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DISTRICT II

July 23, 2025

To:

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Circuit Court Judge
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You are hereby notified that the Court has entered the following opinion and order:

2024AP117 Mark Santner v. Anthony Matson (L.C. #2021PR672)

Before Gundrum, P.J., Neubauer, and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Mark Santner appeals a circuit court order, entered on summary judgment, in favor of Anthony Matson, Earl Jacobson, Debbie Klineschmidt, and Kerwyn Splude that determined the decedent, Scott Santner, transferred real and personal property to Matson, Jacobson, Klineschmidt, and Splude as gifts causa mortis (gifts in contemplation of death). Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2023-24).[1] We conclude the record does

[1] All references to the Wisconsin Statutes are to the 2023-24 version.

not establish that the delivery requirement of gift causa mortis was satisfied. We therefore reverse and remand for further proceedings consistent with this opinion.

The facts are not disputed. In 2021, Scott was hospitalized with COVID-19. While hospitalized, Scott directed Matson to prepare a will for him, giving oral instructions as to proposed distributions. Matson typed up the will and brought it to the hospital for Scott to sign.

At that time, the hospital did not allow for patients in the intensive care unit with COVID-19 to receive visitors, so a hospital employee brought the proposed will to Scott. The hospital also prohibited their employees from acting as witnesses to a will, so Scott was videotaped signing the document. There were no formal witnesses to the signing. A hospital employee returned the signed (but unwitnessed) document to Matson. The document provides:

> Last Will and Testament of Scott M. Santner
>
> I Scott M. Santner, a resident of 810 Summit Dr. Waukesha WI being of sound mind and legal age declare this to be my last will and testament.
>
> Beneficiary's
>
> I give my property at 200 Corkwood Ln, Oldsmar FL to Debbie Klineschmidt.
>
> I give my 2017 Harley Davidson Roadglide and Harley Davidson FLH SVO to Earl Jacobson of Union Grove WI
>
> I give my Chase Bank 401k to Anthony Matson of Menomonee Falls WI.
>
> I declare that all other properties, vehicles, belongings, be sold off and that my estate be divided among the following beneficiaries
>
> Kerwyn Splude of Milwaukee
>
> Earl Jacobson of Union Grove
>
> Anthony Matson of Menomonee Falls

> And I am choosing that no assets be given to my family members or relatives.

The document also appointed Matson as executor. Scott died in the hospital shortly thereafter.

Mark, Scott's brother, petitioned for formal administration of Scott's estate, asserting Scott died intestate and his estate should pass to Scott's three siblings. Scott's friends, Matson, Jacobson, Klineschmidt, and Splude, petitioned for a declaratory judgment that Scott had a valid will or, in the alternative, that they were entitled to receive Scott's estate under the doctrine of gift causa mortis. Both sides moved for summary judgment.

In a written decision, the circuit court first determined the document was not a valid will. It then determined Scott's estate transferred to Scott's friends via gift causa mortis. It granted summary judgment in favor of Scott's friends. Mark appeals.

"The general rule is that a testamentary disposition (a disposition that takes effect upon the death of the person making the disposition) must comply with the statutory requirements for the execution of wills." ***Estate of Oaks v. Stouff***, 2020 WI App 29, ¶13, 392 Wis. 2d 352, 944 N.W.2d 611 (citation omitted). However, the doctrine of gift causa mortis is an exception to the rule against testamentary disposition except by will. ***Id.*** It is an exception because the "delivery of the subject of the gift during life is an adequate safeguard against abuses at which the statute of wills is aimed." ***Will v. Zanden***, 251 Wis. 90, 97, 28 N.W.2d 360 (1947).

> [T]o establish a gift causa mortis, a claimant must prove that: (1) the donor had an intention to make a gift effective at death; (2) the donor made the gift "with a view to the donor's death from present illness or from an external and apprehended peril"; (3) the donor died of that ailment or peril; and (4) there was a delivery of the gifted property.

Oaks, 392 Wis. 2d 352, ¶13.

