

In re Village of Oconomowoc Lake, 7 Wis. (2d) 400.

judgment of the court should be reversed and the complaint dismissed. While the appellant appealed from an order in the form of a denial of a motion to dismiss, the respondent raised no question as to its applicability. We treat the appeal as a review of an order which is before us on appeal from the judgment.

By the Court.—Judgment reversed, with instructions to dismiss the complaint on its merits.

MARTIN, C. J., took no part.

IN RE INCORPORATION OF VILLAGE OF OCONOMOWOC LAKE:
GOTFREDSON and others, Appellants, v. TOWN OF SUMMIT,
Respondent.*

May 5—June 2, 1959.

Municipal corporations: Incorporation of village: Necessary characteristics of village in fact: Sufficiency of evidence.

1. In this present age, for purposes of incorporation, it is not essential that a village in fact have within its boundaries a village store or school, and a community devoted exclusively to residential development and possessing that spirit of togetherness or that core of community spirit characterized by a unity of action and purposes is a village in fact within the meaning of the constitution, and these villages in fact may only be concerned with those services necessary for residential community development such as fire and police protection, zoning, and sanitation. p. 403.
2. In the instant case, the preponderance of all the testimony, evidence, residential requirements, area, territory, survey, census, maps and photographs identifying location of residence, access to roads, and terrain, shows that the territory sought to be incorporated as a village possesses the essential characteristics of a village in fact and meets the requirements set forth in ch. 61, Stats., so as to entitle the petitioners herein to an order of incorporation pursuant to sec. 61.08, Stats. p. 404.

* Motion for rehearing denied, with \$25 costs, on July 21, 1959.

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APPEAL from an order of the circuit court for Waukesha county: CLARENCE E. RINEHARD, Circuit Judge of the Nineteenth circuit, Presiding. *Reversed.*

This is an appeal from the order of the circuit court for Waukesha county denying the petition, as amended, for the incorporation of the village of Oconomowoc Lake located in parts of the towns of Summit and Oconomowoc, Waukesha county, Wisconsin.

The original petition praying the court to order the incorporation as a village was filed October 27, 1952, and amended to include the allegation that the territory is a village in fact December 1, 1955.

A hearing was held and evidence presented to the trial court over a period of six days and pursuant to the court's written memorandum decision, an order denying the application for incorporation was signed on August 30, 1958.

From this order the petitioners appeal.

For the appellants there were briefs by *Steven E. Keane, Lynford Lardner, Jr., Edwin P. Wiley, and Fairchild, Foley & Sammond*, all of Milwaukee, and oral argument by *Mr. Keane and Mr. Wiley*.

For the respondent there was a brief by *John C. Love and Robert T. McGraw*, both of Waukesha, and oral argument by *Mr. Love*.

DIETERICH, J. The matter of the incorporation of the village of Oconomowoc Lake has previously come before this court twice. *In re Village of Oconomowoc Lake* (1953), 264 Wis. 540, 59 N. W. (2d) 662, and *In re Village of Oconomowoc Lake* (1955), 270 Wis. 530, 72 N. W. (2d) 544.

The proposed village as disclosed by the survey, map, photographs, identifying locations of buildings, roads, and terrain includes all land abutting on Oconomowoc Lake,

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except for land having a frontage of 2,650 feet on the north bay of the lake. The lake itself is excluded from the proposed village and this was within the discretion of the petitioners. The land within the proposed village includes 632.09 acres, of which 41.7 acres are classified as agricultural, the balance being rough, wooded terrain unsuited for cultivation, but ideal for residential purposes. The entire area is less than one square mile, but greater than one-half square mile in area. Although the land area is fully contiguous it is not possible to travel by road to all parts of the proposed village and stay within the proposed village limits without using state, county, and town roads, except in the southwestern and northeastern sides of the village where a complete internal road system serves the proposed village.

The number of year-round residents of the area is 339 persons, not including many persons who spend a substantial part of the winter, as well as the summer, in the proposed village.

The heavy black line on the map herein reproduced represents the village boundary line.

Historically, a village in fact has been defined as any small assemblage of houses, for dwelling or business, or both, in the country, whether situated upon regularly laid-out streets and alleys or not. A compact center or nucleus of population was required and adjacent lands reasonably appurtenant and necessary for future growth, always considering the surroundings and circumstances of location and prospects of future prosperity. However, it was not necessary to include all eligible land.

The state has always recognized the spirit of self-government which is a large part of the American way of life. This includes, and with greater force, the right of local self-government.

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Thirty years ago we recognized this right, in somewhat the same circumstances, in the incorporation of the *Village of Chenequa* (1928), 197 Wis. 163, 221 N. W. 856, and that the constitution was made and designed for an expanding future and that where an issue must be decided on the basis of a given state of facts, these facts must be interpreted in the light of the conditions and circumstances presently existing.

