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2013 IL App (3d) 120621-U

Order filed June 7, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

GALE LARSON,)	Appeal from the Circuit Court
)	of the 9th Judicial Circuit,
Plaintiff-Appellant,)	Warren County, Illinois,
)	
v.)	
)	
JOSHUA J. LARSON,)	
)	Appeal No. 3-12-0621
Defendant-Appellee,)	Circuit No. 08-CH-46
)	
DALE EDWARD LARSON, JOHANNA D.)	
LARSON, JILLIAN F. LARSON, and)	
JEREMIAH E. LARSON,)	Honorable
)	Gregory K. McClintock,
Defendants.)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court properly partitioned the parties' property, equitably dividing it based on its attributes and the parties' circumstances.
- ¶ 2 Plaintiff Gale Larson filed this partition action seeking the sale of a 120-acre farmland parcel, in which he and his nephew, defendant Joshua Larson, had ownership interests. The trial court

divided the parcel equitably between Gale and Joshua. Gale appealed the partition. We affirm.

¶ 3

FACTS

¶ 4 In 1979, plaintiff Gale Larson and defendant Dale Larson each inherited an undivided one-half interest in a 120-acre parcel of farmland from their mother. In March 2008, Dale quitclaimed his undivided one-half interest in equal parts to his four children, defendants, Johanna Larson, Joshua Larson, Jillian Larson and Jeremiah Larson, maintaining a life estate for himself. In September 2008, Gale filed a complaint for partition in which he maintained that the parties could not agree on a division of the property, necessitating its sale. Gale filed an amended complaint for partition in February 2008, adding as defendants Tompkins State Bank, which held a mortgage on Gale's interest in the property, and a tenant with a cash rent lease for a portion of the property. The parties agreed the partition proceedings would not affect the tenant's lease and an agreed order releasing him was entered. Dale died in March 2009 and a suggestion of death was filed with the trial court.

¶ 5 On Gale's motion, the trial court appointed Herbert Meyers as a commissioner to evaluate the property and recommend a partition or sale. Meyers filed a report dated June 4, 2009. Thereafter, in December 2009, Joshua's three siblings and co-defendants sold their interests in the property to Gale and his wife, Madge Larson. Madge and Joshua's siblings are not parties to this appeal. Meyers filed a report in February 8, 2010 to address the ownership change. He appraised the property at \$1,024,000 and proposed two divisions. The first option divided the property into a 134-acre parcel valued at \$898,000 and a 26-acre parcel valued at \$119,000. Meyers acknowledged that the parcels were not "exactly alike" in soil quality, income potential, and real estate taxes or "exactly proportionate" in value. The second option proposed a 17-acre and 143-acre division, with the smaller parcel valued at \$124,984 and the larger at \$900,042. Meyers again noted the parcels differed

as to soil quality, income potential, and real estate taxes and were not proportionate in value. Joshua submitted the affirmative defenses of right of first refusal and estoppel, arguing, in part, that his siblings violated his right of first refusal to purchase the property as afforded him under the quitclaim deed the siblings received from Dale.

¶ 6 A bench trial ensued. The parties stipulated that Gale's interests in the property were subject to the bank's lien and that the lease would stay in effect for its term. The transcript from the evidence deposition of Gale's expert, Robert Young, was entered into evidence. Young testified that the property had about 136 tillable acres, with a dozen different soil types and productivity indexes. He stated that the property could not be divided in a manner that would equalize incomes, soil types, real estate taxes or in a manner proportionate to the parties' interests in it. In Young's opinion, the property could not be divided without manifest prejudice to the parties. Young did not personally view the property but reached his conclusions by reviewing Meyers's reports and using a computer program to analyze the soil. He did not perform an independent appraisal.

¶ 7 Meyers submitted a third report which proposed a division of 140 acres and 20 acres. This split would be proportionate to the parties' interests but the parcels would be unequal as to soil type, income potential and real estate tax amounts. In addition, this division would require an easement. According to Meyers, the property was capable of division in kind by any of the three alternatives he submitted. Meyers's June 2011 report was admitted by stipulation as was his January 5, 2012 response to an affidavit filed by Young.

¶ 8 Joshua testified that he moved into a camper near the homestead on the property in 2007 and at some point built an enclosure around the camper. The camper does not have electricity, water, or a septic system. He had cleared brush and timber from the area and enjoyed living in the timbered

area. Joshua wanted to be awarded the homestead portion of the property. Gale testified that he also wanted the homestead portion, he grew up in the homestead, and he had farmed the property for many years before he moved away. He paid the real estate taxes on the property. Gale further stated he never authorized Joshua to live on the property or to build any structures.

¶ 9 The trial court issued an opinion dated February 15, 2012. It determined that Joshua's right of first refusal had been violated, inquired whether Joshua wanted to exercise the right, and opted to wait until that issue was resolved to make further findings. The trial court did state, however, that its intent was to partition the property. It noted that it was not required to equally divide the individual percentages according to the entire acreage; a division was based on value, not acreage; the soil types, fertility and real estate taxes were not equally divided; and a party's desire for the homestead portion did not constitute a manifest prejudice. The trial court issued an additional order on April 12, 2012 in which is found that the property could be equitably partitioned in kind and that Meyer's first option was the fairest division as it gave the tillable land to Gale, who was engaged in farming; gave the non-tillable acreage to Joshua, who maintained his residence there; and resulted in a straight north-south property line. Joshua was ordered to pay \$8,125 to Gale to equalize the value of the partition. The trial court issued an order on May 3, 2012, in which it corrected the requirement that Joshua pay Gale and ordered that Gale pay Joshua the owelty of \$8,125. The trial court issued its final order on June 29, 2012, partitioning the property and assessing the owelty against Gale. Gale appealed.

