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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

CONSERVE COMMUNITY, LLC, JULIE LEIZERMAN, PATRICIA A. LINS, LAWRENCE SUTTER, ALICE L. ACKERMAN, TIMOTHY P. ACKERMAN, JUELY K. BARTHOLOMEW, TIMOTHY J. BARTHOLOMEW, JOAN KRULL, KENNETH ALAN BUSSART, ROBERT COLME BOURGEOIS, SHARON KYLE BOURGEOIS, MARY HERMES, SARAH WEITZ KLAMMER, JOHN S. KLAMMER, THOMAS KORINEK, DAWN KORINEK, COLIN CRAWFORD, DEB CRAWFORD, MARY ELIZABETH BOSWELL, STEVE DANELSKI, MICHAEL MACY, MARGUERITE MACY, WILLIAM R. MEIER, JR., KATRINA MARIA BILLIN, JEFFREY LEE BILLIN, VERONICA FLORES, NICHOLAS FLORES, JEFF R. DOHL, ANGELA P. DOHL, CHARLES SAUTER and DENISE SAUTER, Plaintiffs, J.B. VAN HOLLEN, in his capacity as the Attorney General of the State of Wisconsin, Plaintiff-Intervenor-Counter-Defendant, v. CONSERVE SCHOOL TRUST, JAMES RINN and STEFAN ANDERSON, in his official capacity as Conserve School Headmaster, Defendants, JOHN F. CALHOUN, MICHAEL J. SULLIVAN, RONALD V. KAZMAR, CHRISTOPHER RODGERS and MICHAEL X. CRONIN, Defendants-Respondents,	Appeal No. 2009-AP-2134, On Appeal From Final Judgment Of The Circuit Court For Vilas County, Case No. 09-CV-54, Honorable Neal A. Nielsen, III, Presiding.

CONSERVE SCHOOL CORPORATION,

Defendant-
Cross-Claim-Defendant-
Respondent,

THE CULVER EDUCATIONAL FOUNDATION,

Defendant-Intervenor-
Cross-Claim-Plaintiff-
Counter-Claimant-
Appellant.

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The Respondents' Brief unintentionally brings the trial court's reversible errors into sharper focus: the trial court disregarded the settlor's intent, rendered language in the Trust Instrument superfluous, and permitted the Conserve Defendants to exceed the authority granted to them by the Trust Instrument. In a tacit admission that the trial court's reasoning is indefensible, the Conserve Defendants argue that "the trial court's ruling, not its reasoning" is at issue here. (Resp. Br. at 46.) Yet the Conserve Defendants offer no alternative reasoning that would justify the trial court's ruling. The trial court should therefore be reversed.

I. The Conserve Defendants disregard Mr. Lowenstine's intent.

A. The Conserve Defendants argue that the settlor's intent is irrelevant.

The interpretation of a trust instrument is governed by the settlor's intent, and the trustees' authority is limited by the settlor's intent as reflected in the language of the trust instrument. (App. Br. at 19-20.) The Conserve Defendants respond as follows:

> The judge acknowledged that Mr. Lowenstine may have had a "traditional" school in mind when he wrote the Trust Instrument, but correctly emphasized that the case turns on the language of the Trust Instrument, not what Mr. Lowenstine may have been thinking when he wrote it.

(Resp. Br. at 48 (emphasis added).)

Nothing could better crystallize the difference between Culver's position and that of the Conserve Defendants. The language of the Trust Instrument should be construed "to ascertain and give effect to the settlor's intent." *In re Estate*

of Bork, 145 Ill. App. 3d 920, 928, 496 N.E.2d 329, 334 (Ill. App. Ct. 1986). The "donor's subjective intent is determinative in interpreting a will or trust." *In re Fortwin Trust*, 57 Wis.2d 134, 138, 203 N.W.2d 711, 714 (Wis. 1973). Accordingly, what Mr. Lowenstine was "thinking when he wrote" the Trust Instrument is wholly determinative. The Conserve Defendants' interpretation of the Trust Instrument, which concededly disregards Mr. Lowenstine's intent, therefore cannot stand. The Conserve Defendants cite no authority for their novel argument that the settlor's intent is irrelevant to the interpretation of the Trust Instrument.

