STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2021 AP 2138

IN RE THE ESTATE OF MERLE J. HARBERTS:

JEFFREY J. HARBERTS,

Appellant,

v.

THE ESTATE OF MERLE J. HARBERTS, by its personal representative, Steven R Cray,

PETER J. HARBERTS, and

GREGORY J. HARBERTS,

Respondents.

BRIEF OF RESPONDENTS PETER J. HARBERTS & GREGORY J. HARBERTS

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On appeal from the Circuit Court of Chippewa County,
the Hon. Benjamin J. Lane, Circuit Court Judge, presiding.

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STATEMENT OF THE ISSUES

1. Was the July 16, 2021, order timely appealed?

The Trial Court Answered: The trial court did not address this issue.

2. Did the Appellant forfeit his arguments by failing to preserve them at the trial level?

The Trial Court Answered: The trial court did not address this issue.

3. Alternatively, did the circuit court exceed its authority when it construed the will to allow a bidding process among the heirs to purchase the decedent's real properties?

The Trial Court Answered: "No."

4. Was the implementation of the bidding process contrary to the court's July 16, 2021, order?

The Trial Court Answered: "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Respondents do not request oral argument and do not recommend that the opinion be published.

STATEMENT OF THE CASE AND FACTS

The primary heirs to Merle Harbert's will are his three sons, Jeffrey Harberts, Gregory Harberts, and Peter Harberts.[1] Each son is entitled to one-third of the estate's residue. The main asset consists of ten real properties, two of them Merle's residences and eight of them rental properties. (113:6). In Article Five of his will,[2] Merle directed that all his real properties be sold, with one caveat. Provided there is no "disagreement" among the sons as to who would purchase "any particular parcel," the son could purchase the parcel at 90 percent of the appraised value. If more than one son wanted the same property, it would be sold "at a public or private sale." All sale proceeds would

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1 Each of the Harberts sons will be referred to by their first names.

2 In Article Five of his will Merle directed his personal representative to:

> …sell all of my real estate holdings in such parcels in configuration as my Personal Representative deems advisable at public or private sale, at their then fair market value as determined by appraisal as soon as reasonably practicable after my death. Any one or all of my sons shall have the first right to purchase any one or all of my real estate holdings at any time within six months after the issuance of letter of office at ninety percent of their fair market value as determined by appraisal. The exercise of this option shall be in writing with the customary prorations to be made. If more than one son desires to purchase any particular parcel or parcels, and there is a disagreement as to who will purchase and the disagreement is not resolved at the end of the six-month period referred to above, then the property shall be sold at a public or private sale and the proceeds of the sale shall be added to my estate.

(25:2-3).

go to the estate and the estate residue divided equally among the sons. (25:3).

On May 14, 2021, the personal representative commenced a special proceeding by filing a "Petition for Determination and Order." (119). The Petition noted that "more than one son desires to purchase some of the parcels." (119:3, 11-19). The Petition sought, in relevant part, an order from the circuit court addressing:

> 1. The procedure by which the Personal Representative shall sell the parcels that more than one of the decedent's sons wish to purchase under Article Five of the Will.
>
> 2. Permission to list the parcels that none of the decedent's sons wish to purchase with a realtor with a listing price equal to or greater than the appraised value.

(119:3-4, 6-8).

Jeffrey Harberts responded with a letter filed on June 7, 2021. (127). In that letter, Jeffrey proposed that the properties either be: 1) sold and the proceeds divided, or, 2) directly inherited by each of the three sons with specific properties going to each of them. Any difference in the value of the properties each son received could be made up with funds from the remainder of the estate. (127:2). Jeffrey then filed another letter on June 14, 2021, withdrawing this proposal. (131). In that letter, he complained that "[b]oth my brothers are clearly abusing article 5 against me." He" just" asked "that this division becomes fair and over." (131:1).

A hearing was held on June 15, 2021. To "resolve" the disagreement amongst the sons, the circuit court proposed a bidding process. As the circuit court explained:

> My thought would be is to allow the estate to accept an offer at that 90 percent of the appraised value for a specific property, that

> if multiple beneficiaries are interested, and if another beneficiary wants to outbid that individual, they may do that, but I don't want to play ping pong with these bids, again, like we did with the personal property, and so if there is a bidding war that occurs and if the bids result in a beneficiary asking for the exact same as the appraised value or more, then I think that the representatives should simply mark the real estate and sell it without offering it to either of the parties.
>
> So it either sells for the 90 percent or they have the option to outbid each other until we get to the appraised value of that specific parcel, and once we get to that specific value, it gets listed for a commercial sale.

