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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

IN RE THE ESTATE OF LOIS M. NIES:

MARY NIES AND KAY NIES-TOREN,

Appellants,

v.

APPEAL NO.: 20-AP-1411
CIRCUIT COURT NO.:19-PR-34

PROBATE SERVICES, LLC, MARY KUDICK, CAROL METZGER, JEAN THORPE, MICHAEL NIES AND MARK NIES,

Respondents.

APPEAL FROM THE JULY 8, 2020 ORDER OF THE BROWN COUNTY CIRCUIT COURT, HONORABLE BEAU J. LIEGEOIS PRESIDING, CIRCUIT COURT CASE NO. 2019-PR-34

RESPONSE BRIEF AND APPENDIX OF RESPONDENT, PROBATE SERVICES, LLC/MARY KUDICK

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STATEMENT OF THE ISSUES

I. Are the Appellants entitled to an independent forensic investigation in the Estate of Lois M. Nies when they have failed to provide *any* credible evidence of misfeasance to the Court?

Trial Court Answer: No. (R. 52:p. 1-5; R-App. 101-105; R. 53:p. 1-2; R-App. 106-107; R. 60:p. 1-5; R-App. 108-112; R. 61:p. 1-3; R-App. 113-115).

II. Are the Appellants entitled to have the law firm representing the Personal Representative removed when they have failed to provide *any* credible evidence of a conflict of interest to the Court?

Trial Court Answer: No. (R. 52:p. 1-5; R-App. 101-105; R. 53:p. 1-2; R-App. 106-107; R. 60:p. 1-5; R-App. 108-112; R. 61:p. 1-3; R-App. 113-115).

STATEMENT ON ORAL ARGUMENT

This Respondent does not believe that oral argument is necessary in this appeal. The questions of fact and law, as well as the fact findings of the Circuit Court, are clearly supported by sufficient evidence in the record. The filed record should be sufficient to assist the Court of Appeals in rendering its decision in this regard.

STATEMENT ON PUBLICATION

This Respondent does not believe that this decision should be published. The decision of the Court of Appeals will apply a well-established rule of law to a recurring factual situation. Additionally, the issues will be decided on the basis of controlling precedent and no reason appears for questioning or qualifying the precedent. Wis. Stat. § 809.23(1)(b)(1) and (3).

STANDARD OF REVIEW

Section 879.61 of the Wisconsin Statutes proceedings are conducted solely for the purpose of discovery, whereby the Trial Court is required to determine whether any further relief will be granted. *In re Guardianship of Wisnewski*, 100 Wis. 2d 391, 395-396, 302 N.W.2d 79, 82 (Ct. App. 1981). This determination rests entirely upon the discretion of the Trial Court, and its determination will not be set aside on appeal unless there is a clear abuse of discretion. *In re Guardianship of Wisnewski*, 100 Wis. 2d at 396, 302 N.W.2d at 82. Moreover, the Court of Appeals will uphold a discretionary decision if it can be concluded *ab initio* from the record that there are facts that would support the Trial Court's decision had discretion been exercised on the basis of those facts. *Id.*

STATEMENT OF THE CASE

Nature of the Case

This is an appeal from a final order rendered on July 8, 2020, in which the Circuit Court for Brown County, Judge Beau G. Liegeois presiding, properly determined that the Appellants failed to provide any credible evidence of the need for an independent forensic investigation of certain transactions alleged by the Appellants to be improper. (R. 53:p. 1-2; R-App. 101-102. Specifically, the Trial Court found that "there are insufficient facts to justify the expenditure of funds to do independent investigation . . .[as the Appellants'] assertions relied heavily on speculation and assumptions, some of which were directly refuted with documentation." (R. 60:p. 2; R-App. 109). Additionally, the Trial Court found

that the Appellants failed to provide any credible evidence of a conflict of interest requiring the removal of counsel for the Personal Representative. (R. 60:p. 1-5; R-App. 108-112). The Trial Court held that there "are very kind of vague assertions, and anything that is there potentially I don't think comes close to there being a real conflict that prevents the personal representative from hiring the attorney that they want to represent them." (R. 82:p. 155). It is from this decision that the Appellants appealed.

Statement of the Facts

The Respondent, Probate Services, LLC/Mary Kudick, dispute the skewed facts presented by the Appellants. The following is a synopsis of undisputed facts. Because the facts presented by the Appellants are so disorganized and fragmented, additional facts will be discussed within the arguments below.

Lois Nies died on January 7, 2019 without a will. (R. 1:p.1-2). Her husband, Earl, predeceased her on October 15, 2017. (R. 82: p. 78). At the time of her death, Lois had six children, Kay Nies-Toren, Mary Nies, Jean Thorpe, Carol Metzger, Mark Nies and Michael Nies. (R. 3: p. 1). Mary lives in Idaho. (R. 82: p.114). Kay lives in Pennsylvania. (R. 82:p. 78). Michael lives in Green Bay and Mark lives in Fond du lac. (R. 1:p. 2). Carol and Jean also lives outside the State of Wisconsin. (R. 1:p. 2).

