2013 IL App (4th) 121023-U

NO. 4-12-1023

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 6, 2013
Carla Bender
4th District Appellate
Court, IL

DANIEL L. WERNZ, Plaintiff-Appellant, v. ALBERT D. WERNZ, Individually; WILLIAM T. WERNZ, Individually; THE WILBUR ANTONE WERNZ RESIDUARY TRUST, By and Through DANIEL L. WERNZ, ALBERT D. WERNZ, and WILLIAM T. WERNZ, as Cotrustees; and WERNZ, LTD., Defendants-Appellees.	)	Appeal from Circuit Court of Clark County No. 11CH22 Honorable Tracy W. Resch, Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Appleton and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order finding defendants' rights of first refusal were triggered by plaintiff's prosecution of partition action is affirmed.

¶ 2 In May 2011, plaintiff, Daniel L. Wernz, filed a two-count complaint seeking partition of land he owns in common tenancy with defendants Albert and William Wernz (his brothers). As to the land at issue in count I, plaintiff and his brothers also share the land with the Wilbur Antone Wernz Residuary Trust (Trust). Plaintiff's parents devised the Trust and some of the land at issue in count II to him and his brothers subject to rights of first refusal. Defendants Albert and William filed a motion in the partition action to enforce their rights of first refusal. In September 2012, the trial court found plaintiff had "decided to sell his shares" of the land, thus

triggering the rights of first refusal. The court ordered plaintiff to sell his shares of the land subject to the rights of first refusal to Albert and William at an appraised value.

¶ 3 Plaintiff appeals under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010).

¶ 4 I. BACKGROUND

¶ 5 In May 2011, plaintiff filed a two-count complaint seeking partition of several tracts of land he holds in common tenancy with his brothers, defendants Albert and William. Plaintiff attached three exhibits to his complaint describing the tracts of land he seeks to partition. In count I, plaintiff seeks partition of three separate tracts of land described in exhibit A (Exhibit A land). In count II, plaintiff seeks partition of four separate tracts of land described in exhibit B (Exhibit B land) and three separate tracts of land described in exhibit C (Exhibit C land). Only the Exhibit A and Exhibit B land are at issue in this appeal because only that land is subject to rights of first refusal. The Exhibit C land (6.36 acres), which plaintiff and his brothers share equally as tenants in common, is not at issue.

¶ 6 Plaintiff and his brothers share the Exhibit A land in common tenancy with the Trust. The Exhibit B land is shared exclusively by plaintiff and his brothers as common tenants.

¶ 7 Plaintiff named Wernz, Ltd., operated by Albert and William, as a defendant because that company has farmed the land sought to be partitioned in this case. The rights of Wernz, Ltd., are not at issue in this appeal. Plaintiff, Albert, William, and the Trust's interests in the land are as follows.

¶ 8 A. The Exhibit A Land

¶ 9 Plaintiff seeks partition of the Exhibit A land, containing approximately 270 acres, which he holds in common tenancy with defendants Albert, William, and the Trust.

Plaintiff, Albert, and William each own an undivided, one-sixth share of the Exhibit A land. The Trust owns the other undivided, one-half share of the land.

¶ 10 Plaintiff, Albert, and William each hold an equal one-third beneficiary interest in the Trust and serve as cotrustees. As far as the record reveals, the Trust's only current asset is its share of the Exhibit A land, which was owned by Wilbur Wernz (plaintiff, Albert, and William's father) during his lifetime. Wilbur established the Trust through his last will and testament, which provides as follows:

> "I direct [my one-half share of the Exhibit A land] to be held in trust for a period of ten (10) years after my wife's death, during which time I direct shall be rented by said trustee to my sons, William Tommy Wernz and Albert Davidson Wernz as tenants *** and at the end of the ten (10) year period, I direct my said Trustee to distribute said land to my sons equally, share and share alike, per stirpes, provided however, that if any of my sons decide to sell their share of said land that they shall first give my sons who have farmed the land the first right of refusal to purchase the same at the same price that said son would be willing to accept from any other buyer." (Emphasis omitted.)

Wilbur died in 1995 and his wife, Ruby, died in 2008. By operation of Wilbur's will, the Trust is to terminate in 2018 and the Trust's one-half share of the Exhibit A land is to be distributed equally to plaintiff, Albert, and William to hold as tenants in common. If that happens, each brother will hold an equal, undivided, one-third share of the Exhibit A land as a tenant in

common.