The Conserve Defendants also state that whether Mr. Lowenstine "had a 'traditional' school in mind when he wrote the Trust Instrument" is "a fact question the judge did not decide, and did not need to decide, because all parties and the judge himself agreed that the document is unambiguous in all material respects." (Resp. Br. at 48 and n.10.) To the contrary, the trial court needed to decide what Mr. Lowenstine intended, either solely from the language of the Trust Instrument (if it was unambiguous), or by considering extrinsic evidence (if the Trust Instrument was ambiguous). If Mr. Lowenstine's intent cannot be decided as a matter of law and presents a "fact question," then the trial court's award of summary judgment was erroneous, and this matter should be remanded to the trial court for further proceedings.

B. The Conserve Defendants offer no persuasive explanation for the language or structure of the Trust Instrument.

The Conserve Defendants argue that the Trust Instrument authorizes them to operate whatever type of school that they "would build and operate as they deemed best." (Resp. Br. at 45 (emphasis removed).) According to the Conserve Defendants' position, they would be permitted to operate the Conserve School as a pet-grooming school, so long as it was non-sectarian and tax-exempt. This position alone would render large swaths of the Trust Instrument superfluous. If the Trust Instrument imposed no requirements at all for the structure and format of the Conserve School, then at a minimum, Paragraphs B, K and M would be completely unnecessary. Mr. Lowenstine did, however, set forth a detailed alternate distribution plan, along with specific requirements in Paragraphs B and K for the format and structure of the Conserve School. Mr. Lowenstine likely understood the necessity of including these requirements. After all, the trustees have no incentive to build or operate the Conserve School in any particular way, but they have a compelling business incentive to avoid implementing the alternate distribution plan, which could result in the trustees' loss of control over Central Steel and Wire Company. (R.122, Ex. A at Art. VI, ¶¶M-N, A-App-277-82.)

The Conserve Defendants argue that "regular enrollment" is a "term of art," and that "[n]othing in Paragraph B(10) changes the IRS definition of 'regular enrollment.'" (Resp. Br. at 33-34.) But the term "regular

enrollment" does not appear in Section 170 of the Internal Revenue Code. (App. Br. at 35.) The Conserve Defendants respond that "regular enrollment" is similar enough to the phrase that actually appears in Section 170 (Resp. Br. at 33-34), which undermines their argument that Mr. Lowenstine understood that phrase to be a term of art with a precise legal meaning. If Mr. Lowenstine or his attorney intended to use a term of art, then that term — not a purported rough approximation of it — would appear in Paragraph B(10) precisely as it appears in the Internal Revenue Code.

The Conserve Defendants agree with Culver that Paragraph B(10) was not intended merely to track Section 170 of the Internal Revenue Code, and that "[t]here was no need" for Paragraph B(10) "to spell out the requirements" in Section 170. (Resp. Br. at 31-32.) This concession alone defeats the Conserve Defendants' argument. The Conserve Defendants also note that a separate provision of the Trust Instrument, Paragraph L, "specifically incorporates Section 170." (Resp. Br. at 31.) Paragraph L provides that the Conserve School Trust must "qualify as a charitable organization for purposes of section[] 170" and other provisions of the Internal Revenue Code. (R.122, Ex. A at Art. VI, ¶L, A-App-277.) Accordingly, the Conserve Defendants seem to suggest that Paragraph B(10)'s requirement of "regular enrollment" was a redundant, imprecise, and totally unnecessary reference to Section 170. This interpretation violates Illinois law. *See Harris Trust & Sav. Bank v. Donovan*, 145 Ill.2d 166, 172-73, 582 N.E.2d 120, 123 (Ill. 1991) ("If possible, the court should construe

the will or trust so that no language used by the testator is treated as surplusage or rendered void or insignificant").

