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SUPREME COURT OF WISCONSIN
Appeal No. 2024-AP-117
Circuit Court Case No. 2021-PR-672

In re the Estate of Scott M. Santner:

MARK SANTNER,

Appellant,

v.

ANTHONY MATSON,
EARL JACOBSON,
DEBBIE KLINESCHMIDT and
KERWYN SPUDE,

Respondents-Petitioners,

ON APPEAL FROM THE
CIRCUIT COURT OF WAUKESHA COUNTY
HONORABLE MICHAEL MAXWELL, PRESIDING

PETITION FOR REVIEW

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

(1) Does delivery of an unwitnessed will to an individual's intended donee constitute delivery to establish gift causa mortis?

The circuit court answered YES.

The court of appeals answered NO.

This Court should answer YES.

INTRODUCTION

Scott[1] Santner, isolated in a hospital room and suffering from severe complications due to COVID-19, sought to ensure that his estranged family did not receive any of his estate in the event he did not survive his COVID complications. Scott, knowing that he was going to be intubated, directed his close friend, Anthony Matson, to prepare a will for him. Matson prepared a written will for Scott, identifying Scott's testamentary wishes, but was unable to personally deliver the unsigned Will to Scott because of the hospital's COVID-19 protocols prohibiting visitors. A hospital worker brought the drafted Will to Scott and videotaped him reading and signing what he believed to be his last will and testament assigning his real estate assets, personal property, and financial assets to his four close

[1] Because this petition involves other familial members with the same last name as Scott Santer, this brief will use Scott's first name to refer to him to avoid confusion.

friends—the Petitioners in this case. What Scott believed to be his Will was returned to Matson by hospital staff but was unwitnessed because the hospital barred employees from serving as witnesses for end-of-life documents. Scott was shortly thereafter intubated and unfortunately died from COVID-19 complications.

The unwitnessed Will was invalidated because it did not contain two witness signatures—something Scott was prohibited from accomplishing because the hospital staff was not allowed to act as witnesses to a will and the hospital prevented him from having visitors. But his testamentary intentions were clearly expressed in the signed document along with the video showing him reading and signing it. His worldly possessions were to be distributed to the Petitioners and definitively not his family.

The circuit court correctly held that the unwitnessed Will met the qualifications of a gift causa mortis because Scott's intentions were clear and the gifts were symbolically delivered when Matson received the unwitnessed Will from hospital staff.

The court of appeals reversed. Applying a rigid and out of date interpretation of the delivery element for gift causa mortis, the court of appeals held that nothing was delivered that changed dominion of

control and possession over the items in Scott's unwitnessed Will to his friends. The court of appeals erred because it conflated the physical possession of the items as being required to meet the delivery element of a gift causa mortis analysis.

This error by the court of appeals requires this court's review and presents a clear issue of law that can be resolved by this Court. The court of appeals applied an out-of-date interpretation of what constitutes a symbolic delivery which contravenes published court of appeals' opinions and holdings from this Court. This Court has adopted a more relaxed and flexible interpretation of the delivery element for gift causa mortis that allows for symbolic delivery of the gifts based on the circumstances of the decedent and his intended donees. Because this Court has not addressed the gift causa mortis doctrine since the 1940s, the Court should accept review of this case to clarify what constitutes symbolic delivery for gift causa mortis if the decedent's testamentary intentions are clearly established.

CRITERIA FOR REVIEW

This case meets many of this Court's criteria for review. First, the petition for review demonstrates a need for the Court to consider establishing, implementing or changing a policy within its authority.

Wis. Stat. § 809.62(1r)(b). The Court has not issued a decision on the gift causa mortis doctrine since the 1940s. Since that time, the gift causa mortis doctrine has evolved through only court of appeals' decisions and this case presents a prime opportunity for this Court to act on its law developing function.

