COURT OF APPEALS
DECISION
DATED AND RELEASED

July 23, 1997

NOTICE

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

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No. 96-0691

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

MARCELLA SCHETTER,

PLAINTIFF-APPELLANT,

V.

ERNIE VON SCHLEDORN CHRYSLER-PLYMOUTH, INC.,

DEFENDANT,

C.B. SCHETTER,

INTERVENING-DEFENDANT-RESPONDENT.

MARCELLA SCHETTER,

PLAINTIFF-APPELLANT,

V.

DONALD C. SCHETTER AND ARLENE SCHETTER, HIS WIFE, MARCELLA SCHETTER, ERNIE VON SCHLEDORN, CHRYSLER-PLYMOUTH, INC., STATE OF WISCONSIN AND COUNTY OF WAUKESHA,

DEFENDANTS,

C.B. SCHETTER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County: DONALD J. HASSIN, JR., Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Marcella Schetter has appealed pro se from a judgment which determined her ownership interest and that of the Estate of C.B. Schetter, Marcella's former husband, in real estate owned by C.B. Schetter in Menomonee Falls, Wisconsin.[1] The judgment also partitioned the Menomonee Falls property, determined an accounting of rents from April 19, 1971 (the date of the Schetters' divorce in Florida) to July 31, 1987, and determined the respective credits to which the parties were entitled. We affirm the judgment.

Marcella raises nine issues which we will discuss *seriatim.* Her first argument is that the trial court erred by refusing to consider credits due her as part of the property division in the parties' 1971 Florida divorce. In support of this argument she contended in the trial court that C.B. received more than one-half of the parties' marital assets and that she was entitled to his entire share of the Menomonee Falls property and the rents from it to equalize the division. However, her argument on this subject is premised on the erroneous assumption that the

[1] C.B. Schetter initially was a defendant in the trial court action. Following his death on August 11, 1986, his estate was substituted for him as a party.

parties' total assets were to be measured from the date their marriage commenced rather than from the date of their divorce.

This argument reflects a misunderstanding of the terms of the parties' divorce judgment. The Florida judgment gave to each party "one-half of all of the assets heretofore belonging to both or either of the parties to this marriage." Marcella construes "heretofore" to mean any assets held or accrued by either party at any time during the marriage and to permit an analysis of what assets each party brought to the marriage, what assets were accrued during the marriage from those initial assets, and what debts and losses were incurred by each of the parties individually in their business ventures.

This court construes a judgment in the same manner as other written instruments. *See* ***Schultz v. Schultz***, 194 Wis.2d 799, 805, 535 N.W.2d 116, 118 (Ct. App. 1995). The particular provisions of a judgment must be considered in the context of the judgment as a whole. *See* ***id.***

Viewed in its entirety, it is clear from the Florida divorce judgment that the court was concerned that Marcella had defrauded C.B. by conveying property and withdrawing assets which properly were part of the marital estate, some of which were unaccounted for at the time of the divorce. Its use of the word "heretofore" in the judgment was clearly meant to refer to all assets of the parties as of the date of the divorce, whether held individually or jointly, thus ensuring that any assets which had been transferred by Marcella to her sole name or custody remained marital assets for purposes of the equal division of the parties' estate. Nothing in the judgment as initially entered or modified after appeal supports a conclusion that the Florida trial court contemplated that the division of assets required an accounting of every asset and liability brought to the

marriage or incurred during it, even if the asset or liability were no longer in existence at the time of the divorce.

The trial court was required to give full faith and credit to the Florida judgment. *See* ***Haeuser v. Haeuser***, 200 Wis.2d 750, 758-59, 548 N.W.2d 535, 539 (Ct. App. 1996); § 767.21(1)(a), STATS. Based on that judgment, it properly told Marcella that before she could be awarded more than a one-half interest in the Menomonee Falls property, she would have to establish that C.B. received more than one-half of the total assets of the parties that existed at the time of their 1971 divorce. Because Marcella failed to establish what the parties' total assets and liabilities were at the time of the divorce, and thus failed to show that C.B. received more than one-half of the total assets, the trial court properly refused to credit her in the partition of the Menomonee Falls property with C.B.'s one-half interest in that property.[2]

Marcella's second argument is that the trial court erred by refusing to make an accounting of rents from the date of the parties' marriage forward. Like her first argument, this claim is based on an erroneous belief that the parties' assets and liabilities, for purposes of the 1971 property division, were to be measured from the date of their marriage. Because the divorce judgment does not support this construction, her argument fails and the trial court properly made an accounting of rents which commenced on the date of the divorce.

