2022AP804

State of Wisconsin
COURT OF APPEALS
District III

IN RE THE ESTATE OF JOHN FERDINAND TOTZKE:

VICTORIA FINKE
Appellant,

v.

CARL TOTZKE, C. ANTHONY TOTZKE AND JEFFREY TOTZKE, PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN FERDINAND TOTZKE
Respondents.

BRIEF OF RESPONDENTS C. ANTHONY TOTZKE AND CARL TOTZKE

Appeal from Marathon County Circuit Court Case No. 19-IN-34
Honorable Scott M. Corbett, Presiding

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STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

It is believed that publication of the opinion in this case may be warranted as the case discusses the impact of a buy-sell agreement in a family farm limited liability company on the probate of one of a member farmer's wills.

In that regard, it is also believed oral argument will be beneficial to the court.

STATEMENT OF THE CASE

A. Procedural History

John Ferdinand Totzke (hereinafter "John") passed from this earth on February 9, 2019. He was a lifelong farmer. He farmed with his brother, Carl Totzke (hereinafter "Carl") and later in life with his nephew, C. Anthony Totzke (hereinafter "Anthony"). His farm experience goes back to when he and Carl farmed with his parents. Indeed, his parents transferred the family farm to John and Carl on terms that are not dissimilar (in the sense the terms provided for a smooth transition to a new generation) to the terms that bring this controversy before the Court. (R. 83, Grunewald Affidavit, ¶ 2, Jeffrey Michael Totzke Deposition, page 84, line 15 to page 90, page 23)

Procedurally, John's estate was started as an informal probate by the filing of an Application for an Informal Probate and other common documents that initiate an informal probate on March 22, 2019. (R. 1-12) As championed by the Appellant, Victoria Finke (hereinafter "Finke"), there were a number of orders extending the time to file an inventory in the estate. (R. 19, 23, 27, 32, 36) The first inventory was filed on July 21, 2020. (R. 37) After that inventory was filed, Finke demanded formal proceedings and objected to the inventory. (R. 39, 40) An amended inventory was filed on October 26, 2020. (R. 47)

Anthony and Carl formally became involved in John's estate upon the filing of a notice of retainer by their counsel on March 2, 2021. (R. 63).

An issue developed concerning the proper inventory value (in particular, how that inventory value would be determined) of John's interest in Totzke Land LLC and an order was entered scheduling the issue for summary judgment. (R. 78) On July 30, 2021, Anthony and Carl filed a motion for summary judgment as to the inventory value of Totzke Land LLC (R. 80) along with a brief and supporting affidavits. (R. 81, 82, 83) Finke opposed that motion for summary judgment by filing a brief on August 20, 2021 (R. 98) along with supporting documentation. (R. 99-102) Anthony and Carl filed a rebuttal brief in support of their motion for summary judgment on September 10, 2021. (R. 111)

There was a hearing before the trial court on September 23, 2021. Anthony and Carl's motion for summary judgment was discussed, along with a motion to remove the personal representative[1]. (R. 115) A number of issues were discussed at the September 23, 2021, hearing including scheduling Anthony and Carl's motion for summary judgment for oral argument on December 13, 2021. (R. 116)

Oral arguments were, in fact, heard on December 13, 2021, on Anthony and Carl's motion for summary judgment. (R. 116) The trial court orally granted summary judgment at a hearing held on January 26, 2022. (R. 119)

A written order granting Anthony and Carl's summary judgment as to the proper inventory value of John's interest in Totzke Land LLC was entered by the trial court on April 11, 2022. (R. 128) A notice of entry that order was filed on April 12, 2022. (R. 129)

From that order, Finke appeals. (R. 130)

[1] The motion filed by Finke to remove the personal representative filed on July 30, 2021 (R. 88) has not yet been decided.

B. Statement of the Facts

As noted above, John passed from this earth on February 9, 2019. One of the assets that John owned upon his passing was a fifty percent interest in Totzke Land LLC. (R. 83, Grunewald Affidavit, ¶ 2; Jeffrey Michael Totzke Deposition, page 34, lines 13-15; Affidavit of Carl Totzke, ¶ 2) Totzke Land LLC and Totzke Bros. LLC are entities formed by Carl and John as to their farming operation. Totzke Land LLC owns real estate in the farming operation and Totzke Bros. LLC is the operating entity. Totzke Bros. LLC pays Totzke Land LLC rent for its real estate and that rent is paid on the mortgage debt. (R. 83, Grunewald Affidavit, ¶ 2; Jeffrey Michael Totzke Deposition, page 77, line 3-19; page 83, line 23 to page 84, line 17)

Previously filed inventories have valued John's interest in Totzke Land LLC at $747,434.39 based upon an appraisal and the company's debt. (R. 37 and 48) The previously filed inventories did not take into account the operating agreement of Totzke Land LLC.

