COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1218 **Cir. Ct. No. 2008CV3378**

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

RICHARD A. SKOGEN AND RANDALL S. SKOGEN,

PLAINTIFFS-RESPONDENTS,

V.

ROBERT M. SKOGEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: SHELLEY J. GAYLORD, Judge. *Affirmed.*

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Robert Skogen appeals an order of partition that divided farmland to which he held title as a tenant-in-common with his brothers Richard and Randall Skogen. Robert claims that the circuit court erroneously exercised its discretion in denying Robert's counterclaim for adverse possession of

part of the co-titled property or, in the alternative, in valuing the property subject to partition. We reject Robert's claims for the reasons discussed below and affirm the decision of the circuit court.

BACKGROUND

¶2 It is undisputed that the farmland in question was once jointly owned by the brothers' parents, Amos and Lucille Skogen; that all three brothers grew up on the farm; and that Robert and Richard continued to farm the property as adults, with Robert selling crops and Richard running a dairy operation. Robert began occupying a trailer on one portion of the farm in 1976. In 1987, Robert and his wife constructed a home near where their trailer had been. Amos assisted in the construction of the house and both parents were guests in the house. Robert reimbursed his parents for the taxes on the property for some period of time.

¶3 When Amos passed away in 1998, his half of the family farm was put in trust, to be used by Lucille during her life, and then distributed evenly to the brothers upon Lucille's death. Following Lucille's death in 2002, title to the entire farm was eventually transferred to the brothers as tenants-in-common pursuant to a personal representative's deed signed by Robert, dated August 11, 2004.

¶4 The farm was operated as a joint venture for tax purposes until the trust was terminated in 2005, at which time the brothers reached a temporary agreement to divide the acreage about equally based upon a survey, and to each use and pay taxes upon their separate parts. After disputes arose about whether the brothers were respecting the temporary boundaries and whether the boundaries of the temporary division should be made permanent, Richard and Randall filed the instant action. They proposed a division that would result in three sections of approximately equal value, under which Randall would receive 103.4 acres,

Richard would receive 100 acres, and Robert would receive 63.3 acres. Robert filed a counterclaim asserting several affirmative defenses including a claim of adverse possession.[1]

¶5 The circuit court determined that Robert's use of a portion of the farm during the life of his parents had been permissive rather than adverse, and then appointed a referee to make a recommendation as to whether the entire property could be divided without prejudice. The referee recommended that the property be sold, but the circuit court set that recommendation aside on the grounds that the referee had not applied the proper definition of prejudice. After Robert agreed that it was not necessary to remand the matter to a new referee, the court proceeded to decide itself where the boundaries should be drawn, based upon the testimony and materials previously presented. The court concluded that the proposed division set forth in the complaint—which was supported by the only appraisal that had been conducted—was the best that could be done in terms of equalizing the fair value of the property among the parties.

STANDARD OF REVIEW

¶6 An adverse possession determination presents a mixed question of fact and law, requiring findings concerning the sequence of events and a conclusion as to the legal significance of those events. ***Perpignani v. Vonasek***, 139 Wis. 2d 695, 728, 408 N.W.2d 1 (1987). We will not only sustain the circuit court's findings of fact unless they are clearly erroneous, but will also construe all evidence against the adverse possession and apply all reasonable presumptions in

[1] The adverse possession counterclaim is the only counterclaim the appellant raises on this appeal.

favor of the title owner. WIS. STAT. § 805.17(2) (2009-10);[2] ***Becker v. Zoschke***, 76 Wis. 2d 336, 346, 251 N.W.2d 431 (1977); ***Pierz v. Gorski***, 88 Wis. 2d 131, 136, 276 N.W.2d 352 (Ct. App. 1979). Furthermore, although we do not ordinarily defer to the circuit court's conclusion of law, we will give weight to a legal determination that is intertwined with the factual findings in support of that determination. ***Wassenaar v. Panos***, 111 Wis. 2d 518, 525, 331 N.W.2d 357 (1983).

¶7 A partition action is equitable in nature. ***Klawitter v. Klawitter***, 2001 WI App 16, ¶7, 240 Wis. 2d 685, 623 N.W.2d 169. The threshold question whether certain property can be equitably divided by size or value is a question of fact subject to the clearly erroneous standard of review. *See* ***LaRene v. LaRene***, 133 Wis. 2d 115, 120, 394 N.W.2d 742 (Ct. App. 1986). The remainder of the partition decision is subject to the erroneous exercise of discretion standard. ***Klawitter***, 240 Wis. 2d 685, ¶8.