¶ 11 To summarize the brothers' interests in the Exhibit A land, each brother holds (1) a one-third beneficial interest in the Trust's one-half share, (2) a one-third remainder interest in the Trust's one-half share, to vest in 2018, and (3) a direct, undivided, one-sixth share. Plaintiff and his brothers held their direct, undivided, one-sixth shares in the land prior to Wilbur's death, during which time Wilbur held the undivided, one-half share now held by the Trust.

¶ 12 B. The Exhibit B Land

¶ 13 In count II of his complaint, plaintiff seeks partition of the Exhibit B land, containing about 362 acres, which is held exclusively by him and his brothers in common tenancy. Ruby Wernz devised the Exhibit B land to plaintiff and his brothers, in equal shares, subject to the following restriction contained in her will:

> "If any party shall decide to sell their share of said land they shall first give my other sons the first right of refusal to purchase same at the same price they would be willing to accept from any other buyer."

¶ 14 C. Plaintiff's Complaint for Partition

¶ 15 Plaintiff's complaint sought partition of all the land described in exhibits A, B, and C. In his prayer for relief, plaintiff asked the trial court to, in pertinent part, (1) ascertain and declare the respective rights and interests of the parties in the land and (2) fairly divide and partition the real estate according to the parties' respective rights and interests. Plaintiff also made the following request in his prayer for relief:

> "If division or partition of the property, or any part of it,

cannot be made without manifest prejudice to the parties in interest, the property, or the part or parts of it that cannot be divided or partitioned, be sold by or under the direction of this Court[.]"

¶ 16 D. The Proceedings on Plaintiff's Complaint

¶ 17 In January 2012, the parties entered into a consent judgment for partition, which the trial court incorporated into a written order. In the judgment, the court (1) decreed the rights and interests of the parties in the land, as described above, (2) found plaintiff was entitled to partition, and (3) appointed Robert Crocker, a state-certified real estate appraiser with the firm Agri-Appraisal Company, as a commissioner to appraise the land "as in the case of partition under the provisions of the Illinois Compiled Statutes as applicable to partition of real estate." The court also ordered Crocker, in making his appraisal report, to allocate the land into equal shares proportionate in value to the parties' interests or, "if the premises cannot be so divided without manifest prejudice to the parties in interest," to so indicate in his report.

¶ 18 In a report dated March 2, 2012, Crocker provided the court with a 76-page report in which he, in pertinent part, (1) appraised the land in Exhibits A, B, and C—638.66 acres in all—at a value of $2,085,500, and (2) opined "a fair and equitable partition of said real estate is not practical nor possible." At Crocker's request, a professional forester submitted a separate appraisal for the marketable timber on the tracts.

¶ 19 In April 2012, plaintiff filed a motion for summary determination (see 735 ILCS 5/2-1005(d) (West 2010)) seeking a determination Albert's and William's rights of first refusal were not operative in a partition action. In his motion, plaintiff argued Crocker's conclusion "a

fair and equitable partition" was "not practical nor possible" meant the land would have to be put up for a public sale under section 17-105 of the Code of Civil Procedure (Code). 735 ILCS 5/17-105 (West 2010). That section provides, in pertinent part, as follows:

> "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 2010).

Plaintiff contended because Wilbur's and Ruby's wills provided a right of first refusal to be triggered when one of the sons "decide[s] to sell their share of said land," and the sale mandated under the Code is not a voluntary decision on plaintiff's part, Albert's and William's rights of first refusal were not triggered.

¶ 20 Along with his April 2012 motion for summary determination, plaintiff filed a motion for sale pursuant to section 17-105 of the Code (735 ILCS 5/17-105 (West 2010)), in which he sought "an Order of Sale, directing a public auction with an appropriately retained and appointed private auctioneer, charged with advertising, facilitating, and conducting an appropriate public auction." Defendants filed objections to plaintiff's motion.

¶ 21 In July 2012, the trial court held a hearing on plaintiff's motion for summary determination as to the rights of first refusal and his motion for sale. As to the rights of first refusal, the court found (1) the rights of first refusal were not extinguished by the partition action, (2) plaintiff decided to sell his share of the land, and (3) Albert and William had a right to

enforce their rights of first refusal. The court heard argument but did not rule on plaintiff's motion for sale. The court also ruled on an October 2011 motion plaintiff filed seeking summary determination as to the validity of the 10-year farming lease Wilbur granted to Albert and William in his will. In that motion, plaintiff argued Wilbur, as only one of four tenants in common, was without authority to unilaterally grant Albert and William a right to farm the Exhibit A land for 10 years after Ruby's death. The court agreed and granted the motion, thereby invalidating that provision of Wilbur's will.

