appeal is frivolous. ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, ¶26, 277 Wis. 2d 21, 690 N.W.2d 1. We resolve any doubts in favor of finding an appeal nonfrivolous. ***Id.***, ¶28.

¶22 We conclude Eric and Kathryn's appeal is not frivolous under either standard set forth in WIS. STAT. RULE 809.25(3)(c). As evidence that the appeal was filed in bad faith, Elizabeth cites the "personal tone" of the litigation and asserts Eric and Kathryn have used their filings to "disparage" her. However, the fact that Eric and Kathryn's filings have made unflattering allegations against Elizabeth is not sufficient, in and of itself, to show that the appeal was filed in bad faith—that is, "solely" for the purpose of harassing or injuring Elizabeth. *See* RULE 809.25(3)(c)1. Elizabeth also emphasizes that, by filing their appeal, Eric and Kathryn needlessly prolonged the litigation. Again, though, this does not show that Eric and Kathryn's appeal was filed solely for the purpose of harassing or injuring Elizabeth.

¶23 Elizabeth also argues Eric, Kathryn, and their attorney knew or should have known the appeal was without any basis in law or equity. Although we affirm the circuit court, we do not agree with Elizabeth that all of Eric and Kathryn's appellate arguments were wholly meritless. While we need not determine whether the court erred by admitting Michael's will to probate, given our conclusion that any error was harmless, we observe that Eric and Kathryn's

argument that the court erred by admitting the will without the testimony of two witnesses appears meritorious, based on the authorities they cite. Eric and Kathryn's arguments regarding the invalidity of the trust documents also appear to have had some merit, in light of the circuit court's prior order that the will incorporated the trust documents by reference. We therefore deny Elizabeth's request for sanctions.

By the Court.—Order affirmed.

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