

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 12, 2017

Diane M. Fremgen
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. 2016AP940

Cir. Ct. No. 2012CV231

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**THE SCHROEDER FAMILY REVOCABLE TRUST
DATED FEBRUARY 16, 1994,
PAMELA FASHINGBAUER, TRUSTEE,**

PLAINTIFF-RESPONDENT,

v.

DOUGLAS SCHROEDER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vilas County:
NEAL A. NIELSEN III, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Douglas Schroeder appeals a partial summary judgment in favor of The Schroeder Family Revocable Trust Dated February 16, 1994 (the “Trust”). After the Trust was settled, Douglas took title to real property owned by the Trust pursuant to a handwritten contract of sale with Kenneth Schroeder, Douglas’s father and one of the Trust’s settlors. Kenneth subsequently amended the Trust to remove Douglas as a beneficiary unless he returned the real property, which never occurred.

¶2 The Trust successfully sought an order requiring Douglas to execute a note and mortgage memorializing the terms of the contract between Kenneth and Douglas. Kenneth died while this action was pending, and the parties then filed cross-motions for summary judgment, seeking a determination as to the effect of certain language in the contract directing Douglas to make payments to Kenneth’s identified “surviving heirs” upon Kenneth’s death. The circuit court concluded the contract called for all payments to be made to the Trust, not to the named individuals in the contract, which included Douglas.

¶3 Douglas argues the applicable statutes of limitation precluded all of the Trust’s claims against him, including its memorialization claim. We reject this argument because each of the payments Douglas made pursuant to the contract of sale constituted an acknowledgment and renewal of the debt, so as to toll the running of the applicable statute of limitations. Douglas also argues the circuit court ignored the contract’s plain language when it concluded he was required to make payments to the Trust rather than to the individuals named in the contract. We conclude the circuit court properly interpreted the contract as requiring that the Trust receive all payments resulting from the sale of the Trust’s real property. Accordingly, we affirm.

BACKGROUND

¶4 The material facts are undisputed. Kenneth and Betty Schroeder created the Trust. As originally constructed, it was designed to hold title to their assets during their lifetimes and to distribute those assets upon their death equally to their three children: Douglas, Elizabeth Morrison, and Pamela Fashingbauer. The original Trust instrument gave Douglas the option of receiving Kenneth and Betty's principal residence on Pokegama Lake, at its appraised value, as part of his distributive share of the Trust upon their death.

¶5 Kenneth and Betty were initially named co-trustees. Betty died in February 2002. On March 20, 2002, Kenneth amended the Trust, naming himself and Douglas as co-trustees. Douglas moved into the Pokegama Lake residence with Kenneth in August 2004, and Douglas has occupied the residence since that time. On August 19, 2005, Kenneth, acting as trustee, granted Douglas title to the Pokegama Lake residence through a quit claim deed signed and recorded that day.

¶6 At some point during the summer of 2006, Pamela learned from her father that he had conveyed the Pokegama Lake residence to Douglas, and that the transfer had been accomplished pursuant to a written agreement. Although Douglas initially refused to produce the purchase agreement, he disclosed that he had purchased the property for \$300,000, with no money down and the balance to be paid annually in \$10,000 increments for thirty years. It is undisputed Douglas has made annual payments of \$10,000 since the conveyance. Kenneth subsequently told Pamela that the Pokegama Lake residence was worth much more than the purchase price, and that Douglas had pressured him into signing over the house and had attempted to keep the transaction secret.

¶7 After meeting with Pamela, Elizabeth, and his attorney, Kenneth signed a second amendment to the Trust on July 28, 2006. The second amendment removed Douglas as co-trustee and appointed Pamela in his stead. Kenneth also amended the “Termination of Trust” provisions to explicitly state his intention to remove Douglas as a Trust beneficiary unless Douglas conveyed the Pokegama Lake property back to him or to the Trust prior to his death. The beneficiary provisions specifically stated that all of Kenneth’s “household furnishings, personal effects, and other tangible property” remained subject to the Trust and had not been transferred or otherwise given to Douglas.

