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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 319156-III

COURT OF APPEALS, DIVISION III
IN AND FOR THE STATE OF WASHINGTON

In re Estate of Elma L. Hayes

JAMES L. HAYES,

Appellant,

v.

JERRY D. HAYES,

Respondent.

BRIEF OF APPELLANT

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A. Assignments of Error

Assignments of Error

1. The lower court erred to Petitioner's prejudice by declining to hear supplemental testimony, *sua sponte* excluding admissible evidence, offering and considering personal testimony on behalf of the Respondent, taking "judicial notice" of reasonably disputable facts outside the record and issuing rulings upon matters that were not properly before the court.

2. By declining to hear supplemental testimony, *sua sponte* excluding admissible evidence, offering and considering personal testimony on behalf of the Respondent, taking "judicial notice" of reasonably disputable facts outside the record and issuing rulings upon matters that were not properly before the court, the lower court deprived Petitioner of due process of law.

3. The lower court's determination to the effect that the decedent intended her four children to inherit as tenants-in-common a farm lease encumbering four parcels of property, each of which was specifically devised to one of her four children, was not supported by substantial evidence, and was in fact contrary to law and the uncontroverted evidence of record.

4. The lower court's determination to the effect that Petitioner's leasehold interest on parcels inherited by his siblings was subject to forfeiture by reason of his sale of the parcel he had inherited from the decedent was not supported by substantial evidence, and was in fact contrary to law and the uncontroverted evidence of record.

5. The probate court's forfeiture of Petitioner's leasehold interest on parcels inherited by his siblings was unjust, contrary to law, and contrary to equity.

Issues Pertaining to Assignments of Error

1. "Whether the trial judge committed prejudicial error by *sua sponte* determining issues that were outside the scope of the scheduled hearing?" (Assignments of Error 1 and 2)

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7. "Whether the above-cited errors, considered in the aggregate, deprived Petitioner of due process of law?" (Assignment of Error 2)

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10. "Whether the probate court's determination to the effect that Petitioner's tenancy was subject to forfeiture by reason of his sale of the parcel he had inherited from the decedent was unsupported by substantial evidence of record?" (Assignment of Error 4)

11. "Whether the probate court's determination to the effect that Petitioner's tenancy was subject to forfeiture by reason of his sale of the parcel he had inherited from the decedent was contrary to law and the uncontroverted evidence of record?" (Assignment of Error 4)

12. “Whether forfeiture of Petitioner's leasehold interest of the circumstances of the case at bar was unjust, and contrary to equitable principles?” (Assignment of Error 5)

B. Statement of The Case

Appellant, James L. Hayes (hereinafter referred to as "James"), is one of four children of Lloyd L. Hayes and Elma L. Hayes, who during their lifetimes farmed slightly more than 1200 acres of land near the small rural community of Hartline, Washington. James' siblings – John D. Hayes ("John"), Patricia Elder ("Patricia") and Jerry D. Hayes ("Jerry") – grew up with him in Hartline, and at the time of the hearing, John and Patricia still lived in central Washington, but Jerry had lived out of state for more than 30 years. (CP 213, ¶ 2)

Lloyd Hayes died in March of 1991, leaving Elma to shoulder a substantial amount of debt following two uninsured crop failures out of the preceding five years. In 1991, the Hayes family suffered yet another uninsured crop failure, increasing the amount of debt to approximately \$179,000; and in 1992, the farming operation experienced still another crop failure. This time, however, crop insurance covered a portion of that loss. (CP 214, ¶ 3)

Some time in 1992, Elma Hayes called a family meeting at her home in Hartline, Washington. John, Patricia and James attended this meeting along with their respective spouses, but Jerry elected not to attend. The purpose of the meeting was to elicit ideas for addressing this sizable financial obligation, and to engage in a discussion concerning the future of the family farm. (CP 214, ¶ 4)

At that meeting, James proposed that the farm be sold, but Elma expressed a desire that “one of the boys” – meaning James, John or Jerry – assume responsibility for the farming operations, as well as the substantial debt. John declined, and Jerry had never expressed an interest in taking over the family farming operation, but he had let it be known before the family meeting that he would go along with whatever the rest of the family decided. James was reluctant to assume the risk inherent in servicing this level of debt on top of all of the normal expenses of the farming operation, and no final decision was made at that meeting. (CP 214, ¶ 5)

James had been assisting his father with the family farming operations since the early 1980s, and he continued to do so after Lloyd's death on an informal basis, while he mulled over the pros and cons of taking sole responsibility for the family farm and his parents' debt. By the end of 1992, James had managed to reduce the outstanding balance on that

debt to approximately \$123,000; however, he was concerned not only about the size of the principal, but also, the interest rates (13.5% and 14.5%, respectively) that were being charged on the mortgages and other loans his father had taken out. (CP 214-215, ¶ 6)

1993 Farm Lease. In order to compensate James for the huge risk in terms of cash flow that would be created by the annual debt service, James and his mother agreed to a relatively favorable annual cash rent, and Elma also agreed to extend the lease term to 25 years. From James' perspective, the longer lease term would give him the opportunity to continue to earn a decent living as a farmer until age 65, and also give him a better chance of refinancing his parents' debt and amortizing it over a longer period, thereby reducing the risk of default. (CP 215, ¶ 7)

Finally, James decided to make a formal commitment, and Elma hired attorney Kenneth D. Carpenter to draft a farm lease. James and his mother executed this document (hereinafter, the "1993 Farm Lease") in Mr. Carpenter's law office on December 22, 1993. (CP 215, ¶ 8)

The 1993 Farm Lease contained a provision (in Paragraph 14) prohibiting assignment or subletting, and providing for forfeiture of tenancy in the case of assignment or subletting. This provision was not requested by Elma, nor did she or James discuss it with Mr. Carpenter.

According to attorney Carpenter, the language in Paragraph 14 was essentially "boilerplate" which he included in almost all of the farm leases that he drafted for owners of farmland, because, in his experience, "... many landowners tend to be particular about choosing the people who are going to farm the land they own." (CP 611, ¶ 5)

Although James' three siblings – Jerry, John and Patricia – were identified in the body of the 1993 Farm Lease as "Landlords" along with Elma, they did not at that time own any portion of the farmland which was the subject of the lease. (CP 216, ¶ 9) Prior to execution of the lease, Elma told Mr. Carpenter that she had come to the conclusion that her children would not be able to work together, and that she no longer wanted Jerry, John and Patricia to sign the 1993 Farm Lease as co-landlords (CP 209 ¶ 4; CP 611-612, ¶ 6).

Elma's Modification of Her Estate Plan. After she executed the 1993 Farm Lease in December of 1993, Elma and Mr. Carpenter had several discussions concerning her children and her farm property. She told Mr. Carpenter that she no longer wanted undivided interests in the farm, that she wanted to divide the farm into four separate parcels, and that she wanted to give each child a separate parcel of property of his or her own. (CP 159-160, ¶¶ 5, 6; CP 209, ¶ 5) By contrast, the distribution

scheme set forth in Elma's November, 1990 Last Will and Testament, would have distributed the entire farm to all four children, "...equally, share and share alike...." (CP 159-160, ¶ 6; CP 167)

Because of the relatively limited federal estate tax exemption that was in effect at that time, Mr. Carpenter suggested that Elma begin gifting portions of the various parcels of property to her children during her lifetime, taking into consideration the annual exemptions for federal gift tax purposes. Elma began the gifting program that he suggested by executing quit claim deeds in 1994, 1995 and 1996. (CP 159-160; CP 209; CP 612 ¶¶ 7, 8)

Elma's 2003 Last Will and Testament. Subsequently, Elma told Mr. Carpenter that she wanted to complete the division of the family farm that she had begun in 1994 by bequeathing to each of her four children the balance of the same parcel of property that she had previously gifted to each child in 1994-1996. In response to Elma's request, attorney Carpenter prepared her 2003 Last Will and Testament, which she executed on January 28, 2003. (CP 160, ¶ 7) That document provided, in pertinent part:

Article V
Specific Bequests

"1. I hereby give, devise and bequeath to my son,
JERRY D. HAYES, the following real property:

All of Section 6, Township 25 North, Range 30 E.W.M., South of right-of-way and East of Hartline, Grant County, Washington, Parcel No. 18-1791-000.

"2. I hereby give, devise and bequeath to my son, JAMES L. HAYES, the following real property:

The South Half (S ½) of Section 17, Township 25 North, Range 30 E.W.M., Grant County, Washington, Parcel No. 18-1827-000.

"3. I hereby give, devise and bequeath to my son, JOHN D. HAYES, the following real property:

The East Half (E ½) of Section 18, Township 25 North, Range 30 E.W.M., Grant County, Washington, Parcel No. 18-1828-000.

"4. I hereby give, devise and bequeath to my daughter, PATRICIA A. ELDER, the following real property:

The West Half (W ½) of Section 20, Township 25 North, Range 30 E.W.M., Grant County, Washington, Parcel No. 18-1833-000."

(CP 200-201, 217) Elma passed away in February of 2012 (CP 158).

James and Patricia served as personal representatives of Elma's probate estate, and on June 18, 2012, Jerry, John, Patricia and James each received a "Deed of Distribution by Co-Personal Representatives" consistent with Elma's previous gifting in 1994, 1995 and 1996, and consistent with the

specific bequests set forth above. (CP 218, 257-58, 260-61, 263-64, 266-67)

James' Sale of His Parcel. On August 7, 2012, James sold his ownership interest in the South Half (S ½) of Section 17 – the parcel of property he had inherited from his mother – to a third party. However, James did not at any time assign, sublet or transfer any portion of his interest in the 1993 Farm Lease to any third party. (CP 219, ¶ 18)

From September 1, 1993 through the time of trial, James at all times continued to farm, cultivate and harvest the parcels of property that were devised to Jerry, John and Patricia in a good and sufficient farmer-like manner, in accordance with the recognized principles of good farming, as required by ¶ 8 of the 1993 Farm Lease. (CP 219, ¶ 17)

Jerry's Notice of Termination / Grant County Unlawful Detainer Action. On October 30, 2012, Jerry sent James a Notice of Termination of James' tenancy as to Jerry's parcel. (CP 220, ¶ 19) After James refused to vacate the premises, Jerry initiated an unlawful detainer action in Grant County Superior Court, the Hon. John D. Knodell presiding. While summary proceedings were pending in connection with that action, Judge Knodell inquired with respect to the status of estate issues. (CP 645)

Petition to Lincoln County Probate Court. In response to the inquiry from Judge Knodell concerning Elma Hayes' probate, James filed a *Petition for a Declaration of Rights and Legal Relations Under RCW 11.96A.080* (CP 5-59), in which he asked the Lincoln County probate court to make two limited factual determinations:

"1. Whether it was the intention of the decedent, Elma L. Hayes, to partition the 1993 Farm Lease into four separate leases, each such partitioned lease applicable to a single parcel of real property, and each such partitioned lease with a single Beneficiary as landlord, consistent with Article V of decedent's Last Will and Testament dated January 28, 2003 (as opposed to an intention to grant undivided interests in the 1993 Farm Lease, as tenants-in-common); and

"2. Whether it was the intention of decedent, Elma L. Hayes, to preclude each Beneficiary from enforcing the covenants set forth in the 1993 Farm Lease, to the extent that those covenants do not apply directly to the parcel of real property bequeathed to that Beneficiary (as opposed to an intention to grant each Beneficiary the right to enforce such covenants as they may apply to parcels of real property bequeathed to other Beneficiaries)."

See *Petitioner's Prehearing Memorandum Of Law* (CP 139-140). In his *Prehearing Statement of Proof*, James confirmed the scope of expected testimony by reference to Declarations by attorney Kenneth Carpenter and James Hayes that had been filed previously in the Grant County unlawful detainer action, and indicated that both individuals would be available to

supplement their previously-filed Declarations with live testimony. (CP 154-155)

The initial hearing on James' TEDRA petition was scheduled for June 20, 2013, with the Hon., Judge John F. Strohmaier presiding. Initially, Judge Strohmaier appropriately denied Jerry's objection to the Declaration testimony of Kenneth Carpenter on the basis of attorney-client privilege. However, acting *sua sponte*, the court struck portions of Mr. Carpenter's Declaration and Supplemental Declaration as inadmissible opinion testimony. (R. 15-23) After hearing argument from counsel, and declining to hear supplemental testimony from Mr. Carpenter, Judge Strohmaier issued an oral ruling in favor of Jerry from the bench on that date (R. 72-76); and on July 2, 2013, he signed the "*Findings of Fact, Conclusions of Law and Order*" (CP 635-639) as well as the "*Order on Motion to Strike Portions of Declarations*" (CP 628-630) presented by Jerry's counsel.