At the time of her death, Lois owned an investment account at Edward Jones with a balance of nearly four million dollars. (R. 82:p. 43). The account had a payable on death ("POD") provision that designated the six children as

beneficiaries of the account in equal shares. That money has been paid to the children consistent with POD provision. (Id.).

At the time of her death, Lois also had a safe deposit box containing cash in the amount of $1,050,100 and she owned farmland of slightly more than eighty acres.[1] (R. 18 p. 2; R.51). There was an offer to purchase the farmland for $643,500, which had been accepted before Lois's death with a closing date of no later than February 14, 2019. (R. 51: p. 1; R. 82: p. 34-35). Mary Kudick of Probate Services, LLC was named as Special Administrator for the sole purpose of completing the real estate transaction, which she did. (R. 82: p 72, 74). The sale proceeds were deposited into the estate checking account. (R. 18).

The cash was obtained by Mark and Michael who intended to distribute it in equal shares of $175,000 to each of the six children. (R. 51: p. 2; R. 82: p. 38, 111-113). There is a lot of space in Appellants' Brief occupied by a cloak and dagger tale of how the money was to be distributed. However, at the end of the day, the Personal Representative required that the money be produced, counted, and deposited in the estate checking account and it was. (R. 82:p. 39; R. 18: p. 2).

After Lois died, Mark and Michael contacted Attorney Peterson, who was then employed at One Law Group, S.C. to assist them with their mother's estate. Attorney Peterson arranged a phone conference with all of the children and prepared the documents necessary to open an informal administration, which

[1]The estate is comprised of the two assets just described and an Inventory was prepared by the Personal Representative disclosing an estate of $1,693,600. (R. 18:p.1).

would appoint Mark and Michael as the Personal Representatives. (R. 6:p. 2; R. 82 p. 63, 65). During the phone conference Mary and Kay objected to Mark and Michael being appointed as personal representatives. Attorney Peterson informed them a formal administration would be required and suggested that Mary Kudick of Probate Services, LLC be appointed as an independent Personal Representative. (R. 82:p. 21; R. 1:p. 1-2; R. 2:p. 1; R. 3:p. 1-2). All of the children agreed to her appointment and executed the appropriate waivers. (R. 4:p. 1; R. 5:p. 1; R. 11:p. 1; R. 12:p. 1; and R. 13: p. 1-3)

Additional facts will be included as needed to support the arguments that follow.

Procedural Posture

The Decedent, Lois M. Nies, passed on January 7, 2019 and did not have a Last Will and Testament. (R. 1:p. 1-2). As there were assets subject to probate, a Petition for Formal Administration was filed on January 24, 2019 by the Decedent's son, Michael J. Nies, which requested that Probate Services, LLC/Mary Kudick be appointed as Personal Representative of the estate. (R. 1:p. 1-2). A Consent to Serve also was filed on January 24, 2019 by Probate Services, LLC accepting the appointment to serve as Personal Representative in this matter. (R. 2:p. 1).

The Proof of Heirship disclosed six (6) living children of the Decedent: Michael J. Nies, Mark R. Nies, Carol J. Metzger, Jean M. Thorpe, Mary A. Nies, and Kay M. Nies-Toren. (R. 3:p. 1-2). Each of the six children signed Waiver,

Consent and Approval, which consented to the appointment of Probate Services, LLC as Personal Representative. (R. 4:p. 1; R. 5:p. 1; R. 11:p. 1; R. 12:p. 1; and R. 13: p. 1-3).[2] In light of the consent of all six children, the Brown County Register in Probate issued an Order for Formal Administration and Domiciliary Letters on March 4, 2019 to Probate Services, LLC. (R. 14:p. 1; R. 15:p. 1-2).

On May 1, 2019, an email/letter from Mary Nies and Kay Nies-Toren was sent to the Brown County Register in Probate requesting that the Court issue an order requiring the Personal Representative to investigate a list of alleged wrongdoings that largely occurred before the Decedent's death. (R. 16:p. 1-3; R. 17:p. 1-2). A response was filed by the Personal Representative, through her counsel, on May 9, 2019, that addressed Mary Nies and Kay Nies-Toren's concerns. (R. 19:p. 1-3). The Register in Probate responded on May 15, 2019 that she would not be doing anything further with regard to Mary Nies and Kay Nies-Toren's requests as their requests were outside the scope of her authority as Probate Services, LLC "appears to be acting appropriately and has met all statutory requirements. Anything that occurred prior to the death of the deceased, or any personal family disputes, are not at issue in this estate." (R. 20: p. 1).

