2011 IL App (5th) 100021-U

NO. 5-10-0021

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

LINDA GURLEY, Plaintiff-Appellant, v. TRUMAN MERRIMAN, JR., Individually, AGNES E. DUNN, Individually, TRUMAN MERRIMAN, JR., and AGNES E. DUNN, as Cotrustees of the Violet B. Merriman Revocable Living Trust, TRUMAN MERRIMAN, JR., and AGNES E. DUNN, as Trustees of the Violet B. Merriman Non-Marital Trust, and AGNES E. DUNN, as First Successor Independent Executor of the Estate of Violet B. Merriman, Deceased, Defendants and Counterplaintiffs-Appellees, v. LINDA GURLEY and Unknown Owners and Nonrecord Claimants, Counterdefendants-Appellants.	)	Appeal from the Circuit Court of Johnson County. No. 03-P-19 Honorable Joseph Jackson, Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Chapman and Justice Stewart concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court's finding that a partition would result in manifest prejudice pursuant to the Code of Civil Procedure (735 ILCS 5/17-105 (West 2008)) was against the manifest weight of the evidence.

¶ 2 As part of a probate proceeding in the circuit court of Johnson County, plaintiff, Linda

Gurley, filed a petition for the partition of certain real estate. Defendants–Truman Merriman, Jr., individually, Agnes E. Dunn, individually, Truman Merriman, Jr., and Agnes E. Dunn, as cotrustees of the Violet B. Merriman Revocable Living Trust, Truman Merriman, Jr., and Agnes E. Dunn, as trustees of Violet B. Merriman Non-Marital Trust, and Agnes E. Dunn, as first successor independent executor of the estate of Violet B. Merriman, deceased–filed a petition for sale. After a hearing, the circuit court entered an order granting defendants' petition to sell. On appeal, plaintiff raises issues regarding whether the finding that a partition would result in manifest prejudice is against the manifest weight of the evidence.

¶ 3 We reverse and remand with directions.

¶ 4 FACTS

¶ 5 The focus on appeal is whether the court should have ordered the partition of a family farm instead of ordering the sale of the property as a whole. This invites a brief discussion of the family history and transfers of the property prior to the probate proceedings.

¶ 6 Truman Merriman, Sr., and Violet Merriman entered into the bonds of matrimony and grew old together. During the course of their marriage, the Merrimans owned and farmed a 305-acre tract of land that is the subject of this litigation. Four children were the product of their union. One child predeceased her parents. The three surviving children–plaintiff Linda Gurley, and defendants Truman Merriman, Jr., and Agnes E. Dunn–are parties to this litigation.

¶ 7 In 1999, Truman and Violet conveyed the farm to two trusts–the Violet Merriman Revocable Trust and the Truman Merriman, Sr. Revocable Trust. Each trust received an undivided half-interest in the real estate. Upon the passing of Truman in 2002, the real estate in the Truman Merriman, Sr. Revocable Trust was conveyed by trustees to the Violet Merriman Non-Marital Trust. Violet passed in 2003.

¶ 8 On October 10, 2003, the probate action for the estate of Violet was opened. On

December 31, 2007, plaintiff filed a complaint for the partition of the subject 305 acres of real estate. On May 14, 2008, the other surviving siblings–Truman Merriman, Jr., and Agnes E. Dunn–filed an answer and a counterclaim for a partition. In their answer, defendants requested that the court partition the property according to their respective interests and that, if a fair and impartial partition could not be made without manifest prejudice, the real estate be sold by an order of the court. In the counterclaim, defendants asked for similar relief and the joinder of other parties, including unknown owners and nonrecord claimants.

¶ 9 The court appointed a commissioner by the agreement of the parties. On June 29, 2009, the commissioner issued a report. The commissioner's report described the property and issued an appraisal. The commissioner valued the property as a whole at $762,500. The commissioner discussed both selling the entire tract of 305 acres as a whole and partitioning the property into three separate parcels. The commissioner reported as follows:

> "Obviously the easiest way to divide the property is to simply award each party 100 acres +/-. However, this poses some problems due to the various terrains and access points of the entire property. The southern and western areas of the tract had clear access to Lick Creek Road on two sides, while the northeast corner of the property has limited accessibility, but has approximately $26,600 of marketable timber. (This is approximately 20 inches at chest height).
>
> Due to the unique nature of the entire Johnson County area, there appears to be no difference in the value of crop land, pasture land and woodland. This is due to the fact that the recreational value of various tracts in the area are considered to be identical to the cash value for the tracts."

The report then discussed whether a plat of subdivision would have to be created if the property was partitioned and the lack of value for road access in nearby properties. The report continued as follows:

"**There are now two possible conclusions**.

