STATE OF VERMONT

SUPERIOR COURT
Orange Unit

CIVIL DIVISION
Docket No. 238-10-10 Oecv

Lori Farnham
Plaintiff

v.

Edwin Farnham
Defendant

Findings of Fact, Conclusions of Law, and Order

Plaintiff Lori Farnham seeks statutory partition of marital property that she still owns as tenants in common with her former husband. Defendant Edwin Farnham argues that the property should be assigned to him, but that the property is nearly worthless because it lacks deeded access from the town highway. Defendant also argues that he is entitled to recoup a number of property-related expenses under the rules established by such cases as *Whippie v. O'Connor*, 2010 VT 32, 187 Vt. 523, and *Massey v. Hrostek*, 2009 VT 70, 186 Vt. 211.

*Findings of Fact*

The following facts were established by the credible evidence presented at the court trial held on October 3, 2011. In 1996, the parties were given one acre of land at 78 Hulbert Road in Williamstown, Vermont, as a gift from defendant's parents. The parties then placed a double-wide trailer on the property and lived there together until they separated in 2005. In the final divorce order, the family court awarded plaintiff possession of the marital property until the parties' youngest child turned nineteen, with defendant responsible for paying the mortgage, taxes, and insurance in the interim. The family court also ordered the sale of the property after the possessory period ended, with plaintiff to receive the first $10,000 from the sale proceeds as a lump sum and the parties to split any remaining proceeds equally. The parties thereafter filed many motions in the family court seeking to modify various aspects of this arrangement, but all of the motions were denied for reasons related to the finality of the property division.

The trailer was then severely damaged in a 2009 fire. Plaintiff and the child moved out and the parties sold the remnants of the trailer to a third party and split the salvage proceeds between themselves. The parties also shared the small amount of the insurance proceeds that remained after paying off the mortgage, although plaintiff apparently also sold the furnace and the oil tank but kept those proceeds for herself. Defendant has since pumped the septic system at a cost of $275. Plaintiff now seeks partition of the property even though the youngest child is not yet nineteen. See *Shippee v. Shippee*, 146 Vt. 594, 595–96 (1986) (explaining that it is permissible for the party in possession of the marital property to seek a partition following divorce even thought the court-ordered possessory period has not yet ended).

The one-acre parcel is accessed by a private road that begins at the town highway and runs across the land that was once owned by defendant's parents and is now owned by defendant's mother's estate. Defendant claims that the parcel is landlocked because there is no written instrument establishing the right of the parties to use the private road to access their parcel. But the credible evidence was that the parties used the private road throughout the marriage to access their home, that the parties at one time shared the cost of road maintenance with other neighbors who do have a deeded easement to use the road, and that defendant plowed the snow from the road during the time he was living at the marital home. The credible evidence also established that plaintiff used the road freely while she was living there after the divorce and that both parties have used the road to access the parcel since the 2009 fire. In short, the credible evidence is that the parcel has always been accessible by use of the private road.

Both parties presented expert appraisals of the property. Plaintiff's expert testified that the property was worth $42,000 assuming that there was access to the parcel, and defendant's expert testified that the property was worth $44,000 if there was access to the property but only $11,000 if the parcel was landlocked. Neither expert offered any opinion about whether an easement existed or not, but it should be noted that both experts appear to have used the private road to access the property. For purposes of this decision the court will find plaintiff's expert's valuation of $42,000 to be more persuasive.

*Conclusions of Law*

The first set of issues involve the mechanics of partition in a case where the parties are divorced. In general, partition actions are equitable in nature and the court must consider all of the relevant circumstances regarding the property "to ensure that complete justice is done." *Begin v. Benoit*, 2006 VT 130, ¶ 6, 181 Vt. 553 (mem.) (quoting *Wilk v. Wilk*, 173 Vt. 343, 346 (2002)). In most cases this means that the statutory presumption of equal ownership among cotenants is modified through a painstaking accounting process that is designed to ensure that all tenants "share equally in the burdens and responsibilities of ownership" by sharing such expenses as mortgage payments, taxes, insurance premiums, necessary maintenance expenditures, etc. See *Whippie v. O'Connor*, 2011 VT 97, ¶ 13 (mem.) (summarizing factors to be taken into consideration during the accounting). Often these cases involve the disentangling of property interests held by long-term unmarried couples, e.g., *id.*; *Massey v. Hrostek*, 2009 VT 70, 186 Vt. 211.

In this case, however, the parties were married and divorced. In the final divorce order, the family court already reallocated the burdens and responsibilities of co-ownership by awarding plaintiff the right to exclusive possession of the marital home, and by ordering defendant to make *all* of the mortgage, tax, and insurance payments on the property after the divorce. It would therefore be inequitable and impermissible for this court to modify the final divorce judgment by ordering the parties to share the mortgage, tax, and insurance payments, as defendant has requested. See *Shippee v. Shippee*, 146 Vt. 594, 595–96 (1986) (partitioning court cannot modify final divorce order); *Oliva v. Oliva*, 523 N.Y.S.2d 859, 860 (N.Y. App. Div. 1988) (partitioning court cannot reallocate expenses that one party was ordered to pay as part of final divorce order).