On July 12, 2013, James timely filed motions for reconsideration of both Orders that had been entered on July 2, 2013. On August 6, 2013, Judge Strohmaier summarily denied the motion for reconsideration relating to the Declaration testimony of Kenneth D. Carpenter (CP 632-

633), and issued a lengthy written opinion in which he substantially¹ reaffirmed the July 2, 2013 "Findings of Fact, Conclusions of Law and Order." (CP 641-645) James timely appealed all four of the July 2 and August 6 orders on August 29, 2013. (CP 622-625)

C. Argument

I. THE TRIAL COURT ERRONEOUSLY CHARACTERIZED CERTAIN TESTIMONY OF ATTORNEY KENNETH CARPENTER AS INADMISSIBLE OPINION EVIDENCE.

1. Most of the Excluded Testimony Was Not Opinion Evidence at All.

Prior to entertaining argument with respect to the merits of James' TEDRA petition, the probate court, acting *sua sponte*,² struck the following highlighted statements from the May 2, 2013 *Supplemental Declaration of Kenneth D. Carpenter*, characterizing them as "improper opinion testimony":

¹ Judge Strohmaier appropriately conceded that the issue of applicability of RCW 59.12.035, Washington's farm lease holdover statute, was not properly before the probate court. (CP 645)

² The sole objection raised by Jerry's counsel to the testimony of attorney Carpenter was attorney-client privilege, and that objection was properly overruled by the trial court. (CP 629)

"5. Some time after the 1993 Farm Lease was executed, Elma told me that her children had different opinions about how things should be done, and that it no longer seemed like a good idea to keep the family farm together after her death. In order to avoid future disagreements, instead of having her children share the farm property, *Elma decided to give to each child a separate parcel of property, with the understanding that James would be permitted to farm each parcel of property for the 25 years of his Lease.* As it so happened, the family farm at that time consisted of four distinct parcels, and beginning in late 1994, Elma had me

prepare deeds that would convey to each child a property interest in a particular parcel, with no two children receiving an interest in any one parcel."

"7. Just as Elma had decided before executing the 1993 Farm Lease that it was not a good idea to have her children as co-landlords during her lifetime, she had no intention of making them co-landlords after her death. The suggestion that Jerry (or John or Patricia, for that matter) might have a legal right to receive profits from property owned by James himself or another sibling – like the suggestion that Jerry (or John or Patricia) might have a legal right to control what James did on property that was owned by James himself or another sibling – is not only contrary to common sense, but also, totally foreign to what Elma Hayes was trying to accomplish through the specific bequests set forth in her 2003 Last Will and testament."

(CP 209-210) There is nothing in either of these two paragraphs to suggest that Mr. Carpenter's description of Elma Hayes' intention was a matter of opinion at all. However, if he had been permitted to give supplemental testimony at the June 20, 2013 hearing, Mr. Carpenter could easily have clarified any ambiguity in that regard, as demonstrated by the

following statements contained in his subsequent Declaration in support of James Hayes' motions for reconsideration:

"4. If I had testified, I would have explained to the Court that, before I drafted the 1993 Farm Lease at Elma's request, Elma had stated to me that it was her intention to reward her son James for his willingness to take on all of her financial obligations. The term of the farm lease was set at 25 years, because Elma wanted to make certain that James would have the right to farm until he reached retirement age. I did not determine – or even suggest a particular figure for the cash portion of the lease. That figure (\$5.00 per acre) was given to me by Elma." (CP 611)

"5. If I had testified, I would have explained to the Court that the language in Paragraph 14 prohibiting assignment or subletting, and providing for forfeiture in the case of assignment or subletting, was not requested by Elma, nor did she or James discuss it with me. That language was essentially "boilerplate" which I have included in almost all of the farm leases that I drafted over the years for owners of farmland, because, in my experience, many landowners tend to be particular about choosing the people who are going to farm the land they own. In all my years, I have never seen anyone other than Jerry Hayes take the position that this forfeiture provision was intended to be triggered by a sale of property that is owned by the tenant." (CP 611)

"6. If I had testified, I would have explained to the Court that, before Elma executed the 1993 Farm Lease in December of 1993, she told me that she had come to the conclusion that her children would not be able to work together. In particular, Elma no longer wanted Jerry, John and Patricia to sign the 1993 Farm Lease as co-landlords, and she asked me whether it was necessary to change the current version of the document, which identified them as co-landlords. I told her that she did not need to change the document, and that her children would not be considered co-landlords if Elma were the only person who executed the lease as a landlord.

Consistent with my advice, Elma executed the 1993 Farm Lease without modifying the body of the document." (CP 611-612)

"7. If I had testified, I would have explained to the Court that, after she executed the 1993 Farm Lease in December of 1993, Elma and I had several discussions concerning her children and her farm property. She told me that she no longer wanted undivided interests in the farm, that she wanted to divide the farm into four separate parcels, and that she wanted to give each child a separate parcel of property of his or her own. Because of the limited federal estate tax exemption, I suggested that Elma begin gifting portions of the various parcels of property to her children during her lifetime, taking into consideration the annual exemptions for federal gift tax purposes. She began the gifting program that I suggested, and I prepared the quit claim deeds in 1994, 1995 and 1996 that are described in my previous Declarations, which Elma executed." (CP 612)

"8. If I had testified, I would have explained to the Court that, in 1997, Congress passed the Taxpayer Relief Act of 1997, which made a number of changes to the existing estate and gift tax laws, including estate tax thresholds that were scheduled to increase incrementally over the next 10 years, which reduced the importance of annual gifting during Elma's lifetime. Elma then told me that she wanted to complete the division of the family farm that she had begun in 1994 by bequeathing to each of her four children the balance of the same parcel of property that she had previously gifted to each child in 1994-1996. In response to Elma's request, I prepared her 2003 Last Will and Testament, which she executed." (CP 612)

The testimony set forth above – which was apparently considered by the lower court in ruling upon James' motions for reconsideration (CP 632, 643) – clearly establishes that the excluded testimony

regarding Elma Hayes' intentions was directly derived from specific conversations between Mr. Carpenter and Elma at various points in time. These are statements of fact from Mr. Carpenter's perspective, and testimony describing out-of-court statements by a testator³ with respect to his intent regarding various terms of his will is considered admissible as an exception to the general rule against hearsay under ER 803 (a)(3).

2. Even That Testimony Which Could Arguably Be Characterized As Opinion Evidence Was Admissible Under ER 701.

In addition to the statements cited above, the probate court, *sua sponte*, also struck the following highlighted testimony contained in Mr. Carpenter's Declaration dated April 17, 2013 (CP 160):

"9. Based upon my personal knowledge concerning Elma's estate plan in January of 2003, ***I believe that it would be inconsistent with her intent to distribute to any of Elma's children a landlord's interest in any parcel of real property that she specifically devised to one of her other children.***"

To the extent that this and other testimony given by Mr. Carpenter may be accurately characterized as opinion testimony, opinion evidence relating to

³ Although Elma L. Hayes is properly referred to as a "testatrix," we will utilize the masculine form of the term herein, when referring in a more general sense to individuals who make wills.

an individual's state of mind is admissible under ER 701, so long as the opinion is based upon personal knowledge. See, for example, *State v. Warren*, 134 Wn.App. 44, 138 P.3d 91 (2006), *review granted* 161 Wn.2d 1001, 166 P.3d 719, *affirmed* 165 Wn.2d 17, 195 P.3d 940, *certiorari denied* 129 S.Ct. 2007, 173 L.Ed.2d 1102; and *State v. Perez*, 137 Wn.App. 97, 151 P.3d 249 (2007).

In particular, Washington courts have consistently held that the testimony of the drafter of a will as to the testator's intent is one piece of evidence admissible to explain the language in the will. *In re Estate of Bergau*, 103 Wn.2d 431, 436, 693 P.2d 703 (1985); *In re Estate of Torando*, 38 Wn.2d 642, 228 P.2d 142, 236 P.2d 552 (1951); *In re Estate of Sherry*, 158 Wn.App. 69, 240 P.3d 1182 (2010). For example, in *Sherry*, the Court of Appeals considered for this purpose the "...affidavit of H.H. Hayner, the Sherrys' longtime lawyer and author of their wills, attesting to his conversations with the Sherrys and *his understanding of their intent*, and expressing his opinion that the wills unambiguously gave Mark discretion to distribute undivided interests."⁴ *In re Estate of Sherry*, *supra*, 158 Wn.App. at 82. [emphasis supplied]

⁴ The Court of Appeals held that the Hayner affidavit testimony, considered in the context of other evidence before the court in that particular case, created disputed issues of material fact regarding the intent of the decedents that could not be resolved on summary judgment. *Sherry*, *supra*, 158 Wn.App. at 83.

In the case at bar, Mr. Carpenter's comments to the effect that certain contentions are contrary to Elma's intent and stated objectives are clearly based upon his personal knowledge of Elma's estate plan in January of 2003. There is no lawful basis for striking or refusing to consider this portion of Mr. Carpenter's testimony.

II. JAMES WAS DENIED THE OPPORTUNITY TO FULLY AND FAIRLY LITIGATE THE ISSUES OF INTERPRETATION AND ENFORCEMENT OF THE PROVISIONS OF THE 1993 FARM LEASE .

1. The Issues of Interpretation and Enforcement of the Provisions of the 1993 Farm Lease Should Not Have Been Determined in the Context of the Lincoln County TEDRA Action.

The intended purpose of the Lincoln County TEDRA action, as stated in James' Petition, was to determine Elma Hayes' intent with respect to the provisions of her 2003 Last Will and Testament. By contrast, the focus of the Grant County unlawful detainer action was the meaning and intent of the various provisions in the 1993 Farm Lease. This distinction was made clear, not only in paragraphs XX, XXI and XXII of the *Petition for A Declaration of Rights and Legal Relations Under RCW 11.96A.080* which

was filed on May 23, 2013 (CP 12-13), but also, in *Petitioner's Prehearing Memorandum of Law* (CP 139-140).

At no time did James ask the probate Court to construe or make any ruling whatsoever with respect to the provisions of the 1993 Farm Lease. Moreover, in *Respondents' Answering Statement to TEDRA Petition Re: Declaration of Rights and Legal Relations under RCW 11.96A.080*, the only relief requested by Jerry's counsel is set forth *verbatim* as follows:

REMEDY REQUESTED

"WHEREFORE, Respondent Jerry Hayes prays as follows

"1. That Petitioner's TEDRA Petition for Declaration of Rights and Legal Relations be dismissed and that Petitioner take nothing thereby."

"2. That be removed as Co-Personal Representative for reaching certain fiduciary duties by engaging in self-dealing and personal profit therefrom."

"3. That Respondent be awarded his reasonable attorney fees and costs, as authorized by RCW 11.96A."

(CP 136) These pleadings – taken together – framed the issues that were properly before Judge Strohmaier at the initial TEDRA hearing that was held on June 20, 2013, and this point was reiterated by James' counsel during the course of that hearing, as evidenced by the following:

"MR. HAILEY: And *we didn't ask you, Your Honor, to decide whether or not Mr. Hayes violated the lease. Okay? That's not before you.* The issue before you is, one, for issuance of a declaration acknowledging and recognizing the intention of the decedent Elma L. Hayes, to partition the 1995 farm lease into four separate leases, each sub partitioned lease applicable to a single parcel of real property and each sub partitioned lease with a single beneficiary or landlord consistent with Article V of decedent's last will and testament dated January 28th, 2003.

