

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 27, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 01-3433

Cir. Ct. No. 00-PR-98

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN RE THE ESTATE OF
IRENE H. OSTROWSKI, DECEASED:**

LORRAINE KOSTUCH,

APPELLANT,

V.

ROBERT E. LEA, JR.,

RESPONDENT.

APPEAL from judgments and an order of the circuit court for Portage County: THOMAS T. FLUGAUR, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Lorraine Kostuch, acting as personal representative for the estate of her mother, Irene Ostrowski, appeals related judgments and an order granting Ostrowski's grandson, Robert Lea, Jr., specific performance on a

land contract, awarding Lea immediate possession of the family farm and ordering the Estate to pay a portion of Lea's attorney fees as a sanction for having maintained several frivolous defenses to Lea's claims against the Estate. We affirm in all respects.

¶2 Following Ostrowski's death in 2000, Lea presented a claim to her estate asserting that he and his grandmother had previously entered into an agreement to transfer certain farm equipment and to execute a land contract wherein Ostrowski would sell her 160 acre farm to Lea. Lea attached to his claim a copy of an agreement signed by Ostrowski and Lea in 1995. The agreement provided that once Lea had paid Ostrowski \$32,000 at the rate of \$500 per month, the parties would enter into a land contract applying the \$32,000 to the total purchase price of \$160,000. Under the agreement, the parties were to divide the real estate taxes on the property until execution of the land contract. Under the land contract, Ostrowski would maintain a "life lease," and payments on the purchase price were to continue at the rate of \$500 per month, without interest.

¶3 Kostuch, in her capacity as personal representative, objected to Lea's claim for specific performance of the land contract. Kostuch challenged the authenticity of the agreement on the grounds that Lea had not offered the original document,¹ that there were no witnesses other than Lea and Ostrowski, that the signatures were dated several months after the agreement itself and that many of the objectionable terms were not on the signature page. She further argued that, even if genuine, the agreement was unenforceable because certain formalities the

¹ Court minutes indicate that the original agreement was located among Ostrowski's papers during discovery shortly before the hearing.

statute of frauds required had been omitted, the terms of the agreement were not sufficiently definite, there was a lack of consideration and Ostrowski's declining competence had allowed Lea to exert undue influence over her.

¶4 After a three-day hearing, the circuit court found "overwhelming" evidence that Ostrowski had signed the agreement, had taken a copy of it to her accountant, and had been accepting monthly payments of \$500 from Lea over the course of the preceding five years in accordance with the agreement. The court determined that there was no undue influence, based on the testimony of a number of witnesses, including Ostrowski's doctor and a local bank president. They said that Ostrowski was strong-willed, independent, and still mentally sharp in her later years, and that she had expressed a desire to keep the farm in the family. The court concluded that offer, acceptance and consideration had been established and that Wisconsin law did not require the written agreement to have been witnessed by third parties, acknowledged, delivered, or recorded, in order to be valid and enforceable. In addition, citing its inherent power to fashion equitable relief and its concern that animosity among the parties would continue once they left the courtroom, the court ordered the Estate to turn over possession of the farm immediately and directed the parties to sign a State Bar Form 11 in specific performance of the agreement to execute a land contract.

¶5 Lea moved for attorney's fees. The court acknowledged that the Estate had a right to investigate the validity of Lea's claim. However, it may be inferred from the court's comments that it concluded that the Estate should have quickly discovered that it lacked any reasonable basis in fact to contest that Ostrowski was mentally competent, had signed the agreement and had delivered it to Lea for photocopying. Accordingly, the Estate should have known that it had no reasonable basis in fact or law to argue that the agreement was invalid for lack

of witnesses, notarization and recording. The court found that the Estate had used its “deep pocket” to contest what it should have recognized as a legitimate claim, for the improper purpose of “trying to frustrate a claimant,” thus forcing Lea to run up “outrageous” attorney’s fees in excess of \$40,000. Consequently, the court ordered the Estate to contribute \$25,000 toward Lea’s attorney fees.