¶8 Pamela, acting as co-trustee, met with Kenneth and Douglas in August 2006.¹ Pamela averred that the attendees discussed having the property secured by a mortgage and having Douglas sign a promissory note to memorialize the transaction. It is undisputed that Douglas refused to execute any promissory note or mortgage prior to the commencement of this action.

¶9 Despite the controversy surrounding the Trust, Kenneth and Douglas continued living together until January 2012. At that time, based upon the recommendation of a physician regarding Kenneth’s inability to make financial and health care decisions, Kenneth moved into Pamela’s home. Due to Kenneth’s incapacity, Pamela became the successor trustee, and she requested the return of certain of Kenneth’s personal property that was still located at the Pokegama Lake residence. Douglas refused to return the property.

¹ Douglas’s answer denied this meeting had occurred, but Pamela’s affidavit stating to the contrary is un rebutted by any record evidence, and, based on Douglas’s briefing, it appears he no longer disputes that such a meeting or meetings took place.

¶10 The Trust filed this action on October 10, 2012. The complaint did not identify distinct legal claims, but rather, after reciting the factual background of the case, demanded the following relief, as relevant here:

- A. A Declaration that the financial arrangement between the Plaintiff and the Defendant regarding his claimed indebtedness to the Trust shall be memorialized using values in effect in 2005 when he acted contrary to his fiduciary obligations to the Trust and its beneficiaries;
- B. In the event the conveyance is determined to be a breach of his fiduciary obligations to the Trust and its beneficiaries, that the conveyance be voided, and that an accounting be done to determine what amounts were paid by the Defendant to the Trust, and whether such amounts should be treated as “rent” or some other occupancy related expense;
- C. An order be entered directing the Defendant to immediately and without delay, turn over all of the personal property used by Kenneth A. Schroeder and owned by the Trust presently in the possession of or under the control of the Defendant[.]

Douglas answered and raised numerous affirmative defenses.

¶11 In December 2012, Douglas filed a motion to dismiss. His motion was supported by his attorney’s affidavit, which included a copy of the purchase agreement for the Pokegama Lake residence, labeled “Exhibit A.” Exhibit A was a one-page handwritten instrument, which Douglas had drafted. Exhibit A, which was dated August 19, 2005, and purportedly signed by Kenneth and Douglas on August 20, provides in relevant part as follows:

Kenneth A. Schroeder Quit Claim Deed Xfer residence, 3257 Pokegama Lake Trail, LDF [Lac du Flambeau] WI, 54538 from Schroeder Family Trust to Douglas A. Schroeder.

Douglas A. Schroeder & Kenneth A. Schroeder agree to \$10,000 annual re-imbusement to Kenneth A. Schroeder for a period of 30 yrs. Douglas has the option of early pay

off, i.e. < 30 yrs. If Kenneth dies prior to receipt of \$300,000, remainder due upon his death will continue to be paid in annual installments to surviving heirs, Elizabeth, Douglas and Pamela.^[2]

Property Xfer inclusive of furnishings, equipment and all items on property as of 19 Aug 05.

(Some formatting and punctuation altered.)³ Both Kenneth and Douglas signed the instrument without indicating whether they were doing so in their personal or representative capacities.

¶12 The litigation proceeded without any further action on Douglas's motion. During this time, the Trust questioned Exhibit A's authenticity, as well as Kenneth's signature on it, and it requested that Douglas submit the document to handwriting analysis. Ultimately, the circuit court entered an order requiring Douglas to deliver the instrument to the Trust's counsel for analysis.

¶13 Douglas then re-filed his motion to dismiss with a supporting brief, asserting the Trust's action was barred by the pertinent statutes of limitation. Douglas characterized the complaint as asserting causes of action for breach of a real estate contract, breach of Douglas's fiduciary duties, and conversion of personal property; he argued all such claims were time barred. The Trust, in response, characterized its claims as seeking to memorialize the financial arrangement between Kenneth and Douglas, to void the conveyance as a result of Douglas's alleged breach of his fiduciary duties as trustee, and to obtain an order directing Douglas to return the Trust's personal property.

² The parties refer to this sentence as the "payment provision." We will do likewise.

³ Douglas later disclosed that Exhibit A also consisted of a second page, which contained a record of the payments Douglas had made under the agreement.