(133:43). The court granted the estate's request that any bid be supported by proof of financing. The court also granted Gregory and Peter's request that each bidder get a credit reflective of their eventual inheritance. The bidder would only have to provide proof of financing sufficient to cover 75% of the bid. All of this would have to happen by the end of July, 2021, to comply with the mandatory six-month period in Article Five. (133:47)

At the hearing, Jeffrey made no objection to the court's proposal on the grounds that it violated the terms of the will. Rather, he asked questions about how the bidding process would work:

> JEFFREY HARBERTS: …. I said I could buy up to four, whatever, up to so many, okay, and so those properties get outbid. Can I turn around and start bidding on it, the property that I have, I didn't originally choose in this next choosing? So say I choose up to four, I get outbid on all of those four, can I then turn around and pick a fifth and a sixth and start bidding on those? Because I'm out the first four, now I'm going to start over on the fifth and the sixth, or is it a one-time shot?
>
> THE COURT: I'm not going to give you any individual advice on what you should do here, Jeff. If you think you're --
>
> JEFFREY HARBERTS: I'm just wondering if we got multiple properties and keep on, if we get – you know, if we get bidded out, we're still able to go after all eight properties, is what I'm asking.
>
> THE COURT: Well, the court has set a [133:48] deadline, and it needs to end at the end of July. ….

> JEFFREY HARBERTS: But you brought up bidding war. Okay, so they're going to go in a bidding war for the next six weeks, and I can get involved in any of the properties and bid on any of the properties over the next several weeks, right?
>
> THE COURT: That's correct, until we reach the 100 percent of appraised value, and at that time no one gets it, it gets sold by a listing agent.
>
> MS. HUNT: Can I clarify? So if it hits the appraised value, then it gets sold, or does it have to exceed the appraised value?
>
> THE COURT: At or above.
>
> MS. HUNT: At or above.
>
> THE COURT: Yes. What that does is it gives you the opportunity to show your interest in getting a specific property. ….what this does is it gives the representative the authority to receive your interest. [133:49] ….
>
> JEFFREY HARBERTS: Correct. All right. I got one question. If my brothers and I agree to sell all the properties, all ten properties and the eight rental properties without purchasing any of them, can we move forward with that immediately?

(133:48-51). The court entered an Order on July 16, 2021, stating, in relevant part:

> 9. Pursuant to the Will, Peter Harberts, Gregory Harberts, and Jeffrey Harberts have the first option to purchase the real estate at ninety percent (90%) of the appraised value. Proof of financing shall be provided by the beneficiary to the personal representative for the properties the beneficiary would like to purchase. If more than one beneficiary wants to purchase a property, they can bid against each other. If the bidding reaches the appraised value, the property shall be listed for sale with a realtor. Bidding shall be completed by July 31, 2021.
>
> 10. For any sale of real estate to a beneficiary, the beneficiary shall receive a credit against the purchase price for twenty-five percent (25%) of the value of the property, which will reduce the beneficiary's distribution from the estate.
>
> 11. **This is a final Order for purposes of appeal.**

(emphasis added) (140:3-4).

On July 30, 2021, Jeffrey filed a letter raising several issues

concerning how the personal representative was implementing the court's order, but again made no objection or argument that the court's order violated the provisions of the will. (141:1).

Once the bidding process was completed, the personal representative filed a second Petition, asking the court to approve "the proposed disposition of properties as set forth in Exhibit C." (142:3). Jeffrey filed written objections on August 4, 2021, and August 5, 2021, concerning how the personal representative had implemented the court's order. (146). A hearing was held on September 9, 2021. (156). At the hearing, Jeffrey objected to how the bidding process was being conducted but made no argument that the circuit court's July 16, 2021, order violated the terms of the will. The circuit court entered an order on September 13, 2021, approving the Estate's proposed disposition of the properties. (152).

It wasn't until October 27, 2021, that Jeffrey expressly challenged the circuit court's July 16, 2021, order as contrary to the provisions of the will in a "Motion for Relief from Orders." (159). For the first time, Jeffrey argued the July 16, 2021, order was contrary to Article Five. *Id.* On November 23, 2021, shortly before a scheduled hearing, Jeffrey withdrew the motion. (165). It was never decided.