[2] Marcella contends that she presented evidence showing that C.B. received $56,000 more than her. However, while evidence was presented relating to individual assets, the record created was insufficient to establish that C.B. received more than one-half of the *total* assets of the parties at the time of the divorce.

Marcella's third argument is that the trial court improperly allowed Donald Schetter, C.B.'s son, a 5% management fee for his services in collecting rents and making expenditures to operate the Menomonee Falls property. Marcella contends that there was no legal basis for the award because Donald acted only as the agent of C.B. and she never consented to the arrangement.

The partition of real property constitutes an equitable action. *See* ***Watts v. Watts***, 137 Wis.2d 506, 535, 405 N.W.2d 303, 315 (1987). A decision in equity is reviewed under the erroneous exercise of discretion standard. *See* ***Torke/Wirth/Pujara, Ltd. v. Lakeshore Towers***, 192 Wis.2d 481, 508, 531 N.W.2d 419, 429 (Ct. App. 1995). A trial court has the power to apply an equitable remedy as necessary to meet the needs of a particular case. *See* ***Mulder v. Mittelstadt***, 120 Wis.2d 103, 115, 352 N.W.2d 223, 229 (Ct. App. 1984).

Section 700.23(2), STATS., provides that if land belonging to two cotenants is rented to a third person, any cotenant may recover his or her proportionate share of the net rents collected by the other cotenant after deduction of property taxes, maintenance costs and any other proper charges relating to the property. Pursuant to this statute and the general principles of equity, no basis exists to conclude that the trial court erroneously exercised its discretion by awarding a 5% management fee for Donald's services.[3]

Marcella's fourth argument is that the trial court should have charged the Estate's share of the Menomonee Falls property with rents seized by

[3] Such an award is consistent with the rule that a cotenant in possession of property may be reimbursed in a partition action for expenditures for improvements made in good faith for the preservation and enhancement of the property, even when the other cotenant did not consent. *See* ***Rainer v. Holmes***, 272 Wis. 349, 354, 75 N.W.2d 290, 293 (1956); *see also* ***Heyse v. Heyse***, 47 Wis.2d 27, 34-35, 176 N.W.2d 316, 319-20 (1970).

the Internal Revenue Service to pay liquor taxes on a Florida nightclub business venture in which C.B. was involved. Although Marcella's argument on this subject is difficult to follow, it appears that the claim is again premised on the notion that C.B. should be held solely responsible for liabilities and debts incurred by him during the parties' marriage and before their divorce. Because the Florida judgment provided for an equal division of the parties' assets and liabilities as they existed at the time of the divorce, this argument also fails.[4]

Marcella's fifth argument is that the trial court erroneously charged her in the accounting with $9614, plus interest, arising from a trial court order dated March 18, 1977. In that order, the trial court awarded Marcella an advance in the amount of $9503, plus accumulated interest. However, the trial court also provided that the advance would be deducted from her award, if any, under the final accounting. Because the object of a court of equity is to do justice between the parties, *see* ***Rainer v. Holmes***, 272 Wis. 349, 352, 75 N.W.2d 290, 292 (1956), the trial court's deduction of the advance, plus interest, must be deemed reasonable and within the scope of its discretion.

Marcella's sixth argument is that the trial court improperly accounted for two mortgages. We disagree. According to Marcella's brief, the first mortgage was dated July 22, 1949, in the amount of $13,000 and was executed by C.B. to Marcella or Laura Heim. The second mortgage was dated

[4] This court concludes from the dates set forth in this section of Marcella's brief-in-chief that the debts to which she is referring had been incurred before the time of the divorce. Even if this conclusion is incorrect, Marcella's argument is rejected because most of it is not supported by citation to the record. *See* ***Rock Lake Estates Unit Owners Ass'n v. Township of Lake Mills***, 195 Wis.2d 348, 360 n.5, 536 N.W.2d 415, 420 (Ct. App. 1995). In addition, this argument fails because, as with her claim to additional credit, she has not established that C.B. received more than one-half of the total assets existing at the time of the divorce.

January 17, 1955, in the amount of $10,000 and was executed by Marcella and C.B. to Heim. Marcella states that four years after the parties' divorce, Heim's interest in the first mortgage was assigned to her. She states that Heim's interest in the second mortgage was assigned to her seven years after the divorce.

