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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas
Charles M. Watson Jr., Special Referee

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Appellate Case No.: 2024-000162

Related Appellate Case No.: 2023-001143

Lower Case No.: 2022-CP-36-00326

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Lena Sue Yarborough ..... Appellant,

v.

Joel F. Yarborough, III ..... Respondent.

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# INITIAL BRIEF OF RESPONDENT

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## STATEMENT OF THE ISSUES ON APPEAL

I. *Did the Special Referee err in finding that Appellant failed to carry the burden of proof that her proposal would result in a fair and equitable outcome for both parties even though she presented expert testimony that the proposed subdivision would result in no pecuniary injury to either party?*

II. *Did the Special Referee finding to partition the property by allotment improperly weigh the competing testimony and evidence submitted by the parties or lessen Respondent's burden when challenging Appellant's proposed subdivision of the property?*

III. *Did the Special Referee fail to adopt the testimony of Appellant's expert witness as to the weight to be assigned to relevant factors, such as the differences in topography and the access over certain portions of a tract, when Respondent did not challenge the expert's valuation of the property nor offer a competing expert witness?*

## STATEMENT OF THE CASE

This appeal arises out of a partition action filed by Appellant Lena Sue Yarborough ("Appellant") against her brother, Respondent Joel F. Yarborough III ("Respondent"), concerning three properties in Newberry County and one tract in Fairfield County, after the death of their mother, Bonnelle G. Yarborough. Appellant challenges the Special Referee's holding that the Fairfield tract cannot be fairly and equitably subdivided and ordered the property to be partitioned by allotment with sole ownership to Respondent upon payment to Appellant for her share of the fair market value of the property that was stipulated to by both parties.

On August 19, 2022, Appellant brought this case in Newberry County, seeking to partition four properties. Both Appellant and Respondent testified at the hearing on September 7, 2023. Additionally, Plaintiff called two real estate appraisers and Ben Royer, a registered forester and real estate appraiser. Michael Mannel owns Green Forest Land and Timber and Southern Pine Logging and works as "a wood dealer, a logger, a timber buyer and an operator, a machine operator," (Tr. at 240:11-13). Mannel has an associates degree in forestry from Allegheny College of Maryland. (Tr. at 240:19-25). Mannel stated he is a friend of Respondent (Tr. at 249:8), and personally familiar with the Fairfield tract (Tr. at 249:11-13), testified on behalf of Respondent. "I've walked every acre of it." (Tr. at 249:13).

Following the contested hearing, the Special Referee found that the Fairfield Tract could not be partitioned in kind and ordered it be allotted to Respondent upon payment to Appellant

of $171,966.67. (Partition Order).[1] The Special Referee subsequently denied Appellant's Rule 59(e), SCRCP, motion by Order dated February 2, 2024. (Order Den. Mot. to Recons.) and Appellant filed this appeal.[2]

## STANDARD OF REVIEW

A partition action is an equitable action and the appellate court may review the evidence to determine facts in accordance with its own view of the preponderance of the evidence. Zimmerman v. Marsh, 365 S.C. 383, 386, 618 S.E.2d 898, 900 (2005); Anderson v. Anderson, 299 S.C. 110, 382 S.E.2d 897 (1989); Doe v. Roe, 323 S.C. 445, 475 S.E.2d 783 (Ct. App. 1996). Laughon v. O'Braitis, 360 S.C. 520, 524-25, 602 S.E.2d 108, 110 (Ct. App. 2004); Dorchester County Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 477 S.E.2d 476 (Ct. App. 1996).

The appellate courts review all questions of law de novo. E.g., Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008). Review of the trial court's factual findings, however, depends on whether the underlying action is an action at law or an action in equity. See Townes Assocs. Ltd. v. City of Greenville, 266 S.C. 81, 85-86, 221 S.E.2d 773,

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[1] The Parties agree that they are co-tenants of the Fairfield Tract, with Respondent owning a 22/36 (61.1%) undivided interest and Appellant a 14/36 (38.9%) interest. (Pl.'s Mot. for Summ. J.); (Def.'s Mot. for Summ. J). Also, during the hearing, both parties stipulated that the fair market value of the Fairfield tract was $442,200.