ARGUMENT

I. THE PROBATE COURT'S JULY 16, 2021, ORDER WAS A FINAL ORDER FOR THE PURPOSES OF APPEAL AND THEREFORE THE NOTICE OF APPEAL FILED BY JEFFREY HARBERT ON DECEMBER 13, 2021, WAS UNTIMELY.

1. The Probate court's July 16, 2021, order was a final order for the purpose of appeal.

Jeffrey appeals from both the July 16, 2021, and the September 13, 2021, orders. The notice of appeal was filed on December 13, 2021. As the July 16, 2021, order was a final order, the deadline for filing the appeal was October 14, 2021. This Court therefore lacks jurisdiction to consider any of the issues Jeffrey raises on appeal which were addressed by the circuit court in the July 16, 2021, order.

A notice of appeal must be timely filed to give this court jurisdiction over the order on appeal. Wis. Stat. § 809.10(1)(e). In this case, the notice of appeal had to be filed within 90 days of the order. Wis. Stat. §808.04(1). The only question is whether the July 16, 2021, order was a final order. If it was, then this Court lacks jurisdiction. Whether an order is final presents a question of law reviewed *de novo. Sanders v. Estate of Sanders,* 2008 WI 63, ¶ 21, 310 Wis.2d 175, 750 N.W.2d 806.

An order is final for purposes of appeal when it satisfies each of the following conditions: (1) it has been entered by the circuit court, (2) it disposes of the entire matter in litigation as to one or more parties, and (3) it states on the face of the document that it is the final document for purposes of appeal. *Tyler v. RiverBank,* 2007 WI 33, ¶ 26, 299 Wis.2d 751, 728 N.W.2d 686. "The test of finality is not what later happened in the case but rather, whether the trial court

contemplated the document to be a final judgment or order at the time it was entered. This must be established by looking at the document itself, not to subsequent events." *Fredrick v. City of Janesville,* 92 Wis.2d 685, 688, 285 N.W.2d 655 (1979).

Probate is different than most litigation in that it consists of a series of special proceedings terminated by orders. *Sanders, at* ¶¶ 26-27. Each of these orders "disposes of an entire matter in litigation as to one or more of the parties" and are therefore appealable as a matter of right. *Id., at* ¶26 Because a single probate may include more than one special proceeding, it may also give rise to more than one appeal. *Id.*, at ¶28.

Finality also requires that the order dispose of the entire special proceeding. *Id.*, at ¶33. To dispose of the entire matter, the decision must "contain an explicit statement either dismissing the entire matter in litigation or adjudging the entire matter in litigation as to one or more parties." *Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶ 39, 299 Wis.2d 723, 728 N.W.2d 670.

The probate was commenced as an informal administration on June 30, 2020. (18; 111). Informal administration means "the administration of decedents' estates, testate and intestate, *without exercise of continuous supervision by the court*." (emphasis added). Wis. Stat. § 865.01. (133:18). During the course of informal administration, the personal representative may initiate a formal proceeding "either as to a particular issue or as to the entire subsequent administration of the estate,…." Wis. Stat. § 865.03. A formal proceeding "may combine various requests for relief if all the requests may be finally granted without delay." Wis. Stat. §

865.04(3). Upon the entry of an order in a formal proceeding, "informal administration shall resume except as otherwise ordered by the court." Wis. Stat. § 865.04(4).

To determine whether a probate order is final, the court must first determine the scope of the special proceeding. *Sanders,* at ¶29. Sometimes the scope of a special proceeding is clear-cut. *See e.g. Goldstein v. Goldstein,* 91 Wis. 2d 803, 810, 284 N.W.2d 88 1979) (which of two wills to admit); *Olson v. Dunbar,* 149 Wis.2d 213, 217, 440 N.W.2d 792 (Ct.App.1989) (validity of marital property agreement); *In re Boerner's Estate*, 46 Wis.2d 183, 188, 174 N.W.2d 457 (1970) (construction of the terms of the will); *Sanders,* at ¶¶ 23, 41 (treating property dispute and will contest as two separate special proceedings). In other circumstances, a final order may encompass multiple proceedings from a single dispute. Doubts over whether an order is final should be resolved in favor of jurisdiction. *Sanders*, at ¶33. In this case, the scope of the special proceeding is easily determined by the scope of the May 14, 2021, "Petition for Determination and Order."

The "Petition for Determination and Order" filed by the personal representative on May 14, 2021, combined "various requests for relief" that could be "granted without delay—including a request to construe Article Five. Wis. Stat. § 865.04(2); (119). The July 16, 2021, order, in turn, disposed of all the issues raised in the Petition. (140). See *Sanders*, at ¶28 (Order disposes of an entire matter in litigation as to one or more parties when issues raised in special proceeding are concluded); *In re Boerner's Estate*, at 188 (petition to construe will created special proceeding with appealable final order).

