

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 9, 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. 98-0004

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

MICHAEL L. PAYNE,

PETITIONER-APPELLANT,

V.

JUDITH A. PAYNE, N/K/A JUDITH A. DIRKS,

RESPONDENT-RESPONDENT,

BETHEL PAYNE,

INTERVENOR.

APPEAL from an order of the circuit court for Eau Claire County:
THOMAS H. BARLAND, Judge. *Affirmed.*

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

PER CURIAM. Michael Payne appeals an order imposing a constructive trust on a house for \$64,100 based on the trial court's finding that Michael fraudulently conveyed the house to his parents in an attempt to remove it from the marital estate. Michael argues that the doctrine of laches bars the request for a constructive trust and that the court erroneously determined the market value of the property. We reject these arguments and affirm the order.

The parties separated in March 1985 after a seven-year marriage. Eight months later, Michael conveyed a house and the household furnishings and furniture to his parents for \$20,900 without the consent of his wife, Judith. One month later, he filed for divorce. When Judith questioned him about the conveyance, he told her that she would be found "floating in the Mississippi River" if she raised the issue in the divorce action. Although Michael did not file a financial disclosure statement and the house was not listed as a part of the marital estate, the parties' stipulation awarded Michael the house. The divorce judgment incorporated the stipulation. After the divorce, Michael represented to others that he owned the house and he paid property taxes on it. Thirteen months later, Judith filed a petition for a constructive trust along with other motions relating to child custody and support. The trial court revised the divorce judgment on May 10, 1988, but reserved a decision on the constructive trust issue pending further discovery. That issue was held in abeyance until July 1996, when Judith renewed her petition. Michael contends that Judith should be barred from prosecuting the petition because of the delay in requesting a hearing and that the trial court excessively valued the house.

The factors that determine whether laches should bar an action are unreasonable delay, lack of knowledge by the party asserting laches that the other party would assert the right on which the lawsuit is based and prejudice to the

party asserting the defense. *See Smart v. Dane County Bd. of Adj.*, 177 Wis.2d 445, 458, 501 N.W.2d 782, 787 (1993). Laches is an equitable defense to an action based on unreasonable delay in bringing suit under circumstances that prejudice the opposing party. *See Sawyer v. Midelfort*, 217 Wis.2d 795, 806, 579 N.W.2d 268, 271 (Ct. App. 1998). A party may not invoke an equitable defense where his own misconduct has created the problem. *See Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231, 232 (1959). He who seeks equity must do equity. *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522 (1947). One who seeks equity must have clean hands; that is, he must not be guilty of substantial misconduct in regard to the matter in litigation so as to affect the opposing party's rights. *See Wisconsin Patients Compensation Fund v. St. Mary's Hospital of Milwaukee*, 209 Wis.2d 17, 37 561 N.W.2d 797, 805 (Ct. App. 1997).

Michael's conduct in this litigation precludes application of the doctrine of laches. Initially, the matter was not litigated because he threatened Judith's life. Later, her ability to litigate the question was compromised by Michael's failure to make support payments and by other issues generated by Michael's misconduct that required Judith's immediate attention. Michael's subsequent prosecution and imprisonment on unrelated matters also contributed to the delay. Under these circumstances, Michael cannot fault Judith for the delay.

Neither party attempted to complete the litigation after the trial court held the constructive trust issue in abeyance. Michael had knowledge of the course of events such that he cannot claim that he was unaware that Judith might later seek a ruling on that issue.

Michael has also failed to establish prejudice from the delay. His father died before the motion was heard. He argues, based on no evidence, that his father's testimony would have favored him. This issue was not raised in the trial court and will not be considered for the first time on appeal. *See Allen v. Allen*, 78 Wis.2d 263, 270-71, 254 N.W.2d 244, 248 (1977). In addition, he does not explain why his mother would be unable to provide the same information. Finally, the facts of this case do not suggest that his father's testimony would have benefited his case. A party who receives property in a fraudulent conveyance is unlikely to be a persuasive witness on the value of the property. The timing, nature and terms of the conveyance establish its fraudulent character irrespective of any denials that would come from the parties to the conveyance.

Michael also argues that he was prejudiced by the delay because his incarceration interfered with his ability to participate in the trial. The record does not support that argument. Because the delay is substantially related to Michael's misconduct, he has acquiesced in the course of events and has established no prejudice, the trial court properly refused to apply the doctrine of laches.

The record supports the trial court's finding as to the value of the property. This issue presents a question of fact that will be affirmed unless the trial court's finding is clearly erroneous. *See* § 805.17(2), STATS. The trial court found that the property was worth \$85,000, and subtracted the amount of the mortgage assumed by Michael's parents to arrive at the amount of the constructive trust. The \$85,000 figure came from a loan application executed by Michael within weeks of the date of the divorce. The trial court was not required to accept his testimony that the application exaggerated the true value of the house. Michael testified that the value shown on the application reflected what he felt the property was worth. The court reasonably rejected Michael's estimated fair market value

as shown on the real estate tax statement. Michael admitted that the estimate is often low. The conveyance also included furnishings and furniture that would not be reflected in the tax statement.

We will not address other issues raised in Michael's brief because they are not properly before this court, having never been decided by the trial court, being unsupported by the record or challenging earlier final decisions that were not timely appealed.

By the Court.—Order affirmed.

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

