NO. 4-10-0920 Order Filed 5/27/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

DONALD VOSS and JEROLD VOSS, Plaintiffs-Appellants, v. ALVIN VOSS and ARWIN VOSS, Defendants-Appellees.	)))))))	Appeal from Circuit Court of McLean County No. 08CH488 Honorable G. Michael Prall, Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

Held: The trial court had sufficient evidence to order an unequal division of land with payment of owelty.

On December 29, 2008, plaintiffs, Donald Voss and Jerold Voss, filed suit under sections 17-101 through 17-127 of the Code of Civil Procedure, sometimes referred to as the Illinois Partition Act (Act) (735 ILCS 5/17-101 through 17-127 (West 2006)), against their two siblings, defendants Alvin Voss and Arwin Voss, to partition or sell a parcel of land located in Livingston County (the Flanagan farm) and a parcel of land located in McLean County (the Chenoa farm). Following a partition bench trial, the trial court ordered that plaintiffs be awarded the 101-acre Flanagan farm and that defendants be awarded the approximately 237-acre Chenoa farm. Further, the court

ordered defendants to make payments of $193,851.25 to each plaintiff to equalize the division of the farms.

Plaintiffs appeal, arguing the trial court did not have sufficient evidence to order an unequal division of land with payment of owelty. We affirm.

As heirs and beneficiaries of the estates of Albert B. Rients and Donald H. Voss, plaintiffs and defendants held title as tenants in common to two separate land parcels located in Livingston County and McLean County. Plaintiff Donald Voss has lived on the 101-acre Flanagan farm for more than 30 years. Defendant Arwin Voss has farmed the approximately 237-acre Chenoa farm for more than 35 years and has lived on the farm for approximately 50 years.

On December 29, 2008, plaintiffs filed suit under the Act against defendants to partition or sell the Flanagan farm and the Chenoa farm.

On May 18, 2009, the trial court entered an agreed order appointing Jim Bous as commissioner "to investigate and report to the court in writing as to whether or not the subject real estate is subject to division or partition without manifest prejudice to the parties according to their respective rights and interests." The commissioner surveyed the property and prepared a written report for the court.

At the partition bench trial on August 9, 2010,

consistent with his report, the commissioner testified that the properties were incapable of equitable partition-in-kind between the four heirs. He stated that both properties contained numerous defects or faults requiring "considerable expense, time and effort" to cure. Further, to divide the properties would compound many of the problems relating to drainage and erosion which to cure would require "collective action and *cooperation* between the various landowners who may not all share common goals or objectives." (Emphasis in original.) The commissioner did not consider an award of one farm to plaintiffs and one farm to defendants because his "assignment" was to determine if the properties could be divided into four parcels. He agreed that the proposed award of one farm to plaintiffs and one farm to defendants could be accomplished with a "fair market value appraisal or some way to determine the value that was fair and equitable to the parties."

Defendants offered into evidence appraisals of the properties. Plaintiffs proposed that they be awarded one-half of each farm and defendants awarded the remaining one-half of each farm. Citing "so much animosity between all the kids," defendants proposed the plaintiffs be awarded the 101-acre Flanagan farm with owelty and that defendants be awarded the approximately 237-acre Chenoa farm.

In a letter ruling filed on August 11, 2010, the trial

court stated its belief that the award of one-half of each farm to plaintiffs and one-half of each farm to defendants "would not be equitable." The court reasoned, in part, that "close cooperation of all parties would be required to successfully farm adjacent parcels in each tract" and plaintiffs and defendants are "incapable of such cooperation."

On August 26, 2010, the trial court entered an order awarding plaintiffs the 101-acre Flanagan farm and defendants the approximately 237-acre Chenoa farm. Further, the court ordered defendants to make payments of $193,851.25 to each plaintiff to equalize the division of the farms.

On October 18, 2010, the trial court denied plaintiffs' motion to reconsider, and this appeal followed.

Plaintiffs argue only that the trial court lacked sufficient evidence to order an unequal division of land with payment of owelty. Specifically, plaintiffs argue that the commissioner failed to provide to the court "enough information as to why the land could not be divided in kind, other than he just thought the parties did not get along." We disagree.

Section 17-106 of the Act states:

> "The court in its discretion, *sua sponte*, or on the motion of any interested party, may appoint a disinterested commissioner who, subject to direction by the

court, shall report to the court in writing under oath as to whether or not the premises are subject to division without manifest prejudice to the rights of the parties and, if so, report how the division may be made." 735 ILCS 5/17-106 (West 2006).

If the trial court finds that a division can be made, "then the court shall enter further judgment fairly and impartially dividing the premises among the parties with or without owelty." 735 ILCS 5/17-105 (West 2006). "If the court finds that the whole or any part of the premises sought to be partitioned cannot be divided without manifest prejudice to the owners thereof, then the court shall order the premises not susceptible of division to be sold at public sale in such manner and upon such terms and notice of sale as the court directs." 735 ILCS 5/17-105 (West 2006). "The law favors a division of land in kind, rather than a division of proceeds from a sale of the land and, therefore, an unequal division with owelty is preferred over a sale of the premises." *Rothert v. Rothert,* 109 Ill. App. 3d 911, 916, 441 N.E.2d 179, 182 (1982).

In the present case, the commissioner's report and testimony provided the trial court with sufficient information to determine whether the land was susceptible to an equal division without manifest prejudice to the parties. The commissioner

testified that the properties were incapable of equitable partition-in-kind between the four heirs. He stated that both properties contained numerous defects or faults requiring "considerable expense, time and effort" to cure. Further, to divide the properties would compound many of the problems relating to drainage and erosion which to cure would require "collective action and *cooperation* between the various landowners who may not all share common goals or objectives." (Emphasis in original.) Although the commissioner did not consider an award of one farm to plaintiffs with owelty and one farm to defendants, he could "see no reason why that couldn't be accomplished."

The Act clearly provides that if the trial court finds that a division can be made, "then the court shall enter further judgment fairly and impartially dividing the premises among the parties with or without owelty." 735 ILCS 5/17-105 (West 2006). In this case, the court divided the premises among the parties with owelty, finding the award of one-half of each farm to plaintiffs and one-half of each farm to defendants "would not be equitable." The court reasoned, in part, that "close cooperation of all parties would be required to successfully farm adjacent parcels in each tract" and plaintiffs and defendants were "incapable of such cooperation." Based on the record in this case, the trial court had sufficient evidence to order an unequal division of land with payment of owelty.

For the reasons stated, we affirm the trial court's judgment.

Affirmed.