John and Carl entered into an operating agreement for Totzke Land LLC on July 1, 2009. That operating agreement contains what is commonly referred to as a "buy-sell agreement." The buy-sell agreement provides, upon the happening of certain events including the death of a member, for the transfer of a member's interest back to that limited liability company. In this regard the operating agreement of Totzke Land LLC provides in its pertinent parts as follows:

> Section 7.1. GENERAL RESTRICTIONS ON TRANSFERS. A Member may not…bequeath…or otherwise…divest, dispose of, or transfer ownership or control of all, any part, or any interest in, whether voluntarily or by operation of law, either inter vivos or upon death ("Transfer") the Member's Units of Ownership to any person (a "Transferee") other than the Company or another Member, except in accordance with the terms of this Operating Agreement. Any Transfer, attempted Transfer, or purported Transfer in Violation of the terms and conditions of this Operating Agreement shall be null and void.
>
> ***

> Section 7.4. INVOLUNTARY TRANSFER. An Involuntary Transfer to a person other than the Company or another Member will be effective only after the applicable provisions of this Section 8.4 [sic.] have been complied with. The…estate…to whom Units of Ownership are Transferred by Involuntary Transfer (the "Involuntary Transferee") will have only the rights provided in this Section 7.4. Involuntary Transfer means any Transfer of Units of Ownership…including a Transfer resulting from the dissociation of a Member…including…(1) a Transfer on death…
>
> ***
>
> (a) NOTICE TO COMPANY. The Transferor and the Involuntary Transferee shall each immediately deliver a written notice to the Company describing the event giving rise to the Involuntary Transfer; the date on which the event occurred; the reason or reasons for the Involuntary Transfer; the name, address, and capacity of the Involuntary Transferee; and the Units of Ownership involved (a "Notice of Involuntary Transfer"). The Notice of Involuntary Transfer shall constitute an offer (the "Offer") to sell the Units of Ownership identified in the Notice for an equal amount equal to the book value of the Units of Ownership, calculated as of the last day of the calendar month immediately preceding the date of the Involuntary Transfer, which shall be payable pursuant to the terms of payment set forth in the applicable provisions of Section 7.9 below. Book value shall be the net equity of the Company, as reflected in the accounting, and not the tax, records of the Company, allocated proportionately among the Units of Ownership at the effective time of determination.
>
> (b) OPTION TO PURCHASE. Within the 90-day period commencing on the date of the receipt of the Notice of Involuntary Transfer, the Company shall either reject or accept the Offer by written notice to the Involuntary Transferee during the 90-day Period.
>
> (R. 83, Grunewald Affidavit, ¶ 2; John Michael Totzke Deposition, Exhibit 11, Sections 7.1, 7.4, and 7.9; R-APP A 111-112)

John's estate has complied with the mechanics of this buy-sell agreement. The estate gave a "Notice of Involuntary Transfer" on March 2, 2021. (R. 64, R. 83, Grunewald Affidavit, ¶ 2; Jeffrey Michael Totzke Deposition, page 80, line 15 to page 81, line 5, Exhibit 14, R-APP A

111-112) Totzke Land LLC held a members meeting on March 10, 2021, which was attended by the personal representative (by Zoom), the estate's attorneys (by Zoom), Carl, Anthony, and Carl and Anthony's attorney. Totzke Land LLC voted to accept the offer made by the "Notice of Involuntary Transfer" dated March 2, 2021. (R. 82, Carl Totzke Affidavit, ¶¶ 3 and 4) Through counsel, Totzke Land LLC, at the direction of Carl, provided notice of the acceptance of the offer to the estate by a letter dated March 12, 2021. (R. 82, Carl Totzke Affidavit, ¶ 5, Exhibit 16)

The amount to be paid by Totzke Land LLC for John's interest in Totzke Land LLC, pursuant to the operating agreement is: "...an amount equal to the book value of the units of ownership, calculated as of the last day of the calendar month immediately preceding the date of the involuntary transfer..." Book value is defined by the operating agreement as the "...net equity of the company as reflected in the accounting, and not the tax, records of the company" (R. 83, Grunewald Affidavit, ¶ 2; Jeffrey Michael Totzke Deposition, Exhibit 11, section 7.4, R-APP A 112) The date of the involuntary transfer is the date of John's passing, February 9, 2019, and as a result, the price for the transfer is the book value as of January 31, 2019. At the time this appeal was filed, the book value of Totzke Land LLC had not been determined[2].

These facts are uncontested.

