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**Apr 04 2022**

**SC Court of Appeals**

**STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

APPEAL FROM CHEROKEE COUNTY  
Master-in-Equity, Gordon G. Cooper

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Case No.: 2020-CP-11-00040  
Appellate Case No: 2021-000017

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**Donray Curtis Jones, Cynthia  
Denise Jones, Emma Kelly  
Washington, and Troy Eliazer  
Washington,**

**Appellants,**

**vs.**

**Yvonne J. Robinson**

**Respondent.**

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**FINAL BRIEF OF RESPONDENT YVONNE J. ROBINSON**

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s/ Scott F. Talley

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April 4, 2022

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## STATEMENT OF ISSUES OF APPEAL

1. **DID THE TRIAL COURT ERR IN PROCEEDING TO PARTITION THE PROPERTY IN KIND, PURSUANT TO STATUTE?**
2. **WAS THE TRIAL COURT REQUIRED TO ORDER AN APPRAISAL PRIOR TO PARTITION OF THE PROPERTY IN KIND?**
3. **WAS THE TRIAL COURT CORRECT TO APPORTION COSTS AND ATTORNEYS FEES TO ALL PARTIES, INCLUDING APPELLANTS, AS PERMITTED BY STATUTE?**

## STATEMENT OF THE CASE

On January 14, 2020 Plaintiff initiated this action by filing a Lis Pendens, Summons and Complaint. On January 16, 2020 an Amended Complaint was filed wherein Plaintiff sought a Partition in Kind, or in the alternative a reformation of the Warranty Deed recorded in Deed Book 84, at Page 1920, Cherokee County Register of Deeds. Based on said deed, the property subject of this action was owned by Plaintiff owning one-third interest, Appellants, Donray Curtis Jones and Cynthia Jones owning one-third interest, and Appellants, Emma Kelly Washington and Troy Eliazer Washington owning one-third interest. Appellants filed their answer to the Amended Complaint on or about October 12, 2020 stating that, their intention was the same as it is to this present day; for the land to remain undivided with each party having a one-third interest in the land. On or about October 15, 2019, Respondent Robinson had Cole Land Surveying, LLC perform a survey of the subject property showing division into three separate parcels. The plat of this survey was recorded on November 7, 2019 in Cherokee County Register of Deeds. On

February 24, 2020 the Court issued its Partition Order dated February 19, 2020, which was served on the Defendants/Appellants. On May 29, 2020, prior to the first scheduled hearing in this matter, Appellants did file a document with the Clerk of Court for Cherokee County indicating that they wanted to purchase the 1/3 interest of the Plaintiff in the subject property. This matter came to trial and the Court issued an Order filed December 4, 2020 partitioning the subject property in kind pursuant to the October 15, 2019 survey of the property by Cole Surveying. In addition, the Court ordered the Appellants to pay two-thirds of the attorney's fees/costs incurred by Respondent. This appeal followed.

### **STANDARD OF REVIEW**

In her Amended Complaint, the Respondent sought partition of the subject property in-kind pursuant to a survey she had completed which was entered into evidence. The standard of review for a partition action heard by the Master in Equity is an equitable action and, as such, this Court may find facts in accordance with its view of the preponderance of the evidence. Zimmerman v. Marsh, 365 S.C. 383, 386, 618 S.E.2d 898, 900 (2005). The partition procedure 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). This Court has previously stated that partition in kind is favored when it can be fairly made without injury to the parties. Anderson v. Anderson, 299 S.C. 110, 114, 382 S.E.2d 897, 899 (1989). Furthermore, equitable 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. Zimmerman, 365 S.C. at 388, 618 S.E.2d at 901 (2005). Furthermore, "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 ...." § 15-61-50. Campbell v. Jordan, 675 S.E.2d 801, 382 S.C. 445 (S.C. App. 2009). In addition, "The special referee had jurisdiction to partition the property pursuant to Section 15-61-50 and incidentally to allot certain portions of the property to the respective parties in the action." Campbell v. Jordan, 675 S.E.2d 801, 382 S.C. 445 (S.C. App. 2009). In this case, the Court allowed the Appellants an opportunity, if agreement was reached, to purchase Respondent's interest in the subject property. The parties were unable to do so, and by their own letter post trial letter, Appellants stated that the Court would have to decide the issue presented.