(1) One would be to simply sell the entire tract. This presents a problem to the actual family members. Outside buyers would certainly be present for this type of sale. Family members risk the distinct possibility that they would lose control of the entire farm tract. If the consideration is simply cash to the sellers, then an outright sale would be the best outcome for this court action.

(2) However, if the outcome is the allow for the family members to maintain control over the property, albeit in a form that will still be controversial, then an actual split could be done. The deeded legal descriptions for the tracts note 305 acres +/-. Without a tremendous cost of surveying, this can be achieved with the available legal descriptions." (Emphasis in original.)

The report then discussed the potential breakdown into three parcels. Parcels 1 (100 acres) and 2 (101.25 acres) had direct road frontage, with parcel 1 having a perceived higher value due to more road frontage. The report noted for both of these parcels the need for an easement to allow access to portions of a section contained in parcel 2 and parcel 3. Parcel 3 had road access along the south side along with the actual gate and a pond. This parcel appeared to have the most valuable timber.

¶ 10 The report concluded as follows:

"**Outside of a total sale, I recommend that the farm be partitioned in the above noted manner**. There is a minor difference in acreage amounts. However, the overall value is considered to be very similar in nature. The only true cost of this partition would be an actual survey to delineate the actual corner markers." (Emphasis in original.)

¶ 11 On August 17, 2009, defendants filed a petition to sell the real estate. The petition alleged as follows:

"4. The Commissioner's report was filed on or about June 29, 2009, providing that the best avenue available to the parties is for the sale of the entire piece of property. The report further provides that while partition is possible, it would be at great monetary expense to the parties for surveys and engineering costs required to subdivide the land into three sections."

The petition requested an order directing the property to be sold at auction and the proceeds divided equally.

¶ 12 On October 23, 2009, the court held a hearing on the petitions. The two witnesses at the trial were the commissioner and plaintiff. Plaintiff testified that she lives on 40 acres located across the road from what the commissioner described as parcel 1 in his report. Plaintiff testified that she desired parcel 1, one of the two parcels that would be subject to an easement under the commissioner's proposal.

¶ 13 The commissioner testified to the contents of his report. He stated that the farm could be divided into three parcels of substantially equal size and value:

"Q. [Attorney for plaintiff:] [Commissioner], I believe in your report you state that you make the finding that the overall value of the tracts after partitioned is considered to be very similar in nature. What did you mean by that?

A. Well, one of the indications that was brought up initially by all of the parties was the amount of road frontage on some of the tracts. That perhaps some of the road frontage would have a greater value that they would–than the ones that did not have road frontage. We took into account, and it's in the reports, some of the small land tracts would be available for sale that had sold traditionally that indeed have a higher price per acre of those. But in order to do that, in order to sell those type of tracts, you would have to enter into an extensive surveying system. Perhaps, depending on the size of the tracts, five acres or less, you would have to get into the

Illinois Subdivision Act, Illinois Plat Act, which is fairly extensive and fairly expensive in order to do that. I just believe that the cost of the timber would outweigh any possible potential increase in value of the land along the roads. We were just trying to get it as close as we can to easily divide, and I believe that was the method–that was what the actual appraisal question what was to get it as closely as possible.

Q. Do you feel that you've accomplished that?

A. Yes, I do.

Q. And that these three tracts are substantially similar in value?

A. Yes, I do.

Q. Your recommendation favored partition in kind, did it not?

A. That is correct."

¶ 14 The commissioner testified that in his recommendation he called for easements to be located in parcels 1 and 2 to benefit parcels 2 and 3:

"Q. [Attorney for plaintiff:] And why would you have these easements?

A. There is a drainage ditch down through the northern area of that property that would allow access across those tracts to get to those portions.

Q. Is that–

A. You can see the county has a general outline of the drainage ditch down through here. This would simply allow access to the top parts of those without having to build some type of bridge."

¶ 15 On cross-examination, the commissioner testified that he did not separately appraise the value of the each partitioned parcel:

"Q. [Attorney for defendants:] You testified to the value of the grounds as a whole. On your appraisal did you go into what each different parcel, Parcel 1, 2 or

3[,] would be worth in this instance?

A. I did not separate them out because it–I did not separate them out.

Q. But it's your testimony today that each acre of that three hundred and five acre tract would be worth roughly the same amount of money?

A. Very similar, yes.

Q. As the tract as a whole?

A. As the tract as a whole.

Q. So couldn't it be a different amount if each section is divided up into three parcels?

A. If you got down into smaller acres, perhaps, in the twenties, thirties and forty acres, perhaps you might. But I did not find any of those sales to be substantially different."

