

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 23, 2010

A. John Voelker
Acting 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. 2009AP3046

Cir. Ct. No. 2006CV167

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JOSEPH J. COGAN, JR., AND MARY B. COGAN,

PLAINTIFFS-RESPONDENTS,

V.

GLADYS M. COGAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County:
ROBERT P. VAN DE HEY, Judge. *Affirmed.*

Before Vergeront, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Gladys Cogan appeals from a judgment that awarded legal title to a disputed parcel of property to Joseph Cogan Jr. and Mary

Cogan. Gladys claims that she is entitled to the land either by twenty years of adverse possession under WIS. STAT. § 893.25 (2007-08)¹ or by ten years of adverse possession with record title under WIS. STAT. § 893.26. She further contends that Joseph Jr. and Mary's declaratory judgment action should have been barred by laches. We reject each of these claims and affirm for the reasons discussed below.

BACKGROUND

¶2 Cornelius Cogan owned farmland in Jamestown Township in Grant County. In the 1950s and 1960s, Cornelius sold some lots of his farm to his son, Clarence, and Clarence's wife, Gladys. In 1965, Cornelius entered into a land contract to sell another portion of the farm to his son, Joseph Sr., and Joseph Sr.'s wife, Bernetta, which resulted in a transfer of land by warranty deed in 1971. A contemporaneous survey showed that Joseph Sr. and Bernetta's deed included the legal description of the property that is the subject of the current dispute, which the parties refer to as the "overlap parcel." Cornelius retained a small amount of land for himself.

¶3 While installment payments were still being made on the land contract, Cornelius moved into a trailer located partially on his retained land and partially on the overlap parcel, and he installed a septic tank there. Joseph Sr. and his son, Joseph Jr., moved a fence from the legal boundary to along one side of the overlap parcel around that time to make more room for Cornelius to live on. Bernetta also agreed to let her father-in-law use the land.

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 Cornelius continued to reside on the land he had reserved for himself, plus the overlap parcel that Joseph Sr. had expanded for him, until his death in 1988. Meanwhile, Joseph Sr. and Joseph Jr. cultivated a portion of the overlap parcel in the 1970s, Gladys began using a portion of the overlap parcel for a pumpkin patch in 1984, and Joseph Jr. periodically went morel hunting there after his grandfather's death.

¶5 After Cornelius died, a third son, Donald, served as personal representative for the estate. In the process of distributing the estate among all of Cornelius's children, Donald issued a personal representative's deed to Clarence and Gladys that purported to transfer to them not only Cornelius's actual remaining land, but also the overlap parcel that had been previously deeded to Joseph Sr. pursuant to the land contract. Neither the inventory of the estate nor a title commitment showed the overlap parcel was part Cornelius's estate. Donald merely added a description of the overlap parcel on which his father had been living to the legal description of the other land that was still owned by Cornelius, with the notation "Per Clarence and Donald." The personal representative's deed to Clarence and Gladys was dated January 26, 1989, and recorded on August 23, 1989.

¶6 Gladys became sole owner of Clarence's portion of the family farm and his interest in the overlap parcel after Clarence died in 1991. Gladys continued to use the overlap parcel for the pumpkin patch, firewood and storage, and she later installed her own trailer there. Bernetta did not make any objection to Gladys using the overlap parcel.

¶7 Joseph Sr. passed away in 2001, and his portion of the family farm and interest in the overlap parcel passed to his widow, Bernetta, through probate.

Bernetta in turn transferred it to her son, Joseph Jr., and his wife, Mary, by warranty deed executed December 31, 2003, and recorded January 21, 2004.

¶18 Joseph Jr. and Mary filed this declaratory judgment action in 2006, seeking to quiet their title and require Gladys to remove her personal property from the overlap parcel. Gladys answered that the declaratory judgment claim should be barred by laches, and counterclaimed for adverse possession. The trial court granted judgment in favor of Joseph Jr. and Mary.² Gladys appeals.

STANDARD OF REVIEW

¶19 An adverse possession determination presents a mixed question of fact and law, requiring findings concerning the sequence of events and a conclusion as to the legal significance of those events. *Perpignani v. Vonasek*, 139 Wis. 2d 695, 728, 408 N.W.2d 1 (1987). We will sustain the trial court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2); *Becker v. Zoschke*, 76 Wis. 2d 336, 346, 251 N.W.2d 431 (1977). Furthermore, although we do not ordinarily defer to a trial court's conclusion of law, we will give weight to a legal determination that is intertwined with the factual findings in support of that determination. *Wassenaar v. Panos*, 111 Wis. 2d 518, 525, 331 N.W.2d 357 (1983).

² We note that, although Gladys provided copies of the court's written orders in her appendix, she did not provide a copy of the portion of the transcript in which the court discussed the reasons for its decision. For future reference, we remind counsel that WIS. STAT. RULE 809.19(2) requires the appendix to include the portion of the transcript where the trial court gave its findings.