The Inventory was filed on May 9, 2019 and reflected estate assets of $1,693,600.00. (R. 18:p. 1-3). Partials distributions were issued to each of the six

[2] While the Waiver, Consent and Approval were being reviewed and signed by the children, a Petition for Special Administration also was filed with the Register in Probate as there was an accepted Offer to Purchase that had been entered into prior to the Decedent's death that required the sale to be closed by February 14, 2019. (R. 8:p. 1-2). The Register in Probate issued an Order for Special Administration and Letters of Special Administration to Probate Services, LLC limited to completing the sale of the real estate. (R. 7:p. 1-2; R. 8:p. 1).

children in the amount of $175,000.00. Estate receipts for the partial distributions were received from four of the children, Jean M. Thorpe, Carol J. Metzger, Michael J. Nies, and Mark R. Nies. (R. 21: p. 1; R. 22:p. 1; R. 56:p. 1; R. 58:p. 1). To date, Mary Nies and Kay Nies-Toren have not presented their checks for payment and have not provided the Personal Representative with their estate receipts for the partial distributions.

Attorney Warren M. Wanezek entered an appearance on behalf of Mary Nies and Kay Nies-Toren on June 21, 2019. (R. 23:p.1; R. 24:p. 1). On November 7, 2019, Kay Nies-Toren and Mary Nies filed a Petition for Directions to Personal Representative that requested that the Court replace the Personal Representative's counsel due to an alleged conflict of interest and a failure to investigate various acts of alleged misconduct by the Attorney-in-Fact that occurred prior to the decedent's death. (R. p. 25:p. 1-2; R. 26:p. 1-5; R. 27:p. 1-5). Attorney Bruce R. Bachhuber entered an appearance on behalf of Probate Services, LLC on November 12, 2019. (R. 28:p. 1) A status conference was held regarding the aforementioned Petition on December 18, 2019. (R. 30:p. 1-2).[3]

A hearing before the Honorable Beau G. Liegeois was held on February 18, 2020 on the Petition for Directions to Personal Representative.[4] On March 16,

[3] A Request for Substitution of Judge was filed by Attorney Wanezek on December 18, 2019. (R. 31:p. 1; R. 32:p. 1-2; R. 33:p. 1-2).

[4] Irrelevant to this appeal, multiple correspondences between the parties were exchanged regarding the failure of the Appellants to serve the Notice of Hearing on the interested parties. (R. 34:p. 1; R. 35:p. 1-2; R. 36:p. 1-2). Ultimately, the interested parties were personally served and several interested parties requested to appear by telephone at the hearing. (R. 37:p. 1; R. 38:p. 1; R. 39:p. 1; R. 40:p. 1; R. 41:p. 1; R. 43:p. 1). Prior to the hearing, Attorney Steven J.

2020, Judge Liegeois filed his Decision which denied Mary Nies and Kay Nies-Toren's Petition for the removal of the Personal Representative's counsel and denied their request to order an independent investigation into various acts of fraud, waste and/or mismanagement by the individuals who were acting as Attorney-in-Fact. (R. 52:p. 1-5; R-App. 101-105; R. 53:p 1-2; R-App. 106-107). The Court's order specifically stated "The Personal Representative is ordered to complete the remaining work necessary to close the Estate." (R. 53:p. 2; R-App. 107).

Attorney Wanezek filed letters with the Court on March 17, 2020, April 3, 2020, and June 10, 2020 requesting that the Court revise its Decision. (R. 54:p. 1; R. 55:p. 1-2; R. 59:p. 1-3). On July 8, 2020, Judge Liegeois issued an Amended Decision and correspondence that addressed the concerns of Attorney Wanezek, but did not alter the Court's ruling in substance. (R. 60:p. 1-5; R-App. 108-112; R. 61:p. 1-3; R-App. 113-115).

Following the Court's Decision, the Personal Representative filed the documents necessary to conclude the estate which included the following: Closing Certificate for Fiduciaries, Final Estate Account, Petition for Final Judgment, Order and Notice for Hearing on Petition for Final Judgment, Estate Receipts for the full distributions to Michael J. Nies, Mark R. Nies, Jean M. Thorpe, and Carol J. Metzger, and Waiver, Consent and Approval for Michael J.

Krueger entered an appearance for Mark R. Nies and Michael J. Nies. (R. 42:p. 1). Attorney Bridget M. Erwin entered an appearance for Jean M. Thorpe. (R. 44:p. 1). Attorney Terence J. Bouressa entered an appearance for Carol Metzger. (R. 45:p. 1).