The July 16, 2021, order was intended to be final. No further hearings were scheduled. The circuit court expressly stated in the order that it was "a final Order for the purposes of appeal." (140:4). The court recognized that it may be called upon again to intervene in the case but only "*if* there's any other items that need to be addressed or disputes that need to be resolved.,…." (emphasis added) (133:55). The court would "always leave the door open for everything to come back again anyway, *but at this time I'm foreseeing that we should have it resolved* by the end of July for who's buying what and when." (emphasis added) (133:50). The court noted that the personal representative "has the authority" to move forward. *Id.*; see also Wis. Stat. § 865.10(1).[3]

Once the bidding process was completed, the personal representative filed a second Petition on July 30, 2021, asking the court to confirm the property sales. This latter Petition, based on events that arose after the July 16, 2021, order, represents a second special proceeding. The second Petition was neither anticipated nor viable at the time of the July 16 order. *Harder*, at ¶12 (an order may be final and appealable notwithstanding subsequent actions taken in the circuit court.); see also *Fredrick v. City of Janesville*, 92 Wis.2d 685, 688, 285 N.W.2d 655 (1979) ("[t]he test of finality is not what

3 Wis. Stat. § 865.10(1): "*The personal representative shall proceed with the settlement and distribution of the decedent's estate* and, except as provided by this chapter or required by interested persons*, shall do so without adjudication, order or direction of the court.* At any time, however, the personal representative may invoke the authority of the court to resolve questions concerning the estate or its administration. Subject to other obligations of administration, *an informally probated will is authority to administer and distribute the estate of the decedent according to its terms*."
(emphasis added).

later happened in the case but rather, whether the trial court contemplated the document to be a final judgment or order at the time it was entered. This must be established by looking at the document itself, not to subsequent events."). See also *Sanders*, at ¶28, citing Wis. Stat. § 865.04(2) a "determination of each issue and the completion of each proceeding required for the administration of a decedent's estate *is independent of any other issue or proceeding* involving the same estate." (emphasis added).

The July 16, 2021, order is final. The order was entered; it disposed of all the matters raised in the May 14, 2021, Petition; and its states on its face the order is a final document for the purposes of appeal.

2. The Court of Appeals lacks jurisdiction to decide the arguments in Sections II and III.A in Jeffrey's brief.

The July 16, 2021, and September 13, 2021, orders are each a final order from a separate special proceeding. A timely appeal from the September 13 order does not reach back to the issues decided in the July 16 order. *Sanders*, at ¶41, n. 5 (citing Wis. Stat. § 809.14(4)) (Appeal of a final order in a special proceeding only gives the court jurisdiction to review *that order and nonfinal orders in the same special proceeding*) (emphasis added). This Court therefore lacks jurisdiction over the July 16 order because the notice of appeal was filed more than 90 days from the date of the order.

The arguments Jeffrey makes in Sections II and III.A of his brief are clearly within the scope of the July 16, 2021, order and therefore beyond the Court's jurisdiction. Jeffrey argues in Sections II and III.A that the circuit court violated Article Five: 1) when it set up

a bidding process for the properties rather than ordering their public sale once it became clear the sons could not agree on who would buy which property; and, 2) when it required proof of financing sufficient to cover 75 percent of any bids for property under Article Five's 90 percent option (see Jeffrey's Brief-in-Chief, Sections II & III.A.; pp. ii, 10-20). The only way Jeffrey can prevail on these arguments is if the Court reverses the July 16, 2021, order. It was this order which set up the bidding process to "resolve" the sons' disagreement over who would buy the properties, and it was this order which imposed a proof of financing requirement. As the Court does not have jurisdiction to review the July 16, 2021, order, Jeffrey's arguments in sections II and III.A. cannot be addressed.

The arguments Jeffrey makes in sections III.B., III.C., and III.D. appear to be made in the alternative despite their inclusion under Section III.[4] They are directed at the implementation of the circuit court's July 16, 2021, order, and not the order itself. These arguments therefore pertain to the subject matter covered in the September 13, 2021, order. Respondents will address these arguments in Section IV of this brief.