¶14 The circuit court partially granted Douglas’s motion. It dismissed the Trust’s cause of action to void Exhibit A based on an alleged breach of fiduciary duties, concluding that claim was time barred. However, the court concluded the statute of limitations had not expired on the Trust’s conversion claim. It also ordered Douglas, as a matter of fairness and equity, to memorialize his now-undisputed purchase of the Pokegama Lake residence by signing a promissory note for the remaining principal due on the original \$300,000 balance, with \$10,000 payments due annually with no interest. The court also required Douglas to sign a mortgage securing the repayment of the promissory note. Douglas complied with these directives.

¶15 The parties continued to litigate Exhibit A’s validity. Meanwhile, on June 16, 2014, Kenneth died. In light of this event, the Trust filed a motion for partial summary judgment, seeking a declaration as to the meaning of Exhibit A’s payment provision and whether the requirement that Douglas make payments to Kenneth’s “surviving heirs, Elizabeth, Douglas and Pamela” was affected by Kenneth’s subsequent removal of Douglas as a Trust beneficiary. The Trust asserted that “any claim that [Douglas] might have ... a share of the annual payment [under Exhibit A] was renounced by Kenneth Schroeder in 2006 when he amended the trust.”⁴ Douglas then filed a motion for declaratory judgment seeking a determination that Exhibit A was valid in its entirety.

¶16 In May 2015, Douglas and the Trust entered into a stipulation that resolved most of the issues presented in the litigation. The parties agreed that

⁴ It is undisputed that Douglas never conveyed the Lake Pokegama property back to Kenneth, or to the Trust, such that he would again benefit under the Trust pursuant to the Trust’s second amendment.

Kenneth's and Douglas's signatures on Exhibit A were presumed valid, effectively foreclosing the Trust's challenge to the authenticity of Kenneth's signature. The parties also agreed to "resolve[] with prejudice" all other issues of the lawsuit, except the legal effect of certain of Exhibit A's language. In particular, the parties agreed to continue litigating whether Exhibit A's payment provision was "a testamentary provision, or a contract term which may not be modified."⁵

¶17 Both Douglas and the Trust subsequently filed motions for partial summary judgment. Douglas asserted that, pursuant to WIS. STAT. § 705.10 (2015-16),⁶ Exhibit A's payment provision constituted a nontestamentary transfer upon Kenneth's death, which could not be subsequently altered by the second Trust amendment. Consequently, Douglas argued he was contractually obligated to make the remaining \$10,000 payments in equal shares to himself, Elizabeth and Pamela.⁷ Conversely, the Trust argued the payment provision was testamentary in nature and had been superseded by the Trust's second amendment, which removed Douglas as a Trust beneficiary and therefore barred him from collecting his distributive share of the annual \$10,000 payments. Further, according to the Trust, the deed itself foreclosed any argument that Exhibit A was an independent contract, because the deed indicated the transaction was exempt from the real

⁵ The parties also agreed to continue to litigate the legal effect of Exhibit A on the issue of "[w]hether the conveyance of personal property may violate the fiduciary responsibilities of Douglas Schroeder when acting as co-trustee."

⁶ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

⁷ Douglas also argued the terms of the note he signed at the circuit court's direction in 2014 must be amended to reflect payments to the individuals named in Exhibit A, rather than to the Trust.

estate transfer fee as a conveyance from a trustee to a beneficiary without actual consideration. *See* WIS. STAT. § 77.25(9).

¶18 The circuit court granted the Trust’s motion and denied Douglas’s motion. The court observed that the Trust settlors’ purpose was to “effect an estate plan that would avoid probate,” and that “careful planning was put into place, initially, and then really, as so often happens, got really sloppy as matters went along.” Given that the Trust owned the Pokegama Lake property at the time of its conveyance to Douglas, the court concluded it could only have been “a sale from the Trust to a beneficiary.”

