COURT OF APPEALS
DECISION
DATED AND FILED

February 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2362

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

RICHARD I. ANDRE,

PLAINTIFF-RESPONDENT,

v.

ELEANOR M. TOBON AND NORMAN C. ANDRE,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Sawyer County: FREDERICK A. HENDERSON, Judge. *Affirmed.*

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

CANE, C.J. Eleanor Tobon and Norman Andre (Eleanor & Norman) appeal a judgment[1] in a partition lawsuit regarding a 510-acre real estate parcel they co-own as tenants in common with their brother Richard Andre. The judgment provides that partition could not be made without prejudicing the parties, no basis existed for directing the payment of owelty,[2] and the sheriff must sell the property at public auction. On appeal, Eleanor and Norman argue that the trial court erred by: (1) failing to award them the property with an owelty payment to Richard; (2) concluding that partition in kind would result in prejudice; (3) failing to appoint a referee under § 842.07, STATS., and (4) confining evidence of the parties' emotional attachment to the property to the attorneys' offers of proof and then basing its decision, in part, on emotional attachment. We reject their arguments and affirm the judgment.

I. BACKGROUND

The parties own approximately 510 acres of wooded property surrounding a forty-two-acre lake, commonly known as Dead Lake. In 1994, Richard filed an action seeking sale of the property as one parcel, alleging that partition could not be made without prejudicing the owners. In 1996, the trial

[1] The defendants appeal from the "Findings of Fact and Conclusions of Law which may constitute a final judgment …." The parties do not raise the question of appealability from a trial court's findings of fact and conclusions of law, but such failure cannot waive the issue. ***Thomas/Van Dyken Joint Venture v. Van Dyken***, 90 Wis.2d 236, 241, 279 N.W.2d 459, 462 (1979). Without a final written order or judgment, we have no jurisdiction to consider the controversy's merits. *See* ***id***. In determining appealability, we look behind the document's label and form to the substance and nature of the determination. *See* ***id***. Here, the trial court's findings of fact and conclusions of law constitute a final judgment because it disposes of the entire matter in litigation and was entered when filed in the clerk's office. *See* § 808.03(1), STATS. We therefore have jurisdiction to consider the merits of this partition action. *See* ***id***.

[2] An "owelty" is an "equalization charge." BLACK'S LAW DICTIONARY 764 (6th ed. 1991).

court granted his motion for summary judgment and ordered partition by sale, but gave each co-owner a right of first refusal. Eleanor and Norman appealed, and we reversed the judgment because we determined that the parties' affidavits contained disputes of material fact. *See* ***Andre v. Tobon***, No. 96-1543 (Wis. Ct. App. Mar. 4, 1997).

Following a bench trial, the court found that based on the property's unique characteristics, substantial economic loss would result if the property were partitioned. If partitioned into three equal parcels, the fair market value was $650,000, but if sold as a whole, the trial court determined that the fair market value was $800,000. Further, it found that the highest and best use of the property is a single, private retreat for recreation and personal enjoyment and that the parties have an "equivalent emotional attachment" to the property. Based on those findings, the trial court refused to award the property to Eleanor and Norman with an owelty payment to Richard. Instead, it ordered the sheriff to sell the property as one parcel at public auction. Eleanor and Norman appeal.

II. ANALYSIS

Eleanor and Norman contend the trial court erred by concluding that partitioning the property would prejudice the parties. They argue that there was no evidence indicating whether the value to be realized at a sheriff's sale was greater or less than the fair market value of the property divided into three parts. Instead, they assert, the trial court "went beyond the evidence" to reach its "own expert opinion" that fair market value would be realized at a sheriff's sale.[3] Therefore,

[3] In their reply brief, however, Eleanor and Norman argue that because they offered to pay Richard one-third of the fair market value, Richard is assured to realize fair market value and therefore no economic loss could result if the property were partitioned.

they reason, because no factual basis supports the trial court's conclusion, no prejudice exists, and a sale under § 842.17, STATS., was improper. We are not persuaded.

Partition is an equitable proceeding, and a court of equity seeks to do justice between the parties. *See* ***Jezo v. Jezo***, 23 Wis.2d 399, 404, 127 N.W.2d 246, 249 (1964). "The basis of all equitable rules is the principle of discretionary application." ***Mulder v. Mittelstadt***, 120 Wis.2d 103, 115, 352 N.W.2d 223, 228 (Ct. App. 1984). Here, the trial court made findings of fact and exercised its discretion by granting equitable relief. Pursuant to § 805.17(2), STATS., the factual findings shall not be set aside unless they are clearly erroneous. Discretionary acts are sustained if the trial court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

After trial, a court may order partition along undisputed lines, order partition and appoint a referee, or determine that partition would prejudice the parties and order a sale of the property. ***LaRene v. LaRene***, 133 Wis.2d 115, 119-20, 394 N.W.2d 742, 744 (Ct. App. 1986). Section 842.17(1), STATS., empowers a court to exercise the third option:

> If the court finds that the land or any portion thereof is so situated that partition cannot be made without prejudice to the owners, and there are no tenants or lienholders, it may order the sheriff to sell the premises so situated at public auction.

