

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 28, 2005

Cornelia G. Clark
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. 2005AP967

Cir. Ct. No. 2004PR22

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE ESTATE OF WALTER HEMMRICH:

**DALE HEMMRICH, AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF WALTER HEMMRICH,**

APPELLANT,

v.

**DELORES HEMMRICH, BY HER GUARDIAN AD LITEM,
DIANA SCHIRA,**

RESPONDENT.

APPEAL from an order of the circuit court for Marathon County:
GREGORY B. HUBER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Dale Hemmrich appeals an order of the circuit court permitting Delores Hemmrich to elect against her husband's will pursuant to WIS. STAT. § 861.08.¹ Dale contends the circuit court erred when it waived the requirement that a surviving spouse must, within six months of the decedent's death, either make an election or petition for an extension of time to make an election. We disagree and affirm.

BACKGROUND

¶2 Walter Hemmrich died on June 20, 2003. He was survived by his wife, Delores, and four children, Dale Hemmrich, Wayne Hemmrich, Richard Hemmrich and Karen Keim. Due to her incompetence, Richard was appointed permanent guardian for Delores on May 19, 2003. A probate action was filed on May 18, 2004. Dale, who was also the main recipient of Walter's assets under the will, was appointed personal representative.

¶3 After Richard failed to appear or file any elections on Delores's behalf, a guardian ad litem was appointed for Delores. The guardian ad litem was not notified by the probate office of the appointment until November 2004. Upon notification, the guardian ad litem quickly elected against Walter's will on Delores's behalf. Dale objected to the election on the ground that it was not timely, but the circuit court granted the election.

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

DISCUSSION

¶4 Dale contends the circuit court erred when it waived the requirement that a surviving spouse must, within six months of the decedent's death, either make an election or petition for an extension of time to make an election pursuant to WIS. STAT. § 861.08(3). Granting an extension to a statutory limit is within the circuit court's discretion, and we will not disturb the decision unless discretion was erroneously exercised. *See Giese v. Giese*, 43 Wis. 2d 456, 460, 168 N.W.2d 832 (1969).

¶5 WISCONSIN STAT. § 861.08(1) requires that a surviving spouse make an election within six months of the decedent's death, unless the surviving spouse qualifies for a time extension. The court may grant the surviving spouse an extension if he or she petitions the court and shows cause for the extension. WIS. STAT. § 861.08(3). The petition for the extension must be filed within six months after the decedent's death, unless the court finds the surviving spouse was prevented from filing the action or naming a particular interested party for reasons beyond his or her control and failure to extend the time would result in hardship for the surviving spouse. WIS. STAT. § 861.08(3)(b).

¶6 The circuit court reasoned Delores met the requirements of WIS. STAT. § 861.08(3)(b). Delores did not have a guardian ad litem until November 2004, which was beyond the deadlines to make an election or to petition for an extension of time to make an election. *See* WIS. STAT. §§ 861.08(1), 861.08(3)(b). Delores was prevented from filing the action herself due to reasons beyond her control. Failing to extend the deadline would result in hardship because she would be unable to pursue her rights as the surviving spouse. We agree with the circuit court that an extension was appropriate.

¶7 Dale argues that Richard, Delores's general guardian, should have made the election prior to the deadline; however, the circuit court was faced with the reality of a guardian who was unresponsive and failed to take any action on Delores's behalf. After the guardian ad litem's appointment, she quickly pursued Delores's right to make the election. As the circuit court noted, it was impossible for Delores to have made the election herself, and until the appointment of the guardian ad litem, no one was acting in her interests. Therefore, extending the deadline was not an erroneous exercise of discretion.

By the Court.—Order affirmed.

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