In its ruling, the trial court touched on a perceived ambiguity in the operating agreement. That issue is discussed further below. The trial court determined that John's death created an involuntary transfer as defined in Section 7.4 of the operating agreement and the estate provided

[2] Anthony and Carl, in filing their motion for summary judgment to determine the proper value of Totzke Land LLC, in John's estate, in parlance of perhaps an earlier generation, asked the trial court for "instructions." The trial court, in its oral decision of January 26, 2022, praised the parties for asking for instructions and, as the trial court stated: "It is often said it is easier to ask for forgiveness than for permission, but this is a case where people ask for permission first...I, again, wish to commend all parties that have participated in this for bringing this matter for a measured decision." (R. 119, page 8, lines 8-18).

a notice of an involuntary transfer, the offer of which Totzke Land LLC accepted. The trial court determined the proper inventory value was the book value of Totzke Land LLC pursuant to Section 7.4 (a) of the operating agreement. It was further ordered that the book value be calculated and that the transaction close within 60 days of the date of the entry of the judgment on this issue.[3] The trial court ordered that closing and payment method was to occur between the estate and Totzke Land LLC in accordance with Section 7.8 and 7.9 of the operating agreement. (R. 119, page 3, line 25 through page 4, line 22)[4]

ARGUMENT

I. INTRODUCTION.

In her brief, Finke brings forth three arguments:

- That the unobjected to amended inventory establish the value of John's interest in Totzke Land LLC;
- That her perceived "bait and switch" on inventory values, is not proper probate process; and
- That it was error for the trial court to award summary judgment because of disputed issues of material fact on value.

The first two arguments fold upon one another as, except for the "bait and switch" sound bite, both arguments argue the unobjected inventory value of John's interest in Totzke Land LLC controls. As the trial court found and as is shown below, that statement is contrary to the law.

Finke also argues that summary judgment was improper. Standards for summary judgment are discussed below. Her refined argument is that summary judgment was improper

[3] This has occurred, albeit after the initiation of this appeal.

[4] In the trial court, Finke championed the use of an alternate procedure in the operating agreement, namely the disassociation of a member, as provided for in Section 8 of the operating agreement. Finke does not continue that argument on appeal, except, in a sense, as to her argument concerning ambiguity.

solely because the trial court found an ambiguity in the operating agreement. Fundamentally, the finding of an ambiguity does not, in and of itself, correlate to summary judgment being improper. In addition, Anthony and Carl do not agree with the trial court, that the terms of the operating agreement are ambiguous. These points are discussed below.

II. THE VALUE OF TOTZKE LAND LLC SET FORTH IN THE AMENDED INVENTORY IS NOT CONCLUSIVE AND DOES NOT PREVENT THE ESTATE FROM FILING A NEW INVENTORY VALUING THE DECEDENT'S INTEREST IN TOTZKE LAND LLC AT ITS BOOK VALUE.

A. No authority supports Finke's argument that the unobjected to inventories are conclusive as to the value of John's interest in Totzke Land LLC.

Finke's fundamental argument is that the amended inventory filed by the personal representative on October 26, 2020, (R. 48) is controlling as to the value of John's interest in Totzke Land LLC. The argument is, apparently, that since Finke was the only person to object to the initial inventory, that no one else can object to the inventory and that the value of Totzke Land LLC cannot be corrected in another amended inventory. Finke cites no authority for such a proposition.

Indeed, there cannot be authority for such a proposition. An inventory is not conclusive as to the assets of the estate or their value. *Cameron v. Cameron*, 15 Wis. 1, 6, 82 Am. Dec. 652 (1862); *In re Langenbach's Estate*, 202 Wis. 336, 230 N.W. 141, 142 (1930). An inventory's value is not binding on third parties or the personal representative. 31 Am. Jur. 2d *Executors and Administrators* § 469.

The Court, and opposing counsel for that matter, should not be burdened with having to guess as to what legal theory Finke is relying on in arguing that the value of the decedent's interest in Totzke Land LLC has been established by the inventories filed. Finke does not put

forth any authority supporting her argument and her argument is not supported by the possible remedies discussed below. The short answer as to why Finke does not put forth any authority supporting her argument is that authority does not exist.

Finke's argument is not supported by the doctrines of claim preclusion or issue preclusion as each require that a judgment be entered in a previous suit. *Kruckenberg v. Harvey*, 2005 Wis. 43, ¶ 21, 279 Wis. 2d 520, 531, 694 N.W.2d 879, 885 (one of the elements of claim preclusion is that prior litigation resulting in a final judgment); *Kenyon v. Kenyon*, 2004 Wis. 147, ¶ 22, 277 Wis. 2d 47, 65; 690 N.W.2d 251, 259 (issue preclusion requires an issue of law or fact that has actually been litigated and decided in a prior action).

Neither are her arguments supported by a claim of promissory estoppel. A claim of promissory estoppel has the following elements:

> 1. Whether the promise is one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee;
>
> 2. Whether the promise induced such action or forbearance; and
>
> 3. Whether a justice can be avoided only by enforcement of the promise.
>
> *Bicknese, M.D. v. Sutula*, 260 Wis. 2d 713, 722, 660 N.W.2d 289, 294 (2003)

None of these elements are present in this case or in Finke's factual presentation or argument.

