

STATE OF VERMONT
CALEDONIA COUNTY, SS.

FILED

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James D. Rowell and
Annette D. Robb

v.

John E. Rowell

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Superior Court
Caledonia County
Docket No. 49-3-95 Cacv
CALEDONIA COUNTY COURTS

NOTICE OF DECISION: COMMISSIONERS' REPORT

This is an action for partition of real estate located in Hardwick. The property is owned as tenants in common in equal shares by the two plaintiffs and the defendant, who acquired it from their mother. The plaintiffs are represented by Helen Torino, Esq., and the defendant is represented by Robert R. Bent, Esq. The parties stipulated to the appointment of commissioners, who prepared a Report dated November 4, 1996 with several attachments, including appraisals. Plaintiff's attorney filed a proposed Order for Partition based upon the first of two recommendations contained in the Commissioners' Report. Defendant's attorney filed a Notice of Objection to the plaintiff's proposal on the grounds that the terms of the proposed order based on Recommendation One are not authorized as a matter of law. Defendant further requested an assignment of the plaintiffs' interest in the property to him in exchange for payment by him of two-thirds of the total value established by the commissioners. Both attorneys filed memoranda on the legal issue of whether or not the Commissioners' Recommendation One should be approved by the court and adopted as the basis of an Order of Partition. For the reasons set forth below, the court approves the factual findings set forth in the Commissioner's Report and

concludes that the terms of Recommendation One may not be approved by the court as a matter of law. On the basis of the findings and Report the court approves and adopts Recommendation Two, which requires the property to be sold with the proceeds to be divided among the parties in equal shares.

The essential facts are not in dispute. The property consists of a dwelling house and 40 acres, and was previously the family homestead. It is not the residence of any party, and is currently being used as a vacation home. All parties desire to have ownership of the property, and in particular the house, which was their former family home. Plaintiffs requested in their complaint that they be assigned the interest of defendant with payment of compensation to defendant. Defendant counterclaimed for partition, but did not ask for the plaintiffs' interests to be assigned to him. The parties stipulated to the appointment of two professionals as commissioners: Gary Kuron, a real estate appraiser, and Richard Carbonetti, a forester. The commissioners' task was to determine whether or not the property could be divided into three equal shares, one for each one-third owner, without "great inconvenience to the parties". 12 V.S.A. Sections 5169, 5174.

The commissioners determined that the value of the house and 40 acres was \$75,000. They further determined that the value of the house alone was more than 50% of the total value, which meant that it was not possible to divide the property into three parcels of equal value. "Rich and I agree that there is no feasible way to partition the property into equal thirds." Commissioners' Report, Letter of November 4, 1996, paragraph 3. The complaint established that the two plaintiffs were willing to acquire a single two-thirds share as tenants in common, and the commissioners explored the possibility of creating a two-thirds/one-third division. The

commissioners also determined that the total aggregate value of the property could be enhanced by subdividing it into four distinct parcels, and they set out a proposal for dividing the property into four parcels with a total aggregate value of \$82,700 as follows:

House and 10 acres	\$45,000
Four acres across road from house	10,000
10.01 acres behind house	15,000
15.7 acres behind house	12,700

The commissioners then offered two alternative recommendations ranked in order:

1. A two-thirds/one-third division as follows:

House, land, and 4 acres to two owners	\$55,000, or 66.5% of \$82,700
25.71 acres to one owner	\$27,700, or 33.5% of \$82,700

2. "If the above is not acceptable to the court, then it appears that the only other solution is to auction or sell the property and divide up the proceeds equally." Commissioners' Report, Letter of November 4, 1996, paragraph five.