[2] Appellant filed a separate appeal relating to the Parties' respective ownership interests in a different property subject to this action under appellate case number: 2023-001143, on which the Special Referee had ruled in a previous order granting summary judgment on May 25, 2023, and which is currently pending in the Court of Appeals.

775-76 (1976) (setting forth standards of review to apply in actions at law and actions in equity). Fesmire v. Digh, 683 S.E.2d 803, 385 S.C. 296 (S.C. App. 2009).

The keystone is that the partition action must be fair and equitable to all parties. Zimmerman, supra, at 386, 900; Pruitt v. Pruitt, 298 S.C. 411, 380 S.E.2d 862 (Ct. App. 1989).

## ARGUMENT

This is an action to partition property governed by § 15-61-10 of the S.C. Code (2016), et seq., as amended. A partition action is an equitable action. Anderson , supra. The final relief must be fair and equitable to all parties of the action. Pruitt v. Pruitt, 298 S.C. 411, 414, 380 S.E.2d 862, 864 (Ct. App.1989).

Respondent answered Appellant's Complaint that the properties "should be equitably partitioned, in kind, where possible." Defendant's Answer, Paragraph 9; Defendant's Amended Answer, Paragraph 10. At the hearing, Respondent requested the Special Referee to partition the Fairfield tract by allotment as a division in kind of this tract would result in injury to one of the co-tenants and would not be fair and equitable given the unusual improvements, shape and topography of the property.

When the court determines that the right to partition property has been demonstrated, there are generally three procedures for granting appropriate relief, including divisions in kind, by allotment or by judicial sale. This is set out in § 15-61-50, which provides that "[t]he court of common pleas has jurisdiction in all cases of real and personal estates held in joint tenancy

or in common to make partition in kind or by allotment to one or more of the parties upon their accounting to the other parties in interest for their respective shares or, in case partition in kind or by allotment cannot be fairly and impartially made and without injury to any of the parties in interest, by the sale of the property and the division of the proceeds according to the rights of the parties."

A partition in kind is the physical division of the property into distinct physical tracts held under separate and distinct titles. § 15-61-320(9).

A partition by allotment is the grant of ownership to one or more of the parties conditioned on a payment to the other party. § 15-61-320(7).

A partition by sale is a judicial or private sale of the property, either at auction, sealed bids or in the open market. § 15-61-320(8).

An in kind partition is the judicially preferred remedy, while a partition by sale is the outcome of final resort. "This Court has previously stated that partition in kind is favored when it can be fairly made without injury to the parties." Anderson, supra, at 114, 899; See also Zimmerman, supra, at 901 ("we find the master erred by finding a judicial sale was appropriate. Because a value could have been placed on the property at the time of trial, Marsh's request for a partition by allotment should have been granted.")

Accordingly, the analysis begins with whether property is divisible in kind. Zimmerman lays out a few initial consideration, including the size, shape, and location of the property. Other relevant factors to consider when determining whether real property can be partitioned

in kind are set out in § 15-61-390(A), and include (1) whether the land can be practically divided between the co-tenants; (2) would the division diminish the value of the land; (3) the duration of ownership or possession by a co-tenant, (4) sentimental attachments, (5) the lawful use of the property and any harm to a co-tenant if the same use was not continued, (6) the degree of upkeep a co-tenant has contributed to the property, (7) and any other factors, although no single issue is dispositive.

The Special Referee's final order reflects a thoughtful consideration of all of the relevant factors, problems, benefits, advantages, disadvantages and desired outcomes raised by the co-tenants of the Fairfield property.