¶ 16 On December 18, 2009, the circuit court entered an order granting defendants' petition to sell and ordering that the real estate be placed for sale or auction:

"5. The Court rejects the Commissioner's Report to the extent the Commissioner proposes the division in kind regarding Tracts 1, 2, and 3. The Court notes the unique nature of each parcel of real estate and concludes that requiring an easement across Tract 1 for egress to the northerly portion of Tract 2 and 3 and an easement across Tract 2 for egress to the northerly portion of Tract 3 demonstrates the unequal and unique attractiveness of each tract of real estate. The Commissioner's Report notes the different soil types, land terrain, and uniqueness of each parcel of property and the unique income-producing capability of each parcel of real estate. The Court concludes, therefore, that a division in kind would result in manifest prejudice that could not adequately be remedied by an award of owelty."

¶ 17 Plaintiff appeals.

¶ 18 ANALYSIS

¶ 19 The Code of Civil Procedure (Code) provides in part as follows:

> "§ 17-105. Judgment. The court shall ascertain and declare the rights, titles and interest of all the parties in such action, the plaintiffs as well as the defendants, and shall enter judgment according to the rights of the parties. After entry of judgment adjudicating the rights, titles, and interests of the parties, the court upon further hearing shall determine whether or not the premises or any part thereof can be divided among the parties without manifest prejudice to the parties in interest. If the 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. 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 2008).

¶ 20 The trial court erred by not partitioning the property. The court noted several factors in the commissioner's report that supposedly ran counter to the proposal for a partition. As a question of fact, the trial court's findings are not supported by the commissioner's report, so the order for sale was against the manifest weight of the evidence. An alternative explanation for the result reached by the trial court lies not in the weighing of evidence, but in the erroneous application of the Code. As a matter of law, the court failed to properly apply the standard for manifest prejudice.

¶ 21 The record does not support the judgment of the trial court. This court defers to the judgment of the trial court regarding property valuation unless it is against the manifest weight of the evidence. *In re Estate of Lambrecht*, 375 Ill. App. 3d 865, 871, 874 N.E.2d

170, 176 (2007); see *Wright v. Wright*, 131 Ill. App. 3d 46, 49, 475 N.E.2d 556, 559 (1985). A finding is against the manifest weight of the evidence when the opposite result is clearly evident or if the court's finding is unreasonable, arbitrary, or not based on the evidence in the record. *Best v. Best*, 223 Ill. 2d 342, 350, 860 N.E.2d 240, 245 (2006). The finding that a partition would be prejudicial was against the manifest weight of the evidence.

¶ 22 The court erred by rejecting the findings of the commissioner that supported a partition. The commissioner reported that the value of the three proposed parcels was "very similar in nature." He reported that the various uses of the parcels for crop land, pasture land, and woodland were similar and that the partition could be effectuated without a tremendous cost in surveying. The weight of support for a partition is evident from the conclusion of the commissioner's direct testimony:

> "Q. [Attorney for plaintiff:] Given the fact that you conclude that all this acreage has a value of twenty-five hundred per acre and your parcels are all roughly the same in acreage, does that lead you to conclude that they are roughly similar in value?
>
> A. I still believe that they would be roughly similar in value, yes.
>
> Q. And they can be divided into three equal portions, this real estate?
>
> A. In a substantially similar manner, yes."

¶ 23 Instead of addressing the findings of the commissioner, the trial court began its analysis by stating that it rejected the report "to the extent the Commissioner proposes the division in kind regarding Tracts 1, 2, and 3." In summarily rejecting the findings of the commissioner that supported a partition, the court pointed to other aspects of the report. The court stated that the commissioner's proposed easements "demonstrates the unequal and unique attractiveness of each tract of real estate." The court added that the proposed parcels had different soil types and land terrain and unique income-producing capabilities. From

this, the court rejected the commissioner's proposal and held that a partition would result in manifest prejudice.

¶ 24 The differing topography is a distinction without substance. The court noted that the commissioner found that the soil types and terrain ranged across the farm resulting in different best uses for the proposed parcels. This, however, does not weigh against a partition. The commissioner reported, "[T]here appears to be no difference in the value of crop land, pasture land and woodland." Thus, the commissioner concluded that each proposed parcel had substantially the same value.

¶ 25 Likewise, the recommended easements do not impede the granting of a partition. Easements are a part of a partition commissioner's toolbox. As was stated in *Allendorf*:

> "Defendants' contention that the purported easement is invalid must be first resolved. Their contention that the partition commissioners had no jurisdiction to create an easement is not valid. It was and is a partition commissioner's primary duty to make fair and impartial partition if possible, quantity and quality considered, and if not so possible to appraise and fix the value of the lands. In order to equalize allotments of land which is incapable of exact or fair division, they clearly may charge one portion with an easement in favor of another portion. (68 C.J.S., sec. 142, p. 233). Although it is true that neither the commissioners nor the court in a partition suit have any power to fix building lines or other restrictions merely because they believe the value of the property will be thereby best served, yet the opinion of this court so holding at the same time clearly indicates that certain restrictions may be so imposed in a proper case, if necessary, to make the partition fair and impartial. (*Warren v. Sheldon*, 173 Ill. 340.) Clearly the commissioners and court had the power, as such, to burden one portion of the partitioned estate with an easement in favor of another portion if necessary to provide a fair and impartial partition, and the

partition decree attacked in this suit is not void for want of power or jurisdiction." *Allendorf v. Daily*, 6 Ill. 2d 577, 587, 129 N.E.2d 673, 679 (1955).