DISCUSSION

¶10 WISCONSIN STAT. § 893.25 permits a person to acquire title to real property by adverse possession for an uninterrupted period of twenty years. The statute requires the land to be actually occupied and either protected by a substantial enclosure or usually cultivated or improved. WIS. STAT. § 893.25(2). A person claiming adverse possession must show that the disputed property was used for the requisite period of time in an “open, notorious, visible, exclusive, hostile and continuous” manner that would apprise a reasonably diligent landowner and the public that the possessor claimed the land as his or her own. *Pierz v. Gorski*, 88 Wis. 2d 131, 137, 276 N.W.2d 352 (Ct. App. 1979). An adverse claimant may “tack” or add his or her time of possession to that of prior adverse possessors with whom he or she is in privity in order to establish continuous possession for the requisite statutory period. *Perpignani*, 139 Wis. 2d at 724-25.

¶11 WISCONSIN STAT. § 893.26 shortens the requisite period of adverse possession to ten years when the claimant “originally entered into possession of the real estate under a good faith claim of title, exclusive of any other right, founded upon a written instrument as a conveyance of the real estate or upon a judgment of a competent court” and the instrument or judgment is duly recorded with the register of deeds within thirty days. WIS. STAT. § 893.26(1) and (2). Ordinarily, “[t]he finder of fact must strictly construe the evidence against the adverse possessor and apply all reasonable presumptions in favor of the true owner.” *Pierz*, 88 Wis. 2d at 136. However, there is a rebuttable statutory presumption that entry and claim of title are made in good faith.

¶12 Gladys first claims that she and her predecessors in interest, her late husband Clarence and her father-in-law Cornelius, adversely possessed the overlapping parcel for a period of more than twenty years, going back to when Cornelius placed a trailer there. However, the trial court's determination that Cornelius had permission to use the land after he sold it to Joseph Sr. is amply supported by Joseph Jr. and Bernetta's testimony that Joseph Sr. himself moved the fence to give his father more room. Since permissive use is not adverse, Gladys could not tack Cornelius's use of the land to her own, and thus could not establish a twenty-year period of adverse possession under WIS. STAT. § 893.25.

¶13 Gladys next contends that she and her late husband adversely used the land themselves for over ten years under a good faith claim of title. The first problem with this theory is that Clarence and Gladys did not record their personal representative's deed until about seven months after they obtained it. Furthermore, as the trial court pointed out, Gladys was already permissively using the property for her pumpkin patch for years before she obtained the personal representative's deed, and she did not change the nature of that usage until she put a trailer and sheds up sometime around 1990, months after the deed had been recorded. It is therefore highly questionable whether Gladys "originally" entered into possession of the real estate under a good faith claim of title and, if so, whether the written instrument under which her entry was made was recorded "within 30 days" of that entry.

¶14 In addition, the trial court determined that the presumption that entry had been made in good faith was rebutted by the evidence that the personal representative had simply added the overlap parcel to a deed without any basis to believe that the parcel was actually part of his father's estate. It is implicit in the court's decision that Clarence and Gladys should have been aware of this

themselves, since the survey and title commitment on the land they were going to obtain through probate did not contain the overlap parcel. We therefore conclude that the trial court's determination that the title was not claimed under the personal representative's deed in good faith is not clearly erroneous. Without good faith, Gladys could not rely upon WIS. STAT. § 893.26 to establish adverse possession.

¶15 Finally, we address the question of laches. The equitable defense of laches “operates as a bar upon the right to maintain an action by those who unduly slumber upon their rights.” *Flejter v. Estate of Carl Flejter*, 2001 WI App 26, ¶41, 240 Wis. 2d 401, 623 N.W.2d 552 (citation omitted). The elements of laches are: (1) an unreasonable delay by the party now seeking relief; (2) lack of knowledge or acquiescence by the party asserting laches that a claim for relief was forthcoming; and (3) prejudice to the party asserting laches caused by the delay. *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶¶27-29, 290 Wis. 2d 352, 714 N.W.2d 900. The reasonableness of the delay and prejudice questions are treated as questions of law based upon factual findings. *Id.*, ¶17. However, once the elements of laches have been established, a court still has discretion whether or not to apply the doctrine. *Id.*

¶16 Gladys argues that it was unreasonable for Joseph Jr. and his predecessors in interest to wait over fifteen years after the personal representative's deed was recorded to file a declaratory judgment action. She cites no authority, however, for the proposition that the adverse possession doctrine of “tacking” interests also applies to the doctrine of laches. To the contrary, it would seem reasonable for a person who has recently obtained a clouded title to raise the issue.

¶17 Here, Joseph Jr. obtained title to the overlap parcel in December of 2003. He then sent several letters to his aunt through counsel asking her to remove her personal property from the parcel before he filed suit in March of 2006. Gladys therefore had notice that a claim was forthcoming. We do not think a delay of just over two years was unreasonable under the circumstances, particularly given the long periods of time typically involved in adverse possession claims. Nor has Gladys identified anything that happened during those two years that prejudiced her ability to defend against the declaratory judgment action. In sum, we see no basis to overturn the trial court's determination that laches did not apply here.

By the Court.—Judgment affirmed.

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