¶ 22 Two days after the trial court ruled the partition action did not extinguish their rights of first refusal, Albert and William, through counsel, wrote a letter to plaintiff's counsel (1) informing her Albert and William were choosing to exercise their rights of first refusal and (2) proposing to purchase plaintiff's shares of the Exhibit A and Exhibit C land. As to the Exhibit A land, although Albert's and William's rights of first refusal apply only to the Trust's one-half share of the land—and not to plaintiff's direct, undivided one-sixth share—Albert and William proposed to purchase "all [plaintiff's] interests in the real estate, as beneficiary of the Wilbur Antone Wernz Trust or otherwise."

¶ 23 As defense counsel asserted in the letter, section 17-105 of the Code (735 ILCS 5/17-105 (West 2010)) authorizes the court to approve a public sale of land in a partition action at two-thirds the appraised value. Therefore, according to defense counsel, under the "willing to accept" language of Wilbur's and Ruby's wills, plaintiff established he was willing to accept two-thirds the value of his shares in the land by filing the partition action. Crocker appraised the total value of the Exhibit A land and the Exhibit B land, including timber, at $766,602 and $1,449,385, respectively. Based on that appraisal, one-third of the Exhibit A land was worth

$255,534 and one-third of the Exhibit B land was worth $483,128.33. Therefore, Albert and William offered to purchase plaintiff's shares for two-thirds of their appraised value: $170,356 for the Exhibit A land and $322,085.56 for the Exhibit B land. Plaintiff did not respond to the offer.

¶ 24 Following plaintiff's failure to accept their offer, Albert and William filed a motion to enforce their rights of first refusal, asking the trial court to order plaintiff to sell his shares pursuant to the terms of the offer. Meanwhile, plaintiff filed a motion to reconsider, asking the trial court to reverse its earlier determination that the rights of first refusal were operative in the partition action.

¶ 25 In August 2012, the trial court held a hearing on both motions. The court denied Albert and William's motion to enforce their rights of first refusal pursuant to the two-thirds offer and, based on their counsel's indication they might come back with another offer at the full appraised value, abstained from ruling on plaintiff's motion to reconsider.

¶ 26 Shortly after the August 2012 hearing, Albert and William, through counsel, sent a letter to plaintiff's counsel offering to buy plaintiff's shares for full appraised value. As to the Exhibit A land, however, Albert and William only offered to purchase what was covered by their rights of first refusal, namely "a 1/6 interest in the real estate held in trust for [plaintiff's] benefit." Accordingly, the new offer was $127,767 for plaintiff's one-third interest in the Trust's one-half share of the Exhibit A land, and $483,128.33 for plaintiff's one-third share of the Exhibit B land. Plaintiff did not respond to that offer.

¶ 27 In September 2012, Albert and William filed a second motion to enforce their rights of first refusal, this time asking the trial court to order plaintiff to sell his shares pursuant

to the terms of the most recent offer, as described above. The court held a hearing on that motion the same month. After hearing arguments from counsel, the court found as follows:

> "First, each right of first refusal is contingent upon a decision to sell. The decision to sell language in both rights of first refusal is for all intents and purposes the same. [Plaintiff's] prosecution of the partition action constitutes a decision on his part to sell the real estate, as that language is used in each of the rights of first refusal.
>
> ***
>
> The Court finds, secondly, that the price set by each right of first refusal is the 'same price,' that [plaintiff] would be willing to accept from another buyer.
>
> Thirdly, the fair market value determined by Mr. Crocker's appraisal represents a price which [plaintiff] would accept from another buyer in these partition proceedings.
>
> Fourthly, the Court finds that the argument is made that the Court should allow the real estate to be sold at public auction in which event it might bring a price in excess of fair market value or at least the price would more precisely reflect fair market value.
>
> Whether a better price would be obtained at public auction is, of course, speculative. There are two reasons, both based upon the substantive terms of the right of first refusal, why a public

auction should not be required. One, the right of first refusal does not contemplate a sale at the highest and best price, but only at a price that [plaintiff] is willing to accept and that figure is Mr. Crocker's fair market value appraisal. Secondly, a public auction would incur substantial expense, and the right of first refusal is designed to operate without the incurrence of the expenses of public auction and without the procedural burdens and notoriety of a public auction. The rights of first refusal are intended to effectuate a private sale in a simple and expeditious manner. A public auction is inconsistent with that obvious purpose.