¶19 Accordingly, the circuit court held Exhibit A “clearly ... doesn’t require payments back to his father as an individual, but payments to the Trust.” The payment provision did not alter this payment scheme by specifically naming the Trust beneficiaries that were to receive property under the Trust following Kenneth’s death. Because the Trust was to receive the payments, Kenneth’s subsequent amendment removing Douglas as a beneficiary precluded him from receiving a share of the annual \$10,000 payments. According to the circuit court, under WIS. STAT. § 705.10(1), “[t]he party to whom payments are due has the right at any time to make [a] change and to indicate that henceforth payments will go in some other direction.” Douglas now appeals, asserting the circuit court erred both in determining the majority of the Trust’s claims were timely filed and in its interpretation of Exhibit A.

DISCUSSION

¶20 Douglas first argues the statutes of limitation preclude the Trust’s entire action against him. He presents arguments regarding both the Trust’s claim to have the 2005 conveyance declared void and its claim for unlawful conversion

of personal property. However, the mootness doctrine counsels against us addressing whether (and how) the applicable statute of limitations applies to each of those claims. An issue is moot when its resolution will have no practical effect upon an existing controversy. *State ex rel. Badke v. Village Bd. of Greendale*, 173 Wis. 2d 553, 568, 494 N.W.2d 408 (1993). Mootness is a question of law. *PRN Assocs. LLC v. DOA*, 2009 WI 53, ¶25, 317 Wis. 2d 656, 766 N.W.2d 559.

¶21 Pursuant to the parties' stipulation, there were only two issues that could be litigated after May 27, 2015: (1) whether Douglas violated his fiduciary duties by authorizing the conveyance of personal property to himself; and (2) the legal effect of certain language in the 2005 conveyance, including the payment provision. All other issues were resolved with prejudice and without the possibility of relief, including the Trust's voidness and conversion claims.⁸ Any conclusion that these claims are time barred would be moot because the Trust has, in effect, abandoned them.⁹

⁸ A conversion claim seeking the return of personal property is different from a claim for a breach of fiduciary duty resulting from the transfer of property between fiduciaries. Compare *H.A. Friend & Co. v. Professional Stationery, Inc.*, 2006 WI App 141, ¶11, 294 Wis. 2d 754, 720 N.W.2d 96 (reciting elements of a conversion claim) with *Berner Cheese Corp. v. Krug*, 2008 WI 95, ¶40, 312 Wis. 2d 251, 752 N.W.2d 800 (reciting elements of a breach of fiduciary duty claim). Pursuant to the parties' stipulation, only the latter issue was subject to continued litigation here.

However, the Trust failed to amend its complaint to include a breach of fiduciary duty claim regarding the transfer of the personal property under Exhibit A. As such, following the circuit court's decision on the parties' cross-motions for summary judgment, the court entered an order granting Douglas's motion to award him all personal property on the premises of the Pokegama Lake residence. This order was entered with the Trust's consent, which agreed that the issue of the ownership of the personal property had been rendered moot by the parties' stipulation.

⁹ In addition, Douglas prevailed on his statute of limitations defense regarding the Trust's attempt to void the conveyance. The circuit court dismissed that cause of action with prejudice.

¶22 The remaining issue regarding Douglas’s statute of limitations defense is whether the Trust’s “memorialization” claim, which the circuit court refused to dismiss and on which it ultimately granted relief, was also time barred. To the extent Douglas’s arguments on this issue require us to determine which statute of limitations applies to the Trust’s action, if any, we review the matter de novo. See *Munger v. Seehafer*, 2016 WI App 89, ¶18, 372 Wis. 2d 749, 890 N.W.2d 22. Similarly, determining whether the applicable statute of limitations has run on a claim is a question of law when the facts are undisputed. *Id.*

¶23 In Douglas’s view, the Trust’s claim to memorialize the 2005 conveyance was in fact a claim arising from his alleged breach of his fiduciary duties as co-trustee. Accordingly, Douglas argues that claim had to have been brought within the statute of limitations for intentional torts, WIS. STAT. § 893.57.¹⁰ See *Zastrow v. Journal Commc’ns, Inc.*, 2006 WI 72, ¶42, 291 Wis. 2d 426, 718 N.W.2d 51. Douglas’s theory is that the supposed breach of his fiduciary duties occurred on August 19, 2005, at the time of the transfer, and that the claims accrued on that date because Kenneth was aware of the transfer by virtue of his having authorized it. Alternatively, Douglas contends the Trust was aware by at least July 26, 2006, that it had potential claims against Douglas relating to the transfer. Thus, Douglas asserts the Trust’s October 10, 2012 action to memorialize the conveyance was untimely.