While it may have been usual and customary fifty years ago, or twenty years ago, for a community to grow around the market or place of employment, school, church, and perhaps the village blacksmith, due to limitations in the means of transportation, this is not so today. Decentralization is the trend of today. Areas are developing exclusively devoted to residential purposes. The construction of superhighways and the technical improvement in the manufacture of automobiles have made it possible for families to live in one community, be employed in another, and seek recreation in still others. Public transportation of passengers by bus, plane, helicopter, and packages, mail, and freight by truck, has brought communities to within minutes of each other where formerly it was hours.

In this present age we do not deem it essential that a village in fact have within its boundaries a village store or school. A community devoted exclusively to residential development and possessing that spirit of togetherness or that core of community spirit characterized by a unity of action and purpose is a village in fact within the meaning of the constitution. These villages in fact may only be concerned with those services necessary for residential community development such as fire and police protection, zoning, and sanitation. *State ex rel. Holland v. Lammers* (1901), 113 Wis. 398, 86 N. W. 677, 89 N. W. 501; *Fenton v. Ryan*

(1909), 140 Wis. 353, 122 N. W. 756; *Borgnis v. Falk Co.* (1911), 147 Wis. 327, 349, 350, 133 N. W. 209; *In re Village of Chenequa* (1928), 197 Wis. 163, 221 N. W. 856; *In re Village of Elm Grove* (1954), 267 Wis. 157, 64 N. W. (2d) 874; secs. 61.01 and 61.08, Wisconsin statutes.

We conclude that the preponderance of all the testimony, evidence, residential requirements, area, territory, survey, census, maps and photographs identifying location of residence, access to roads, terrain, shows that the territory possesses the essential characteristics of a village in fact and meets the requirements set forth in ch. 61, Stats., so as to entitle petitioners and applicants to an order of incorporation pursuant to sec. 61.08, Stats.

By the Court.—Order reversed with instructions to enter an order of incorporation pursuant to sec. 61.08, Stats. Appellants' request for permission to tax costs for printing brief in excess of 50 pages granted.

MARTIN, C. J., took no part.

ESTATE OF STRANGE: STATE, Appellant, v. STRANGE and others, Respondents.

May 5—June 2, 1959.

Executors and administrators: Trusts: Wills: Testamentary trust: Unsuccessful action by executors-trustees to void final judgment and trust: Allowability of fees to executors' attorney and to guardian ad litem out of trust fund.

1. Although executors may be allowed their proper disbursements, including fees to their attorney, such fees are normally charges against executors, to be allowed only as a credit on the executors' account. p. 407.
2. Where executors, who had become trustees of a testamentary trust under a 1928 final judgment, brought an unsuccessful

- action in 1957 to void the 1928 judgment and testamentary trust, and thereby bring about the distribution of the trust fund among the testator's heirs, attorney fees, incurred by the executors in such action in derogation of the testamentary trust, were not to be paid from the fund assigned in trust thirty years ago and administered as such in the interim. pp. 406, 407.
3. Where a guardian *ad litem* was appointed "for said minors, unknown heirs, devisees, legatees, or incompetents, for the sole purpose of appearing for them and taking care of their interests," in the unsuccessful 1957 action by the executors-trustees to void the 1928 final judgment and testamentary trust, but the 1928 judgment had judicially determined the identity of the testator's heirs, and the record showed that all heirs and devisees were known and were known not to be minors or incompetents, and the guardian *ad litem* found no one whom he represented nor one who could or did benefit by his service, no fees to the guardian *ad litem* were allowable out of the trust fund. pp. 407-409.
 4. Guardians *ad litem* are not to be appointed under sec. 324.29 (2), Stats., unless there is some necessity for one to serve a useful purpose. p. 408.
 5. Generally speaking, it is improper for a court to order paid out of trust funds the expenses of litigation of a defeated party respecting such fund except to the extent of his interest in the fund. p. 408.

APPEALS from an order and a judgment of the county court of Winnebago county: HERBERT J. MUELLER, Judge. *Reversed.*

The facts are stated in the opinion.

For the appellant there were briefs by the *Attorney General* and *John E. Armstrong* and *E. Weston Wood*, assistant attorneys general, and oral argument by *Mr. Wood* and *Mr. Armstrong*.

For the respondents there was a brief by *Morris Warzinik* of Neenah, attorney, and *D. E. McDonald* of Oshkosh of counsel, and oral argument by *Mr. Warzinik*.

For the respondent guardian *ad litem* there was a brief and oral argument by *E. C. Joyce* of Neenah.