COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP1086 **Cir. Ct. No. 2010PR51**

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

IN RE THE ESTATE OF FLOYD HECK:

SHELDON HECK,

APPELLANT,

V.

HARVEY HECK, TRACY HECK, ROBERT BLOCH AND JUSTIN BLOCH,

RESPONDENTS.

APPEAL from an order of the circuit court for Clark County: JON M. COUNSELL, Judge. *Affirmed*.

Before Vergeront, Sherman and Blanchard, JJ.

¶1 BLANCHARD, J. Sheldon Heck appeals a circuit court order denying the admission of his father's will to probate based on a failure to comply

with the execution of wills statute, WIS. STAT. § 853.03 (2009-10).[1] Sheldon argues, contrary to the circuit court's conclusion, that the will's execution complied with the § 853.03 requirement that the testator sign the will, or acknowledge his or her signature or the will itself, in the "conscious presence" of each of two persons before they sign as witnesses to the will's execution. In Sheldon's view, the requirement is met as long as the testator is aware that a person is planning to sign as a witness and the testator could have "readily arranged" to sign or acknowledge his or her signature or the will itself in the presence of that person. We disagree and affirm the order.

BACKGROUND

¶2 The facts are undisputed for purposes of this appeal. Floyd Heck, the testator and Sheldon's father, signed a will at his residence on October 10, 2008. Floyd's nephew Ben Heck was present, saw Floyd sign the will, and signed the will as a witness. Ben then took the will to his residence approximately 1.3 miles away, where his wife, Jan Heck, signed the will as the second purported witness. Ben returned the will to Floyd's residence the next day. At no point did Floyd and Jan communicate about the will.[2]

¶3 Floyd died in July 2010, and Sheldon sought to probate the will. Other family members objected, including Floyd's son, Harvey Heck. Harvey

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] We note that the parties' record citations leave us uncertain whether Floyd and Sheldon shared a residence. However, there is apparently no dispute that Floyd and Ben signed the will at the location where Floyd resided and that Ben and Jan Heck's residence was approximately 1.3 miles away from that location.

moved for summary judgment, arguing that the will's execution failed to comply with WIS. STAT. § 853.03. The circuit court agreed, concluding that the undisputed facts showed that Jan was not present when Floyd signed the will and that Floyd did not subsequently acknowledge his signature on the will or the will itself in Jan's presence.

DISCUSSION

A. Standard of Review

¶4 We review a grant of summary judgment de novo, using the same methods as the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). We need not recite all those methods here because they have been repeatedly summarized in published opinions of the Wisconsin courts. It is enough to say that in this case there are no genuine issues of material fact and the only question presented involves the interpretation and application of statutes to undisputed facts, a question of law that we review de novo. *See* ***Seifert v. School Dist. of Sheboygan Falls***, 2007 WI App 207, ¶16, 305 Wis. 2d 582, 740 N.W.2d 177.

B. Relevant Statutes

¶5 Two statutes are relevant: WISCONSIN STAT. § 853.03, which contains the will execution requirement at issue, and WIS. STAT. § 851.035, which defines "conscious presence." The statutes provide, in full, as follows:

> **853.03 Execution of wills.** Every will in order to be validly executed must be in writing and executed with all of the following formalities:
>
> **(1)** It must be signed by the testator, by the testator with the assistance of another person with the testator's

> consent or in the testator's name by another person at the testator's direction and in the testator's conscious presence.
>
> **(2)**(am) *It must be signed by at least 2 witnesses who signed* within a reasonable time *after any of the following*:
>
> 1. The signing of the will as provided under sub. (1), *in the conscious presence of the witness*.
>
> 2. The testator's implicit or explicit acknowledgement of the testator's signature on the will, *in the conscious presence of the witness*.
>
> 3. The testator's implicit or explicit acknowledgement of the will, *in the conscious presence of the witness*.
>
> (bm) The 2 witnesses required under par. (am) may observe the signing or acknowledgement under par. (am)1. to 3. at different times.
>
> * * *
>
> **851.035 Conscious presence.** "Conscious presence" means *within the range of any of a person's senses*.

(Emphasis added.)

C. Analysis

¶6 As indicated above, WIS. STAT. § 853.03(2)(am) requires that two witnesses sign the will, and that each does so within a reasonable time *after* the testator does at least one of the following *in the conscious presence of the witness*:

1. Signs the will (or is assisted in doing so or directs that it be done);

2. Implicitly or explicitly acknowledges his or her signature on the will; or

3. Implicitly or explicitly acknowledges the will itself.

¶7 Sheldon does not, as a factual matter, take issue with the circuit court's conclusion that Jan was not present when Floyd signed the will and that Floyd did not subsequently acknowledge his signature on the will or the will itself in Jan's presence before she signed as a purported witness. Rather, Sheldon argues that the court failed to correctly apply the "conscious presence" standard. Sheldon argues that, if the proper legal standard is applied, then the will complies with WIS. STAT. § 853.03(2)(am). We disagree for the following reasons.