The requirements for "delivery" of gifted property are the same for a gift causa mortis and a gift inter vivos (gift during life). ***Meegan v. Netzer***, 2012 WI App 20, ¶12, 339 Wis. 2d 460, 810 N.W.2d 358. Ordinarily, the delivery requirement accomplishes a change in dominion and control of the item from the donor to the donee. ***Potts v. Garionis***, 127 Wis. 2d 47, 52, 377 N.W.2d 204 (Ct. App. 1985). The form that the "delivery" of gifted property must take depends upon the nature of the property and the situation of the parties. ***Sorenson v. Friedmann***, 34 Wis. 2d 46, 55, 148 N.W.2d 745 (1967). For example, in ***Sorenson***, 34 Wis. 2d at 55, the court concluded that a gift of money in a savings account had been "symbolically delivered" when the decedent gave the donee her bank account passbook and "[t]he form of [the] account was such that [the donee] could withdraw the decedent's money if she had possession of the passbook."

There are also relaxed standards for delivery when the donor/donee are family or live together. ***Potts***, 127 Wis. 2d at 53. For example, in ***Oaks***, 392 Wis. 2d 352, ¶¶4, 41, "under the 'relaxed rule' that applies when assessing the delivery of a gift between members of the same household," we determined that the decedent had delivered all of his worldly possessions to his live-in girlfriend, who had been his romantic partner for twenty-three years. We observed, in part, that his partner was "already in physical possession of the residence and all of the property inside it, and she had access to indicia of ownership for the rest of [the decedent's] belongings—i.e., keys to his vehicles, checkbooks, and bank account information." ***Id.***, ¶38.

Conversely, in ***Meegan***, 339 Wis. 2d 460, ¶1, we determined that a gift of debt forgiveness had not been delivered. There, the decedent made notations on a draft will and wrote a letter to his attorney explaining he wanted the debt owed by certain members of his extended family forgiven upon his death. ***Id.***, ¶15. There, we did not need to determine whether the decedent's documents were sufficient to cancel the debt "because the more fundamental problem

… [was] that these writings of [the decedent] were not delivered to the debtors." ***Id.*** We explained:

> [The decedent] did not instruct his attorney to deliver to the debtors his notation on the draft will and the letter to his attorney. Indeed, that was plainly not the purpose for which [the decedent] gave his attorney these writings. [The decedent]'s purpose for giving his attorney these writings was so that his attorney could include provisions to this effect in his will. There is no factual basis for asserting that [the decedent]'s attorney held these writings in trust for the debtors. Thus, the delivery to the attorney, with no instruction for delivery to any debtor, does not constitute delivery to any debtor.

Id., ¶18.

In this case, the circuit court determined the gifts were delivered by analogy to ***Lawrence v. Children's Home & Aid Soc.***, 231 Wis. 44, 285 N.W. 415 (1939). In ***Lawrence***, the decedent executed a warranty deed conveying her house to a charity. ***Id.*** at 45. She gave a copy of the deed to the charity and put the original deed in a bank safe-deposit box with instructions that, upon her death, the deed was to be taken out of the safe-deposit box and recorded. ***Id.*** at 45-46. On her deathbed, the decedent gave the safe-deposit box key to her brother and instructed him to retrieve the deed upon her death and record it. ***Id.*** at 46. Her brother did as instructed. ***Id.*** On appeal, the court determined, "[w]hile the deceased did not actually deliver the deed in question into the hands of [her brother], she did, in our opinion, make a good symbolical delivery of the deed." ***Id.*** at 52. The court determined the delivery was valid. ***Id.***

Here, we cannot conclude from this record that Scott's gifts of real and personal property were delivered to his friends. First, nothing was delivered, actually or symbolically, that arguably changed dominion and control of the items from Scott to his friends. *See* ***Potts***, 127 Wis. 2d at 52. There was no deed signed, but waiting to be filed, conveying his real property.