¶6 The Estate’s contentions on appeal are that: (1) the agreement lacked sufficiently definite terms to be enforceable; (2) the form land contract the court directed the parties to sign included terms that were not part of the agreement; and (3) the positions taken by the Estate before the circuit court were not frivolous.

¶7 WISCONSIN STAT. § 706.02 (1999-2000)² provides, among other things, that a contract to convey land must identify the parties; the land to be conveyed; the interest to be conveyed; and “any material term, condition, reservation, exception or contingency upon which the interest is to arise, continue or be extinguished, limited or encumbered.” The Estate concedes that Lea and Ostrowski’s agreement identified the parties, the land to be conveyed, the purchase price and the fact that payments were to be made in monthly installments without interest. It argues that the agreement should nonetheless be unenforceable because it does not indicate whether prepayment is acceptable, whether there is a default interest rate, who should insure the property, whether the land contract could be assigned, and how the life lease was to work. The Estate has not, however, pointed to any precedents in which the absence of similar details was

² All further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

deemed fatal, and we are not persuaded that the listed details were essential to the terms of the contract.

¶8 The Form 11 land contract which Lea and the personal representative signed requires: that Lea would pay interest at the rate of 5% per annum if he defaulted on any payments; that he would make payments in escrow to cover anticipated taxes, assessments and insurance premiums to maintain \$125,000 of coverage—which amounts the Estate would use to pay those obligations; that upon full payment, the Estate would provide a warranty deed to the property free and clear of all liens and encumbrances except any created by Lea's act or default; that Lea would receive a fifteen-day grace period following any default in the payment schedule before the entire outstanding balance would be due and payable; and that a default in any of Lea's other obligations would not result in the outstanding balance being due in full until fifteen days after the Estate provided written notice of the default. The Estate contends that the circuit court exceeded its authority by requiring it to execute Form 11 because none of the foregoing provisions or other standard clauses used in the land contract were specified in the agreement.

¶9 Specific performance, however, is an equitable remedy resting in the discretion of the court. *Anderson v. Onsager*, 155 Wis. 2d 504, 513, 455 N.W.2d 885 (1990) (citation omitted). In addition, the personal representative of an estate is subject to the probate court's supervision. *See generally* WIS. STAT. ch. 857 (setting forth the powers and duties of the personal representative). Here, the parties would have been free to use a standard land contract form utilizing typical clauses to fulfill their agreement had Ostrowski not died shortly before Lea had finished paying the initial \$32,000 triggering the obligation to enter into a land contract. The circuit court determined that additional guidance on what it deemed

non-essential terms for the land contract was appropriate and necessary to effectuate the intent of the parties, given the personal representative's continuing hostility towards Lea's claim. We are satisfied that the circuit court's direction that the personal representative sign a standard land contract incorporating the specified provisions of the agreement did not alter the essential terms of the parties' agreement, and was within the court's equitable and supervisory powers.

¶10 With regard to the attorney's fees, the Estate first contends that "many of the legal positions asserted by the Estate in connection with this matter do not constitute 'defenses' at all," apparently in the sense that they were not affirmative defenses set forth in a pleading. We flatly reject any notion that the strictures of WIS. STAT. § 814.025 against frivolous "defenses" are limited to affirmative defenses or pleadings. All positions asserted by the Estate in its briefs and at the hearing in opposition to Lea's claim were "defenses" within the meaning of the statute.

¶11 The Estate next contends that the circuit court failed to hold an evidentiary hearing before imposing sanctions. This claim is belied by the record, however, which shows that a properly-noticed hearing on the attorney's fee issue was held on December 11, 2001. The fact that the Estate did not present any witnesses at the hearing does not mean that it was not afforded a proper opportunity to do so.