¶8 The interpretation of a statute begins with the language of the statute, and if the meaning is plain, we ordinarily stop the inquiry. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. We give statutory language its common, ordinary, and accepted meaning, except that we give technical or specially defined words or phrases their technical or special definitional meaning. ***Id.*** We may resort to dictionary definitions to ascertain the common, ordinary, and accepted meaning of terms. *See* ***id.***, ¶53. In addition, we must interpret statutes in a manner that avoids unreasonable or absurd results. ***Id.***, ¶46.

¶9 As already indicated, "conscious presence" is expressly defined in WIS. STAT. § 851.035 to mean "within the range of any of a person's senses." The "senses" are commonly understood to mean hearing, sight, smell, touch, and taste. *See* WEBSTER'S II NEW COLLEGE DICTIONARY 1006 (1995).

¶10 Sheldon points to no evidence to support a conclusion that Floyd either signed his will or acknowledged his signature or the will itself within the range of any of Jan's senses. Rather, Sheldon argues that a person may validly sign a will as a witness under the statutes if the testator is aware that the person plans to sign as a witness and the testator could have "readily arranged" to be in

the witness's presence to sign the will, to acknowledge his or her signature, or to acknowledge the will itself. Specifically, Sheldon argues as follows, relying on evidence in the record regarding Floyd's capacity and knowledge:

> Floyd Heck had the mental faculties, the physical ability, the available proximity, and the awareness that *he could then have readily arranged*, in person with Jan Heck, to have his Will acknowledged, have his signature acknowledged or simply have signed his Will in the presence of Jan Heck. Floyd Heck knew and was well aware of what was taking place, and, where it was going to take place[,] in the witnessing of his Will. [He], by his approval assented to Ben Heck to allow Ben Heck to take the Will … to Jan Heck for the signing by Jan Heck of the Will. Floyd Heck knew what was going on, had a sense of awareness related to his Will, and, *therein, he did sign and acknowledge his signature and his Will in the "Conscious Presence" of [Jan Heck]*.

(Emphasis added.) (Record citations omitted.)

¶11 This argument ignores the unambiguous requirement in the statutes that the testator take some concrete action regarding the will—"signing" or implicitly or explicitly "acknowledging" the testator's signature or the will itself—that occurs within the range of at least one sense of each witness before the witness signs the will. Stated another way, there is no basis in the statutory language to conclude that it is sufficient that the testator, even with the clearest awareness and intent, could "readily" have arranged to be in the witness's presence when taking one of the described actions.

¶12 Relying on the Uniform Probate Code, Sheldon argues that the conscious presence standard is intended to be a liberal one.[3] However, a comment

[3] The legislature adopted the conscious presence standard in 1997 Wis. Act 188, §§ 85, 126, 128.

to the Code shows that the conscious presence standard is not nearly so liberally construed as to encompass Sheldon's exceedingly broad understanding of it:

> [T]he so-called "conscious presence" test is codified, under which a signing is sufficient if it was done in the testator's conscious presence, i.e., *within the range of the testator's senses such as hearing*; the signing need not have occurred within the testator's line of sight. For application of the "conscious-presence" test, see ***Cunningham v. Cunningham***, 83 N.W. 58 (Minn. 1900) (conscious-presence requirement held satisfied where "the signing was *within the sound of the testator's voice*; he knew what was being done …"); ***Healy v. Bartle***[***tt***], 59 A. 617 (N.H. 1904) (individuals are in the decedent's conscious presence "whenever they are *so near at hand that he is conscious of where they are and of what they are doing, through any of his senses*, and where he can readily see them if he is so disposed."); ***Demaris' Estate***, 110 P.2d 571 (Or. 1941) ("[W]e do not believe that sight is the only test of presence. We are convinced that any of the senses that a testator possesses, *which enable him to know whether another is near at hand and what he is doing*, may be employed by him in determining whether [an individual is] in his [conscious] presence …").

UNIF. PROBATE CODE § 2-502, 8 U.L.A. 145 (1998) (emphasis added).[4]

¶13 Similarly, Sheldon's reliance on BLACK'S LAW DICTIONARY adds nothing to his argument. BLACK'S defines the "conscious-presence test" as "[a] method for judging whether a testator is in the presence of a witness to a will, whereby if the testator can sense the presence of the witness—even if the witness cannot be seen—the witness is present." BLACK'S LAW DICTIONARY 345 (9th ed. 2009). This definition does not lend coherence to Sheldon's otherwise incoherent

[4] The pertinent Uniform Probate Code provision, § 2-502, is not identical to WIS. STAT. § 853.03, but both use the conscious presence standard. *See* UNIF. PROBATE CODE § 2-502, 8 U.L.A. 144 (1998). Also, the Code, unlike the Wisconsin Statutes, does not contain a section expressly defining conscious presence.

argument that Floyd's "awareness" that Jan planned to sign, or would be asked to sign, as a witness is the same as "sens[ing] [her] presence."