Five, in view of the Court's ruling today, *** [plaintiff] is given 14 days within which to move in writing to dismiss or withdraw the partition action. If he does not so act within 14 days, then and in that event, he is directed to complete the sale of real estate not later than Friday, October 26, 2012.

Sixth, the Court finds that the mathematical calculation of values set forth in [Albert and William's second offer] have not been contested and are hereby adopted by the court as the sale price of each tract, to which the right of first refusal applies."

Shortly thereafter, the court entered its written order incorporating the aforementioned findings. That order only applied to (1) plaintiff's interests in the Trust's share of the Exhibit A land and (2) plaintiff's direct, one-third share of the Exhibit B land. The order did not dispose of plaintiff's

claims regarding (1) his and his brothers' direct, one-sixth shares of the Exhibit A land or (2) his and his brothers' direct, one-third shares of the Exhibit C land.

¶ 28 This appeal followed.

¶ 29 II. ANALYSIS

¶ 30 Plaintiff appeals from the trial court's order granting defendants Albert and William's second motion to enforce their rights of first refusal, asserting the court erred in (1) applying the rights of first refusal applicable to the Trust's share of the Exhibit A land, (2) finding the rights of first refusal were triggered by plaintiff filing and prosecuting the partition action, and (3) ordering plaintiff to sell his shares of the land to Albert and William without a public auction. Before addressing plaintiff's specific contentions of error, however, we must first determine whether this court has jurisdiction to hear the appeal.

¶ 31 A. Jurisdiction

¶ 32 "A reviewing court has an independent duty to consider issues of jurisdiction, regardless of whether either party has raised them." *People v. Smith*, 228 Ill. 2d 95, 104, 885 N.E.2d 1053, 1058 (2008). Because the trial court's September 2012 order did not dispose of plaintiff's claims regarding (1) his and his brothers' direct, one-sixth shares of the Exhibit A land or (2) his and his brothers' direct, one-third shares of the Exhibit C land, the appeal before us is from a final judgment not disposing of the entire proceeding. Illinois Supreme Court Rule 304 (eff. Feb. 26, 2010) confers jurisdiction upon the appellate courts to hear appeals from certain final judgments that do not dispose of the entire proceeding.

¶ 33 Although both parties agree this court has jurisdiction over the present appeal, they disagree as to the source of our jurisdiction. Plaintiff argues jurisdiction lies in Rule 304(a)

and the trial court's written finding, "This Order shall become final and appealable on October 9, 2012," is sufficient to confer jurisdiction under that rule. Defendants Albert and William assert jurisdiction lies in Rule 304(b)(1). Because we find Rule 304(a) provides jurisdiction, we need not address whether Rule 304(b)(1) does as well.

¶ 34 Under Rule 304(a), a party may appeal from a final judgment not disposing of the entire proceeding "only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both." Ill. S. Ct. R. 304(a) (eff. Feb 26, 2010). That rule further provides, "In the absence of such a finding, any judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable." Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). The record in this case contains no express written finding comporting with the requirements of Rule 304(a). The written order, prepared by defense counsel and signed by the trial court, states, "This Order shall become final and appealable on October 9, 2012." The docket entry corresponding to the date of the hearing states, in pertinent part, "this order will become final Oct. 9, 2012 if partition is not withdrawn."

¶ 35 The First District described the necessity of an express written finding as follows:

> "A circuit court's declaration that an order is 'final and appealable,' without reference to the justness of delay, or even reference to immediate appealability, evinces no application of the discretion Rule 304(a) contemplates. [Citation.] Instead, absent some other indication from the record that the court intended to invoke Rule 304(a) (see *Coryell v. Village of La Grange*, 245 Ill.

App. 3d 1, 5[, 614 N.E.2d 148, 151] (1993) (noting that court was not asked to make a Rule 304(a) finding and that Rule 304(a) was not referenced in the court's order)), a circuit court's declaration that an order is 'final and appealable' amounts to nothing more than a non-binding interpretation." *Palmolive Tower Condominiums, LLC v. Simon*, 409 Ill. App. 3d 539, 544, 949 N.E.2d 723, 728 (2011).

