

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 5, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2011AP1629

Cir. Ct. No. 2008PR13

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE ESTATE OF MARGARET R. HOFACKER:

LYLE M. HOFACKER,

APPELLANT,

V.

**LILA M. BATES, THE ESTATE OF LEON M. HOFACKER AND THE
ESTATE OF MARGARET R. HOFACKER,**

RESPONDENTS.

APPEAL from an order of the circuit court for Pierce County:
THOMAS E. LISTER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Lyle Hofacker appeals an order concerning a provision in Margaret Hofacker's will requiring an heir to close within forty-five

days of exercising an option to purchase her farm property.¹ We conclude the personal representative failed as a matter of law to follow the procedure under the will for exercising the option. We also conclude the circuit court appropriately applied equitable principles to deem Lila Bates' exercise of the option valid. We therefore affirm.

¶2 An extensive and contentious litigation history surrounds this estate. Margaret's will granted her four children the option to purchase her farm, and also established the order in which the children could exercise the option. Leon Hofacker had the right of first refusal. If he declined, the option would pass to Lila; if she declined, it would pass to Lyle and then to Lita Hofacker.

¶3 The will required Lita, as personal representative, within sixty days of appointment, to provide a written offer to sell the real estate to Leon, who was required to notify the personal representative within thirty days after receiving the written offer of the intention to exercise the option. Failure to timely respond to the written offer within thirty days was to be construed as a rejection of the offer to sell. The will also provided the "[c]losing date shall be no more than forty-five (45) days after exercise of the option."² If Leon failed to exercise the option, the personal representative was to make the same offer under the same terms and conditions to the other heirs in the order in which they were listed in the will.

¹ This matter involves a will and codicil, but for ease of reference we refer to these testamentary documents collectively as "the will."

² In contrast to the will's provisions requiring a written offer and a written response by the optionee within thirty days, the will provision regarding closing said nothing about the option lapsing or being forfeited if the closing does not occur within forty-five days of exercise.

¶4 Margaret died on December 4, 2007.³ Leon also died before the option could be extended to him. The option was extended to Leon's estate, but it was not exercised. The circuit court excluded from Margaret's probate a second codicil drafted just weeks shy of Margaret's one hundredth birthday that purported to give Lyle and Lita, respectively, the rights of first and second refusal. In a previous appeal in this matter, we affirmed the circuit court's order. *Hofacker v. Bates*, No. 2009AP1170, unpublished slip op. (WI App April 6, 2010).

¶5 After the circuit court invalidated the codicil purporting to give Lyle the right of first refusal, Lila's attorney sent correspondence to the attorney for the personal representative giving notice of Lila's intention to exercise the option. The correspondence also stated that a legal description should be created for a life estate given in the will to Lita for a portion of the farm. The personal representative failed to respond to the letter.

¶6 An evidentiary hearing was held on May 24, 2010, concerning the legal description for Lita's life estate. On August 24, 2010, a status conference was conducted during which the circuit court specifically addressed the personal representative's failure to provide written offers to sell as required in the will. The court admonished counsel to "do everything by the book." The court also stated:

So if there is a paper trail that shows that Leon's option has either been waived or offered and not exercised, let's get that documentation in the court file so that that issue is put to bed, okay?

....

³ Lyle also claimed a right to purchase the property under a purported purchase agreement, executed by Lita as Margaret's power of attorney, the day before Margaret's death. A conveyance from Lita, as personal representative, was rescinded by the circuit court.

And same thing as far as [Lila's option]. Let's make sure it has been validly exercised in writing in a way that beyond question no matter who's complaining about what.

