STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

John K. DuBose, III, Special Referee

Trial Court Case No. 2011-CP-28-073
Appellate Case No. 2014-001012

Albert H. Hough, individually and as Personal Representative of the Estate of Harold W. Hough and as Personal Representative of the Estate of Elizabeth P. Hough; George J. Hough and Angela Hough ..... Respondents,

v.

Richard Wesley Hough, Joel Pitts Hough, and Mary Louise Robinson ..... Defendants,

Of whom Richard Wesley Hough is the ..... Appellant,

And

Joel Pitts Hough and Mary Louise Robinson are ..... Respondents.

Respondents Albert Hough's, George Hough's and Angela Hough's Initial Brief

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STATEMENT OF ISSUE ON APPEAL

Does S.C. Code Ann. § 15-61-25 (Supp. 2013) operate to compel a partition sale by the petitioning co-owner to a non-partitioning co-owner when the petitioning co-owner seeks a partition in kind and the real property at issue can be fairly partitioned in kind?

STATEMENT OF THE CASE

This partition action was filed in January, 2011. It involves five siblings, Albert, George, Richard, Joel and Mary Louise, and Albert's spouse, Angela. Albert, George and Angela are co-Plaintiffs. Joel is incapacitated and is represented by his attorney/guardian ad litem, and Mary Louise is in default. (Affidavit of Default). The action involves eight parcels of unimproved land (mostly a combination of timberland and pastureland) totaling approximately 1,289 acres, the respective interests in which were received by the siblings from their parents via gifts and inheritance. (Second Amended Complaint- Exhibit A.)

The Respondents (Petitioners below) seek a partition in kind. (Second Amended Complaint, First Cause of Action.) In the pretrial phase of the case no party sought a partition by sale. All parties, according to the issues joined by the pleadings, admitted, or admitted by default in the case of Mary Louise, that the land can be fairly partitioned in kind. (Second Amended Complaint, p. 2, ¶ 7; and Appellant Richard Hough's Answer, p. 3, ¶ 7). Trial was set to begin on Monday, May 12, 2014. (Amended Notice of Trial.) On Friday, May 2, 2014, Appellant filed and served a notice, pursuant to S.C. Code Ann. § 15-61-25 (Supp. 2013) that he was interested in purchasing the land that is the subject of the partition action. (Notice of Interest). On May 5, 2014, Respondents herein (Plaintiffs below) filed and served

their Motion to Disallow or to Strike Defendant Richard Hough's Section 15-61-25 Notice of Interest in Purchasing Property, and for Expedited Hearing. (Motion to Disallow.) By consent, the hearing on Respondents' Motion was conducted by conference call on May 6, 2014. By Order dated May, 7, 2014 the trial court held that S.C. Code Ann. § 15-61-25 (Supp. 2013) is not available to a tenant in common when the land can be fairly partitioned in kind and that Richard had not shown to the Court that partition in kind was not practicable or expedient. (Order dated May 7, 2014.) Appellant's Notice of Appeal was filed and served on May 8, 2014.

STANDARD OF REVIEW

Partition is an equitable action. Anderson v. Anderson, 299 S.C. 110, 382 S.E.2d 897 (1989). However, the interpretation of a statute is a matter of law that is reviewed *de novo* by an appellate court. Perry v. Bullock, Op. No. 27419 (S.C.Sup.Ct. filed July 16, 2014.)

STATEMENT OF THE FACTS

The parties (Albert, Richard, George, Joel and Mary Louise) are siblings, children of Harold and Elizabeth Hough. Plaintiff Angela Hough is Albert's wife. Real property obtained by the parents during their marriage was gradually gifted to the children in various fractional interests over many years. The vast majority of the title to the real property had been transferred to the children prior to the parents' deaths in 2011 (Elizabeth died on March 16, 2011, and Harold died on April 2, 2011), but small undivided interests remained in the names of the parents. Albert is the personal representative of the probate estates of the parents.

