COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP78 **Cir. Ct. No. 2012GN10**

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

IN RE THE CONSERVATORSHIP OF NORMAN WICKE:

DEBRA JAMES, CONSERVATOR FOR NORMAN WICKE,

PETITIONER-RESPONDENT,

V.

ROBERT WICKE,

OBJECTOR-APPELLANT.

APPEAL from an order of the circuit court for Taylor County: ANN KNOX-BAUER, Judge. *Affirmed*.

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 STARK, J. Debra James was appointed conservator for her father, Norman Wicke. Thereafter, she petitioned the circuit court for approval of an "Asset Preservation Plan" that would transfer Norman's assets into several

irrevocable trusts. The circuit court approved the plan over an objection by Debra's brother, Robert Wicke. Robert now appeals, arguing: (1) the court lacked legal authority to approve the asset preservation plan; and (2) Debra failed to comply with WIS. STAT. § 54.21(2)[1] when petitioning for court approval. We reject these arguments and affirm.

BACKGROUND

¶2 On June 1, 2012, Norman petitioned the circuit court to appoint Debra as conservator of his estate.[2] Norman was eighty-eight years old at the time. Letters of conservatorship were issued to Debra on July 2, 2012.

¶3 Acting as Norman's conservator, Debra subsequently petitioned for court approval of an asset preservation plan. The petition asserted Norman resided at an assisted living facility and his monthly income was insufficient to meet his cost of care. The petition further asserted Norman would qualify for assistance from the Department of Veterans Affairs if he divested himself of certain assets. The petition proposed to accomplish this divestment by transferring Norman's assets into several irrevocable trusts. The petition asserted, "The distribution provisions of the various trusts are drafted to implement the estate plan Norman created over the years by the way he titled assets and by the beneficiary designations he placed on various assets."

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

[2] "Any adult resident who is unwilling or believes that he or she is unable properly to manage his or her assets or income may voluntarily apply to the circuit court of the county of his or her residence for appointment of a conservator of the estate." WIS. STAT. § 54.76(1).

¶4 The asset preservation plan provided the trust assets would be distributed among Norman's six children as follows: $122,824.71 to Debra; $53,483.33 to Robert; $53,483.33 to John Wicke; $89,783.33 to Ronald Wicke; $89,783.33 to Lori Stine; and $45,754.33 to a special needs trust for Donna Sotak.[3] Debra, Lori, and Ronald consented to the plan, as did Donna's power of attorney. However, Robert and John objected to the plan, arguing the circuit court lacked legal authority to approve it. Alternatively, Robert and John argued rejection of the plan was warranted for several substantive reasons.

¶5 Following a nonevidentiary hearing, both Debra and Robert submitted briefs to the court. Attached to Debra's brief was an affidavit signed by Norman,[4] in which he averred he spent "several years" after his wife's death "reconfiguring [his] assets and beneficiary designations" in a manner he believed was fair to all his children. Norman averred the asset preservation plan "fairly and truly represent[ed]" the estate plan he put in place after his wife's death. Norman specifically stated, "The distribution plan I put in place does not distribute my estate in equal shares, because I reached the conclusion that an equal distribution

[3] Donna was disabled and resided at a skilled nursing facility. The parties inform us she died on January 29, 2014.

[4] For the first time in his reply brief, Robert argues Norman's affidavit should not be considered part of the record on appeal because it was submitted as an attachment to Debra's posthearing brief and was therefore not properly before the circuit court. Implicit in this argument is the notion that we do not know what Norman's wishes were because no evidence of his wishes is properly before us. However, Robert provides no legal analysis in support of his assertion that we may not consider Norman's affidavit. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments). We are unaware of any legal authority preventing Debra from submitting the affidavit as an attachment to her posthearing brief. Moreover, if Robert wanted the circuit court to hold an evidentiary hearing, he could have requested one, but he did not. In addition, we need not consider arguments raised for the first time in a reply brief. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661.

of my assets amongst my children would not be fair." Norman acknowledged Robert and John had objected to the asset preservation plan, and he stated he felt "duress and pressure" from Robert, John, and their attorney to adopt their alternative plan. However, Norman stated he did not agree with Robert and John's plan, particularly because it would have eliminated Donna as a beneficiary of his estate. Norman reiterated he wanted a portion of his estate to be used to fund a special needs trust for Donna.