¶ 10

ANALYSIS

¶ 11 The issue on appeal is whether the trial court erred when it ordered the property partitioned. Gale argues the property should have been sold and that the trial court erred in ordering a partition.

He contends a partition was improper because Meyers did not use the correct standard in making his recommendations and the division was not fair or objective and manifestly prejudiced the parties. Gale maintains that the trial court should have adopted the recommendations of his expert, Young, and ordered the property sold.

¶ 12 A party owning land in co-ownership may compel a partition of the property by complaint seeking the division and partition of the property per the parties' interests, or where a division and partition cannot be made without "manifest prejudice" to the owners, requesting a sale and division of proceeds. 735 ILCS 5/17-101, 17-102 (West 2008). In a partition action, the trial court shall determine the rights of the parties and whether the property may be divided without manifest prejudice to the parties. 735 ILCS 5/17-105 (West 2008). Where the trial court determines the property may be divided, it does so fairly and impartially with or without owelty. 735 ILCS 5/17-105 (West 2008). If the trial court finds the property cannot be divided without manifest prejudice to the parties' interests, it shall order the property sold and fix its value. 735 ILCS 5/17-105 (West 2008). Where appropriate, a court-ordered disinterested commissioner shall submit a report under oath as to whether the property is subject to division without manifest prejudice to the parties' rights and how the division may be made. 735 ILCS 5/17-106 (West 2008).

¶ 13 The purpose of a partition action is to sever the interests of property co-owners so that each party "may take possession of, enjoy and improve his separate estate at his own pleasure." *Davis v. Davis*, 128 Ill. App. 2d 427, 430 (1970). In a partition action, the law favors the division of land in kind as opposed to a division of proceeds from a sale of the land. *Harris v. Johnson*, 42 Ill. App. 3d 751, 754 (1976). When a property that may be divided results in a division of unequal shares, the trial court may order owelty to equalize the shares. *Harris*, 42 Ill. App. 3d at 754. The special

circumstances in a partition action may be considered by the trial court. *Harris*, 42 Ill. App. 3d at 754 (division into small parcels may not manifestly prejudice the parties where the parcels were useable, despite their small size); *In re Marriage of Mercer*, 117 Ill. App. 3d 377, 382 (1983) (right to partition not affected when property in question was family home in which minor children still resided). We will not reverse a trial court's determination on a complaint for partition unless it is against the manifest weight of the evidence. *Robinson v. North Pond Hunting Club*, 382 Ill. App. 3d 888, 892 (2008).

¶ 14 Gale's arguments that Meyers did not use the correct standard in analyzing the partition request and that the division was not fair or objective are without merit. Meyers testified that he was charged with determining whether the subject property could be partitioned without manifest prejudice to either party. He was provided copies of the applicable statutes to guide his determination. Gale objects to the definition of manifest prejudice offered by Meyers. The partition statute, however, does not define manifest prejudice and we find nothing improper in the definition offered by Meyers. Moreover, contrary to Gale's claims that Meyers felt compelled to divide the property, Meyers testified that he understood that if an equitable division of the property was not possible, he could recommend the property be sold and the proceeds divided per the parties' interests.

¶ 15 Meyers's recommended options to partition the property took into account the parties' interests in the property, as well as the attributes of the property. He considered the differences in soil type, analyses, taxes and income potential throughout the parcel. The trial court accepted Meyers's first option, which awarded the tillable part of the property to Gale and the timbered section of the property to Joshua. This division accounted for Gale farming the acreage and for Joshua to maintain his residence on the homestead portion of the property. That both parties sought the homestead

portion did not make the property incapable of partition or result in a manifest prejudice to either party. Both parties testified to their attachment to the homestead area. Gale grew up in the home while Joshua resided near the homestead at the time of the partition proceedings. We note that the homestead itself is dilapidated and uninhabited. Joshua improved the homestead portion of the property with a camper and garage-like structure and by clearing timber. Gale was awarded the income-producing tillable land, which he farmed. Awarding the homestead to Joshua did not manifestly prejudice Gale.

¶ 16 Gale relies on *Wright v. Wright*, 131 Ill. App. 3d 46, 48-49 (1985), as support that partition resulted in manifest prejudice. Like the instant property, the properties in *Wright* were comprised of differences in improvements, soil types and values. *Wright*, 131 Ill. App. 3d at 48. However, *Wright* is distinguished in that 13 people there had varying interests in the property and partition would have required numerous easements and caused drainage problems. *Wright*, 131 Ill. App. 3d at 48-49. Here, the property was divided into two parcels approximating the parties' ownership interests. Partition did not affect egress and ingress to either parcel or alter the drainage or other attributes of the property.

¶ 17 Lastly, Gale asserts that his expert's opinion recommending sale of the property should have been adopted and Meyers's recommendations rejected. Aside from asserting that Young is better qualified, Gale offers no valid objections to Meyers's report. The division of land is preferable to its sale and Meyers offered three viable options to divide the property. The trial court acknowledged that the division was not exactly proportionate to the parties' individual interests and properly ordered Gale to pay an owelty to Joshua to equalize the interests. We find that the trial court equitably partitioned the property according to its attributes and the parties' interests. Partition did not

manifestly prejudice the parties. The trial court's determination was not against the manifest weight of the evidence.

¶ 18 For the foregoing reasons, the judgment of the circuit court of Warren County is affirmed.

¶ 19 Affirmed.