

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 26, 2017

Diane M. Fremgen
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1765

Cir. Ct. No. 2014CV48

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

PETITION FOR ORDER REGARDING WILLIAMS/JONES PIONEER CEMETERY:

**MELVIN DEWITT, DONNA DEWITT, DARRELL PARKER, RUTH PARKER,
MERLIN WILLIAMS, WANDA WILLIAMS AND PHYLLIS MCCOY,**

PETITIONERS-RESPONDENTS,

v.

EARL G. FERRIES AND PAULETTE M. FERRIES,

RESPONDENTS-CO-APPELLANTS,

TOWN OF FOREST,

APPELLANT.

APPEAL from an order of the circuit court for Vernon County:

MICHAEL J. ROSBOROUGH, Judge. *Reversed.*

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. This case concerns a one-acre parcel of land located within a 204-acre farm, which DeWitt alleged is a cemetery subject to the transfer mechanism in WIS. STAT. § 157.115(1)(c) (2015-2016).¹ The circuit court ordered the transfer of the parcel to the Town of Forest in Vernon County to “manage” the parcel as a Town cemetery under § 157.115(1)(c). The Town of Forest, and Earl Ferries and Paulette Ferries,² argue in pertinent part that the court erred in concluding that the requirements for transfer in § 157.115(1)(c) were met because DeWitt failed to prove, and the circuit court failed to make conclusions necessary to satisfy, the statutory requirement that “there exists no association or group with authority to transfer ownership and operation of the cemetery to the town.” We agree with this particular argument, which is dispositive. Accordingly, we reverse the order transferring the parcel to the Town.

¹ We will refer to the petitioners-respondents, Melvin DeWitt, Donna DeWitt, Darrell Parker, Ruth Parker, Merlin Williams, Wanda Williams, and Phyllis McCoy, collectively as DeWitt.

WISCONSIN STAT. § 157.115(1)(c) provides that when certain conditions are met, when a “cemetery in a town is falling into disuse, or is abandoned or neglected ... the circuit judge may upon petition by 6 or more persons interested in the upkeep of the cemetery order its transfer to the town, including the transfer of all assets.”

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² We will refer to Earl and Paulette Ferries collectively as Ferries.

BACKGROUND

¶2 The final order that the Town and Ferries appeal resolved two actions, both initiated by DeWitt: first, a petition for transfer under WIS. STAT. § 157.115(1)(c), and second, a petition for a writ of mandamus. While the final order was issued in the mandamus action, the order addressed the content of both the mandamus action and the transfer action. Relying on undisputed facts and the circuit court’s findings, we first describe the parcel at issue and then briefly describe each action. We relate additional facts as pertinent to our analysis in the discussion section that follows.

¶3 *The Parcel:* The parcel at issue is a one-acre rectangle that “is part of” Ferries’ farm. The ownership of the parcel is disputed based on the parties’ different interpretations of various deeds that have conveyed the farm since 1892. DeWitt “believe[s] that 25-30 bodies were interred in the [parcel] before 1918.” Within the memory of those who testified on behalf of DeWitt and Ferries there have not been any headstones, markers, flat stones, or other indications of the burial of human remains in the parcel.

¶4 *The Transfer Action:* In March 2014, DeWitt filed a petition for an order transferring the parcel to the Town to “manage” as a Town cemetery pursuant to WIS. STAT. § 157.115(1)(c), alleging that the parcel is a cemetery and was “neglected and abandoned with no current authority to manage, possess or control [it] for care and maintenance.” DeWitt supported the petition with an affidavit of Darrell Parker, who averred that his great-grandmother was buried in the parcel in or before 1918.

¶5 In April 2014, the circuit court granted DeWitt’s petition without holding a hearing or receiving any other information on the matter. The court

signed DeWitt's proposed set of findings and order, which: (1) found that "a proper Petition ... was filed by seven ... persons interested in the upkeep of the ... neglected and abandoned Cemetery," "with no current authority ... acting to manage, possess and control" it; and (2) ordered the Town "to immediately take the management, control and possession of this neglected and abandoned Cemetery and ... to provide the proper care and maintenance of the Cemetery, as requested in [the] Petition."

¶6 In September 2014, Ferries moved the circuit court to reopen the proceedings on several grounds, including that Dewitt had provided insufficient notice to affected persons or entities and that its submissions failed to establish that the statutory requirements, including the absence of ownership or authority, were satisfied. The court orally denied the motion to reopen because "the petition was in proper form [and] complied with the statute." The circuit court clarified that it did not "transfer by order anybody's property to anybody else" but had only entered an order "turning [the parcel] over to the township. And what the [T]own then does is up to the [T]own." The court did not enter a final written judgment or order in this transfer action.

¶7 *The Mandamus Action:* In February 2016, DeWitt filed a petition for a writ of mandamus, naming the Town, Town Board, and Town Chair as respondents, and seeking an order requiring the Town to "provide proper, timely, and permanent care and maintenance" of the parcel as a cemetery. The Town moved to quash the writ of mandamus. The circuit court held a hearing attended by DeWitt, Ferries, and the Town. The court orally denied the motion to quash and proceeded, over objections by the Town and Ferries, to hold an evidentiary hearing on both the writ petition and the underlying April 2014 transfer order. Melvin DeWitt and Paulette Ferries testified.

