No. 94-3316

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

In the Matter of the Estate of Jeffrey M. Bender, Deceased:

LAWSON BENDER, Former Special Administrator and Personal Representative,

Appellant,

v. **ERRATA SHEET**

KARMEN LINDHAL,

Claimant-Respondent.

Marilyn L. Graves
Clerk of Court of Appeals
231 East, State Capitol
Madison, WI 53702

Peg Carlson
Chief Staff Attorney
119 Martin Luther King Blvd.
Madison, WI 53703

Court of Appeals-District I
633 West Wisconsin Avenue
Milwaukee, WI 53203

Court of Appeals-District II
2727 N. Grandview Blvd.
Waukesha, WI 53188-1672

Court of Appeals-District III
740 Third Street
Wausau, WI 54403-5784

Court of Appeals-District IV
119 Martin Luther King Blvd.
Madison, WI 53703

Jennifer Krapf
Administrative Assistant
119 Martin Luther King Blvd.
Madison, WI 53703

Hon. Richard G. Harvey, Jr.
Reserve Judge
Walworth County Courthouse
P.O. Box 1001
Elkhorn, WI 53121-1001

Lisle W. Blackbourn
P.O. Box 260
Elkhorn, WI 53121

David A. Hudec
P.O. Box 167
East Troy, WI 53120

PLEASE TAKE NOTICE that the attached opinion is to be substituted for the opinion in the above-captioned case which was released on June 26, 1996.

Dated this 31st day of December, 2006.

COURT OF APPEALS
DECISION
DATED AND RELEASED

June 26, 1996

No. 94-3316

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

In the Matter of the Estate of Jeffrey M. Bender, Deceased:

LAWSON BENDER, Former Special Administrator and Personal Representative,

Appellant,

v.

KARMEN LINDHAL,

Claimant-Respondent.

APPEAL from a judgment of the circuit court for Walworth County: RICHARD G. HARVEY, JR., Reserve Judge. *Reversed and cause remanded*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Lawson Bender (Lawson), the decedent's brother and former special administrator of the Estate of Jeffrey M. Bender, appeals from a judgment admitting into probate a will of Jeffrey M. Bender (the

decedent) naming Karmen Lindhal as his sole beneficiary, allowing Lindhal to file an amended claim against the estate, voiding a quitclaim deed executed by Lindhal with regard to the single-family residence she formerly shared with the decedent, and terminating Lawson's status as personal representative of the estate. We conclude that the decedent died intestate because the will offered by Lindhal and admitted into probate was invalidly executed and the trial court erroneously invalidated the quitclaim deed. Therefore, we reverse and remand for further proceedings consistent with this opinion.

The decedent and Lindhal began living together in the early 1980s. They purchased a single-family residence in 1988. The parties' romantic relationship apparently ended in 1992. In August 1992, Lindhal and the decedent gave a second mortgage on the residence to a bank and used the proceeds to satisfy personal and house-related debts. On September 2, 1992, Lindhal quitclaimed her interest in the residence to the decedent. The decedent died in an automobile accident on October 1, 1993. At the decedent's death, his brother, Lawson, was issued letters of special administration and appointed personal representative following a contested hearing.

Lindhal filed a claim against the estate in November 1993 alleging the existence of an oral agreement that she "could continue to reside and have an ownership interest" in the residence. She also claimed all personal property at the residence and a vehicle. She petitioned for probate of a will drafted by Attorney Andrew Allen in 1988 which named her as the decedent's sole beneficiary.[1] Lawson challenged the validity of the will under § 853.03, STATS., on a number of occasions. Lindhal contended that the will was properly executed.

An executed copy of the 1988 will was never located.[2] Lindhal, as the party offering the 1988 document as the decedent's will, had the burden to prove that the will was valid by a preponderance of the evidence. *See* ***Estate of Baker,*** 50 Wis.2d 330, 332 n.1, 184 N.W.2d 72, 73 (1971). Lindhal presented the testimony of two individuals, Robert Burnette and Mary Hurdy-Schlehlein,

[1] If there was no valid will, Lawson would be the decedent's heir under the rules of intestate succession. *See* §§ 851.09 and 852.01(1)(d), STATS.

[2] The will which was the subject of probate proceedings was an unsigned copy from Allen's file.

who testified that in the spring of 1988 they affixed their signatures as witnesses to a document presented to them by the decedent at the Citizens National Bank of Lake Geneva where Schlehlein and Burnette were working. The court found that the witnessed document was the will drafted by Allen.