The same fate belies a claim of equitable estoppel which requires the following elements:

> 1. Action or non-action;
>
> 2. On the part of one against whom estoppel is asserted;
>
> 3. Which induces reasonable reliance thereon by the other, either an action or non-action, and

4. Which is to his or her detriment.

> *Village of Hobart v. Brown County*, 2005 Wis. 78, ¶ 36, 281 Wis. 2d 628, 647, 698 N.W.2d 83, 92.

Finke does not present facts or argument that satisfy these elements. Fundamentally, an inventory does not work an estoppel on the question of value. 31 Am. Jur. 2d *Executors and Administrators* § 469.

Another potential theory that Finke could be relying on is that of waiver. Waiver is the intentional relinquishment of a right either expressly or by conduct inconsistent with the intent to enforce that right. *Wegner v. West Bend Mutual Insurance Company*, 207 Wis. App. 18, ¶ 25, 298 Wis. 2d 420, 436, 728 N.W.2d 30, 38. None of the facts stated or imagined by Finke fit the waiver argument.

As stated by one authority:

> The inventory returned by the personal representative is prima facie evidence as to the items included therein and their respective values, and as to the total of the estate comprised within the jurisdiction. However, it is not conclusive as to these matters, and may always be explained or shown to be incorrect where there has been no judicial determination of the correctness of the inventory and appraisal. Thus, the mere inventorying of an asset has no effect upon an adverse claimant, and the mere inventorying of a questionable asset upon an inventory is not binding on adverse claimants, nor is the failure to list an asset an obstacle to bringing an action to claim that asset.
>
> 34 C.J.S. *Executors and Administrators* § 204 *(footnotes omitted)*

Finke's arguments in this regard are specious and should be dismissed by the Court out of hand.

B. <u>There is no need for Carl and Anthony to "seasonably" object to the prior filed inventories.</u>

In connection with her argument that the prior unobjected to inventories control, is her argument is that Carl and Anthony needed to "seasonably" file an objection to the prior filed inventories.

It is important to review the law that Finke puts forth for her argument as to "seasonably" objecting to an inventory. She cites the case of *In Re the Estate of Astrach*, 25 Wis. 2d 331, 130 N.W.2d 878 (1964).[5] In *Astrach*, the court was faced with a dramatically different procedural posture than the case at bar. In that case, the lack of an objection to an account in an estate was the death knell to an appeal of the final judgment in that matter. This is fundamental tenet of appellate procedure. *Shadley v. Lloyds of London*, 2009 WI App 165, ¶ 25, 322 Wis. 2d 189, 204, 776 N.W.2d 838, 845.

Furthermore, *Astrach* dealt with an account, not an inventory. As a result, not only is *Astrach* procedurally different than the case at bar, it is factually different than the case at bar. [6]

The following quotes from *Astrach*, however, ring true to the case at bar:

> The record is replete with evidence of controversy and discord, and unsubstantiated accusations.
>
> *Id.* at 25 Wis. 2d 333, 130 N.W.2d 879
>
> ***
>
> It was apparent to the lower court, as it is to us on review, that almost everything the administrator de bonis non and its attorney attempted to do was senselessly objected to. What might have been a routine and expeditiously settled estate was converted into protracted legal wrangle, arising for the most part out of specious charges and vague innuendoes.

[5] She also cites *Matter of Ruedinger's Estate*, 83 Wis. 2d 109, 264 N.W.2d 604 (1978). However, the term "seasonably" does not appear in that case. Indeed, *Ruedinger* is not pertinent to the present case. It deals with the appealability of an order in probate, whether a party submitted to the jurisdiction of the court by filing an objection to an inventory, and an evidentiary issue.

[6] Under Wis. Stat. § 862.13, at or before the hearing on the account of a personal representative, a person interested may file an objection to the account. There is no corollary statute as far as an objection to an inventory.

Id. at 25 Wis. 2d 336, 130 N.W.2d 881

The *Astrach* decision is inapposite to the present matter as it deals with the lack of an objection at a hearing on a final account and, further, does not deal with an inventory. Finke's reliance on this case is misplaced.

C. The difference in value between the book value and the appraised value of John's interest in Totzke Land LLC is a nonstarter.

Throughout her brief, Finke references the difference between the appraised value of John's interest in Totzke Land LLC and its book value. The difference is considerable, but it is not a relevant factor.

Courts have faced this issue before. Indeed, if an option to purchase is based upon book value or a price set by formula, the courts are likely to sustain the agreement. Further,

> "[o]ptions empowering the corporation or other shareholders to purchase shares on the death of a shareholder are frequently used and their validity is firmly established…The transfer price in an option to purchase the shares of a holder who dies is usually fixed at book value or at a price determined by some formula set out in the restrictive provision. In a number of a decisions, courts have upheld such an option despite a great disparity between the option price and the then current value of the shares." 1 *Close Corp. & LLCs: Law & Practice*, Section 7:17 (Rev. 3d Ed.) *(footnotes omitted)*