Nies, Mark Nies, Carol J. Metzger, and Jean M. Thorpe. (R. 58:p. 1; R, 64:p. 1-3; R. 65:p. 1-2; R. 66:p. 1-2; R. 67:p. 1-5; R. 73:p. 1-4; R. 74:p. 1-4). As Mary Nies and Kay Nies-Toren did not sign their Estate Receipts and Waiver, Consent and Approval, a final judgment hearing was required. The Order and Notice for Hearing on Petition for Final Judgment provided a final judgment hearing date of October 15, 2020. (R. 77:p. 1). In light of this appeal, the hearing on the final judgment has been adjourned pending the decision from this Court. As addressed below, the Trial Court's decision is appropriate and well supported by the record.

ARGUMENT

I. THE TRIAL COURT'S DECISION WAS WELL SUPPORTED BY THE EVIDENCE PRESENTED AND SHOULD BE AFFIRMED.

The Appellants erroneously claim that "none of [their] "Facts" . . . are in debate or contested with competing evidence." (App. Br. p. 19). However, the Appellants fail to acknowledge that the hearing on February 18, 2020 was an "initial showing" by the Appellants and the only witnesses to be called were the two Appellants. (R. 82:p. 25). Furthermore, the Appellants fail to disclose in their brief all of the facts that were presented and form the basis of the Trial Court's decision. As will be shown below, the Trial Court properly determined when reviewing all of the evidence presented, there was insufficient evidence produced by the Appellants to justify the Respondents presenting additional witnesses or to require additional investigation into the Estate of Lois M. Nies.

A. THE TRIAL COURT PROPERLY DETERMINED THAT THE APPELLANTS ARE NOT ENTITLED TO AN INDEPENDENT FORENSIC INVESTIGATION IN THE ESTATE OF LOIS M. NIES WHEN THEY HAVE FAILED TO PROVIDE ANY CREDIBLE EVIDENCE OF MISFEASANCE TO THE COURT.

The Appellants filed their Petition for Direction to the Personal Representative pursuant to section 879.61 of the Wisconsin Statutes. Section 879.61 of the Wisconsin Statutes states:

> [a]ny personal representative or any person interested who suspects that any other person has concealed, stolen, conveyed or disposed of property of the estate; or is indebted to the decedent; possesses, controls or has knowledge of concealed property of the decedent; possesses, controls or has knowledge of writings which contain evidence of or tend to disclose the right, title, interest or claim of the decedent to any property; or possesses, controls or has knowledge of any will of the decedent, may file a petition in the court so stating. The court upon, such notice as it directs, may order the other person to appear before the court or a circuit court commissioner for disclosure, may subpoena witnesses and compel the production of evidence, and may make any order in relation to the matter as is just and proper.

Wis. Stat. § 879.61. When reaching its determination, the Trial Court is required to examine the following factors: (1) The extent to which an opportunity for a quick and complete examination had been provided to prevent deception or surprise; (2) the potential abuse of discovery as a fishing expedition, delaying tactic or harassment device; and (3) the availability of alternative discovery methods. *In re Guardianship of Wisnewski*, 100 Wis. 2d at 396, 302 N.W.2d at 82. In this matter as addressed below, the Appellants failed to raise any issues that warranted a further investigation and the Trial Court properly dismissed their Petition.

The Trial Court correctly dismissed the Petition for Direction to Personal Representative by holding that the Appellants, Mary Nies and Kay Nies-Toren, are not entitled to an independent forensic investigation in the Estate of Lois M. Nies when they only provided "assertions [that] relied heavily on speculation and assumptions, some of which were directly refuted with documentation." (R. 60:p. 2; R-App. 109). The Appellants presented five alleged events that gave rise to their request for a forensic investigation under section 879.61 of the Wisconsin Statutes, which are namely: (1) the sale of farmland real estate, (2) depositing rent checks, (3) a life insurance policy, (4) the Will in the Estate of Earl Nies, and (5) the production of $1,050,100 in cash.

As evidenced below, the Appellants failed to provide any proof other than assumptions, hearsay and surmise as to any wrongdoing during the relevant time period as to any of these events. In many instances, documentation directly refutes the Appellants' assertions. More importantly, the Appellants do not claim that the Personal Representative failed to act appropriately; rather, they assert that the former Attorneys-in-Fact for Lois Nies allegedly failed to act appropriately *prior* to the death of Lois Nies. As their assertions fail to prove any additional property exists that should be included in the Estate of Lois Nies or additional property that should be investigated, the Trial Court was correct in its decision.