¶24 We disagree with Douglas that the Trust’s memorialization claim was in fact a claim seeking to recover for an alleged breach of fiduciary duty. The

¹⁰ WISCONSIN STAT. § 893.57 was amended in 2009 to extend the limitations period from two to three years. See 2009 Wis. Act 120.

complaint's demand for relief somewhat muddled the two concepts by requesting a "[d]eclaration that the financial arrangement between the Plaintiff and the Defendant regarding his claimed indebtedness to the Trust shall be memorialized using values in effect in 2005 when he acted contrary to his fiduciary obligations to the Trust and its beneficiaries." However, the complaint was drafted before the Trust knew for certain there was any kind of written agreement between Kenneth and Douglas related to the Pokegama Lake residence. The relief demanded in the relevant section was not for compensation flowing from the alleged breach of fiduciary duties, but rather to have Kenneth's and Douglas's supposed oral agreement reduced to writing. As the Trust observes, it did not ask that the obligation be memorialized *because* Douglas breached his fiduciary duties. When the written instrument was later produced, the parties and court treated the memorialization claim as one to formalize the undisputed debt by requiring Douglas to sign a promissory note and mortgage consistent with the handwritten instrument.

¶25 The Trust argues that, under these circumstances, its request for memorialization of the agreement sought to invoke the circuit court's equitable authority. Once a court determines equitable relief is appropriate, it has wide latitude to fashion a remedy based on the equities of the case. *Ash Park, LLC v. Alexander & Bishop, Ltd.*, 2010 WI 44, ¶74, 324 Wis. 2d 703, 783 N.W.2d 294. Accordingly, the Trust argues its memorialization "claim" was not one for breach of fiduciary duties at all, but rather an equitable claim designed to forestall a potential subsequent challenge to the contract based on the statute of frauds. *See* WIS. STAT. § 241.02(1)(a) (requiring that agreements that are not to be performed within one year be in writing).

¶26 Having concluded that the Trust’s claim was not one for breach of fiduciary duty, we need not also decide whether its claim was actually one invoking the circuit court’s equitable authority. Whatever the substantive basis for the Trust’s “memorialization” claim, whether legal or equitable, there is a basic principle of law that sufficiently resolves the statute of limitations issue Douglas presented. It is undisputed that Douglas has made the annual \$10,000 payments required under Exhibit A. “A partial payment on an obligation made prior to the running of the statute of limitations tolls the statute, and sets it running from the date of the payment.” *St. Mary’s Hosp. Med. Ctr. v. Tarkenton*, 103 Wis. 2d 422, 424, 309 N.W.2d 14 (Ct. App. 1981). Regardless of the applicable limitations period, Douglas’s payment each year set the statute running anew, making the Trust’s “memorialization” claim timely.¹¹

¶27 Beyond his statute of limitations arguments, Douglas also challenges the circuit court’s ruling construing Exhibit A’s payment provision.¹² On appeal,

¹¹ Douglas’s only argument is that the statute of limitations applicable to breaches of fiduciary duty bars the Trust’s memorialization claim. However, given our having rejected that argument, he does not present any other potentially applicable limitations period. While we perceive two different limitations periods that might apply, *see* WIS. STAT. § 893.33 (actions concerning real property) and § 893.43 (actions on contract), neither of those statutes would bar the Trust’s action here.

The Trust presents other arguments in support of affirming on the statute of limitations issue, including Douglas’s waiver of the defense, that we need not reach because the application of the partial payment rule adequately resolves the issue. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

¹² To the extent Douglas argues the statute of limitations barred the circuit court from interpreting Exhibit A’s payment provision, this argument is foreclosed by the stipulation the parties entered into, whereby they expressly agreed the meaning of that provision would be subject to further litigation. By entering into that stipulation, Douglas forfeited any such argument regarding the statute of limitations. *See Cascade Mountain, Inc. v. Capitol Indem. Corp.*, 212 Wis. 2d 265, 269, 569 N.W.2d 45 (Ct. App. 1997) (“A party cannot complain about an act to which he or she deliberately consents.”).