See ***Lawrence***, 231 Wis. at 45-46. There was no passbook, or similar item or instruction given, that would have permitted his friends to access his money or bank accounts. *See* ***Sorenson***, 34 Wis. 2d at 55. Nothing in the record indicates that Scott's friends were already in possession of the items Scott needed to deliver to effectuate the gift. *See* ***Oaks***, 392 Wis. 2d 352, ¶38. Moreover, it does not appear that Scott gave his "will," or even instructed that his "will" be given, to Jacobson, Klineschmidt, or Splude. *See* ***Meegan***, 339 Wis. 2d 460, ¶15. The delivery requirement of a gift causa mortis was not satisfied. Because the delivery requirement was not satisfied, the property could not be transferred as a gift causa mortis. Therefore,

IT IS ORDERED that the order of the circuit court is reversed and the cause is remanded for further proceedings consistent with this opinion.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

LAZAR, J. (*dissenting*). While the majority sets forth the facts (albeit in abbreviated form) and some of the relevant law, it fails to consider the implications of the circumstances surrounding Scott M. Santner's[2] hospitalization and fails to apply them to established law. Accordingly, I respectfully dissent.

The majority's recitation of the facts requires further amplification. Scott was hospitalized on September 24, 2021, for treatment after he was struck seriously ill with COVID-19.[3] Almost immediately, Scott's health worsened, and he recognized that he may not

[2] For ease of reference, Scott M. Santner, the decedent, and his brother, Mark Santner, shall be referred to by their first names.

[3] The World Health Organization declared a global pandemic of Coronavirus Disease 2019 (COVID-19) on March 11, 2020, due to widespread human infection worldwide.

recover. It was with that recognition of impending death that Scott realized that he should put his affairs in order. He had not previously prepared a will.

Scott's relationship with his family members was bad. He made no bones about telling hospital employees that he was not close to his family and did not want his relatives to inherit any of his assets. He went so far as to state that "those bastards can't have any of it, don't give them any."

Literally from his death bed, Scott contacted longtime friend Anthony Matson and former fiancée Debbie Klineschmidt and implored them to find him a lawyer so he could draft a will to disinherit his family. Unfortunately, there was not sufficient time, and so Scott dictated the terms of his will to Matson by telephone on September 29, 2021. Matson typed up the provisions as set forth in the majority. The key provision highlighted Scott's clear intent to disinherit his family:

> And I am choosing that no assets be given to my family members or relatives.

Scott intended for his assets to be given to his longtime friends—Matson, Earl Jacobson, Kerwyn Splude, and Klineschmidt.

The next day, Matson delivered the draft to a nurse at the hospital; he was barred from seeing Scott in person. Scott's health had further deteriorated, but he was refusing to be intubated for ventilation until he was able to sign the draft will. A nurse recorded a video of Scott signing the draft will and expressing his intentions with respect to his assets that same day.

Hospital policy forbade staff from witnessing wills or other testamentary documents.[4] Scott was intubated and placed on a ventilator later that day. He never regained consciousness and died on October 12, 2021, from acute hypoxic respiratory failure due to COVID-19.

Almost immediately, on October 14, 2021, Mark Santner filed a petition to be nominated as personal representative and requested the matter proceed intestate. Matson, Jacobson, Klineschmidt, and Splude filed a petition seeking a declaration that the unwitnessed will was valid and enforceable or, in the alternative, that Scott had made a valid gift causa mortis of all of the real and personal property in his estate.

Following a hearing in August 2023, the circuit court issued a thorough and thoughtful written Decision and Order on January 9, 2024. First, the court concluded that the unwitnessed will was not a valid will.[5] Next, the court noted that whether real property may be transferred as a gift causa mortis is a matter of first impression in Wisconsin. It concluded, pursuant to ***Klabunde v. Casper***, 139 Wis. 491, 121 N.W. 137 (1909)—a case in which real property was validly gifted to an acquaintance after the owner's death based on a deed the owner had signed and directed to be delivered to the acquaintance upon the owner's death—that there was "little

[4] Given the ravages of COVID-19, this policy strikes this judge as appalling—especially when the hospital also barred any visitors other than family members who were only allowed when they were "say[ing] goodbye." This effectively barred all patients from being able to complete effective financial and estate planning in the midst of an unprecedented medical disaster where individuals may not have previously believed that such planning was imminently required.

[5] Should our state supreme court accept a petition for review in this appeal, there is another issue that could possibly be addressed: whether the witness requirements for a valid will are subject to an impossibility exception during extreme circumstances (such as a global pandemic) where there are other sufficient indicia of reliability, or whether new technologies—such as zoom—alters in any way the witness requirements.

basis that [Scott's] real estate could not be similarly transferred via gift causa mortis if all the elements are met."