1. Farmland Real Estate

The Appellants claim that the former Attorneys-in-Fact, Michael Nies and Mark Nies, sold the farmland "real estate for below its value and planned a 'kick

back' from the auctioneer." (App. Br. p. 21). ***Prior to Lois Nies' death***, her Attorneys-in-Fact entered into a Vacant Land Listing Contract and Exclusive Auction Contract with Massart Auctioneers, Inc., which noted a listing price of $800,000 with a 10% buyer's fee added to the bid price. (R. 46:p. 1; R. 48:p. 1). If Massart Auctioneers, Inc. could find a buyer willing to pay the full list price, the purchase price would be $880,000 when the buyer's fee was added. (R. 46:p. 1;R. 82:p. 28). The auction was held on December 13, 2018 and resulted in an accepted offer of $643,500. (R. 18:p. 2; R. p. 47:p. 1). Following the auction, the Attorneys-in-Fact renegotiated the 10% buyer's commission down to 4%. (R. 82: p. 29-30). The sale was required to close by February 14, 2019. (R. 6:p. 1-2). As Lois Nies passed before the real estate sale could be closed, the now serving Personal Representative, Probate Services, LLC/Mary Kudick, closed upon the real estate transaction as Special Administrator of this estate. (R. 7:p. 1-2; R. 8:p. 1).

The Appellants raised issue with this transaction claiming that the property sold below market value. As evidence of this allegation, the Appellants submitted, without proper foundation, a retrospective appraisal report that they commissioned after Lois Nies' death that showed a market value of $923,000. (R. 49:p. 1). However, the fact the Appellants obtained an appraisal that is higher than the sale price is irrelevant to show that a "person has concealed, stolen, conveyed or disposed of property of the estate or is indebted to the decedent" as required by section 879.61 of the Wisconsin Statutes. Moreover, the Appellants testified that

when Probate Services, LLC/Mary Kudick was appointed as Special Administrator that Appellants knew there was an accepted Offer to Purchase that was going to close and they did not object to the land sale prior to closing. (R. 82:p. 72, 74). Rather, the Appellants waited two hundred and sixty-six days following closing to file their Petition for Directions to Personal Representative raising issue with the sale price. As the sale to a third party has concluded and the Appellants had notice and opportunity to raise issue with the sale price prior to its closing, they have waived this issue.

The Appellants also claimed that the Attorneys-In-Fact were to receive a 3% kick back on the sale. During the hearing, Kay Nies-Toren testify that she called Damien Massart and learned of the "kick back."[5] (R. 82:p. 29-30). However, Kay Nies-Toren admitted that the commission that was reported on the written closing statements was consistent with renegotiated written commission contract of 4% with Massart Auctioneering, Inc. (R. 47:p. 1). Furthermore, Kay Nies-Toren admitted that she had no evidence of the Attorneys-In-Fact taking the alleged 3% commission. (R. 82:p. 62). Thus, the Trial Court properly found that

> the cross-examination to refute petitioners' assertions conclusively demonstrates that petitioners do not have enough facts to assert that an investigation of the transaction is necessary. First, the contract was already in place with Lois passed away. And second, as to purported kickbacks from the transaction, it was demonstrated that Massart Auctioneers

[5] It should be noted that there were multiple objections to hearsay regarding this conversation. (R. 82:p. 30-31). The Trial Court stated "[t]here is a lot of hearsay that's being testified to. But at this point in the proceeding where Attorney Wanezek is just making an initial showing . . . I will give him some leeway to let the witness make her statement, and I will consider the hearsay that is involved but as to its weight." (R. 82:p. 31).

> had agreed to a commission reduction and there was no evidence that Michael or Mark actually received any money from the sale.

(R. 52:p. 4; R.-App. 104; R. 60:p. 4; R-App. 111).

2. Depositing Rent Checks

The Appellants also claim that prior to the death of the decedent "Mike and Mark did not put the decedent's money into the Edward Jones Account as they should have." (App Br. p. 22). However, the record is void of any proof to support this allegation. Kay Nies-Toren testified by hearsay that her brother Mark told her he got involved as a power of attorney because he noticed that some checks and cash were not being deposited. (R. 82:p. 44). She also testified that when one of her parents' properties at 1000 Lime Kiln Road sold in 2014, five years before Lois's death, the funds were not immediately deposited into her parents' Edward Jones account based upon a statement from her brother Mark. (R. 82:p. 81). Kay Nies-Toren admits that the only evidence that she has to support this allegation is "what Mark told [her]" and Mark also told her that the money is in the Edward Jones account now. (R. 82:p. 81). Thus, by the Appellants' own admission, this money has been deposited into the Edward Jones account and has been accounted for. She produced no evidence at all to suggest otherwise. The Trial Court properly found that further investigation was unnecessary.

3. Life Insurance Policy

The Appellants claim that a life insurance policy in the amount of $700,000

is "known to exist" that was issued insuring the life of Lois Nies' husband, Earl Nies. (App. Br. p. 14; R. 82: p. 44). The Appellants' proof of the existence of this policy is alleged statements made by Jean and Michael. (App. Br. p. 14). When Kay Nies-Toren was questioned as to whether she has any evidence that this policy exists, she responded "I don't have any evidence." (R 82:p. 58). Moreover, Kay Nies-Toren could not even be certain that the amount was $700,000. Specifically, she stated "I heard it on the phone and I wasn't sure if it was [$]700,000." (R. 82:p. 57). Kay Nies-Toren also testified that she did not have any evidence that would contradict that the life insurance policy that was paid into Edward Jones by American General Life Insurance Company following Earl Nies' death was $95,469.68, and not the alleged $700,000 that she believed she heard on the phone. (R. 82:p. 59-60). Most importantly, the policy was paid into the Edward Jones account, a non-probate asset, sometime after Earl died on October 15, 2017. The balance of that account was distributed according to its POD terms. A personal representative is not required to spend money of the estate investigating non-probate assets.

