COURT OF APPEALS
DECISION
DATED AND FILED

October 5, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 97-3275 & 98-1848

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

MELVIN F. KOEHLER
AND DONNA M. KOEHLER,

PLAINTIFFS-RESPONDENTS,

V.

BARBARA J. KOEHLER,

DEFENDANT-APPELLANT,

ZURICH INSURANCE COMPANY
AND MICHAEL A. WOZNY,

DEFENDANTS.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Barbara Koehler appeals the grant of summary judgment to her parents on their partition action on real estate owned by both Barbara and her parents and she appeals from the orders confirming the sheriff's sale of the property and disbursing the sale proceeds.[1] On appeal, Barbara makes numerous arguments. First, Barbara disputes the trial court's determination that partition by sale, rather than partition in kind, was the appropriate remedy, and she challenges the trial court's decision to appoint a guardian ad litem for her. Second, she objects to the sale and the disbursement of funds, contending that the trial court erred in approving the bid of $129,000 because the bid amount was inadequate, and the successful bidder both failed to post the required ten percent of the purchase price and failed to deposit the money in the required time frame. Finally, she contends that the bid accepted by the trial court was not "fair value," and the trial court should have permitted the property to be turned into condominiums before sale. We decline to address any of Barbara's claims because Barbara has failed to properly raise any of her claims in the trial court and, thus, she has waived her right to bring these matters on appeal. Thus, we affirm the trial court's orders.

I. BACKGROUND.

¶2 Melvin and Donna Koehler are the parents of Barbara Koehler. On May 10, 1984, Barbara Koehler and her parents purchased a two-unit townhouse for $90,900. The Koehlers purchased an undivided one-half of the property for $45,450, and loaned Barbara $38,916 toward the purchase price for her one-half interest. The parties agreed that Barbara would live in one unit and pay her

[1] Barbara started two separate appeals. The respondents' request to have the appeals consolidated was granted over Barbara's objection.

parents rent of $710 per month for that unit. She would also pay back the loaned money at the rate of $442.32 per month. They further agreed that Barbara was free to rent out the other unit and that she could keep the rent money for that unit. Barbara and her parents also agreed to split the property taxes, with Barbara paying one half and her parents paying the other half. Barbara and her parents abided by this agreement for twelve years. In May 1996, for inexplicable reasons, Barbara stopped paying the rent and failed to repay the remainder of the loan. She also stopped renting the other unit and stopped communicating with her parents, who attempted to contact her personally, by phone, and by letters.

¶3 Barbara's actions resulted in the loss to her parents of the rental income from Barbara's unit, and deprived them of the money due on the loan. The Koehlers were also forced to pay all the property taxes. As a consequence, the Koehlers began a partition action in April, 1997. The remedy they sought was a partition by sheriff's sale of the property, as opposed to a partition in kind. They contended that the property could not be divided equally. The Koehlers proposed that the proceeds from the sale of the house first be applied to the outstanding debts owed to them, and that any surplus be split, with half going to Barbara and half to them. After Barbara filed an answer claiming that the house should be divided, not sold, and claiming that her parents acquiesced in her decision to stop paying rent, the Koehlers filed a motion seeking summary judgment.

¶4 Prior to the date scheduled for the summary judgment hearing, Barbara's attorney advised the court, in chambers and on the record, that he had some concerns about Barbara's ability to assist him because of her mental status. As a result, the trial court had Barbara testify briefly. Following her testimony, the trial court found that it had "some reason to believe … that pursuant to 803.01(3), … with regard to [her] personal affairs, there may be a question of

some ability on the part of the subject … to be able to handle them." The trial court then appointed Attorney Lynn Hackbarth to act as Barbara's guardian ad litem.