The circuit court then held that the first three elements of a gift causa mortis were met.[6] *See* ***Meegan v. Netzer***, 2012 WI App 20, ¶10, 339 Wis. 2d 460, 810 N.W.2d 358. The majority does not quarrel with that conclusion, and I agree that those elements were met.[7]

The sole remaining question—and where the majority goes astray—relates to the fourth element: was there a delivery of the gifted property? Noting that "symbolic" delivery is permissible when it is impossible to physically deliver property and that "[w]hat form the delivery of the property must take depends upon its nature and the situation of the parties," ***Sorenson v. Friedmann***, 34 Wis. 2d 46, 55, 148 N.W.2d 745 (1967), the circuit court held that Scott symbolically delivered the gifts to his intended donees:

> [G]iven [Scott's] declining health and the significant roadblocks set by the hospital to him exercising his right to control the disposition of his property, what other method of deliver[y] did he have other than to have the document outlining his wishes be delivered to his friend? There is no dispute that [Scott] had the document delivered to Mr. Matson and as such, this does constitute a delivery under a gift causa mortis.

[6] As detailed in the majority, there are four elements needed to establish a gift causa mortis: "(1) the donor has an intention to make a gift effective at death; (2) the donor makes the gift 'with a view to the donor's death from present illness or from an external and apprehended peril'; (3) the donor must die of that ailment or peril; and (4) there must be a delivery." ***Meegan v. Netzer***, 2012 WI App 20, ¶10, 339 Wis. 2d 460, 810 N.W.2d 358 (citation omitted). *See* Majority at 3-5.

[7] Scott's intent to skip over his family is obvious—both from his unwitnessed will and statements to friends and hospital staff. He expressed this clear intent while hospitalized with a serious COVID-19 contagion, and he shortly thereafter died from that disease. At no point does Mark dispute that Scott did not want any of his assets to be given to his family.

The circuit court focused upon the key point ignored by the majority: the impossibility of executing a will or more fully delivering a gift causa mortis due to the global pandemic. When such circumstances create a perfect storm to bar a decedent from completing a will, necessitating a gift causa mortis—and then also make actual delivery of the gift impossible—courts should factor those unique circumstances into the equation. *See* ***Sorenson***, 34 Wis. 2d at 55 (requiring courts to consider "the situation of the parties" in determining adequacy of delivery).

Starting with the proposition that "[t]he law favors free and comprehensive power of disposition by an owner of his property," ***Crook v. First Nat'l Bank***, 83 Wis. 31, 37, 52 N.W. 1131 (1892), and the long-standing principle that one of the most important rights a citizen of our state has is the right to leave his or her estate to whomsoever he or she chooses, ***Eisenberg v. Eisenberg***, 90 Wis. 2d 620, 624-25, 280 N.W.2d 359 (Ct. App. 1979), this court acknowledges the clear and unequivocal intent of Scott to disinherit his family as well as his undisputed efforts to legally execute a valid will. But for the global pandemic coupled with the hospital's ban on allowing staff to provide a service to witness wills during that time, Scott's clear wishes would have been effectuated.

Aside from the questions regarding the delivery of real property via a gift causa mortis as argued in the initial briefs, the parties—in response to this court's order for supplemental briefing—were also asked to hone in on delivery with respect to personal property (including 401(k) accounts, bank accounts, vehicles/motorcycles, and miscellaneous items). Again, symbolic delivery has been upheld in the context of a gift causa mortis for such personal property. *See* ***Will v. Vander Zanden***, 251 Wis. 90, 95, 28 N.W.2d 360 (1947). In ***Will***, our supreme court followed a prior holding in ***Hoks v. Wollenberg***, 209 Wis. 276, 243 N.W. 219 (1932) that viewed delivery of gifts causa mortis more expansively.