¶6 The circuit court issued an order approving the asset preservation plan on October 21, 2013. Robert now appeals.

DISCUSSION

I. Legal authority to approve the plan

¶7 Robert first argues the circuit court lacked legal authority to approve the asset preservation plan. However, we agree with Debra that whether the court had legal authority to approve the plan is irrelevant because court approval was unnecessary under WIS. STAT. § 54.76(3).[5]

¶8 Statutory interpretation presents a question of law that we review independently. ***Hocking v. City of Dodgeville***, 2010 WI 59, ¶17, 326 Wis. 2d 155, 785 N.W.2d 398. When interpreting a statute, our objective "is to determine what the statute means so that it may be given its full, proper, and intended effect." ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶44, 271 Wis. 2d

[5] Debra has consistently asserted, both in this court and the circuit court, that court approval of the asset preservation plan was unnecessary. Debra states she petitioned for court approval of the plan even though she knew it was not required "in the interests of transparency[,]" so that "all parties [would have] the ability to comment on the [p]lan in the presence of the court."

633, 681 N.W.2d 110. Our analysis begins with the plain language of the statute. ***Id.***, ¶45. "If the language of a statute is clear on its face, we need not look any further than the statutory text to determine the statute's meaning." ***State v. Peters***, 2003 WI 88, ¶14, 263 Wis. 2d 475, 665 N.W.2d 171.

¶9 WISCONSIN STAT. § 54.76 governs the appointment, powers, duties, and termination of conservators. Section 54.76(3) states, "An individual whose income and assets are under conservatorship may make gifts of his or her income and assets, subject to approval of the conservator." This language is clear and unambiguous. Nothing in the statute requires court approval for the gifts.[6] Here, the asset preservation plan called for Norman to make gifts to his children by distributing assets to them through various irrevocable trusts. Acting as Norman's conservator, Debra approved the gifts. The gifts were therefore permitted by § 54.76(3), and court approval was unnecessary.

¶10 Robert argues WIS. STAT. § 54.76(3) is inapplicable because the distributions proposed by the asset preservation plan would be gifts made by Debra, not Norman. Alternatively, Robert contends the distributions would not actually constitute gifts. However, Robert does not provide any legal or evidentiary support for these arguments. We therefore decline to address them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments).

[6] In ***Zobel v. Fenendael***, 127 Wis. 2d 382, 394, 379 N.W.2d 887 (Ct. App. 1985), we held that an individual under a conservatorship needed approval from either the conservator or the conservatorship court to gift his or her property. However, ***Zobel*** was decided before the enactment of WIS. STAT. § 54.76(3). *See* 2005 Wis. Act 387, §§ 100, 454. Section 54.76(3) clearly states that approval of the conservator is required; it does not mention court approval.

¶11 Under the unambiguous language of WIS. STAT. § 54.76(3), court approval of the asset preservation plan was unnecessary. Whether the circuit court had legal authority to approve the plan is therefore irrelevant. Accordingly, we reject Robert's argument that reversal is warranted because the circuit court lacked authority to approve the plan.[7]

II. WIS. STAT. § 54.21(2)

¶12 Robert next argues Debra's petition for approval of the asset preservation plan failed to comply with the requirements of WIS. STAT. § 54.21(2).[8] However, Robert concedes he failed to raise this argument in the

[7] Robert's statement of the issues identifies only the two issues discussed in the body of this opinion. However, the argument section of his brief includes a separate subsection entitled, "The trial court's justification for approving multiple trusts is unsupported." (Capitalization omitted.) Because court approval of the asset preservation plan was unnecessary, we need not address whether the court should have rejected the plan because it called for multiple trusts. For the same reason, we decline to address Robert's arguments about the unequal distribution of Norman's estate, the significant discretion provided to Debra as proposed trustee in the timing of the distribution of assets, and the divestment of Robert's assets caused by the creation of the trusts.

