

¹ To avoid confusion, we use the first names of the beneficiaries who share the same last name. No familiarity or disrespect is intended.

Court to remand this case to allow Dennis to put on evidence for his estoppel, impossibility, and frustration of purpose claims. Preliminarily, we find Point Two was not preserved, and we decline to exercise plain error review. Because the stay expired at the conclusion of the will contest and Dennis failed to timely exercise the option to purchase the property under the terms of the will, we deny Points One, Three, and Four. Accordingly, we affirm the probate court's judgment.

Background

This legal odyssey, spanning nearly a decade, comes before us for the fourth time to resolve a probate dispute among siblings about the sale of their deceased mother's real property. *Broughton v. Estate of Tyner*, ED106922, Order dated 1-2-2018 (Mo. App. E.D. 2018) (dismissing Respondents' appeal of a grant of summary judgment due to lack of finality as the judgment failed to dispose of all issues); *Broughton v. Estate of Tyner*, 600 S.W.3d 6, 13 (Mo. App. E.D. 2020) (reversing a grant of summary judgment in favor of Dennis on Respondents' undue influence claim); *Estate of Tyner*, 682 S.W.3d 431, 436 (Mo. App. E.D. 2024) (reversing an award of attorney's fees in favor of Dennis after he successfully defended against Respondents' claims in a will contest jury trial).

Will Provision

Ann Louis Tyner (Mother) died on May 19, 2016 as a widow. Mother had two sons and three daughters. Mother's sons include Earl Claude Tyner (Earl), a personal representative of the estate but not a party to this appeal, and Dennis Lynn Tyner, the appellant and a personal representative as well. Mother's daughters include Charla Ann Broughton, Theresa Marchelle Schultz, and Cecile Yvonne Gregory.² The probate court admitted Mother's will on June 9,

² Charla Broughton passed away during the pendency of this case.

2016. The fourth paragraph of Mother's will states all of her real property shall be devised and bequeathed in five equal shares to her five children. The fifth paragraph of Mother's will provides:

I do hereby give my son, Dennis Lynn Tyner, the right to purchase all real estate owned by me at my death, which includes my home, at the price of Four Hundred Dollars (\$400.00) per acre. [1] Dennis Lynn Tyner has (3) three months after my death to exercise his right to purchase. [2] He can exercise his right to purchase by giving the hereinafter named Personal Representative a written notice that he is exercising this right. [3] He shall be given what time is legally necessary to complete this transaction, ***but not more than (1) year after this Will is admitted to probate.*** If this option is exercised, then the Personal Representative is to distribute these proceeds pursuant to paragraph FOURTH above.

Dennis provided timely notice in writing that he wished to exercise the purchase option on June 14, 2016, and the notice was filed with the probate court the next day. On June 23, 2016, the estate filed a petition for an order to sell real property and a notice of hearing on the petition. The probate court set the hearing for July 22, 2016. The hearing was continued twice and rescheduled for September 20, 2016.³

Stay, Consolidation, and Will Contest

In September 2016, Respondents, as a response to the petition for an order to sell real property, filed a will contest action in Shelby County Circuit Court questioning the validity of the fifth paragraph of the will, while simultaneously moving for a stay of the probate proceedings.⁴ Respondents' petition, raised a total of five counts. Count II asked for a determination of assets of the estate and Count IV requested a stay of the sale of real property. In his answer, Dennis requested those counts be transferred to the probate division. The probate

³ Judge Greenwell, who initially presided over the case, recused and a second Judge, Judge Prewitt, granted Respondents' request for continuance of the hearing with the consent of Dennis' counsel.

⁴ "Any contest of the validity of a probated will . . . which has been rejected by the judge of the probate division ***shall be heard before a circuit judge*** other than the judge of the probate division[.]" § 473.083.5 (emphasis added). All Section references are to RSMo (2016), unless otherwise noted.

court granted the stay on September 20, 2016. The stay order stated “[c]ase stayed *pending outcome of will contest in circuit court*[.]” (emphasis added).

