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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

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.

REPLY BRIEF OF APPELLANT

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**PETITIONER'S RESPONSE TO RESPONDENT'S
COUNTER STATEMENT OF THE CASE.**

Certain material assertions of fact set forth in Respondent's Statement of the Case, and elsewhere in the Brief of Respondent, are contrary to the uncontroverted evidence of record. Those erroneous factual assertions will be identified in the body of this Reply Brief, where the context will aid the Court in understanding their significance.

REPLY TO RESPONDENT'S ARGUMENT

For the convenience of the Court, in this portion of Appellant's Reply Brief, we will utilize Respondent's headings, as we address Respondent's argument, *seriatim*.

A. "Standard of Review." [Respondent's Brief, p. 10]

It is not at all surprising that Respondent expresses some confusion regarding the appropriate standard of review to be utilized, because the manner in which the trial court managed the procedural aspects of the June 20, 2013 initial TEDRA hearing was a source of confusion for all parties involved. By way of example, we note the trial court's vacillation between treating the initial hearing as a preliminary discussion or as a full hearing on the merits;¹ the trial court's vacillation between conducting an

¹ RP 3-10, 28-29, 68-69, 71-72.

evidentiary hearing with live testimony and a summary proceeding determined on affidavits and declarations;² the trial court's *sua sponte* intervention on behalf of Respondent, precluding material testimony from the estate's attorney, Kenneth D. Carpenter;³ the trial court's *sua sponte* expansion of the scope of the hearing beyond the scope of the pleadings, and contrary to the requests of counsel, after the closure of evidence;⁴ and the trial court's *sua sponte* abuse of the doctrine of judicial notice, considering as evidence the court's personal experiences, after the closure of evidence.⁵

It is one thing to afford "significant deference" to a trial court's procedural management of a TEDRA case, and quite another to permit a trial court to run roughshod over accepted norms of procedural due process. *In Re Estate of Fitzgerald*, 172 Wn.App. 437, 294 P.3d 720 (2012), cited by Respondent, certainly does not stand for the latter proposition, nor does the *Fitzgerald* decision address the kinds of procedural irregularities that were present in the case at bar.

² RP 3-10, 13-14, 22, 23, 26-27, 28, 29, 32-33, 35, 49-50, 51, 53, 67, and 68-72.

³ Brief of Appellant, Section I, pp. 14-20, Section II.3, pp. 28-29.

⁴ Brief of Appellant, Section II.1, pp. 20-23; RP 75-76.

⁵ Brief of Appellant, Section II.2, pp. 23-27.

Given the manner in which the trial court ultimately elected to proceed in this case,⁶ the appropriate standard of review is not the "substantial evidence" standard utilized in *Dorsey v. King County*, 51 Wn.App. 664, 668-669, 754 P.2d 1255 (1988), (reviewing a lower court decision to deny habeas corpus).⁷ Instead, the appropriate standard of review in this Court is the *de novo* standard established for summary proceedings pursuant to CR 56. *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); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

Engaging in the same inquiry as the trial court, and viewing the facts in the light most favorable to the nonmoving party, an order granting summary judgment will be upheld on appeal only if there are no genuine issues of material fact, and the moving party is entitled to prevail as a matter of law. CR 56(c); *Folsom v. Burger King*, 135 Wn.2d 658, 663,

⁶ Although the probate court approved findings of fact and conclusions of law that were presented by Jerry's counsel on July 2, 2013, the court 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." (RP. 81). See also, RP 8.

⁷ Apart from the fact that – contrary to GR 14.1 – the unpublished *Washburn* opinion was improperly cited by Respondent as precedent, there is no indication that the two-day *Washburn* bench trial described in that opinion bore any similarity whatsoever to the *ad hoc* process to which the parties were subjected in the case at bar.

958 P.2d 301 (1998); *Wilson*, supra, at 437. Under that standard, the evidence before the Lincoln County probate court clearly precluded entry of summary judgment in favor of Jerry Hayes, for the reasons set forth in Section IV of the initial Brief of Appellant, at pp. 32-44.

B. "The trial court properly excluded Mr. Carpenter's speculative opinions." [Respondent's Brief, p. 11]

Respondent cites *Foster v. Gilliam*, 165 Wn.App. 38, 54-55, 268 P.3d 945 (2011) for the proposition that "... a court resolving disputed issues of fact in a TEDRA case need not consider live testimony, but may resolve disputed issues by conclusory affidavits and other written materials as the trial court did here." Brief of Respondent, p. 12. With all due respect, Respondent is missing the point.