the parties continue their dispute regarding whether Exhibit A was a testamentary document. We agree with Douglas and the circuit court that Exhibit A's payment provision is nontestamentary under WIS. STAT. § 705.10.¹³ That statute explains that “[a] provision for a nonprobate transfer on death in ... [a] conveyance ... or other written instrument of similar nature is nontestamentary.” Sec. 705.10(1). The purpose of this section is to give effect to provisions in a contract that would otherwise fail to comply with the formalities necessary to effectuate testamentary transfers. See *Reichel v. Jung*, 2000 WI App 151, ¶21, 237 Wis. 2d 853, 616 N.W.2d 118 (quoting UNIFORM NONPROBATE TRANSFERS ON DEATH ACT § 101 cmt., 8B U.L.A. 200 (1993)).

¶28 Accordingly, we agree with Douglas that Exhibit A is a contract and we reject the Trust's assertion that Exhibit A “can be construed to be an amendment to the Trust as it existed in 2005.” Kenneth reserved the right to revoke or amend the Trust at any time prior to his death. However, as the circuit court recognized, Exhibit A does not manifest any intention to amend the Trust. The Trust argues Exhibit A in some way clarifies that Douglas could share in the \$300,000 obligation owing to the Trust when the corpus was distributed following Kenneth's death. But at the time of the sale, Douglas was already entitled to share the Trust corpus equally with his two sisters upon Kenneth's death. Exhibit A is plainly a contract by the Trust to sell Douglas the Pokegama Lake residence and the personal property within it for \$300,000, payable over thirty years.

¹³ The interpretation and application of a statute is a question of law that this court reviews de novo. *Jamerson v. Department of Children & Families*, 2013 WI 7, ¶39, 345 Wis. 2d 205, 824 N.W.2d 822.

¶29 Although the parties spend the bulk of their briefing focusing on the nature of the agreement, ultimately our conclusion that Exhibit A represents a nontestamentary contract of sale does not resolve the issue of how the payment provision therein should be construed. While Douglas relies heavily on *Reichel*'s statement that the effect of WIS. STAT. § 705.10 is “to take such contractual arrangements out of the realm of probate and to permit the terms of the contract to be upheld,” *see Reichel*, 237 Wis. 2d 853, ¶22, this rule merely begs the question of what exactly the contract's terms mean. Here, that question is to whom the required payments are to be made following Kenneth's death.

¶30 Neither party argues the payment provision's language is ambiguous. “[I]n the absence of a claim of ambiguity, which might require extrinsic evidence, the construction of a written contract is only a question of law for the court.” *Kania v. Airborne Freight Corp.*, 99 Wis. 2d 746, 763, 300 N.W.2d 63 (1981). In addition, whether the circuit court properly granted summary judgment is a question of law that this court reviews de novo. *Moya v. Aurora Healthcare, Inc.*, 2017 WI 45, ¶15, 375 Wis. 2d 38, 894 N.W.2d 405. A party is entitled to summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” WIS. STAT. § 802.08(2).

¶31 The central dispute regarding the interpretation of the payment provision is whether Douglas's payments subsequent to Kenneth's death are to be paid to the Trust, or whether those payments are to be made to the individuals named in Exhibit A. Douglas argues the circuit court erred in its interpretation of Exhibit A by concluding that all of Douglas's payments were to be made to the Trust. He contends the payment provision, by its plain terms, required payment to

each of Kenneth's children, individually, upon Kenneth's death. According to Douglas, this payment provision was unaffected by Kenneth's subsequent Trust amendment removing Douglas as a beneficiary.