The commissioners were clear that the reason for dividing the 15.71 acres into two lots was to enhance the total value available for division by creating two development lots with a higher aggregate value than a single lot would have. The commissioners were also clear that they had not proceeded to plan or confirm many specific details with respect to the two development lots. For example, they proposed that the 10.01 acre lot would have road access by either fifty feet of road frontage or a right of way across one of the contiguous parcels, but this was not actually planned or laid out. Similarly, they proposed that the 15.7 acres lot would have access by an easement "to be determined". Thus, no specific plans were made and found to be feasible for

providing access to these two lots. Since the terms of easements and/or rights of way across the various parcels were not specified, it appears that the effect of easements and rights of way on the values of the burdened lots was not determined. In addition, the commissioners were clear that there was no information about whether the development lots would support on-site septic systems, and if so, at what cost. It is not clear whether the values the commissioners assigned to the 10.01 and 15.7 acre development lots were based on an assumption that there was no information about septic feasibility and such lack of information was reflected in the market values assigned to the lots, or whether they were based on an assumption that permits could be obtained for on-site septic facilities.

Findings of fact of the commissioners must be accepted by the court unless they are clearly erroneous, and any party objecting to the findings bears the burden of proving them to be clearly erroneous. Messier v. Messier, 140 Vt. 308, 313-314 (1981). The recommendations in the Commissioners' Report "shall be accepted by the court and judgment rendered thereon" unless "cause is shown". 12 V.S.A. Section 5172. In this case, the commissioners developed factual information for use in the partition process, and then made two alternative recommendations, in priority order. A major portion of the Report consists of concrete factual findings. The second component of the Report consists of the first and second alternative recommendations. The first recommendation could only be accomplished by both a) creating additional subdivision lots with two separate lots assigned to each share, and b) dividing the property on a two-thirds/one-third basis as opposed to creating three portions of equal value. The commissioners themselves expressed reservations about whether or not such an arrangement was "acceptable to the court".

Defendant has raised no objection to the factual findings of the commissioners, and there

is nothing to suggest that they are clearly erroneous. Therefore, the facts as developed by the commissioners are hereby accepted by the court and used as the factual basis for this decision. The second part of the Commissioners' Report, in which the recommendations were made, involves mixed conclusions of law and fact, with the commissioners expressing lack of understanding with respect to applicable law and a question about their authority to make the first recommendation as a matter of law.

The essence of the dispute is one of application of the law to the facts: under these circumstances, is the court compelled to conclude as a matter of law that there is "great inconvenience to the parties" such that the property cannot be divided in kind under Recommendation One, or does Recommendation One contain terms that successfully eliminate potential problems of inconvenience and is within the parameters of statutory requirements for partition such that the court is required by law to adopt it as the basis for its order.

Statutory provisions and case law have established several principles applicable to partition proceedings. The law favors a partition in kind rather than by sale if it can be done without great inconvenience to the parties. 12 V.S.A. Section 5174; Blanchard v. Cross, 97 Vt. 370 (1924). "Great inconvenience" is to be determined with reference to the best interests of all of the owners. Id. at 373. The yardstick for determining the portion received by each owner, whether by partition in kind or division of proceeds, is monetary value. Therefore, if property is to be divided in kind, each owner must receive property of equal value, and if partition occurs through sale, each owner receives equal net proceeds. If partition in kind cannot be accomplished by dividing the property into separate portions, the commissioners may provide for one owner to take assignment of the interests of others if the commissioners find that such owner agrees to pay

the others the value of their interests. Billings v. Billings 114 Vt. 512, 518 (1946). If neither of those is possible, the property must be sold and the net proceeds divided equally. If each co-owner seeks to acquire the interest of the other, sale is the only feasible alternative. Weenolsen v. Kamber, 137 Vt. 540 (1979).

In this case, Defendant claims that he is entitled to enjoy the benefits of possession of the residence because he cannot be eliminated from enjoyment of one of the attributes of the property. This is not the case. The whole point of partition is to divide into fair portions real estate which inherently is made up of various attributes, and market value, rather than property attribute, has been settled upon as the device for measuring equality.