The issue of concern to James Hayes in the context of this appeal is not whether lower courts in general have the inherent power to limit live testimony in TEDRA actions, nor is the issue of concern whether James was denied his right to a trial by jury. Instead, the issue properly before this Court is whether this particular trial court's *ad hoc* decisions to expand the scope of the hearing and – at the same time – preclude supplemental oral testimony violated what all parties agree to be the

"cornerstones" of procedural due process: notice and an opportunity to be heard.⁸

In this case, James clearly had a reasonable expectation going into the June 20, 2013 hearing – as expressed in his Prehearing Statement of Proof (CP 154-155), and as restated by counsel during the course of the hearing (RP 32-33) – that oral testimony would be permitted for the purpose of supplementing certain Declarations – Declarations which had been prepared in the context of a separate Grant County Superior Court lawsuit that involved interpretation and enforcement of provisions of the 1993 Farm Lease.

It is equally clear from numerous colloquies between counsel and the court (RP 28-29, 31, 33-34, 36, 56-57, 59-6671-72) that, going into the June 20, 2013 hearing, James had a reasonable expectation that the issues for determination by the probate court would be limited to interpretation of Elma's intent regarding the manner in which the 1993 Farm Lease was to be distributed to her children at the time she executed her 2003 Last Will and Testament, in January of 2003, and that the issues of interpretation and enforcement of the terms of the lease would remain for determination by Judge Knodell, in Grant County Superior Court.

⁸ See the citations of authority set forth in the initial Brief of Appellant, p. 30.

Determination of Elma's testamentary intent in January of 2003 is separate and distinct from the issue which has been – and is still – pending before the Grant County Superior Court, to wit: the intent of the contracting parties (Elma and James) with respect to the meaning of the terms and conditions of the 1993 Farm Lease that was executed in December of 1993. This is so because interpretation of a contract focuses upon the context surrounding the instrument's execution,⁹ whereas courts and others responsible for interpretation or execution of a last will are required 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).

It is not inaccurate to say that a trial court abuses its discretion with respect to admission or exclusion of evidence where the court bases its ruling upon an erroneous view of the law. However, a far more complete statement of the rule was set forth by the Washington Supreme Court in *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435, 441 (1994), as follows:

⁹ See generally, *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501-505, 115 P.3d 262 (2005).

Trial court rulings on admissibility of evidence are generally reviewed under an abuse of discretion standard. *Brouillet v. Cowles Pub'g Co.*, 114 Wash.2d 788, 801, 791 P.2d 526 (1990). ***A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds.*** *In re Marriage of Kovacs*, 121 Wash.2d 795, 801, 854 P.2d 629 (1993).

[Emphasis supplied] In the case at bar, for the reasons discussed herein, the probate court's exclusion of much of the testimony of Kenneth D. Carpenter's was indeed an abuse of the lower court's discretion, not only because it was based upon untenable grounds, but also, because it was manifestly unreasonable.

1. **"The trial court is entitled to sua sponte exclude inadmissible evidence." [Respondent's Brief, p. 13]**

Respondent implies – but does not state directly – that a trial court has unlimited discretion with respect to *sua sponte* exclusion of evidence. In that regard, the following comments by the Supreme Court of Alaska in *Vachon v. Pugliese*, 931 P.2d 371, 381 (1996) are worth noting:

"It is not an abuse of discretion for a judge to make *sua sponte* evidentiary rulings ***under certain circumstances***. 1 John W. Strong, *McCormick on Evidence* § 55, at 224 (4th ed. 1992) (“[T]he failure by the party does not of itself preclude the trial judge from excluding the evidence on his own motion if the witness is disqualified for want of capacity or the evidence is incompetent, and he considers that the interests of justice require the exclusion of the

testimony.”). However, “[i]t is *only when the evidence is irrelevant, unreliable, misleading, or prejudicial, as well as inadmissible, that the judge should exercise his discretionary power to intervene.*” *Id.* at 225.”

[Emphasis supplied] Clearly, the evidence proffered by attorney Kenneth D. Carpenter was neither "irrelevant, unreliable, misleading or prejudicial," and for that reason, there was no justification for the trial court's *sua sponte* action.