[8] WISCONSIN STAT. § 54.21(2) provides that a guardian or other individual seeking an order authorizing the guardian to transfer a ward's income or assets to or for the benefit of any person "shall submit to the court a petition that specifies all of the following:"

> (a) Whether a proceeding by anyone seeking this authority with respect to the ward's income and assets was previously commenced and, if so, a description of the nature of the proceeding and the disposition made of it.
>
> (b) The amount and nature of the ward's financial obligations, including moneys currently and prospectively required to provide for the ward's maintenance, support, and well-being and to provide for others dependent upon the ward for support, regardless of whether the ward is legally obligated to provide the support. If the petitioner has access to a copy of a court order or written agreement that specifies support obligations of the ward, the petitioner shall attach the copy to the petition.

(continued)

circuit court. Arguments raised for the first time on appeal are generally deemed forfeited. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997). We do not "blindside trial courts with reversals based on theories which did not originate in their forum." ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995).

¶13 We may exercise our discretion to address forfeited issues in exceptional cases, ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶17, 273 Wis. 2d 76, 681 N.W.2d 190, when the issue "involves a question of law rather than of fact, when the question of law has been briefed by both parties and when

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> (c) The income and assets of the ward that is the subject of the petition, the proposed disposition of the property, and the reasons for the disposition.
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> (d) The wishes, if ascertainable, of the ward.
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> (e) As specified in sub. (3), whether the ward has previously executed a will or similar instrument.
>
> (f) A description of any significant gifts or patterns of gifts that the ward has made.
>
> (g) The current and likely future effect of the proposed transfer of assets on the ward's eligibility for public benefits, including medical assistance or a benefit under s. 46.27.
>
> (h) Whether the guardian of the person and the guardian of the estate, if not the petitioner, agree with or object to the transfer.
>
> (i) The names, post-office addresses, and relationships to the ward of all of the following:
>
> 1. Any presumptive adult heirs of the ward who can be ascertained with reasonable diligence.
>
> 2. If the ward has previously executed a will, trust, or other instrument, the named or described beneficiaries, if known, under the most recent will, trust, or other instrument executed by the ward.

the question of law is of sufficient public interest to merit a decision[.]" ***Apex Elecs. Corp. v. Gee***, 217 Wis. 2d 378, 384, 577 N.W.2d 23 (1998). Robert does not contend that his argument regarding WIS. STAT. § 54.21(2) meets these conditions, nor does he offer any reason for failing to raise the argument in the circuit court. Instead, he argues Debra's failure to comply with § 54.21(2) is subject to the plain error rule set forth in WIS. STAT. § 901.03(4), which states, "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge." This argument misses the mark for two reasons.

¶14 First, the plain error rule in WIS. STAT. § 901.03(4) applies only to evidentiary errors. ***State v. Seeley***, 212 Wis. 2d 75, 81 n.2, 567 N.W.2d 897 (Ct. App. 1997). Robert does not argue the circuit court erroneously admitted or excluded evidence; he argues the court erred by approving Debra's petition because it did not comply with the requirements of WIS. STAT. § 54.21(2). The plain error rule is therefore inapplicable.

¶15 Second, even if the plain error rule applied under the circumstances, Robert has failed to establish that the circuit court's approval of Debra's petition constituted plain error. "The plain error doctrine should be reserved for cases where there is the likelihood that the [circuit court's error] has denied a [party] a basic constitutional right." ***State v. Wiese***, 162 Wis. 2d 507, 515, 469 N.W.2d 908 (Ct. App. 1991). Robert does not develop any argument that the circuit court's alleged error met this standard. He asserts Wisconsin law "does not favor [forfeiture] when mandatory statutory provisions are involved[,]" but he does not cite any legal authority in support of that proposition. As a result, Robert has failed to demonstrate that any error occasioned by Debra's failure to comply with

WIS. STAT. § 54.21(2) was plain error. We therefore decline to address the merits of Robert's argument.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.