It would likewise be impermissible for this court to grant defendant's request for modification of the lump-sum award to account for plaintiff's sale of the oil tank and the furnace after the fire, see *Wilson v. Wilson*, 2011 VT 133, ¶¶ 5–6 (mem.) (explaining that, even in family court, final property divisions are not subject to modification except for reasons that would warrant the reopening of the judgment), or to award defendant any sums compensating him for his "ouster" from the property. See *Oliva*, 523 N.Y.S.2d at 860 (no award for "ouster" where one party was awarded exclusive possession of the marital home in the final divorce order). It is permissible, however, for the accounting to include the cost of pumping the septic system, as the final divorce order contemplated that the parties would share the cost of maintenance expenses that exceeded $200. *Shippee*, 146 Vt. at 595–96.

The second issue involves the valuation of the property. Defendant argues that the property value should be deeply discounted because the parties do not have a deeded easement or a prescriptive right to use the private road to access their property. Yet all of the credible evidence at trial established that the road was owned throughout the marriage by defendant's parents and that the parties used the road freely throughout the marriage and after the divorce. No one has credibly suggested that the parties were ever prevented from using the road or that the estate has any intent of doing so in the future. Hence, although the parties never obtained a written instrument evidencing their right to use the road, the most likely explanation is that the formality seemed unnecessary given the family relationships involved.

It has not escaped the court's attention that a lower property value favors defendant, who is seeking to take assignment of the property, or that defendant is an heir of the estate that now owns the road but that defendant has not attempted to acquire the easement that he claims is lacking. It would serve the defendant's interests to obtain the property at a reduced price and then to secure the easement after the fact, thereby retaining the increased property value entirely for himself.

The most equitable outcome under the circumstances is to value the property in accordance with the credible evidence presented at trial—i.e., as property that has always been accessible by use of the private road. There is no evidence that the estate has barred or prohibited access to either party. In the event of an assignment of the property to defendant, he is in a position to negotiate with his mother's estate for a deeded easement but the benefits of the increased property value will be shared evenly between the parties instead of accruing only to defendant. And in the event of a sale of the property to a third party, it will be in defendant's best interests to obtain the easement before the sale so as to maximize the property's value. If there is any cost in obtaining the deeded easement from the estate, it must be borne entirely by defendant because, under the circumstances, any other arrangement presents too great an opportunity for manipulation.

The third issue is the accounting itself. In light of the foregoing findings and rulings, each party's equal share in the $42,000 property value is adjusted only to account for the shared cost of pumping the septic system as described above. Defendant is therefore awarded a 50.33% interest in the property and plaintiff is awarded a 49.67% interest in the property for purposes of the partition action. Of course these numbers do not include any consideration of the lump-sum

amount set forth in the final divorce order. If defendant is to take assignment of the property, therefore, the total assignment price in accordance with this order and the final divorce order would be $25,895.24 ($10,000 lump sum plus (49.67% of the remaining property value of $32,000)). An assignment in this amount would accomplish the family court's intent.

The final issue is the path forward from here. Both parties agree that the property cannot be subdivided, so, according to the statutory procedures, the next task is to appoint commissioners to determine whether either party will take assignment of the property or whether the property must be sold. Defendant has already nominated three individuals to serve as commissioners and plaintiff may do the same within thirty days. At the expiration of that time limit, the court will appoint three commissioners to serve their statutory functions unless the parties notify the court in the interim that they have negotiated the assignment between themselves, thereby avoiding the expense of the commissioners. 12 V.S.A. § 5181.

**ORDER**

For the foregoing reasons, plaintiff is entitled to a judgment of partition. A final judgment order will be issued separately.

Dated at Chelsea, Vermont this 9 day of January, 2012.

Harold E. Eaton, Jr.
Superior Court Judge

Joyce E. McKeeman
Assistant Judge (as to facts)

Victoria N. Weiss
Assistant Judge (as to facts)

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Final Judgment Order

This action came on for trial before the court on October 3, 2011. Based on the findings of fact, conclusions of law, and order entered of even date, it is hereby ORDERED and ADJUDGED that plaintiff Lori Farnham is entitled to a judgment for partition of the real property located at 78 Hulbert Road in Williamstown, Vermont, with the respective titles of the parties having been determined as follows:

| | |
|---|---|
| Lori Farnham: | 49.67% |
| Edwin Farnham | 50.33% |

Dated at Chelsea, Vermont this 9 day of January, 2012.

Harold E. Eaton, Jr.
Superior Court Judge

VERMONT SUPERIOR COURT
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