As a result of the lifetime gifts and the testamentary devises, 100% of the titles to various properties passed to the parties herein in various undivided interests.[1] The Respondents' Second Amended Complaint seeks to have the real property tracts partitioned-in-kind to the co-owners (Second Amended Complaint, First Cause of Action) and to have Appellant answer in money damages for damage to the Pine Farm real property. Specifically, Respondents seek damages stemming from Appellant's course of conduct in using a bulldozer to dig six-foot-deep trenches through the property and placing locked gates along the roadways to block access to portions of the property. (Second Amended Complaint, Second Cause of Action; Exhibits D-1, D-4, D-6 and D-15) The cause of action for injunctive relief was the subject of pre-trial injunction orders that are not a subject of this appeal.

Portions of the real property at issue were utilized by the parties' parents as a farm. Over the years, Respondent Albert Hough has used portions of the real property for raising his own cattle. (Deposition of Albert Hough, p. 7, ll. 3-15) He returned full-time to Kershaw County in 2006. (Deposition of Albert Hough, p. 6, ll. 13-15) After that time, Respondents Albert and Angela Hough have spent substantial amounts of time tending their cattle on the farm property. (Deposition of Angela Hough, p. 11, l. 3 - p. 12, l. 7) Appellant has lived in Charlotte, North Carolina continuously since 1981. (Deposition of Richard Wesley Hough, p. 10, ll. 5-15)

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[1] Any Title to the real property owned by the parents on the dates of their deaths immediately passed to the persons to whom title was devised, subject to rights of the personal representative to use the property for the purpose of estate administration. S.C. Code Ann. § 62-3-101.

Defendant Joel Hough is incapacitated, and attorney Scott Rankin has been appointed to act as Joel's attorney and guardian-ad-litem. Joel does not object to a partition-in-kind that partitions a fair and equitable share of real property to him.

Defendant Mary Louise Robinson is in default. (Affidavit of Default.)

In his Amended Answer to Second Amended Complaint, dated April 10, 2014, which includes counterclaims and cross claims, Defendant Richard Hough agreed and admitted that the real property parcels at issue are divisible in kind. (Amended answer, ¶ 7.) His first counterclaim has been withdrawn and dismissed. His second counterclaim/first cross claim against Joel, alleges that the Plaintiffs and Joel have used some of the cotenancy property for a cattle business without his consent and without having paid compensation to him for the use of his cotenancy interest. In his third counterclaim/second cross claim against Joel, Defendant Richard Hough seeks an accounting of the rents and profits derived by Plaintiffs and by Joel from their use of the cotenancy property as a cattle business. These issues are likewise not involved in this appeal.

Only days before the commencement of trial, Richard filed and served a notice, pursuant to S.C. Code Ann. § 15-61-25 (Supp. 2013), that he was interested in purchasing the land that is the subject of the partition action. (Notice of Interest.) The trial court concluded and ordered that S.C. Code Ann. § 15-61-25 (Supp. 2013) did not provide purchase rights to Richard under the facts of this case. (Order dated May 7, 2014.)

ARGUMENT

Nature of partition remedy. Rule 71, SCRCP, provides two procedures for partitioning real property: (1) issuing a writ of partition appointing commissioners to report

to the Court, Rule 71(f)(1), SCRCP, and (2) allowing the trial judge to take testimony in the customary manner of hearings and decide the issues without resort to a writ of partition. This case utilized the second procedure.

A partition action is equitable. Anderson v. Anderson, 299 S.C. 110, 382 S.E.2d 897 (1989). Partition in kind is favored when it can be fairly made without injury to any of the parties. Id.

In general, a trial court may partition jointly held property in kind, by allotment or by sale. Brown v. Brown, 402 S.C. 202, 740 S.E.2d 507 (Ct. App. 2013), citing S.C. Code Ann. § 15-61-50 (2005).

S.C. Code Ann. § 15-61-50 reads:

> The 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.

To be more precise, case law applying § 15-61-50 has identified four specific methods for partitioning property: partition in kind (divide the property among all owners); partition by sale (sell the entire property and divide the proceeds of sale); partial allotment (allot a portion of the property to one of the owners with the remainder to be held jointly by the other owners or sold with the proceeds to be divided among the other owners); and total allotment (allot the entire property to one of the joint owners and require that person to pay a sum assessed by the Court to the other owners). Marsh v. Zimmerman, 365 S.C. 383, 618 S.E.2d 898 (2005) and authorities cited therein. Marsh predated the enactment of S.C. Code

Ann. § 15-61-25 (Supp. 2013) as addressed below.