In 2017, the parties jointly requested that all counts of the will contest petition (16SB-CC00007) be consolidated in front of the same judge—the Honorable Judge Frederick (Rick) Tucker. Also, in 2017, Respondents moved to consolidate the probate case (16SB-PR00023) with the will contest so it too could be heard by Judge Tucker. On February 14, 2017, the probate court granted that consolidation by consent of all parties. The probate case then entered a two-year period of inactivity while Respondents and Dennis litigated the will contest. The will contest went to trial and the jury found the fifth paragraph was a valid part of the will. The circuit court entered judgment in accordance with the jury’s verdict on September 15, 2022. Respondents did not appeal this judgment, which became final on October 15, 2022.⁵

Probate Case Actions During the Will Contest

In spite of the stay, the parties proceeded to litigate several motions in the probate case. These motions included but were not limited to a claim against the estate, a motion to remove a personal representative, and a petition to sell personal property. The probate court ruled on all these motions before the termination of the will contest. Respondents filed a motion to remove Dennis as a personal representative, which the court denied, and instead the probate court made Gregory a personal representative alongside Dennis and Earl. Additionally, on May 14, 2019, the estate, by personal representatives Dennis and Earl, filed notice of hearing on the petition for an order to sell real property setting the hearing for June 13, 2019. However, on June 12, 2019, the estate sought and was granted a continuance of the hearing. The court’s docket entry of June

⁵ “A judgment becomes final in a civil matter at the expiration of 30 days after its entry if no timely authorized after-trial motion is filed.” Rule 81.05(a)(1). All Rule references are to Mo. Civ. P. (2025). No party filed any authorized after-trial motion.

13, 2019, indicates the hearing regarding the sale of the real property was continued until such time as a party re-notices the motion.

Probate Actions After Will Contest

In September 2022, Dennis and Earl sought attorney's fees from the estate for defending against Respondents' will contest and the probate court awarded such fees. Respondents appealed the award of attorney's fees. Meanwhile, during the pendency of the appeal, counsel for the estate sent an email regarding a contract for sale of the land, to which Respondents' counsel replied a day later, stating the documents looked fine and wanting to know when he should send Gregory to sign. In July 2023, Earl and Gregory, both personal representatives of the estate, signed a real estate contract allowing Dennis to purchase the real property by the terms outlined in the will. However, Dennis did not sign this contract. On January 9, 2024, this Court reversed the probate court's award of attorney's fees. *Estate of Tyner*, 682 S.W.3d 431, 436 (Mo. App. E.D. 2024).

Present Issues

On May 24, 2024, the estate, by personal representative Earl, filed a notice of hearing on the petition for an order to sell real property. Respondents objected to the sale stating Dennis' purchase option had expired. In June 2024, Earl filed a proposed order to lift the stay and Respondents filed a motion to strike this proposed order. On July 25, 2024, the probate court held a hearing to resolve the issues surrounding the motion to strike the proposed order to lift the stay.

At the hearing, Respondents claimed the stay was lifted when the will contest concluded and Dennis failed to purchase the real estate within the one-year time limit. Dennis asserted, that he needed a specific court order to lift the stay. To support this assertion, Dennis made three

claims arguing the stay prevented him from exercising his option. First, Dennis explained the stay order remained in effect as it was ambiguous because it did not detail what outcome, of the will contest, would lift the stay or what the probate court would do given a certain outcome. Second, Dennis claimed he could not have fully complied with the terms of the will with the stay still in effect, however he argued he substantially complied. Dennis pointed to the timely filing of his written notice of intent to exercise the purchase option and notice of hearing on the sale of the real estate to illustrate his substantial compliance with the terms of the option. Third, Dennis argued the contract law doctrines of estoppel, impossibility, and frustration of purpose should apply to prevent Respondents from benefiting from the stay they requested. Dennis indicated that an employee of a title insurance company was present in the gallery and she could attest that an order lifting the stay would be necessary to acquire title insurance. However, the probate court indicated it had no need to hear any testimonial evidence as the issue of the stay was a legal point. Dennis did not seek permission from the probate court to put this potential witness on the stand.

