COURT OF APPEALS
DECISION
DATED AND FILED

April 22, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1870 **Cir. Ct. No. 2010CV361**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

ERIC J. FANETTI AND TODD A. FANETTI,

PLAINTIFFS-APPELLANTS,

V.

DONALD A. AND MARILYN J. FANETTI 2004 REV. TR. AND MARILYN J. FANETTI, INDIVIDUALLY,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V.

FANETTI PROPERTIES LIMITED PARTNERSHIP AND RUSK PRAIRIE FARMS, LLC,

THIRD-PARTY DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Dunn County: ERIC J. LUNDELL, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Eric and Todd Fanetti appeal a judgment that dismissed their claims against Marilyn J. Fanetti and the Donald A. Fanetti and Marilyn J. Fanetti 2004 Revocable Trust (the Revocable Trust).[1] Eric and Todd argue that Marilyn had an impermissible conflict of interest in her role as both trustee and beneficiary of the Revocable Trust, and that she breached her fiduciary duties as trustee by making decisions that benefitted her own interests, to the other beneficiaries' detriment. Eric and Todd also argue the circuit court erred when it "accepted for issue preclusion purposes a finding of the Probate Court as to the allocation of assets[.]" Finally, Eric and Todd argue the court erred by awarding Marilyn and the Revocable Trust damages on their counterclaims. For the reasons set forth below, we affirm.

BACKGROUND

¶2 Marilyn married Donald Fanetti in 1985. It was the first marriage for both parties. After the marriage, they ran Donald's trucking business located in Franklin, Wisconsin. They had no children. From 1986 to 2004, they purchased various parcels of farm property in Dunn County. As of August 2004, they owned assets totaling $23.8 million. In 2005, they sold their trucking business and Franklin home and moved to one of the Dunn County farm properties.

[1] Because the principal players in this case share the last name Fanetti, we refer to them by their first names throughout this opinion.

¶3 In September 2004, Marilyn and Donald began estate planning with attorney John Herbers. It is undisputed that Donald's intent in creating the estate plan was to ensure the Dunn County farms passed to his nephews, Eric and Todd. On October 13, 2004, Herbers sent Marilyn and Donald draft estate planning documents, including wills, a marital property agreement, and a document entitled "Donald A. Fanetti and Marilyn J. Fanetti 2004 Revocable Trust." Donald and Marilyn reviewed the draft documents, requested changes, and ultimately signed revised versions on December 22, 2004.

¶4 Donald's will named Marilyn as personal representative of Donald's estate. It left his personal effects to Marilyn and the remainder of his estate to the Revocable Trust. The marital property agreement, in turn, classified the majority of Marilyn and Donald's property as marital property. It contained a "Washington Will" provision, stating, "On each party's death, all property of such deceased party shall pass without probate to the Trustee of the Joint Trust as provided in Wisconsin Statutes section 766.58(3)(f), except that the survivorship marital property of the first party to die shall pass to the surviving party."

¶5 The Revocable Trust named Marilyn and Donald as trustees. It further provided, "Upon the resignation, death or inability to act of one of us, the other shall continue to act as sole Trustee." As relevant to the Dunn County farms, Paragraph 1.02 of the Revocable Trust stated:

> Distribution of Dunn County Farms. If Marilyn J. Fanetti is the Surviving Spouse, then upon Donald A. Fanetti's death, her interest in our property in Dunn County, Wisconsin shall be exchanged for Donald A. Fanetti's interest in other property of equal value. Upon the death of Donald A. Fanetti, our entire interest in real and tangible personal property … located in Dunn County, Wisconsin, … (hereinafter referred to as "Dunn County Farms"), shall be distributed outright in equal shares to Eric and Todd Fanetti, or entirely to the survivor of them. The recipients

> of the Dunn County Farms shall be responsible for all expenses, debts, taxes (including death taxes, property taxes and income taxes) and other encumbrances or charges against the property[.]

¶6 Around the same time, Donald also created the Donald A. Fanetti 2004 Insurance Trust (the Insurance Trust), which was to be funded with the proceeds of life insurance Donald purchased. On Donald's death, the Insurance Trust would terminate and the proceeds would be distributed to Eric and Todd in equal shares to pay estate taxes and other expenses associated with their receipt of the farms. Marilyn was named trustee of the Insurance Trust.

¶7 After Donald was diagnosed with cancer in June 2006, he and Marilyn made certain changes to their estate plan. On July 20, 2006, the Revocable Trust was amended so that if Donald were no longer able to act as trustee, his brother-in-law James Hilger would be co-trustee with Marilyn. On the same date, Donald executed a codicil to his will naming Marilyn and Hilger co-personal representatives of his estate.