¶7 On April 7, 2011, a telephone hearing was held concerning who should be allowed to farm the tillable acres for the 2011 crop season. Several days prior to the hearing, Lyle filed a brief indicating “[t]he only issue before the court is who should be allowed to rent the 117.75 acres of tillable land in the estate of the decedent during the 2011 growing season.” However, the brief also stated “there are several outstanding legal issues to be litigated.” Among these “outstanding issues” was an allegation that Lila failed to properly exercise her option to purchase. The April 7 telephonic hearing was not recorded.⁴

¶8 On May 3, 2011, another telephone hearing was held to clarify a proposed order arising out of the April 7 hearing. At that hearing, Lyle argued that Lila failed to properly execute her option to purchase Margaret's property because she failed to close within forty-five days, and therefore he should be granted the farm as the next beneficiary in line to receive the option. The circuit court stated:

I'm glad you brought that up As part of the record, the Court last time considered that issue and found that it was the fault of all these parties that that was essentially an improbability given all of the continuing conflicts, litigation, objections, appeals, et cetera, and therefore, the Court felt that strict compliance with a 45-day deadline was inequitable.

⁴ The record in this case has significantly hindered our work. Aside from the fact that the April 7 telephonic hearing was not recorded and therefore no transcript exists, the issue concerning whether Lila properly exercised her option was not developed in Lyle's brief, or during the subsequent May 3 hearing. A party who appeals has the burden to establish the issue was sufficiently raised in the circuit court, and we assume what is missing in transcripts would support the circuit court's decision. See *Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979).

¶9 The court concluded the forty-five day requirement for closing was “waived as all parties contributed to making this provision impossible to fulfill and [it] shall not invalidate the exercise of the option to purchase the farm by Lila Bates.” The order also held, “The exercise of the option to purchase the farm property from the estate of Margaret Hofacker is deemed valid.” Lyle now appeals.

¶10 Lyle argues the circuit court erred by finding that it was impossible for Lila to close on the property within forty-five days. We will uphold a circuit court’s findings of fact unless clearly erroneous. *See* WIS. STAT. § 805.17(2). Interpretation of a testamentary document involves questions of law which we review independently. *See Holy Family Convent v. DOR*, 157 Wis. 2d 192, 195, 458 N.W.2d 579 (Ct. App. 1990).

¶11 Here, Margaret’s will set forth a clear procedure for offering and exercising the option to purchase. The will unambiguously required the personal representative to provide the heir “a written offer to sell” The personal representative was also specifically encouraged by the circuit court to “do everything by the book.” Regarding the execution of Lila’s option to purchase, the court explicitly stated, “Let’s make sure it has been validly exercised in writing in a way that’s beyond question no matter who’s complaining about what.”

¶12 Yet, despite the will’s specific requirement to provide written notice of the offer to sell, and the circuit court’s direction to “make sure it has been validly exercised in writing,” the personal representative failed to do so. Without a written offer to sell, Lila had no way to formally exercise her option to purchase. It follows that without formal notice of the offer to sell, and without an

opportunity to formally exercise the option, the forty-five day period for closing never commenced as a matter of law.

¶13 We also conclude the circuit court appropriately held under the circumstances of this case that it would be inequitable to force Lila to forfeit her opportunity to exercise the option. The court applied the cardinal equitable maxim that “equity regards that as done which ought to be done[.]” See *Richardson v. Richardson*, 223 Wis. 447, 461, 271 N.W. 56 (1937). The court recognized that a forfeiture would penalize Lila for the personal representative’s failure to comply with the requirements of the will and the court’s specific admonition to follow the procedures for exercising the option “by the book.” It would also penalize Lila for the protracted litigation in this case, to a large extent initiated and continued by Lyle, which in turn would frustrate Margaret’s intentions. The circuit court properly exercised its equitable authority by concluding that Lila’s intention to exercise the option was valid.⁵

¶14 We reject Lyle’s suggestion that the circuit court improperly changed the will to carry out its own idea of what is equitable. See *Woehler v. Bohnert*, 215 Wis. 108, 111, 254 N.W.103 (1934). To the contrary, the court merely utilized its equitable authority to effectuate the testatrix’s substantive wishes that Lila be provided the second opportunity to exercise the option. We therefore affirm.

⁵ Lyle also argues that closing within forty-five days was not impossible because once the prior appeal was decided “there was no litigation preventing the personal representative from distributing the property in accordance with the terms of the Will, which she attempted to do.” This argument ignores the personal representative’s failure to provide the required written offer to sell as set forth in Margaret’s will.

¶15 Lila has filed a motion seeking frivolous fees and costs on appeal. The motion is denied.

By the Court.—Order affirmed.

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