"That is a ruling which you are exclusively qualified to make because it's your job to determine the – to determine the testatrix's intent, her intent with respect to that devise of property. And then for issuance of a further declaration acknowledging and recognize the intention of the decedent, Elma L. Hayes, to preclude each beneficiary from enforcing the covenants set forth in the 1993 farm lease to the extent that those covenants do not apply directly to the parcel of real property bequeathed to that beneficiary. [emphasis supplied]

(R. 64-65) In fact, Jerry's counsel agreed with this assessment, as demonstrated by the following colloquy with the court:

"JUDGE STROHMAIER: Okay. So I guess it's up to me at this time – So if I continue on today, then one way or the other, the actions down in Grant County would be moot it looks like. It would be off or not?"

"MR. WILLENBROCK: Not necessarily, Your Honor. *There's still the issue that remains whether it's actually been terminated, which is still before Judge Knodell.* The issue is whether it's been distributed out of the estate and whether there is one unified single lease that at one time encumbered the property. *Judge Knodell would then look to the lease, the lease's explicit terms, and whether that lease had been terminated,* in which case, my client Jerry Hayes, is entitled to possession of his one-fourth interest parcel of the farm." [emphasis supplied]

(R. 71-72). Given the expressly limited scope of the relief requested by the pleadings and counter-pleadings, James Hayes and his counsel were never put on notice that the terms of the 1993 Farm Lease would be construed in the context of the TEDRA petition, nor did James and his counsel even have a reasonable opportunity to present critical evidence and authority that would have been pertinent to interpretation and enforcement of the forfeiture provision in that document.

2. **The Presiding Judge Improperly Offered and Considered Personal Testimony By Misapplying the Doctrine of "Judicial Notice".**

As previously indicated, the probate court erroneously refused to consider direct testimony from Elma Hayes' attorney regarding her estate planning objectives and the manner in which her 2003 Last Will and Testament was intended to further those objectives. It is also important to note that Jerry Hayes introduced no evidence whatsoever relating to these issues that would have tended to controvert Mr. Carpenter's testimony.

If there was no evidence offered in support of Jerry's argument, then on what basis did the probate court rule in Jerry's favor? The following excerpts from the court's August 6, 2013 *Order Denying Motion*

for Reconsideration Re: Termination of Lease answer that question quite clearly:

"The court's statements made at the July 2, 2013 hearing in reference to his prior farm experience was intended to show that he has very familiar with and had substantial experience in dry land farming as a farm attorney in the area for over 27 years (former law offices in Odessa, Ritzville, and Lind) and as one who had grown up on a farm in the area (15 miles southwest of Lind). This experience easily allowed this court to assert that the terms of this lease were obviously a "sweetheart" deal. This assertion did take into account James Hayes' claim that he had assumed approximately \$123,000 in debt, although he did not provide any evidence how he obtained/purchased the farm machinery, implements, equipment and supplies needed to begin farming."

"Based on the court's prior experience, the court did take judicial notice of the very favorable lease terms to this tenant son for the purpose of determining the extent that the parents went to to encourage their son to continue with their family farming operations. Of course, weather plays a major factor in farming and freeze outs do occur as represented by James Hayes, but in other years higher yields will be harvested. A tenant in 1993 should reasonably expect historical averages and not anticipate annual freeze outs or continued droughts. Suggesting that \$5/acre would be a reasonable rent based on the parents' prior crop yields and tax returns and his perceived risk is not realistic or relevant to the issues before the court. It should be noted that the large tax loss of \$35,132 in 1991 was in the year the father died and certainly is not indicative of the annual projected net farm income. The parents could have elected to lease out their farm to a neighboring tenant under rental rates estimated by Jerry Hayes to be at least \$20-25/acre, but they did not. Obviously, they wanted one of their sons to continue with the family farm and assist them in paying off their accrued farm debt. These estimated rental rates appear very reasonable and

are less than what the court would have expected for farm land in the Wilbur-Creston area. Coincidentally, farmers often enrolled their most marginal farm ground into the Conservation Reserve Program (CRP) for a ten-year period; and payments were regularly submitted and accepted for \$50/acre in 1993 as well as in prior and subsequent years. The landlord would often contract to receive 50% of that annual payment."

"This court's prior farm experience also allowed him to conclude that the extremely favorable terms of allowing the tenant son to take over the farming operations for a fixed \$5/acre rental for an exceptionally long term of 25 years would only be given to close family members and not to third parties. The "boilerplate" language that Mr. Carpenter referred to⁵ was inserted because it is the custom and usage in the area and certainly would be expected in the present case. A tenant's interest in a farm lease is personal to that landlord; and tenants are certainly not interchangeable. Therefore, testimony would not be necessary to address the need for this "boilerplate" paragraph."

"It would be highly unlikely that a parent who intends for all his or her children to inherit somewhat equally (in this case each child received a half section) could even conceive that the tenant son would elect to sell his respective interest in the farm but insist that he continue with the same extremely favorable terms against his siblings on the remaining portions after the parent's death. Either the tenant is farming the entire farm or he is not farming at all as there was but one farm lease. The parents' purpose to encourage a son to continue with the family farm and possibly for successive generations would be defeated once the tenant son elected to sell his interest in the farm."

(CP 641-645) [emphasis supplied].

⁵ The Court is making reference to the testimony set forth in paragraph 5 of the July 26, 2013 Declaration of Kenneth D. Carpenter in Support of Petitioner's Motion for Reconsideration. (CP 611)

The concept of "judicial notice" that was mentioned – and apparently relied upon – by the lower court is in fact defined (and strictly limited) by the terms of ER 201. That rule of evidence states, in pertinent part:

- (a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.
- (b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

The Washington Judicial Council Comment for Rule 201 explains that an adjudicative fact is the type of fact that is normally determined by the jury. *5 Wash. Prac., Evidence Law and Practice* § 201.2 (5th Ed. 2007). In Washington case law, “[t]he tradition has been one of caution in requiring that the matter be beyond reasonable controversy.” *State of Washington v. K.N.*, 124 Wn.App. 875, 881, 103 P.3d 844 (2004).

ER 201’s alternative requirements that the judicially noticed fact they generally known within the territorial jurisdiction of the trial court or capable of accurate determination should not be confused with knowledge or information which is personally known by the trial judge. *Bechtel Civil and Minerals, Inc. v. South Columbia Basin Irrigation District*, 51

Wn.App. 143, 147, 752 P.2d 395 (1988); *State of Washington v. K.N.*, *supra*, 124 Wash.App. at 882. On the contrary, one of the fundamental axioms of judicial notice is that the trial judge may not take judicial notice of a fact merely because he or she has personal knowledge of its truth. 21B *Wright & Graham, Federal Practice and Procedure: Evidence 2d*. §5104, Rule 201, at 160 (2005). Moreover, consistent with this principle, where a trial court judge offers his or her own memories or experiences in support of judicial notice, he impermissibly testifies as a witness in a proceeding over which he or she is presiding, in direct violation of ER 605.⁶ *Vandercook, v. Reece*, 120 Wn.App. 647, 651-52, 86 P.3d 206 (2004).

In effect, Judge Strohmaier became the chief witness for Jerry Hayes in the case at bar – a witness who could neither be cross-examined nor refuted – after both sides had presented their evidence. Instead of deciding the issues before him on the basis of admissible evidence, it is abundantly clear from his oral and written comments that Judge Strohmaier determined those issues – along with others that were not properly before him – on the basis of his personal experiences and prejudices. (R. 72-76; CP 641-645)

⁶ The full text of ER 605 reads as follows: "The judge presiding at the trial may not testify in that trial has a witness. No objection need be made in order to preserve the point."

It is also clear that Judge Strohmaier's characterization of the 1993 Farm Lease as a "sweetheart" deal, and his passionate opinion that parents who own family farms always desire their children and future generations to keep the farm in one piece, are not the kinds of "adjudicative facts" that would meet the criteria for judicial notice pursuant to ER 201, even if those "facts" had not been thoroughly controverted by the overwhelming direct and circumstantial evidence concerning Elma's intent. In essence, Judge Strohmaier impermissibly substituted his own testamentary scheme for that of the testatrix.

**3. The Presiding Judge Improperly Precluded
Consideration of Testimony Which Would Have
Supported Entry of Judgment in Favor of James.**

As previously indicated, the probate court erroneously characterized as inadmissible opinion a good portion of the Declaration testimony of attorney Kenneth D. Carpenter. Among other things, this testimony demonstrated unequivocally that, after her husband died, and after Mr. Carpenter had drafted the 1993 Farm Lease, Elma Hayes decided that her children could not work together, and that the family farm should be divided up upon her death.

Moreover, the Court compounded this error by creating confusion and uncertainty regarding the nature and scope of the hearing (R. 3-10, 28-29, 68-69, 71-72), and by declining to hear additional testimony from attorney Carpenter that would have clarified statements in the declarations. In so doing, the court ignored repeated offers of proof by James' counsel,⁷ as well as counsel's explanation that the declarations in the record were only a starting point for testimony, because they had been prepared more than two months earlier, in the context of motions that were pending before Judge Knodell in the Grant County unlawful detainer action (R. 32-33).

III. THE ACTIONS OF THE COURT IN ABRUPTLY EXPANDING THE SCOPE OF THE HEARING WITHOUT PRIOR NOTICE, IN ARBITRARILY LIMITING TESTIMONY, AND IN FAILING TO RECUSE ITSELF AFTER DEMONSTRATING PARTIALITY, DEPRIVED PETITIONER OF DUE PROCESS OF LAW.

⁷ See, for example, R. 10, 13-14, 22, 23, 26, 28, 29, 32-33, 35, 49-50, 51, 53, 67, 68, and 71.

The cornerstones of procedural due process are – at minimum – notice and an opportunity to be heard. *In re Detention of A.S.*, 138 Wn.2d 898, 982 P.2d 1156 (1999); *Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355 (1995), *reconsideration denied, and amended*; *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 871 P.2d 1050 (1994), *cert. denied*, 115 S.Ct. 1503, 440 U.S. 960, 59 L.Ed.2d 598. Moreover, due process, the appearance of fairness and the Code of Judicial Conduct require a judge to recuse himself where there is bias against a party or where impartiality can be questioned. *State v. Leon*, 133 Wn.App. 810, 138 P.3d 150 (2006), *rev. denied*, 159 Wn.2d 1022, 157 P.3d 404.

In the case at bar, it was not until after the evidence and argument had been presented, and after the court finished issuing its oral ruling, that Petitioner had any inkling that the court intended to (1) ignore the scope of the issues as framed in the Petition, (2) construe the terms of the 1993 Farm Lease, (3) issue a finding that Petitioner had violated the terms of the lease, and (4) impose a forfeiture of Petitioner's leasehold interest as to the parcels of property owned by Jerry, John and Patricia. Prior to that point in the June 20, 2013 hearing, the entire focus of the evidence and argument had been the decedent's intent with respect to the provisions of her 2003 Last Will and Testament; and counsel for both parties had clearly

informed the court that the issues relating to interpretation and enforcement of the terms of the lease had previously been submitted to Judge Knodell for determination in the context of the unlawful detainer action.

This unanticipated and undesired expansion of the scope of the June 20, 2013 hearing was in and of itself sufficient to make the process patently unfair. However, that unfairness was exacerbated by the court's refusal to consider supplemental testimony from attorney Carpenter,⁸ and it was exacerbated yet again by the court's incredible assumption of the role of chief witness on behalf of Jerry Hayes, which is demonstrated time and time again in the court's written and oral rulings. Rule 2.11 (A) of the Code of Judicial Conduct states, in pertinent part:

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

⁸ If Judge Strohmaier did in fact consider the additional declaration testimony of attorney Kenneth D. Carpenter prior to denying Petitioner's motions for reconsideration – which appears to be the case, although it is not entirely clear – then it could be argued that the probate court's consideration of the additional testimony served to rectify the court's earlier error when the court declined to consider supplemental testimony from Mr. Carpenter at the June 20, 2013 hearing.

Even the appearance of unfairness that the court's behavior generated should have been sufficient to prompt the court to recuse itself. However, the court's written and oral statements at the June 20, 2013 hearing and on reconsideration make it crystal clear that the court's actual biases and prejudices relating to family farms in general were in fact the driving force behind the court's rulings. Considering all of these errors and irregularities in the aggregate, it is clear that Petitioner was denied due process of law, and that the challenged rulings should be overturned by this court.