Conversely, Respondents made numerous and persistent requests for permission to put on evidence, and Gregory was allowed to testify. Gregory stated that in July 2023 she and Earl signed a contract to sell the real estate to Dennis, and the contract was admitted into evidence without objection. The real estate contract included a petition for an order of sale of real property, a proposed order to approve and confirm the sale, and a report of private sale.

To clarify who had the burden to re-notice the petition for an order to sell the real estate, the probate court asked the parties. Respondents claimed Dennis needed to re-notice the petition as it was his motion. Dennis claimed that he did so in 2016 and 2024.⁶ The probate court

⁶ The hearing on the petition had also briefly been re-noticed for hearing by Earl in 2019, but was then continued at his request.

requested findings of fact and conclusions of law from both parties. Respondents filed their proposed findings of fact and conclusions of law, and Dennis did not. In September 2024, the probate court granted the Respondents’ motion to strike the proposed order to lift the stay. In the order, the probate court stated the stay terminated when the will contest concluded in August 2022. Dennis now appeals.

Standard of Review

“On review of a court-tried case, an appellate court will affirm the [probate] court’s judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law.” *In re Est. of McDow*, 707 S.W.3d 621, 626 (Mo. App. W.D. 2024) (quoting *Ivie v. Smith*, 439 S.W.3d 189, 198–99 (Mo. banc 2014)); *see also Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). “Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of fact can reasonably decide the case.” *Grabb v. Grabb*, 689 S.W.3d 207, 212 (Mo. App. W.D. 2024) (internal quotation omitted). “We view the evidence and the reasonable inferences drawn from the evidence in the light most favorable to the judgment, disregard all evidence and inferences contrary to the judgment, and defer to the [probate] court’s superior position to make credibility determinations.” *Id.* (internal quotation omitted).⁷

⁷ Dennis argues the standard of review for all four of his points is *de novo*. He explains that each point requires this Court to interpret a court order (Point I), a statute (Point II), and a will and last testament (Points III & IV). Dennis further suggests a determination as to whether the doctrines of estoppel, impossibility, and frustration of purpose is also a matter of *de novo* review. However, his assertions ignore the procedural posture of this case as this Court is here to decide whether the probate court properly granted Respondents’ motion to strike the order lifting the stay after hearing evidence on July 25, 2024, not to interpret any of the aforementioned documents.

Discussion

I. The probate court did not err in finding Dennis' time to purchase the real property expired

For purposes of clarity and ease of the reader, we address Dennis' Points One, Three, and Four together as these points primarily concern the stay.

A. The stay was lifted at the conclusion of the will contest

In Point One, Dennis argues the stay remains in effect until lifted by order of the probate court or alternatively the stay expired once the mandate in *Estate of Tyner*, 682 S.W.3d 431 (Mo. App. E.D. 2024), the appeal of attorney's fees, was handed down. Dennis explains the consolidation of the probate case and the will contest meant both cases must be resolved for the stay order to have lifted. Dennis argues that the will contest was not resolved at least until February 1, 2024, when this Court's mandate in the attorney's fee appeal was issued. Hence, he had a year from that date to complete the real estate purchase. Respondents claim the stay order terminated at the conclusion of the will contest. We find the stay was expired once the judgment in the will contest became final on October 15, 2022.

Rule 66.01(b), Mo. R. Civ. P. (1996), allows a court to consolidate "civil actions involving a common question of law or fact [which] are pending before the court[.]" The court in its order "may order a joint hearing or trial of any or all the matters in issue in the civil actions; it may order all the civil actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." Rule 66.01(b), Mo. R. Civ. P. (1996).

However, Rule 66.01 is not available in probate actions unless its applicability is specifically ordered by the probate judge. *See Brown v. Brown*, 688 S.W.3d 600, 604 (Mo. App. W.D. 2024) (internal quotation omitted) (finding that Rule 74.06, governing relief from

judgments, does not apply to probate matters unless specifically ordered as applicable by the probate judge). Rule 41.01(a)(2), Mo. Civ. P. (2018), states that Rules 41 through 101 shall govern civil actions pending before a circuit judge except those actions governed by the probate code. Rule 41.01(b), Mo. Civ. P. (2018), clarifies that “Rules 41, 54.18, 55.03, 56, 57, 58, 59, 60, 61, 62, and 67.03 apply to proceedings in the probate division of the circuit court.”