Second, a decision by this Court is necessary to develop, clarify, and harmonize the law on what constitutes delivery for gifts causa mortis in the digital era where transfer of ownership of property or assets does not require the physical possession of such items. Wis. Stat. § 809.62(1r)(c). Again, the court of appeals' opinions have developed a less rigid standard for gifts causa mortis that should be harmonized via a decision from this Court. By accepting review, this Court can fully harmonize the numerous court of appeals opinions that have developed the gift causa mortis analysis since this Court last addressed this topic.

Third, the summary disposition decision of the court of appeals in this case directly conflicts with *In re Est. of Oaks*, 2020 WI App 29, 392 Wis. 2d 352, 944 N.W.2d 611 which presents another reason why this Court should accept review of this case. Wis. Stat. § 809.62(1r)(d). The *Oaks* decision applied a flexible analysis of the

delivery requirement which permitted the delivery of the decedent's property through a simple note left for the intended donee.

STATEMENT OF CASE

I. Factual Background

On September 24, 2021, Scott was admitted to Waukesha Memorial Hospital for COVID-19 complications. (R. 113:6; Pet. App. 116.) Scott's health began to deteriorate following his admission. (*Id.*) As a result, Scott decided it would be in his best interests to draft a will (the "Will") in anticipation of his impending death due to COVID-19. (R. 113:22-25; Pet. App. 132-135.)

He requested the Hospital allow visitors to his room (located in the ICU) to "help him take care of his personal affairs." (R. 113:25; Pet. App. 132.) Due to hospital policy at the height of the pandemic, no visitors were allowed. (R. 113:29; Pet. App. 139.) The sole exception to this rule was reserved for family members to say goodbye to loved ones near death. (R. 113:31; Pet. App. 141.)

The Hospital also had a policy that prohibited employees from witnessing any documents relating to finances, including wills. (R. 113:31; Pet. App. 140.) Therefore, Scott was left with no option to create and execute a valid will.

Desperate for help, Scott called his longtime friend, Anthony Matson ("Matson"), from his hospital bed, and asked him to find a lawyer to draft his Will.[2] (R. 113:35; Pet. App. 145.) Scott called and made the same request to his friend Debbie Klineschmidt ("Klineschmidt"). (R. 113:48; Pet. App. 158.) However, neither Matson nor Klineschmidt were able to find help. (*Id.*)

On September 29, 2021, Scott and Matson again spoke on the telephone. (R. 113:35; Pet. App. 145.) He asked Matson to draft up a Word document to serve as his will. (R. 113:36-37; Pet. App. 146-147.) The provisions of the Will were written as follows:

> Last Will and Testament of Scott M. Santer
>
> I Scott M. Santer, 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:

[2] Petitioners-Respondents will refer to this document as the "Will" knowing it is not a validly executed will pursuant to Wisconsin statute. However, under these unique circumstances, it meets the elements of "gift causa mortis."

> 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.
>
> I appoint Anthony J. Matson of
> W158N6301 Cherry Hill Dr
> Menomonee Falls WI 53051
> As Executor
> Or Debbie Klineschidt
> If he is unable to do so.

(R. 113:42; Pet. App. 152.) Matson saved and printed two copies of the Will. (R. 113:38; Pet. App. 148)

The Will did not bequeath any of Scott's assets to his family members. (R. 113:42; Pet. App. 152.) This is because he had a terrible relationship with his relatives, which he made clear to the Hospital's various employees who interacted with him prior to his death. (R. 113:50; Pet. App. 160.) At one point, Scott, in reference to his family members obtaining his assets after his death, stated that "those bastards can't have any of it, don't give them any." (R. 113:56; Pet. App. 166.)

To avoid his assets being distributed to his family members, Scott listed his close personal friends as the beneficiaries of his estate. (R. 113:42; Pet. App. 152.) The friends named in the Will included Earl Jacobson ("Jacobson"), who the Decedent met in high school and stayed in contact throughout their adult life. (R. 113:52; Pet. App.