IV. THE UNCONTROVERTED EVIDENCE OF RECORD PRECLUDES A FINDING THAT, WHEN SHE EXECUTED HER 2003 LAST WILL AND TESTAMENT, ELMA HAYES INTENDED HER CHILDREN TO HOLD THE 1993 FARM LEASE AS TENANTS IN COMMON.

Although the probate court approved the findings of fact and conclusions of law that were presented by Jerry's counsel on July 2, 2013, the court essentially treated the June 20 hearing as a summary adjudication, and

indicated that the purpose of the findings of fact would be to allow the court of appeals to "...kind of see where I'm coming from." (R. 81)

An appellate court reviews a lower court ruling granting summary judgment on a de novo basis. *Int'l Bhd. of Elec. Workers, Local Union No. 46 v. Trig Elec. Constr. Co.*, 142 Wn.2d 431, 434-35, 13 P.3d 622 (2000), *cert denied*, 532 U.S. 1002 (2001). In doing so, the appellate court views the facts in the light most favorable to the nonmoving party. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Summary judgment is proper only where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c).

The two issues that were properly before the probate court were (1) whether Elma Hayes intended the 1993 Farm Lease to be partitioned upon her death in the same manner as she had divided and bequeathed the property to which the lease applied; and (2) whether Elma intended each of her children to have the ability, after her death, to control the manner in which James farmed the three parcels of property that were devised to James and their other siblings. As mentioned above, the probate court could have held a full evidentiary hearing on the merits,⁹ but instead,

⁹ R. 10, 13-14, 22, 23, 26, 28, 29, 32-33, 35, 49-50, 51, 53, 67, 68, and 71.

elected to adjudicate these issues summarily, based solely upon declarations and copies of documents submitted by the parties. (R. 81; (CP 632, 641-645) Under the summary adjudication standard of CR 56, CR the court's findings were precluded by the evidence presented.

1. The Evidence of Record Is Irreconcilably Inconsistent with the Trial Court's Ruling that Elma Hayes Intended for Children to Hold the 1993 Farm Lease As Tenants in Common.

The following direct and circumstantial evidence that was before the probate court unequivocally established that, prior to execution of the 1993 Farm Lease, Elma L. Hayes had second thoughts about making Jerry, John and Patricia co-landlords, and that she desired to execute the lease as the sole landlord:

- *Declaration of Kenneth D. Carpenter* dated April 17, 2013 (CP 159, ¶¶ 4, 5);
- *Supplemental Declaration of Kenneth D. Carpenter* dated May 2, 2013 (CP 209-210, ¶¶ 3, 4);
- *1993 Farm Lease* (CP 223, 231-233);
- *Declaration of James L. Hayes* dated April 9, 2013 (CP 216, ¶ 9; CP 237)¹⁰;

¹⁰ A significant piece of evidence which gives some insight into Elma's reasons for ultimately declining to include her children as co-landlords on the 1993 Farm Lease and

- *Declaration of Kenneth D. Carpenter in Support of Petitioner's Motions for Reconsideration* dated July 26, 2013 (CP 611-612, ¶¶ 5, 6);
- *Declaration of James L. Hayes in Support of Petitioner's Motions for Reconsideration* dated July 12, 2013 (CP 557, ¶¶ 4-5);

The following direct and circumstantial evidence that was before the probate court further established that, as early as 1994, Elma L. Hayes decided to partition the family farm among her children, and begin gifting property interests consistent with that decision - a dramatic change from the previous estate plan represented by her 1990 Last Will and Testament:

- *Declaration of Kenneth D. Carpenter* dated April 17, 2013 (CP 158-160, ¶¶ 3, 5 and 6; CP 167, 191, 193, 195, 197, 200-201);
- *Supplemental Declaration of Kenneth D. Carpenter* dated May 2, 2013 (CP 209, ¶ 5);
- *Declaration of James L. Hayes* dated April 9, 2013 (CP 216, ¶ 11; CP 240, 242, 244 and 246);

subsequently partitioning the family farm is Jerry's e-mail message dated July 26, 2012 (Exhibit 2 to the earliest *Declaration of James L. Hayes*), in which Jerry admitted:

"When Mom came to Arizona in 1992, she brought the lease agreement with her. I was on page 2 when I reminded her that this was exactly what Dad didn't want to see happen due to the implied sacrifice we would all need to make. She vehemently denied he ever said that as she ripped the lease out of my hands and told me she didn't need my signature or approval to proceed and that my vote didn't count. ***It was a moment that never healed between us and permanently damaged our relationship.***" [emphasis supplied]

- *Declaration of Kenneth D. Carpenter in Support of Petitioner's Motions for Reconsideration* dated July 26, 2013 (CP 612, ¶¶ 7-8);

Finally, the following direct and circumstantial evidence that was before the probate court established that, in January of 2003, Elma L. Hayes intended to reaffirm the distribution plan that she had begun in 1994, by executing a new Last Will and Testament in which she bequeathed separate parcels of farmland to each of her children, completely consistent with her previous gifting:

- *Declaration of Kenneth D. Carpenter* dated April 17, 2013 (CP 159-160, ¶¶ 5, 6, 7; CP 167);
- *Supplemental Declaration of Kenneth D. Carpenter* dated May 2, 2013 (CP 209, ¶ 5);
- *Declaration of James L. Hayes* dated April 9, 2013 (CP 216, ¶ 11; CP 240, 242, 244 and 246);
- *Declaration of Kenneth D. Carpenter in Support of Petitioner's Motions for Reconsideration* dated July 26, 2013 (CP 612, ¶¶ 7-8);

As to each of these factual propositions, the evidence of record cited above is both uncontroverted and contrary to the court's factual findings, and results in the following consequences.

2. The Evidence And Legal Precedent Compel a Finding That Decedent Intended to Partition the Family Farm upon Her Death.

Had she so intended, Elma Hayes could easily have bequeathed her farmland to her children as tenants in common, with undivided interests. Instead, consistent with her separate gifts of property interests to each of her children which began in 1994 and 1995, Elma clearly expressed her intention in her January 28, 2003 Last Will and Testament to divide her farmland into four distinct parcels, and to separately convey each parcel to a single child. These separate ownership interests were ultimately formalized by the deeds of distribution that were issued by the co-personal representatives, which conveyed to each child a distinct parcel, as his or her "sole and separate property."

For a number of reasons, even if Elma's intention had been less clearly expressed, the preference under the law should have been to interpret a direction to allocate and divide the farmland equally between her children as a direction to partition the property prior to distribution, in lieu of distributing undivided interests as tenants in common. This would effectively have accomplished the same purpose as the specific bequests that were directed in this case. See, for example, *In re Estate of Sherry*, 158 Wn.App. 69, 240 P.3d 1182 (2010). Moreover, even where property is initially devised to beneficiaries of a probate estate as tenants in common with undivided interests,

... [I]n jurisdictions that have adopted the Uniform Probate Code, devisees of undivided interests can elect to partition in the probate proceeding, commonly resulting in a partition agreement. See, e.g., Uniform Probate Code § 3-911 and its official comment, 8 pt. 2 U.L.A. 278 (1998).

In re Estate of Sherry, supra, 158 Wn.App. at 80. Whether we are dealing with a *de facto* partition by a testatrix in accordance with the terms of her Last Will and Testament, or a voluntary or court-ordered partition during the course of probate in response to a request of a devisee who is a tenant-in-common, or a voluntary or court-ordered partition subsequent to probate pursuant to the general partition statute, the analysis with respect to the persistence of a leasehold interest is the same.

Partition proceedings in the state of Washington are governed by Chapter 7.52 RCW. Pertinent to the issue at bar, *RCW 7.52.110* very clearly provides, in pertinent part:

"Such decree and partition shall not affect any tenants for years or for life, of the whole of the property which is the subject of partition...."

There is no logical reason to treat Elma's *de facto* partition and distribution of the farmland – farmland which was subject to the terms of the 1993 Farm Lease – any differently from an equitable partition of the property during probate, or a statutory partition of the property subject to probate. In either case, mere division and distribution of the property does not serve

to extinguish the interest of a tenant as to parcels in which he does not own the reversionary interest.

3. **The Evidence And Legal Precedent Compel a Finding That James' Leasehold Interest in His Own Parcel of Property Was Extinguished By Operation of Law upon Receipt of His Fee Simple Interest In That Parcel.**

It has long been the rule in this State that a tenancy for years is extinguished by merger with a freehold estate when the tenancy and the freehold are held by one person at one and the same time without any intermediate estate. *Mobley v. Harkins*, 128 P.2d 289, 14 Wn.2d 276 (1942); *National Bank of Commerce v. Fountain*, 9 Wn.App. 727, 514 P.2d 194 (1973). Thus, when James Hayes received his parcel of land from Elma's estate on June 18, 2012, his fee simple interest merged with what would have been his lessee's interest under the 1993 Farm Lease as to that parcel, and his tenancy – which would otherwise have been a "charge or encumbrance" on that parcel – was at that time extinguished, by operation of law, as to that parcel.

4. **The Evidence And the Law Compel a Finding That Elma Hayes Did Not Intend Her Children**

to Have Leasehold Rights in Each Other's

Separate Parcels of Property.

Elma Hayes' 2003 Last Will and Testament does not specifically mention the 1993 Farm Lease at all, nor was the specific issue of partition was ever raised in discussions with the attorney who drafted her 2003 Will. For those reasons, it is necessary to examine circumstantial evidence and legal precedent in order to determine whether it was Elma's intention that her children receive undivided interests in the 1993 Farm Lease, as tenants in common, or whether it was her intention to partition the 1993 Farm Lease, consistent with her *de facto* partition of the property to which the lease pertained. The paramount duty of all courts and others concerned in the execution of last wills is to give effect to the testator's intent when the will was executed. *RCW 11.12.230; In re Estate of Bergau, 103 Wn.2d 431, 435, 693 P.2d 703 (1985); In re Estate of Price, 73 Wn.App. 745, 754, 871 P.2d 1079 (1994); In re Estate of Sherry, 158 Wn.App. 69, 240 P.3d 1182 (2010)*. In the case at bar, the Last Will and Testament of Elma L. Hayes was executed on January 28, 2003, 10 years after execution of the 1993 Farm Lease.

Presumably, Elma was well aware of James' leasehold interest, and yet she granted James a separate and distinct fee simple ownership interest

that would make that leasehold interest meaningless – both logically, and as a matter of law – with respect to the particular parcel that she bequeathed to James. Had she desired to avoid this result, she could have expressed that intention by devising the farmland to her four children as tenants in common, yet she did not.

Just as there is no evidence whatsoever to indicate that Elma intended the provisions of the 1993 Farm Lease to encumber the parcel of property that she bequeathed to James, there is also no evidence to indicate any desire on Elma's part to terminate James' tenancy as to the three separate and distinct parcels of property that she devised to his siblings, even assuming that she could have lawfully accomplished either of these things.¹¹ In the absence of such evidence, Jerry's position creates an absurd outcome: that, as a matter of law, merger of James' fee simple and leasehold interests results in forfeiture of his leasehold rights under the 1993 Farm Lease as to the separate and distinct parcels of property that were devised to James' siblings, because he is no longer "leasing" his own property.

¹¹ For that reason, it is unnecessary to determine whether a landlord could intentionally invalidate an otherwise enforceable lease, merely by dividing the property and transferring one of the resulting parcels (including the smallest and/or least valuable parcel) to the tenant.

The premise underlying this argument is that the effect of an encumbrance upon partitioned property must necessarily be identical as to each recipient of a portion of the property. Unfortunately, that premise is fundamentally flawed. In *Hill v. Reno*, 112 Ill. 154 (1883), the Illinois Supreme Court observed as follows:

“Co-tenants may lease to one another or to strangers. They may all concur in the lease or each may lease his moiety separately. If, however, the lessors be co-parceners or tenants in common, the lease operates as a separate demise of each and must be so treated.”

112 Ill. at 164.¹² See also, *Thomas v. Farr*, 380 Ill. 429; 44 N.E.2d 434 (1942).

Washington courts have not yet addressed this issue, which obviously has application not only to bequests of leased property, but also, voluntary and involuntary partitions of leased property. However, the Illinois approach has the advantage of making good sense – and good public policy – in both contexts. Moreover, even if this court should decline to adopt a "bright line" rule that applies to all such cases, the uncontroverted evidence before the court in this particular case precludes a finding that Elma Hayes intended her children to receive and hold the

¹² The Black's Law Dictionary definition of a "co-parcener" is one of two or more persons sharing an inheritance, by whom it is held as an entire estate.