¶8 In early 2007, Marilyn and Donald decided to transfer ownership of the Dunn County farms to a limited partnership. To carry out the transfer, Marilyn and Donald first formed Rusk Prairie Farms, LLC, on March 16, 2007, with each of them holding a fifty-percent membership interest. On the same day, they transferred 2,300 acres of real property, $100,000 cash, and $1 million in farm equipment to Rusk Prairie Farms, and they assigned their membership interests in Rusk Prairie Farms to the Revocable Trust. Also on the same day, Eric and Todd created Fanetti Farms II, LLC, in which they each held a fifty-percent membership interest. Eric and Todd transferred their interests in two parcels of real property to Fanetti Farms II.

¶9 Four days later, Eric, Todd, and the Revocable Trust formed Fanetti Properties Limited Partnership (FPLP). The Revocable Trust assigned to FPLP its membership interest in Rusk Prairie Farms—worth $8,547,100. Eric and Todd assigned to FPLP their membership interests in Fanetti Farms II—worth $94,333. The limited partnership agreement provided that Eric and Todd would be general partners of FPLP, and the Revocable Trust would be a limited partner. The agreement further provided the Revocable Trust would hold 9,784 units of FPLP, and Eric and Todd would each hold 108 units.

¶10 On January 29, 2008, the Revocable Trust gifted Eric an additional 1,761 FPLP units. Herbers retained Brownstone Associates, a business valuation firm, to value the gift. Brownstone determined an FPLP unit was worth $567.80 on the date of the gift, making the gift's total value $999,895.80.

¶11 On February 3, 2009, Marilyn and Donald executed a second amendment to the Revocable Trust. The amendment changed Paragraph 1.02 to state, "[U]pon Donald A. Fanetti's death, [Marilyn's] entire interest in [FPLP] shall be exchanged for Donald A. Fanetti's interest in other property of equal value." The amendment further stated that, upon Donald's death, the Revocable Trust's "entire interest in [FPLP] shall be distributed to Eric Fanetti and Todd Fanetti[,]" such that Eric would own sixty-five percent of the total units and Todd would own thirty-five percent. Like the previous version of Paragraph 1.02, the amended version required Eric and Todd to pay "all expenses, debts, taxes (including death taxes, property taxes and income taxes) and other encumbrances or charges" upon their receipt of the FPLP units.

¶12 Donald died on May 28, 2009. Following his death, Marilyn disagreed with Eric and Todd regarding administration of the Revocable Trust.

First, Marilyn took the position that Paragraph 1.02 of the Revocable Trust required her to transfer the trust's FPLP units to Eric and Todd only after Marilyn's share of the FPLP units was exchanged for other trust property of equal value. In contrast, Eric and Todd argued they were absolutely entitled to receive the FPLP units upon Donald's death, regardless of any exchange. Alternatively, they asserted assets outside the Revocable Trust could be exchanged for Marilyn's share of the FPLP units.

¶13 The parties also disagreed about which property passed into the Revocable Trust at Donald's death. Before Donald died, the only items in the Revocable Trust were 8,023 FPLP units and two vehicles valued at $147,000. After Donald's death, Marilyn resisted transferring other property into the Revocable Trust. It is undisputed that keeping property out of the Revocable Trust benefitted Marilyn because, under Marilyn's interpretation of Paragraph 1.02, if the Revocable Trust did not contain other property equal in value to her FPLP units, Marilyn would not have to transfer the FPLP units to Eric and Todd.

¶14 A third dispute between the parties involved valuation of the FPLP units. After Donald's death, Herbers arranged to have Brownstone Associates update the valuation it completed in December 2008. In November 2009, Brownstone issued a draft report concluding a single FPLP unit was worth $720.40 on the date of Donald's death—an increase of $152.60 from the December 2008 valuation. Marilyn disagreed with Brownstone's valuation, which relied on a real estate appraisal by appraiser William Tice. Tice had valued FPLP's real property at $8,772,000, which Marilyn asserted was too low. She therefore hired Ellefson Appraisal to complete a separate real property valuation. Ellefson valued FPLP's real property at $12,058,700.

¶15 Marilyn also disagreed with Brownstone's decision to use a thirty-five percent discount rate when valuing FPLP. She believed no discount rate should be applied. It is undisputed that a higher valuation of the FPLP units benefitted Marilyn because the more her FPLP units were worth, the more property she would receive in the exchange she asserted was required by Paragraph 1.02 of the Revocable Trust.

¶16 On August 11, 2010, Eric and Todd filed the instant lawsuit against Marilyn and the Revocable Trust in St. Croix County. Eric and Todd asked the circuit court to interpret Paragraph 1.02 of the Revocable Trust; to order Marilyn to transfer the Revocable Trust's FPLP units to them; to complete a comparison of trust assets, if necessary; and to remove Marilyn as trustee of the Revocable Trust and the Insurance Trust. Marilyn and the Revocable Trust answered the complaint and asserted counterclaims against Eric and Todd for breach of FPLP's limited partnership agreement; conversion of personal property; conversion of funds; unjust enrichment; and breach of fiduciary duty. Eric and Todd subsequently amended their complaint to add a breach of fiduciary duty claim.