¶ 36 Despite the lack of an express written finding "that there is no just reason for delaying either enforcement or appeal or both," as required by Rule 304(a), our review of the transcript of the hearing on defendants' second motion to enforce their rights of first refusal convinces us the trial court intended to invoke Rule 304(a). At the conclusion of the hearing, after the court announced its ruling and directed defense counsel to prepare a written order, the following exchange occurred:

"[THE COURT:] Well, [defense counsel], when do you believe the effective date of this judgment is for purposes of appeal? I ask the question because, obviously, I'm giving [plaintiff] 14 days, and then I'm giving the parties until October 25 to close. I don't want anybody misled or to misunderstand what the effective date is for purposes of appeal.

[DEFENSE COUNSEL]: I don't purport to know those things off the top of my head, Your Honor. It is a probate case, it is my understanding that any order can be reconsidered until the

case is over. I think if [plaintiff's counsel] wants to appeal or someone wants to appeal it, they would need a 301 [*sic*] finding.

THE COURT: Any observations?

[PLAINTIFF'S COUNSEL]: If I could suggest, Your Honor, I think with the 14 days to withdraw, I think if he does not, in fact, act on that within 14 days, then on that 15th day it would be become [*sic*] a final and appealable order with respect to 304(a) because then at that point that would mean that he's conceded that they would move towards closing within so many days and that order would then be taking effect.

Now, if we were going to appeal, we would have to put our notice on between then and any closing and ask that that part of it be stayed, but if we could enter something in the docket that shows that on that 15th day ***, then the order would become a final and enforceable order for purposes of appeal pursuant to 304(a).

THE COURT: [Defense counsel], what do you think about that?

[DEFENSE COUNSEL]: I am fine with whatever [plaintiff's counsel] wants to do because I assume she's the one that is going to do the appealing. I don't want to mislead somebody and say I know what I'm talking about.

THE COURT: I'm going to find and direct that the order

contain the language that the court considers this a final and appealable order as of October 9, 2012.

[DEFENSE COUNSEL]: I will put that in there."

¶ 37 Although the trial court's written finding did not expressly mention justness of delay or immediate appealability or enforceability, the written finding did state the order "shall become final and appealable *on October 9, 2012*." (Emphasis added.) The inclusion of that date in the written finding demonstrates the court's clear intent to allow an appeal on that date, without delaying until the disposition of the entire proceeding. Additionally, plaintiff's counsel clearly stated in open court she intended to appeal from the order, if at all, under Rule 304(a). The court's commentary evinced its desire to accommodate such an appeal. Moreover, the court's order, which required plaintiff to either withdraw his complaint or sell his shares within a certain number of days, created a ticking clock scenario that justified appellate review before the case moved forward. The court was well aware of this, and its written finding, as well as its discussion with the parties' counsel, demonstrated its intent to allow an appeal from the order pursuant to Rule 304(a). See *Palmolive Tower Condominiums, LLC*, 409 Ill. App. 3d at 544, 949 N.E.2d at 728. Accordingly, we have jurisdiction over the appeal pursuant to Rule 304(a) and proceed to the merits.

¶ 38 B. The Standard of Review

¶ 39 At issue in this case is the interpretation of (1) case law, (2) the language in Wilbur's and Ruby's wills creating the rights of first refusal, and (3) certain provisions of the Code pertaining to the partition of real estate. The trial court heard no testimony and its decision was based entirely on the pleadings, written documentation admitted into evidence, and the

arguments of counsel. Accordingly, our review is *de novo*. See *In re Estate of Overturf*, 353 Ill. App. 3d 640, 642, 819 N.E.2d 324, 327 (2004); *State Bank of Cherry v. CGB Enterprises, Inc.*, 2013 IL 113836, ¶ 22, 984 N.E.2d 449.

¶ 40 C. The Trial Court Properly Determined Plaintiff "Decided to Sell" His Shares of the Land

¶ 41 Plaintiff asserts the trial court erred in determining he had "decided to sell his share" of the land subject to the right of first refusal when he filed and prosecuted his complaint for partition. Specifically, plaintiff contends any sale ultimately occurring as a result of his filing the complaint was involuntary on his part because the Code mandates a sale of the land when the court determines "division cannot be made without manifest prejudice to the owners." See 735 ILCS 5/17-105 (West 2010). Defendants Albert and William cite the language of the court's finding plaintiff decided to sell by "filing *and prosecuting*" (emphasis added) the partition action, arguing plaintiff established his decision to sell by not only filing the complaint but also (1) filing a motion for sale in the partition action and (2) declining to withdraw his complaint after an equitable partition was deemed impossible. We agree with the trial court and conclude plaintiff decided to sell his shares of the land subject to the rights of first refusal.