¶12 The Estate argues that the circuit court did not make sufficiently detailed findings as to what defenses it was finding to be frivolous, when the Estate should have known they were frivolous and what portion of Lea's attorney's fees resulted from those defenses to justify the amount of the sanction. We disagree. We think it plain from the circuit court's discussion that its

conclusion the Estate maintained frivolous defenses applied primarily to the Estate's claims that Ostrowski's signature on the agreement was forged, that Lea had exerted undue influence over Ostrowski and that the agreement had never been delivered to Lea.³ It was not necessary for the circuit court to pinpoint a precise moment in time when the Estate should have realized that those defenses were frivolous, or to itemize the resulting fees in exact detail. The circuit court's estimation of what amount of attorney's fees would have been incurred in response to a reasonable investigation and defense by the Estate, and subtraction of that amount from the actual fees incurred (which the circuit court stated it had reviewed), was an appropriate method of calculation.

¶13 Finally, the Estate maintains that none of its defense positions were frivolous. It argues that its evidentiary objections to Lea's attempts to authenticate the agreement were reasonably well-founded in law and that its handwriting expert's opinion that Ostrowski had not signed and dated the document provided a reasonable factual basis for the challenge. However, the record shows that the Estate had the original of the agreement whose authenticity it was challenging within its possession the entire time it was denying Lea's claim. The Estate's contention that it was not required to produce the agreement until a formal discovery request had been made is disingenuous at best, because it ignores the Estate's obligation to make a reasonable inquiry into the facts before making factual assertions to the circuit court. In addition, the Estate had no factual basis to dispute that Lea had been making monthly payments of \$500 to Ostrowski with

³ The circuit court also mentioned the Estate's arguments that the absence of witnesses, notarization, and recording rendered the agreement unenforceable were contrary to established law, but it noted that those arguments had been made in the early stages of the proceedings and were a minor part of the litigation.

checks bearing notations “farm payment” since shortly after the date on the signature page of the agreement. The personal representative knew that Ostrowski had given a copy of the agreement to her own accountant for use in tax preparation and that the accountant recognized Ostrowski’s signature. Given the totality of the facts within the Estate’s knowledge, we have no difficulty affirming the circuit court’s conclusion that the Estate’s challenge to the authenticity of the agreement was frivolous.

¶14 Similarly, while the Estate sets forth an accurate summary of the law applicable to undue influence and competency determinations, it fails to acknowledge its lack of a reasonable factual basis to challenge Ostrowski’s competency. The Estate claims that certain statements and actions Ostrowski took after the agreement was signed could be interpreted as showing that she had some confusion over the legal effect of the agreement. However, in addition to the observations of various family members, acquaintances and the personal representative herself that Ostrowski was competent to handle her day-to-day affairs, the Estate was also aware nearly a month before the hearing that Ostrowski’s doctor was of the opinion that Ostrowski had been mentally competent. Furthermore, with regard to the undue influence claim, the Estate had no factual basis to challenge Lea’s assertions that Ostrowski herself had set the price per acre for selling her farm to her grandson, based on the price that she had received for other property she had sold previously through an independent auction, and that Ostrowski had commented to others that she was glad the farm was staying in the family. We concur with the circuit court’s assessment that it could not reasonably be questioned, based on all the evidence available, that Ostrowski had freely and competently entered into the agreement.

¶15 The circuit court found the Estate's expenditure of time at the hearing on the delivery question to be frivolous in two regards: first, the circuit court had already ruled prior to the hearing that delivery was not legally necessary, and second, the Estate had no factual basis to dispute Lea's claim that Ostrowski had in fact given him the original so that he could make a photocopy, particularly in light of the fact that Ostrowski had also given her accountant a copy of the agreement. The circuit court's analysis appears to be a reasonable application of the law to the facts of record.

¶16 In sum, we see no basis to reverse the circuit court's decisions in this matter.

By the Court.—Judgments and order affirmed.

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