DISCUSSION

Adverse Possession

¶8 WISCONSIN STAT. § 893.25 permits a person to acquire title to real property by adverse possession for an uninterrupted period of twenty years. The statute requires the land to be actually occupied and either protected by a substantial enclosure or usually cultivated or improved. WIS. STAT. § 893.25(2). A person claiming adverse possession must show that the disputed property was used for the requisite period of time in an "open, notorious, visible, exclusive,

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

hostile and continuous" manner that would apprise a reasonably diligent landowner and the public that the possessor claimed the land as his or her own. ***Pierz v. Gorski***, 88 Wis. 2d 131, 137, 276 N.W.2d 352 (Ct. App. 1979).

¶9 Possession with the permission of the true owner is consistent with a use subservient to the true owner's rights, and is therefore not hostile. ***Northwoods Dev. Corp. v. Klement***, 24 Wis. 2d 387, 392, 129 N.W.2d 121 (1964); *see also* 3 Am. Jur. 2d Adverse Possession § 52 (1986) ("However exclusive and however long endured, permissive possession can never ripen into title against anyone."). A possessor's acknowledgement of title in another constitutes evidence that the possession was by permission. ***Id.***

¶10 Here, setting aside any threshold question as to whether or how Robert could properly use the doctrine of adverse possession to acquire title to property to which he already held title as a tenant-in-common, we are satisfied that the circuit court correctly determined that Robert's use of the land while it was titled in his parents' names was permissive, not adverse. In addition to the fair inference that Amos's assistance in building Robert's house demonstrated that Amos had provided permission for Robert to be living there, Robert himself acknowledged his parents' title first by reimbursing them for at least some of the taxes paid on the property, and later by signing the personal representative's deed transferring title of the property to himself and his brothers.

Partition

¶11 Partition is a mechanism by which a person holding a joint or common interest in real property may sue to have the cotenants' interests in that real property divided. Unless limited by law or agreement, a cotenant is entitled to partition as a matter of right. WIS. STAT. § 842.02. If the basis for partition—that

is, where the lines dividing the owners' respective interest would be drawn—is clear following trial or default and proofs, the court may proceed to enter judgment accordingly. WIS. STAT. § 842.07; ***LaRene***, 133 Wis. 2d at 118 n.1. Conversely, if it is obvious that there is no place the lines could be drawn that would not be prejudicial to one or more of the owners, the court may proceed to order the sale of the whole property and divide the proceeds rather than dividing the property itself. ***LaRene***, 133 Wis. 2d at 120; WIS. STAT. § 842.17. Otherwise, the court shall appoint a referee to report either a basis for partition or the conclusion that any partition would be prejudicial. ***LaRene***, 133 Wis. 2d at 118; WIS. STAT. §§ 842.07 and 842.11. Upon receiving the referee's report, the court may "set aside the report and refer the case to a new referee;" adopt a referee's recommendation for partition without sale; or, upon a finding of prejudice, order that the premises be sold by the sheriff at auction. WIS. STAT. §§ 842.13, 842.14(1) and 842.17(1).

¶12 Here, it appears that the circuit court deviated from the standard statutory procedure by making its own determination as to where the partition lines should be drawn without adopting a referee's recommendation, after having previously concluded that the evidence produced at the hearing on Robert's counterclaims did not provide an adequate basis for partition. We conclude, however, that Robert invited any error that may have occurred in this regard by informing the court—in response to direct questioning on the issue—that he did not believe it was necessary to appoint a second referee. *Cf.* ***Boltz v. Boltz***, 133 Wis. 2d 278, 283-84, 395 N.W.2d 605 (Ct. App. 1986) (court not required to appoint referee after parties stipulated to have court proceed to partition).

¶13 As a practical matter, then, the court's decision to proceed on its own after having rejected the first referee's report amounted to nothing more than

a reconsideration of its initial determination as to whether a referee's report was needed. We do not see why such a reconsideration should be subject to any different standard of review than an initial decision as to the necessity of a referee's report.

¶14 The court's determination that the farm could be equitably divided among the brothers rather than sold was supported both by counsel's concessions during oral argument following rejection of the referee's report and the brothers' testimony at the hearing as to how they had been operating the farm the past few years, with part of the land being used for the dairy operation and other parts being used for crops.

¶15 As to where the court drew the lines, the parties had basically presented the court with two options. Robert wanted a division that equalized acreage, with offsets for the differing values of improvements on each partitioned section, excluding the value of the house he had built. Richard and Randall wanted a division that equalized the total value of each partitioned section, resulting in different acreages. The court's decision to adopt the equalized value approach was well within its discretion.

¶16 Richard's claim that his house should have been excluded from the valuation of the partition sections is based upon a misunderstanding of WIS. STAT. § 842.14(4). That section provides in relevant part:

> …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.

Here, Richard built his house with inferred permission from his parents, not the assent of his brothers, who were not titleholders of property at the time. Since the house was already part of the property when the brothers took title as tenants in common, it was not an improvement made during the tenancy-in-common for which separate compensation needed to be made to the other tenants.

By the Court.—Order affirmed.

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