¶14 Sheldon argues in the alternative that we should adopt a substantial compliance rule for WIS. STAT. § 853.03(2)(am) and that he has shown substantial compliance here. He argues that the purpose of a substantial compliance rule is to allow probate of a will despite "procedural peccadillos" and that the failure of Jan to be "consciously present" as required is just such a trivial defect. We are not persuaded because the Wisconsin authority that Sheldon cites does not support his argument. Specifically, in ***Wood v. Kusta***, 224 Wis. 479, 482-84, 272 N.W. 469 (1937), it is apparent that the testator and witnesses were in fact within one another's conscious presence. The court viewed this type of presence as an important element to constitute substantial compliance when the evidence suggested that the testator may have made an implicit, not explicit, request for attestation by one of the witnesses. ***Id.*** at 483-84.[5] The other substantial compliance issue in ***Wood*** was that the testator signed the will on the correct page but in the wrong place on that page. ***Id.*** at 482. Here, in contrast, the issue is not whether Floyd Heck made a sufficient implicit acknowledgement, nor is the issue whether there was a technical defect in Jan's or Floyd's signature on the will.

¶15 Moreover, addressing the substantial compliance issue at a more general level, even assuming without deciding that it is possible to comply with the conscious presence requirement through substantial compliance, this doctrine

[5] The version of the execution of wills statute at issue in ***Wood v. Kusta***, 224 Wis. 479, 272 N.W. 469 (1937), did not specify whether it was sufficient for a testator to implicitly request attestation to a will or to implicitly acknowledge a will to a witness. *See* WIS. STAT. § 238.06 (1937); ***Wood***, 224 Wis. at 481.

would be of no use to Sheldon. This is because, as we have explained above, there was a complete failure to meet the requirement, not a mere technical or trivial failure to comply with some aspect of the requirement. For these reasons, we conclude that there would not be substantial compliance in this case, even assuming that the substantial compliance doctrine is available under the terms of the current statute, WIS. STAT. § 853.03(2).

CONCLUSION

¶16 In sum, for all of the reasons stated, we affirm the circuit court's order denying admission of Floyd's will to probate.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

¶17 SHERMAN, J. (*concurring*). I join the majority in the entirety of its opinion, without reservation. However, I add a few comments.

¶18 The appellant in this case urges us to relax the formality of the requirements for the proper execution of a valid will. It is understandable that the formality of testamentary distribution may seem gratuitous and archaic now that so many less formal alternative options to transfer property at death are available. These include, without limitation, living trusts, the so-called "Washington Will"[1] under WIS. STAT. § 766.58(3)(f) and transfer on death under WIS. STAT. § 705.15.

¶19 The formality appropriate in the execution of a valid will is a matter for the legislature, not the courts. Having enacted these changes to non-testamentary distribution, it is presumed that the legislature was aware of the fact that it was leaving the formality of testamentary distribution unchanged. *See* ***Heritage Farms, Inc. v. Markel Ins. Co.***, 2009 WI 27, ¶40, 316 Wis. 2d 47, 762

---

[1] The supreme court has explained:

> WISCONSIN STAT. § 766.58(3)(f) is commonly referred to as the "Washington Will" statute. It provides that, pursuant to a marital property agreement, spouses may agree to "[p]rovid[e] that upon the death of either spouse any of either or both spouses' property, including after-acquired property, passes without probate to a designated person, trust or other entity by nontestamentary disposition."

Maciolek v. City of Milwaukee Employes' Ret. Sys. Annuity & Pension Bd., 2006 WI 10, ¶3 n.4, 288 Wis. 2d 62, 709 N.W.2d 360.

N.W.2d 652 ("[w]e generally presume that when the legislature enacts a statute, it is fully aware of the existing laws").

¶20 From time to time, courts offer suggestions to the legislature for areas of the law that might benefit from study and legislative clarification. *See, e.g.,* ***Solowicz v. Forward Geneva Nat., LLC***, 2010 WI 20, ¶70, 323 Wis. 2d 556, 780 N.W.2d 111, (Bradley, J., concurring) (Justice Bradley suggesting "that the chief of the legislative reference bureau consider reporting this decision to the law revision committee to examine whether legislation should be enacted to address this evolving area of law"). I hesitate to do so here lest I inadvertently give the impression that I am suggesting that the formality of testamentary distribution needs to be addressed. I make no such suggestion; I only wish to call attention to the tension which is developing regarding the growing disparity between testamentary and non-testamentary means of estate planning.