I. The greater weight of the evidence and testimony presented at the hearing supports the Special Referee's finding that the proposed partition in kind of the Fairfield tract would not be fair and equitable to both co-tentants.

The Special Referee found that he could not partition the Fairfield tract in kind in such a way that would be fair and equitable to both parties.

The tract at issue has its own unique factors that make a partition in kind untenable. Although it is a larger tract (143 acres), it has four dissimilar physical features. The northeastern portion (which Appellant sought to cut off for herself), is the flattest, most desirable section. (Partition Order, at 4). In fact, Royer testified over sixty (60%) of Tract B is usable by federal (USDA) guidelines. (Tr. at 287:1-5). On the other hand, Tract A on the western side of the property, (slated to go to Respondent) has approximately 15% usable acreage, (Tr. at 286:18-25)

including only one area where a structure could be located. (Tr. at 228:2-6). The existing right-of-way road on the property is almost entirely located within Appellant's proposed Tract B. (Tr. at 107:3-6).

Respondent and Mannel testified that the physical challenges of Tract A include that there are three very prominent gullies that cannot be crossed by a typical roadway. (Tr. at 147:8-13). The only current roadway on Tract A is a skid-trail that runs along the western property line and around the gullies. (Tr. at 142:20-24). Mannel also noted that the highway adjoining the property is approximately six feet higher at Tract A and located on a curve of the highway which could severely restrict access by logging trucks onto the property. (Tr. at 278:20-23). The skid-trail on Tract A ends where a gully makes the soil too wet for vehicles and the two creeks are in soft-soil areas. (Tr. at 268:5-11). Mannel testified that the roadways beside the creeks is virtually impassable because of the soft soil and logging best management practices prohibit the construction of a road that runs parallel to a body of moving water. (Tr. at 267:4-7; 268:20-22).

Finally, the property located on the south-side of the creeks is extremely steep as demonstrated by the topography maps, (Tr. at 139:17-21) and has no productive economic value other than as recreational hunting property. (Tr. at 255:19-257:6).

Royer acknowledged that his proposed property division was difficult to create because of the unusual topography of the tract as a whole (Tr. at 158:2-10; 152:1-2 "There's no perfect solution to this.") and acknowledged that he resorted to creative ideas in making his designs.

A: Yes, It's an irregular shape. There's different access. This

is a very– I struggled for a long time trying to find a good way to subdivide this property.

Q: And I think you testified that you had to use creative principles.

A: I mean, yeah. Yeah. I drew a lot on different shapes and analyzed it with the different topographies. Yeah. This isn't an easy tract. I look at, you kno, just dividing it by the creek, but that didn't come up to an equitable distribution.

(Tr. at 158:11-23)

Royer agreed that many of Respondent's concerns about the proposed property division were valid. (Tr. at 158:2-4) He testified that he believed Tract A was the more desirable of the two proposed tracts because of its larger size. (Tr. at 158:1-2) However, there is only approximately 82 acres of land north of the creeks, and Appellant's proposed subdivision plan assigns 48 acres of it to her, (Pl. Subdiv. Plan Ex. 19) despite her 38% interest in the tract as a whole. Appellant's proposal would allocate just shy of sixty percent (58.5%) of the most accessible and advantageous property to her. (Tr. at 255:19-257:6)

Mannel testified that if the property were owned 50/50 by two co-tenants, Tract B is clearly the preferred cut. (Tr. at 269:19-22) However, Respondent would be injured by this selection. It would be inequitable if the cost to Respondent for choosing the undisputed preferred tract (Tract B) was to give up forty (40) additional acres that he would have to give up if the Special Referee were compelled to accept Appellant's subdivision.

Because the Fairfield tract cannot be equitably partitioned in kind, the Special Referee

determined that an allotment of the property is the proper procedure for partitioning it and that Respondent should take sole ownership of the property upon payment to Appellant for her interest.

