

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 6, 2010

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. 2009AP1170

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,

RESPONDENT.

APPEAL from an order of the circuit court for Pierce County:
ROBERT W. WING, Judge. *Affirmed.*

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

¶1 PER CURIAM. Lyle Hofacker appeals an order invalidating a codicil to his mother, Margaret Hofacker's, will. Lyle argues the circuit court

applied the wrong legal standard and contends the court's conclusion that his mother lacked testamentary capacity when she signed the codicil was clearly erroneous. We disagree and affirm.

BACKGROUND

¶2 Margaret Hofacker's will granted her four children—Leon Hofacker, Lila Bates, Lyle Hofacker, and Lita Hofacker—the option to purchase her farm. The will also established the order in which they could exercise the option. Leon 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. In July 2007, Margaret, accompanied by Lita, met with her attorney, Mary Beth Gardner, to discuss changing the order in which the purchase option could be exercised. Gardner drafted a codicil to Margaret's will, which gave Lyle and Lita, respectively, the rights of first and second refusal.¹ Gardner met with Margaret and Lita on August 29, 2007, just weeks shy of Margaret's one hundredth birthday, to sign the codicil. Gardner determined Margaret's lack of responsiveness indicated she could not understand enough that day to sign the codicil. She advised Margaret, Lita and Lyle—who picked them up—she “did not believe [Margaret] was alert enough to sign that codicil on that day, and that she may have a better day in the future and we could certainly [sign it then].”

¶3 On September 8, 2007, Margaret signed the codicil at her home. Family friends Gerald and Bonnie Bryse were present to witness the signing, as was Lita. Bonnie testified that after she and Gerald arrived, they chatted with

¹ This was the second codicil. An earlier codicil is not at issue in this appeal.

Margaret about her upcoming birthday party for about half an hour. She stated that Lita then announced “it was time now to sign the papers” and presented a document, turned only to the signature page, to Margaret. The Bryses observed Margaret sign the document, though not on the signature line. Then, at Lita’s request, they signed as witnesses.

¶4 Margaret died on December 4, 2007. Lila, to whom the codicil gave last priority to purchase the farm, moved to exclude it from probate, contending Margaret lacked testamentary capacity when she signed it. Lyle, who was given first priority, opposed the motion.

¶5 At a hearing on the motion, various relatives testified Margaret had been largely unresponsive and uncommunicative in the weeks surrounding the codicil signing. The Bryses testified Margaret was able to engage them in small talk about her birthday the day they witnessed her signature, but stated that no one read the codicil aloud or described what it was. Lita testified she read the codicil to Margaret earlier in the day and believed Margaret knew “what she was signing.”

¶6 At the conclusion of the hearing, the circuit court found there was “clear, satisfactory, and convincing” evidence Margaret did not possess testamentary capacity when she signed the codicil. The court cited her attorney’s reservations about her capacity to comprehend the document the week before she signed it, contradictory testimony about whether Margaret read the codicil before signing it, Margaret’s unresponsiveness to her relatives, and her inability to sign the document in the correct place. The court granted Lila’s motion excluding the codicil from probate. Lyle appeals.

DISCUSSION

¶7 Lyle raises two issues on appeal. The first is whether the circuit court applied the correct standard when evaluating Margaret’s testamentary capacity. This is a question of law we review independently. *Gittel v. Abram*, 2002 WI App 113, ¶41, 255 Wis. 2d 767, 649 N.W.2d 661. The second is whether there is sufficient evidence to support the circuit court’s finding Margaret lacked testamentary capacity. This is a factual finding we will affirm unless clearly erroneous. *See id.*

1. Whether the circuit court applied the correct legal standard

¶8 Lyle argues the circuit court injected a requirement not prescribed by law when it ascribed significance to Margaret’s failure to sign on the codicil’s signature line. Under WIS. STAT. § 853.03 (2007-08), wills and codicils must be in writing, signed, and witnessed. Lyle contends that because the statute does not require the testator to sign in any particular place, the court imposed an obligation the law does not require. Lyle misrepresents the court’s rationale.

