COURT OF APPEALS
DECISION
DATED AND FILED

September 5, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2751

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

ROBERT KUCHARSKI, A/K/A ROBERT KAYE,

PLAINTIFF-APPELLANT,

V.

ANDREW L. KUCHARSKI, JR. AND DANIEL F. KAYE, A/K/A DANIEL F. KUCHARSKI,

DEFENDANTS-RESPONDENTS,

WILLIAM KAYE, A/K/A WILLIAM KUCHARSKI AND HILLSIDE FAMILY TRUST CHICAGO,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Burnett County: EUGENE D. HARRINGTON, Judge. *Affirmed in part; reversed in part, and cause remanded with directions.*

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

¶1 PER CURIAM. Robert Kucharski appeals from a judgment denying his action for partition of two lots. Robert argues that he has an equitable one-fourth interest in the lots by virtue of a previous settlement agreement, a letter and an unrecorded deed to a nearby lot. He also argues that even if the trial court properly refused to recognize his equitable claim, he possesses a one-eighth legal interest in both lots pursuant to an executed and recorded deed. We affirm the trial court's discretionary determination that Robert has no equitable interest in the lots. However, because the court concluded that Robert acquired an interest in the lots through a quitclaim deed, we reverse the judgment denying Robert a remedy under WIS. STAT. ch. 842.[1] Therefore, we affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

¶2 This case involves a family dispute over lakefront property that has been owned by various family members for decades. We will briefly summarize the property's ownership to the extent that it bears on Robert's equitable and legal claims.

¶3 In 1986, Robert's brothers, Daniel and Andrew, owned the property as joint tenants. That same year, in what was a disputed incident, Andrew may have conveyed his interest in the property to his father, Andrew, Sr.[2] Despite Andrew, Sr.'s alleged ownership of one-half of the property, Daniel and his five siblings decided to divide the property among themselves.

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[1] All statutory references are to he 1999-2000 version, unless otherwise noted.

[2] Whether Andrew gave his father his interest in the property was an issue litigated in a previous case. This fact is relevant for background purposes only.

¶4 According to a December 1995 letter from Daniel to his siblings, the property was to be divided into four lots. Robert would have one of the lots, and he and several others would need to contribute funds to pay taxes, loans and attorney fees. Robert ultimately paid $1,733 toward those expenses.

¶5 At the time the letter was distributed, Daniel and Andrew had already, in July 1995, divided the parcel into four lots. They had also executed several quitclaim deeds, including a deed to Robert for lot 4. This deed, signed on November 8, 1995, was never recorded.

¶6 In the meantime, Andrew, Sr. began to assert his alleged right to one-half of the entire property, claiming that Andrew had signed over his share of the property in 1986. In 1996, four of the brothers, Andrew, Daniel, Robert and William, filed a lawsuit against Andrew, Sr., seeking to obtain full title to the four lots.

¶7 The lawsuit against Andrew, Sr. settled prior to trial in October 1997. The parties presented the circuit court with an oral stipulation that the court later referenced in its written judgment.[3] It appears undisputed that the settlement provided that Andrew, Sr. would relinquish his rights to lots 1, 2 and 3, but become the sole owner of lot 4. Specifically, the written judgment provided that the four brothers "shall deed Lot 4" to their father.

[3] The transcript of the oral stipulation has not been provided on appeal, with the exception of two individual pages, even though the trial court took judicial notice of the entire court file from the previous case. However, the written judgment was made part of this record as an exhibit to filings with the trial court. The written judgment does not detail any agreements or arrangements that may have existed among the brothers with respect to lots 1, 2 and 3, except to note that the parties "shall cooperate in the transfer of any and all marital interests" in the four lots.

¶8 However, as the circuit court's written judgment discusses in detail, the four brothers had the option to purchase lot 4 by paying $25,000 within ninety days and thereafter paying an additional $30,000. The brothers failed to timely pay the $25,000, and the option to purchase lot 4 was lost. In April 1998, Andrew, Sr. executed a quitclaim deed of his one-half ownership interest in lots 1, 2 and 3 to the four brothers as tenants in common. It is this deed that provides the basis for Robert's claim of a one-eighth legal interest in the disputed lots.

¶9 Robert filed this lawsuit in December 1998 seeking partition of lots 1, 2 and 3. Robert settled his claim against William, and the case proceeded to trial against Daniel and Andrew for lots 1 and 2. The trial court ultimately dismissed Robert's action in its entirety. This appeal followed.