Mr. Lowenstine included Paragraph B(10) as an instruction regarding the Conserve School's curriculum and student population. Paragraph L is an instruction regarding the school's tax-exempt status. Both are independent instructions, and both must be honored.[1]

The Conserve Defendants also argue that Paragraph B(10) addressed the "potential grade range of Conserve students . . . ." (Resp. Br. at 31.) That explanation does not address the meaning or function of the phrase "regular enrollment." Moreover, the semester-away program violates Paragraph B(10) by exceeding the grade range, which extends only "through high school." (R.122, Ex. A at Art. VI, ¶B(10), A-App-274.) Despite this restriction, the Conserve Defendants say that "post-graduate students will also be permitted to attend" the new program. (Resp. Br. at 29.)

The Conserve Defendants use Paragraph B to justify their expenditure of Mr. Lowenstine's fortune. Yet they claim not to be bound by that paragraph's restrictions because the word "may" appears in the paragraph's opening lines. (Resp. Br. at 30-31.) The trial court specifically disagreed with that argument. (R.117:99-101, A-App-247-49.) Also, in the single case cited by the Conserve Defendants on this issue, the court had to construe a certain provision to be

[1] The Conserve Defendants' reliance on Mr. Lowenstine's express citation to Section 170 in Paragraph L also defies logic. The Conserve Defendants are effectively arguing that although Mr. Lowenstine intended Section 170 to apply in Paragraph B(10), he nevertheless cited Section 170 not in Paragraph B(10) but in Paragraph L.

discretionary in order to give effect to all the language in a will. *See Myers v. Pink*, 42 Ill. App. 2d 230, 240, 191 N.E.2d 659, 664 (Ill. App. Ct. 1963). In this case, the opposite is true. The Conserve Defendants' interpretation, not Culver's, would render large portions of the Trust Instrument superfluous.

The Conserve Defendants take the position that Paragraph K is merely precatory. (Resp. Br. at 35.) While it may be true that the Conserve Defendants are not obligated to offer instruction to students who are enrolled in other schools, once they choose to do so, they are obligated to give effect to Mr. Lowenstine's intent, and only offer instruction to such students outside of regular school hours. (App. Br. at 31-32.)

Paragraph K specifies that students "enrolled in public or other private schools" may only attend the Conserve School for "tutorial instruction" after their "regular school hours." (R.122, Ex. A at Art. VI, ¶K, A-App-276-77.) The Conserve Defendants suggest that the semester-away students will not be "enrolled in public or other private schools" as contemplated by Paragraph K. (Resp. Br. at 37.) This is mere sophistry. The Conserve Defendants concede that the students will remain on the "rolls" of their sending schools. (Resp. Br. at 39.) They also explicitly acknowledge that each semester-away student is taking classes at the Conserve School for academic credit at his or her "sending school;" thus, each semester-away student will graduate from his or her "sending school," not from the Conserve School. (Resp. Br. at 9 ("The Trustees anticipate that credits from Conserve will transfer to sending schools"); *id*. at 35-36 (discussing

"sending schools").) Under these circumstances, it is disingenuous to suggest that the semester-away students are not "enrolled in public or other private schools" as contemplated by Paragraph K. Because the semester-away students are necessarily "enrolled in public or other private schools," the Conserve Defendants violate the Trust Instrument by providing those students with full-time classes.

Next, the Conserve Defendants assert that the semester-away students will have no "regular school hours" at their "sending schools" and, therefore, Paragraph K does not apply. (Resp. Br. at 35-37.) But the only reason why the students have no "regular school hours" at their sending schools is the Conserve Defendants' refusal to comply with the requirements in Paragraph K. In other words, the Conserve Defendants argue that they can free themselves of the limitations imposed in Paragraph K simply by ignoring them. This approach violates Mr. Lowenstine's intent and should be rejected by this Court.

