

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 16, 2002

Cornelia G. Clark
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. 01-2447

Cir. Ct. No. 97 PR 390

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE ESTATE OF
CYNTHIA M. STOCKING:**

JAMES L. STOCKING,

APPELLANT,

V.

ESTATE OF CYNTHIA M. STOCKING,

RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
ELSA C. LAMELAS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Peterson, JJ.

¶1 PER CURIAM. James L. Stocking appeals from the circuit court order granting partial summary judgment to the Estate of Cynthia M. Stocking. The court concluded: (1) James and his wife, Cynthia, had held their Trout Lake property

as tenants in common, and James's failure to timely file a claim against Cynthia's estate, under WIS. STAT. § 859.01 (1997-98),¹ resulted in his loss of the right to litigate his ownership interest in the property; and (2) James's offer of proof to rebut the statutory presumption of his one-half ownership interest in the Trout Lake property² was precluded by the dead man's statute, WIS. STAT. § 885.16,³ and he

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise indicated. WISCONSIN STAT. § 859.01 states:

Time for filing claims. When an application for administration is filed, the court, or the probate registrar under informal administration proceedings, shall by order set a date as the deadline for filing a claim against the decedent's estate. The date shall be not less than 3 nor more than 4 months from the date of the order.

James acknowledges that he failed to file a claim against Cynthia's estate by the May 11, 1997 deadline set forth in the February 1997 order.

² WISCONSIN STAT. § 700.20 states:

Extent of undivided interests in tenancy in common.

The extent of the undivided interests of tenants in common for the duration of the tenancy is determined by the intent expressed in the document of title, instrument of transfer or bill of sale; if no intent is expressed in the document, instrument or bill of sale, tenants in common are presumed to own equal undivided interests for the duration of the tenancy.

³ WISCONSIN STAT. § 885.16 (1999-2000) states:

Transactions with deceased or insane persons. No party or person in the party's or person's own behalf or interest, and no person from, through or under whom a party derives the party's interest or title, shall be examined as a witness in respect to any transaction or communication by the party or person personally with a deceased or insane person in any civil action or proceeding, in which the opposite party derives his or her title or sustains his or her liability to the cause of action from, through or under such deceased or insane person, or in any action or proceeding in which such insane person is a party prosecuting or defending by guardian, unless such opposite party shall first, in his or her own behalf, introduce testimony of himself or herself or some other person concerning such transaction or communication, and then only in respect to such transaction or communication of which testimony is so given or in respect to

(continued)

was therefore unable to establish a genuine issue of material fact. Although our rationale differs from that of the circuit court, we affirm. See *Buchanan v. Gen. Cas. Co.*, 191 Wis. 2d 1, 8, 528 N.W.2d 457 (Ct. App. 1995) (“We may affirm a lower court’s decision on grounds that differ from those relied upon below.”).

¶2 Much of the relevant factual background was set forth in this court’s opinion in the previous appeal emanating from the estate litigation following Cynthia’s death. See *Estate of Stocking v. Stocking*, No. 98-1952, unpublished slip op. (Wis. Ct. App. Aug. 1, 2000), *review denied*, 2000 WI 121, 239 Wis. 2d 308, 619 N.W.2d 91. James was excluded as a beneficiary under Cynthia’s will. Ownership of their Trout Lake property is at issue in the instant appeal.

¶3 In 1980, James and Cynthia, as tenants in common, entered into a five-year land contract to purchase the Trout Lake property. In 1985, the property was conveyed to them, as tenants in common, by warranty deed. Both the contract and the deed were included in the summary judgment submissions. The Estate never claimed more than a one-half interest; in 1998, James, however, filed an action for partition of the property. He contends that he alone owned the property because “[t]he purchase price and substantially all repairs and improvements” to the property, as well as all property tax payments, were made by him “with his funds, and not with marital property funds.”

matters to which such testimony relates. And no stockholder, officer or trustee of a corporation in its behalf or interest, and no stockholder, officer or trustee of a corporation from, through or under whom a party derives the party’s interest or title, shall be so examined, except as aforesaid.

¶4 James argues that the petition, under WIS. STAT. § 857.01,⁴ for classification of property, which was filed on behalf of both personal representatives of Cynthia's estate, preserved his opportunity to litigate the ownership of the Trout Lake property, notwithstanding his failure to make any claim against the estate under WIS. STAT. § 859.01. He also argues that although the dead man's statute is disfavored, and although it must be strictly construed, his testimony regarding payments for the property, as well as his testimony regarding his "lack of donative intent" (summarized in his May 14, 2001 affidavit but not mentioned in his May 29, 2000 affidavit, both of which were submitted to the circuit court), should be allowed.

