COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2007AP2940** Cir. Ct. No. 2004PR12

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

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**IN RE THE ESTATE OF EDWIN H. SCHULTZ:**

**STEVEN E. SCHULTZ, STEPHANIE ZIMMER AND DEBORAH MCFALL,**

**APPELLANTS,**

**V.**

**ELSIE SCHULTZ, PERSONAL REPRESENTATIVE,**

**RESPONDENT.**

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APPEAL from orders and a judgment of the circuit court for Price County: DOUGLAS T. FOX, Judge. *Appeal dismissed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. This is a probate dispute between Elsie Schultz and her late husband Edwin's children from a prior marriage.[1] The children argue the court erred in awarding Elsie certain gambling winnings. They also argue Edwin's estate should not have included property Edwin gave his children before his death. A threshold question in this appeal is whether the children's appeal is timely. We conclude it is not, and dismiss the appeal.

## BACKGROUND[2]

¶2 Edwin and Elsie married in 1978. In 1990, they entered into a post-nuptial agreement. The agreement stated that they would be governed by the law of Wisconsin in effect prior to the Marital Property Act, and any property acquired after the agreement would belong to the record owner. The agreement also stated that if Edwin predeceased Elsie, his assets would be placed in a trust to be administered for Elsie's benefit during her lifetime.[3] When Elsie died, whatever assets remained in the trust would be distributed according to Edwin's will. When the parties entered into the agreement, Edwin had substantially more income and assets than Elsie, whose only income came from her social security benefits.

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[1] Appellants are Edwin's only children. For clarity, throughout this opinion we refer to them collectively as the children or Edwin's children.

[2] The children's brief does not contain any citations to the record, either in the statement of facts or in the argument section. We remind counsel that this blatant failure to conform to WIS. STAT. RULE 809.19(1)(d)-(e) is grounds for sanctions. *See* WIS. STAT. RULE 809.83(2). In addition, we may decline to consider arguments not supported by appropriate citation to the record. ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[3] The agreement allowed Edwin to leave certain specified items directly to his children. That provision of the agreement is not relevant here.

¶3 In 1999, Edwin executed a will that was consistent with the post-nuptial agreement. However, in 2001 Elsie won a $1.45 million casino jackpot. In 2002, Edwin executed a new will purporting to leave half of the gambling winnings to his children. He also gave his children a substantial amount of property classified as his under the marital agreement.

¶4 Edwin died in January 2004, and his estate was probated. In the probate proceeding, the children and Elsie asserted conflicting claims to half of the lottery winnings. In addition, Elsie, as personal representative, attempted to recover property Edwin transferred to his children before his death. The court issued three orders and a judgment relevant to these issues:

(1) A September 23, 2004 decision and order denying admission of the 2002 will to probate and admitting the 1999 will instead on the grounds that the 2002 will was contrary to the marital property agreement.

(2) A February 2, 2006 letter decision concluding Elsie's gambling winnings were not part of Edwin's estate.

(3) A February 27, 2007 order including money and certain property in the estate. The court concluded Edwin transferred the money and property to his children in a bad faith attempt to circumvent the agreement.

(4) A November 28, 2007 judgment against the children for $91,000. The judgment was entered after the children refused to turn over property belonging to the estate.

¶5 The children filed a notice of appeal in the circuit court on December 19, 2007. The notice of appeal indicates the children appeal from

eleven different record documents, including the four documents mentioned above.

## **DISCUSSION**

¶6 A notice of appeal must be filed in the circuit court within ninety days of the final judgment or order appealed from.[4] WIS. STAT. § 808.04(1). If a timely notice of appeal is not filed, we do not have jurisdiction over the appeal. WIS. STAT. RULE 809.10(1)(e).

¶7 Only a final judgment or order is appealable as a matter of right. WIS. STAT. § 808.03(1). A final judgment or order "disposes of the entire matter in litigation as to one or more of the parties, whether rendered in an action or special proceeding…." ***Id.***

¶8 Elsie argues each of the probate orders was a final order in a special proceeding. Because the notice of appeal came well over ninety days after the last of those orders, she argues we lack jurisdiction to review them.