2. **"Mr. Carpenter's stricken testimony was limited to those statements which reflected Mr. Carpenter's opinion about Elma's intent, as opposed to personal information based on her expressions of intent."**
[Respondent's Brief, p. 14]

Direct, Uncontroverted "Context Evidence" Relating To

Formation of the 1993 Farm Lease. At page 14 of Respondent's initial Brief, Jerry's counsel asserts that Mr. Carpenter "... had no discussions with Elma that contradicted the plain language of the Lease..." To the same effect, at an earlier point on that same page, counsel also asserts that Mr. Carpenter "... attempted in part to testify about Elma's intent, but did so based on his beliefs rather than a discussion in which she expressed the 'intent' advanced by James."

In fact, 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). *She asked Mr. Carpenter* whether it would be permissible to execute the farm lease as the sole landlord, without revising the text of the lease. (CP 611, ¶ 6). Finally, consistent with Elma's statements regarding her intention, and consistent with Mr. Carpenter's advice, *she executed the 1993 Farm Lease as the sole landlord. Id.*

Contrary to Jerry's contention, these statements and actions by Elma Hayes directly contradicted the "plain language of the lease," which, as originally drafted, clearly named Jerry, John and Patricia as co-landlords. (CP 223). Additionally, contrary to Jerry's assertions, Mr. Carpenter's mere recitation of these particular facts – all of which represent clear indicia of Elma's intentions – was not in any sense of the word an expression of opinion. To that extent, the trial court's exclusion of Mr. Carpenter's testimony was both manifestly unreasonable and based upon untenable grounds. *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435, 441 (1994).

Direct, Uncontroverted Evidence Regarding Elma's Intention to Modify Her Estate Plan. At page 17 of Respondent's Brief, he contends that "James offered no evidence of express statements by Elma

on her intent" (referring to her testamentary intent). In fact, attorney Kenneth D. Carpenter testified to the effect that, 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). Elma's direction (to Mr. Carpenter) to partition the farm into four separate parcels was a dramatic departure from the distribution scheme set forth in her November, 1990 Last Will and Testament, which would have distributed the entire farm to all four children, "...equally, share and share alike...." (CP 159-160, ¶ 6; CP 167).

The evidence is also uncontroverted that, consistent with her announced intention to divide the family farm and give each of her children a separate parcel, and consistent with Mr. Carpenter's advice, Elma began the gifting program that he had suggested by executing quit claim deeds to her various children in 1994, 1995 and 1996. (CP 159-160; CP 209; CP 612 ¶¶ 7, 8)

Finally – once again, contrary to the assertion that "James offered no evidence of express statements by Elma on her intent" – the uncontroverted evidence offered at trial established that *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. (CP 160, ¶ 7) It was in response to this express direction from Elma that attorney Carpenter prepared her 2003 Last Will and Testament (CP 200-201, 217), which she executed on January 28, 2003. *Id.*

Once again, attorney Carpenter's mere recitation of these particular facts – all of which represent clear indicia of Elma's testamentary intent – was not in any sense of the word an expression of opinion. To that extent, the trial court's exclusion of Mr. Carpenter's testimony was both manifestly unreasonable and based upon untenable grounds. *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435, 441 (1994).

3. **"The evidence stricken was not based on Elma's 'state of mind,' and the court did not abuse its discretion in excluding it as not helpful." [Respondent's Brief, p. 16]**

Respondent's contends that attorney Kenneth D. Carpenter's testimony regarding Elma Hayes' statements do not fall within the hearsay exception for "state of mind" evidence. ER 803(a)(3) clearly provides:

*“Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (**such as intent, plan, motive, design**, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.”*

[Emphasis supplied] Attorney Carpenter's testimony relating the substance of several discussions with Elma Hayes concerning her desire to divide up the family farm and her desire to avoid having her children as co-landlords clearly qualify as "state of mind" testimony under ER 803, and there is no basis for excluding this testimony as "opinion evidence."

Elma's 2003 Last Will and Testament Is On Its Face

Ambiguous with Respect to Her Intended Disposition of the 1993

Farm Lease. Incredibly, Respondent seems to suggest that Elma's 2003 Last Will and Testament is unambiguous on its face with respect to her intention to distribute the 1993 Farm Lease to her children as tenants in common. However, this contention ignores the fact that the 1993 Farm Lease is not mentioned anywhere in Elma's 2003 Last Will and Testament;

and more importantly, it ignores the fact that Elma took great pains to partition and segregate the interest of each sibling with respect to the farmland itself, which is inherently inconsistent with the concept of joint control over farming operations on land which was bequeathed to other siblings. Together, these facts create sufficient uncertainty with respect to Elma's intention that they demand additional explanation.