162.) Similarly, Scott also met Kerwyn Splude in high school and continued their friendly relationship until Scott's death. (R. 113:54; Pet. App. 164.) As previously stated, Scott and Matson were also long-time friends. The last individual named on Scott's Will was Debbie Klineschmidt. Klineschmidt carried on a romantic relationship with Scott for over seven years and the two continued their friendship after the romantic relationship ended. (R. 113:45; Pet. App. 155.) During his hospitalization, he elected to have Klineschmidt serve as his health care power of attorney. (R. 113:46; Pet. App. 156.)

On September 30, 2021, Matson drove to the Hospital to deliver the unsigned Will to Scott. (R. 113:38-39; Pet. App. 148-149.) When Matson arrived, he went straight to the lobby desk and asked a nurse to take the unsigned Will to Scott. (*Id.*) The nurse stated she would get the documents to him. (R. 113:39; Pet. App. 149.) At this point, Scott refused to be intubated for ventilation until he could sign the Will delivered by Matson. (R. 113:33; Pet. App. 143.)

When a nurse named Jill Schroeder entered Scott's hospital room, she spotted the Will in a plastic bag resting on the sink. (R. 113:24; Pet. App. 134.) She handed the bag to him, and he removed

the Will and asked her to record a video of him executing it. (R. 113:25; Pet. App. 135.) Scott executed the Will on September 30, 2021, while Schroeder filmed him. (R. 113:26-27, 169; Pet. App. 136-137, 169.) Schroeder was prevented from signing the Will as a witness because of the Hospital's policy prohibiting employees from signing as a witness for the purposes of a patient's testamentary documents. (R. 113:27, Pet. App. 137.)

In the video, Scott can be seen reading and signing two copies of what he believed to be his last will and testament.[3] (R. 113:59; Pet. App. 169.). His breathing is heavy, but he lucidly reads aloud the terms of the Will without issue prior to signing it. (*Id.*). In the video, he states "I'm choosing that no assets … be distributed to my direct family." (*Id.*).

After Scott finished signing the Will, he asked Schroeder to place the executed Will on the countertop because the Will "would be picked up." (R. 113:25; Pet. App. 135.) Soon after, a different Hospital employee picked up the Will and took it back to the lobby. (R. 113:25-26; Pet. App. 135-136.) Later that day, Matson returned

[3] The video of Scott signing the unwitnessed Will was presented at the summary judgment hearing and a USB drive of that video is in the record and appendix. (R. 113:59; Pet. App. 169.) The video can be viewed on an unlisted Youtube page available here: https://youtu.be/PHSSl7w6j-Q.

to the Hospital to pick up the executed Will after Klineschmidt called to inform him that it was completed. (R. 113:40; Pet. App. 150.) Afterwards, Matson placed the Will in safekeeping at his place of employment. (R. 113:26; Pet. App. 151.)

At approximately 2:37 p.m., on September 30, 2021, Scott was sedated, intubated, and placed on a ventilator. (R. 113:10; Pet. App. 120.) Klineschmidt visited him in the Hospital for the first time on October 7, 2021. (R. 113:46; Pet. App. 156.) Her second, and final, visit occurred on October 12, 2021, right before Scott passed away. (R. 113:46; Pet. App. 157.) As Scott's power of attorney, she gave the Hospital staff the instruction to "pull the plug." (*Id.*) Scott never regained consciousness after being placed on the ventilator. (R. 113:11; Pet. App. 121.) He died on October 12, 2021, from acute hypoxic respiratory failure as a complication of COVID-19. (R. 113:58; Pet. App. 168.)

II. Procedural History

On October 14, 2021, Mark Santner[4] ("Santner"), filed a petition with the court nominating himself to serve as personal representative and requesting the matter proceed intestate. (R. 1.) On

[4] Mark Santner is Scott's estranged brother.

October 21, an Order for Formal Administration was signed by Court Commissioner Paul R. Nowakowski. (R. 9.) On November 3, Matson, Jacobson, Klineschmidt, and Splude (collectively "Petitioners") filed a petition seeking a declaration that the Will was valid and enforceable, or, in the alternative, that Scott made a valid gift causa mortis. (R. 13.)