¶9 We conclude the orders dated September 23, 2004 and February 27, 2007 were final orders disposing of two special proceedings. The February 2, 2006 letter decision was a nonfinal order in the special proceeding disposed of by the February 27, 2007 order. As a result, to give us jurisdiction over the issues raised in this appeal, the children were required to file timely notices of appeal from the September 23, 2004 and February 27, 2007 orders. Because they did not do so, we lack jurisdiction.

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[4] A shorter time period applies in certain circumstances. *See* WIS. STAT. § 808.04.

¶10 After briefing in this case, our supreme court decided ***Sanders v. Estate of Sanders***, 2008 WI 63, __ Wis. 2d __, __ N.W.2d __. The court reaffirmed earlier precedent holding that the probate of an estate consists of a series of special proceedings terminated by orders. ***Id.***, ¶¶26-27 (citing ***Goldstein v. Goldstein***, 91 Wis. 2d 803, 810, 284 N.W.2d 88 (1979)). Each of the orders "disposes of an entire matter in litigation as to one or more of the parties" and is therefore appealable as a matter of right. ***Id.***, ¶26 (citing WIS. STAT. § 808.03(1)). Because a single probate may include more than one special proceeding, it may also give rise to more than one appeal. ***Id.***, ¶28.

¶11 When determining whether an order is a final order disposing of a special proceeding, we first determine the scope of the special proceeding. ***Id.***, ¶29. Sometimes the scope of a special proceeding is clear-cut. For instance, a will contest is a distinct special proceeding, as is a dispute over the enforceability of a marital property agreement. *See* ***Goldstein***, 91 Wis. 2d at 810 (will contest); ***Olson v. Dunbar***, 149 Wis. 2d 213, 440 N.W.2d 792 (Ct. App. 1989) (marital property agreement). In other instances, however, the scope of a special proceeding may be disputed. For example, in ***Sanders*** the court was called on to decide whether an ongoing dispute over real estate and other property was a series of special proceedings to resolve a series of property disputes or a single special proceeding encompassing all of the parties' property disputes. ***Sanders***, __ Wis. 2d __, ¶¶23-24. Doubts over whether an order is final are resolved in favor of jurisdiction—in other words, in favor of a single broad special proceeding rather than multiple narrow special proceedings. *See* ***id.***, ¶33.

¶12 In addition, we also examine the language of the order to be sure it actually disposes of the entire special proceeding. ***Id.*** Finality is determined by whether a decision disposes of a matter, not whether it decides necessary issues.

***Wambolt v. West Bend Mut. Ins. Co.***, 2007 WI 35, ¶39, 299 Wis. 2d 723, 728 N.W.2d 670. To dispose of the matter, the decision must "contain an explicit statement either dismissing the entire matter in litigation or adjudging the entire matter in litigation as to one or more parties." ***Id.*** Doubts over whether language does so are resolved in favor of jurisdiction.[5] ***Id.***, ¶46.

¶13 Here, the September 23, 2004 decision and order denying admission of the 2002 will to probate and admitting the 1999 will concluded exactly the same kind of special proceeding at issue in ***Goldstein***. *See* ***Goldstein***, 91 Wis. 2d at 810; *see also* ***Sanders***, __ Wis. 2d __, ¶¶23, 41 (treating property dispute and will contest as two separate special proceedings). The will contest therefore was a distinct special proceeding. *See* ***Goldstein***, 91 Wis. 2d at 810. The September 23, 2004 decision and order concluded with the following order:

> UPON THE FOREGOING, IT IS HEREBY ORDERED, that the Last Will and Testament executed by Edwin Schultz on January 25, 2002, is denied admission to probate.
>
> IT IS FURTHER ORDERED, that the Last Will and Testament executed by Edwin Schultz on November 17, 1999, be and is hereby admitted to probate.