¶17 The federal estate tax return for Donald's estate was due August 28, 2010. On August 26, 2010, Herbers withdrew as the Revocable Trust's attorney, and Hilger withdrew as co-trustee. Herbers did not provide Marilyn with a draft of the estate tax return he had been preparing. Marilyn therefore completed the return herself and filed it on August 27, 2010. On the return, she indicated Donald had died testate. She also indicated the FPLP units in the Revocable Trust were worth $1,131.58 per unit. By signing the return, Marilyn indicated under penalty of perjury that the information provided was true, accurate, and complete.

¶18 Marilyn subsequently filed a probate action in Dunn County, asserting Donald died intestate. She claimed Donald's will could not be found. Proceedings in Eric and Todd's lawsuit were stayed pending resolution of the probate action. Marilyn submitted an inventory to the probate court indicating Donald's estate contained $2.5 million in assets subject to probate. On February 13, 2013, the probate court entered a final judgment stating that all of Donald's probate property passed to Marilyn as his surviving spouse.

¶19 About one week after the probate court's judgment was filed, a three-day trial to the court was held in the instant lawsuit. After trial, the parties submitted proposed findings of fact and conclusions of law. The circuit court adopted Marilyn's proposed findings and conclusions in their entirety. The court concluded Eric and Todd had failed to prove Marilyn breached her fiduciary duties as trustee of the Revocable Trust because:

- Marilyn correctly interpreted Paragraph 1.02 of the Revocable Trust "to require an exchange of Marilyn Fanetti's interest in the [FPLP] units for Donald Fanetti's interest in the other assets of the Revocable Trust before the units are to be transferred to Eric and Todd Fanetti[;]"

- Marilyn "had good faith reasons" to question Brownstone's valuation of the FPLP units, and it was reasonable for her to use a value of $1,131.58 per unit on the estate tax return;

- It was "not a conflict of interest for [Marilyn] to make the determination of what assets go into [the Revocable Trust] because the title of the assets is what determines where the assets go[;]" and,

- The final judgment in the probate action was "a conclusive determination of the persons who are the successors in interest to the estate of the decedent and of the extent and character of their interests therein[.]"

¶20 Accordingly, the court entered a judgment dismissing Eric and Todd's complaint in its entirety. The court also awarded Marilyn and the Revocable Trust $653,896.34 on their counterclaims, including $363,180 in income the court determined FPLP should have distributed to the Revocable Trust in 2009. Eric and Todd now appeal.

DISCUSSION

I. The circuit court properly concluded Marilyn did not have an impermissible conflict of interest and did not breach her fiduciary duties as trustee of the Revocable Trust.

¶21 On appeal, Eric and Todd first argue the circuit court "applied an incorrect standard" in determining whether Marilyn: (1) had an impermissible conflict of interest as both trustee and beneficiary of the Revocable Trust; and (2) breached her fiduciary duties as trustee. (Capitalization omitted.) Before turning to these issues, we pause to address the parties' arguments regarding our standard of review and the applicable burden of proof.

A. Standard of review

¶22 The parties agree that whether the circuit court's factual findings fulfill a particular legal standard—such as the elements of a breach of fiduciary duty claim—is a question of law for our independent review. *See* ***Groshek v. Trewin***, 2010 WI 51, ¶11, 325 Wis. 2d 250, 784 N.W.2d 163. They also agree that, as a general matter, a circuit court's factual findings will not be set aside unless clearly erroneous. *See* WIS. STAT. § 805.17(2).[2] However, Eric and Todd

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

contend the clearly erroneous standard does not apply in this case because the circuit court adopted Marilyn's proposed findings of fact verbatim. Under these circumstances, they argue we must "scrutinize the record more carefully" and independently review the court's factual findings.[3]

¶23 We disagree. Eric and Todd have not cited any Wisconsin authority supporting their argument that stricter scrutiny of a circuit court's factual findings is required when the court has adopted a party's proposed findings of fact.[4] We have previously held it is not error for a circuit court to adopt a party's trial brief as its findings of fact and conclusions of law because that procedure "[meets] the requirements of [WIS. STAT. § 805.17(2)] for actions tried to the court without a jury." *See* ***CIT Group/Equip. Fin., Inc. v. Village of Germantown***, 163 Wis. 2d 426, 438, 471 N.W.2d 610 (Ct. App. 1991). We therefore decline Eric and Todd's request to strictly scrutinize or independently review the circuit court's factual findings. We will instead uphold the court's findings unless they are clearly erroneous—that is, against the great weight and clear preponderance of the evidence. *See* ***Phelps v. Physicians Ins. Co. of Wis.***, 2009 WI 74, ¶39, 319 Wis. 2d 1, 768 N.W.2d 615.