In light of the loose testimony provided by the Appellants, the Trial Court was well justified to conclude as follows:

> [i]n regard to the claim of the possibility of a $700,000 life insurance policy being in existence, this too was based exclusively on speculation and assumption. Petitioners had no real, tangible detail to offer about this claim, and the likelihood that they were confusing it with another insurance policy that did pay into the Edward Jones investment account is very high. Since there were no facts or documents offered

to support this claim, it is not necessary to investigate it.

(R. 52:p. 4; R.-App. 104; R. 60:p. 4; R-App. 111).

4. The Will in the Estate of Earl Nies

The Appellants also claim that Last Will and Testament of Earl A. Nies, who is the spouse of Lois Nies should be disclosed as part of the probate proceedings for Lois Nies. (App. Br. p. 5, 23). Specifically, the Appellants want to know "if Earl's estate was properly executed as it pertains to the Estate of Lois Nies." (App. Br. p. 5). Earl Nies passed away on October 15, 2017. (R. 82:p. 78). It is undisputed that Earl and Lois were married for a significant length of time as all the heirs of Lois' estate were a product of the marriage. The Appellants claim that because the Last Will & Testament of Earl Nies was allegedly withheld "there is no ability to discern what the Estate of Lois even owned." (App. Br. p. 23).

The Appellants' argument is without merit. First, the Personal Representative was appointed to represent the Estate of Lois Nies. Probate Services, LLC had the duty to "collect, inventory and possess all of the decedent's estate. . ." Wis. Stats. § 857.03(1). It is irrelevant what the Last Will and Testament of Earl A. Nies states. Second, since this is a longstanding marriage, it is likely that the majority of real estate and accounts were jointly held and would pass to Lois Nies based upon the joint tenancy and not based upon the Last Will & Testament. Third, with no legitimate reason for this inquiry, it becomes increasingly clear that this request is merely a fishing expedition to seek potential

means to continue harassment of the other heirs. The Trial Court properly placed no weight upon this request as it is without merit.

5. $1,050,100 Cash

The Appellants have alleged a so-called scheme to distribute $1,050,100 in cash equally amongst the children of Lois Nies outside of the probate proceedings. (App. Br. p. 11). While the Appellants' brief tells a suspense style thriller of the alleged plot, the end of the story illustrates the proper accounting of the funds. Kay Nies-Toren testified that she received a text message from her sister Jean regarding the plot to distribute the cash outside of probate over Easter weekend 2019. (R. 82:p. 36). After receiving the text message, Ms. Nies-Toren contacted the Personal Representative to advise her of this situation. (R. 82:p. 38). The Personal Representative reported that she was meeting Michael and Mark Nies at Denmark State Bank, where the estate checking account is held, to receive the funds and deposit them into the estate checking account. (R. 82:p. 83).

Following the receipt of the funds, Attorney Daniel Duke of Hanaway Ross, S.C. sent a letter to all the estate beneficiaries indicating that the source of the $1,050,100 in funds was originally cash in a home safe. (R. 19:p. 1-3). At the time that Earl and Lois Nies moved to an assisted living community and the home was vacated, the cash was removed, counted and placed in a safe deposit box.[6] (R.

[6] The Appellants have requested that they receive compensation under section 879.63 of the Wisconsin Statutes for reporting the alleged plot to the Personal Representative. (App. Br. 31). This request should be denied as it was not raised in the Trial Court. Additionally, to recover pursuant to this statute, a person may "bring an action in court in which the estate is being administered to reach the property and make it part of the estate." Wis. Stat. § 879.63. In this

19:p. 2). Due to the large amount of cash in the estate checking account, a partial distribution of $175,000 was provided to each of the heirs. (R. 19:p. 1-3).

During the testimony of Kay Nies-Toren, she testified that she was aware that her parents had given $25,000 in cash to each of ten grandchildren in 2014. (R. 82:p. 75). In total, Kay Nies-Toren was aware that $250,000 in cash was distributed equally to the grandchildren of Earl and Lois Nies and that Mark and Michael distributed the money. (R. 82:p. 76). Mary Nies also testified that she was aware that her parents had given $25,000 in cash to each grandchild. (R. 82:p. 148). Thus, the Appellants had knowledge of their parents' saving and holding large amounts of cash on hand.