C. "James requested the TEDRA hearing on the merits and was afforded a fair hearing and due process." [Respondent's Brief, p. 18]

We fully agree with Respondent's contention that a "fair hearing" under review process analysis requires "such procedural protections as the particular situation demands." *In re Martin*, 154 Wn.App. 252, 265, 223 P.3d 121 (2009), cited at page 19 of Respondent's Brief. We also agree with Respondent's statement, on that same page, "The hallmarks of due process are notice and an opportunity to be heard."

Once again, issue of concern to James is not the "plenary power" of probate courts to administer and settle all estate and trust matters in a TEDRA action. The issue on appeal before this Court is instead whether the manner in which particular trial court abruptly expanded the scope of the hearing and – at the same time – precluded supplemental oral

testimony deprived Petitioner of his fundamental right to notice and an opportunity to be heard.

1. **"The 1993 Farm Lease was at issue by James' request, and he cannot now disclaim the court's authority or assert lack of due process because he disliked the outcome; the hearing was not 'expanded' beyond the proper scope, nor did James lack notice of the issues he himself raised." [Respondent's Brief, p. 20]**

With all due respect, Respondent is clearly confusing the issues that were pending before Judge Knodell in the Grant County unlawful detainer action with the very different issues that were pending before Judge Strohmaier in the Lincoln County TEDRA action, and in so doing, Respondent is mistakenly treating them as one and the same.

James' Position on Appeal Is Absolutely Consistent with His Position Both Before and During the June 20, 2013 Hearing, Whereas Jerry's Position Is Not. James' sole reason for bringing the TEDRA action was to respond to Judge Knodell's request (in the context of the Grant County unlawful detainer action) for further information regarding the status of the 1993 Farm Lease as an asset of Elma's probate estate,¹⁰ as clearly declared by James in Paragraph XIX of his May 23, 2013 Petition. (CP 12)

¹⁰ Contrary to Respondent's contention, the evidence of record establishes that, unlike the parcels of farmland, Elma's interest in the 1993 Farm Lease had not yet been distributed to her children by her probate estate. (CP 160).

In Section II.1 of James' initial brief on appeal – citing not only portions of the *Petition for A Declaration of Rights and Legal Relations Under RCW 11.96A.080* (CP 12-13), but also, *Petitioner's Prehearing Memorandum of Law* (CP 139-140) – we have shown that James made this point abundantly clear in advance of the June 20, 2013 hearing, and in fact, James' position was entirely consistent with the relief requested by Jerry prior to the hearing. (CP 136)

Unaccountably, Jerry's current contention on appeal is irreconcilably inconsistent with the position taken by his counsel during the course of the June 20, 2013 hearing. At that hearing, both counsel for James (RP 64) and counsel for Jerry (RP 71-72) advised the probate court in no uncertain terms that the issues of interpretation and termination of the 1993 Farm Lease remained to be determined by Judge Knodell, regardless of the outcome of the TEDRA action. Only now – with the advantage of hindsight, and knowledge of the lower court's ruling in his favor – does Jerry disingenuously take the position that the issues of interpretation and enforcement of the forfeiture/termination provisions of the 1993 Farm Lease were properly determined by the probate court.

James Did Not At Any Time Invite the Lower Court to Determine the Intention of the Contracting Parties When They

Executed the 1993 Farm Lease. James definitely did not "... ask the court to rule on the relevant covenants", as argued at page 21 of the Brief of Respondent. Instead, James asked nothing more of the probate court than to find that a partition of the 1993 Farm Lease flowed, both logically and legally,¹¹ from the physical partition of the family farm – a partition that Elma clearly intended and accomplished by the terms of her 2003 Last Will and Testament, consistent with her prior division and distribution of separate and distinct portions of the farm property over the decade preceding execution of her will.

To be sure, such a finding would have had the practical effect of preventing James and his siblings from asserting that they had the right to interfere with each other's utilization of their own separate real property bequests by virtue of their new status as landlords under that lease. However, that practical effect would be the same, without regard to Judge Knodell's ultimate rulings with respect to the meaning and enforcement of the forfeiture/termination provisions of the 1993 Farm Lease agreement.