¶ 42 The language in both Wilbur's and Ruby's wills provides the rights of first refusal are triggered if any of the sons "decide to sell their share of said land." Under Wilbur's will, the farming sons, Albert and William, possessed the right of first refusal. Under Ruby's will, all three sons possessed the right of first refusal. In construing the language of a will, the court's primary objective is to ascertain the intent of the testator, which the court will effectuate if not contrary to law or public policy. *Citizens National Bank of Paris v. Kids Hope United, Inc.*, 235

Ill. 2d 565, 574, 922 N.E.2d 1093, 1097 (2009). The intention of the testator is to be ascertained by examining the entire will and by giving to the words employed their plain and ordinary meaning. *Harris Trust & Savings Bank v. Donovan*, 145 Ill. 2d 166, 172, 582 N.E.2d 120, 123 (1991).

¶ 43 Here, even if plaintiff's mere filing of the complaint for partition did not constitute a decision to sell his shares of the land, the manner in which he prosecuted the complaint demonstrated his decision to sell. We are unpersuaded by plaintiff's claim section 17-105 of the Code (735 ILCS 5/17-105 (West 2010)) rendered a sale outside of his control and involuntary on his part. After Crocker reported an equitable partition of land was not practical or possible, plaintiff was the only party empowered to prevent a judicially ordered sale. His only two options at that point were to proceed in the litigation toward a sale or withdraw his complaint and revert to the status quo. Plaintiff decided to take the former course of action and filed a motion for sale, requesting a public auction of the land. If plaintiff, in filing his complaint for partition, sought only a partition of the land and not a sale, he would have withdrawn his complaint once partition was no longer an option. His failure to do so constituted a decision to sell.

¶ 44 D. The Trial Court Properly Applied the Rights of First Refusal to the Trust's Share of the Count I Land

¶ 45 Plaintiff asserts the trial court erred in ordering him to sell his one-third interest in the Trust's one-half share of the Exhibit A land. Plaintiff contends Albert's and William's rights of first refusal are not operative until the Trust terminates and distributes its share of the land to the brothers in 2018, 10 years after Ruby's death. At that time, each brother's beneficial interest in the Trust's share of the land will be converted into a direct, undivided, one-sixth share of the

land. Only then, according to plaintiff, may Albert and William enforce their rights of first refusal, should plaintiff then decide to sell his one-sixth share of the Exhibit A land obtained from the Trust. Defendants Albert and William argue plaintiff's interpretation renders their rights of first refusal meaningless and defeats Wilbur's clear intent to keep the land in the family. We agree with defendants.

¶ 46 "If possible, the court should construe the will or trust so that no language used by the testator is treated as surplusage or rendered void or insignificant." *Harris Trust & Savings Bank*, 145 Ill. 2d at 172, 582 N.E.2d at 123. With this and the aforementioned principles of construction in mind, we turn again to the language of Wilbur's will creating the rights of first refusal:

> "At the death of my wife, Ruby Davidson Wernz, I direct my Trustee to distribute the Trust Estate to my children, William Tommy Wernz, [plaintiff], and Albert Davidson Wernz, share and share alike, per stirpes, with the exception, however, of my land used in farming which I direct to be held in trust for a period of ten (10) years after my wife's death, during which time I direct shall be rented by said trustee to my sons, William Tommy Wernz and Albert Davidson Wernz as tenants upon such terms and conditions as my Trustee shall deem fair and proper and at the end of the ten (10) year period, I direct my said Trustee to distribute said land to my sons equally, share and share alike, per stirpes, provided however, that if any of my sons decide[s] to sell their share of said

land that they shall first give my sons who have farmed the land the first right of refusal to purchase the same at the same price that said son would be willing to accept from any other buyer." (Emphases omitted.)

¶ 47 We conclude Wilbur's intent was (1) to keep the land in the family and, (2) to the extent he placed his one-half share of the land in trust, to guarantee Albert and William the right to farm the land for 10 years after Ruby's death. However, as mentioned earlier, the trial court determined Wilbur was without authority to grant Albert and William a right to farm the land for 10 years after Ruby's death without plaintiff's consent. See *Daugherty v. Burns*, 331 Ill. App. 3d 562, 570, 772 N.E.2d 237, 243-44 (2002). Albert and William have not contested that ruling. Wilbur's intent, to the extent he placed his one-half share of the land in trust rather than simply devising it to the sons in equal shares subject to a right of first refusal, has been defeated.