4 The headnote for Section III reads: "***MERLE'S WILL DID NOT REQUIRE*** THAT HIS SONS PROVIDE PROOF OF FINANCING BEFORE BEING PERMITTED TO EXERCISE THEIR FIRST RIGHT TO PURCHASE, …." (emphasis added) (Jeffrey's Brief-in-Chief p. 10))

II. ALTERNATIVELY, JEFFREY FORFEITED THE ISSUES HE RAISES IN SECTIONS II AND III.A. OF HIS BRIEF BECAUSE HE FAILED TO PRESERVE THESE ARGUMENTS AT THE TRIAL LEVEL.

The "fundamental" forfeiture inquiry is whether a legal argument or theory was raised before the trial court, as opposed to being raised for the first time on appeal. *Schonscheck v. Paccar, Inc.,* 2003 WI App 79, ¶¶10-11, 261 Wis.2d 769, 661 N.W.2d 476. The forfeiture rule focuses on whether arguments have been preserved, not on whether general issues were raised before the trial court. *See, e.g.*, *State v. Rogers*, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App 1995) (forfeiture rule requires a party to "make all of their arguments to the trial court"). These arguments must inform the trial court of the "specific grounds on which [they are] based." *State v. Corey J.G.*, 215 Wis.2d 395, 405, 572 N.W.2d 845 (1998). Arguments not presented to the trial court "'will not be reviewed on appeal.'" *Vollmer v. Luety*, 156 Wis. 2d 1, 10, 456 N.W.2d 797 (1990) (citation omitted).[5]

The purpose of the "forfeiture" rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal. The forfeiture rule also gives both parties and the circuit court notice of the issue and a fair opportunity to address the objection; encourages attorneys to diligently prepare for and conduct trials; and prevents attorneys from "sandbagging" opposing counsel by failing to object to an error for

5 As the forfeiture rule is one of judicial administration, the court of appeals may choose to ignore it, typically when a case presents an important recurring issue. *See Olmsted v. Circuit Court for Dane Cnty.,* 2000 WI App 261, ¶ 12, 240 Wis.2d 197, 622 N.W.2d 29.

strategic reasons and later claiming that the error is grounds for reversal. *State v. Ndina*, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612. Whether a party properly preserved an assertion or argument is a question of law the Court reviews de novo. *State v. Mercado*, 2021 WI 2, ¶32, 395 Wis. 2d 296, 953 N.W.2d 337.

The arguments Jeffrey makes in Sections II. And III.A. of his brief are forfeited, as he never made them to the circuit court. Jeffrey did not challenge the court's ruling at the hearing on June 15, 2021. (See e.g. 133:47-51). He made no argument between the hearing on June 15, 2021, and the filing of the written Order on July 16, 2021. In his July 30, 2021, letter Jeffrey raised several issues concerning how the personal representative was implementing the court's order, but again made no objection or argument that the court's order violated the provisions of the will. (141:1). It was not until his August 5, 2021, letter to the circuit court that Jeffrey even came close to suggesting the terms of the will were being violated. His objection was not directed at the July 16, 2021, order, however, but the personal representative's (Steven Cray's) bidding form:

> The Cray Buy Back form for real estate is NOT ARTICLE 5 of the Will. (And Not a replacement to Article 5).
>
> The CRAY BUY BACK FORM is Not in the Will of Merle J. Harberts.
>
> ….
>
> The CRAY INVENTED BUY BACK FORM being used in my father's estate is not in the Merle J. Harbert's Will.
>
> The Cray Buy Back Form is Not in Article 5 and not a replacement to the will or Article 5.

(146:1). These one-sentence declarations do not develop anything resembling a legal argument, nor do they directly challenge the circuit

court's July 16, 2021, order. Even if they did, they are not timely. Any objection to the circuit court's decision should have been made at the June 15, 2021 hearing,[6] or in a timely motion for reconsideration. Jeffrey did neither. His challenge to the circuit court's construction of his father's will in Sections II and III.A of his Brief-in-Chief is forfeit.

III. ALTERNATIVELY, THE CIRCUIT COURT'S BIDDING PROPOSAL WITH A FINANCING REQUIREMENT WAS CONSISTENT WITH THE LANGUAGE OF THE WILL.

When it became clear Jeffrey, Peter and Gregory could not agree on which of them would purchase which rental properties (199:3, 11-19), the personal representative filed a "Petition for Determination and Order" asking the circuit court to determine "the procedure by which the Personal Representative shall sell the parcels that more than one of the decedent's sons wish to purchase under Article Five of the Will." (119:4).