¶5 Between the date of the appointment of the guardian ad litem for Barbara and the date of the summary judgment hearing, Barbara's lawyer filed a motion seeking an adjournment, claiming he needed additional time. That motion was scheduled to be heard at the same time as the summary judgment motion. On the date of the hearing, Barbara appeared personally and with both her retained attorney and her guardian ad litem. At that time, Barbara's attorney withdrew his motion seeking an adjournment. After the Koehlers' attorney advised the trial court that no affidavits had been filed in opposition to their summary judgment request, Barbara's attorney told the trial court that "[w]e don't have an objection to the findings of fact, conclusions of law and order as [attorney for plaintiffs] has submitted it." The guardian ad litem then related to the trial court that she had had an opportunity to discuss the matter with her ward and that she believed that "after discussion that my ward does in fact understand what's going on and it is in her best interest," and "we have no objection to the motion." The trial court then granted the summary judgment motion and signed a judgment giving the Koehlers a right to partition of the property by sale rather than in kind. The judgment acknowledged Barbara's homestead rights, exempted $40,000 from the liens which Barbara's creditors had on the property, and directed that the property be sold at a public auction. The judgment also contained a formula for dividing the proceeds of the sale.

¶6 Following the grant of summary judgment, a newly-retained lawyer for Barbara filed a motion for relief from judgment, claiming as grounds for the motion that Barbara mistakenly thought that the judgment called for a partition in

kind, not a partition and sale of the property. After a hearing, the trial court concluded that Barbara "failed to demonstrate [any] mistake, inadvertence or excusable neglect" justifying the reopening of the judgment. The trial court refused to reopen the judgment and the property remained scheduled for a sheriff's sale.

¶7 Eventually, Ralph Rosen emerged as the highest bidder for the property. The record reveals that Rosen, contrary to the trial court's order, did not deposit ten percent of the bid amount, which would have been $12,900. Instead, Rosen deposited $12,090. Further, Rosen did not deposit the balance of the bid price within the ten days as is required under § 846.17, STATS. The trial court confirmed the sale of the property for $129,000. Neither of the defects was ever raised by Barbara, although she did attempt to raise them by attaching an unsigned motion setting forth her arguments to a letter objecting to the trial court's signing the order memorializing what had occurred at the confirmation hearing.

¶8 Prior to the hearing to confirm the sale of the property, a new attorney for Barbara filed a motion on Barbara's behalf seeking an adjournment of the motion confirming the sale of the property, and requesting that Barbara be appointed a guardian ad litem, apparently either not knowing of Attorney Hackbarth's involvement or possibly thinking she had been previously discharged as Barbara's guardian ad litem. This lawyer also filed a motion objecting to the confirmation of the sale. On January 12, 1998, the trial court concluded that Barbara's motions were not filed and served in a timely fashion and proceeded to hear the scheduled motion for confirmation of the sale.[2] The Koehlers called

[2] Attorney Hackbarth, as Barbara's guardian ad litem, was present in court for this hearing.

Rosen as a witness at the motion to confirm the sale. A long-time real estate broker, Rosen testified that he felt $129,000 represented the fair value of the property, even though the assessed value of the property was higher, because no one had been permitted inside the property and its condition was unknown. In protesting the confirmation of the sale, Barbara's attorney presented a listing of townhouse condominiums and their sale prices to the trial court. Barbara also testified that it was her belief she was awarded a divided half-interest in the property and she urged the trial court to give her more time to convert the property into condominiums. She did not offer any evidence refuting Rosen's estimate of the home's value in a forced sale.

¶9 In a later proceeding, the trial court determined that from Barbara's one-half share of the proceeds, the Koehlers were entitled to $19,555.66 as payment in full satisfaction of the mortgage note. Out of Barbara's remaining share, the trial court ordered disbursement of $40,000 to Barbara as her homestead interest in the property. The balance of her proceeds was awarded to lien creditors, the guardian ad litem, and the Koehlers for "costs, disbursements and attorneys' fees." In the same proceeding, the trial court also heard Barbara's motion seeking the removal of her court-appointed guardian ad litem, and her attorney's motion asking to withdraw from any future representation of Barbara. The trial court did not discharge the guardian ad litem, but it did allow Barbara's attorney to withdraw.

