COURT OF APPEALS
DECISION
DATED AND FILED

December 9, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0323

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

MARGARET J. MAGNANT,

PLAINTIFF-APPELLANT,

V.

RICHARD K. HAND,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Sheboygan County: JOHN B. MURPHY, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Margaret J. Magnant appeals from an order concluding that she and Richard K. Hand equally own residential property titled in both of their names. We affirm.

Magnant and Hand began dating in 1993. After fire destroyed her rental home and possessions, Magnant and her children moved in with Hand and paid one-half of his rent and utilities. With the proceeds of her renter's insurance, Magnant undertook to purchase a house. Because she had filed for bankruptcy in 1992, she was not able to obtain a mortgage loan. Magnant and Hand decided to buy the house together since she had sufficient funds for the down payment and closing costs and Hand had the requisite creditworthiness. Without having employed counsel for the transaction, Magnant and Hand took title as tenants in common. Hand did not contribute any funds to the purchase of the house.

Each month Hand paid the mortgage and Magnant reimbursed him for one-half of the mortgage and utility expenses. Hand moved out of the house approximately one year after its purchase and he ceased paying any part of the mortgage. In the six months before Hand moved out, Magnant paid for approximately $3588 in remodeling and improvements. While Hand did not contribute to these expenses, he did assist Magnant with some of the labor, although the extent of his contribution was disputed.

Magnant commenced an action to resolve the parties' interests in the property and sought a declaration that she was the sole owner of the property or, in the alternative, partition. She alleged that the § 700.20, STATS., presumption of equal undivided interests in a tenancy in common was rebutted because Hand did not make a monetary contribution to the acquisition, maintenance or improvements to the property.

In lieu of an evidentiary hearing, the parties' counsel made an extended offer of proof to the trial court which summarized the testimony and other evidence. In addition to the undisputed facts recited above, Magnant's

counsel stated that Magnant's only understanding about tenancy in common was that her interest in the property pass to her children at her death. Magnant believed that she and Hand would marry, and therefore she "had no qualms about purchasing the house" with him. She did not understand that purchasing the home as tenants in common would give Hand a presumed one-half interest in the property. The parties did not have any written or oral agreement relating to their ownership interests in the house. Magnant could not document all of the improvement expenses and how much labor Hand had contributed.

Hand's counsel agreed that the parties never formalized their view of their respective interests in the property either by oral or written agreement and that the parties believed their relationship would continue. Hand questioned whether Magnant's improvements increased the value of the property. Hand emphasized that Magnant would not have received a mortgage loan had he not agreed to sign the mortgage note.

The parties then filed briefs outlining their claims. Magnant argued that she had rebutted the § 700.20, STATS., presumption that tenants in common own property in equal undivided interests. Magnant conceded that Hand's credit made it possible for her to purchase the property. Magnant contended that the parties' respective contributions to the property demonstrated their understanding of the interest each held—Hand effectively paid rent while Magnant made all other monetary contributions to the property.

In his brief, Hand emphasized the absence of oral or written expressions of Magnant's intent with regard to the property. Hand argued that Magnant did not rebut the presumption because she offered no evidence of an intent contrary to the presumed equal undivided interests in the property. In

support of the argument, Hand noted that at the time the parties purchased the property they "were looking toward eventual marriage." Hand further noted expressions of intent that the parties would share the house and the profits from its sale.

In her rebuttal brief, Magnant highlighted that the parties disputed the inferences to be drawn from Magnant's lack of understanding regarding the incidents of tenancy in common and whether Hand actually made any remarks regarding disposition of the profits from the house.

The trial court found that although Magnant paid the down payment, Hand contributed his creditworthiness, which was valuable consideration equivalent to the cash contributed by Magnant. The court found that there was strong evidence that Magnant intended to gift one-half of the down payment to Hand. The court found no evidence that the parties had oral or written communications which suggested anything other than equal ownership. The court concluded that Magnant did not rebut the § 700.20, STATS., presumption of equal ownership and declared that Hand and Magnant had an equal interest in the property.[1]

"Partition is an equitable proceeding ...." ***Jezo v. Jezo,*** 23 Wis.2d 399, 404, 127 N.W.2d 246, 249 (1964). "An appeal to equity requires a weighing of the factors or equities that affect the judgment—a function which requires the exercise of judicial discretion." ***Mulder v. Mittelstadt***, 120 Wis.2d 103, 115, 352 N.W.2d 223, 228 (Ct. App. 1984). "A trial court has the power to apply an

[1] The court gave the parties sixty days to achieve a buy-out arrangement. When the parties were not able to do so, proceedings in the circuit court concluded and the court's determination of an equal share in the property became appealable.

equitable remedy as necessary to meet the ends of the particular case." ***Id.*** at 115, 352 N.W.2d at 229. As such, we owe the trial court deference in the exercise of its equitable powers. *See* ***Disrud v. Arnold***, 167 Wis.2d 177, 185, 482 N.W.2d 114, 117 (Ct. App. 1992).

The factors to be considered by the court in a partition action to determine interests in property are set forth in ***Jezo***. The presumption of equal ownership can be rebutted by evidence showing the source of the cash outlay at acquisition, the intent of the co-tenant to gift a one-half interest to the other co-tenant, an unequal contribution of money or services, unequal expenditures in improving the property or other evidence raising inferences contrary to the presumption of equal interest. *See* ***Jezo***, 23 Wis.2d at 406, 127 N.W.2d at 250.

The trial court applied the ***Jezo*** factors. The court considered (1) Magnant's intention to gift, a reasonable inference from evidence that the parties contemplated marriage when they purchased the house; (2) Hand's contribution of his creditworthiness; and (3) Magnant's monetary contributions to the maintenance and improvement of the house. The court found no evidence that the parties had an oral or written agreement regarding their interests in the property. Counsels' submissions were in dispute regarding the inferences which could be drawn about Magnant's intent when she made the down payment and took title as tenant in common with Hand. The trial court's findings based upon this record are not clearly erroneous. *See* § 805.17(2), STATS.

Hand argues that ***Jezo*** is no longer good law because § 700.20, STATS., was enacted subsequent to ***Jezo***. We disagree and conclude that the ***Jezo*** factors apply to this case in the context of the rebuttable presumption of § 700.20. ***Jezo*** and § 700.20 are not inconsistent in their substantive provisions.

By the Court.—Order affirmed.

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