However, to implicate any other rules of civil procedure in a probate proceeding, the probate judge must serve an order upon the parties specifying the rules to be applied. Rule 66 is not included in the civil procedure rules applicable to the probate court under Rule 41.01. Notably the February 14, 2017, order granting consolidation fails to refer to any rule of civil procedure. Even if the court’s approval of the parties’ request to consolidate the cases could be construed as applying Rule 66, this was never made applicable in actuality as the court never issued an order expressing its intent to apply Rule 66 in the proceedings, let alone serve such an order on all parties.

Even assuming the probate court did issue such an order, the consolidation would not have had the effect Dennis claims it does. To determine what is meant by the probate court’s order of consolidation in this context, this Court must examine the record. *In Matter of Adoption of C.T.P.*, 452 S.W.3d 705, 711 (Mo. App. W.D. 2014) (quoting *Woods v. Cory*, 149 S.W.3d 912, 914 (Mo. App. S.D. 2004)). Respondents filed their initial five count petition in September 2016, in the Circuit Court of Shelby County, because the petition included a will contest count. Respondents also included a count asking the court to determine assets (Count II) and to stay the sale of real estate (Count IV). Dennis in his answer to the petition requested that Counts II and IV be transferred to the probate division. In January 2017, in the will contest case, the parties jointly requested that all counts in the matter be consolidated in front of the same judge—the

Honorable Judge Tucker. Next, Respondents, with consent of all parties, moved that the cause in the probate court also be consolidated into the one action before Judge Tucker, and that motion was granted in February 2017.

Despite the use of the word consolidation in the order, the actions continued to proceed simultaneously as two separate cases—the circuit court case with its counts—and the probate case. The only difference was the same judge presided over both cases instead of a separate judge for the circuit court case and a probate judge for the discovery of assets and sale of real estate. The record is robust with evidence demonstrating the unique identity of each proceeding. *See Moss v. Home Depot USA, Inc.*, 988 S.W.2d 627, 630 (Mo. App. E.D. 1999) (finding the consolidated cases remained separate entities because the docket entries, orders, and judgments were entered into their respective cases). After the consolidation was granted and while the stay order remained in effect, the parties filed several motions in the probate case which the probate court ruled on before the termination of the will contest. As further evidence, Dennis behaved as if the stay order was no longer in effect by filing for attorney’s fees in the probate case after his successful defense of the will contest.⁸ The record in this case clearly demonstrates that the probate case and will contest retained their separate identities as their docket entries, orders, and judgments remained separate. *See id.*

Having found that the cases are separate entities, we turn now to the effect of the stay order on the proceedings. The stay order on its face clearly states the probate case is stayed pending the outcome of the will contest, yet the parties and the probate court treated it only as a stay on the sale of the real property. As discussed previously, the parties litigated several matters

⁸ “In all suits and other proceedings in the probate division of the circuit court, ***the party prevailing*** shall recover his costs against the other party, ***except in those cases in which a different provision is made by law.***” § 472.040 (emphasis added); *see Estate of Tyner*, 682 S.W.3d at 436 (finding Dennis who personally stood to gain from the will’s validity was not entitled to attorney’s fees).

in the probate case before the termination of the will contest. Once the will contest was terminated, the stay terminated as well.

Dennis' alternative argument that the stay remained in effect until the mandate was handed down in *Estate of Tyner*, 682 S.W.3d 431 (Mo. App. E.D. 2024), ignores the clear language of the stay order and the history of the proceedings in both the probate case and will contest. Consequently, Dennis had one year from the time the judgment in the will contest became final on October 15, 2022, to complete the transaction to purchase the real property. Accordingly, we deny Point One.