C. The semester-away program violates the Trust Instrument.

The Conserve Defendants argue that, although the semester-away program is "primarily a semester school for high school juniors, sophomores, seniors, and post-graduate students will also be permitted to attend, and students will be permitted to attend for a full year." (Resp. Br. at 29.) Even if this assertion were accurate, it would not support the Conserve Defendants' position. The inclusion of post-graduate students violates Paragraph B(10), which limits the

Conserve School to providing education "through high school." (R.122, Ex. A at Art. VI, ¶B(10), A-App-274.)

Moreover, it is uncontested that the semester-away program is "semester based" (R.92, Ex. A, R-App-17), and that it is "a semester boarding school, primarily for 11th graders" (R.92, Ex. A, R-App-9). Even assuming that a rare student will receive a full year of instruction in the new program, and even further assuming that this would satisfy the Trust Instrument's requirements with respect to that individual student's instruction, the new program *as a whole* still would not comply with the Trust Instrument. Under Illinois law, compliance with a trust instrument's requirements in only a small percentage of circumstances is insufficient. In *N. Ill. Med. Ctr. v. Home State Bank of Crystal Lake*, 136 Ill. App. 3d 129, 146, 482 N.E.2d 1085, 1098 (Ill. App. Ct. 1985), the settlor intended to establish a hospital "which would provide hospital services to the citizenry of, and be principally identified with, the city of Crystal Lake." The Illinois Appellate Court held that a certain hospital did not "qualif[y] as an intended recipient under a reasonable construction of the trust provisions" because, among other things, "Crystal Lake residents make up only a small percentage of the total in-patient population" of that hospital. *Id.*, 136 Ill. App. 3d at 148, 482 N.E.2d at 1099-1100.

D. There is no inconsistency in Culver's interpretation of the Trust Instrument.

The Conserve Defendants attempt to manufacture an inconsistency in Culver's position. (Resp. Br. at 26-27.)

There is no inconsistency. Culver has consistently maintained that the Conserve School was intended to be a traditional school, much like Culver. *See N. Ill. Med. Ctr. v. Home State Bank of Crystal Lake*, 136 Ill. App. 3d 129, 146, 482 N.E.2d 1085, 1098 (Ill. App. Ct. 1985) (settlor's "overriding intent" may "be gleaned from his alternative bequest"). Culver explained that the semester-away program violates the standard set forth in Article VI, Paragraph B(10) of the Trust Instrument, which requires the Conserve School to be operated, if at all, as a school for the "regular enrollment of students beginning with the seventh grade, and extending, in the discretion of the trustees, through high school." (R.122, Ex. A at Art. VI, ¶B(10), A-App-274.) Such a school must therefore provide the "regular enrollment of students" *at least* a full "grade" of education; in other words, it must be a traditional school that provides education in full "grade" level increments. There is no inconsistency in this argument.

II. The Conserve Defendants offer no substantive response to Culver's alternative argument that the Trust Instrument is, at a minimum, ambiguous.

A. The trial court wrongly decided the issue of ambiguity.

The Conserve Defendants claim that Culver waived its alternative argument that the Trust Instrument is, at a minimum, ambiguous. (Resp. Br. at 55.) That claim is erroneous. Culver's counsel repeatedly raised the issue of ambiguity in the context of Culver's renewed motion to compel disclosure of the attorney files. (R.112:6, 10, 11, 16 and 17, A-App-135, 139, 140, 145 and 146.) Culver requested those files specifically because the trial court could

have found the Trust Instrument's language to be ambiguous. *Id*. When the trial court denied Culver's motion, it "reserve[d] the right to revisit the ruling in the event that [it] were to make a determination of ambiguity." (R.112:18, A-App-147.) The trial court even set a trial date in the event that the meaning of the Trust Instrument could not be decided on summary judgment. (R.81.) At the summary judgment hearing, the trial court expressly considered whether the Trust Instrument was ambiguous: "[W]e look then at the language itself, and determine, is there ambiguity in it. And I don't know that the Court does find ambiguity in this situation." (R.117:102-03, A-App-250-51.) This issue was squarely before the trial court and was not waived.