¶10 Barbara, acting *pro se*, appeals the grant of summary judgment, the order disbursing the partition sale proceeds, and the order confirming the sheriff's sale.[3]

II. ANALYSIS.

¶11 Barbara's briefs contain a number of claims. However, Barbara failed to timely raise her claims in the trial court, and thereby waived the asserted errors. In her initial appeal she argues that the trial court erred in appointing a guardian ad litem for her. She claims that before the trial court could appoint a guardian ad litem for her, there should have been clear and convincing evidence that she was incompetent. Barbara also seeks a reversal of the order to sell the house. She wishes the matter remanded to the trial court for a hearing on the question of whether it was proper to partition the property by sale rather than to divide it between the parties. She also complains that the trial court erred in selling the house at a sheriff's sale and that the trial court possibly erred by not appointing a referee.

¶12 In her second appeal, Barbara challenges the trial court's decision to confirm the sale, contending that Rosen, the highest bidder, failed to deposit ten percent of the bid and he failed to deposit the balance of the offer within the required time frame. Barbara argues that the trial court should not have confirmed the sale because of the sheriff's failure to require ten percent of the bid amount. The record does not disclose why Rosen deposited $12,090 instead of the required

[3] Although the guardian ad litem was ultimately discharged by the trial court, she asked to be reappointed after the appeals were filed and, in response, the trial court vacated the earlier order discharging the guardian ad litem. The guardian ad litem then chose not to file an appellate brief.

ten percent of his bid, which was $12,900. Barbara contends that his failure to deposit the correct amount was contrary to the trial court's own order. Barbara also submits that the trial court should have forfeited the deposit money and scheduled a new sale when Rosen failed to deposit the balance of the money by January 22, 1998. The balance was not deposited until January 31, 1998. For this argument Barbara relies on § 846.17, STATS., which reads in part:

> In the event of the failure of such purchaser to pay any part of the purchase price remaining to be paid within 10 days after the confirmation of such sale, the amount so deposited shall be forfeited and paid to the parties who would be entitled to the proceeds of such sale as ordered by the court, and a resale shall be had of said premises.

Finally, she argues that the "trial court erred when it refused to recognize the agreement between the parties."

¶13 In one of her reply briefs, Barbara also makes several new claims. One of them is her contention that the guardian ad litem was incompetent. Earlier she argued that the trial court "abused its discretion" in appointing a guardian ad litem and, in the alternative, she claimed that her attorney, not separate counsel, should have been appointed as her guardian ad litem.[4] In her reply brief she states, for the first time, that the guardian ad litem was incompetent. We decline to address Barbara's claim, raised in her reply brief—that the guardian ad litem was incompetent—because the issue was never raised or considered by the trial court and, hence, should not be considered for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980) (appellate court will generally not review an issue raised for the first time on appeal); *see also*

[4] Although Barbara did request that the trial court discharge the guardian ad litem, she never complained to the trial court that the guardian ad litem appointment was improper.

Northwest Wholesale Lumber, Inc. v. Anderson, 191 Wis.2d 278, 294 n.11, 528 N.W.2d 502, 508-09 n.11 (Ct. App. 1995) (asserting that courts consistently refuse to consider arguments raised for the first time in a reply brief because such arguments violate the Rules of Appellate Procedure).