The seminal case is *Renberg v. Zarrow*, 1983 OK 22, 667 P.2d 465 (1983). In that case, the Supreme Court of Oklahoma heard a matter where a buy-sell agreement between shareholders provided that upon the death of any shareholder, the surviving shareholders had an option to buy the decedent's shares at a price set by the majority of the shareholders each year and if no price was set in any year, then the most recent price set was controlling. One of the shareholders passed and the surviving shareholders of the corporation exercised their option to purchase and tendered promissory notes (as provided in the buy-sell agreement) totaling over

$3.5M.[7] This figure was based upon the agreed-upon per share price pursuant to the formula in the buy-sell agreement of $3,500 per share. The decedent's trustees (also heirs of the decedent) commenced an action to prevent the transfer of shares and argued that the buy-sell agreement was void and unenforceable. The trustees put forth evidence that the fair market value of the shares of stock were $23,100 per share. The trial court agreed with the trustees and the surviving shareholders appealed. The Oklahoma Supreme Court reversed. That court's reasoning is important to the case before this Court.

The disparity in price between the buy-sell agreement price and the fair market value price was considerable. The case does not indicate the number of shares that the decedent owned, but the tender of the amount of over $3.5M indicates the decedent, at $3,500 per share, owned approximately 1,000 shares. At the fair market value price of $23,100 per share, the fair market value of the decedent's shares would be over $23M. The difference between the formula value and the fair market value is stark. It is a difference of $19M.

Despite this vast difference, the court upheld the formula value of the buy-sell agreement. It found that a great disparity between the price specified in a buy-sell agreement and the actual value is not sufficient to invalidate the agreement. It states: "If the value of the stock is determined pursuant to method provided in stockholders' agreement, the stockholder, the heirs, and the personal representative of the deceased shareholder are bound by its terms." *Id* at 471 *(footnotes omitted)*

The Oklahoma court also brings forth the concept (without naming it as such) of "mutuality of risk." The Oklahoma court indicated that while the buy-sell agreement price inured to the benefit of the surviving shareholders, it might very well have resulted in a benefit to

[7] Plus cash to pay the first installment due under the terms of the buy-sell agreement and interest.

the decedent if she had survived. *Id.* at 470 The concept of "mutuality of risk" is reflected in other cases of nearly identical facts to the case at bar.

In *Evangelista v. Holland*, 27 Mass. App. Ct. 244, 527 N.E.2d 589 (1989), the surviving stockholder in a closely-held corporation sought to compel the executors of a deceased stockholder to sell the decedent's stock for an amount agreed to in the stockholders' agreement. The disparity between the price pursuant to the buy-sell agreement ($75,000) and the value of the shares ($191,000) was not as dramatic as the disparity in *Renberg*, but nonetheless significant. In *Evangelista*, the Massachusetts Court granted specific performance to the surviving shareholders for the sale of the stock to them pursuant to the terms of the buy-sell agreement. In doing so, the Court states:

> That the price established by a stockholders' agreement may be less than the appraised or market value is unremarkable. Such agreements may have as their purpose: the payment of a price for a decedent's stock which will benefit the corporation or surviving stockholders by not unduly burdening them; the payment of a price tied to life insurance; or fixing a price which assures the beneficiaries of the deceased stockholder of a predetermined price for stock which might have little market value.
>
> *Id.* at 27 Mass. App. Ct. at 249; 537 N.E.2d at 593

The Court indicated that when the buy-sell agreement was entered into, the order and time of death of the shareholders was an unknown and that there was a "mutuality of risk."

The concept of "mutuality of risk" is echoed in *Concord Auto Auction Inc. v. Rustin*, 627 F.Supp 1526 (D. Mass. 1986). The issue in *Concord Auto* was before the court on summary judgment. That case involved an administrator of a deceased shareholder's estate refusing to transfer stock in a closely-held corporation to the surviving shareholders pursuant to the terms of a buy-sell agreement. The administrator of the estate argued, among other things, that the value of the stock increased so substantially that specific performance of the provisions of the buy-sell

agreement would be unfair and unjust to the estate. The court rejected these arguments finding that buy-sell agreements among shareholders and closely-held corporations are common and bind the shareholders and their administrators or executors. It affirmed the order of specific performance. *See also*, *Nichols Construction Corp. v. St. Clair*, 708 F.Supp 768 (M.D. La. 1989) (where the Court enforced a buy-sell agreement in an estate for the transfer of stock at book value); *Sehi Computer Products, Inc. v. Estate of Sehi*, 2005 WL 1684130 (E.D. Mich. 2005) (where the Court enforced, on summary judgment, a buy-sell provision as to the stock of a decedent and ordered the estate to transfer the stock to the corporation at the price determined by the buy-sell agreement); *Brigham v. M & J Corporation*, 252 Mass. 674, 227 N.E.2d 915 (1967) (where the Court ordered an estate transfer the shares of a corporation to the corporation pursuant to the terms of the buy-sell agreement that determined value and the terms of the transfer); *see St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Incorporated*, 562 F. 2d 1040 (8th Cir. 1977) (holding that upon death of a shareholder, the estate of the deceased shareholder was obligated to offer the shares of the corporation pursuant to the terms of a buy-sell agreement); *Dunham v. Dunham*, 336 So. 2d (1976) (upholding a provision in a corporation's articles of incorporation obligating a deceased shareholder's estate to offer the shares of stock back to the corporation); *Bennett v. Foust*, 996 P.2d 693 (Wy. 2000) (on nearly identical facts to the case at bar the Court found that the buy-sell agreement created an option in favor of the corporation on the death of a shareholder and that the corporation's delay in purchasing this stock was not unreasonable).

