

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

September 23, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**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 § 808.10 and RULE 809.62, STATS.

**No. 99-0078**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

---

**IN RE THE MARRIAGE OF:**

**FRANKIE KIRK ROTTIER, FORMERLY FRANKIE KIRK,**

**PETITIONER-APPELLANT,**

**v.**

**JOHN EDWARD WALSH,**

**RESPONDENT-RESPONDENT.**

---

APPEAL from an order of the circuit court for Dane County:  
RICHARD J. CALLAWAY, Judge. *Reversed and cause remanded with  
directions.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

PER CURIAM. In this post-judgment divorce proceeding, Frankie Kirk Rottier appeals from a trial court order denying her motion for injunctive and declaratory relief. She based her motion on a right of first refusal (ROFR) she

held on a parcel of rural land owned by her previous husband, John E. Walsh. We conclude that the unambiguous language of the ROFR did not permit her former husband to require that she either purchase a portion of the parcel or abandon her ROFR on that portion. Accordingly, we reverse and remand with instructions to issue the declaratory relief and injunction.

Frankie Kirk Rottier, formerly Frankie Kirk, was married to John E. Walsh. They divorced in 1996. As part of their marital settlement agreement, each gave the other a ROFR on homes each was to receive pursuant to the settlement. The agreement provided in pertinent part: “Frankie Kirk shall have a right of first refusal to purchase the residence located at 8847 Hidden Valley Road, Cross Plains, Wisconsin. The form of such rights of first refusal shall be as set forth in Exhibit B to this Agreement.” We attach Exhibit B to this opinion.

During the parties’ marriage, they divided the property at 8847 Hidden Valley Road into two parcels by certified survey. They did so in anticipation of a county zoning ordinance change which would have prevented subdivision of their property. The survey described the property as Lot 1 and Lot 2. Lot 1 contained about thirty acres and a residence. Lot 2 was undeveloped.

On December 17, 1998, Walsh sent Rottier a letter, a copy of an offer to purchase Lot 2, and other material. Pursuant to the ROFR, Rottier had seven days following delivery of the letter to exercise her right to purchase the property. Rottier believed that the ROFR required Walsh to give her the opportunity to buy the entire parcel, not just Lot 1 or Lot 2. Accordingly, she began this action on December 23, and obtained a temporary restraining order prohibiting Walsh from selling Lot 2. The trial court scheduled a hearing on Rottier’s request for a temporary injunction for January 4, 1999.

On January 4, the trial court heard testimony from a realtor concerning whether the offer Walsh had received was bona fide. Walsh also testified. Rottier was on a previously planned vacation, and appeared by counsel. The trial court concluded that if it granted the temporary restraining order, Walsh would be deprived of the ability to get the best price for the property. It also concluded that Rottier could not prevail on the merits, and denied the motion for a temporary restraining order. The court gave Rottier until 4:00 p.m. on January 6 to exercise her ROFR, or give a quit claim deed to the parcel to Walsh. It also denied Rottier's motion for declaratory relief. Rottier appealed and obtained a stay pending appeal.

Rottier makes essentially two arguments—that, as a matter of law, the ROFR prevented Walsh from selling only one of the parcels, and that the trial court erred by disposing of the entire action on a motion for a temporary injunction. Because we agree that the ROFR does not permit Walsh to sell only one parcel, we need not consider Rottier's arguments concerning the procedure used by the trial court. We do note, however, that the usual practice in matters where injunctions are issued is to address requests for temporary injunctions at one hearing and the merits of the case at a time thereafter scheduled.

Injunctions are equitable relief. *See Madison Teachers, Inc. v. Madison Metro. Sch. Dist.*, 197 Wis.2d 731, 747, 541 N.W.2d 786, 793 (Ct. App. 1995). Whether to grant an injunction is a matter within the discretion of the trial court. *See Sunnyside Feed Co. v. City of Portage*, 222 Wis.2d 461, 471, 588 N.W.2d 278, 283 (Ct. App. 1998), *review denied*, 222 Wis.2d 676, 589 N.W.2d 630 (1998). However, an error of law constitutes an erroneous exercise of discretion. *See Hull v. State Farm Mut. Auto. Ins. Co.*, 222 Wis.2d 627, 636, 586 N.W.2d 863, 866 (1998). And we review an unambiguous document de novo.

See *Micro-Managers, Inc. v. Gregory*, 147 Wis.2d 500, 507, 434 N.W.2d 97, 100 (Ct. App. 1988). Ambiguous documents are another matter. If a contract is ambiguous, a court must consider testimony or other extrinsic evidence to determine the intent of the parties and the meaning of the contract. See *Patti v. Western Mach. Co.*, 72 Wis.2d 348, 351, 241 N.W.2d 158, 160 (1976).

Rottier asserts that the ROFR unambiguously prevents Walsh from selling only a part of the Hidden Valley Road property. Her secondary position is that the ROFR is ambiguous, requiring a hearing as to its meaning. Walsh contends that the ROFR plainly permits him to sell Lot 2 separately, but that even if it is ambiguous, the trial court did not err by denying Rottier's motions and deciding the matter on the merits. We therefore examine the ROFR to consider the parties' arguments.

We do not consider the general language in the parties' marital settlement agreement to be significant. The ROFR, however, is specific as to the parties' agreement. We find it significant that Walsh granted Rottier a right of first refusal "as to the following described real estate: Lots One (1) and Two (2)..." Section 1.2 of the ROFR provides for a notice from Walsh to Rottier of a bona fide offer to purchase "the above-described real estate...." We conclude that the ROFR unambiguously requires that Walsh accept an offer to purchase "the above-described real estate," and that the ROFR unambiguously describes the "above-described real estate" as both Lot 1 and Lot 2. It is undisputed that the offer was not for both lots, but only for Lot 2. Walsh did not receive a bona fide offer to purchase "the above-described real estate."