1993 Farm Lease as tenants in common, and in fact compels a finding to the contrary.

Multiple individuals who share ownership of a landlord's interest in a lease as tenants in common are functionally indistinguishable from co-landlords. Although the 1993 Farm Lease as originally drafted contemplated that Jerry, John and Patricia would be co-landlords along with Elma, the direct and circumstantial evidence cited above establishes unequivocally that Elma rejected that concept at the time the lease was executed, in part, because she believed that her children could not work together. (CP 209-210, 216, 237, 611-612)

This was also part of the rationale for her subsequent decision to divide the family farm into four separate parcels, to begin gifting those four separate parcels to each of her four children (contrary to her previous estate plan), and to bequeath those parcels separately to her children upon her death. It is apparent that the evidence before the trial court precluded summary adjudication of this issue in Jerry's favor. However, it is equally apparent that the uncontroverted evidence of record compels a finding that Elma did not intend her children to operate as co-landlords or tenants in common after her death. Accordingly, given the evidence of record, the trial court's ruling in that regard should be reversed.

**V. THE LAW AND UNCONTROVERTED EVIDENCE
OF RECORD PRECLUDE A FINDING THAT JAMES
BREACHED THE TERMS OF THE 1993 FARM
LEASE WHEN HE SOLD HIS OWN PARCEL OF
PROPERTY.**

For the reasons stated previously, the issues of interpretation and enforcement of the terms of the 1993 Farm Lease were never properly before the probate court – both parties to the Lincoln County Superior Court proceeding had previously submitted those issues for determination by Judge Knodell in the Grant County Superior Court unlawful detainer litigation – and the probate court's decision to rule upon those issues violated James' right to due process of law. Over and above the deprivation of procedural due process, the probate court also erroneously interpreted and applied the forfeiture provisions of the lease, which provides an additional, independent basis for overturning the lower court's rulings with respect to the forfeiture issues.

1. **There Is Nothing in the 1993 Farm Lease That Suggests an Intention to Prohibit or Penalize The Sale of an Ownership Interest in the Farm Property.**

As noted previously, James' leasehold interest in the parcel of property that his mother specifically devised to him in her 2003 Last Will and Testament was extinguished by operation of law no later than June 18, 2012, when he received a fee simple interest in that same parcel property from Elma's estate. Jerry claims that, when James subsequently sold his ownership interest in his own parcel of property on August 7, 2012, he somehow breached ¶ 14 of the 1993 Farm Lease (CP 182), which reads as follows:

"14. Binding Effect – Assignments – Personal to Tenant. This Lease shall be binding upon the heirs, personal representatives, and assigns of the Landlord herein. It is understood that this Lease is personal to the Named Tenant, and ***no assignment or subletting or transfer by operation of law by the Tenant will be recognized, without the written consent of the Landlord.*** In the event the Tenant cannot personally perform the terms, conditions, and covenants required herein upon the Tenant, then this Lease will terminate immediately, provided that the Tenant or Tenant's successors shall be permitted to harvest any then growing crop and the summerfallow then in existence shall be settled in accordance with Paragraph 10 herein."

[emphasis supplied] In point of fact, James did not assign, sublet or transfer the 1993 Farm Lease to anyone. He did nothing more than sell his ownership interest in his separately-owned parcel of property, just as Elma had the right to sell the entire farm to a third party during her lifetime, and just as Jerry, John and Patricia have had the unfettered right to sell their

respective ownership interests in their own separate parcels of property that they inherited from their mother.

This restriction on alienation of the lease was not included in the 1993 Farm Lease at Elma's request. It was nothing more than "boilerplate" that was inserted as a matter of course by Elma's attorney, when he drafted the document that was inserted by attorney Carpenter for the purpose of assuring that the landlord had the right to determine the tenant on his own property. (CP 611, ¶ 5). Moreover, assuming for the sake of argument that there are two possible ways in which to construe this provision – one of which is favorable to the landlord's successor in interest (Jerry), and one of which favors the tenant (James) – the following observation from the Washington Supreme Court would apply:

From the record it appears that the lease was drafted by the landlord's attorney. Depending on evidence adduced on remand, it may be proper for the court to construe ambiguous language against the drafter's client. *Guy Stickney, Inc. v. Underwood*, 67 Wn.2d 824, 827, 410 P.2d 7 (1966); *Universal/Land Constr. Co. v. Spokane*, 49 Wn. App. 634, 638, 745 P.2d 53 (1987); Restatement (Second) of Contracts § 206 (1981).

Berg v. Hudesman, 115 Wn.2d 657, 677, 801 P.2d 222 (1990). In this case, Elma Hayes, as landlord, was Mr. Carpenter's client, while James

Hayes, the tenant, was the non-drafting party. Accordingly, any ambiguity respect to interpretation of the forfeiture provision of the 1993 Farm Lease and/or applicability of that provision in the event of mere sale of a parcel of property owned solely by the tenant – and not a parcel of property owned by the landlord – should be resolved in favor of James Hayes.

2. **Forfeiture of James' Leasehold Interest under the Circumstances of the Case at Bar Would Be Unjust, and Contrary to Principles of Equity.**

Jerry's insistence that James forfeit his leasehold rights with respect to Jerry's parcel of farmland by reason of James' sale of the parcel of farmland that he himself had inherited was before Grant County Superior Court Judge Knodell in the context of Jerry's action for unlawful detainer. Unlawful detainer actions in general – and for that matter, motions for issuance of a writ of restitution – are proceedings in equity. *Indigo Real Estate Services v. Wadsworth*, 169 Wn.App. 412, 426 n.10, 280 P.3d 506 (2012); *Housing Authority v. Pleasant*, 126 Wn.App. 382, 390, 109 P.3d 422 (2005); *Josephinum Assocs. v. Kahli*, 111 Wn. App. 617, 624, 45 P.3d 627 (2002); see also *RCW 59.18.380*. As stated on many occasions by the Washington Supreme Court:

It is elementary law in this jurisdiction that
forfeitures are not favored and never

enforced in equity unless the right thereto is so clear as to permit no denial. *Dill v. Zielke*, 26 Wn.2d 246, 173 P.2d 977 (1946); *Moeller v. Good Hope Farms, Inc.*, 35 Wn.2d 777, 215 P.2d 425 (1950); *State ex rel. Foley v. Superior Court*, 57 Wn.2d 571, 358 P.2d 550 (1961); *Hyrkas v. Knight*, 64 Wn.2d 733, 393 P.2d 943 (1964); *Rocha v. McClure Motors, Inc.*, 64 Wn.2d 942, 395 P.2d 191 (1964). [emphasis supplied]

John R. Hansen v. Pac. Int'l Corp., 76 Wn.2d 220, 228, 455 P.2d 946 (1969); *Mayflower Realty Co. v. Sec. Sav. & Loan Soc.*, 192 Wash. 129, 132, 72 P.2d 1038, 1937 (1937). Moreover, even where there has been a clear violation of a covenant in a lease – and no such violation is present in this case – that circumstance will not warrant forfeiture of the tenant's leasehold rights where such a forfeiture would be out of all proportion to the harm suffered by the landlord as a result of the tenant's conduct. In commenting on just such a violation, the Washington Supreme Court held:

"At the least, there was such carelessness and inefficient business methods as would not ordinarily be excusable. Here, that carelessness must be weighted in the scales against a ***forfeiture of rights which are valuable out of all proportion to the harm which appellants have suffered by the careless conduct.*** The law does not favor forfeitures, and equity abhors them. Because forfeitures are not favored, we are constrained to hold that the trial court's findings and the conclusions based thereon were not erroneous." [emphasis supplied]

Deming v. Jones, 173 Wash. 644, 648, 24 P.2d 85 (Wash. 1933).

Both logically, and as a matter of law and equity, Jerry has no basis for his objection to James' disposition of his own separate and distinct parcel of property; but of equal importance, James' sale of his own property does not in any way diminish his ability to continue to perform farming operations on Jerry's parcel of farmland, nor does it in any way diminish the amount of rent that Jerry is entitled to receive. By no stretch of the imagination is James in breach of his leasehold obligations to Jerry (or any of his other siblings, for that matter). The 1993 Farm Lease executed by Elma Hayes is valid and enforceable as to the parcel bequeathed to Jerry, and consistent with principles of law and equity, the court's premature termination of the contract is unwarranted, and should be overturned.

D. Conclusion

By declining to hear testimony that was offered to supplement and clarify declarations that had been offered in a separate proceeding, by excluding admissible evidence, by offering and considering personal testimony on behalf of the Respondent, by taking "judicial notice" of reasonably disputable facts outside the record and by issuing rulings upon

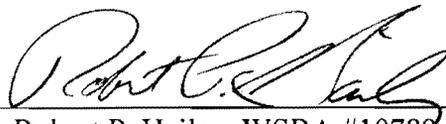
matters that were not properly before the court, the lower court deprived Petitioner of due process of law.

Notwithstanding these deficiencies of procedural due process, the probate court's summary adjudication of the issues relating to the 2003 Last Will and Testament of Elma Hayes and the 1993 Farm Lease in favor of Jerry was clearly improper, if for no other reason than the existence of evidence which was inconsistent with the court's findings. In fact, the non-excluded evidence supporting James' contentions was uncontroverted, as a result of which, any summary adjudication should have been in favor of the Petitioner. For the same reason, entry of judgment in favor of Jerry would not meet the "substantial evidence" test, even if such a judgment had been based upon a full evidentiary hearing.

All of the foregoing reasons, the challenged orders issued on July 2, 2013 and August 6, 2013 should be reversed, and this case should be remanded with directions to enter judgment in favor of James Hayes on the issues defined in the Petition.

RESPECTFULLY SUBMITTED, this 31st day of January, 2014.

RANDALL | DANSKIN, P.S.

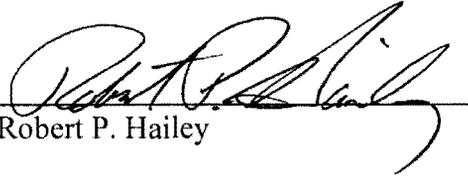
By: 
Robert P. Hailey, WSBA #10789
Attorneys for Appellant James L. Hayes

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the foregoing document on the 31st day of January, 2014, addressed to the following:

Matthew Andersen
Winston & Cashatt
601 W. Riverside Avenue
Suite 1900
Spokane, WA 99201

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|-------------------------------------|------------------|
| <input checked="" type="checkbox"/> | Hand Delivered |
| <input type="checkbox"/> | U.S. Mail |
| <input type="checkbox"/> | Overnight Mail |
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Robert P. Hailey

Hill v. Reno

Supreme Court of Illinois
May 10, 1883.
No Number in Original

Reporter: 112 Ill. 154; 1883 Ill. LEXIS 37

WILLIAM HILL v. SARAH A. RENO *et al.*

Prior History: [**1] APPEAL from the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

Disposition: *Decree reversed.*

Core Terms

partition, lease, heirs, tenant in common, rent, lessee, merger, court of equity, covenants, inconveniences, matter of right, value of a share, real estate, same right, inheritance, succeeding, chancery, freehold, lessor

Case Summary

Procedural Posture

Appellant lessee sought review of a decree of the Superior Court of Cook County (Illinois), which dismissed a bill in chancery for partition of certain real estate brought by the lessee against appellees, two heirs at law of an intestate seized in fee of the reversion in the real estate and the heirs' husbands.

Overview

The lessee contended that he was entitled to a decree partitioning certain real estate, but the trial court found otherwise. In reversing, the court found that Ill. Rev. Stat. ch. 106, § 1 gave to every tenant in common of a freehold estate the right to coercive partition by a bill in chancery. Although the reversion in fee to the real estate was in several tenants in common, the lessee had purchased a part of the reversion and taken an assignment thereof to himself. The court determined that the lessee therefore had the right to demand a partition in chan-

cery even though such partition would necessarily result in a sale of the premises where, as here, there was no question as to the sufficiency of the lessee's title. Upon the lessee's purchase of his interest in the reversion, a merger, pro tanto, of the term had been effectuated, thereby extinguishing certain covenants to pay rent, taxes, and other assessments as to the part purchased. Further, the court determined that the issue of whether the lessee was entitled to partition was separate and distinct from the issue of equitable distribution of the proceeds upon sale of the real estate.