At the hearing on the Petition, the circuit court acknowledged a "dispute here among individuals" as to the selling of these properties. The circuit court found, based on the language of the will, that Merle "understood" a dispute "may occur" between his sons as to which of the properties they would buy: "[s]o we need to *resolve* these issues before we get into liquidation." (133:19). The court also found the option to purchase in Article Five "ambiguous" on the mechanics of the sale. The will did not explain, for example, how the "costs for title

6 See *State v. Davis*, 66 Wis.2d 636, 658, 225 N.W.2d 505, 515 (1975) ("An objection is not timely if it is made after the time when the error could have been corrected."); *Wingad v. John Deere & Co.*, 187 Wis.2d 441, 458, 523 N.W.2d 274, 281 (Ct.App.1994) ("a party cannot wait until after receiving an unfavorable ruling to make an objection that could have been raised during the course of the proceeding.").

and evidence of title and recording fees, transfer fees" and other transactional costs would be paid. (133:36).

In order to "resolve[] the disagreement" between the sons Merle anticipated might occur "when he was making the will," the circuit court came up with a bidding process that would allow each of the sons to express interest in a certain property and place a bid on each of the properties they wanted to buy starting at 90 percent of appraised value. The bidding could go up to but could not equal or exceed the appraised value. If a bid equals or exceeds the appraised value, "it's over." The property would not be sold to any of the sons directly but listed with an agent. (133:43-44). The question of who would buy which property had to be "resolved" within six-months of the personal representative's appointment.

The circuit court also agreed with the Estate's request that any "bid" be accompanied by proof of financing. (133:44). The circuit court also granted Peter and Gregory's request that proof of financing need only reflect 75 percent of the bid in recognition of the fact that each of them would be receiving roughly one-third of the total value of the real estate. (133:39, 44). In its order, the circuit court stated:

> 9. Pursuant to the Will, Peter Harberts, Gregory Harberts, and Jeffrey Harberts have the first option to purchase the real estate at ninety percent (90%) of the appraised value. Proof of financing shall be provided by the beneficiary to the personal representative for the properties the beneficiary would like to purchase. If more than one beneficiary wants to purchase a property, they can bid against each other. If the bidding reaches the appraised value, the property shall be listed for sale with a realtor. Bidding shall be completed by July 31, 2021.
>
> 10. For any sale of real estate to a beneficiary, the beneficiary shall receive a credit against the purchase price for twenty-five percent (25%) of the value of the property, which will reduce the beneficiary's distribution from the estate.

(140:3-4).

Jeffrey now argues that both the bidding process and the required proof of financing are contrary to the terms of the will and the testator's intent. Because the sons could not agree on who would purchase which property at 90% of the appraised value, all the properties should have all been sold and the proceeds divided.

The disagreement boils down to the word "resolved." Article Five of the will states, in relevant part:

> If more than one son desires to purchase any particular parcel or parcels, and there is disagreement as to who will purchase *and the disagreement is not resolved at the end of the six-month period* referred to above, then the property shall be sold at a public or private sale and the proceeds of the sale shall be added to my estate.

(86:2-3). Jeffrey argues that "not resolved" means "the sons could not agree" on which parcels they would each purchase. (Jeffery's Brief-in-Chief, p. 15). The circuit court's interpretation, on the other hand, took into account Merle's "wishes" that his sons be given "the option to purchase [real properties] for less than [appraised value]. … (156:49). The sons would not be able to obtain properties at less than appraised value unless their disagreement was "resolved." The circuit court's bidding process was a means to "resolve" this disagreement.

The overriding objective of will construction is to ascertain the testator's intent. *Furmanski v. Furmanski,* 196 Wis.2d 210, 215, 538 N.W.2d 566 (Ct.App.1995). The court looks first to the language of the will as the best evidence of the testator's intent. If there is no ambiguity or inconsistency in the will's provisions, there is no need for further inquiry into the testator's intent. *Madison Gen. Hosp. Med. & Surgical Found., Inc. v. Volz*, 79 Wis. 2d 180, 187, 255 N.W.2d 483

(1977). If an ambiguity exists in the will's language, the court looks to the surrounding circumstances at the time of the will's execution. *Lohr v. Viney,* 174 Wis.2d 468, 480, 497 N.W.2d 730 (Ct.App.1993). Ambiguity exists where the will's language is subject to two or more reasonable interpretations, either on its face or as applied to the extrinsic facts to which it refers. *Lohr*, at 480-481. See also *Madison Gen. Hosp. Med. & Surgical Found., Inc. v. Volz*, 79 Wis.2d 180, 186, 255 N.W.2d 483, 486 (1977) ("[a] latent ambiguity exists where the language of the will, though clear on its face, is susceptible of more than one meaning when applied to the extrinsic facts to which it refers.). The "surrounding circumstances" include the amount and character of the testator's estate, family relationships, the testator's attitude toward his various next of kin and the testator's relationship with persons who claim to be objects of the testator's bounty. *See generally Breese v. Bennett,* 7 Wis.2d 422, 96 N.W.2d 712 (1959). If an ambiguity still persists, the court may resort to the rules of will construction and extrinsic evidence. *Lohr*, at 480.