Having concluded that the offer Walsh received was not of the sort described in § 1.2 of the ROFR, what next? A possible conclusion is that the

ROFR remained as it did before Walsh received the offer, encumbering both Lots 1 and 2. But this is not a reasonable interpretation. Such an interpretation would leave a purchaser in the position of owning a lot subject to a ROFR in favor of Rottier. Most purchasers and lenders would conclude that this would not give them clear title. More importantly, if we were to accept this meaning of the ROFR, that document would be meaningless, because Walsh could first sell Lot 2 without offering it to Rottier, and then Lot 1, also without offering it to Rottier. It is unreasonable that the parties intended to hire attorneys to draft a meaningless document.

The only reasonable meaning attributable to the document is that Walsh and Rottier intended the ROFR to apply to a sale of the entire property. This interpretation is favored by the “above-described real estate” language which we have examined, and is enhanced by § 1.8 of the ROFR in which the parties speak of Walsh closing on “the real estate described above.” That real estate is, as we have noted, both Lots 1 and 2.

Walsh agrees that the issue is one of contract construction. But he asserts that the ROFR is silent as to whether the two parcels can be sold separately. We agree with Walsh that this would not necessarily make the contract ambiguous. See *Erickson v. Gunderson*, 183 Wis.2d 106, 117-18, 515 N.W.2d 293, 299 (Ct. App. 1994). He argues that other parts of the parties’ agreement make their intent clear. In their divorce agreement, Walsh was given complete authority to manage and control the property awarded him “as fully and effectively as if the parties had never married.” But if this language were to control, the ROFR would be illusory—both he and Rottier could have totally ignored the ROFR. We conclude that it would be unreasonable for Walsh and Rottier to have

inserted the ROFR in their Marital Settlement Agreement with the intent that it have no meaning.

Walsh cites *Mueller v. Schier*, 189 Wis. 70, 82, 205 N.W. 912, 916 (1925), and *Dodge v. Carauna*, 127 Wis.2d 62, 65, 377 N.W.2d 208, 210 (Ct. App. 1985), for the rule that public policy favors the free and unrestricted use of property so that restrictions in deeds must be strictly construed to favor the unencumbered and free use of property. We agree, but the ROFR is not a deed restriction. It is an agreement requiring a certain procedure to transfer real estate. A ROFR is a contract between two persons. While it may eventually involve a third person, a ROFR disappears once the real estate is transferred. The consequences of a deed restriction can last much longer and affect many persons not parties to the original deed. We conclude that the policy reasons for strictly construing deed restrictions are not applicable to ROFRs.

Walsh then focuses more narrowly on ROFRs, and cites *Frandsen v. Jensen-Sundquist Agency, Inc.*, 802 F.2d 941, 946 (7th Cir. 1986) for the rule that it is “well established” in Wisconsin law that first refusal rights are narrowly construed. We, of course, are not bound by federal courts’ interpretations of law, with exceptions not applicable here. See *State v. King*, 205 Wis.2d 81, 93, 555 N.W.2d 189, 194 (Ct. App. 1996). And, the cases *Frandsen* cites are, with one exception, cases involving restrictions on the sale of stock in corporations. The one case involving real estate, *Edlin v. Soderstrom*, 83 Wis.2d 58, 70-71, 264 N.W.2d 275, 281 (1978), focuses on the standard of review of equitable decisions involving specific performance. We agree that “[c]ourts have traditionally been unwilling to grant specific performance if the essential terms of the agreement are vague or uncertain.” *Id.* at 70, 264 N.W.2d at 281. But Rottier is not asking for specific performance of anything. She and Walsh are both asking us to interpret a

contract that they made with each other. We see no reason not to apply traditional contract rules in determining their intent.

Walsh argues that Rottier has the right to match any offer as to Lot 1, and the right to match any offer as to Lot 2. But the ROFR does not directly or inferentially authorize this procedure. There is nothing in the ROFR which suggests that the parties intended this result.

We need not address Walsh's defense of the trial court's procedure when it decided the case on the merits at the hearing on the motion for the temporary injunction. We have concluded that there is only one reasonable interpretation of the parties' ROFR. Whether the trial court used the proper procedure is moot.

The trial court's decision favoring Walsh is an erroneous exercise of discretion because, as we have explained, it is an error of law. We therefore remand with directions to enter an injunction prohibiting John E. Walsh from transferring Lots 1 and 2 of Certified Survey Map No. 3858 recorded in the Dane County Register of Deeds office in Volume 16 of Certified Survey Maps, Page 52 as document No. 1728288 other than as specified in this opinion.

*By the Court.*—Order reversed and cause remanded with directions.

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

AN EXHIBIT HAS BEEN ATTACHED TO THIS OPINION.  
THE EXHIBIT CAN BE OBTAINED UNDER SEPARATE COVER BY  
CONTACTING THE WISCONSIN COURT OF APPEALS.

**COURT OF APPEALS**  
OF WISCONSIN  
ROOM 215, 110 E. MAIN STREET  
POST OFFICE BOX 1688  
MADISON, WISCONSIN 53701-1688  
TELEPHONE: (608) 266-1880  
FAX: (608) 267-0640

Marilyn L. Graves, Clerk  
Court of Appeals