Outcome

The court reversed the decree of the superior court and remanded the cause for further proceedings in accordance with the court's opinion.

LexisNexis® Headnotes

Estate, Gift & Trust Law > Estate Administration > Intestate Succession > General Overview
Real Property Law > Estates > Concurrent Ownership > General Overview
Real Property Law > Estates > Concurrent Ownership > Tenancies in Common

HNI Upon the death a lessor without a will, there is, by operation of law, a severance of the estate into as many distinct freeholds as he leaves heirs succeeding to the property, the share of each depending upon the nearness of the relation he bears to the deceased; but the law does not, and of necessity can not, ascertain or define the boundaries of their respective estates, hence it leaves them to possess and occupy the premises as a whole, according to their respective interests, until a partition can be effected in some mode authorized by law. The same law, therefore, which clothes such heirs with the title to the property imposes upon them and their assigns all the inconveniences and hardships incident

to the ownership of real estate thus held. Ill. Rev. Stat. ch. 39, § 1.

Real Property Law > Estates > Concurrent Ownership > General Overview
 Real Property Law > Estates > Concurrent Ownership > Joint Tenancies
 Real Property Law > Estates > Concurrent Ownership > Tenancies in Common

HN2 See Ill. Rev. Stat. ch. 106, § 1.

Civil Procedure > Preliminary Considerations > Equity > General Overview
 Real Property Law > Estates > Concurrent Ownership > General Overview
 Real Property Law > Estates > Transfers > Partition Actions
 Real Property Law > Estates > Concurrent Ownership > Tenancies in Common

HN3 Courts of equity are bound to proceed with a partition action unless it can be seen when the titles of the co-tenants are spread before it that there are legal objections to the complainant's title. Partition is as much a right in equity as it is at common law. Tenants in common have an absolute right to a division of the land held in common, notwithstanding inconveniences may thereby result to the other tenants, or if partition can not be made, to a sale, and division of the proceeds. Partition is as much a matter of right in equity as it is at common law. Tenants in common have an absolute right to a division of the land held in common, notwithstanding inconveniences may thereby result to the other tenants, or if partition can not be made, to a sale, and division of the proceeds.

Contracts Law > Types of Contracts > Covenants
 Real Property Law > Estates > Concurrent Ownership > General Overview
 Real Property Law > Estates > Concurrent Ownership > Joint Tenancies
 Real Property Law > Estates > Concurrent Ownership > Tenancies in Common
 Real Property Law > Encumbrances > Restrictive Covenants > General Overview

HN4 Notwithstanding the rule that a bill in equity for partition is a matter of right, nevertheless there are certain well recognized modifications of it. For instance, if an estate is devised or otherwise conveyed to two or more, upon the express condition that it should not be subject to partition, or if several tenants in common, or joint tenants, covenant between themselves that the estate shall be held and enjoyed in common only, equity would not, in the absence of special equities, award a partition at the suit of some of the parties, against the ob-

jections of the others; and where the title of the complainant is doubtful, -- or, in other words, where he does not show a clear right to partition, -- it will not be awarded. So where several persons have purchased land, with a view of selling it out into lots for building ground, according to a certain plan, and it has been agreed among them that neither of them should dispose of his share except in a certain manner, such an agreement has been determined, in a suit by the representatives of one of the parties against the survivors, to bar the right to partition.

Civil Procedure > Preliminary Considerations > Equity > General Overview
 Real Property Law > Estates > Concurrent Ownership > General Overview
 Real Property Law > Encumbrances > Restrictive Covenants > General Overview

HN5 Equity will not award a partition at the suit of one in violation of his own agreement, or in violation of a condition or restriction imposed upon the estate by one through whom he claims.

Contracts Law > Types of Contracts > Lease Agreements > General Overview
 Real Property Law > Estates > Concurrent Ownership > General Overview
 Real Property Law > Estates > Concurrent Ownership > Tenancies in Common

HN6 A tenant in common has the same right to sell or lease his estate as an owner in severalty having exclusive possession. Co-tenants may lease either to one another or to strangers. They may all concur in the lease, or each may lease his moiety separately. If, however, the lessors be co-parceners, or tenants in common, the lease operates as the separate demise of each, and must be so treated, -- and this is the well recognized doctrine on the subject.

Civil Procedure > Preliminary Considerations > Equity > General Overview
 Real Property Law > Estates > Concurrent Ownership > General Overview

HN7 Where an actual partition is made, and there is any inequality in the value of the shares not justified by the interests of the parties in the estate, the equity court will decree pecuniary compensation, called owelty. But where, from any cause, one's share is worth more than another's, and a sale is ordered, the parties' rights are easily adjusted by a proper division of the proceeds.

Counsel: Messrs. CAMPBELL & CUSTER, for the appellant.

Messrs. WAITE & CLARKE, and Mr. J. B. SKINNER, for the appellees.

Opinion by: MULKEY

Opinion

[*156] Mr. JUSTICE MULKEY delivered the opinion of the Court:

This is an appeal from a decree of the Superior Court of Cook county, dismissing, on the hearing, a bill brought by William Hill, the appellant, against Sarah A. Reno, Eugenia M. Little, Charles A. Reno and Jacob H. Little, the appellees, for the partition of certain real estate in the city of Chicago.

No controverted questions of fact arise upon this record. The undisputed facts of the case are, that Abner R. Reeves, being the owner in fee of the land in controversy, on the 28th [*157] of January, 1872, leased the same to William Parmelee for a term of twenty years, from the first day of April then next following, at an annual rent of \$2400 for the first five years, to be paid quarterly. At the expiration of the first five years, and at the end of each successive five years, a new valuation or rental of the premises, equal to six per cent of their entire [**2] value, was to be fixed by arbitrators, to be chosen as in the lease provided. The lessee was to pay all taxes and assessments, including water rates, and in case of failure to do so, they were made a lien upon the improvements to be erected on the premises by the lessee. The latter covenanted and agreed to erect on the demised premises a building, to be worth at least \$10,000, which the lessor agreed to purchase at the end of the term, at a price to be fixed by arbitration. The lessee was authorized to sell or assign his interest in the term, but the assignee was to be bound by all the covenants in the lease. While this lease was in full force, to-wit, on the 31st of October, 1875, the said Abner Reeves died intestate, seized in fee of the reversion in said premises, leaving certain collateral relations as his heirs at law, among whom were his sisters, Sarah A. Reno and Eugenia M. Little, the other appellees being their respective husbands. Having acquired, by purchase, the interests of some of the other heirs in addition to what they had inherited themselves, Mrs. Reno and Mrs. Little, at the time of filing the present bill, respectively owned about one-third of the premises [**3] in ques-

tion, and the residue belonged to the appellant, as hereinafter shown. Parmelee erected the house on the premises, as provided for in the lease, and subsequently sold and transferred the same, together with said lease, to others. In 1880, appellant purchased the leasehold estate, together with the building thereon, and took an assignment of the lease. In the following year he purchased and became assignee of so much of the reversion in said premises as was not owned by appellees, being a fraction over a third interest. After the commencement [*158] of the present suit, to-wit, on the 23d of May, 1882, appellant and appellees selected arbitrators, in pursuance of the provisions of the lease, who appraised the rent for five years, from April 1, 1882, to the satisfaction of the parties, respectively, since which time appellant has regularly paid appellees their respective shares of the rent under such appraisalment. It was also stipulated between the parties, for the purposes of the hearing, that the premises in question were not susceptible of division, except by means of a sale thereof.

Under the facts stated the simple question presented for determination is, whether [**4] the lessee of real estate, the reversion in fee of which is in several tenants in common, can, by purchasing a part of the reversion, and taking an assignment thereof to himself, demand, as a matter of right, a partition in chancery, when such partition will necessarily result in a sale of the premises.

Before giving a direct answer to this question it is proper to determine the exact legal relations of these parties with respect to the property in controversy. *HNI* Upon the death of Reeves, the lessor, there was, by operation of law, a severance of the estate into as many distinct freeholds as he left heirs succeeding to the property, the share of each depending upon the nearness of the relation he bore to the deceased; but the law did not, and of necessity could not, ascertain or define the boundaries of their respective estates, hence it left them to possess and occupy the premises as a whole, according to their respective interests, until a partition could be effected in some mode authorized by law, -- in other words, upon the death of Reeves his heirs at law succeeded to the property in question as tenants in common. The same law, therefore, which clothed them with the title to [**5] the property imposed upon them and their assigns all the inconveniences and hardships incident to the ownership of real estate thus held. (Sec. 1, chap. 39, Rev. Stat.; 1 Washburn on Real [*159] Prop. (4th ed.) 653.) Perhaps the most important right which the law has

annexed to this kind of tenancy is that of partition. In very ancient times this right, at least at law, was confined exclusively to lands held in parcenary, and as parceners always acquired title by inheritance, it followed the right extended only to estates in fee. But the law in this respect was changed by an act of the British parliament, as early as 31 Henry VIII, extending the right of partition to estates of inheritance, in joint tenancy, and in common.

But it is not necessary to go back to the common law, and ancient British statutes made in aid thereof, in support of the right in question in this State, for it is expressly conferred by our own legislature. Section 1, chapter 106, of the Revised Statutes, provides, "that *HN2* when lands, tenements or hereditaments are held in joint tenancy, tenancy in common, or co-parcenary, whether such right or title is derived by purchase, devise or descent, or whether [**6] any or all of the claimants are minors or of full age, any one or more of the persons interested therein may compel a partition thereof, by bill in chancery, *as heretofore*, or by petition in the circuit court of the proper county," etc. Since the statute gives to every tenant in common of a freehold estate the right to coercive partition by bill in chancery, as the right had existed and been enforced by courts of equity before the passage of the act, it is important to determine, with some particularity, the true limits of chancery jurisdiction over the subject as it exists, independently of statutory provisions. While there is considerable controversy among authors as to when courts of equity first assumed jurisdiction in partition cases, and also as to the true grounds of the jurisdiction, yet all concede that it is of very ancient origin, extending back to the time of Elizabeth, and that no branch of equity jurisdiction is more universally recognized or firmly established than it is.

But the material question, so far as the case in hand is concerned, is, is this right to partition imperative and absolutely [*160] binding upon courts of equity where a case is fairly [**7] brought within the law authorizing a partition, or are courts of equity clothed with such discretion that, under a given state of facts, they may grant the relief, or refuse it, and yet commit no error, -- or, differently put, when they may grant the relief without committing an error, are they bound to do it? That *HN3* they are so bound we think is fully shown by the general current of authorities. Freeman, in his work on Co-tenancy and Partition, sec. 424, in discussing this question says: "It is now certain that

unless, when the titles of the respective parties are spread before a court of equity, it can see that there are legal objections to the complainant's title, *he can demand, as a matter of right, that it proceed with the partition.*" No question is made as to the sufficiency of appellant's title in this case. In *Smith v. Smith*, 10 Paige, 470, it is declared that partition is as much a matter of right in equity as it is at common law. In 5 Wait's Actions and Defences, the author lays down the rule in these words: "Tenants in common have an absolute right to a division of the land held in common, notwithstanding inconveniences may thereby result to the other tenants, [**8] or if partition can not be made, to a sale, and division of the proceeds," -- citing many authorities in support of it. Bispham, one of the most polished and accurate of modern law writers, in discussing this subject, in his work on Equity, (2d ed.) p. 532, holds this language: "This jurisdiction was assumed some time about the reign of Elizabeth, and became so well established, both in England and the United States, that to invoke this equitable remedy has become a matter of right, and not of mere grace." In support of the text numerous authorities are cited which fully sustain it. See, also, to the same effect, 2 Leading Cases in Equity, pt. 1, p. 906, *et seq.*

In *Howey et al. v. Goings*, 13 Ill. 95, this court cite with approval the following language held by the court in *Parker v. Gerard*, Amb. 236, namely: "That such *HN4* a bill" (being a [*161] bill in equity for partition) "is a matter of right, and there is no instance of not succeeding in it but where there is not proof of title in plaintiff." It will be thus seen that this court at an early day placed itself in line with the general current of authority on this question, in strong and emphatic terms. [**9]

Notwithstanding the rule as stated is almost universally conceded, nevertheless there are certain well recognized modifications of it. For instance, if an estate should be devised or otherwise conveyed to two or more, upon the express condition that it should not be subject to partition, or if several tenants in common, or joint tenants, should covenant between themselves that the estate should be held and enjoyed in common only, equity would not, in the absence of special equities, award a partition at the suit of some of the parties, against the objections of the others; and where the title of the complainant is doubtful, -- or, in other words, where he does not show a clear right to partition, -- it will not be awarded. So where several persons had purchased land, with a view of selling it out

into lots for building ground, according to a certain plan, and it was agreed among them that neither of them should dispose of his share except in a certain manner, it was held, in a suit by the representatives of one of the parties against the survivors, that the agreement barred the right to partition. *Peck v. Cardwell*, 2 Beav. 137. See, also, in this connection, *Cabbage* [**10] *v. Franklin*, 62 Mo. 364; *Selden v. Vermilya*, 2 Sandf. (N.Y.) 568.