In fact, just as civil complaints now require review with a liberal construction to do justice for the parties, ***Strid v. Converse***, 111 Wis. 2d 418, 422, 331 N.W.2d 350 (1983), in the century following the initial establishment of the gift causa mortis elements, Wisconsin courts have moved from a strict construction of "delivery" to one with broader strokes "indicating greater liberality in upholding gifts, in order to carry out the clear and unmistakable intention of the donor," ***Baltes v. Klief***, 188 Wis. 626, 629, 206 N.W. 877, (1926). In other words, "[m]any of the strict requirements to the transfer of property by gift ... have been removed or relaxed to give a freer exercise to such a disposition of property." ***Opitz v. Karel***, 118 Wis. 527, 530, 95 N.W. 948 (1903).

In 1967, our supreme court instructed courts to look not only to the nature of the property when determining whether delivery for a gift causa mortis had been effectuated, but *also* to "the situation of the parties." ***Sorenson***, 34 Wis. 2d at 55 (citing ***Horn v. Horn***, 152 Wis. 482, 487, 140 N.W.58 (1913); ***Baltes***, 188 Wis. at 628). In ***Wardell v. Stouff***, 2020 WI App 29, ¶¶31-33, 392 Wis. 2d 352, 944 N.W.2d 611, the decedent left a note indicating that all of his "worldly belongings" were gifted to his girlfriend in their shared residence immediately before he committed suicide. This court considered "the situation of the parties" and determined that "delivery" was adequate because the decedent "could be reasonably certain [the girlfriend] would find [the note] when she came downstairs." ***Id.***, ¶41 (citation omitted).

In the instant appeal, we must look to the circumstances in order to appropriately apply the doctrine: the friendship between Scott and his intended donees, the relationship between Scott and his ex-fiancée (who was his health care power of attorney and was present when Scott died in the hospital), the animosity Scott had towards his family, the extraordinary circumstances imposed by COVID-19, and the harsh restrictions mandated by the hospital.

COVID-19 and hospital policy made it impossible for the execution of a valid will. Those special circumstances—and Scott's intubation and loss of consciousness following the signing of the unwitnessed will—also made it impossible to draft other documents (such as a deed) or obtain financial records, keys, or bank passbooks that could be "delivered" to his intended donees. Scott's intentions, expressed in statements to his friends and hospital staff, the unwitnessed will he dictated, and the video where he signed that document are clear. He did everything physically possible to deliver his gift causa mortis. By naming Matson his "executor" in the unwitnessed will and by not allowing intubation until that signed document was hand-delivered to Matson, Scott took the only steps he could to see that his wishes for the disposition of his personal property were symbolically delivered to his donees. *See* ***Meegan***, 339 Wis. 2d 460, ¶15. The majority inappropriately uses a restrictive reading of delivery to thwart Scott's wishes in view of this symbolic delivery.

At the very least, the majority should have concluded that Scott delivered sufficient documentation or other indicia to effectuate the gift causa mortis of his personal property (401(k) account, bank account, vehicles/motorcycles, and all other personal property) to his intended donees. The unwitnessed will is a written instrument that, pursuant to WIS. STAT. § 705.10(1)(a) and (c), satisfies the gift causa mortis elements for personal property including "[m]oney or other benefits due, controlled by or owned by a decedent before death" as well as "[a]ny property controlled by or owned by the decedent before death." Scott took all possible steps to deliver these gifts to his friends by ensuring that the signed, written document was hand-delivered to Matson with instructions that he effectuate Scott's intentions as to his personal property. Therefore, at least all of the non-real property assets listed in the probate inventory (aside from the vehicles) should be transferred to the donees listed in the unwitnessed will.

Finally, Wisconsin does not require the transfer of a title or key to vehicles (or motorcycles) in order for such personal property to be gifted ala causa mortis. Therefore, WIS. STAT. § 705.10(1)(c) also allows the gifting of vehicles by a written instrument. In this case, the unwitnessed will qualifies as such an instrument.

The majority has erred in failing to consider, as our supreme court requires, both the nature of the property *and* the situation of the parties. Given the circumstances, I conclude that Scott *did* satisfy the delivery requirement for a gift causa mortis for all of his assets (real and personal property) under our case law. I would affirm the order of the circuit court. I, thus, respectfully dissent.

Samuel A. Christensen
Clerk of Court of Appeals