

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 7, 2006**

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. 2004AP3011**

**Cir. Ct. No. 2003PR55**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**IN RE THE ESTATE OF MARILYN H. BROOKS:**

**DENNIS BROOKS, PERSONALLY AND THE ESTATE OF  
MARILYN H. BROOKS,**

**APPELLANTS,**

**v.**

**DIANE HIETPAS, JEROME BERGHUIS, EUGENE BERGHUIS,  
MARIANNE VAN HANDEL, JEAN MARIE HINDS AND RICHARD VAN HANDEL,**

**RESPONDENTS.**

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APPEAL from an order of the circuit court for Outagamie County:  
DENNIS C. LUEBKE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Dennis Brooks and the Estate of Marilyn Brooks (collectively, Brooks) appeal an order denying their petition for probate of Marilyn Brooks' Last Will and Testament. Brooks argues the circuit court erred by concluding that the will was not properly executed. We reject Brooks' arguments and affirm the order.

### **BACKGROUND**

¶2 On April 3, 2003, Marilyn Brooks signed a preprinted form will naming her nephew, Dennis Brooks, as the sole beneficiary. Marilyn died three months later without procuring witnesses' signatures to the will. On September 11, 2003, Dennis's sister, Linda Robertson, found the will among Marilyn's effects and brought it to an attorney for inspection. On November 4, 2003, Marilyn's neighbors, Steve and Jane Martzahl came forward to sign and formally acknowledge the will, indicating they had seen the will during a visit to Marilyn's home during the second or third week of April 2003.

¶3 A petition for formal administration of the will was filed and the named respondents filed objections to the probate of the will. After a hearing, the circuit court concluded that the will was not validly executed because Marilyn had not acknowledged either her signature on the will or the will itself to Steve Martzahl. The court consequently denied the petition for probate of the will, leaving the estate to be probated under the laws of intestacy. This appeal follows.

### **DISCUSSION**

¶4 Brooks argues that Marilyn implicitly acknowledged her will to Steve Martzahl and, therefore, the will was properly executed. This matter requires us to review mixed issues of fact and law. The trial court's factual

findings will be upheld unless clearly erroneous. WIS. STAT. § 805.17(2) (2003-04)<sup>1</sup>. Whether those facts fulfill a particular legal standard, however, is a question of law. See *State ex rel. Hennekens v. City of River Falls Police and Fire Comm'n*, 124 Wis. 2d 413, 424, 369 N.W.2d 670 (Ct. App. 1990). The form of wills and the requirements for legal execution thereof are subject to legislative control. *In re Estate of Dejmal*, 95 Wis. 2d 141, 153, 289 N.W.2d 813 (1980). It is the policy of the courts to sustain a will as legally executed if it is possible to do so consistently with the requirements of the statute. *Id.* This court has no power to substitute its judgment for that of the legislature as to the essentials of a will, and it cannot lower the statutory requirements prescribed. *Id.*

The formal requirements for the valid execution of a will have been set out in WIS. STAT. § 853.03, which provides:

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) It must be signed by 2 or more witnesses, each of whom signed within a reasonable time after witnessing any of the following:

(a) The signing of the will as provided under sub. (1).

(b) The testator's implicit or explicit acknowledgement of the testator's signature on the will, within the conscious presence of each of the witnesses.

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

(c) The testator's implicit or explicit acknowledgement of the will, within the conscious presence of each of the witnesses.

A duly executed will creates a presumption of validity. *In re Estate of Malnar*, 73 Wis. 2d 192, 193, 243 N.W.2d 435 (1976).

¶5 At the hearing, Jane Martzahl testified that around the third week of April 2003, she and her husband, Steve, went to Marilyn's home to assist her with the operation of a microwave. Upon their arrival, Jane entered the house and Steve initially remained outside to look at a corn planter. Jane and Marilyn sat at a kitchen table containing only two documents: the microwave manual and the subject will. Jane testified that she saw the will and read its dispositive provisions. Marilyn then said something to the effect of "I'm taking care of a few things," or "I took care of a few things." Jane responded, "Okay, that's good." The two women then stood up and as they walked to the microwave, Steve knocked on the door and Marilyn told him to come in. Steve testified that as he stood in the kitchen, approximately seven feet from Marilyn and Jane, he "sneakily took a look" at the will, turning it over and replacing it in nearly the same spot he found it on the table. Steve further testified that although he did not know whether Marilyn saw him reading the will, he assumed that she did because of her close proximity in the kitchen.

¶6 The circuit court ultimately found that although the Martzahls had signed the will within a reasonable time after witnessing it, Steve did not, implicitly or explicitly, witness any acknowledgement by Marilyn of either her signature on the will or the will itself. Brooks challenges the trial court's finding, arguing that Marilyn implicitly acknowledged her last will and testament to Steve by preparing it, signing it, placing it open on her kitchen table for all to see,

allowing Steve to read it and saying nothing to repudiate it within minutes of explicitly acknowledging it to Jane. The record, however, supports the circuit court's finding that Steve "sneaked" a look at the will while Marilyn was not watching and, under any view of the facts, Marilyn did not acknowledge her will to Steve. Because the circuit court's finding is not clearly erroneous, we conclude the will was not validly executed and the circuit court properly denied the petition for probate of the will.

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