Santner filed a motion for summary judgment on November 18, 2022, arguing the Will was not valid and enforceable, or alternatively, that Petitioners cannot establish the elements of gift causa mortis were satisfied. (R. 98.) Petitioners filed a cross-motion for summary judgment, wherein they argued that all four elements of gift causa mortis were met regarding Scott's unwitnessed Will. (R. 114.)

On January 9, 2024, the court issued a decision and order granting the Petitioners' motion for summary judgment and denying Santner's motion for summary judgment. (R. 212; Pet. App. 014-022.) In a written decision, the circuit court first acknowledged that the parties agreed that a valid will was not executed because no witness signatures were obtained. (R. 212:4; Pet. App. 017.) The circuit court then moved to the gift causa mortis analysis and held that

the first three elements were met. (R. 212:7; Pet. App. 020.) The court then assessed the delivery requirement and determined there was symbolic delivery of the gifts because the Will was delivered from Scott to Matson. (R. 212:7; Pet. App. 020.) The court held that "Since symbolic delivery of a gift is sufficient to meet the delivery element of a gift causa mortis claim, Ms. Klineschmidt, Mr. Jacobson, or Mr. Splude did not need to be in physical possession of the document to be a valid delivery." (R. 212:8; Pet. App. 021.) (citing *Lawrence v. Children's Home & Aid Soc.*, 231 Wis. 44, 285 N.W. 415 (1939)). The circuit court also referenced the fact that Scott faced significant roadblocks by the Hospital in exercising his right to control disposition of his own property prior to his death. (R. 212:9; Pet. App. 022.) The circuit court ultimately held that "There is no dispute that the decedent had the document delivered to Mr. Matson and as such, this does constitute a delivery under gift causa mortis." (*Id.*).

III. The Court of Appeals Reverses the Circuit Court's Decision

In a summary disposition, the court of appeals reversed the circuit court's summary judgment decision. *Santner v. Matson*, No. 2024AP117, 2025 WL 2058333 (Wis. Ct. App. July 23, 2025); Pet. App. 001-013. The court of appeals held that the delivery element of

a gift causa mortis was not satisfied and therefore the property addressed in Scott's unwitnessed Will could not be transferred as gift causa mortis. *Id*. at *3; Pet. App. 004-005. The court of appeals determined that neither actual or symbolic delivery was achieved which would have "changed dominion and control of the items from Scott to his friends." *Id*. The court reasoned that because Scott never "gave his 'will,' or even instructed that his 'will' be given, to" his friends that there was no symbolic delivery of the document. *Id*.; Pet. App. 006.

Judge Maria Lazar dissented. The dissent argued the majority opinion failed "to consider the implications of the circumstances surrounding Scott M. Santner's hospitalization and fail[ed] to apply them to established law." *Id*. (Lazar, J., dissenting); Pet. App. 006.

Unlike the majority opinion, the dissent provides a more complete picture of the facts behind Scott's attempt to formulate a will while in the hospital. "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." *Id*.; Pet. App. 007. The dissent further identified the hurdles placed upon him because of the

hospital's COVID policies. "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." *Id*.; Pet. App. 007-008.

Identifying the single issue raised in this petition for review, the dissent boiled down the appeal to one issue: "was there a delivery of the gifted property?" *Id*. at *5; Pet. App. 009. The dissent would have affirmed the circuit court's determination about the delivery of the gifts because 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." *Id*.; Pet. App. 010. Citing *Sorenson v. Friedmann*, 34 Wis. 2d 46, 55, 148 N.W.2d 745 (1967), the dissent argued the court of appeals should have considered the unique factors—a global pandemic and clear prohibitions on Scott effectuating a valid will—regarding whether the delivery element had been established after Scott had the Will delivered back to Matson. *Id*.; Pet. App. 010. The dissent also noted that the majority's decision seemed to ignore "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." *Id*. (citing *Eisenberg v. Eisenberg*, 90 Wis. 2d 620, 624-25, 280 N.W.2d 359 (Ct. App. 1979)); Pet. App. 010.