LEGAL STANDARDS

¶10 In a partition action pursuant to WIS. STAT. ch. 842, the court first determines the rights of the parties. *See* WIS. STAT. § 842.07.[4] The court's findings of fact will be upheld unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). Whether Robert has one-eighth legal ownership in lots 1 and 2 based on the April 1998 deed from his father presents a question of law this court reviews de novo. *See* ***Crowley v. Knapp***, 94 Wis. 2d 421, 430, 288 N.W.2d 815

[4] WISCONSIN STAT. § 842.07 provides:

> On default and proof or after trial of issues, the court shall by findings of fact and conclusions of law determine the rights of the parties. If the basis for partition is clear, the court may enter judgment partitioning the interests. If the basis for partition is not clear, the court shall appoint a referee to report either a basis for partition, or the conclusion that partition is prejudicial to the parties.

(1980) (court's interpretation of deed presented question of law subject to de novo review).

¶11 However, we use a different standard to review whether Robert is entitled to one-fourth of each lot based on equity principles. A trial court has the power to apply an equitable remedy as necessary to meet the needs of the particular case. ***Mulder v. Mittelstadt***, 120 Wis. 2d 103, 115, 352 N.W.2d 223 (Ct. App. 1984). Analyzing a claim for equity requires weighing the factors that affect the judgment, a function that requires the exercise of judicial discretion. *See* ***id.*** On appeal, we use the deferential erroneous exercise of discretion standard when reviewing this discretionary act. *See* ***id.***

¶12 Finally, application of WIS. STAT. ch. 842 to the parties' rights as determined by the trial court is a question of law we review de novo. *See* ***State v. Shea***, 221 Wis. 2d 418, 425, 585 N.W.2d 662 (Ct. App. 1998) (the proper interpretation and application of a statute are questions of law that we review independently).

DISCUSSION

¶13 Robert argues that he is the rightful owner of one-fourth of lots 1 and 2, and is entitled to one of the remedies defined in WIS. STAT. ch. 842. First, he contends that he has one-eighth legal ownership by virtue of the April 1998 deed from Andrew, Sr. to the four brothers as tenants in common. Second, he asserts that he has a one-fourth equitable interest in the disputed lots, based on the

settlement agreement, the December 1995 letter, the unrecorded deed to lot 4 and some payments he made for taxes and other costs.[5]

I. Legal ownership via the April 1998 deed

¶14 The trial court concluded that the brothers acquired an interest in the disputed property by virtue of the April 1998 deed from Andrew, Sr. In doing so, the court implicitly accepted the authenticity of the deed, which is not disputed on appeal. Despite the court's conclusion, the court denied Robert's action for partition based on equity principles. Robert argues the court erred because the deed gives him a one-eighth interest[6] in lots 1 and 2. We agree.

¶15 Once the trial court concluded that Robert had legal rights flowing from the April 1998 deed, the court was bound to apply the remedies of WIS. STAT. ch. 842 to that interest. Specifically, the court had three options: (1) decide where the actual partition line should be drawn; (2) appoint a referee who will identify a suitable partition line or recommend sale; or (3) conclude that the partition is impossible and order a sale. *See* WIS. STAT. § 842.07; ***LaRene v. LaRene***, 133 Wis. 2d 115, 119-20, 394 N.W.2d 742 (Ct. App. 1986).

¶16 We conclude that the trial court erred when it denied Robert one of these remedies. Accordingly, we reverse that portion of the judgment and remand

[5] Robert does not assert that the one-fourth equitable interest is in addition to the one-eighth legal interest. Rather, he asserts that he is equitably entitled to one-fourth, and one-half of that amount has already been made his by the April 1998 quitclaim deed from his father.

[6] Daniel and Andrew do not specifically dispute Robert's assertion that the appropriate fraction of ownership based on the April 1998 deed is one-eighth (Andrew, Sr.'s one-half interest divided by four brothers equals one-eighth total interest to each brother). Instead, they dispute whether Robert is equitably entitled to any property.

for application of one of the three options. Although the court's written opinion found that "there was no proof that the lots may be physically partitioned," suggesting that the only viable option is to order a sale, we conclude that we should reverse and remand with directions that the court consider which of the three WIS. STAT. ch. 842 options should be applied to Robert's one-eighth legal interest in lots 1 and 2.