The principle which seems to underlie all these cases is, that *HNS* equity will not award a partition at the suit of one in violation of his own agreement, or in violation of a condition or restriction imposed upon the estate by one through whom he claims. The objection to partition in such cases is in the nature of an estoppel. It is supposed by counsel for appellees that some such defence arises out of the relations of the parties to this record, which renders it inequitable to grant [*162] the relief; but just what he or those under whom he claims have done to deprive him of the right of partition, the most valuable of all rights incident to such an estate, counsel have not satisfactorily shown.

Laying aside any vague or general notions we may have with respect to the merits of this case, let us look at the evidence itself to see if any such estoppel exists, and if so, the precise grounds upon which it rests. In the first place, it is to be observed that Parmelee, the original lessee, entered into no covenant or agreement, for himself or his assigns, that he or they would not purchase the reversion, [**11] or any part of it, after the execution of the lease, and no one pretends that under the general law there was anything illegal or inequitable in doing so. It follows, therefore, that appellant, as assignee of the lessee, had a clear legal and equitable right to acquire his interest in the reversion as he did. By his purchase he became tenant in common of the freehold and inheritance with appellees, and, so far as the right to partition is concerned, he unquestionably acquired the same right which the heirs had from whom he purchased. Now, it is manifest that either of the heirs, upon the death of Reeves, could, notwithstanding the lease made by him, have compelled a partition, by bill in equity, against the objections of all the other heirs and the owner of the term combined, although the partition would have resulted in a sale of the premises, and consequently, if not purchased by appellees, in depriving them of their shares of the rent and of all interest in or power to enforce the covenants in the lease, -- a matter to which great importance seems to be attached by appellees' counsel.

If either of the heirs might, through the instrumentality of a court of equity, have accomplished [**12] this without any violation of appellees' rights, -- and this is not at all questioned, -- upon what principle can it be contended that appellant, the assignee of such heir, may not do the same thing, for, at the very farthest, he asks to do nothing more [*163] than what is conceded the heir might have done? The ordering of a sale of the premises will not necessarily deprive appellees of their rights under the lease. They have the same right to purchase them that any one else has, and if they are struck off to another for more than they are worth, or for more than appellees are willing to give, appellees will get the benefit of the enhanced price. As these matters are always taken into account by purchasers seeking investment for capital, viewed as a business transaction, it is to be presumed that the interest on the purchase money during the term would be about an equivalent for the rent, in which event appellees would lose nothing.

We agree with counsel for appellees on the question of *merger*. We think it clear, from the authorities, that upon appellant's purchase of his interest in the reversion there was a merger, *pro tanto*, of the term, and consequently the covenants [**13] to pay rent, taxes, assessments, etc., were thereby extinguished as to the part purchased by him. (Taylor on Landlord and Tenant, sec. 502; *Carroll v. Balance*, 26 Ill. 19.) But we do not agree with counsel for appellees as to all the consequences which they assume will flow from such merger. As we understand it, the merger of the term and extinguishment of the covenants as to appellant's interest did not, and does not, at all affect the respective rights of appellees under the lease. As to them, and their several shares in the property, the lease and all its provisions are in force and effect just as though no merger or extinguishment had taken place, and will so remain as long as they continue to be owners of the reversion. But, as we have just seen, like all tenants in common of real estate not susceptible of partition except through the instrumentality of a sale, they are liable to lose all interest in the estate unless they will pay as much or more for it at the sale than any one else. As already seen, by the death of Reeves there was a severance of the freehold and inheritance into as many distinct estates as [*164] there were heirs, and an apportionment of [**14] the rent between them according to their respective interests. After such apportionment of the rent neither of the heirs had any interest in or concern with the rent belonging to the others, and upon appellant's purchase of the shares of some of

these heirs, it relieved him from the payment of so much of the rent as would have been due them but for his purchase; but his liability as to the other heirs and their assigns remained precisely as it did before. Taylor on Landlord and Tenant, (7th ed.) sec. 385; *Crosby v. Loop*, 13 Ill. 625.

Counsel for appellees say in their brief: "By the merger of the leasehold into the fee as to part of the premises, the covenants to pay rent and all taxes and assessments on that portion so merged have been forever extinguished, so that whoever should buy the premises as an entirety would take them in a very unsatisfactory condition. The sale would be made subject to the lease, and as appellant has a lease on two-thirds of the premises until April 1, 1892, and as, from the nature of the premises, it would be impossible to lease an undivided third to any other tenant, that portion would be not only entirely non-productive during the next nine [*15] years, but at the same time require the purchaser to pay out large sums for taxes and assessments." This is a misapprehension. The purchaser, in the case supposed, would have the same right to occupy and enjoy the premises, in proportion to his interest in the present estate, as the lessee himself; and if the lessee assumed the exclusive possession, he would be bound to account to the purchaser for something over one-third of their rental value, or the purchaser might rent, as is often done, his third interest, either to the lessee or a third party. *HN6* A tenant in common has the same right to sell or lease his estate as an owner in severalty having exclusive possession. Freeman, in his work on Co-tenancy, sec. 220, says: "Co-tenants may lease either to one another or to strangers. They may all concur in the lease, or each may [*165] lease his moiety separately. If, however, the lessors be co-parceners, or tenants in common, *the lease operates as the separate demise of each, and must be so treated,*" -- and this is the well recognized doctrine on the subject.

The further statement of counsel, that appellant "being in possession of an undivided two-thirds by virtue of his [*16] lease, must, of course, get the benefits of the whole of the premises, as in that way alone could he secure his rights to an undivided two-thirds," is therefore wholly unwarranted. It may be conceded that inconveniences, and even losses, might occur by reason of the state of things suggested, but they would not necessarily happen, and they are only such inconveniences and possible losses as are incident to such ownership of property, and all property is liable to become subject to

this species of ownership. Whoever, therefore, succeeds to an estate thus circumstanced, whether by descent or purchase, while accepting the benefits which it confers must submit to all such inconveniences and losses as are incident to property thus held.

So far all the questions we have discussed are clearly settled by the authorities in the way we have stated, leaving no real ground for controversy. There is a single point, however, to notice, which presents the only difficulty or matter of doubt in the case. It is conceded if partition is awarded the premises are to be sold, and if so, of course must be sold as an entirety, subject to the lease, for we are satisfied the statute does not contemplate [*17] any other kind of sale. This being so, if the value of the shares of appellees, which are alone subject to the lease, are thereby enhanced, it is clear that a division of the proceeds of the sale in proportion to their shares in the fee would not be equitable to them; and if the converse of this hypothesis is true, -- that is, if their shares are worth less, by reason of being subject to the lease, -- they would receive more than they are entitled to if the proceeds were divided in that ratio. What is here said [*166] of the shares of appellees subject to the lease, with a slight modification of the language, of course, is equally applicable to appellant's share without the lease. It may well be that the shares in the fee now held by appellant, if bought by a stranger, being divested by the merger of all right to demand rent under the lease from the lessee, and of all right to demand of the lessee payment of taxes or assessments, are less valuable than had no merger occurred. It may be that the mere right to occupy and use the premises in common with the lessee of the shares held by appellees is not so valuable as would have been the rights under the lease had no merger occurred. [*18] These are questions which pertain to the distribution of the proceeds, and not to the right to have partition made. If it be true that by the merger of the lease *pro tanto*, mentioned above, the value of the shares in the fee held by appellant has been impaired, and the value of his leasehold estate has been thereby enhanced, the relative value of the shares in the fee held by appellant, (as they actually now exist,) and of the shares held by appellees, with the benefits of the lease, if any, can readily be ascertained by the master, and the partition of the proceeds of the sale should be made upon this basis.

But does this difficulty, if it may be so regarded, in the absence of any other valid objection, warrant

a denial of the right of partition altogether? Appellees maintain that it does, and cite two cases that seem to favor that view of the subject, namely, *Lansing v. Pine*, 4 Paige, 639, and *Shillito v. Pullan*, 2 Disney, (Ohio,) 588. But it does not appear the statutes of the States in which these cases arose, regulating partitions, are the same as our own, and even if they were, we would not feel ourselves absolutely bound by them in giving effect or [**19] a construction to our own statute.

But waiving this consideration, to which we attach but little importance, and viewing the question in the light of the acknowledged general principles which govern courts of chancery in administering this branch of their jurisdiction, we are [*167] unable to perceive how the possible difference in the value of the shares of the parties, growing out of the fact that some of them are subject to an unexpired lease and others are not, presents an insuperable obstacle to a partition of the premises. It has always been understood, and it is so stated in all the text books we have examined on the subject, that one of the peculiar and main advantages of a partition in equity over one at law is, that in the former all inequalities of this character may be fairly and equitably adjusted. *HN7* Where an actual partition is made, and there is any inequality in the value of the shares not justified by the interests of

the parties in the estate, the court will decree pecuniary compensation, called *owelty*. But where, from any cause, one's share is worth more than another's, and a sale is ordered, the parties' rights are easily adjusted by a proper division [**20] of the proceeds. Bispham's Equity, secs. 491, 492; Freeman on Co-tenacy and Partition, sec. 425.

Applying these principles to the case in hand, if appellees' shares of this property are worth more by reason of being leased, as is contended by their counsel, is not that fact susceptible of proof, and can not the difference be fixed by the evidence as definitely as any other fact which depends upon the opinions of witnesses? We are unable to perceive any serious difficulty in determining this difference, if any such exists, and when once ascertained there would certainly be no trouble in making distribution of the proceeds of the property accordingly. This course would be in strict conformity with the practice of courts of equity in exercising this jurisdiction, from the earliest times. Moreover, after a most careful examination of the standard text books on the subject, we find no such qualification or limitation in them as that contended for, and this we regard as a very significant fact.

The decree of the court below is reversed, and the cause remanded for further proceedings in conformity with the views here expressed.

Thomas v. Farr

Supreme Court of Illinois
May 13, 1942
No. 26569.

Reporter: 380 Ill. 429; 44 N.E.2d 434; 1942 Ill. LEXIS 603

ANN S. THOMAS, Appellee, vs. VIRGINIA REED FARR et al. -- (VIRGINIA REED FARR, Appellant.)

Subsequent History: [***1] Rehearing denied June 11, 1942.

Prior History: APPEAL from the Superior Court of Cook county; the Hon. PETER H. SCHWABA, Judge, presiding.

Disposition: *Reversed and remanded, with directions.*

Core Terms

lease, partition, undivided, lessee, tenant in common, decree, conveyed, moiety, ascertained, leasehold, merger

Case Summary

Procedural Posture

Appellant co-owner of real property sought review of a decree of partition entered in the Superior Court of Cook County (Illinois) in favor of appellee co-owner of real property.

Overview

Appellant, whose interest in the property was subject to a 99-year lease, contended that the trial court should have implied an agreement not to partition from the terms of the lease and should have denied the partition. In the alternative, appellant claimed that if the partition was upheld she was entitled to compensation from the proceeds of the sale for the value of her reversionary interest and her rights under the lease. On appeal, the court ruled that the trial court was correct in allowing a partition because

there was no implied agreement not to partition from the terms of the lease, but that the trial court erred when it ordered the whole property sold free of appellant's lease. Noting that the proceeds of property sold subject to a lease had to be distributed upon equitable principles so that each co-owner received his fair share, the court determined it was necessary to ascertain the value of the separate moieties and to distribute the proceeds of the partition sale after the effect of the lease upon the value of each co-owner's share was ascertained.