B. Dennis did not comply with the terms of the will

In Point Three, Dennis claims he substantially performed his obligations under the terms of the will to purchase the real property by timely exercising his option and providing notice to sell the real property. Dennis further explains the only obstacle to him completing the transaction was the stay. Respondents argued this point was not preserved. In the alternative, Respondents argued that Dennis partially completed the requirements to purchase the real property but failed to exercise that option within the one-year deadline. We hold Dennis did not comply with the terms of the purchase option outlined in the will.

“When determining the meaning of a will’s provision, the paramount rule of construction is that the [testator’s] intent is controlling and such intention must be ascertained primarily from the [will] as a whole.” *In Matter of Edwin Meissner Testamentary Tr.*, 497 S.W.3d 860, 863 (Mo. App. E.D. 2016) (quoting *First Nat’l Bank of Kansas City v. Hyde*, 363 S.W.2d 647, 652 (Mo. banc 1962)) (internal quotation marks omitted). “Where the language used is clear and of well-defined force and meaning, it must stand as written[.]” *O’Riley v. U.S. Bank, N.A.*, 412 S.W.3d 400, 406 (Mo. App. W.D. 2013) (quoting *Hyde*, 363 S.W.2d at 653).

Dennis had three responsibilities under the will to perfect the exercise of the option to purchase the real property: 1) he must give notice to exercise this option within three months of Mother's death; 2) he must give this notice to a personal representative of the estate; and 3) he must complete the transaction within one year after the will has been admitted to probate. Dennis satisfied the first and second requirement but he did not complete the transaction within the prescribed time period.

Dennis, as a personal representative, timely filed his desire to exercise the option about a month after Mother's death and provided notice for a hearing shortly thereafter. However, Dennis did not complete the transaction within the year after the will had been admitted to probate. As explained above, the one-year time limit began to run on October 15, 2022, when the judgment for the will contest became final. Dennis had until October 15, 2023 to complete the transaction. Dennis did not re-notice his motion to sell real property until May 2024, nearly two years from the conclusion of the will contest. Dennis failed to comply with the explicit and unambiguous terms of the will. We deny Point Three.

C. Estoppel, impossibility, and frustration of purpose do not apply

In Point Four, Dennis argues the doctrines of estoppel, impossibility, and frustration of purpose should apply because Respondents should not benefit from the stay they requested. Respondents contend they did nothing to prevent the sale of the real property between August 2022 and May 2024. We find these doctrines are not applicable.

Dennis requests this Court hold that the contract law doctrines of estoppel, impossibility, and frustration of purpose are applicable to a requirement imposed by a will despite his inability to find caselaw to support his request. Dennis further complains the probate court prohibited him from putting on evidence to substantiate this argument. We decline the invitation to find these

doctrines applicable, as Dennis failed to offer evidence, despite having the opportunity to do so at the hearing, that may have entitled him to such defenses.

Missouri courts do not favor relief by estoppel and we will not apply it lightly “nor will it arise unless justice to the rights of others demands it.” *Brownfield v. Heman*, 711 S.W.3d 386, 407 (Mo. App. W.D. 2025) (internal quotation and quotation marks omitted). “The party asserting impossibility must demonstrate that virtually every action possible to promote compliance with the contract has been performed.” *Premier Valet, LLC v. Premier Valet Servs., LLC*, 667 S.W.3d 144, 148 (Mo. App. E.D. 2022) (internal quotation and quotation marks omitted). Frustration of purpose requires a showing that “the party who is hindered or prevented from performing would have performed except for the acts of the inhibiting party.” *Tribus, LLC v. Greater Metro, Inc.*, 589 S.W.3d 679, 698 (Mo. App. E.D. 2019) (internal quotation omitted). “Arguments and statements of counsel are not evidence of the facts presented.” *Wilson v. Wilson*, 667 S.W.3d 181, 187 (Mo. App. W.D. 2023) (internal quotation omitted).

Here, Dennis did not submit any evidence to demonstrate justice demanded Respondents should be estopped, he performed every possible action, or he would have performed but for the acts of Respondents. Dennis’ counsel argues that these doctrines should apply, without having put any witnesses on the stand. In his brief, Dennis claims the court rejected the possibility that these doctrines applied by finding this case revolved around a legal point, not a factual one. However, at the hearing, Dennis did not seek permission from the probate court to put on evidence to satisfy the burden for these defenses or otherwise complain the court did not allow him to do so.