¶9 The court did not conclude the codicil was invalid because it did not meet the formal requirements to execute a codicil. Rather, it simply identified Margaret’s failure to sign on the signature line as an indication of her state of mind. It observed, “If she knew what she was doing, why wouldn’t she sign ... above where her name is typed? I mean, that’s a pretty simple, elementary thing.” The court was permitted to consider the manner in which Margaret signed the codicil when evaluating whether she had the capacity to understand what she was signing.

2. Whether the circuit court's finding was clearly erroneous

¶10 Lyle argues the circuit court's finding Margaret lacked testamentary capacity was clearly erroneous because the Bryses and Lita testified Margaret was lucid and responsive the day she signed the codicil.

¶11 While testimony Margaret appeared lucid to the Bryses and Lita the day she signed her codicil is relevant to whether she possessed testamentary capacity, it is not dispositive. *See Gittel*, 255 Wis. 2d 767, ¶45 (witness's opinion testator possessed testamentary capacity is not conclusive). The court acknowledged the Bryses' and Lita's observations, but it also noted that nothing in their account of that day proved Margaret was capable of making decisions about the disposition of her property. It observed, Margaret's ability to "carry on a very short conversation about ... what dress she wants to wear [to her birthday party is] a far cry from really being able to know what your property is and who the people are that would ordinarily take your property."

¶12 The court weighed this testimony against testimony from others about Margaret's state of mind around the time she signed the codicil. It gave particular weight to the testimony of her attorney, who postponed the signing because she had reservations about Margaret's ability to understand the codicil. Margaret's daughter-in-law, Loretta Hofacker, also testified that when she visited Margaret that week, Margaret "never responded to anything that we said or asked her" or indicated "she was aware of what we were saying [or whether she knew us]." Margaret's granddaughter, Sharon Young, testified Margaret was unable to converse with her during several visits she had with her over the year, including at her birthday party one week after she signed the codicil. Likewise, Margaret's great-granddaughter, Christine Fox, testified Margaret could neither converse with

nor recognize her during the last two years of Margaret's life. The court could reasonably conclude this testimony indicated Margaret's ability to make decisions about her property was severely impaired.

¶13 Lyle also argues the circuit court's conclusion was erroneous because the court incorrectly concluded Lita's testimony contradicted the Bryses'. When Lita was asked on direct examination whether she explained to her mother what she was signing, she responded that she did. Lita did not say then when she explained the codicil to Margaret, but on cross-examination she clarified it was before the Bryses arrived that day. The Bryses testified Lita did not explain the document when Margaret signed it. The court interpreted Lita's and the Bryses' testimony to be contradictory.

¶14 However, the court's concern was not simply whether Lita in fact read the codicil to Margaret that day, but whether there was evidence Margaret knew what was happening when she signed the codicil. Even if Lita read the codicil to Margaret earlier in the day, it is undisputed no one said anything about what Margaret was signing when she signed it. The court pointed out that when Lita gave Margaret the codicil it was open only to the signature page and there was no discussion about the document. In light of the substantial amount of testimony that Margaret often appeared unable to comprehend or respond to what others said to her, the court could reasonably infer the dearth of evidence Margaret knew what she was signing indicated she lacked the capacity "to comprehend the nature, the extent, and the state of affairs of [her] property." See *Gittel*, 255 Wis. 2d 767, ¶40 (citation omitted). Its conclusion she lacked testamentary capacity was therefore not clearly erroneous.

¶15 In any event, Lyle failed to file a reply brief refuting Lila’s argument that the court’s conclusion Margaret lacked testamentary capacity was not clearly erroneous—or any of Lila’s other arguments. We may therefore deem the matter conceded. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted are deemed conceded).

By the Court.—Order affirmed.

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