The disparity between the appraised value of John's interest in Totzke Land LLC and the book value, while no doubt argued by Finke for shock value, is a nonstarter.

D. Bait-and-switch argument.

In conjunction with her argument that the unobjected to inventories should be conclusive as to the value of John's interest in Totzke Land LLC, Finke makes a "bait-and-switch" argument. The use of the "bait-and-switch" sound bite, while no doubt used to sensationalize Finke's position, is not supported by the facts before the Court. Indeed, the analogy itself is foreign to the facts before the Court.[8]

Throughout her brief, Finke alludes to what she describes as the personal representative's discussions in a meeting with his brother, father, and their lawyer. This apparently is to conjure up a type of conspiracy and conflict of interest of the personal representative as to the proper inventory value of the decedent's interest in Totzke Land LLC.

The facts before the Court show that this meeting was a member's meeting of Totzke Land LLC held on March 10, 2021. That meeting was attended by Carl, Anthony, the personal representative, Anthony and Carl's attorney, and the estate's attorneys. (R.82, Carl Totzke Affidavit, ¶ 3) At that meeting, Totzke Land LLC voted to accept the offer made by the "Notice of Involuntary Transfer" given by the estate dated March 2, 2021. That is the offer to sell the decedent's interest in Totzke Land LLC to Totzke Land LLC at book value as defined in the operating agreement. (R. 82, Carl Totzke Affidavit, ¶ 4; Grunewald Affidavit, ¶ 2; Jeffrey Michael Totzke Deposition, page 80, line 15 to page 81, line 5, Exhibit 14)

Finke's assertion is that this was some type of surreptitious meeting between the personal representative and his father and brother to somehow cheat the other beneficiaries out of their inheritance. This is troubling because Finke's counsel was aware of the nature and purpose of that meeting. (R. 95, Finke Exhibit 13) It was altogether proper for the personal representative

[8] The traditional definition of unlawful bait and switch applies to insincere offers to sell one item in order to induce the buyer to purchase another. David Adam Friedman, *Explaining "Bait-and-Switch" Regulation*, 4 Wm. & Mary Bus. L. Rev. 575 (2013), see Wis. Stat. § 100.18(9)

to attend a member's meeting as John owned a fifty percent interest in Totzke Land LLC. It was further proper and necessary for Totzke Land LLC to have a members meeting to respond to the offer made by the estate pursuant to the Notice of Involuntary Transfer.

Any comments on Finke's factual presentation and arguments would not be complete without reference to the *ad hominen* attacks she makes as to counsel for Carl and Anthony. As Finke would have it, counsel for Carl and Anthony was a part of a grand conspiracy that Finke imagines to sell John's interest in Totzke Land LLC for less than its appraised value and, in doing so, defraud the beneficiaries. There is an old saw in the law that states that if you have the facts, try the facts, if you do not have the facts, try the law, and if you have neither the facts nor the law, try the attorney.[9]

Such arguments have no place in a court of law. They only serve to reflect the quality of Finke's position.

III. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT.

A. Summary judgment standards.

A motion for summary judgment in Wisconsin is governed by Wis. Stat. § 802.08 which provides that summary judgment "...shall be rendered if the [basically the record] show there are

[9] The first inference that can be located as to this saw is as follows:

> Such tactics [referring to tactics criticizing anti-war statements] have been compared to the story of a young lawyer who was consulting an older lawyer as to how he should act in the conduct of various cases. He said, "What shall I do if the law is against me?" The older man said, "Come out strong on the facts." "What shall I do if the facts are against me?" "Come out strong on the law." "Then, what shall I do if both are against me?" "Abuse the other fellow's attorney."

1925 March, The Rotarian, Among Our Letters: This War Business by W.N. Fitzwater, Elkins, W. Va., Page 50, Rotary International

no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." The purpose of summary judgment is to "avoid trials where there is nothing to try." *Rollins Burdick Hunter of Wis., Inc. v. Hamilton*, 101 Wis. 460, 470, 304 N.W.2d 752, 757 (1981)

An appellate court independently reviews a grant of summary judgment using this same methodology as the circuit court. *Hardy v. Hoefferle,* 2007 WI App 264, ¶ 6 , 306 Wis. 2d 513, 743 N.W.2d 843. "Under that methodology, the court, trial or appellate, first examines the pleadings to determine whether claims have been stated and a material factual issue is presented." *Preloznik v. City of Madison,* 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). If so, the appellate court then examines the moving party's submissions to determine whether they establish a prima facie case for summary judgment. *Id.* If the moving party has made a prima facie showing, the appellate court examines the opposing party's affidavits to determine whether a genuine issue exists as to any material fact. *Id.* See *Gemini Capital Group, LLC v. Jones*, 2016 App. 21 23, ¶ 12, 378 Wis. 2d 614, 620-621, 904 N.W.2d 131, 134.