¶8 At the end of the hearing, the circuit court ordered simultaneous briefing addressing the merits of both the April 2014 order and the petition for writ of mandamus. In July 2016, the court issued a final decision and order in which the court “confirmed” the April 2014 order and denied the petition for writ of mandamus. The Town and Ferries appeal the part of the final decision and order that “confirmed” the April 2014 transfer order.

DISCUSSION

¶9 We conclude that the dispositive issue in this appeal is whether “there exists no association or group with authority to transfer ownership and operation of the cemetery to the town.”³ WIS. STAT. § 157.115(1)(c). We conclude that DeWitt failed to prove, and the circuit court failed to make conclusions necessary to satisfy, the requirement that there be an absence of such ownership or authority, and therefore the circuit court’s order transferring the parcel to the Town was invalid. Accordingly, we do not address whether the other requirements necessary for transfer of property under WIS. STAT. § 157.115(1)(c) are met. *See Turner v. Taylor*, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673

³ We assume, without deciding, that the parcel is a cemetery subject to the transfer mechanism of WIS. STAT. § 157.115(1)(c).

Separately, we note that the argument section of DeWitt’s brief in response to the Town appears to be missing two pages. However, we assume that our analysis of the issues would remain unchanged had the missing pages been included, because of the overlap between DeWitt’s argument in its brief in response to the Town and DeWitt’s argument in its brief in response to Ferries. We strongly encourage counsel to carefully review all submissions to this court.

N.W.2d 716 (if a decision on one issue disposes of an appeal, we will not generally decide the other issues raised).⁴

¶10 To determine whether there exists an absence of ownership of, or authority over, a cemetery under WIS. STAT. § 157.115(1)(c) we must apply a statute to a set of facts. “The application of a statute to the facts of the case is a question of law that we review de novo.” *Waller v. American Transmission Co., LLC*, 2013 WI 77, ¶52, 350 Wis. 2d 242, 833 N.W.2d 764.

¶11 WISCONSIN STAT. § 157.115(1)(c) provides that

Whenever any cemetery in a town is falling into disuse, or is abandoned or neglected, and by reason of the removal or death of the persons interested in its upkeep there exists no association or group with authority to transfer ownership and operation of the cemetery to the town, the town board, at the expense of the town, shall take charge of the cemetery and manage and care for it, and if the town board fails to take charge of the cemetery, the circuit judge may upon petition by 6 or more persons interested in the upkeep of the cemetery order its transfer to the town, including the transfer of all assets. Cemeteries so transferred shall be managed as provided for other town cemeteries.

¶12 WISCONSIN STAT. § 157.115(1)(c) unambiguously requires that a petitioner seeking an order of transfer demonstrate that there “exists *no* association or group with authority to transfer ownership and operation of the cemetery.” (Emphasis added.) Thus, the burden fell on DeWitt to affirmatively demonstrate the absence of ownership of or authority over the parcel in order to transfer ownership and operation of it as a cemetery.

⁴ We emphasize that we resolve this case based on the narrow proposition we identify, and we express no opinions about other arguments made by the parties on a range of potentially novel and complex topics.

¶13 Among other contentions, Ferries argues that DeWitt failed to prove that transfer of the parcel was proper under WIS. STAT. § 157.115(1)(c) because Ferries owns the parcel, having filed an affidavit of adverse possession of the parcel in 2009,⁵ and, therefore, Ferries has ownership of or authority over the parcel, thereby precluding application of the transfer mechanism. DeWitt argues in response that, “No other ‘groups or associations’ existed in the record and in the evidence to *receive* the transfer of the ‘cemetery’ beyond the Town.” However, that argument does not address whether there are any entities with authority to *make* a transfer of ownership of the parcel.

¶14 DeWitt also argues that Ferries’ adverse possession claim was invalid because the parcel was and is used as a cemetery and, therefore, cannot be subject to a claim of adverse possession. However, DeWitt supports this argument only with citations to case law from other states and one treatise, none of which binds this court. In addition, we agree with the Town that the cases that DeWitt cites are inapposite, for at least the reason that the cases do not stand for the proposition that, regardless of easements that relatives of interred persons may be entitled to over cemetery land, such easements would prohibit transfers of title to cemetery land. In that regard, we note that the circuit court expressly concluded, “this decision does not purport to resolve any claim [Ferries] may make as to adverse possession.”

¶15 Finally, even if DeWitt’s adverse possession argument had some merit, DeWitt had the burden of proving that there were no other claims of

⁵ DeWitt included in its petition for transfer the Ferries’ affidavit of adverse possession, and acknowledged that the affidavit of adverse possession covered “the same parcel wherein which the neglected and abandoned [cemetery] is located.”

ownership. More specifically, DeWitt fails to demonstrate that the circuit court was presented with persuasive evidence or argument that ownership interests did not result from the 1898 conveyance of the parcel from Emma and Isaac Jones to G.M. Carson, J.C. Williams, W. Downing, David Jones, and Edward Carson.

¶16 In sum, we agree with the Town that absence of any ownership or authority “needs to be definitively determined before a transfer under Wis. Stat. § 157.115(1)(c) can occur.” We conclude that DeWitt failed to prove, and the circuit court failed to make conclusions necessary to satisfy, the requirement that there be an absence of ownership or authority here. Accordingly, the circuit court erred in granting the petition for transfer.

CONCLUSION

¶17 For the reasons stated, we reverse the order of the circuit court transferring the parcel to the Town under WIS. STAT. § 157.115(1)(c).

By the Court.—Order reversed.

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

