

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 13, 2005

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. 2005AP559

Cir. Ct. No. 2004CV91

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

RALPH HIEMSTRA,

PLAINTIFF-RESPONDENT,

V.

MICHAEL S. DAMROTH, M.D.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Barron County:
FREDERICK A. HENDERSON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Michael Damroth appeals a summary judgment declaring Ralph Hiemstra's land free from any claim by Damroth under an August 1995 option to purchase. Damroth contends the option does not violate the rule against perpetuities. We disagree and affirm the judgment.

Background

¶2 Damroth initially agreed to purchased 120 acres of farmland from Hiemstra and his wife, Lois. Damroth also agreed to lease the land back to the Hiemstras after its purchase. While negotiating the purchase and lease terms, Damroth also expressed interest in an additional sixty-acre parcel. The Hiemstras were willing to sell it but not immediately, so the parties executed an option drafted by Damroth's attorney. The option states, in relevant part:

[The Hiemstras assign] the option to purchase indefinitely, but not before the last of the undersigned owners, Ralph and Lois C. Hiemstra, dies.

....

During the term of this Option, the undersigned [Hiemstras] agree not to sell, gift, or assign, in any way, the property.

....

The Option will expire only when Michael S. Damroth, or his heirs or assigns, file a Termination of Option statement with the Register of Deeds for Barron County.

¶3 The option also specified the purchase price. In 1995, the price would have been \$25,000. The price increased \$1,000 per year until 2000, when it would have been \$30,000. After 2000, the price was fixed at \$30,000.

¶4 Lois is now deceased. Damroth still wishes to purchase the parcel but a third party has, in the meantime, offered Hiemstra \$60,000 for it. Hiemstra thus commenced this action seeking invalidation of the option for lack of consideration and because he claimed it violates Wisconsin's rule against

perpetuities, WIS. STAT. § 700.16.¹ After Hiemstra filed his complaint, Damroth executed and recorded his expiration notice, which specified the option would terminate ninety days after Hiemstra's death.

¶5 Hiemstra filed a motion for summary judgment, which the trial court granted on the grounds that the option was invalid under the statute. Damroth appeals.

Discussion

¶6 We review summary judgments de novo, using the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). The methodology is well established and we will not repeat it here. See *Lambrecht v. Estate of Kazmarczyk*, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. Interpreting the option presents us with a question of law. See *Cohn v. Town of Randall*, 2001 WI App 176, ¶5, 247 Wis. 2d 118, 633 N.W.2d 674 (interpretation of a document is a question of law); *Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 460, 405 N.W.2d 354 (Ct. App. 1987) (interpretation of a contract is a question of law).

¶7 Rules against perpetuities are “intended to enhance the marketability of property interests by limiting the remoteness of vesting.” 61 AM. JUR. 2D *Perpetuities, Etc.* § 6 (2002). The rules are “a limitation on contingent future interests in property ... so that current owners will not be discouraged from making the most effective uses of their properties.” *Id.*

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶8 The common law rule against perpetuities is not in force in Wisconsin. Rather, WIS. STAT. § 700.16(1)(a) states: “A future interest or trust is void if it suspends the power of alienation for longer than the permissible period. The permissible period is a life or lives in being plus a period of 30 years.” “The power of alienation is suspended when there are no persons in being who, alone or in combination with others, can convey an absolute fee in possession of land” WIS. STAT. § 700.16(2).

¶9 The court ruled the option in this case is invalid because it extends indefinitely upon the Hiemstras’ deaths, contrary to WIS. STAT. § 700.16(1)(a). Damroth disputes this interpretation of the option, pointing to the clause that states “During the term of this Option, the undersigned agree not to sell, gift, or assign, in any way, the property.” This, he claims, indicates the power of alienation is suspended only during the Hiemstras’ lifetimes. We disagree.

¶10 Damroth ignores the plain language of the option. Specifically, it states the purchase option extends “*indefinitely, but not before* the last of the undersigned owners ... dies.” (Emphasis added.) This means the option does not even really start until the Hiemstras are both deceased. Then, there is no limit to when Damroth must exercise it. Because the option on its face can extend well beyond two lives in being plus thirty years, it is void. WIS. STAT. § 700.16(1)(a).

¶11 To the extent that reading the option as a whole creates ambiguity—because, in fairness to Damroth’s interpretation, it is true that the Hiemstras would not be able to “sell, gift, or assign” the property, if they are deceased—we construe contractual ambiguities against the drafter. *See Dieter v. Chrysler Corp.*, 2000 WI 45, ¶15, 234 Wis. 2d 670, 610 N.W.2d 832. Moreover, any ambiguity

would go to the start date of the option, not its termination, because it unambiguously states it will continue indefinitely. This is not permitted.²

¶12 The option also provided that it would expire if Damroth filed a termination statement with the register of deeds. Damroth filed such a statement on the day he was served in this action. The statement indicated the option would terminate within ninety days of Hiemstra's death. Therefore, Damroth reasons, even if the option was initially defective, it has been "cured" to conform with WIS. STAT. § 700.16(1)(a). We disagree.

¶13 WISCONSIN STAT. ch. 706, subject to certain enumerated exceptions not relevant here, "govern[s] every transaction by which any interest in land is created, aliened, mortgaged, assigned or may be otherwise affected in law or in equity." WIS. STAT. § 706.001(1). No such transaction is valid unless, among other things, it is signed by each grantor. WIS. STAT. § 706.02(1)(d). A grantor includes "vendors, mortgagors, [and] optionors" WIS. STAT. § 706.01(6).

¶14 Damroth contends he is an optionor. He is wrong. An optionor is one who grants the option. Here, Damroth is the optionee because, if it were valid, he would be the one receiving, not giving, the option. Hiemstra's signature was needed on the termination of option statement.

¶15 Damroth also points out that Hiemstra signed the option, which allows Damroth the unilateral right to file the termination statement. However, the

² Damroth also claims that the option is valid because regardless of the timeframe, there is no alienation. He contends the Hiemstras' heirs will be able to transfer the fee. Damroth has failed to explain this to our satisfaction. To the extent he would have the heirs be bound by the purchase option, as well as the clause regarding price, surely he would also have them bound by the restriction against sale, gift, or assignment of the land.

option says nothing about Damroth unilaterally determining the end date for the option or unilaterally signing the termination notice. More importantly, Damroth provides no authority for the implicit argument that he and Hiemstra could contract to ignore formal, statutorily mandated requirements governing land transactions. The termination notice, signed by Damroth only, is insufficient to cure the WIS. STAT. § 700.16(1)(a) deficiency.

¶16 Alternatively, given that the option is void under WIS. STAT. § 700.16(1)(a), it is of no legal effect. *See* BLACK'S LAW DICTIONARY 1604 (8th ed. 2004) (defining "void"). This means Damroth could not have cured any defect by filing the termination notice because no option existed to terminate. Then, the only way to cure or amend the void option would be to re-execute it in a transaction fulfilling statutory requirements.

By the Court.—Judgment affirmed.

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