The trial court made the following findings of fact regarding the will offered by Lindhal. Allen drafted the will at the decedent's request in the spring of 1988 and asked the decedent to come to his office to discuss and execute it. The decedent never returned to Allen's office. Rather, sometime during the spring of 1988, he took a document to the Citizens National Bank. There, Burnette and Schlehlein affixed their signatures to the document as witnesses. We recite the following paragraph from the trial court's written decision:

> Burnette testified that he was in part of Schlehlein's office space, and that decedent, with whom he was acquainted, arrived in Mary Schlehlein's office. Mary came into Burnette's office and asked him if he would witness a signature. Burnette walked through a small reception area, and Mary and the decedent were there. The document had been signed by decedent, so Burnette asked him if the signature was his signature, and he replied "Yes." Mary had already signed the document, and since Burnette had seen her signature, as he put it, "hundreds of times," Burnette did not ask her if her signature was in fact hers. The decedent, Mary, and Burnette were all standing together in the same room or space. Burnette signed below the two signatures already on the document.

Based upon these facts, the trial court concluded that the will was properly executed in the presence of two witnesses, Schlehlein and Burnette, and that their testimony was credible with regard to the execution of the will. Therefore, the court concluded that the 1988 will was legally valid and governed distribution of the estate.

Where the trial court acts as the finder of fact, its findings will not be disturbed unless they are clearly erroneous. *See* § 805.17(2), STATS. However, whether those facts support a legal conclusion that the decedent's will was valid presents a question of law which we decide independently of the trial court. *See* ***Estate of Warunek,*** 159 Wis.2d 129, 132, 463 N.W.2d 866, 867 (Ct. App. 1990).

Execution of wills is governed by § 853.03, STATS.[3] Section 853.03 provided that in order to be validly executed, every will must be in writing and executed with the following formalities: (1) it must be signed by the testator, and (2) "it must be signed by 2 or more witnesses in the presence of the testator and in the presence of each other." ***Id.***

"[I]t is the policy of courts to sustain a will as legally executed if it is possible to do so consistent with the requirements of [§ 853.03, STATS.]." ***Warunek,*** 159 Wis.2d at 134, 463 N.W.2d at 868. Schlehlein and Burnette testified that the decedent signed the will. The first requirement is satisfied. Accordingly, we turn our attention to the second requirement for executing a valid will: signature by two or more witnesses in the presence of the testator and in the presence of each other.

Cases discussing the requirement that a will be executed in the presence of two witnesses have stated that the concept of presence includes state of mind and physical proximity. ***Estate of Hulett,*** 6 Wis.2d 20, 26, 94 N.W.2d 127, 130 (1959); *see also* ***Estate of Haugk,*** 91 Wis.2d 196, 206, 280 N.W.2d 684, 689-90 (1979). The state of mind requirement focuses on "the witnesses' awareness that the other witness is signing the testamentary document." ***Haugk,*** 91 Wis.2d at 206, 280 N.W.2d at 690.

> A person in whose presence an act is done must be informed of what is taking place so that he actually knows what is being done; or the act is not done in his presence,

[3] We refer to the 1993-94 statutes. Although § 853.03, STATS., was amended by 1993 Wis. Act 486, the amendments merely made gender-neutral the language appearing in the statute prior to that date. No substantive changes were made in the language. We recite the language from the current statute.

> no matter how close to him it may be done. A will is not signed in the presence of one who is attending to another matter and does not know what is taking place until he is told later.

Hulett, 6 Wis.2d at 26, 94 N.W.2d at 130 (quoted source omitted). In ***Hulett,*** the will offered into probate was invalid because, under the facts of the case, "[i]t was clearly established that when each witness signed the document the other was totally unaware of the signing ...." ***Id.*** at 26, 94 N.W.2d at 131.

Here, the trial court found that Schlehlein had signed the will as a witness before she called Burnette into the room to sign as a witness. Burnette testified that Schlehlein had already affixed her signature by the time he arrived, but that because he had seen her signature "hundreds of times," he did not ask her to verify her signature. These findings are not clearly erroneous based upon the testimony adduced at trial. However, they do not substantiate that the witnesses signed in the presence of each other as required by § 853.03(2), STATS.

The facts found by the trial court and the additional testimony of Burnette[4] indicate that Burnette and Schlehlein did not execute the will in each other's presence because Burnette was not present either physically or by state of mind when Schlehlein signed. Burnette testified that the office where he worked, Schlehlein's office and the conference room or anteroom where the execution occurred were in close proximity to each other.[5] However, he also testified that at the time Schlehlein interrupted him to ask him to witness a document, he was "very much involved" in a project for which he was trying to meet a deadline. He further described himself as harried and unaware that a will was being executed in an adjoining room. He did not pay any attention to the document he was signing.

---

[4] Burnette's testimony regarding the circumstances under which he witnessed the document was uncontroverted and the trial court found that his testimony was credible. Therefore, we consider that testimony in arriving at our legal conclusion that the will was not validly executed.