¶17 We base this decision on several factors: (1) there is a strong presumption for partition rather than sale, *see* ***Boltz v. Boltz***, 133 Wis. 2d 278, 282-83, 395 N.W.2d 605 (Ct. App. 1986); (2) the court did not make detailed findings because it declined to apply any of the options; (3) the record does not reveal any evidence concerning the feasibility of partitioning one-eighth, as opposed to one-fourth, of each of the lots; and (4) the partition issue is complicated by the fact that there are buildings on the lots in which Robert does not claim an interest. In light of these facts, we conclude that the interests of the parties would be best served by remanding for consideration of the options under WIS. STAT. ch. 842.

II. Robert's equitable claim

¶18 At trial, Robert urged the trial court to award him one-fourth of lots 1 and 2 based on equity principles.[7] Robert's theory in support of equitable

[7] It is important to recognize that although Robert presented evidence at trial that suggested he was arguing that the settlement agreement gave him a legal right to one-fourth of the three lots, he did not ultimately pursue this argument in the trial court. The court and Robert's counsel discussed Robert's theory of recovery, and counsel agreed that it was an equitable action and that Robert was "here to have the court administer equity." Accordingly, the trial court analyzed Robert's claim for one-fourth of the lots based on equity principles, as opposed to contract enforcement principles. Furthermore, the court did not make findings with respect to any agreements that may have existed among the brothers at the time they settled with their father.

(continued)

ownership was that since 1994, the family plan was that he was to become the owner of lot 4. He cited as evidence the unrecorded 1995 deed giving him lot 4 and the December 1995 letter laying out the brothers' plan. He also argued that when the brothers settled their lawsuit against their father, their intention was that each would keep his lot, by helping Robert secure lot 4 through the offer to purchase and settlement, and by executing appropriate deeds among themselves. Because the right to purchase lot 4 was lost, Robert asserted, he was entitled to one-fourth of lots 1, 2 and 3.

¶19 The trial court rejected Robert's argument, concluding that equitable principles did not support his claim. First, the court found that throughout the years, Robert had contributed only $1,733.75 toward the acquisition of the property. In sharp contrast, Andrew and Daniel had paid over $230,000, including real estate taxes, mortgage amortization, insurance premiums, survey costs and legal fees.

¶20 Second, the court recognized that Daniel, Andrew and Robert had all tried to preserve the ninety-day option to purchase lot 4, but only Andrew had finally procured $25,000. Unfortunately, he was too late and the option had expired. Third, the court found that Robert "remains unwilling to credit any amount to [Andrew or Daniel] for their contributions to preserve the property."

On appeal, Robert argues that he has a "one-eighth equitable interest" in lots 1 and 2, but also hints that he is legally entitled to the lots pursuant to the settlement agreement. The transcript of the settlement agreement is not part of the record, and we therefore have no means of interpreting the agreement, even if we were inclined to do so. It is the appellant's responsibility to insure that the record includes all documents pertinent to the appeal. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26, 496 N.W.2d 226 (Ct. App. 1993). Robert's failure to include the settlement transcript in the record, as well as his waiver at the trial court, preclude our review of his legal rights under the settlement agreement.

Fourth, the court noted that notwithstanding the lack of a legal obligation to do so, Daniel in 1988 gave Robert $27,000 in insurance proceeds received after a fire loss on the property.

¶21 Based on these factors and other trial testimony, the trial court concluded that Robert was not entitled to an equitable share of the disputed property. On appeal, Robert does not specifically challenge the court's factual findings, but instead argues that the court "erred by concluding that [Robert] did not have [an] equitable interest in the lots 1 and 2 pursuant to the settlement agreement."

¶22 We conclude that the court did not erroneously exercise its discretion. Specifically, the court examined the relevant facts, applied a proper legal standard, and reached a reasonable conclusion with respect to the equitable issues before it. Robert's lack of financial contribution to the property, including his failure to contribute any funds to offset the attorney fees spent to litigate against their father, justifies the court's discretionary decision.

CONCLUSION

¶23 We affirm the trial court's discretionary determination that Robert has no equitable interest in lots 1 and 2. However, because the court concluded that Robert acquired an interest in lots 1 and 2 through a quitclaim deed, we reverse the court's judgment denying Robert a remedy under WIS. STAT. ch. 842. Therefore, we affirm in part, reverse in part, and remand for further proceedings. Specifically, we direct the trial court to consider and then apply one of the options available under ch. 842 to Robert's one-eighth interest in lots 1 and 2.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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