Respondent offered to purchase Appellant's interest in the Fairfield tract based on Appellant's proposed fair market value of the property, and which was stipulated to by both parties. When both co-tenants have comparatively equitable claims, the proper relief to be granted hones down to deciding a fair economic division of the property. "[E]quitable considerations such as the length of ownership and sentimental attachment to property may be considered in a partition action, but the pecuniary interests of all of the parties is the determining factor in deciding whether to require a judicial sale or to allow a partition by allotment." Campbell v. Jordan, 675 S.E.2d 801, 382 S.C. 445 (S.C. App. 2009).

The Special Referee's order reflects Respondent's long-term physical presence on the property and improvements to the property made by him, as discussed below. "The rule appears well settled in this state that the right of a cotenant in possession of the common property to be reimbursed for improvements made by him, or in the partition to have the portion of the land improved by him allotted to him, is exceptional, and to maintain it the improving tenant must establish: (1) That he was in possession under an honest belief of ownership; or (2) that to disallow his claim would be inequitable; and (3) that the allowance would result in no inequity to the interests of his cotenants.' Shumaker v. Shumaker, 234 S.C. 421, 426, 108 S.E.2d 682, 685.

The Fairfield tract cannot be partitioned in kind in such a way that both parties would

receive equitable and beneficial results. Royer conceded Respondent's valid objections that the best land on the tract would go to Appellant under her plan (Tract B), leaving Respondent a tract that is inaccessible in several locations because of the several creeks, steep hills and gullies. Mannel testified that it is physically impossible to construct a road-way on Tract A that would have the reach and stability of the existing right-of-way.

In fact, Respondent and Mannel testified that they have both personally designed, maintained, and worked on the property for over twenty years and many of the improvements, including the roadway, are there because of years of sweat equity and effort by the two. "Compensation in money or by allotment of the improved portion of the common property to the improving tenant 'is allowed not as a matter of legal right but purely from the desire of a court of equity to do justice and to prevent one tenant from becoming enriched at the expense of another.' Shumaker, supra, at 426, 685." Few v. Few, 242 S.C. 433, 131 S.E.2d 248 (S.C. 1963).

Respondent testified that he believed the Fairfield tract should be partitioned by allotment and offered to buy out Appellant's 3½/9 interest based on the agreed upon fair market value, with Appellant's interest valued at $171,888.89 based on her 38.889% ownership of this tract which as a whole has a fair market value of $442,000.00.

In this case, there was no reason for the Special Referee to consider the final possible avenue for relief, a judicial sale, as neither party sought this relief. Because the fair market value is agreed upon, the Special Referee had no reason to consider whether the property should be sold. "Because a value could have been placed on the property at the time of trial, Marsh's

request for a partition by allotment should have been granted." Zimmerman, supra, at 901.

Therefore, if a partition in kind is ruled out, a partition by allotment is the next best available remedy.

II. The Special Referee's decision to apportion the Fairfield tract by allotment is supported by the facts of this action and firmly grounded in the controlling legal precedents even if not specifically requested in the pleadings.

Section 15-61-370 authorizes a co-tenant to buy the interest of the other co-tenant on request, with the value of the entire parcel multiplied by co-tenant's fractional ownership. Both parties stipulated that the value of the Fairfield tract has a fair market value of $442,000. While neither party may have met the technical requirements of § 15-61-25(A) to compel a pretrial buy-out, section 15-61-370 recognizes a similar method of providing for a buy-out when the Court determines that a partition by allotment is the proper remedy.

Before ruling, the Special Referee sought further guidance from the parties on several legal questions, including (1) whether the Special Referee had the authority to order the property sold if not specifically requested in the pleadings; (2) whether the property must be marketed and sold at auction to the public as an open sale; (3) Respondent's proposed offer to purchase the property from Appellant; (4) and whether the Special Referee should dismiss the partition action if the court found that the property cannot fairly be divided in kind. As to the last interrogatory, neither party sought to dismiss the proceeding.