The Trial Court was proper to conclude that "it was not unreasonable for their father to have kept $1.05 million in cash at his residence. There was evidence that he and Lois gave cash gifts to members of the family at one point." (R. 52:p. 3; R-App. 103;R. 60:p. 3; R-App. 110). Additionally, the Trial Court specifically noted that it "is not going to substitute its judgment for their father's financial judgment." Ultimately, the Trial Court concluded

> there are not enough facts being asserted to show that there is anything nefarious regarding distribution of the cash. *Kay Nies-Toren and Mary Nies* both testified about a purported scheme to personally pick up there [sic] share of the inherited cash. The first problem with this argument is that it was not their brothers Michael or Mark that contacted them about the purported plan, it was their sister. The second problem is that although that communication with their sister may have happened, it was not how the cash was actually

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matter, no action was brought by the Appellants and the recovery of the assets was accomplished by the Personal Representative, not by the Appellants.

> disbursed. All proper procedures seemed to have been followed after the discovery of the cash.

(R. 60:p. 3; R-App. 110). Thus, due to the lack of evidence presented by the Appellants, the Trial Court's determination was proper.

As related to all of the events presented by the Appellants, there is an absence of any factual support to show that any deception or concealment of the assets has occurred. What is clear from the evidence is there is a distrust amongst the Appellants and their brothers who were previously serving as the Attorneys-in-Fact for Lois Nies. An order for a forensic investigation would be an abuse of discovery based upon the evidence presented at hearing. It is challenging to imagine a legitimate basis to expend additional money in a search for phantom assets that might have been there based upon transactions that occurred years ago and while the Decedent was alive. It appears to the Respondents that further discovery would only be a fishing expedition, and a delaying tactic or harassment device. Most importantly, only two of the six heirs wish to expend funds performing additional discovery. As the additional expense to conduct discovery will be paid from the estate which will be split equally amongst the heirs, the additional discovery decreases the inheritance of the heirs not wishing to engage in the discovery.

If the Appellants wish to conduct additional discovery, there is nothing that prevents the Appellants from initiating their own action at their own expense to investigate these alleged wrongdoings by the Attorneys-in-Fact. Section

244.16(1)(d) of the Wisconsin Statutes provides that a descendant may petition the court for review of the agent's conduct. In addition, section 244.17 of the Wisconsin Statutes provides that an agent who violates that chapter is liable to the principal or the principal's successors in interest to restore the value of the principal's property to what it would have been had the violation not occurred, and reimbursement for attorney's fees and costs paid on the agent's behalf. For all the above referenced reasons, this Court should affirm the Trial Court's decision.

B. THE TRIAL COURT CORRECTLY DETERMINED THAT HANAWAY ROSS, S.C. SHOULD NOT BE REMOVED AS COUNSEL FOR THE PERSONAL REPRESENTATIVE.

The Appellants have requested that the Personal Representative's counsel, Hanaway Ross, S.C., be removed citing "alleged or potential conflicts of interest and the appearance of impropriety." (App. Br. p. 32). Unfortunately, the Appellants misconstrue the evidence in an attempt to create a conflict of interest that otherwise does not exist. When the evidence is reviewed objectively, there is no conflict of interest and the Personal Representative simply selected the counsel of its choosing.

Following Lois Nies' passing on January 7, 2019, Attorney Christina L. Peterson[7] was contacted by the previously serving Attorneys-in-Fact to advise of her death and informed of the pending real estate transaction concerning the farmland. As the farmland contract of sale was required by the contractual terms

[7] At the time of Lois Nies' death, Attorney Peterson was employed at One Law Group, S.C. in De Pere, Wisconsin. Attorney Peterson moved her practice to Hanaway Ross, S.C. in Green Bay, Wisconsin on January 19, 2019.

to close on or before February 14, 2019, a meeting was scheduled with all six of the heirs. (R. 6:p. 2; R. 82:p. 63, 65). As four of the heirs live out of state, the meeting was scheduled by telephone with the two Wisconsin heirs, Michael and Mark, attending in person. (R. 82:p. 63, 151). In an effort to reduce probate expenses, informal probate administration documents were drafted and provided to each of the heirs via email in advance of the meeting so they could be reviewed as part of the meeting. (R. 82:p. 20). The informal probate administration documents listed Michael and Mark Nies serving as co-Personal Representatives. (R. 82:p. 20).

The initial phone conference with the six heirs lasted approximately one hour and each of the heirs was given an opportunity to speak.[8] (R. 82:p. 65). During the conference, the deadline to close on the farmland transaction was discussed as well as the difference between formal and informal proceedings. (R. 82:p. 21). In light of the obvious disagreement between the heirs, Attorney Peterson recommended that an independent entity, Probate Services, LLC/Mary Kudick, be nominated as the Personal Representative. (R. 82: p. 21). Attorney Peterson then prepared formal probate administration pleadings, which were filed on January 24, 2019. (R. 1:p. 1-2; R. 2:p. 1; R. 3:p. 1-2). Attorney Peterson adamantly denies that she hung up on the Appellants at the conclusion of this conference. (R. 82:p. 21).