[3] Marilyn argues Eric and Todd forfeited this argument by failing to move for reconsideration after the circuit court issued its findings of fact. We disagree. Eric and Todd's argument is not that the circuit court necessarily erred by adopting Marilyn's proposed findings of fact, but that, because the circuit court did so, its findings are subject to stricter scrutiny on appeal. Eric and Todd could not have properly raised this argument in a motion for reconsideration in the circuit court. Further, Marilyn concedes a motion for reconsideration "is not always required" to preserve an issue for appeal.

[4] Eric and Todd cite one Wisconsin case in support of their argument that we should strictly scrutinize the circuit court's factual findings. *See* ***State v. Wilks***, 117 Wis. 2d 495, 501, 345 N.W.2d 498 (Ct. App. 1984), *aff'd* 121 Wis. 2d 93, 358 N.W.2d 273 (1984). However, ***Wilks*** does not address the standard of review that applies when a circuit court adopts a party's proposed findings of fact. Accordingly, it is not on point.

¶24 In a related argument, Eric and Todd complain the circuit court's factual findings are "in direct contravention to Wisconsin law" because "many of the 352 [f]indings are simply a recital of the trial testimony or the history of litigation and are replete with irrelevant statements, which are not appropriate findings." However, Eric and Todd do not specify which of the circuit court's factual findings they believe are inappropriate or irrelevant. They do not explain how any inappropriate factual findings affected their substantial rights. *See* WIS. STAT. § 805.18(2) (We will not reverse a judgment based on an error that did not affect a party's substantial rights.). Their argument that the circuit court made inappropriate factual findings is therefore undeveloped, and we decline to address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

B. Burden of proof

¶25 Eric and Todd's complaint sought removal of Marilyn as trustee of the Revocable Trust. A request for removal of a trustee is addressed to the circuit court's discretion. ***Gehl v. Hansen***, 5 Wis. 2d 91, 96, 92 N.W.2d 372 (1958). There is no Wisconsin law addressing the burden of proof that applies when a party seeks removal of a trustee. Citing several cases from other jurisdictions, Marilyn argues the party seeking removal must prove the grounds for removal by clear and convincing evidence. *See, e.g.*, ***In re Croessant's Estate***, 393 A.2d 443, 446 (Pa. 1978) (Removal of a trustee is a "drastic action, and proof of the need for this remedy must be clear."); ***Braman v. Central Hanover Bank & Trust Co.***, 47 A.2d 10, 30 (N.J. Ch. 1946) ("Courts are reluctant to remove an executor or trustee without clear and definite proof of fraud, gross carelessness, or indifference." (quoting another source)). Citing a different foreign case, Eric and Todd argue the grounds for removal need only be proved by a preponderance of

the evidence. *See* ***In re JMW Auto Sales***, 494 B.R. 877, 889-90 (Bankr. S.D. Tex. 2013).

¶26 We need not resolve this dispute because, even if the preponderance of the evidence standard applies, we conclude Eric and Todd have failed to meet their burden of proof. We therefore assume, without deciding, that grounds for removal of a trustee need only be proved by a preponderance of the evidence, and we proceed to address the merits of Eric and Todd's arguments that Marilyn had an impermissible conflict of interest and breached her fiduciary duties as trustee.[5]

C. Impermissible conflict

¶27 Eric and Todd first argue that, because she was both a beneficiary and a trustee of the Revocable Trust, Marilyn had an impermissible conflict of interest that required her removal as trustee. They cite cases from other jurisdictions, as well as the Restatement (Third) of Trusts, for the proposition that a trustee-beneficiary has an inherent conflict of interest with other trust beneficiaries.[6] They do not, however, cite any authority for the proposition that this conflict is impermissible under Wisconsin law.

¶28 Moreover, as Marilyn points out, our supreme court has held in similar circumstances that a mere conflict of interest is not enough to justify

[5] Although we do not decide the issue, we tend to favor the middle burden of proof. As discussed below, under the circumstances of this case, to establish grounds for Marilyn's removal as trustee Eric and Todd had to do more than show that she had a conflict of interest or that her actions disadvantaged Eric and Todd. Instead, Eric and Todd had to show she acted in bad faith. *See infra*, ¶¶31, 35. Bad faith is similar to fraud, which must be established by clear and convincing evidence. *See* ***Lundin v. Shimanski***, 124 Wis. 2d 175, 184, 368 N.W.2d 676 (1985).