An equitable review of multiple factors is the prescription for the Special Referee who

must decide whether to allot the property to a co-tenant once the Special Referee determines that a partition in kind is not practical. It is well settled that in a partition action, equity is the measure and the court is charged with reaching a just result that is fair and equitable to both parties and does not cause injury to either party. There are several enumerated factors set out in § 15-61-390(A), namely (1) whether the land can be practically divided between the co-tenants; (2) would the division diminish the value of the land; (3) the duration of ownership or possession by a co-tenant, (4) sentimental attachments, (5) the lawful use of the property and any harm to a co-tenant if the same use was not continued, (6) the degree of upkeep a co-tenant has contributed to the property, (7) and any other factors, although no single issue is dispositive. § 15-61-390(B).

While the first factor addresses whether the property can be partitioned in kind, the remaining factors apply to either an in kind or partition by allotment. Balancing the above factors and the preferred order of possible remedies, the Special Referee decided that partition by allotment was the proper remedy that would afford both parties an equitable outcome, at least as near as possible for this property.

The Special Referee has the express authority to order the property or properties sold, under any procedure laid out in § 15-61-320(8)(auction, sealed bids or open market sale) even if the relief is not requested in the pleadings. The South Carolina statutes governing an action to partition real property provide considerable flexibility to the court. If the court finds that a partition by sale is proper, the court is not limited to any particular type of sale, and

§15-61-320(8) of the Code authorizes auctions, sealed bids or open market sales, nor does the statute foreclose other possible equitable sales. Respondent's offer to purchase Appellant's interest is relevant to both the issues of allotment and the uncertainty of expanded remedies.

Appellant submits the proposition that the Special Referee lacks the authority to partition the Fairfield tract by allotment because Appellant believes that Respondent did not specifically request a partition by allotment. In his Answer and Amended Answer, Respondent admitted that the properties "should be equitably partitioned, in kind, where possible (emphasis added)." Defendant's Answer, Paragraph 9; Defendant's Amended Answer, Paragraph 10. The phrase "where possible" would lead a reasonable person to reflect on the statute's scheme of authorizing several myriad outcomes and remedies. In practice, partition actions are well established proceedings and it beggars the belief that the parties were oblivious to the many well established remedies available. Respondent denies Appellant's assertion that his Answer does not incorporate or in inconsistent with a finding of partition by allotment.

Appellant provides a slimmed-down citation to Zimmerman, supra. but eschews the ultimate holding in which the appellate court implicitly acknowledged that the relief granted in the case at bar is available in a partition action when allotment is the preferred procedure for partition. In fact, the majority in Zimmerman noted the Court could waive the requirement for strict technical compliance with this section when equity is served. Supra, note 2 at 901. Appellant offers no court decision that repudiates Zimmerman, other than to opine that the Rules of Civil Procedure are inflexible.

Respondent's answer notwithstanding, the Special Referee directed Appellant to her own pleadings where she sought a "partition in kind or by allotment" in the Complaint. Order on Motion to Reconsider, at 2.

Appellant claims to have been deprived of the opportunity to cross-examine Respondent and his witness or present other testimony or evidence as to the proper remedy. However, this is inconsistent with the voluminous record and liberal opportunities the Special Referee afforded to both parties to be heard and present their claims.

III. The Special Referee was not required to adopt Appellant's expert witness proposed plan to partition the property, nor did the Special Referee's rejection of Appellant's proposed plan to divide the Fairfield property lend credibility to any reasonable inferences that the Special Referee shifted the burden of proof and persuasion from Appellant to Respondent.

Appellant argues that the Special Referee should have accepted the testimony of the expert witness Royer and adopted his proposed plan for subdivision of the property because Respondent did not offer a countervailing expert witness or proposed subdivision of the property. Appellant overlooks well-established canons rejecting the proposal that an expert witness has an unassailable credibility enhancement when weighed against other (lay) witnesses. This argument echoes those set out and rejected in Terwilliger v. Marion, 222 S.C. 185, 188; 72 S.E.2d 165, 166 (1952), holding that the fact that testimony is not directly contradicted does not render it undisputed because questions may be raised on the inherent

probability of the testimony and the credibility of the witness.