It is apparent in reviewing the "Heir's [sic] Brief in Opposition to Motion for Summary Judgment" and the supporting materials filed by Finke in the trial court (R. 98-102) that she brought forth no material issues of fact at trial.[10]

[10] Indeed, the only possible issue of fact is as to when the personal representative became aware of the buy-sell agreement in the operating agreement of Totzke Land LLC. Finke points this out in her appellate brief (Appellate Brief, page 18), but did not at trial. It can hardly be said this is a material issue of fact. Other than a conclusory statement, Finke puts forth no reasoning as to why this is a material fact.

"Evidentiary matters and affidavits accompanying a motion for summary judgment are deemed uncontroverted when competing evidentiary facts are not set forth in counter affidavits." *Selzer v. Brunsell Brothers Ltd.*, 257 Wis. 2d 809, 822, 652 N.W.2d 806, 812 (Ct. App. 2002) *quoting Wisconsin Elec. Power Co. v. California Union Ins. Co.*, 142 Wis. 2d 643, 684, 419 N.W.2d 255, 259 (Ct. App. 1987).

As such, the operating agreement of Totzke Land LLC, the Notice of Involuntary Transfer, and the acceptance of the offer made by the Notice of Involuntary Transfer by Totzke Land LLC are all uncontroverted.

Summary judgment is an appropriate procedure in probate proceedings. Civil procedure rules apply in probate matters, unless there is a specific probate provision governing the procedure at hand. Wis. Stat. § 801.01(2); *State of McCoy v. Wisconsin Academy of Sciences, Arts, & Letters*, 118 Wis. 2d 128, 133, 345 N.W.2d 519, 523 (Ct. App. 1984). No specific probate procedure exists as to the issues of this case.

Finke basically argues that because the trial court determined that the operating agreement, in particular sections 7 and 8, are ambiguous, that summary judgment was improper for that sole reason. However, even in the face of ambiguous language, when there are no material issues of fact to be tried, summary judgment is proper. *Hardware Mutual Insurance Co. v. Hartford Accident & Indemnity Co.*, 6 Wis. 2d 457, 466, 95 N.W.2d 215, 219-220 (1959).

Simply put, with no material issues of fact, summary judgment was proper in this matter as Anthony and Carl were entitled to judgment as a matter of law. Finke in her brief repeatedly calls for an evidentiary hearing, but she puts forth nothing to show a material issue of fact or that Anthony and Carl are not entitled to judgment as a matter of law.

B. The interplay between Sections 7 and 8 of the operating agreement of Totzke Land LLC is not ambiguous, but if it is, the trial court properly construed the operating agreement as a rational business instrument.

Finke's entire argument as to the impropriety of summary judgment is the conclusion that because the trial court found that the operating agreement of Totzke Land LLC is ambiguous, summary judgment is improper. As noted above, the law is to the contrary when there are no material issues of fact.

An ambiguity exists if a writing can mean different things to reasonable people. *Borchardt v. Wilk*, 156 Wis. 2d 420, 427, 456 N.W.2d 653, 656 (Ct. App. 1990) Further, it is important to add that just because the writing is complex does not mean it is ambiguous. *Romeo v. West Bend Mut. Ins. Co.*, 216 Wis. App. 59 ¶ 37, 371 Wis. 2d 478, 498-499, 885 N.W.2d 591 600, *citing Haus v. Bresina*, 2002 Wis. App. 188, ¶ 8, 256 Wis. 2d 664, 671, 649 N.W.2d 736, 740.

The trial court made the following statements as to the provisions of sections 7 and 8 of the operating agreement of Totzke Land LLC being ambiguous:

> Now, I have reviewed the agreement with respect -- very closely, and I certainly believe that the language in the agreement is certainly suboptimal. I am interpreting the contract in order to try to give meaning to the plain language that's been used in the agreement. However, I certainly can discern that reasonable people can fairly construct that contract in more than one way, and, in fact, even the notices that were provided to the company were notices of involuntary transfer and then involuntary dissociation. So I think that everyone recognizes that there is language regarding different methods of sale of ownership units set forth in the agreement, but I found Attorney Anderson's citation to *Borchardt versus Wilk*, 156 Wis. 2d 420 Court of Appeals 1990 to be very helpful with respect to my analysis of this. I do find that in certain respects this agreement is ambiguous, but I am going to give a construction to that agreement that will in the Court's estimation make it into a rational business instrument that will effectuate what appears to have been the intentions of the parties.