This is an "explicit statement" disposing of the special proceeding to determine which will to probate; indeed, it is difficult to imagine what the court could have done to dispose of the proceeding more explicitly. *See* ***Wambolt,*** 299 Wis. 2d 723, ¶39. We therefore conclude the September 23, 2004 decision and order was a

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[5] ***Wamboldt*** set out a prospective rule that final orders or judgments should contain an explicit statement that they are final for purposes of appeal. ***Wambolt v. West Bend Mut. Ins. Co.***, 2007 WI 35, ¶49, 299 Wis. 2d 723, 728 N.W.2d 670. However, that rule is only applicable to judgments and orders entered after September 1, 2007. ***Id.*** The three orders here were all entered prior to that date.

final appealable order. Because the children did not timely appeal from that order, we lack jurisdiction to review it. *See* WIS. STAT. RULE 809.10(1)(e).

¶14 We reach the same conclusion with regard to the February 27, 2007 order including money and certain property in the inventory. Resolving doubts in the children's favor, we conclude both the February 2, 2006 letter decision concluding Elsie's gambling winnings were not part of Edwin's estate and the February 27, 2007 order were parts of a single special proceeding encompassing all disputes over what property was part of the estate. *See* ***Sanders***, __ Wis. 2d __, ¶33. The February 27, 2007 order disposed of the parties' final property dispute—the dispute over property transferred by Edwin prior to his death. It therefore resolved the entire matter in controversy with respect to the disputes over what property was included in the inventory. *See* ***id.***, ¶40. The order also included the following statement concluding the proceeding:

> IT IS ORDERED THAT:
>
> 1. All classification of assets in the Inventory is approved and confirmed.
>
> 2. The personal representative is directed to proceed with administering the estate consistent with this Order.

This is an "explicit statement" disposing of the special proceeding over what property was part of the estate. *See* ***Wambolt,*** 299 Wis. 2d 723, ¶39. As a result, the February 27, 2007 order was a final, appealable order. Because the children

did not timely appeal that order, we lack jurisdiction to review classification of assets in the inventory.[6] *See* WIS. STAT. RULE 809.10(1)(e).

¶15 The children argue the November 28, 2007 judgment is the only final judgment or order in this case, and the three earlier orders were nonfinal orders. They argue their timely appeal from the judgment gives us jurisdiction to review these previous nonfinal orders. *See* WIS. STAT. RULE 809.10(4).

¶16 However, as explained above, the will contest and inventory dispute were distinct special proceedings concluded by final orders. The judgment was entered only after the estate moved for contempt because the children refused to turn over property belonging to the estate. The judgment therefore concluded a different proceeding initiated by the estate in an attempt to recover its property. The children do not argue the contempt proceeding was part of the same special proceeding as the inventory dispute or the will contest, and we are satisfied the contempt proceeding was a different special proceeding.

¶17 An appeal from a final order in a special proceeding only gives us jurisdiction to review that order and nonfinal orders *in the same special proceeding*. ***Sanders***, 2008 WI 63, __ Wis. 2d __, ¶41 n.5 (citing WIS. STAT. RULE 809.10(4)). While the children's timely appeal from the judgment gives us jurisdiction to review the contempt proceeding, all of the issues the children raise relate to earlier special proceedings we lack jurisdiction to review.

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[6] Because the February 2, 2006 letter decision was a nonfinal order, to appeal that order the children were required to timely appeal from the February 27, 2007 order concluding the inventory proceeding. *See* ***Sanders***, 2008 WI 63, __ Wis. 2d __, ¶41 n.5 (appeal from final order gives us jurisdiction to review nonfinal orders in the same special proceeding); *see also* WIS. STAT. RULE 809.10(4).

¶18 The children also argue Elsie's position is contrary to ***Wambolt***. However, as explained above, both the September 23, 2004 decision and order and the February 27, 2007 order included "explicit statement[s]" disposing of those special proceedings as required by ***Wambolt***. *See* ***Wambolt,*** 299 Wis. 2d 723, ¶39. While the children quote extensively from ***Wambolt***, their only attempt to apply ***Wambolt*** to the facts present here is a bald assertion that ***Wambolt*** "completely destroys" Elsie's argument. We are not persuaded.

*By the Court.*—Appeal dismissed.

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