2. **"The court exercised its discretion in determining that the evidence did not overcome the unambiguous Lease and estate documents; he did not take improper 'judicial notice' of facts." [Respondent's Brief, p. 23]**

¹¹ Petitioner has cited *Hill v. Reno*, 112 Ill. 154 (1883), and *Thomas v. Farr*, 380 Ill. 429; 44 N.E.2d 434 (1942) as persuasive authority in support of this proposition, whereas Respondent has cited no legal authority whatsoever in opposition to it.

In his discussion of the concept of judicial notice, Respondent cites – and then proceeds to ignore – the very clear requirement of ER 201 that "[A] judicially noticed fact must be one not subject to reasonable dispute. . . ." Respondent also blithely ignores the authorities cited at pages 26-28 of James' initial Brief of Appellant, which clearly require that the judicially noticed fact "... be beyond reasonable controversy,"¹² and which equally clearly observe that the judicially noticed fact should not be confused with knowledge or information which is personally known by the trial judge.¹³

It is inaccurate to characterize the personal experiences and preferences considered by the probate court¹⁴ as merely "common experience and common sense," and it is absurd to equate them with the kind of universally accepted information that falls within the doctrine of judicial notice. Concepts of "equity" referred to at pages 24-25 of the Brief of Respondent are not pertinent to this evidentiary issue. In light of the manner in which this inadmissible evidence permeated both the process and the outcome of the June 20, 2013 TEDRA hearing, there is no basis upon which the trial court's decision can be upheld.

¹² *State of Washington v. K.N.*, 124 Wn.App. 875, 881, 103 P.3d 844 (2004).

¹³ *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; 21B *Wright & Graham, Federal Practice and Procedure: Evidence 2d*. §5104, Rule 201, at 160 (2005).

¹⁴ As identified in the Brief of Appellant, pp. 24-25.

3. **"The court's exercise of its discretion to preclude inadmissible evidence in a civil matter does not deprive the litigant of due process." [Respondent's Brief, p. 25]**

Delaware v. Van Arsdall, 475 U.S.673, 679 (1986) is cited by Respondent for the proposition that "An evidentiary exclusion gives rise to a due process violation only in the criminal arena when a defendant is denied his right to present a defense." With all due respect, the *Van Arsdall* opinion discussed the Sixth Amendment Confrontation Clause of the Constitution, but there does not appear to be any mention of due process in that opinion.

Although the Sixth Amendment right to confront witnesses may not apply directly in civil proceedings, the "due process of law" clauses in the Fifth and Fourteenth Amendments do apply to civil proceedings, as the Washington State Supreme Court observed in *Gourley v. Gourley*, 158 Wn.2d 460, 145 P.3d 1185 (2006):

In *Flory v. Department of Motor Vehicles*, 84 Wash.2d 568, 527 P.2d 1318 (1974), the respondent challenged hearing procedures for driver's license revocation which barred the tribunal from considering live testimony. Relying on *Goldberg*, we held the requirements of a due process hearing "included the right to confront adverse witnesses, **the right to present evidence** and oral argument, and the right to representation by counsel." *Id.* at 571, 527 P.2d 1318.

158 Wn.2d at 480-81. [Emphasis supplied] To be clear, it is not James' contention that erroneous evidentiary rulings always rise to the level of due process violations. However, in this particular case, the trial court's improper *sua sponte* exclusion of material admissible evidence, the court's abrupt *sua sponte* expansion of the scope of the initial TEDRA hearing (after the parties had presented their evidence) to include issues which were not before the court, and the trial judge's improper *sua sponte* consideration of the court's own personal experiences – once again, after the parties had presented their evidence – served to deprive James Hayes of his due process right to prior notice of the nature and scope of the hearing, his due process right to present evidence at the hearing, and his due process right to confront and cross-examine the individual who proved to be the chief witness against him – the trial judge himself.

4. "There exists no evidence of bias which rendered the hearing unfair." [Respondent's Brief, p. 26]

The trial judge's improper reliance upon his own personal experiences constituted impermissible testimony in a proceeding over which he was presiding, in direct violation of ER 605.¹⁵ *Vandercook, v. Reece*, 120 Wn.App. 647, 651-52, 86 P.3d 206 (2004). To make matters

¹⁵ 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."

worse, this "impermissible testimony" was offered and considered after the closure of evidence, without any opportunity for cross-examination or even rebuttal.