¶ 48 It remains possible to effectuate Wilbur's intent to keep the land in the family. In applying the rights of first refusal, it is not contrary to law or public policy to construe plaintiff's "share of said land," as that language is used in Wilbur's will, to include plaintiff's current interests in the Trust's share of the Exhibit A land, despite those interests not including legal title. Those interests include (1) a current one-third beneficial interest in the Trust's one-half share of the land and (2) a remainder interest in an undivided, one-sixth share of the land as a common tenant. A remainder interest is "[t]he property that passes to a beneficiary after the expiration of an intervening income interest." Black's Law Dictionary 1319 (8th ed. 2004).

¶ 49 Because plaintiff moved for a public sale of the entirety of the Exhibit A land, plaintiff's proposed course of action would essentially liquidate his beneficial and remainder

interests in the Trust's share of the land. We therefore conclude plaintiff decided to sell both his beneficial and remainder interests in the Trust's share of the land. Additionally, because a sale would eliminate plaintiff's beneficial income derived from the Trust's one-half share of the land, the price plaintiff would be willing to accept for his one-third beneficial and remainder interests in the Trust's share is equivalent to one-sixth the value of the Exhibit A land. The court properly ordered plaintiff to sell his interests in the Trust's share of the Exhibit A land for $127,767.

¶ 50 E. The Trial Court Did Not Err in Ordering Plaintiff To Sell His Shares Directly to Albert and William at the Appraised Value

¶ 51 Plaintiff asserts the trial court erred in determining he was willing to accept the appraised value for his shares and ordering him to sell those shares to Albert and William at their appraised value. Specifically, plaintiff contends his filing of the complaint for partition indicated, if anything, he was willing to accept the price his shares would receive at a public auction, because that is the only method of sale the Code contemplates. See 735 ILCS 5/17-105 (West 2010). Plaintiff claims, regardless of the presence of the rights of first refusal, the Code mandates the land be sold at a public auction. We disagree.

¶ 52 The Code provides for a public sale of land sought to be partitioned when the trial court determines the land "cannot be divided without manifest prejudice." 735 ILCS 5/17-105 (West 2010). Plaintiff argues the court should have ordered a public sale and allowed Albert and William to exercise their rights of first refusal by matching the highest bid. However, that procedure is contrary to the language of Wilbur's and Ruby's wills, which provide the price be ascertained by determining the amount plaintiff "would be willing to accept from any other buyer." Because plaintiff formally sought a sale under procedures of the Code that would have

allowed the court to approve a sale at two-thirds the appraised value, the court properly determined plaintiff was willing to accept the appraised value.

¶ 53 Plaintiff asserts the price he would be willing to accept from any other buyer can only be ascertained by holding a public auction. His assertion is based on the false premise he would have a choice of whether to accept or decline the final bid. In Illinois, a sale by auction is typically complete when the "auctioneer so announces by the fall of the hammer or in other customary manner." 810 ILCS 5/2-328(2) (West 2010). In a judicial sale, "[t]he final acceptance is made by the court, not the crier of the sale, and the bid remains an offer only until confirmation of the crier's acceptance by the court." *Well v. Schoeneweis*, 101 Ill. App. 3d 254, 258, 427 N.E.2d 1343, 1346 (1981). Accordingly, if the final bid on the land was at least two-thirds the appraised value, the court could approve the sale and make it final pursuant to section 17-105 of the Code (735 ILCS 5/17-105 (West 2010)) without consulting plaintiff and giving him the opportunity to accept or decline the final price. By this token, the price plaintiff "would be willing to accept" can be ascertained by the mere fact plaintiff is "willing" to consent to an auction. We reject plaintiff's contention an auction must actually be held to ascertain the price he would be willing to accept.

¶ 54 III. CONCLUSION

¶ 55 For the foregoing reasons, we conclude the trial court properly (1) applied the rights of first refusal to the Trust's share of the Exhibit A land, (2) found the rights of first refusal were triggered by plaintiff filing and prosecuting the partition action, and (3) ordered plaintiff to sell his shares of the land to Albert and William without a public auction.

¶ 56 Affirmed.