Partition of distinct parcels. Where there are several parcels, owned by different parties in different fractional interests, the whole of the parcels may be treated as one estate for the purpose of making division and allotment where no injustice results. 68 C.J.S. Partition § 133(e) (1998). There is no requirement that each parcel must be divided in accordance with the fractional interests of the parties or even that each party receive a share of each parcel. The parties are entitled to receive an equitable share of the whole of the properties. Id.

Appellant's Argument. Appellant's brief argues only that the plain language of S.C. Code Ann. § 15-61-25 compels a sale of the entire property to a nonpetitioning co-owner, without regard to the type of partition sought by the petitioning co-owner, without regard to the nature of the property to be partitioned and whether the property can be fairly partitioned in kind. According to this reasoning, a nonpetitioning co-owner, with sufficient assets to purchase the entire property, can compel all other co-owners, who want to own land rather than receive a check, to sell their interests, even if the property can be fairly partitioned in kind and dispensing with the law that places the burden of proof (to show that partition in kind cannot be fairly made) on the nonpetitioning party who seeks to have the property sold. It is not surprising that Appellant's brief does not mention, much less address, S.C. Code Ann. § 15-61-50 and its body of case law.

Interaction of S.C. Code Ann. § 15-61-25 and § 15-61-50. Effective May 25, 2006, S.C. Code Ann. § 15-61-25 was enacted in response to the use of traditional partition law to force sales of "heir property." The Center for Heirs Property Preservation in Charleston, SC

defines heirs' property as:

> In the Lowcountry, heirs' property (HP) is mostly rural land owned by African Americans who either purchased or were deeded land after the Civil War. Historically, HP owners were routinely denied access to the legal system; could not afford to pay for legal services, and didn't understand or trust the legal system. As a result, much of this land was passed down through the generations without the benefit of a written Will, or the Will was not probated within the 10 years required by SC law to make it valid – so the land became heirs' property. Often the family members didn't know that. Heirs' property is land owned "in common" (known as tenants in common) by all of the heirs, regardless of whether they live on the land; pay the taxes or have never set foot on the land. . . . Heirs' property ownership is risky because the land can be easily lost. Any heir can sell his/her percentage of ownership to another who can force a sale of the entire property in the courts.
>
> (www.heirsproperty.org)

S.C. Code Ann. § 15-61-25 (Supp. 2013) reads:

> § 15-61-25. Right of first refusal of joint tenant or tenant in common to purchase property prior to partition; procedure.
>
> (A) For the purposes of this section, "joint tenants and tenants in common" include heirs or devisees. Upon the filing of a petition for partition of real property owned by joint tenants or tenants in common, the court shall provide for the nonpetitioning joint tenants or tenants in common who are interested in purchasing the property to notify the court of that interest no later than ten days prior to the date set for the trial of the case. The nonpetitioning joint tenants or tenants in common shall be allowed to purchase the interests in the property as provided in this section whether default has been entered against them or not.
>
> (B) In the circumstances described in subsection (A) of this section, and in the event the parties cannot reach agreement as to the price, the value of **the interest or interests to be sold** shall be determined by one or more competent real estate appraisers, as the court shall approve, appointed for that purpose by the court. The appraisers appointed pursuant to this section shall make their report in writing to the court within thirty days after their appointment. The costs of the appraisers appointed pursuant to this section shall be taxed as a part of the cost of court to those seeking to purchase **the interests of the joint tenants or tenants in common petitioning to sell their interest in the property described in the petition for partition**.

(emphasis added.)