¶32 We agree with the circuit court's observation that Exhibit A, handwritten and prepared without the assistance of an attorney, reflects the parties "lack of sophistication and understanding" about the nature of the conveyance from the Trust. Nonetheless, these characteristics do not prevent us from giving effect to the parties' intentions in this case. See *Seitzinger v. Community Health Network*, 2004 WI 28, ¶22, 270 Wis. 2d 1, 676 N.W.2d 426. The "intention" that we search for is not the subjective intent of the drafter, but rather the scope and purpose of the document as manifested by the language used. *Chapman v. B.C. Ziegler & Co.*, 2013 WI App 127, ¶2, 351 Wis. 2d 123, 839 N.W.2d 425 (cited source omitted). "Finally and critically, we must interpret contracts to avoid absurd results." *Id.*

¶33 Douglas's argument understates the significance of both the grantor's identity and the nature of the transaction at issue. It is undisputed the Pokegama Lake residence belonged to the Trust at the time Kenneth and Douglas executed Exhibit A. Although Exhibit A did not indicate Kenneth was acting as trustee, the quit claim deed stated that the grantor was "Kenneth A. Schroeder, Trustee of the Schroeder Family Revocable Trust dated Feb 16, 1994." Exhibit A was not an agreement between Kenneth and Douglas as individuals; it was a conveyance from the Trust, executed by the trustee, to an individual who was also a beneficiary.

¶34 Based upon Exhibit A's plain language, and the nature of the transaction, we agree with the circuit court that Douglas's payments subsequent to

Kenneth's death were to be directed to the Trust. At the time the Trust and Douglas executed Exhibit A, all of Kenneth's property (including all property acquired after the Trust was settled) had been placed in the Trust. The record does not disclose that any property had been removed, and it is undisputed that the Trust had not been revoked. The Trust's purpose was to receive Kenneth and Betty's assets, which were to be held for the settlors' lifetimes and then upon their deaths were to be distributed to the beneficiaries.

¶35 In light of the Trust's purpose and the absence of any indication Kenneth wished to remove property from the Trust corpus or revoke the Trust, it makes little sense to interpret Exhibit A as evidencing an intent to have Douglas pay the named individuals for the Pokegama Lake residence, rather than to pay the Trust. Prior to Kenneth's death, it is undisputed that all amounts Douglas paid, whether to the Trust or to Kenneth directly, would have been placed in the Trust.¹⁴ These amounts would then have been distributed to the Trust beneficiaries upon Kenneth's death. Under Douglas's interpretation, payments made after Kenneth's death would be treated differently. According to Douglas, those payments would avoid the Trust altogether and go directly to his two sisters and to himself.

¶36 Exhibit A's language is inadequate to support this result. The document references Kenneth's "surviving heirs," only after which it enumerates the three particular names. But there would be no heirs upon Kenneth's death—at least not as that term is commonly understood, to refer to individuals taking property under a will or intestacy laws. *See, e.g.*, WIS. STAT. § 851.09. Indeed, by

¹⁴ The "Declaration of Trust Ownership," executed by Kenneth and Betty at the same time as the Trust's settling, stated that all their property, "whether presently owned or hereafter acquired," would be transferred to the Trust.

placing all their property in the Trust, Kenneth and Betty manifested an intention to avoid probate altogether. Exhibit A's payment provision is best understood as merely endorsing the Trust distribution plan in place at the time Exhibit A was executed. At that time, Elizabeth, Douglas and Pamela were all entitled to share equally in the Trust corpus upon Kenneth's death.

¶37 Even so, Douglas argues the second Trust amendment removing him as a Trust beneficiary had no effect upon Exhibit A's payment provision because Kenneth lacked the authority to modify the contract unilaterally. It is true that a party to a contract cannot alter its terms without the assent of the party or parties. *See Nelsen v. Farmers Mut. Auto. Ins. Co.*, 4 Wis. 2d 36, 55, 90 N.W.2d 123 (1958). However, Douglas's argument assumes the second amendment in fact accomplished a modification of the payment provision. This is not so. Properly understood, and as just explained, Exhibit A directed all of Douglas's payments to the Trust itself, to be distributed in accordance with the governing Trust document. The change in Trust beneficiaries that occurred subsequent to Exhibit A's signing did nothing to alter Exhibit A's critical terms.

¶38 Accordingly, we conclude the circuit court properly granted the Trust summary judgment on the issue of the proper interpretation of Exhibit A's payment provision. All of Douglas's payments that have or are to occur following Kenneth's death are payable to the Trust, which then must distribute those funds to the beneficiaries as provided for in the Trust's governing documents.

By the Court.—Judgment affirmed.

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