[5] While much was made at trial of the physical layout of the offices in which the will was executed, physical proximity is not the only consideration in determining the presence of witnesses. *See* ***Estate of Hulett,*** 6 Wis.2d 20, 26, 94 N.W.2d 127, 130 (1959).

Accordingly, the requirements of § 853.03(2), STATS., were not satisfied, and the trial court erred in concluding otherwise. We independently conclude that the will offered by Lindhal was not validly executed, and therefore the trial court erred in admitting it into probate.

Because the will leaving the decedent's residence to Lindhal is invalid, this court must review Lindhal's entitlement to the residence by virtue of the trial court's nullification of the quitclaim deed she executed on September 2, 1992—approximately one year before the decedent's death and several days after she and the decedent gave a second mortgage on the house to the bank. The proceeds of the second mortgage were used to pay off Lindhal's and the decedent's personal obligations and improvements made to the home.

The court nullified the quitclaim deed after finding that the decedent and Lindhal did not intend for Lindhal to part with her interest in the property. Rather, the court considered language in the transfer tax return,[6] the circumstances surrounding the second mortgage and Lindhal's testimony regarding the oral agreement with the decedent and found that the parties intended to shield the property against possible judgment liens arising from Lindhal's involvement in an Illinois business and to avoid the transfer tax.

Lindhal testified at trial that the decedent "never bought me out," notwithstanding that she executed a quitclaim deed. She testified that the quitclaim deed was solely intended to remove her name from the property and that if the decedent died the house would be hers.[7] She contended that she paid $100 per week in cash to the decedent after she moved out of the house at the end of September 1992 and that this was to be applied to her share of house expenses. Lindhal testified that after she signed the quitclaim deed, she expressed a concern about her future interest in the property should anything happen to the decedent. The decedent told her that he had provided for her in his will.

---

[6] The transfer tax return stated that the transfer was a "reformation of prior recorded conveyance." The trial court speculated that this language evinced Lindhal's intent not to part with her interest in the property.

[7] Lindhal's November 1993 claim against the estate alleged the existence of an oral agreement with the decedent in which she would own the real estate in the event of his death.

"[The] first step in construction of a deed is to examine what is written within the four corners of the deed, for this is the primary source of the intent of the parties. If the language of the deed is unambiguous, then its construction, as the construction of other unambiguous instruments, is purely a question of law for the court, but when there is an ambiguity, the sense in which the words therein are used presents a question of fact. Also, where a deed is susceptible to only one interpretation, extrinsic evidence may not be referred to in order to show the intent of the parties." ***Rikkers v. Ryan,*** 76 Wis.2d 185, 188, 251 N.W.2d 25, 27 (1977) (citations omitted). "[P]arol evidence is not admissible to vary or explain the terms of a deed, and the acts of the parties are not admissible to show a practical construction where the language of the deed is neither ambiguous nor indefinite." ***Kleih v. Van Schoyck,*** 250 Wis. 413, 419, 27 N.W.2d 490, 493 (1947).

The language of the deed is not ambiguous. It does not reserve any interest to Lindhal or contain any language indicating that it was other than a full transfer of her rights in the residence to the decedent. The trial court erred in considering extrinsic evidence (i.e., execution of a second mortgage, language in the transfer tax return and Lindhal's testimony regarding the parties' oral agreement) as a basis for invalidating the quitclaim deed.[8] We hold that the quitclaim deed was valid and enforceable against Lindhal.

Lindhal's remaining claims are premised on her November 1993 claim to personal property and her July 1994 amended claim alleging that she paid one-half of the down payment on the residence and monthly payments for upkeep. The claim stated: "Under the legal principles of quantum meruit and quasi-contract and equity, [Lindhal] is entitled to the single family residence." Because the trial court upheld the will submitted by Lindhal and invalidated the quitclaim deed, there was no reason to address any of Lindhal's other claims against the estate.[9]

---

[8] Lindhal does not allege that she was misled by the decedent into signing the quitclaim deed or otherwise did it involuntarily. She executed the deed for the express purpose of insulating the property from future debts.

[9] In its written decision, the court stated that Lindhal's claim and amended claim were "inferentially proven by the terms of Jeffrey's will, since they achieve most of the bequest to Karmen provided in the will." We do not construe this as a decision on Lindhal's other claims.

On appeal, Lawson argues that the trial court erred in permitting Lindhal to file an amended claim. Lawson also argues that the trial court should have granted him a mistrial because the court read several depositions, large portions of which were not in evidence at the trial in this matter. Because we remand for further proceedings, we decline to address these arguments. In considering the balance of Lindhal's claims in light of the fact that the decedent died intestate and Lindhal quitclaimed her interest in the residence, the court on remand may address these arguments and such issues as it believes are necessary and hold such proceedings as it believes are necessary to decide Lindhal's claims to personal property and real estate in light of our decision.

By the Court.—Judgment reversed and cause remanded.

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