This third option is referred to as partition by sale. In contrast, a partition in kind refers to when the property can actually be divided without prejudice to the

owners, and no need therefore exists to sell the property as a whole. Under § 842.17(1), there is a strong presumption for partition in kind rather than sale, but if partition in kind would prejudice the owners, a judicial sale may be ordered. ***Boltz v. Boltz***, 133 Wis.2d 278, 282-83, 395 N.W.2d 605, 607 (Ct. App. 1986). Prejudice results if partition in kind would cause substantial economic loss. ***Id***. at 283, 395 N.W.2d at 607.

While courts of equity may order partition by sale against the landowner's will if partition in kind would cause a co-owner substantial economic loss, partition in kind is the rule. ***M&I Bank v. De Wolf***, 268 Wis. 244, 247-48, 67 N.W.2d 380, 382 (1954). Partition by sale is the "extraordinary and dangerous" exception. ***Id***. The burden of proof to show prejudice lies with the party requesting a sheriff's sale. ***Id***. at 248, 67 N.W.2d at 382. Here, the trial court determined that substantial economic loss would result if the property were partitioned and that such economic loss would prejudice the owners. The record contains evidence that a three-way partition would reduce the property's economic value. Professional appraisers for both parties testified that the fair market value of the property as a whole was greater than its fair market value if partitioned in kind. Because these findings are not clearly erroneous, we will not disturb them on appeal. *See* § 805.17(2), STATS.; ***Boltz***, 133 Wis.2d at 283, 395 N.W.2d at 607.

Whether these findings constitute prejudice to the owners within § 842.17(1), STATS., however, is a question of law we review de novo. *See* ***LaRene***, 133 Wis.2d at 120-21, 394 N.W.2d at 744. We agree with the trial court that Richard would be prejudiced because the land is worth less in three separate parcels than it would be if sold as a whole. *See* ***id***. Based on its finding that partition would result in substantial economic loss and therefore be prejudicial, the

trial court was empowered to order a judicial sale rather than order partition in kind under § 842.17(1). *See* ***Boltz***, 133 Wis.2d at 283, 395 N.W.2d at 607.

We also reject Eleanor and Norman's contention that under ***De Wolf***, we must determine whether a sheriff's sale would result in realization of the property's fair market value and that to constitute prejudice under § 842.17(1), STATS., the proceeds likely to be received at a sheriff's sale must meet or exceed the fair market value of the property as divided. ***De Wolf*** indeed notes, as Eleanor and Norman point out, that to determine if partition in kind would prejudice the owners, a court determines if the value of each owner's share will be materially less than his or her probable share of the purchase money in case the premises are sold as a whole. *See* ***id***. at 249, 67 N.W.2d at 382-83. Based on this language, they suggest that to determine if substantial economic loss exists, we look at the results of the sheriff's sale. This confuses the remedy with the rule. Rather, if substantial economic loss would result from partition and such partition would prejudice the owners, § 842.17(1) empowers a court to order a sheriff's sale. *See* ***Boltz***, 133 Wis.2d at 282-83, 395 N.W.2d at 607. The remedy for such prejudice is a judicial sale of the property as one parcel. *See* § 842.17(1), STATS.

What Eleanor and Norman are arguing, then, is that the remedy of a judicial sale for a court's finding of prejudice by partition is worse than partition. Their argument questions the equities of the remedy, but that argument is better addressed to the legislature, not this court. In any event, the trial court recognized that although sheriff's sales do not normally result in fair market value, here a sheriff's sale would likely bring fair market value. Both experts testified that it is possible, though not typical, that a sheriff's sale could result in fair market value. The trial court noted, however, that this was not the typical sheriff's sale due to

land contract or mortgage foreclosures at which the successful purchaser is usually the lender and the property is often not well-maintained.

In contrast, the trial court concluded that the land here is "a nice piece of property" that would probably sell, either to outsiders after six weeks of advertising or to Eleanor and Norman who want to retain the property. Further, the trial court also permitted the parties to "pursue such additional marketing and advertising efforts and activities at their own expense as they deem appropriate." Unlike ***De Wolf***, evidence supports the trial court's finding that fair market value would result from this atypical sheriff's sale.