[8] The Appellants claimed that Attorney Peterson indicated that she represented all six of the heirs. (App. Br. p. 33). This is a blatant misrepresentation of the discussion. When questioned if the Estate is required to treat the six heirs equally, Attorney Peterson indicated that the Personal Representative treats all the heirs equally.

The Appellants raise three alleged conflicts regarding this representation: (1) One Law Group, S.C. represented Alex Nies, Michael Nies' son, (2) Attorney Peterson previously represented Earl and Lois Nies, and (3) the interrelationship between One Law Group, S.C. and Hanaway Ross, S.C. (App. Br. p. 32-34).

First, the Appellants learned of One Law Group, S.C. representation of Alex Nies in a criminal matter through CCAP and were unaware of the date of that representation. (R. 82:p. 144). It is undisputed that Attorney Peterson did not represent Alex Nies. Moreover, at the time of the representation of Alex Nies, Attorney Peterson was not a member of Hanaway Ross, S.C. (R. 82:p. 145). Other than learning on CCAP of Alex Nies being involved in a criminal matter with representation through a firm where Attorney Peterson previously worked, the Appellants could not provide any reason as to why this would raise a conflict of interest.

Second, the Appellants alleged there is a conflict of interest as Attorney Peterson previously represented their parents. (App. Br. p. 32). Kay Nies-Toren testified that she did not "know exactly when Christina Peterson got involved." (R. 82:p. 63). Her only knowledge of Attorney Peterson's involvement prior to Lois Nies' death was based upon recording information at the Register of Deed's Office related to property that was owned at the time of Earl Nies' death. (R. 82:p. 64). This hardly constitutes a conflict of interest as it is common place for people to use the same attorney that previously represented them in other transactions.

Lastly, the Appellants questioned the interrelationship between One Law Group, S.C. and Hanaway Ross, S.C. (App. Br. p. 34). The answer to this question is simple. There is no interrelationship between the two entities. These are two separate law firms, with separate legal entities in separate cities. As counsel for the Appellants is a long standing member of the State Bar of Wisconsin and the Brown County Bar, he should be well aware that these are two unrelated multiple attorney law firms in Green Bay area. This is a last ditch attempt to create an alleged conflict of interest.

Ultimately, the Trial Court was proper to hold the following:

> as to replacing Hanaway Ross Law Firm, I am going to deny that one. . . .I don't think that [the Appellants] established that they have standing or -- to get the Court to interfere in that relationship. There were conflicts of interest that were mentioned -- or potential alleged conflicts of interest. They are very kind of vague assertions, and anything that is there potentially I don't think comes close to there being a real conflict of interest that prevents the personal representative from hiring the attorney that they want to represent them.

(R. 82:p. 155). In addition to there being no legitimate conflict of interest, it appears that the two Appellants are attempting to control the Personal Representative's choice of counsel regardless of the interests of the majority of siblings who have not supported their effort. None of the remaining heirs have requested that the Personal Representative replace its counsel. The Appellants also have failed to provide any evidence that they have standing to demand replacement of the Personal Representative's counsel as the contract for legal services is between Probate Services, LLC and Hanaway Ross, S.C. As the

Appellants have failed to provide any basis to require that the Personal Representative find new counsel, the Trial Court was proper in its determination.

CONCLUSION

For the above-mentioned reasons, the Respondent, Probate Services, LLC/Mary Kudick, respectfully requests that this Court affirm the Trial Court's final order on the issues as identified above.

Dated this 25th day of November, 2020.

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CERTIFICATION PAGE

I certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) of the Wisconsin Statutes for a brief and appendix produced using the following font:

Monospace font: 10 characters per inch; double-spaced; 1.5 inch margin on the left side and 1 inch margins on the other 3 sides. The length of the brief is ____ pages.

X Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 5,836 words, excluding the certification page and appendix.

Dated this 25th day of November, 2020.

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

IN RE THE ESTATE OF LOIS M. NIES:

MARY NIES AND KAY NIES-TOREN,

Appellants,

v.

PROBATE SERVICES, LLC, MARY KUDICK, CAROL METZGER, JEAN THORPE, MICHAEL NIES AND MARK NIES,

Respondents.

APPEAL NO.: 20-AP-1411
CIRCUIT COURT NO.:19-PR-34

APPEAL FROM THE JULY 8, 2020 ORDER OF THE BROWN COUNTY CIRCUIT COURT, HONORABLE BEAU J. LIEGEOIS PRESIDING, CIRCUIT COURT CASE NO. 2019-PR-34

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(12)(f)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of section 809.19(12)(f) of the Wisconsin Statutes.

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 served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 25th day of November, 2020.

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