¶5 Summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party

⁴ WISCONSIN STAT. § 857.01 states:

Ownership in personal representative; management and control. Upon his or her letters being issued by the court, the personal representative succeeds to the interest of the decedent in all property of the decedent. The personal representative or surviving spouse may petition the court for an order determining the classification of property under ch. 766, and for other equitable relief necessary for management and control of the marital property during the administration of the estate. The court may make any decree under ch. 766, including a decree that the property be titled in accordance with its classification, to assist the personal representative or surviving spouse in managing and controlling the marital property and the decedent's property other than marital property during administration of the estate. During administration, the management and control rules under s. 766.51 apply to the property of a decedent spouse which is subject to administration and to the property of the surviving spouse. With regard to property subject to the election of the surviving spouse under s. 861.02, the personal representative may manage and control the property while the property is subject to administration. The personal representative shall determine when, during administration, property shall be distributed to satisfy an election under s. 861.02.

is entitled to a judgment as a matter of law.” WIS. STAT. § 802.08(2) (1999-2000). We review a circuit court’s grant of summary judgment *de novo*. ***Novak v. Am. Family Mut. Ins. Co.***, 183 Wis. 2d 133, 136, 515 N.W.2d 504 (Ct. App. 1994).

¶6 Although James has presented a number of substantial arguments regarding the application of several statutes to this case, we need not reach them because, as the Estate correctly responds, the undisputed facts contained in the summary judgment submissions support the order for partial summary judgment.

¶7 First, the 1980 land contract and the 1985 warranty deed confirm the status of James and Cynthia as tenants in common of the Trout Lake property. Second, nothing in the summary judgment submissions suggests any alteration of their ownership interests in the property. Third, and most importantly in light of his arguments, James’s most recent affidavit acknowledges that, notwithstanding his alleged payments for the property purchase, taxes, maintenance, and improvements, he expected Cynthia to reimburse him for one-half of those expenditures.

¶8 In his May 14, 2001 affidavit, James states, “I understood and planned to be reimbursed for ½ of all of the purchase costs and past and future expenses required by the lake home.” Clearly, therefore, notwithstanding his payments, James deemed Cynthia’s ownership to be such that she was to have reimbursed him for one-half of the very expenditures he now claims to be evidence of his full ownership. Thus, the submissions unequivocally establish that James continued to recognize Cynthia’s obligations as the co-owner of the property. This, in combination with the other documentary evidence, confirms that James could never overcome the

presumption, under WIS. STAT. § 700.20, that he and Cynthia, as tenants in common, had owned undivided half-interests in the Trout Lake property.⁵

¶9 In his reply brief, James attempts to counter the Estate’s argument on this point. He does so, however, completely misconstruing the Estate’s position. He contends that the Estate argues that he “asserted only a request for cash reimbursement of his disproportional payments, not full title ownership of Trout Lake.” He cites a portion of the Estate’s brief that states, “James in his affidavit admits Cynthia’s ownership and that he is seeking reimbursement for his asserted overpayment.” In that portion of the Estate’s brief, however, the Estate is referring to the critical concession in James’s affidavit, not to his underlying claim for full ownership of the Trout Lake property. Thus, James’s otherwise extensive reply brief leaves the Estate’s dispositive argument untouched. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted argument deemed admitted).

⁵ While James argues that his May 14, 2001 affidavit “is sufficient to establish genuine issues of material fact which require the denial of the estate’s partial Summary Judgment motion,” he acknowledges that, in the absence of his testimony, the statutory presumption prevails. His brief to this court explains: “If James can prove that the funds he used to purchase, maintain and improve Trout Lake were his individual property and, if he can establish that he did not intend to gift any part of the Trout Lake property to Cynthia, James can overcome the presumption of equal undivided interests” Clearly, James’s implicit concession is correct.

And, as James acknowledges, WIS. STAT. § 903.01 (1999-2000) states:

Presumptions in general. Except as provided by statute, a presumption recognized at common law or created by statute, including statutory provisions that certain basic facts are prima facie evidence of other facts, imposes on the party relying on the presumption the burden of proving the basic facts, but once the basic facts are found to exist the presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5 (1999-2000).