Outcome

The court reversed the trial court's decree of partition and remanded the case for further proceedings.

LexisNexis® Headnotes

Contracts Law > Types of Contracts > Covenants
Real Property Law > Estates > Concurrent Ownership > General Overview
Real Property Law > Estates > Concurrent Ownership > Joint Tenancies
Real Property Law > Estates > Transfers > Partition Actions
Real Property Law > Estates > Concurrent Ownership > Tenancies in Common

HNI Partition is one of the rights that one tenant in common can exercise against his co-tenants. However, where a clear right to the writ is not shown, it is not awarded. The writ is also denied where the estate is devised or conveyed upon the express condition that it should not be partitioned, and in a case where the tenants in common or joint tenants covenant or agree among themselves that it shall be held and enjoyed in common, only.

Contracts Law > Types of Contracts > Lease Agreements > General Overview
Real Property Law > Estates > Concurrent Ownership

380 Ill. 429, *429; 44 N.E.2d 434, **434; 1942 Ill. LEXIS 603, ***1

ship > General Overview
 Real Property Law > Estates > Transfers > Partition Ac-
 tions
 Real Property Law > Estates > Concurrent Owner-
 ship > Tenancies in Common
 Real Property Law > Landlord & Tenant > General Over-
 view

HN2 Co-tenants may lease to one another or to strangers. They may all concur in the lease or each may lease his moiety separately. If, however, the lessors be co-parceners or tenants in common, the lease operates as a separate demise of each and must be so treated. This rule applies to anyone who acquires an interest in the co-tenancy, whether by descent or purchase. The property may be partitioned, but a lease upon the whole or a part thereof still remains in effect, except where merged by the lessee acquiring title to the reversion.

Contracts Law > Types of Contracts > Lease Agree-
 ments > General Overview
 Real Property Law > Estates > Concurrent Owner-
 ship > General Overview
 Real Property Law > Landlord & Tenant > General Over-
 view

HN3 Where a lease exists upon a moiety, both the lessee and the reversioner have an interest in such share, but by reason of the lease the interest of the co-tenant upon whose share it exists may be of more or less value than that of other co-tenants whose shares are not leased. In case of the sale of the property subject to the lease, the purchaser acquires the reversion of the co-tenant whose share is under lease and the fee of those not leased but the interest of the lessee remains in effect. Therefore, the proceeds of the property sold subject to a lease must be distributed upon equitable principles so each co-tenant receives his fair share thereof. In such a case a long-term lease might decrease the proportionate value of the reversioner's share to that of an unencumbered share, but the value of the leasehold may not be destroyed by a sale free and clear thereof and a division of the proceeds made as though no lease was in effect. Whatever may be the value of the separate moieties, that must be ascertained and the proceeds distributed after the effect of the lease upon the value of such co-tenant's share has been ascertained, whether it may increase or decrease the value thereof.

Counsel: FRANTZ & JOHNSTON, (CHARLES RALPH JOHNSTON, and HARRY KALVEN, JR., of counsel,) for appellant.

JOSEPH F. ELWARD, for appellee.

Opinion by: FARTHING

Opinion

[*429] [**435] Mr. JUSTICE FARTHING delivered the opinion of the court:

Lancaster Reed, John W. Reed, and Virginia Reed Farr were seized of certain real estate in Cook county, Illinois, [*430] as tenants in common and each had an undivided one-third interest. By warranty deed dated January 12, 1923, Lancaster Reed conveyed his undivided one-third to Fred J. Stebbins, Orson B. Stebbins, and Wallace J. Stebbins. On the same date Virginia Reed Farr and John Warner Reed, leased to Fred J. Stebbins, Orson B. Stebbins, and Wallace J. Stebbins, their undivided two-thirds for a term of 99 years at an annual rental of \$6000 payable \$500 monthly. On February 27, 1923, John Warner Reed conveyed his undivided one-third interest to Fred J. Stebbins, Orson B. Stebbins, and Wallace J. Stebbins and thereafter rent was paid to Virginia Reed Farr, appellant, [***2] by lessees at the rate of \$250 per month until March 6, 1941. The Stebbinses, by deed of trust dated August 6, 1936, conveyed their undivided two-thirds interest to Chicago Title and Trust Company, as trustee. On January 6, 1941, Chicago Title and Trust Company conveyed an undivided one-third interest to Ann S. Thomas, appellee.

A partition suit was filed by her on January 15, 1941, praying for partition and division by and between plaintiff and defendants according to their respective interests, or, if the same could not be done without prejudice, then for sale free and clear of the lease. The answer of Mrs. Farr admitted that she had an undivided interest in the said property, encumbered by the aforesaid lease, and denied that appellee was entitled to the relief prayed for or any other relief. The case was referred to a master who recommended a decree for partition and a decree was rendered and commissioners appointed. They reported that the property was not divisible and appraised it at \$60,000. The property was sold to Dorothy T. Enzenbacher for \$40,000 and an order was entered confirming the sale and referring the cause to the master for distribution. Virginia Farr then [***3] appealed to this court from the decree of partition, decree of sale and the order confirming the master's report.

[*431] Appellant was the owner of an undivided one-third in fee subject to the lease of the Stebbinses. Two thirds of the property is not leased. One third was never leased and the other one-third was leased to the Stebbinses, but as they afterward acquired the reversion in it, there was a merger of their leasehold interest with the reversion and the lease was terminated as to that one-third. (*Hill v. Reno*, 112 Ill. 154.) Of the undivided two-thirds interest formerly held by the Stebbinses, the Chicago Title and Trust Company now holds title to an undivided one-third in trust and Ann S. Thomas, appellee, owns an undivided one-third.

HNI Partition has long been one of the rights that one tenant in common can exercise against his cotenants. (*Howey v. Goings*, 13 Ill. 95; *Hill v. Reno*, *supra*; *Martin v. Martin*, 170 Ill. 639; *Blakeslee v. Blakeslee*, 265 id. 48.) However, in *Hill v. Reno*, *supra*, this court recognized that there are certain modifications of this rule; as, where a clear right to the writ is not shown, it will [***4] not be awarded. Also the writ will be denied where the estate is devised or conveyed upon the express condition that it should not be partitioned, and in a case where the tenants in common or joint tenants covenant or agree among themselves that it shall be held and enjoyed in common, only.

Appellant contends that an agreement not to partition should have been implied from the terms of the 99-year lease and the partition should have been denied; or, if the partition is upheld, she should be compensated from the proceeds of the sale for the value of her reversionary interest and her rights under the lease.

There are two cases in Illinois which are very similar to the present case. *Hill v. Reno*, *supra*, is the leading Illinois case on the question of whether "the lessee of real estate, the reversion in fee of which is in several tenants in common, can, by purchasing [***436] a part of the reversion, and taking an assignment thereof to himself, demand, as a [*432] matter of right, a partition in chancery, when such partition will necessarily result in a sale of the premises." Both parties here cite that case with approval but with different interpretations. There [***5] a piece of real estate was owned by one Reeves who leased it to Parmelee. During the term of the lease Reeves died intestate leaving as his heirs-at-law his sisters, Sarah Reno and Eugenia Little, and certain other collateral heirs. Mrs. Reno and Mrs. Little owned together about an undivided two-thirds and the collateral heirs owned about an un-

divided one-third. Hill purchased the leasehold estate of Parmelee and later the reversion in fee of the collateral heirs. Hill brought a bill for partition, and the defendant argued, as does appellant here, that partition would not lie because by the lease there was an implied agreement not to partition. This court said that if there was an agreement not to partition, it would work an estoppel and the writ would be denied. However, we found that there was no agreement and partition was allowed, but we made it clear that the premises must be sold "subject to the lease, for we are satisfied the statute does not contemplate any other kind of sale." In declaring the manner in which the distribution of the proceeds should be made, this court said, at page 165: "This being so, if the value of the shares of appellees, which are alone subject [***6] to the lease, are thereby enhanced, it is clear that a division of the proceeds of the sale in proportion to their shares in the fee would not be equitable to them; and if the converse of this hypothesis is true, -- that is, if their shares are worth less, by reason of being subject to the lease, -- they would receive more than they are entitled to if the proceeds were divided in that ratio. What is here said of the shares of appellees subject to the lease, with a slight modification of the language, of course, is equally applicable to appellant's share without the lease. It may well be that the shares in the [*433] fee now held by appellant, if bought by a stranger, being divested by the merger of all right to demand rent under the lease from the lessee, and of all right to demand of the lessee payment of taxes or assessments, are less valuable than had no merger occurred. It may be that the mere right to occupy and use the premises in common with the lessee of the shares held by appellees is not so valuable as would have been the rights under the lease had no merger occurred. These are questions which pertain to the distribution of the proceeds and not to the right to have [***7] partition made. If it be true that by the merger of the lease *pro tanto*, mentioned above, the value of the shares in the fee held by appellant has been impaired, and the value of his leasehold estate has been thereby enhanced, the relative value of the shares in the fee held by appellant, (as they actually now exist,) and of the shares held by appellees, with the benefits of the lease, if any, can readily be ascertained by the master, and the partition of the proceeds of the sale should be made upon this basis."

The other case in Illinois which is similar to the present case is *Arnold v. Arnold*, 308 Ill. 365. In that case Herman, Theodor, and Adolph Arnold were ten-

ants in common of a piece of improved real estate. Herman made a twenty-five-year lease of his one-third to Adolph, and thereafter, the then owner of Theodor's undivided one-third interest joined with Adolph and leased the entire premises to a third party. Adolph died and his executor sought to bring partition. The lower court decreed partition and the defendants appealed. This court reversed and remanded and said that the decree gave no direction for partitioning the premises so as to preserve the respective [***8] rights of the parties under leases and agreements to which the partition must be subject. We further went on to say, at page 370, that "if there cannot be a partition in fact, it is perfectly manifest that there cannot be a sale of the property, which [*434] would not only be plainly inconsistent with the leases and agreements of the parties and of the property but disastrous to substantial rights and interests."

The plaintiff here would have only the rights as to partition that the Stebbinses had. They were tenants in common with appellant and the fact that they had a lease from appellant on her interest, would not have prevented them from being entitled to partition. We do not see that there was an implied agreement here not to partition for the 99 years, the term of the lease, and the court was correct in allowing a partition.

[**437] The court below erred when it ordered the whole property sold free of appellant's lease. As we said in *Hill v. Reno, supra*, **HN2** "Co-tenants may lease to one another or to strangers. They may all concur in the lease or each may lease his moiety separately. If, however, the lessors be co-parceners or tenants in common, the lease [***9] operates as a separate demise of each and must be so treated." Thus, it is immaterial whether all the co-tenants in the present case joined in the lease, as in

any event, whether made by one or all, it is still a separate lease of each co-tenant.

This rule applies to anyone who acquires an interest in the co-tenancy, whether by descent or purchase. (*Hill v. Reno, supra*.) The property may be partitioned, but a lease upon the whole or a part thereof still remains in effect, except where merged by the lessee acquiring title to the reversion. **HN3** Where a lease exists upon a moiety, both the lessee and the reversioner have an interest in such share, but by reason of the lease the interest of the co-tenant upon whose share it exists may be of more or less value than that of other co-tenants whose shares are not leased. In case of the sale of the property subject to the lease, the purchaser acquires the reversion of the co-tenant whose share is under lease and the fee of those not leased but the interest of the lessee remains in effect. Therefore, the proceeds of the property sold subject to a lease must be distributed [*435] upon equitable principles so each co-tenant receives [***10] his fair share thereof. In such a case a long-term lease might decrease the proportionate value of the reversioner's share to that of an unencumbered share, but the value of the leasehold may not be destroyed by a sale free and clear thereof and a division of the proceeds made as though no lease was in effect. Whatever may be the value of the separate moieties, that must be ascertained and the proceeds distributed after the effect of the lease upon the value of such co-tenant's share has been ascertained, whether it may increase or decrease the value thereof.

The decree of the circuit court is reversed, and the cause remanded with directions to proceed in a manner not inconsistent with the views herein expressed.

Mr. JUSTICE SHAW, dissenting.