

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 24, 2008

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1657

Cir. Ct. No. 2005IN203

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN THE MATTER OF THE ESTATE OF ALBERT A. GADOWSKI:

DUMKE & ASSOCIATES, LLC AND MORTON MARTIN, LLC,

APPELLANTS,

V.

FRANCES WHEELER,

RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County:
MARK J. MCGINNIS, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Dumke & Associates, LLC, a creditor against the estate of Dr. Albert Gadowski, appeals an order granting a petition to transfer real

property from Gadowski's estate to Frances Wheeler. The court transferred the property after determining that Wheeler was a secured creditor and that there was no equity in the property. Dumke claims Wheeler was an unsecured creditor who failed to file a timely claim against the estate. We disagree and affirm the order.

BACKGROUND

¶2 Gadowski died on November 3, 2005. In 2002, Gadowski signed a ten-year lease for office space with Dumke. The lease provided that Gadowski's obligations under the lease would continue after his death. Seeking to collect these amounts, Dumke filed a \$249,000 claim against Gadowski's estate.

¶3 However, the value of the probate estate was only \$57,145. As relevant here, the estate inventory lists Gadowski as owning a partial interest in a home valued at \$399,900. Wheeler was the other owner of that property. The inventory indicates Gadowski had no equity interest in the home after subtracting, among other things, equity owed to Wheeler pursuant to a property agreement.

¶4 Gadowski and Wheeler entered into the property agreement in 1996. It is essentially a cohabitation agreement, although it is also designed to act as a marital property agreement in the event Gadowski and Wheeler ever married. The property agreement recognizes a \$100,000 contribution that Wheeler made toward the purchase of their home and states that, in the event of either's death or the dissolution of the relationship, the first \$100,000 of equity in the home shall be paid to Wheeler. The agreement also contains the following language regarding a mortgage:

The parties acknowledge that the homestead is owned as tenants in common between the parties. The parties acknowledge a first mortgage obligation to Citizens Bank, N.A. in the original amount of \$231,000. The parties

further acknowledge the \$100,000 contribution of [Wheeler] to the purchase price of the homestead. In the event of the death of one of the parties, [Wheeler] or her estate shall have a second mortgage on such homestead which shall be payable in full within six months of the date of death of the deceased party or upon sale of the homestead, whichever shall first occur....

Gadowski's will directs his personal representative to honor the property agreement's provisions regarding the home.

¶5 Wheeler petitioned for a declaration of rights regarding the property and sought to have it transferred to her. Dumke opposed the petition, contending Wheeler did not have a security interest in the home and was required to file a claim against the estate, which she did not do. The circuit court concluded that the property agreement gave Wheeler a mortgage or security interest in the home. Because there was no equity in the property, the court granted Wheeler's motion, ordering the property to be transferred to her.

DISCUSSION

¶6 Whether the facts satisfy a particular standard of law is a question of law we review independently, without deference to the circuit court. *State v. Trudeau*, 139 Wis. 2d 91, 103, 408 N.W.2d 337 (1987). This same standard of review applies to construing property agreements. *See Gardner v. Gardner*, 190 Wis. 2d 216, 240, 527 N.W.2d 701 (Ct. App. 1994).

¶7 When an application for the administration of an estate is filed, the court or probate registrar must set a deadline for filing claims against the estate. WIS. STAT. § 859.01.¹ Claims not filed by this date are generally barred. *See* WIS.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

STAT. § 859.02(1) and (2). However, a claim need not be filed to enforce “any mortgage, pledge, lien or other security agreement against property of the estate.” *See* WIS. STAT. § 859.43(1).

¶8 The issue here is whether Wheeler had a “mortgage, pledge, lien or other security agreement against” the home. We conclude she did.

¶9 The property agreement recognizes Wheeler’s \$100,000 toward the purchase of the home and expressly states that the first \$100,000 in home equity belongs to her. The property agreement seeks to protect Wheeler’s equity by giving her a security interest in the home. Whether called a “mortgage, pledge, lien or other security agreement,” the intent expressed in the property agreement is clearly to provide Wheeler with a security interest in the home at the time of Gadowski’s death.

¶10 Dumke argues the property agreement creates an unsecured obligation and merely gives Wheeler the right to ask the estate for a mortgage upon Gadowski’s death. However, the property agreement states that, in the event of Gadowski’s death, Wheeler “shall have a ... mortgage on” the home. One cannot fairly read this as creating a security interest any later than the moment of Gadowski’s death.

¶11 Dumke also argues that the property agreement fails to create a security interest because it is not in recordable form and was not recorded prior to Gadowski’s death. Dumke relies on the recording statutes, specifically WIS. STAT. § 706.05, which details the information that must be included in a recordable document. For example, a recordable document must contain a full legal description of the property. WIS. STAT. § 706.05(2m)(a).

¶12 However, the recording statutes merely define those classifications of persons who may claim an unrecorded instrument is valueless. *See State v. Barkdoll*, 99 Wis. 2d 163, 167-68, 298 N.W.2d 539 (1980). The effect of failing to record a document is specified in WIS. STAT. § 706.08, which states that “every conveyance that is not recorded as provided by law shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real estate or any portion of the same real estate whose conveyance is recorded first.” WIS. STAT. § 706.08(1). As used in § 706.08, a “conveyance” includes any transaction in which an interest in land is created, including a security interest. *See* WIS. STAT. §§ 706.001(1) and 706.01(4).

¶13 Therefore, under WIS. STAT. § 706.08, an unrecorded security interest is only void against a subsequent good faith purchaser of property. Here, there is no subsequent good faith purchaser of the home. As a result, Wheeler’s security interest against Gadowski and his estate remained unaffected by the fact that her security interest was unrecorded. As stated by our supreme court, an unrecorded mortgage gives “the mortgagee a lien upon the mortgaged property, good as between the parties and as to all the world except subsequent purchasers or mortgagees in good faith and for a valuable consideration.” *See Barkdoll*, 99 Wis. 2d at 168 n.5 (citing *Claridge v. Evans*, 137 Wis. 218, 223, 118 N.W. 198 (1908)).²

² Dumke also relies on WIS. STAT. § 409.203, a Uniform Commercial Code provision, when arguing what constitutes a valid security interest. However, WIS. STAT. ch. 409 generally does not apply to interests in, or liens on, real estate. *See* WIS. STAT. § 409.109(4)(k). Because Dumke fails to explain how § 409.203 applies here, we deem its argument relying on § 409.203 undeveloped, and we do not address it further. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

By the Court.—Order affirmed.

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