[6] We have not found any Wisconsin case adopting the section of the Restatement (Third) of Trusts that Eric and Todd cite.

removal of a trustee without an additional showing that he or she acted in bad faith. *See* ***Gehl***, 5 Wis. 2d at 97. In ***Gehl***, the testator left each of his three sons one-fifth of his stock in a certain corporation. ***Id.*** at 93. He left the remaining two-fifths to a trust, whose beneficiaries were his three daughters. ***Id.*** The three sons, who were also directors of the corporation, were named trustees of the trust. ***Id.***

¶29 The daughters sued for removal of the sons as trustees, arguing the sons "so managed the company that no dividends were declared even though there were profits, thus depriving the [daughters] of any income from the trust." ***Id.*** at 94-95. The sons testified it was "necessary and sound business judgment to retain all profits in the company to expand the business in order to keep its competitive position in the industry." ***Id.*** at 95. The circuit court granted the daughters' request for removal, reasoning the sons "represented conflicting interests as individuals and as trustees in making a deliberate decision to put all the corporate profits into capital expansion rather than permit the payment of dividends[.]" ***Id.*** at 94.

¶30 On appeal, the supreme court reversed. The court conceded the sons "were placed in a position of a possible conflict of interest by their father … when he appointed them in his will as trustees … and also gave each of them stock in the company and together the controlling interest." ***Id.*** at 95. However, the court held this conflict, standing alone, did not require removal. ***Id.*** at 97. The court reasoned the testator must have been aware of the conflict when he drafted the will because the will explicitly provided the trustees' actions would be "all without impeachment to my said trustees whatever except for lack of good faith." ***Id.*** at 93, 97. The court concluded the sons' decision not to pay dividends did not

"amount to a lack of good faith" because they "believed it was in the best interests of the company and sound business practice." ***Id.*** at 97.

¶31 Here, Donald and Marilyn created the Revocable Trust knowing that Marilyn would be both a beneficiary and trustee. Eric and Todd concede Donald was aware of this conflict when the estate plan was drafted. Like the will in ***Gehl***, Paragraph 5.09 of the Revocable Trust provides that the trustee "shall not be liable for any loss or damage resulting from decisions made or actions taken in good faith." We therefore agree with Marilyn that, to establish Marilyn should have been removed as trustee based on her conflict of interest, Eric and Todd had to prove she acted in bad faith.

¶32 The circuit court found that Marilyn acted in good faith in her administration of the Revocable Trust and did not engage in self-dealing. As we explain in greater detail below, these findings are supported by the evidence and are not clearly erroneous. *See infra*, ¶¶36-49. Although Eric and Todd cite evidence suggesting Marilyn acted in bad faith, the mere existence of contrary evidence does not render the circuit court's findings clearly erroneous. "When evidence supports the drawing of either of two conflicting but reasonable inferences, the trial court, and not this court, must decide which inference to draw." ***Plesko v. Figgie Int'l***, 190 Wis. 2d 764, 776, 528 N.W.2d 446 (Ct. App. 1994).

¶33 Eric and Todd nevertheless assert the circuit court erred by failing to strictly scrutinize Marilyn's administration of the Revocable Trust. They argue a court must strictly scrutinize a trustee's actions whenever he or she is also a trust beneficiary. They do not, however, cite any Wisconsin law in support of that proposition. In their reply brief, they advance a slightly different argument that

strict scrutiny was required because Marilyn's actions benefitted her, to the other beneficiaries' detriment. *See* ***Teasdale v. Teasdale***, 261 Wis. 248, 260, 52 N.W.2d 366 (1952) ("When a trustee deals with trust property to his or her advantage and to the disadvantage of other beneficiaries a court of equity should give close and jealous scrutiny to the transaction.").

¶34 We agree with Marilyn that, even assuming the circuit court was required to strictly scrutinize her actions, Eric and Todd have not shown the court failed to do so. After listening to three days of trial testimony and considering numerous exhibits, the court made 352 findings of fact, virtually all of which are supported by specific citations to the record. While Eric and Todd criticize the court for adopting Marilyn's proposed findings of fact, we have already concluded doing so is not reversible error. *See supra*, ¶23. We therefore reject Eric and Todd's argument that the circuit court erred by failing to strictly scrutinize Marilyn's actions.

D. Breach of fiduciary duties

¶35 Eric and Todd next argue the circuit court erroneously concluded Marilyn did not breach her fiduciary duties as trustee. Their complaints about Marilyn's conduct fall into five main categories: (1) Marilyn's interpretation of Paragraph 1.02 of the Revocable Trust; (2) her valuation of the FPLP units; (3) her failure to gather trust assets; (4) her decision to probate Donald's estate; and (5) her alleged hostility toward Eric and Todd. Pursuant to Paragraph 5.09 of the Revocable Trust, Marilyn asserts Eric and Todd must show that she acted in bad faith in order to establish a breach of her fiduciary duties. Eric and Todd do not dispute this assertion. We conclude the circuit court properly determined Marilyn did not act in bad faith and did not breach her fiduciary duties.