¶14 Appellant makes an additional request for the first time in her reply brief. She requests that we exercise our discretion and grant her a new trial in the interest of justice pursuant to § 752.35, STATS. We decline to entertain this request because it should have been contained in her initial brief. This issue, too, has been improperly raised. Barbara has failed to explain why she waited until the reply brief to argue several of her claims.[5] *See* ***Swartwout v. Bilsie***, 100 Wis.2d

[5] Waiver notwithstanding, Barbara's claims also fail on their merits. As noted, Barbara never objected to the appointment of a guardian ad litem. With regard to her complaint that the trial court did not have a proper basis for appointing a guardian ad litem, we conclude that under § 803.01(3), STATS., the threshold which must be met for appointing a guardian ad litem for a party in an action is considerably less than that required to appoint a guardian pursuant to Chapter 880, STATS. Under § 803.01(3), all the trial court need find is that "the court has reason to believe that a party is mentally incompetent to have charge of the party's affairs." Section 803.01(3) permits the trial court to appoint separate counsel upon a showing of good cause. Besides Barbara's attorney voicing concerns about Barbara's mental status, Barbara herself provided the trial court with sufficient reason to believe she might have been mentally incompetent. Barbara testified that she believed she was the victim of a major conspiracy, the members of which were her parents, former tenants and neighbors. She told the trial court that the conspirators were electronically monitoring her house with sophisticated equipment that controlled her answering machine, and that they also sabotaged her garbage disposal. Her testimony revealed a belief system which incorporated many fanciful and highly unlikely scenarios. Further, with regard to her other complaints, the role of a guardian ad litem is to do what is in the ward's best interest, not necessarily to advocate for what the ward wants. Thus, her guardian ad litem was not incompetent for failing to follow Barbara's orders. Additionally, the trial court did not err in appointing separate counsel as her guardian ad litem. When the guardian ad litem was appointed, there was an apparent conflict of interest between how Barbara wished to handle the initial partition claim and how others thought her best interests would be served at that stage of the proceedings.

(continued)

342, 346 n.2, 302 N.W.2d 508, 512 n.2 (Ct. App. 1981) (appellate court will generally not consider issues raised for first time in reply brief).

¶15 Barbara contends that the lawyers who represented her, including the guardian ad litem, were informed of many of the arguments being raised in these appeals, but they failed to raise these issues with the trial court. If true, Barbara's

---

With regard to her claim concerning the sale of the property, we also note that Barbara was present at the summary judgment motion hearing when both her attorney and her guardian ad litem advised the trial court that she was now in agreement with her parents' request for a partition by sale. Barbara never contradicted either statement. Barbara cannot now complain about the summary judgment order when she was present and heard both of her attorneys stipulate to the partition by sale, and heard the trial court's comment that the house could not legally be divided in kind and, thus, that the partition action required a sale. Further, had Barbara raised an objection to the summary judgment at that time, the respondents were still entitled to summary judgment because no affidavits were ever submitted in opposition to their motion.

Finally, we reject Barbara's remaining claims. Barbara's contention that she and her parents agreed she was awarded a divided half-interest in the property is belied by the deed. Further, the trial court accepted the only evidence presented concerning the fair value of the home. Barbara argued that the house would have a higher value if turned into condominiums. The trial court was not free to adjourn the sale until the house was converted into townhouse condominiums. Moreover, regarding the claimed irregularities in the confirmation process, Rosen substantially complied with the trial court's order to deposit ten percent of the bid amount, and § 846.17, STATS., does not apply as it deals with foreclosures. This was a sale ordered in a partition action.

We further note that much of Barbara's brief is devoted to areas that are not relevant to the legal issues before us, e.g., her desire to turn the property into condominiums rather than sell it, and her contention that the trial court should have had the advice of expert witnesses.

After reviewing the record, we also conclude that these two cases consolidated for appeal involve none of the circumstances normally present when we exercise our discretion under § 752.35, STATS. Section 752.35, STATS., provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

remedy may be to look to them for relief. Barbara's attaching her unsigned motion containing many of the arguments raised in these appeals to a letter objecting to the form of the confirmation of sale order does not salvage her failure to raise these issues before the trial court.

¶16 Accordingly, we affirm the judgment and orders of the trial court.

By the Court.—Judgment and orders affirmed.

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