

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

March 31, 1998

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. 97-2612**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**IN RE THE ESTATE OF LILLIAN DALLMAN:**

**ESTATE OF LILLIAN DALLMAN,**

**PETITIONER-RESPONDENT,**

**v.**

**THEODORE PYKE, II,**

**CLAIMANT-APPELLANT.**

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APPEAL from an order and a judgment of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Reversed and cause remanded.*

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

PER CURIAM. Theodore Pyke appeals a summary judgment dismissing his lawsuit for specific performance for sale of certain property against the personal representative of the estate of Lillian Dallman. After some earlier dispute about the right to this property, Pyke and Dallman entered into an agreement whereby Dallman would become owner of the property, but Pyke would have the first right to purchase the property under certain conditions, one of which was if Dallman sold the property. This agreement with Dallman was part of an agreed-upon partition of a larger parcel. Instead of offering the property for sale, Dallman, before her death, gifted the property to her son, a transaction Pyke considers in violation of their previous written agreement. Pyke's lawsuit sought to void Dallman's conveyance and compel Dallman's personal representative to honor the agreement by conveying the property to him.

On summary judgment, the trial court ruled that the agreement was unambiguous and, therefore, it would not address the intent of the parties as to its meaning. Rather, it concluded that a gift of property is not a sale or its equivalent and the agreement permitted gratuitous transfers, whether by will or lifetime gift. On appeal, Pyke argues that the agreement was ambiguous, in terms of whether it mandated a sale in the event of a lifetime gift. He contends that the agreement's other provisions, when read together, reveal ambiguities in the parties' mutual intent that require extrinsic evidence for resolution. The trial court may grant summary judgment if there was no dispute of material fact and the personal

representative deserved summary judgment as a matter of law. *See Powalka v. State Life Mut. Assur. Co.*, 53 Wis.2d 513, 518, 192 N.W.2d 852, 854 (1972). We conclude that the agreement was ambiguous and requires resort to extrinsic evidence to ascertain the parties' mutual intent. *See Capital Invest., Inc. v. Whitehall Packing Co.*, 91 Wis.2d 178, 190, 280 N.W.2d 254, 259 (1979). We therefore reverse the summary judgment and remand the matter for further proceedings.

The Dallman-Pyke agreement permitted more than one reasonable construction and therefore revealed ambiguity. *See Foursquare Prop. v. Johnny's Loaf & Stein Ltd.*, 116 Wis.2d 679, 681, 343 N.W.2d 126, 127 (1983). Most courts have ruled that rights of first refusal do not apply to gifts; as a general matter, such rights do not stop landowners from conveying their land by gift. *See, e.g., Isaacson v. First Security Bank*, 511 P.2d 269 (Idaho 1973); *Hackal v. Adler*, 650 N.Y.S.2d 792 (App.Div. 1996); *Jackson v. Valvo*, 579 N.Y.S. 300 (App.Div. 1992); *Mericle v. Wolf*, 562 A.2d 364 (Pa. Super. Ct. 1989); *Perritt Co. v. Mitchell*, 663 S.W.2d 696 (Tex.App. 1983); *Bennett v. Dove*, 277 S.E.2d 617 (W.Va. 1981); *Rainbow Oil Co. v. Christmann*, 656 P.2d 538 (Wyo. 1982); *see also Ogle v. Hubbel*, 82 P. 217 (Cal.App. 1905). Here, however, the Dallman-Pyke agreement contains other provisions and arose out of unusual circumstances that may take it outside the general rule.

For example, the agreement requires conveyance to Pyke under circumstances besides Dallman's proposed sale. The agreement provided that should the Dallmans desire to sell said premises during their lifetime then Pyke had the right to purchase it. In addition, however, the agreement provided that the following events gave Pyke the right to elect to purchase the property: (1) the dwelling's destruction; (2) delinquent liens, taxes, and assessments; and (3) the commencement of a lawsuit against the landowner. Also, the Dallmans were not to permit the premises to be encumbered.

Read together, these additional terms seem to further qualify Dallman's powers over the real estate. They create doubt over whether the parties intended to exempt lifetime gifts from Pyke's right to purchase the property. In other words, these terms create the inference that the agreement may have conferred broader rights on Pyke than rights of first refusal may confer generally. Moreover, the right of first refusal was part of an effort to partition a larger parcel; this required the trial court to read the agreement in context with the overall goals of the larger transaction. As a result, neither we nor the trial court may definitively interpret the agreement giving Pyke the right of first refusal without extrinsic evidence. On remand, the trial court must hold further proceedings on this question of whether the parties intended in the agreement to allow Dallman to gift the property without being subject to Pyke's right of first refusal.

*By the Court.*—Order and judgment reversed; cause remanded for proceedings consistent with this opinion.

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