Next, Eleanor and Norman argue that the trial court erred when it failed to appoint a referee under § 842.07, STATS. Their sole argument is that because the record contains no evidence to support a finding of prejudice, the basis for partition "was not clear to the Trial Court" and thus the court was required to appoint a referee. If the basis for partition is not clear, the trial court must appoint a referee to "to report either a basis for partition, or the conclusion that partition is prejudicial to the parties." In short, § 842.07 envisions the appointment of a referee only when the court has determined that partition is appropriate and the basis is unclear. *See* ***Boltz***, 133 Wis.2d at 285-86, 395 N.W.2d at 608. "The basis for partition" refers to the location where the partition lines are to be drawn, not to the reason for partition. *See* ***LeRene***, 133 Wis.2d at 118 n.1, 394 N.W.2d at 743 n.1.

Because the trial court concluded that partition in kind was inappropriate, Eleanor and Norman's argument must fail. As discussed above, the record indeed contains evidence to support a finding of prejudice because partition would destroy the value of the property as a whole. Thus, the trial court's finding

of prejudice was not clearly erroneous. *See* § 805.17(2), STATS. Additionally, when a trial court determines that partition would prejudice the parties and instead orders a sale, there is no need to appoint a referee. *See* ***Boltz***, 133 Wis.2d at 285-86, 395 N.W.2d at 608; ***LaRene***, 133 Wis.2d at 119-20, 394 N.W.2d at 744.

Next, Eleanor and Norman insist that the trial court erred by not awarding them the property with an owelty payment to Andre. In rejecting the owelty argument, the trial court stated:

> This issue of owelty, that's an interesting concept; but it seems to me, and I have made my finding, that all of the parties have an emotional connection to this property. And it does not seem to be equitable--and this is a court of equity--to say against the wishes of Dick, [Richard] Dick, you have to take money from these people, any more than it would be equitable for me to say to Norman and Eleanor, you have to take money from Dick for this property. I really don't see anything that would allow the court to apply this doctrine of owelty running from Eleanor and Norman to owing Dick any more than it would be if Dick said well, why not let me do the owelty and to them. I really don't see that.

Framing the issue as one of first impression, Eleanor and Norman maintain that § 842.14(4), STATS.,[4] and Wisconsin common law allow a trial court to award all the property to one party of a partition action with an owelty payment to the other.

[4] Section 842.14(4), STATS., provides:

> If partition is adjudged, and if it appears that it cannot be made equal between the parties without prejudice to the rights or interests of some of them, the court may provide in its judgment that compensation be made by one party to the other for equality of partition, according to the equity of the case; and where any party has with the knowledge or assent of the others or any of them, made improvements upon lands partitioned, the portion of such lands upon which such improvements have been made may be allotted to such party without computing in their value the value of such improvements.

Richard makes a persuasive argument that while Wisconsin law has long recognized the doctrine of owelty,[5] application of the doctrine is limited to only those cases in which "partition is adjudged." *See* § 842.14(4), STATS.

Although it is questionable whether a court acting in equity may, in exercising its discretion, order an owelty payment as Eleanor and Norman suggest, we need not resolve that issue because the trial court considered and rejected such a payment. One reason the court rejected an owelty payment based on fair market value of $800,000 was Richard's real estate appraiser's contention that the property was worth over one million dollars. If that is correct, Richard's one-third would obviously be greater than the proposed owelty payment. Here, the trial court was satisfied that the property would bring at least $800,000 at a sheriff's sale and reasonably exercised its discretion under § 842.17(1), STATS., to sell the property as one parcel.

Finally, Eleanor and Norman contend that the trial court erroneously exercised its discretion by excluding evidence of the parties' emotional attachment and then basing its decision to deny owelty in part on such attachment. While the trial court allowed the attorneys to make offers of proof regarding emotional attachment, the trial court heard no testimony regarding that issue. Eleanor and Norman argue that because the trial court based a "key … factual conclusion" on no evidentiary basis and conflicting offers of proof, the trial court "clearly" misused its discretion.

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[5] For uses of the term "owelty" see ***M&I Bank v. De Wolf***, 268 Wis. 244, 250-51, 67 N.W.2d 380, 383-84 (1954); ***Jezo v. Jezo***, 23 Wis.2d 399, 406e, 129 N.W.2d 195, 197 (1964) (*on motion for rehr'g*); ***Hayden v. Newman***, 229 Wis. 316, 322, 282 N.W. 66, 69 (1938).

Eleanor and Norman fail to develop their argument regarding how the trial court erred by excluding any further evidence on the parties' emotional attachment to the property. Therefore, even if we were to address the owelty argument, we would first have to develop Eleanor and Norman's emotional attachment argument before we could address its application to the doctrine of owelty. We decline to develop their argument for them. *See* ***State v. Waste Mgmt., Inc.***, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978).

By the Court.—Judgment affirmed.

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