Furthermore, issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the appellate court with a platform for meaningful review. Wilder Corp. v. Wilke, 330 SC 71, 497 S.E.2d 731 (1998). It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. Honea v. Honea, 292 SC 456, 357 S.E.2d 191 (Ct. App. 1987). This case does not involve heir's property as defined in S.C. Code § 15-61-320. At no point prior to trial or during trial did the Appellants allege that the subject property was heir's property.

### **STATEMENT OF FACTS**

Ms. Robinson moved to the land in 2018. (R.21, L.16-17). Ms. Robinson testified that she thought she signed a deed that they would all own 1/3 of the total land where their homes were located. (R.23, L.15-20). There were already three septic tanks on the property and that when she located her home there it related to the location of one of the septic tanks. There were three homes on the land at the time the deed was done in April of 2016. Appellants already lived on the land and had their home connected to one of the three septic tanks. (R.23 L.22-24). Respondent testified

that she realized after signing the deed to the Appellants that the property was not “divided” and all three owned the entire parcel as tenants in common. In 2019, she had the property surveyed to divide the property into three lots, as equal in size as possible, to include the location of each parties’ home on the property. That survey purported to divide the 3.4 acres into three separate parcels. (Supp.R.1, L.5-7). Ingress and egress from Highway 18 to all three parcels, as provided, is set forth on the plat. (Supp.R.1, L.22-24). Respondent thought that was the survey depicted was being done with the property when she signed her deed in 2016. (Supp.R.2, L.16-18). Respondent did not dispute the fact that each of the Appellant couples would own a particular tract as shown in the plat. (Supp.R.2, L.23-25). There are separate water meters on the property. (R.25, L.23-25). Respondent was informed that the Court could allocate costs and fees if the relief she was seeking was granted. (Supp.R.3 L.16-18). Respondent testified that the metes and bounds shown on the survey the court relies upon on partitioning the property in kind was based on historical information obtained by the surveyors. (R.29, L.23-25)(Supp.R.4 L.1). Appellant Jones testified that she wanted her family to have a tract of land, however, all parties owning the land are not family. (Supp.R.5, L.7-10). In addition, Ms. Jones stated that she believed that the deed was signed in Greenville, when in fact, it was signed at a law firm in Spartanburg (Supp.R.6, L.23-25)(R.31, L.1).

At the hearing on October 13, 2020 the Master ordered that the parties take 30 days to try to work out the matter amongst themselves as to the Respondent’s one-third interest in the land or a purchase price of same. If the parties could not come to a resolution, the Court would have to make a decision based on the applicable law. (R.43 L.14-25). There was no follow-up hearing; the Court’s Final Order was e-filed on December 4, 2020. The court ordered that the land be partitioned in kind pursuant to the survey, (R.55). The Court also ordered the Appellants to pay a

collective two-thirds of the respondent's attorney fees and costs. (R.12). On December 30, 2020 the Appellants timely served the Notice of Appeal addressed to the Respondent's counsel and filed it with the trial court.

## ARGUMENT

### 1. DID THE TRIAL COURT ERR IN PROCEEDING TO PARTITION THE PROPERTY IN KIND, PURSUANT TO STATUTE?

A partition is an equitable action and, as such, this Court may find facts in accordance with its view of the preponderance of the evidence. Zimmerman v. Marsh, 365 S.C. 383, 386, 618 S.E.2d 898, 900 (2005). The partition procedure 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). This Court has previously stated that partition in kind is favored when it can be fairly made without injury to the parties. Anderson v. Anderson, 299 S.C. 110, 114, 382 S.E.2d 897, 899 (1989). Furthermore, equitable 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. Zimmerman, 365 S.C. at 388, 618 S.E.2d at 901 (2005).