(R. 119, page 8, line 22 to page 9, line 18)

The critical language of the trial court is: "So I think that everyone recognizes there is language regarding different methods of sale of ownership as set forth in the agreement..." The different methods regarding sale of ownership units are the involuntary transfer under section 7 of the operating agreement and the involuntary disassociation under section 8. The trial court found that John's death was an involuntary transfer under section 7, that the proper notice was given by the estate, and that the company timely accepted the offer made by that notice. (R. 119, page 9, line 20 to page 11, line 23) There is nothing ambiguous here.

The trial court goes on to discuss the notice of disassociation of section 8 of the operating agreement. The trial court explains that under those provisions, the disassociating member gives written notice of the event causing the involuntary disassociation. This notice also constitutes an offer to sell the member's interest in the company to the company. In this scenario, the company pays the disassociating member the fair market value of the company.

The trial court determined death causes both an involuntary disassociation and an involuntary transfer of John's interest in Totzke Land LLC. Here is where it found ambiguity. A careful reading of the trial court's decision in this matter reveals that the trial court did not find any of the language of Totzke Land LLC's operating agreement is ambiguous. What it did is found that the document is ambiguous because a death of a member of the LLC could trigger the involuntary transfer language of section 7 **and** the involuntary disassociation of section 8. (R. 119, page 13, lines 3-25)

This is where the trial court is in error. When the language of section 7 is carefully reviewed, it includes the mechanics for valuing the company in the event of a disassociation. Section 7 defines Involuntary Transfer as: "Involuntary Transfer means any Transfer of Units of

Ownership by operation in law or any transaction, preceding, or action, *including a Transfer resulting from the disassociation of a Member…*" (R. 83, Grunewald Affidavit, ¶ 2; Jeffrey Michael Totzke Deposition, Exhibit 11, Section 7.4) *(emphasis added)* This unambiguously makes an involuntary transfer of a member's interest because of disassociation subject to the involuntary transfer language of Section 7. As a result, under either scenario, the transfer is to be at book value as defined in the operating agreement.

While complex, and perhaps cumbersome, section 7 and section 8 mesh together on the valuation of John's interest in Totzke Land LLC after he passed. Further, both the involuntary transfer language of Section 7 of the operating agreement and the disassociation language of Section 8 of the agreement talk about an offer to sell the decedent's interest in the company to the company. While the estate did provide both a notice of involuntary transfer and a notice of disassociation (R. 64, R-APP B 124-125; R-APP C 126-127), the company has only accepted the offer made by the notice of involuntary transfer. It has not accepted the terms of the notice of disassociation (R. 82). The disassociation procedure of Section 8 of the operating agreement does not obligate the company to purchase a member's interest. As such, the only accepted offer on the table is the purchase of the decedent's interest in Totzke Land LLC pursuant to Section 7 of the operating agreement for book value as that term is defined in the operating agreement.[11]

Even if the trial court is correct that the operating agreement of Totzke Land LLC creates an ambiguity between the provisions of section 7 and section 8, that is not the death knell of Anthony and Carl's summary judgment motion nor of the operating agreement itself. As stated by the Supreme Court:

[11] There could be, albeit an unusual occurrence, a circumstance when a company would accept the offer of the notice of dissolution instead of the offer of the notice of involuntary transfer. This would logically occur only when the fair market value of the member's interest was less than the book value.

> When interpreting an ambiguous contract provision, we must reject a construction that renders an unfair or unreasonable result. [*Borchardt v. Wilk*, 156 Wis.2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990)] (citing *Wausau Joint Venture v. Redevelopment Auth.*, 118 Wis.2d 50, 58, 347 N.W.2d 604, 608 (Ct.App.1984)). Likewise, we should adopt a construction that will render the contract a rational business instrument so far as reasonably practicable. [*Borchardt v. Wilk*, 156 Wis.2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990)] (citing *Bruns v. Rennebohm Drug Stores, Inc.*, 151 Wis.2d 88, 94, 442 N.W.2d 591 (Ct.App.1989)).
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> *Gottsacker v. Monnier*, 2005 WI 69, ¶ 24, 281 Wis. 2d 361, 375, 697 N.W.2d 436, 442–43

The trial court followed this pronouncement by rendering a construction of the operating agreement that resulted in a "rational business instrument" citing *Borchardt v. Wilk, supra*. The trial court's summary judgment order, while determining that the operating agreement was ambiguous, is not improper given the above.

CONCLUSION

The trial court's order granting Anthony and Carl's motion for summary judgment as to the proper inventory value of Totzke Land LLC should be affirmed.

Dated this 11th day of August, 2022.

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CERTIFICATIONS

I certify as follows:

A. This brief conforms to the rules contained in Wis. Stat. § § 809.19(8)(b), (bm), and (c). The length of this brief is 7,166 words.

B. Filed with this brief is an appendix that complies with Wis. Stat. § 809.12(am). If the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Date: August 11, 2022

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