Plaintiffs argue that “great inconvenience” to the parties can be avoided by adoption of Recommendation One because of their willingness to take as tenants in common a portion of the property representing an undivided two-thirds interest in overall aggregate property value. However, Recommendation One calls for fourteen acres and the house, representing the value of two-thirds of the property, to be “set out” for the plaintiffs, and 25.71 plus access easements to be “set out” for the defendant. This is not within the options that the statute confers upon the commissioners. Under the statutory scheme, they must, if possible, create three pieces of property of equal value, one for each owner. If that is not possible and they find that one is willing to buy out the others, they may assign the interests of the others to the one willing to buy on the condition that he or she pays the specified amount to compensate the others. If no one is willing to buy, then a sale is required. 12 V.S.A. Section 5175. If more than one is willing to buy, then a sale is required. Weenolsen v. Kamber, 136 Vt. 540 (1979). Here, although the plaintiffs specified in their complaint that they were willing to buy out the defendant, the statute

authorizes a buyout by only one of multiple co-owners; it does not permit a majority of co-owners to combine to squeeze out a minority owner. Neither does the statute authorize the commissioners to “set out” parcels on anything other than equal shares to each separate owner. See 12 V.S.A. Sections 5170 and 5188. The scheme appears to be that either separate and equally valuable plots are created from available real estate, or one owner buys everyone else out, but if neither of those solutions is available at the time the commissioners are conducting their “doings” (12 V.S.A. Section 5172), the property must be sold, giving each owner an equal opportunity to bid to buy the others out. Therefore, the court agrees with defendant that the commissioners do not have the authority to create a two-thirds/one-third division. The commissioners themselves were unsure of this point, and left it to the court to decide as a matter of law.

As to the commissioners’ attempt to create enhanced value to bring aggregate value to a level susceptible to proportionate division, the court accepts the general principle of creation of additional lots to enhance overall value and produce full equal value for all owners; the problem comes in the practical implementation. Even if the parties in this case stipulated to a two-thirds/one-third split, which they have not, there are factual circumstances of the proposal in Recommendation One that produce an inability to partition with net results being equal to all owners. Because there are substantial technical problems in creating legal access to each of the development lots and establishing their suitability for on-site septic systems, and because follow-through on these issues entails costs, the overall effect would be a diminution in the net value to the recipient of the two development lots constituting a one-third share. “There is no guarantee that the land would pass soil testing, should the decision be made for further subdivision, and

monies spent could be wasted.” Commissioners’ Report, Letter dated September 18, 1996. Even if the development costs were allocated pro-rata among the owners, the results of soil testing and engineering and legal work to create access to the development parcels would have an impact on the values of the lots after the work was completed, and because these are unknowns, the commissioners have not been able to take such impacts into account in their proposal. Therefore, the values obtained by each owner at the end of the project would most likely not be equal, even though the projections in the proposal look equal. The partition statute is based on the principle that each owner actually receives a net value that is equal (at the time of partition) to the net values received by each other owner. Because of the unresolved septic and access problems, such a result cannot be achieved in this case on the basis of the information that the commissioners had available to them and included in their Report.


The commissioners made a factual determination that the property could not be partitioned in kind in equal portions. They made a valiant and laudable effort to recommend a method for an equitable division based on a two-thirds/one-third split, although they recognized that it may not be acceptable to the court. For the reasons set forth above, the court concludes as a matter of law that the property cannot be partitioned without “great inconvenience” to all parties. The commissioners made no finding that any one owner was willing to take assignment of the interests of all the other owners. Therefore, the court rejects the first recommendation of the commissioners, and approves the second recommendation set forth in the Commissioners’ Report, and therefore orders that the property be sold with the net proceeds distributed to the owners in equal shares.

Although defendant represented, in his Notice of Objection, that he was willing to pay

two-thirds of \$82,700 and requested that the property be assigned to him, he does not claim that the commissioners' findings are erroneous in omitting a finding that he was willing to do so. It is too late to introduce such a position for the first time after the commissioners have filed their report. The court's role is to accept the Commissioners' Report and enter judgment thereon. 12 V.S.A. Section 5172. It is not to accept portions only of the Report, or modify it after giving the participants a second chance to adopt a new position after they have seen the results of the commissioners' work. Messier v. Messier, 140 Vt. 308, 314 (1981). This is sound policy, in that it promotes the finality of the work of the commissioners unless error or good cause is shown.

The attorneys shall confer on the arrangements for a sale and submit within thirty days a stipulation or a request for a court hearing on terms of an order for sale.

Dated at St. Johnsbury this 11th day of July, 1997.



Hon. Mary Miles Teachout
Superior Judge