Appellants rely upon S.C. Code § 15-61-25 in arguing that they had a right of first refusal to purchase the property of the Respondent. While it is admitted that the Appellants, at least 10 days prior to the trial of the matter, submitted a statement of their interest in purchasing the property, the cited statute contemplates a scenario where the Plaintiff/Respondent in this matter, is seeking to sell the property. Herein, Respondent asked for partition in kind. See Amended Complaint. The process set forth in S.C. Code § 15-61-25(B), wherein the parties cannot reach agreement, states that the "value of the interest or interests to be sold shall be determined" by

appraisers. Here, no filing submitted by either party sought a sale of the entire parcel of property. Furthermore, prior to issuing its final order, the trial court afforded the parties an opportunity to try to resolve the matter, in the spirit of S.C. Code § 15-61-25, yet the parties were not able to agree. While they never formally asked for any formal appointment of appraisers, the Court did allow the parties time prior to issuing the final order to see if they could resolve the price issue. The Appellants never put a price on the subject property, but they did send letters dated October 5, 2020 asking if Respondent would sell her interest and at what price. Further, Appellant Jones stated in that letter that they were willing to purchase at a fair price so that nobody suffers damage, etc., and that time was of the essence so a prompt response was necessary. Respondent, on October 28, 2020, as to the price, was willing to take \$72,000.00. On November 3, 2020, Appellants replied that the Court would have to settle the matter. The Court then issued its order December 4, 2020.

Appellants did not try to get an appraiser appointed or find any value for the portion of property that they wanted to purchase. They never paid any money into the Court during the pendency of the action, or take the steps necessary to protect their rights, even when afforded the opportunity after the trial of this matter. In Appellants' appeal on page 8, the Appellants acknowledge that the Judge extended yet another opportunity to decide on a price without further ruling of the Court. Appellants' reliance on S.C. Code §15-61-25 is incorrect due to the fact that the amended complaint in this matter sought to partition the property in kind, and not sell it, as contemplated by said statute. S.C. Code § 15-61-50 was the partition procedure as requested by the Plaintiff in the amended complaint and based on the survey which was attached as an exhibit to the complaint and entered into evidence at the hearing.

"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 ...." § 15-61-50. (citing Campbell v. Jordan, 675 S.E.2d 801, 382 S.C. 445 (S.C. App. 2009).

"The special referee had jurisdiction to partition the property pursuant to Section 15-61-50 and incidentally to allot certain portions of the property to the respective parties in the action." (citing Campbell v. Jordan, 675 S.E.2d 801, 382 S.C. 445 (S.C. App. 2009).

**2. WAS THE TRIAL COURT REQUIRED TO ORDER AN APPRAISAL PRIOR TO PARTITION OF THE PROPERTY IN KIND?**

If Appellants desired to have the property appraised and sold as they now argue, that matter was not raised in any responsive pleading or at trial. Other than the May 2020 filing wherein they state they desire to purchase the property interest of the Respondent, nothing else was done. Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the appellate court with a platform for meaningful review. Wilder Corp. v. Wilke, 330 SC 71, 497 S.E.2d 731 (1998). It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. Honea v. Honea, 292 SC 456, 357 S.E.2d 191 (Ct. App. 1987).

**3. WAS THE TRIAL COURT CORRECT TO APPORTION COSTS AND ATTORNEYS FEES TO ALL PARTIES, INCLUDING APPELLANTS, AS PERMITTED BY STATUTE?**

It is clear pursuant to S.C. Code § 15-61-50, that the Court has jurisdiction in a matter such as this to make partition in kind or by allotment to more than one of the parties. Further, pursuant to S.C. Code § 61-11-110, the Court of Common Pleas may fix attorney fees in all partition proceedings as may be equitable, assess such fees against any or all of the parties or interests. The parties testified that they split all costs associated with the subject property, including the property taxes. Respondent wrote the parties prior to commencement of the underlying action inquiring

about Appellants desire to partition the property as the trial court found. They were not interested in doing so at that time so this action followed. An Affidavit of Attorney's fees/costs was entered into evidence at the trial of this matter and found to be reasonable by the trial court. This issue was within the jurisdiction of the trial court based on statute.

### **CONCLUSION**

The trial courts order shall be affirmed and the costs of this appeal shall be assessed against the Appellants.

Respectfully submitted,

s/ Scott F. Talley

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**Respondent.**

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**CERTIFICATE OF COUNSEL**

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IT IS HEREBY CERTIFIED that the Final Brief of Respondent in this matter complies with South Carolina Rule of Appellate Procedure 211(b).

April 4, 2022

s/ Scott F. Talley

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