B. The trial court's reasoning should not be ignored.

The Conserve Defendants argue that "statements in an oral ruling do not make a document ambiguous." (Resp. Br. at 56.) This response is superficial. The trial court struggled with a difficult choice between two interpretations of the Trust Instrument, of which Culver's interpretation was at least a reasonable alternative. (App. Br. at 37-40.) The trial court should therefore have found that the Trust Instrument, at a minimum, did not unambiguously permit the Conserve Defendants to shut down the Conserve School and replace it with a semester-away program without implementing the alternate distribution plan. (*Id*. at 38.) This was an error in the trial court's ruling, and it justifies reversal.

III. The Conserve Defendants' speculation about Section 170 of the Internal Revenue Code underscores the error in the trial court's discovery rulings.

The Conserve Defendants speculate that, as used by Mr. Lowenstine, the phrase "regular enrollment" referred to Section 170 of the Internal Revenue Code and various revenue rulings. (Resp. Br. at 22-25, 28, 30-34.) They further argue that "when a trust instrument (particularly one drafted by counsel) uses a term of art, the law presumes that the settlor intended to adopt that term of art." (*Id*. at 33.) The Conserve Defendants, however, offer no basis for suggesting that Mr. Lowenstine or his attorney ever thought of the phrase "regular enrollment" as a term of art, or that either of them intended that phrase to refer to the Internal Revenue Code. The trial court denied Culver access to the files that might have shown what Mr. Lowenstine or his attorney intended by that phrase. Because the trial court's rulings and the Conserve Defendants' arguments rest upon speculation regarding the meaning of the phrase "regular enrollment," Culver should have been permitted to test that speculation through discovery. The trial court's discovery rulings therefore constituted an abuse of discretion.

IV. The alternate distribution plan has been triggered.

The Conserve Defendants claim that even if this Court concludes that the Trust Instrument prohibits a semester-away program, the alternate distribution plan has not been triggered, because the trustees have not "determine[d], in their discretion, that it is 'legally impossible or otherwise impractical'" to operate the school within the parameters of

the Trust Instrument. (Resp. Br. at 58.) On the contrary, the trustees have already closed the Conserve School due to a lack of money and therefore have determined and publicly acknowledged that it is impractical to operate the Conserve School as Mr. Lowenstine envisioned. Under the Conserve Defendants' argument, they could legally violate the terms of the Trust Instrument so long as they did not utter the word "impractical." Stated differently, this argument, which the trial court properly rejected (R.117:105-07, A-App-253-55), would permit a breach of trust to continue until the trustees publicly acknowledge their own breach.

The alternate distribution plan is not triggered by the utterance of magic words, but by the economic impracticability of operating the Conserve School in accordance with the requirements of the Trust Instrument. The economic impracticability is obvious. As the Conserve Defendants admit, if the economic downturn never occurred, the Conserve School would continue to exist as a traditional school (R.123, Ex. L at pp. 13-14, Ex. M at p. 9, Ex. N at p. 47), as Mr. Lowenstine intended. Because the primary gift to the Conserve School has failed, the alternate distribution plan is "automatically triggered." *In re Estate of Offerman*, 153 Ill. App. 3d 299, 303, 505 N.E.2d 413, 416 (Ill. App. Ct. 1987).

CONCLUSION

Culver respectfully requests that this Court award the relief requested in Culver's appellate brief and such further and additional relief as the Court deems just and proper under the circumstances.

Dated this __ day of December, 2009.

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CERTIFICATE OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this reply brief is _____ words.

Dated this __ day of December, 2009.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been filed with the paper copies of this brief with the court and served on all opposing parties.

Dated this ____ day of December, 2009.

_____
Sven W. Strutz

Subscribed and sworn to before me
this ___ day of December, 2009.

_____
Notary Public, State of Wisconsin
My commission expires: _____

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