The dissent pointed to the *Oaks* decision which affirmed a gift causa mortis when the decedent left a note identifying all his "worldly belongings" should be gifted to his girlfriend prior to committing suicide. *Id*. at *6; Pet. App. 011. In that case the court of appeals considered the "situation of the parties" and determined that delivery of the note was adequate for gift causa mortis purposes even though no real property or real estate deeds were exchanged because the decedent "could be reasonably certain [the girlfriend] would find [the note] when she came downstairs." *Id*. (quoting *In re Est. of Oaks*, 2020 WI App 29, ¶41, 392 Wis. 2d 352, 944 N.W.2d 611); Pet. App. 011.

The dissent considered the unique circumstances and situation of the parties and reasoned that "COVID-19 and hospital policy made it impossible for the execution of a valid will. … 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." *Id*. at *6; Pet. App. 012. The dissent would

have affirmed the circuit court's decision because "The majority inappropriately uses a restrictive reading of delivery to thwart Scott's wishes in view of this symbolic delivery." *Id*. at *6; Pet. App. 012.

Matson, Jacobson, Klineschmidt, and Splude now petition this Court for review.

ARGUMENT

I. THE COURT OF APPEALS DECISION CONFLICTS WITH *OAKS* AND *SORENSON*

In the 1930s, this Court recognized that the rules involving gift causa mortis[5] have been modified to indicate "greater liberality in upholding gifts, in order to carry out the clear and unmistakable intention of the donor." *In re Schreihart's Est.*, 223 Wis. 218, 228, 270 N.W. 71, 76 (1936) (quoting *Estate of Dohm*, 188 Wis. 626, 628, 206 N.W. 877, 878 (1926)). In *Schreihart*, the Court favorably summarized a New York case where the donor, near death, wanted to convey his bank deposits to a donee, who was present at the hospital. *Id*. at 228. The donor tried to get out of the hospital bed to physically hand the deposit over to the donee but could not locate the deposit.

[5] The requirements for a valid gift causa mortis are: 1) the donor has the intention to make the gift effective at his death; 2) the donor makes the gift with a view that the donor's death is imminent due to present illness or impending peril; 3) the donor died of that illness or peril; and 4) there was delivery of the gift. *In re Est. of Hansen*, 2012 WI App 20, ¶10, 339 Wis. 2d 460, 810 N.W.2d 358. The dispute in this case solely focuses on the fourth element of delivery.

Id. The doctor, who was present, stated that the deposit was in an office within the hospital that was closed and could not be immediately retrieved. *Id*. The intended donee returned the following day when the office opened but the donor had since died so there was not a physical transfer of the bank deposit. *Id*. at 229. Regardless of this lack of physical delivery, this Court affirmed the finding that the delivery element had been met. *Id*. Prior to the *Schreihart* decision, this Court had already recognized that "Many 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. This modification of the law applies to what may be the subject of a gift, as well as the manner of executing it." *Opitz v. Karel*, 118 Wis. 527, 530, 95 N.W. 948, 949 (1903).

This liberalization of the delivery requirement is over 100 years old. And has been reaffirmed in other cases by this Court. *See Sorenson*, 34 Wis. 2d 46, 55, 148 N.W.2d 745, 749 (1967) ("What form the delivery of the property must take depends upon its nature and the situation of the parties.").[6] The *Sorenson* court affirmed the

[6] While *Sorenson* dealt with an inter vivos gift, the requirements for delivery of an inter vivos gift and gift causa mortis are the same and courts can look to cases analyzing both doctrines. *In re Est. of Hansen*, 2012 WI App 20, ¶12, 339 Wis. 2d 460, 810 N.W.2d 358.