In comparison, the probate court allowed the Respondents to present evidence that they facilitated the sale of the real estate because of their persistence. The probate court allowed

Gregory to testify regarding the land sale contract signed by herself and Earl in July 2023. The May 2023 email sent by Gregory’s counsel and her signing of the real estate contract provides clear evidence that Dennis could have purchased the real estate within the one-year time limit but curiously he did not sign the contract.⁹

Dennis had the opportunity to present evidence as he brought someone from a title insurance company who would have testified that a specific order lifting the stay was required to properly acquire title insurance. However, Dennis did not take advantage of that opportunity and did not call his witness to the stand. His counsel’s arguments alone do not constitute evidence. *See id.* Assuming arguendo, and had Dennis put on evidence at the July 2024 hearing about the issue of title insurance, these doctrines would remain inapplicable as nothing prevented Dennis from signing the July 2023 real estate contract. Additionally, Dennis does not explain why he could not have requested to lift the stay or re-noticed his motion to sell the real property earlier than he did. We deny Point Four.

II. Dennis failed to preserve his argument that the probate court did not comply with its obligations under § 473.493.1

In Point Two, Dennis claims the probate court ignored its obligation to set the hearing regarding the motion to sell real property. Respondents assert this point was not preserved. We agree and find Dennis did not preserve this argument.

“An issue that was never presented to or decided by the [probate] court is not preserved for appellate review.” *Bell-Kaplan v. Schwarze*, 712 S.W.3d 836, 847 (Mo. App. S.D. 2025) (quoting *State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 129 (Mo. banc 2000)). “[I]t

⁹ Dennis explains the difficulties involved in a private sale of real property in a supervised probate estate as three steps must be taken. First, an executor or administrator of the estate files a petition. § 473.493.1. Second, the court must issue an order that details the sale. § 473.500. Third, the executor or administrator shall file a report of the sale. § 473.513.1. The July 2023 real estate contract signed by Earl and Gregory has all three of these components. Dennis does not elaborate as to why he did not sign this contract which, if signed, would have prevented this appeal.

simply is not the role of the court of appeals . . . to grant relief on arguments that were not presented to or decided by the [probate] court.” *Id.* (quoting *Barkley v. McKeever Enters., Inc.*, 456 S.W.3d 829, 839 (Mo. banc 2015)). “This rule abides regardless of the merits of the argument.” *Id.* (*Barkley*, 456 S.W.3d at 839).

At the July 2024 hearing, Dennis never claimed the probate court failed to set a hearing regarding the sale of the real property. Dennis’ initial brief reflects this fact, as he only cites to the probate court inquiring during the hearing who had the duty to re-notice the petition to sell.¹⁰ Therefore, this point is not preserved for appellate review.

Conclusion

The judgment of the probate court is affirmed.



Rebeca Navarro-McKelvey, P.J.

John P. Torbitzky, C.J.,
Robert M. Clayton III, J., concur.

¹⁰ Dennis in his reply brief asked this Court to apply plain error review to this issue if we find it to be unpreserved. We decline this request as the request itself was not preserved because Dennis only asked for plain error review in his reply brief. *Cottonaro v. Express Med. Transportation, Inc.*, 688 S.W.3d 751, 759 n.9 (Mo. App. W.D. 2024) (quoting *Swafford v. Treasurer of Mo.*, 659 S.W.3d 580, 585 n.7 (Mo. banc 2023)) (denying a party’s request for plain error review because the first time it was requested was in the party’s reply brief). Even if the request was preserved, we decline to exercise plain error review as we rarely apply plain error review in civil cases. *Id.* at 759 (internal quotation omitted) (“As a practical matter, we rarely resort to plain error review in civil cases.”); *Int. of P.S.A.*, 697 S.W.3d 846, 849 (Mo. App. S.D. 2024) (internal quotation omitted) (“If there is no facial showing of manifest injustice or miscarriage of justice, appellate courts should decline to exercise plain error review.”).