1. Interpretation of Paragraph 1.02

¶36 Eric and Todd first suggest Marilyn breached her fiduciary duties by interpreting Paragraph 1.02 of the Revocable Trust to require that other trust property of equal value be exchanged for her share of the Revocable Trust's FPLP units before any of the FPLP units could pass to Eric and Todd. However, the circuit court concluded Marilyn's interpretation of Paragraph 1.02 was correct, and Eric and Todd do not challenge that conclusion on appeal.[7] They do not explain how Marilyn's correct interpretation of Paragraph 1.02 could constitute a breach of her fiduciary duties.

¶37 Further, the evidence amply supports the circuit court's conclusion that Marilyn's interpretation of Paragraph 1.02 was not in bad faith or a breach of her fiduciary duties. Herbers, who drafted the Revocable Trust, testified Paragraph 1.02 "was designed to work so that immediately upon [Donald's] death Marilyn's interest in the farms would be transferred to [Donald's] interest in the trust in exchange for other assets of equal value back to Marilyn." Only after that

[7] The closest Eric and Todd come to arguing the circuit court misinterpreted Paragraph 1.02 is their assertion the court "failed to look at the estate plan as a whole." (Capitalization omitted.) Specifically, they contend the court failed to "harmonize[]" the Revocable Trust with the will and marital property agreement. However, they do not explain how any provision of the will or marital property agreement affects Paragraph 1.02. While the will and marital property agreement affect which property passes into the Revocable Trust at Donald's death, they do not appear to affect the exchange Paragraph 1.02 describes.

Eric and Todd also argue the circuit court failed to construe the estate planning documents "in light of the purpose of Donald's estate plan," specifically, "Donald's overriding interest that the farms pass to [Eric and Todd] on his death." The court acknowledged that transferring the farms to Eric and Todd was one of the goals of the estate plan. Nevertheless, the court credited Herbers' testimony that Paragraph 1.02 was intended to operate so that the farms would be transferred only after Marilyn's interest was exchanged for trust property of equal value. Eric and Todd do not explain why this interpretation of Paragraph 1.02, advanced by the attorney who drafted the Revocable Trust, conflicts with the purpose of the estate plan.

exchange took place would the Revocable Trust's FPLP units pass to Eric and Todd. Marilyn's expert, attorney Scott Nelson, agreed with Herbers' interpretation of Paragraph 1.02. He also testified it was reasonable for Marilyn to interpret Paragraph 1.02 "in the same way as the [Revocable Trust's] drafter[.]" Eric and Todd's expert, attorney David Reinecke, similarly testified that Marilyn's interpretation of Paragraph 1.02 was reasonable and that it was appropriate for her to interpret Paragraph 1.02 "in accordance with the drafter." We therefore reject Eric and Todd's argument that Marilyn's interpretation of Paragraph 1.02 constituted a breach of her fiduciary duties.

2. Valuation of the FPLP units

¶38 Eric and Todd also argue Marilyn breached her fiduciary duties by refusing to use Brownstone's valuation of the FPLP units on the estate tax return and instead using a higher valuation. The circuit court concluded that Marilyn had "good faith reasons" to question Brownstone's valuation, and that the value she used on the estate tax return was "reasonable." Ample evidence supports these conclusions.

¶39 Marilyn testified she believed there were a number of problems with Brownstone's valuation. First, she believed the Tice real estate appraisal Brownstone used was too low. She testified Tice had underreported the number of irrigated acres owned by FPLP. Tice conceded at trial there is a "huge difference in value between land that's irrigated and that which is not." Marilyn also questioned the number of bushels of storage Tice included in his appraisal. She faulted Tice for failing to consider that some of the land is "right next to the expressway and railroad[,]" which makes it easier to get crops to market. She noted Tice used comparables that included hilly, wooded land and involved

transactions between related parties. She criticized Tice for concluding that some of the farm buildings, which were used to house equipment, did not contribute to the farms' value. She also observed Tice did not attribute any value to a trailer that FPLP rented out for $530 per month. Marilyn's appraisal expert, Richard Wanke, testified Tice's valuation for the main farm buildings was "astonishingly low[.]" The circuit court accepted this evidence and found that Tice's appraisal was not accurate.

¶40 Marilyn further testified she did not agree with the thirty-five percent discount rate that Brownstone used to value the FPLP units. Wanke testified it was unclear from Brownstone's report why it chose a thirty-five percent discount rate, and he did not believe the information in the report supported that rate. Wanke further testified the twenty-percent discount rate Marilyn ultimately used when filing the estate tax return was reasonable.

¶41 In addition, evidence at trial showed that Brownstone's valuation omitted some of FPLP's assets, including a $50,000 irrigation system deposit and $335,000 in input costs. Duane Draheim, the principal author of Brownstone's report, testified these assets should have been included in the valuation. Eric conceded at trial that the omission of these assets from Brownstone's valuation raised doubts about its validity.