It is well established that the trial court is in the best position to weigh the testimony of all of the witnesses. "As with lay witnesses, "[e]valuating the credibility of experts and the value of their opinions is a function best committed to the [trial court], and one to which appellate courts must defer,..." United States v. Bolander, 722 F.3d 199 (4th Cir. 2013).

Moreover, Appellant recognizes the special attention that the Special Referee accorded to Royer's testimony, noting the "'very granular (and impressively thorough) analysis of the different components of the property which contribute or detract from the values of different portions,' 'very detailed information' regarding the physical features of the property including its timber, and a 'very detailed appraisal.'" (Partition Order, at 2-3). Appellant fails to address the carefully delineated reasons set out by the Special Referee that mitigated against accepting Royer's proposed subdivision.

At the conclusion of the hearing, the Special Referee found that Appellant failed to carry her burden of proof that her proposed division was fair and equitable. The Special Referee found that Royer attempted to divide the property in an equitable fashion, "[h]owever . . . even with the granularity and detail of Mr. Royer's proposed division, (Appellant) has failed to meet her burden of proof that her proposed division is fair and equitable. Partition Order, at 3-4. The Special Referee detailed several reasons of concern about Appellant's proposed subdivision, including that "all of the high, flat ground [would go to Appellant] and (Responsent) "portion of the tract would consist of a lot of gullies and creeks;" a quarter of Respondent's portion would

be hardwood trees on the other side of a creek, and the location of the improved road on Appellant's piece and problems with setting a road across the gullies and creeks. Partition Order, at 4. The Special Referee observed that he "considered variations for dividing the property in which each party would receive a relatively equal portion of the high ground and the areas with gullies and creeks, using the detail provided by (Royer). However, . . . I have not been able to come up with an equitable way to do so." Partition Order, at 5.

The Special Referee noted that as a result of the partition, one or both of the co-tenants would eventually be left not owning the property. Respondent offered to pay the fair market value to Appellant and the offer was adopted by the Special Referee. Partition Order, at 5.

in both the Partition Order and the Order Denying Appellant's motion for reconsideration, the Special Referee identified, discussed and weighed all of the competing relevant factors before finding that the unique physical and topographic features of this particular property weighed against Appellant's proposed plan of subdivision.

The Special Referee's order reflects a thoughtful consideration of the competing issues in record presented at the hearing as a whole and did not unduly weigh any one consideration, including the viability of the timber and logging plans for the property. The Special Referee, an able and well-seasoned practitioner of law, issued what he believed to be the best possible ruling in this partition action based on his view of the preponderance of the testimony and exhibits offered at the hearing and the carefully reasoned and detail-oriented order of the Special Referee deserves considerable deference.

Finally, Appellant challenges the undue weight assigned by the Special Referee to the value of timber on the property, and specifically, to concerns about the access to the timber for harvest. However, the Special Referee rejected this claim and observed that he "chose to give the comparative topographies greater weight than (Royer) did." Order on Motion to Reconsider, at 2.

## CONCLUSION

The Special Referee did not err by finding Appellant failed to meet her burden of proof and persuasion that her proposed subdivision of the Fairfield Tract was fair and would not harm either or both parties, and the order clearly identifies the proper factors he considered and explained his findings in minute detail.

The Special Referee held that partition of the Fairfield tract by allotment between the co-tenants was the proper relief and that both parties had ample opportunities during the hearing, and after, to make full and meaningful presentations to the court. The Court should defer to the Special Referee's well written and fully supported justifications and affirm the order partitioning the Fairfield Tract by allotment which fairly and equitably benefits both without a pecuniary injury to either.

Respectfully submitted,

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