> (C) **In the event that the petitioning joint tenants or tenants in common object to the value of the interests** as determined by the appointed appraisers, those joint tenants or tenants in common shall have ten days from the date of filing of the report to file written notice of objection to the report and request a hearing before the court on the value. An evidentiary hearing limited to the proposed **valuation of the interests of the petitioning joint tenants or tenants in common** shall be conducted, and an order as to the valuation of the interests of the petitioning joint tenants or tenants in common shall be issued. (emphasis added)
>
> (D) After the valuation of the interest in property is completed as provided in subsection (B) or (C) of this section, the nonpetitioning joint tenants or tenants in common **seeking to purchase the interests of those filing the petition** shall have forty-five days to pay into the court the price set as the value of those interests to be purchased. Upon the payment and approval of it by the court, the court shall execute and deliver or cause to be executed and delivered the proper instruments transferring title to the purchasers. (emphasis added)
>
> (E) In the event that the nonpetitioning joint tenants or tenants in common fail to pay the purchase price as provided in subsection (D) of this section, **the court shall proceed according to its traditional practices in partition sales**. (emphasis added)

S. C. Code Ann. §15-61-25 (Supp. 2013) does not expressly mention either §15-61-50, its preference for partitions in kind, or the requirement of law that a partition by sale can only be ordered when a partition in kind is first shown not to be practicable or expedient.

Appellant argues that, "[h]ad the legislature intended to limit the right of first refusal to only nonpetitioning parties in actions for partition by sale, it would have included such limitation in the express language of the statute." (Appellant's Brief, p. 6)

The legislature did just that. Subsection (D) allows the costs of appraisals to be taxed either to the purchaser or to the "tenants in common **petitioning to sell their interest in the property**." Further, subsection (E) requires that the court "shall proceed according to its

traditional practices in partition sales" if the nonpetitioning co-owner does not complete his purchase after the valuation procedure is completed. As Appellant would have it, any nonpetitioning co-owner could convert any partition action into a sale by noticing his interest in purchasing the property and then failing to complete the purchase.

After §15-61-25 was enacted in 2006, a conflict existed between it and the probate code statute setting out the procedure for partition actions in the probate court. Estate of Livingston v. Livingston, 404 S.C. 137, 744 S.E.2d 203 (2013). This conflict was resolved on January 1, 2014, when a revised probate code statute took effect. S.C. Code Ann. § 62-3-911(Supp. 2013) now includes an identical procedure to that set forth in §15-61-25. The probate code, however, clarifies the applicability of this procedure with the following introduction:

> (2) If the property cannot be fairly and equitably partitioned in kind, the court shall direct the personal representative to sell the property and distribute the proceeds subject to the following provisions of this item.

The "following provisions" are identical in language to §15-61-25, except for references to "nonpetitioning interested heirs or devisees" instead of "nonpetitioning joint tenants or tenants in common." The reporter's comment to § 62-3-911 states that the 2013 amendment makes the probate procedure "comparable to the procedure in circuit court pursuant to § 15-61-25."

At least one circuit court has interpreted §15-61-25 to apply only where a sale is sought by the petitioning party. The Standing Order in All Partition Actions[2] issued by the

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[2] Respondents ask the Court to take judicial notice of this Order, which was not presented to the circuit court. A copy of the Order is included in Respondents' designation of matter to be included in the record herein.

Honorable Mikell R. Scarborough, Master-in-Equity for Charleston County, provides:

> This court is now regularly seeing partition actions in which the purpose of the action is contemplated sale of the real estate contained therein. Therefore, pursuant to Section 15-61-25, 1976 SC Code of Laws, as Amended, (2007 Supp.), this court shall require Notice of the requirements of this statute to be served upon all parties in the action and upon all joint tenants or tenants in common. (Order dtd. 12/20/07)

The trial court ruled that §15-61-25 does not operate when all parties admit that the real property can be fairly partitioned in kind (or if in the absence of admissions, the evidence nevertheless shows that the property can be fairly partitioned in kind.) Stated otherwise, the trial court found that the rights and procedures in §15-61-25 provide a process for a new method of sale, but that new process remains subject to §15-61-50 and the law's preference for partitions in kind. The question raised by this appeal is the facial conflict presented by the express provisions of the two statutes and by case law precedent. The two statutes relate to the same subject, namely how to fairly partition jointly owned property. They are both found in the same Title and Chapter of the Code. They can be construed as being in conflict with each other, such that §15-61-25 is separate from and trumps §15-61-50 (the Appellant's position), or they can be construed as working together so that meaning is given to each and they work together harmoniously (the Special Referee's conclusion and the Respondents' position.)

