COURT OF APPEALS
DECISION
DATED AND RELEASED

October 29, 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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 97-0104

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

IN RE THE MARRIAGE OF:
PEARL A. POWERS,

PETITIONER-RESPONDENT,

V.

THOMAS F. POWERS,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Reversed and cause remanded.*

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

PER CURIAM. Thomas F. Powers appeals from the property division made in a judgment of divorce. The dispositive issue on appeal is the trial court's ruling that Thomas and Pearl A. Powers did not intend to make a gift of a certain residence to Thomas's son, Patrick Powers. We conclude that a gift was

made and that the property is not part of the marital estate subject to division. We reverse the judgment and remand the issue of property division to the trial court.

The undisputed facts are that on April 13, 1990, Thomas and Pearl executed a quitclaim deed of the residence at 5611 - 44th Avenue in Kenosha to Patrick Powers.[1] The deed stated: "Grantors convey this property subject to the retention of a life estate in the grantors." The deed was shown to Patrick and a copy was retained by Patrick's older sister who handles his financial affairs. The deed was never recorded.

A valid gift depends on four elements: (1) intent to give on the part of the donor; (2) actual or constructive delivery to the donee; (3) termination of the donor's dominion over the property; and (4) dominion in the donee. *See* ***Potts v. Garionis***, 127 Wis.2d 47, 50, 377 N.W.2d 204, 205 (Ct. App. 1985). "Intent is a fact, and the circuit court's findings of fact concerning the transferor's intent will be sustained unless clearly erroneous." ***Wierman v. Wierman***, 130 Wis.2d 425, 429, 387 N.W.2d 744, 746 (1986). If more than one reasonable inference can be drawn from the established facts, we must accept the reasonable inference drawn by the trial court. ***Potts***, 127 Wis.2d at 54, 377 N.W.2d at 207.

The trial court found that Thomas and Pearl did not intend to make a gift of the property and that they never terminated their dominion over the property. These findings are based on the fact that in a trust document executed on April 10, 1992, Thomas and Pearl included the 44th Avenue residence as property funding the trust and that they continued to pay taxes, insurance and

[1] Patrick Powers is the disabled adult son of Thomas Powers from a previous marriage. Patrick was living in the residence when the deed was executed.

maintenance expenses related to the property. The trial court erred, however, in construing the subsequent conduct as negating donative intent that existed when the quitclaim deed was made and delivered on April 13, 1990. "A gift once made cannot be revoked." ***Guenther v. Guenther***, 244 Wis. 386, 393, 12 N.W.2d 727, 730 (1944).

Thomas and Pearl executed the quitclaim deed and relinquished control over it.[2] The deed can be equated with title, and the making of the deed and delivery to Patrick exhibits an intent to relinquish title to the property and make the gift. Thomas and Pearl did not live in the residence when the gift was made—Patrick did. Therefore, no physical relinquishment of the property was necessary.

The reservation of the life estate is the significant fact here. Thomas and Pearl's subsequent conduct—funding the trust with their remaining interest in the property[3] and continued payments of taxes, insurance and maintenance expenses—was consistent with the retained life estate. *See* ***Niland v. Niland***, 154 Wis. 514, 517, 143 N.W. 170, 171 (1913) ("A tenant for life, entitled to the income from real estate, is bound to pay taxes and keep the premises in repair."); ***Banaszak v. Banaszak***, 133 Wis.2d 358, 361, 395 N.W.2d 614, 616 (Ct. App.

[2] The fact that the deed was never recorded has little significance in light of the fact that the deed was held by a third person. There can be no inference from this record that the deed went unrecorded in order to allow Thomas and Pearl the ability to transfer the property to someone else. Thomas and Pearl wanted Patrick to have the residence when they passed away. Indeed, the deed was executed just prior to Thomas entering the hospital for potentially life-threatening surgery. The subsequent creation of the Patrick Powers Trust was also consistent with a desire to make the residence available to Patrick.

[3] As the trial court noted, the transfer of the residence to the Patrick Powers Trust may have been a legal nullity. If the gift was already completed at that point, the parties' misapprehension of the law cannot negate the gift.

1986). That the retained life estate may have had no actual value or benefit to Thomas and Pearl because they did not live in the home does not undercut the validity of the deed. Continued maintenance of the residence through the retained life estate exhibits the parties' intent to assist the disabled Patrick.

The only reasonable inference is that the residence was given to Patrick in 1990. It should not be included as part of the divisible marital estate. Our decision requires the extrication of a significant asset from the marital estate.[4] Thus, the trial court will have to make a new determination on how the marital property should be divided. Because a new decision is necessary, we need not address the other issues Thomas raises with respect to the disposition of certain other items of marital property.

By the Court.—Judgment reversed and cause remanded.

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

[4] The 44th Avenue residence was valued at $54,000.