We conclude that the trial court properly exercised its discretion in accounting for these mortgages. As to the second mortgage, it awarded Marcella $5000, plus interest, representing one-half of the $10,000 mortgage and the amount for which C.B. was liable at the time of the divorce. It deemed this amount payable to Marcella based on Heim's assignment of her interest.

In analyzing the first mortgage, the trial court recognized that one-half of it, or $6500, was a marital asset at the time of the divorce because it was owed to Marcella. Absent proof that C.B. had received more than one-half of the assets existing at the time of the divorce, it therefore concluded that this $6500 had been accounted for in the property division. It concluded that the remaining $6500 debt was a marital debt owed equally by Marcella and C.B., and credited Marcella with one-half of that debt which was owed by C.B., or $3250 plus interest.

The trial court's decision was reasonably based upon the facts of record, as set forth by the parties. Marcella's remaining objections to its determinations are again premised on the notion that for purposes of the property division, the parties' assets and liabilities throughout their marriage, rather than those existing at the time of the divorce, should be considered. Again, that argument fails.

Marcella's seventh argument is that the trial court erred when it ordered the clerk of the circuit court to pay Donald Schetter $870.37, plus interest, representing the difference between money advanced by Donald towards the

Menomonee Falls property and rent money he used for his own purposes. She contends that the trial court failed to recognize that the clerk had previously paid this difference to Donald.

In its respondent's brief, the Estate states that it recognizes "that there is evidence in the record from which this court may conclude that Donald Schetter was already paid" and that it therefore does not oppose reformation of the judgment to delete the $870.37 item from the accounting. Despite the Estate's acquiescence, we decline to grant relief as requested by Marcella. This portion of the judgment is in favor of Donald—not the Estate. Although Donald was a defendant in the trial court, he has never participated or been ordered to participate as a respondent in this appeal. When the notice of appeal was filed, this court issued a notice to the parties dated March 11, 1996, setting forth the caption for the appeal. It listed C.B. as a defendant-respondent, but listed Donald only as a defendant. That notice stated: "If you do not agree with the caption, please notify this office at once." A notice of amended caption containing identical language and again listing Donald simply as a defendant on appeal was issued on August 9, 1996.

Marcella never filed a motion objecting to the caption. Consequently, only the Estate, and not Donald, has participated as a respondent on appeal. Because Donald is not a respondent, the portion of the judgment in his favor cannot be disturbed by this court. If any relief is possible under § 806.07, STATS., or some other means, it must be sought by Marcella in the trial court, not this court.

Marcella's eighth argument is that the trial court should not have charged her with interest on credits given to the Estate for expenditures made by

C.B. on the property. However, in cases of equity, the allowance of interest is a matter within the discretion of the trial court. *See* ***Estreen v. Bluhm***, 79 Wis.2d 142, 156, 255 N.W.2d 473, 481 (1977). Because the trial court could reasonably determine that interest was required to fully compensate the Estate for expenditures made by C.B., we will not disturb that award, particularly since interest was also awarded to Marcella on rents and credits due her.[5]

Marcella's final argument is that she should have received more than 5% interest on the rents found to be due her. However, 5% is the legal rate of interest provided in § 138.04, STATS. As such, the trial court acted reasonably in setting the rate of interest at this amount, *see* ***Estreen***, 79 Wis.2d at 158, 255 N.W.2d at 482, regardless of whether it could also, in the exercise of its discretion, have set a higher rate.[6]

In affirming the trial court's judgment, we note that Marcella's reply brief, portions of which are almost unintelligible, appears to possibly raise issues which were not raised in her brief-in-chief. To the extent it does so, they will not be addressed by this court. *See* ***Torke/Wirth/Pujara***, 192 Wis.2d at 492, 531 N.W.2d at 423.

By the Court.—Judgment affirmed.

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[5] Marcella cites 20 AM. JUR. 2D, *Cotenancy and Joint Ownership*, for the proposition that interest could not be awarded because C.B. never demanded a contribution by her for the expenditures made by him. However, she cites no Wisconsin law which prohibits a trial court from awarding interest until a demand for contribution is made.

[6] Contrary to Marcella's contention, we do not construe the trial court's decision as indicating that a court in equity could never award more than the legal rate of interest. We construe its statements simply as indicating that it believed it was appropriate to use 5% because that was the legal rate of interest established by statute.

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