¶42 The evidence further showed that, because Marilyn disagreed with Tice's appraisal, she hired Ellefson to conduct a separate appraisal of FPLP's real property. After Herbers and Hilger resigned, she was left with only one-and-one-half days to file the estate tax return. The IRS had already granted one extension, and no additional extensions were allowed. Herbers did not provide Marilyn with a draft of the return he had been preparing. Using Ellefson's appraisal, and adding

what she believed were the correct values of FPLP's other assets, Marilyn concluded FPLP was worth $14,144,783. Based on factors listed in a table in Brownstone's report, she then applied a twenty percent discount for "minority interest and lack of marketability." (Some capitalization omitted.) This resulted in a per-unit value of $1,131.58.

¶43 Marilyn acknowledged she understood that using a higher per-unit value on the estate tax return would benefit her. However, she testified she used the higher value because she believed it was fair and accurate. She testified Herbers stressed that the information reported on the estate tax return should be "completely accurate[.]" She also testified she felt it was important to use an accurate value because the return required her to attest under penalty of perjury that the information provided was true, accurate, and complete.

¶44 These facts amply support the circuit court's conclusion that Marilyn acted reasonably and in good faith by refusing to use Brownstone's valuation on the estate tax return and by instead using a per-unit value of $1,131.58. We agree with the circuit court that Marilyn did not act in bad faith or breach her fiduciary duties when valuing the FPLP units.

3. Failure to gather trust assets

¶45 Eric and Todd next argue Marilyn breached her fiduciary duties by failing to gather trust assets. This argument is largely undeveloped. With one exception, Eric and Todd do not identify the assets they believe Marilyn should have transferred into the Revocable Trust. Without knowing which assets Eric and Todd believe should have been transferred into the Revocable Trust, and why, we cannot determine whether Marilyn acted improperly by failing to transfer the

assets. We need not address undeveloped arguments. *See* ***Pettit***, 171 Wis. 2d at 646.

¶46 The only asset Eric and Todd specifically assert should have been transferred into the Revocable Trust is a $1,048,510.40 mortgage due from Glenn's Investment, LLC. However, they do not point to any evidence that this mortgage should have been classified as trust property. Consequently, they have not established Marilyn should have transferred it into the Revocable Trust.

¶47 Eric and Todd complain that Marilyn reported the Glenn's Investment, LLC, mortgage as trust property on the estate tax return, but she then asserted in the probate action that it should pass to her as Donald's surviving spouse. In response, Marilyn argues she classified the mortgage differently based on the facts known to her at different times. She asserts that, when she filed the estate tax return, she believed there was a will that would transfer the mortgage to the Revocable Trust. She later filed the probate action after Donald's will could not be found. Without the will, the mortgage passed to her as Donald's surviving spouse. Eric and Todd do not respond to Marilyn's argument that she legitimately classified the mortgage differently at various times. We therefore deem the argument conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Eric and Todd have not established that Marilyn acted in bad faith or breached her fiduciary duties by failing to gather trust assets.

4. Probating Donald's estate

¶48 Eric and Todd also suggest Marilyn breached her fiduciary duties by filing the Dunn County action to probate Donald's estate. Marilyn testified that, after Donald died in 2009, she believed Herbers was "doing whatever needed to be

done" to ensure assets were transferred to the appropriate parties. However, she subsequently discovered no assets had been transferred out of Donald's name. She therefore commenced the probate action to ensure the assets were properly transferred. Based on this testimony, which the circuit court accepted as true, the court could reasonably conclude Marilyn did not act in bad faith or breach her fiduciary duties by probating Donald's estate. *See* ***Bank of Sun Prairie v. Opstein***, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979) (when acting as fact-finder circuit court is ultimate arbiter of witnesses' credibility).

5. Hostility toward Eric and Todd

¶49 Finally, Eric and Todd argue Marilyn breached her fiduciary duties by expressing "hostility" toward them. However, their argument that Marilyn was hostile toward them is based mainly on the fact that she administered the Revocable Trust in a manner with which they did not agree. While there is some evidence that Marilyn harbored hostility toward Eric and Todd,[8] the circuit court, which listened to Marilyn's testimony and observed her demeanor, found that she acted reasonably and in good faith. As outlined above, ample evidence supports these conclusions. We therefore reject Eric and Todd's argument that Marilyn breached her fiduciary duties by expressing "hostility" toward them.

II. The circuit court gave appropriate weight to the probate court's decision.

¶50 Eric and Todd next argue the circuit court "erred when it accepted for issue preclusion purposes the finding of a probate court as to allocation of

[8] For instance, in a letter to the Wisconsin Department of Transportation written after Donald's death, Marilyn described Eric and Todd as "thiefs" and wrote, "I'm a good person & these guys are bullying me & stealing from me."

assets." (Capitalization omitted.) Whether issue preclusion is a bar to litigation is a question of law that we review independently. ***Mrozek v. Intra Fin. Corp.***, 2005 WI 73, ¶15, 281 Wis. 2d 448, 699 N.W.2d 54.