The construction of a will involves a question of law decided de novo. *Furmanski v. Furmanski,* 196 Wis.2d 210, 214, 538 N.W.2d 566 (Ct.App.1995). Despite this de novo standard of review, the Court values the circuit court's analysis. *Id.* But see *Fohr v. Fohr*, 2007 WI App 149, ¶ 7, 302 Wis. 2d 510, 514, 735 N.W.2d 570, 572 ("[i]nterpretation of a will is generally a factual question, unless the facts surrounding the execution of the will are undisputed. (cite omitted)")

Article Five is ambiguous in that it only requires that any "disagreement" between the sons be "resolved" within the six-month

period. It doesn't specify *how* the disagreement is resolved. Jeffrey assumes it means solely by agreement between the sons. The language Merle used, however, does not exclude a resolution by other means—including court intervention—especially if the sons do not object to it.

The circuit court recognized from the language of the will that Merle wanted to give his sons an opportunity to purchase his properties at less than appraised value, but also anticipated there may be disagreement among them. (133:36). The court's solution was to allow a bidding process that "resolved" the disagreement among the sons prior to the six-month deadline. None of the sons objected to the circuit court's bidding proposal at the June 15, 2021, hearing and thus effectively consented to its use. The circuit court's solution is neither contrary to nor inconsistent with the language of the will.

Jeffrey also argues the circuit court's proof of financing requirement is "contrary to the terms of the will." (Jeffery's Brief-in-Chief, p. 20). He claims that the will only requires "an intention to exercise the right to purchase be made in writing." *Id.*, at p. 18. The will states, however, that: "[t]he *exercise* of this option shall be *in writing* with the *customary prorations* to be made." (86:2). The use of the word "exercise" goes beyond a mere expression of intent. By requiring his sons to "exercise" an option "in writing" that includes prorations, Merle suggests a more formal approach consistent with an arms-length transaction. An arms-length transaction will typically include proof of financing. The estate also had a duty to assure the sons were bidding in good faith and capable of finalizing the sale so as not to deprive one of the other sons from an opportunity to obtain the

property. In short, the financing requirement was not only consistent with Merle's more formalized approach, it provided integrity to the bidding process by assuring the option could, in fact, be exercised. (133:44).

In summary, the bidding process was a reasonable interpretation of the language in Article Five in that it "resolved" the disagreement among the sons. Likewise, proof of financing is not only a reasonable requirement from any seller, especially a fiduciary one, but in this case was also necessary to insure the integrity of the bidding process. The circuit court's July 16, 2021, and September 13, 2021, orders should be affirmed.

IV. JEFFREY'S ARGUMENT THAT THE COURT IMPROPERLY DISMISSED HIS BIDS; INCORRECTLY CALCULATED THE WINNER OF THE BIDDING; AND DEPRIVED HIM OF HIS "FAIR" SHARE, WERE EITHER FORFEITED, UNDEVELOPED ON APPEAL, OR HAVE NO LEGAL MERIT.

1. The circuit court did not "improperly" dismiss Jeffrey's bids.

a) The argument should be rejected as either forfeited or undeveloped on appeal.

Jeffrey's argument appears to be that the circuit court erred because it "ignored" his explanation for why he filled out the bidding form the way he did. Jeffrey does not explain how this constitutes grounds for reversal. He did not articulate a coherent legal argument to the circuit court and fails to do so on appeal. He does not apply facts to the law, cites no authority, and does not suggest a legal remedy. (133:47-48; 141:1-2; 145:1; 146:1-2; 156:9-12, 31-34, 42, 47-48; see also

Jeffrey's Brief-in-Chief, pp. 20-22.). This argument should be rejected as either forfeited, see *Rogers*, at 827; *Corey J.G.*, at 405; and *Vollmer*, at 10; or undeveloped on appeal. See *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (holding that this court may decline to address undeveloped arguments because we "cannot serve as both advocate and judge").

b) Alternatively, the argument is without merit.