"greater liberality" in upholding gifts causa mortis "by relaxing the strict requirement of actual delivery" if the donor's intentions are clear. *See id*. at 56. "[I]f the intention to give away property is plainly manifest, and no rights of creditors are involved, it has been said that the law should effectuate the gift rather than indulge in the technical distinctions and thereby thwart such intention." 38 Am. Jur. 2d Gifts § 5 (1968). Therefore, actual possession of the gifted property is not required to satisfy the delivery element of gift causa mortis. In this case, the delivery element was satisfied when Scott had the unwitnessed Will returned to Matson prior to Scott being intubated. Matson and the other Petitioners did not need to physically possess the items listed in the Will because those gifts were symbolically delivered to them by the return of the Will to Matson. The majority opinion of the court of appeals erroneously determined that delivery had not been achieved because Scott never transferred possession or control of his assets to his friends. But this strict and rigid delivery requirement is not in accord with other court of appeal's decisions.

The court of appeals instead has adopted a more liberal approach in assessing whether the delivery requirement is met. *In re Est. of Oaks*, 2020 WI App 29, ¶¶39-42, 392 Wis. 2d 352, 944 N.W.2d

611. In *Oaks*, the decedent committed suicide in his home and left a note stating he gave "all worldly belongings" to his live-in girlfriend. *Id*., ¶5. The court of appeals applied the holding from *Sorenson* that a court must "consider the 'situation of the parties' when assessing whether the delivery requirement was satisfied." *Id*., ¶33 (quoting *Sorenson*, 34 Wis. 2d 46, 55, 148 N.W.2d 745 (1967)). The *Oaks* court acknowledged that the decedent's note ascribing "all worldly belongings"—which included real estate—to the girlfriend "did not permit actual, physical delivery of each item, or of indicia of ownership of each item." *Id*., ¶32. Yet the *Oaks* court still affirmed the note as meeting the element of delivery for a gift causa mortis. *Id*., ¶38.

Despite this decision, the court of appeals in this case improperly determined that the delivery of the unwitnessed Will from Scott to Matson did not qualify as a delivery under the gift causa mortis analysis. The court erroneously conflated physical possession of the gifts as being required to meet the delivery element for a gift causa mortis. But the physical transfer of the property or assets prior to death does not need to exist if the delivery of those items is symbolically delivered to the donees. If a simple, handwritten suicide

note, like the one in *Oaks*, can qualify as meeting the delivery requirement so should a typed out unwitnessed Will that was recorded on video with the testator explicitly affirming the terms of that Will. The instructions by Scott to transmit the Will back to Matson combined with the video recording of Scott affirming his intentions effectuated the delivery requirement for gift causa mortis.

Here there is no question that Scott wanted to gift all of his property and possessions to his four friends he named in his Will. To ensure this intention could not be contested, he videotaped himself reading and signing the Will. He was physically unable to deliver the gifts or an indica of ownership of these gifts to his friends because he could not leave the hospital and his friends could not come visit him. "Where actual manual delivery cannot be made, the donor may do that which, under the circumstances, will in reason be considered equivalent to actual delivery. Thus, manual transfer is not always necessary for a gift, and the delivery of the subject of a gift may be symbolic or constructive in an appropriate case." 38 Am. Jur. 2d Gifts § 21 (2025). Or as another court reasoned: "The delivery necessary to consummate a gift must be as perfect as the nature of the property and the circumstances and surroundings of the parties will reasonably

permit." *In re Van Alstyne*, 207 N.Y. 298, 309, 100 N.E. 802 (1913). Here, Scott symbolically delivered the gifts to his intended donees by having the Will returned to Matson after Scott signed it at the hospital.