¶51 Although Eric and Todd initially assert the circuit court should not have accepted the probate court's findings as to "allocation of assets," they do not develop any argument on that basis. Instead, they argue the probate proceedings "cannot deprive [Eric and Todd] of a remedy in these Trust proceedings due to Marilyn's breaches of her duties as Trustee." They further assert the probate court "had no jurisdiction to decide Marilyn's probate action's impact on the claimed breaches of Marilyn's duties … under the Revocable Trust[.]"

¶52 Contrary to Eric and Todd's assertions, the circuit court did not find that the probate court's judgment precluded it from determining whether Marilyn breached her fiduciary duties. The circuit court simply held:

> Final judgment in a probate is a conclusive determination of the persons who are the successors in interest to the estate of the decedent and of the extent and character of their interests therein, subject only to the right of appeal and the right to reopen the judgment. It operates as an assignment or final adjudication of the transfer of the right, title and interest of the decedent to the distributee therein designated. WIS. STAT. § 863.31(1). As such, the assets included in Dunn County Case No. 11-PR-58 are owned by Marilyn Fanetti as surviving spouse pursuant to the Final Judgment.

Eric and Todd do not develop any argument that this holding is incorrect.

¶53 Eric and Todd instead complain that the probate court did not consider the marital property agreement when allocating assets. However, as Marilyn points out, the time for Eric and Todd to make claims about what assets should have passed to the Revocable Trust through the marital property agreement

was during the probate action. Although Eric and Todd received notice of the probate action, the probate court found they failed to timely appear to raise their claims. Eric and Todd did not appeal from that decision or from the probate court's final judgment. As a result, they cannot now complain about the probate court's allocation of assets or its failure to consider the marital property agreement.

III. The circuit court properly awarded Marilyn and the Revocable Trust damages on their counterclaims.

¶54 Last, Eric and Todd argue the circuit court improperly awarded Marilyn and the Revocable Trust damages on their counterclaims. Specifically, they argue the court erred by finding that FPLP improperly failed to distribute $363,180 in income to the Revocable Trust in 2009.

¶55 Eric and Todd argue the decision whether to distribute income is subject to the business judgment rule. The business judgment rule "is a judicially created doctrine that contributes to judicial economy by limiting court involvement in business decisions where courts have no expertise and contributes to encouraging qualified people to serve as directors by ensuring that honest errors of judgment will not subject them to personal liability." ***Reget v. Paige***, 2001 WI App 73, ¶17, 242 Wis. 2d 278, 626 N.W.2d 302.[9] The rule "creates an evidentiary presumption that the acts of the board of directors were done in good faith and in

[9] Citing ***Bane v. Ferguson***, 890 F.2d 11 (7th Cir. 1989), Eric and Todd argue the business judgment rule is applicable to partnerships. Marilyn does not dispute this assertion, and we therefore deem it conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

Marilyn contends Eric and Todd forfeited their business judgment rule argument by failing to raise it in the circuit court. However, Eric and Todd's answer to Marilyn's counterclaims clearly asserted the business judgment rule as an affirmative defense.

the honest belief that its decisions were in the best interest of the company." ***Id.***, ¶18. In other words, the rule protects a director from liability for "honest errors of judgment if he or she acted with good faith." ***Yates v. Holt-Smith***, 2009 WI App 79, ¶22, 319 Wis. 2d 756, 768 N.W.2d 213. "The rule does not, however, shield a corporate director who has acted in bad faith." ***Id.***

¶56 The circuit court implicitly concluded Eric and Todd acted in bad faith toward the Revocable Trust. The evidence supports that conclusion. Following Donald's death, Eric and Todd operated FPLP as though they owned it outright. They instructed FPLP's accountant not to provide Marilyn with any financial records. They also instructed the accountant to prepare FPLP's 2009-2011 tax returns as though the Revocable Trust no longer held any FPLP units.

¶57 The evidence at trial further showed that Eric and Todd, as general partners of FPLP, allocated $563,180 in income to the Revocable Trust for the year 2009, but did not actually distribute any income. The only payment the Revocable Trust received from FPLP after Donald's death was $200,000 toward paying the income tax due on the income that was allocated to the Revocable Trust but never paid. Despite failing to distribute income to the Revocable Trust, Eric and Todd chose to pay themselves for work performed as general partners of FPLP. The circuit court found that Eric and Todd's actions constituted self-dealing. As a result, the business judgment rule does not shield Eric and Todd from liability.

By the Court.—Judgment affirmed.

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