¶ 26 The record does not indicate any prejudice from the easements. Defendants did not testify, nor did they present any evidence indicating a diminution in value or impediment of use from the easements. See, *e.g.*, *Wright v. Wright*, 131 Ill. App. 3d 46, 49, 475 N.E.2d 556, 559 (1985) (a commissioner recommended against a partition into 13 parcels with numerous easements creating drainage problems); *Kawszewicz v. Kawszewicz*, 385 Ill. 461, 468, 53 N.E.2d 386, 389 (1944) (the approval of a commissioner's recommendation that developed property should not be partitioned). The commissioner testified that all three parcels would have road access but that two of the parcels would benefit from an easement that would allow the bypass of a drainage ditch running through the northernmost tract of each parcel. The commissioner did not indicate any decrease in value or impediment of use inherent to the creation of these easements. Ultimately, the commissioner reported that the properties would have substantially the same value after the easements. No alternative testimony was presented.

¶ 27 In rejecting the commissioner's proposal, the court pointed to aspects of the report that it asserted went against the proposal. Nonetheless, the record does not demonstrate prejudice arising from the varying topography or proposed easements. The court's finding that a partition would be prejudicial is against the manifest weight of evidence.

¶ 28 As a matter of law, the court's order was based on an errant interpretation of the Code. The court premised its decision on the "unequal and unique attractiveness of each tract of land." Neither uniqueness nor equality of property is the test.

¶ 29 The court found that the easements and the different uses of the property demonstrated the property's uniqueness. This is a misnomer. Uniqueness is a superlative term. A tenet of property law is that all real estate is unique. *Ashline v. Verble*, 55 Ill. App. 3d 282, 284,

370 N.E.2d 613, 615 (1977); 81 C.J.S. *Specific Performance* § 76 (2001).

¶ 30 Similarly, the trial court found that the parcels were unequal. The record does not support this finding. The proposed partition passes all but the most exacting test for equality. Unless equality is interpreted as synonymous with identical, these properties fit under the definition of equal. As the commissioner reported, each partition was similar in size and substantially the same in value. This was uncontroverted. Given that all real estate is unique and none is identical, the commissioner proposed a partition that is for all practical purposes equal.

¶ 31 The applicable standard is manifest prejudice. See 735 ILCS 5/17-105 (West 2008). This standard diverges from the sameness sought by the trial court. The question of manifest prejudice derives from equity. As was stated in *Harris*:

> "In a partition action, the law favors a division of land in kind, rather than a division of proceeds from the sale of the land. A sale under partition is proper only where the division of the premises cannot be made without manifest prejudice to the rights of the interested parties. (*Peck v. Peck* (1959), 16 Ill. 2d 268.) When property is susceptible to partition in kind, but the shares of the partition are not equal, the court may award owelty to equalize the shares taken in the partition. (*Cooter v. Dearborn* (1886), 115 Ill. 509, 4 N.E. 388; *Stegeman v. Smith* (4th Dist. 1966), 67 Ill. App. 2d 451.) It is apparent, therefore, that what the law favors is an equitable, but the necessarily equal, division of property, with the possible award of owelty to attempt to equalize the interests of the parties. In determining whether division can be made without manifest prejudice to the rights of parties, it is proper to consider the special circumstances which we find in the instant case, that the owners of the undivided interest in Outlot 19 owned the lots adjacent to Outlot 19 on opposite sides of the lot. While a division of property into small parcels may at times work prejudice

to rights of parties (*Phillips v. Phillips* (1900), 185 Ill. 629), such division would not be so prejudicial as to deny partition in kind, if the distributed parcels are usable by the parties." *Harris v. Johnson*, 42 Ill. App. 3d 751, 754, 356 N.E.2d 1107, 827 (1976).

¶ 32 The Code calls for a partition unless it results in manifest prejudice. 735 ILCS 5/17-105 (West 2008). The commissioner reported that the proposed partition called for parcels that were substantially similar in value. The record is devoid of any evidence of prejudice to the parties from this proposal, nor is there any indication that the partition offends the principles of equity.

¶ 33 Accordingly, the order of the circuit court of Johnson County is hereby reversed, and the matter is remanded with directions that the court proceed to fulfill the requirements for a partition under the Code (735 ILCS 5/17-105 (West 2008)).

¶ 34 Reversed; cause remanded with directions.