On its face, §15-61-25 is not ambiguous. However, as read by Appellant, it is inconsistent with §15-61-50 and the extensive body of case law construing and applying §15-61-50. In Amisub of South Carolina, Inc. v. South Carolina Dept. of Health & Environmental Control, Op. No. 27382 (S.C.Sup.Ct. filed April 14, 2014) (Shearouse Ad.Sh. No. 15 at 38, 48), it is written:

> The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). It is well-established that this Court will not construe a statute by concentrating on an isolated phrase. Laurens Cnty. Sch. Dists. 55 & 56 v. Cox, 308 S.C. 171, 174, 417 S.E.2d 560, 561 (1992) ("The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose. In applying the rule of strict construction the courts may not give to particular words a significance clearly repugnant to the meaning of the statute as a whole, or destructive of its obvious intent."); see also Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 468, 636 S.E.2d 598, 606–07 (2006) ("A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers."). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). Moreover, statutes dealing with the same subject matter are in pari materia and must be construed together, if possible, to produce a single, harmonious result. Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000). Because we must presume that the General Assembly is familiar with existing legislation, statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative. Hodges v. Rainey, 341 S.C. 79, 88, 533 S.E.2d 578, 583 (2000) (citations omitted).

Marsh v. Zimmerman, 365 S.C. 383, 618 S.E.2d 898 (2005) predated the enactment of S. C. Code Ann. §15-61-25 (Supp. 2013.) It describes the partition procedure as a sequential analysis that begins with the question whether the property can be fairly partitioned in kind.

> The partition procedure must be fair and equitable to all parties of the action. . . **When** the court determines a partition cannot be fairly and equally made, the court may order a sale of the property and a division of the proceeds according to the rights of the parties. . . (emphasis added and internal citations omitted.)

Marsh v. Zimmerman, supra.

Before a partition sale in any form can be ordered, the court must first determine that a partition in kind cannot be made in a manner that is fair to all parties. The burden of proof

for such a showing is on the party seeking a partition by sale (the Appellant herein.)

In summary, the Appellant's argument about the reach of S. C. Code Ann. §15-61-25 (Supp. 2013) misses the mark because:

A. it ignores that the language of S.C. Code Ann. § 15-61-25 makes clear its procedure is only applicable where a sale is sought and/or ordered;

B. it ignores the operation of S.C. Code Ann. § 15-61-50 and would compel a private sale;

C. it ignores the property rights of the petitioning co-owners who seek a partition in kind when there is no dispute that a partition in kind can be fairly made;

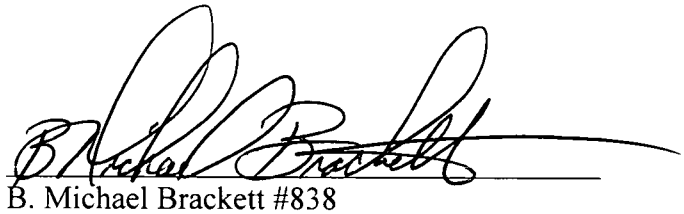
D. it ignores the requirement that whatever partition method is utilized, it must be fair and equitable to all parties;

E. it would allow the parties to engage in time consuming and expensive pretrial procedures and trial preparation with the expectation, from the pleadings, that the issues for trial involve a partition in kind with the attendant questions of appraised values and surveys, only to have that preparation rendered useless by a last-minute notice and conversion to a forced private sale of the property.

If, however, S.C. Code Ann. § 15-61-25 is read to operate only in the context of a partition action where a sale is sought and partition in kind is impractical, all of these conflicts are resolved. Based on the language of the statute and the substantial body of law on partition actions in South Carolina, Appellant's argument must fail.

CONCLUSION

For the reasons set out hereinabove, the May 7, 2014 Order of the trial court should be affirmed.



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November 3, 2014