The circuit court and the dissent from the court of appeals correctly noted that Scott was prohibited from physically delivering possessions to the intended beneficiaries. R. 212:9, Pet. App. 022; *Santer*, 2025 WL 2058333 at *6 (Lazar, J., dissenting), Pet. App. 012. "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." *Santer*, 2025 WL 2058333 at *6 (Lazar, J., dissenting); Pet. App. 012. Because of the circumstances of Scott's hospitalization and medical diagnosis, he effectuated the delivery as best as he possibly could by having the unwitnessed Will returned to Matson before Scott was intubated.

The transfer of the unwitnessed Will from Scott to Matson qualified as a symbolic delivery of everything in the unwitnessed Will as the circuit court correctly determined. (R. 212:8; Pet. App. 021.) This Court should grant review because the court of appeals decision erroneously applied a strict interpretation of the delivery requirement for gifts causa mortis that conflicts with the *Sorenson* and *Oaks*

decisions. This Court should grant review of this case to affirm the application of a flexible analysis with consideration of the situation of the parties when determining whether a gift causa mortis was symbolically delivered.

II. GRANTING REVIEW WILL HELP MODERNIZE THIS COURT'S JURISPRUDENCE ON GIFT CAUSA MORTIS AND HARMONIZE THE LAW INTO THE MODERN ERA

"[T]his court will consider petitions primarily on the basis of the ongoing evolution of the law, which is again in accordance with our law-declaring and developing function." *State v. Schumacher*, 144 Wis. 2d 388, 406, 424 N.W.2d 672 (1988). Because this Court has not issued a decision on the gift causa mortis elements since the 1940s, it should grant review to modernize the analysis of what constitutes delivery for gift causa mortis. This case presents an opportune vehicle to reaffirm the Court's holdings on symbolic deliveries for gifts causa mortis.

A. A Decision from this Court Will Help Harmonize and Clarify the Requirements for Gifts Causa Mortis in the Modern, Digital Era

This Court has not issued a decision on the gift causa mortis doctrine since 1947. *In re Nols' Est.*, 251 Wis. 90, 28 N.W.2d 360 (1947). Since that time, fax machines, home computers, laptops, and cell phones have been invented and incorporated into modern society.

Individuals are easily able to transfer ownership or indicate transfer of ownership at the touch of button without having to physically deliver gifts. Scott could not have physically delivered the items listed in his unwitnessed Will to his chosen beneficiaries due to his medical ailment and because the hospital did not permit visitors or staff to serve as witnesses. To ensure that his testamentary intentions would be followed, Scott used his cell phone to record himself reading and signing his perceived Will—a technology that was not available when the Court last issued a comprehensive decision on gifts causa mortis. Scott did everything in his power in his last lucid moments to ensure that his possessions would be transferred to his friends rather than his family. Despite these efforts, the court of appeals rejected his attempts.

This factual scenario is not just applicable to the unique circumstances of COVID though. As the circuit court surmised at the summary judgment hearing, this situation could also apply when an individual is facing imminent death due to cancer, heart disease, or emergency surgery. (R. 241:71, Pet. App. 093). An individual could also find themselves in this same predicament if he or she is the victim of a life-ending accident. While COVID may have been a once in a

generation circumstance, the prohibitions Scott faced from executing a valid will could and are likely to occur in other circumstances. The invention of modern technology though provides individuals to indicate their intentions and, even transfer indica of ownership of assets, to individuals if they are facing imminent death. The Court granting review in this case would allow it to develop the law in terms of analyzing how the incorporation of modern technology may assist in delivering gifts causa mortis.

B. Constitutional Considerations Raised by the Court of Appeals Dissent

As Judge Lazar rightly noted in her dissent, individuals in this state have a constitutional right to have their testamentary intentions carried out. (R. 260:10, Pet. App. 010.) "In this state, there is a constitutional right to make a will and to have it carried out according to the testator's intentions." *Auric v. Cont'l Cas. Co.*, 111 Wis. 2d 507, 513, 331 N.W.2d 325, 329 (1983) (citing a collection of Wisconsin Supreme Court cases). "This right reflects a strong concern that people should be as free as possible to dispose of their property upon their death." *Id*.