Jeffrey did not have sufficient financing to make bids on all the properties, and the bids he made on the two properties he wanted were $1 over the appraised values. (156:13, 15-17, 22-23, 24-25, 29-30, 32). The circuit court repeatedly warned Jeffrey prior to the bidding that once a bid reached the appraised value, the property would be sold to the public. (133:43, 45, 48). Any deficiency in Jeffrey's bidding was entirely self-inflicted.

2. The circuit court did not improperly "calculate" the winning bid.

a) The argument should be rejected as either forfeited or undeveloped on appeal.

Jeffrey's argument appears to be that the circuit court erred because it didn't understand his explanation for why he filled out the "maximum bid" on the bidding form the way he did. How this differs from the previous argument is unclear. Again, Jeffrey does not explain how this constitutes grounds for reversal. He did not articulate a coherent legal argument to the circuit court and fails to do so on appeal. He does not apply facts to the law, cites no authority, and

does not suggest a legal remedy. (156:18-20, 23-24; see also Jeffrey's Brief-in-Chief, pp. 22-23.). This argument should also be rejected as either forfeited, see *Rogers*, at 827; *Corey J.G.*, at 405; and *Vollmer*, at 10, or undeveloped on appeal. See *Pettit*, at 647 (holding that this court may decline to address undeveloped arguments because we "cannot serve as both advocate and judge").

b) Alternatively, the argument is without merit.

Jeffrey's argument is without merit as it only illustrates his own confusion. Jeffrey apparently believed that his "maximum" bid of $275,001 on a property appraised at $275,000 and his "maximum" bid of $260,001 on a property appraised at $260,000 were not actual bids and therefore the circuit court erred in finding these bids exceeded the appraised value. Rather, Jeffrey apparently believed he was bidding in an undisclosed increment "above" whatever Greg or Peter were bidding *up to* this maximum amount. (156:18-20; 23-24; Jeffrey's Brief-in-Chief, pp. 23).

Nothing the circuit court said in the order or at the hearing allowed or even suggested Jeffrey could bid in such a manner. Jeffrey's method of bidding also fails because he never identified the increment. Was it $1 over whatever Gregory bid? $100? $1,000? Without identifying the increment, Jeffrey cannot say what the specific dollar amount of his bid was. He states in his brief, for example, that his bid was "just above" Gregory's bid of $261,200 on one property, and "just above" Gregory's bid of $242,100 on the other. (Jeffrey's Brief-in-Chief, p. 22). As Jeffrey's "maximum bid" exceeded the appraised value of the properties he wanted to buy, and was, in

any event, not a specific dollar amount, the circuit court correctly rejected Jeffrey's bids and ordered the property sold to the public.

3. Jeffrey's alleged lesser share of the will than his brothers does not violate the terms of the will because it was contemplated by the will.

a) The argument should be rejected as either forfeited or undeveloped on appeal.

Lastly, Jeffrey argues that somehow the court erred because he got less than his brothers, both of whom benefitted by purchasing property at 90 percent of appraised value. Again, Jeffrey does not explain how this constitutes grounds for reversal. He did not articulate a coherent legal argument to the circuit court and fails to do so on appeal. He does not apply facts to the law, cites no authority, and does not suggest a legal remedy. (141:1-2; 156:3-5; see also Jeffrey's Brief-in-Chief, pp. 24). This argument should also be rejected as either forfeited, see *Rogers*, at 827; *Corey J.G.*, at 405; and *Vollmer*, at 10, or undeveloped on appeal. See *Pettit*, at 647 (holding that this court may decline to address undeveloped arguments because we "cannot serve as both advocate and judge").

b) Alternatively, the argument is without merit.

Jeffrey's argument has no factual or legal basis. The will says nothing about equity among the sons in purchasing the property at less than appraised value. (25:2-4; 156:3-5). Under the terms of Merle's will, one son could have purchased all the properties at 90 percent of appraised value. (25:2-3; 156:4). No matter how "fairly" the properties were divided up for purchase among the sons, the

difference between the "90-percent" price and true market value would vary with each property. One son would always do better than the other two. Jeffrey's argument is meritless.

CONCLUSION

For the foregoing reasons, this Court should find it is without jurisdiction to decide any issues relating to the July 16, 2021, order, and affirm the September 13, 2021, order. Alternatively, it should affirm both orders.

Respectfully submitted this 31st day of March 2022.

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CERTIFICATION BY ATTORNEY

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 6,693 words.

Dated this 31st day of March 2022.

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