Scott was prevented from executing a valid will because of the hospital's COVID protocols prohibiting visitors and precluding

hospital staff from serving as witnesses. Despite this hurdle, Scott went through every possible measure available to him—having a will drafted up delineating his possessions, videotaping himself reading and signing the document, and having it delivered to Matson—to provide for his testamentary wishes. As the circuit court noted in its written order, "what other method of deliver did he have other than to have the document outlining his wishes be delivered to his friend?" (R. 212:9; Pet. App. 022.) The delivery of the unwitnessed Will to Matson must constitute delivery under the gift causa mortis analysis. The narrow construction of the delivery requirement from the court of appeals decision should not be allowed to stand in the way of Scott's clear testamentary intent to choose his friends as the recipients of his estate assets. This Court accepting review will help clarify that an individual's right to dispose of their estate as they see fit should not be impeded by a rigid gifts causa mortis interpretation especially as technological advances allow for more accessible ways to denote the testator's intentions.

C. The Pandemic Era Restrictions on Will Formation Present This as An Opportune Time to Help Evolve the Law on Gift Causa Mortis

"The pandemic has brought into sharp focus the mismatch between traditional rules that govern valid will executions, on the one

hand, and contemporary restrictions, practices, and preferences, on the other." Crawford, Bridget J.; Purser, Kelly; and Cockburn, Tina "Wills Formalities in a Post-Pandemic World: A Research Agenda," *University of Chicago Legal Forum*: Vol. 2021, Article 4, 93, 94 (2021).[7] During the early stages of the pandemic, legal scholars began to recognize that "COVID-19 vividly highlights the shortcomings of formal wills. Indeed, the outbreak has exposed the main problem with the Wills Act: it renders will-making inaccessible." David A. Horton & Reid Kress Weisbord, COVID-19 and Formal Wills, 73 STAN. L. REV. ONLINE 18, 19 (2020).[8] Promoting and encouraging valid will-making is preferred for a variety of reasons. It provides stability, clarity, and efficiency in determining a decedent's final wishes. 79 Am. Jur. 2d. Wills § 1 (2025) (defining a will as "the legal expression of a person's wishes as to the disposition of his or her property after death"). Yet, Scott was prohibited from effectuating a valid will because the hospital did not allow its employees to act as witnesses to a will and did not allow visitors because of the COVID protocols.

[7] Available at: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1685&context=uclf

[8] Available at: https://review.law.stanford.edu/wp-content/uploads/sites/3/2020/05/73-Stan.-L.-Rev.-Online-Horton-Weisbord.pdf

In accepting review of this case, this Court can help develop the law to modernize it to allow for more convenient and efficient ways for individuals to issue gifts causa mortis prior to death in the event that they cannot effectuate a valid will. The rigid interpretation of the court of appeals of what constitutes delivery for a gift causa mortis thwarts Scott's clear intent to deliver his possessions to his friends rather than his family. Allowing the court of appeals decision to stand will do a disservice to the effort Scott went through to express his wishes for the disposition of his property after his death.

The COVID-19 pandemic inflicted immeasurable pain upon the public at large and its effects continue to reverberate throughout legal disputes. The unique circumstances of what occurred to Scott, when trying to effectuate a valid will, should not be held against him as he engaged in every effort available him to express his testamentary intentions. Granting review for this case will afford this Court the opportunity for further develop the importance of a testator's clear intentions when delivering a gift causa mortis.

CONCLUSION

Petitioners, Anthony Matson, Earl Jacobson, Debbie Klineschmidt, and Kerwyn Spude, respectfully request that this court grant their petition for review.

Dated this 20th day of August, 2025.

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CERTIFICATION

We certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief. The length of this brief is 5,827 words.

Dated this 20th day of August, 2025.

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RESPONDENTS-PETITIONERS APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains:

1. A table of contents;
2. The findings and opinion of the Circuit Court;
3. A copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and
4. Portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 20th day of August, 2025.

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