That the probate judge's personal memories and experiences permeated his consideration of this case is undeniable. Equally undeniable is the fact that those memories and experiences influenced his abrupt decision – after the closure of evidence – to expand the scope of the hearing far beyond the question of the testamentary intent, and issue an order terminating the 1993 Farm Lease as to Jerry, John and Patricia.¹⁶

Finally, because it is clear from the record that the trial judge himself believed that he had personal knowledge of facts that related to Elma Hayes' likely intent (the primary matter in dispute), this is in and of itself sufficient to reasonably question his impartiality, and require his recusal pursuant to Rule 2.11 (A)(1) of the Code of Judicial Conduct, without a showing of actual bias.

D. "James submitted no evidence of an intent by Elma to create four Leases, and the trial court properly based its decision on her unambiguous will provision." [Respondent's Brief, p. 18]

Because the standard of review of a summary adjudication is *de novo*, and because summary judgment is not appropriate where material

¹⁶ John and Patricia had not even filed pleadings in support of Jerry's contentions regarding termination of the 1993 Farm Lease.

facts are disputed, findings of fact and conclusions of law entered in the context of such a ruling are superfluous. *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978); *Colwell v. Ezzell*, 119 Wn.App. 432, 433, 81 P.3d 895 (2003). At the July 2, 2013 presentment hearing, the trial court was made aware of the fact that findings were unnecessary. (RP 81) Although the court nonetheless approved the findings of fact and conclusions of law that were presented by Jerry's counsel on that date, the trial judge acknowledged that the June 20 hearing was essentially 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." (RP 81)

At page 29 of his Brief, Respondent asserts that "Appellant relies entirely upon the fact that Jerry, John and Patricia did not sign the lease as support for his argument." This statement is clearly untrue, as demonstrated by numerous citations from the record in the initial Brief of Appellant, at pages 34-36.

Respondent's remaining arguments appear to have been adequately addressed in the Brief of Appellant, at pages 36-43. Neither *Andersen v. Frye & Bruhn*, 69 Wash. 89, 124 P. 499 (1912) nor *Godefroy v. Hupp*, 93 Wash. 371, 160 P. 1056 (1916) appear to stand for the proposition stated

at page 31 of Respondent's Brief. More importantly, neither case contradicts the persuasive authority of *Thomas v. Farr*, 380 Ill. 429; 44 N.E.2d 434 (1942) and *Hill v. Reno*, 112 Ill. 154 (1883), which treat a partitioned lease with multiple landlords as creating a separate and distinct lease as to each landlord.

E. "The court properly concluded that no equitable basis existed to block that forfeiture." [Respondent's Brief, p. 18]

We note initially that this issue was not properly before the probate court at all – it had already been squarely presented to Judge Knodell for determination in the context of the Grant County Superior Court unlawful detainer action. However, because the probate court *sua sponte* broadened the scope of the hearing after the presentation of evidence, and summarily terminated the 1993 Farm Lease, it became necessary to address the issue in the context of James' motion for reconsideration.

For the reasons discussed extensively at pages 44-47 of the initial Brief of Appellant, James did not "assign, sublet or transfer" his leasehold interest. Moreover, the 1993 Farm Lease contained no term prohibiting a sale of the leased property, or any portion thereof, by an owner of that property. The lease was due to expire by its terms in September of 2018 (CP 223). At that time, James' siblings would have the unfettered right to farm their own parcels, as well has the right to sell their respective parcels

without any reduction in value for the leasehold encumbrance. James' sale of his separate parcel of farmland had no adverse effect whatsoever on the rights of his siblings.

F. "Attorney fees should be awarded to Respondent against Appellant." [Respondent's Brief, p. 18]

The lower court directed that Jerry's attorney fees and costs be paid out of the estate of Elma Hayes, pursuant to RCW 11.96A.150, which permits a court, in its discretion, to award attorney fees "to any party," "from any party," in an amount the court deems equitable. To the extent that Jerry now seeks to overturn the trial court's award of attorney fees from the estate pursuant to TEDRA – or any other theory, for that matter – his cross-appeal is untimely. RAP 5.2 (f).

Moreover, to the extent that Jerry now seeks an award of attorney fees on appeal pursuant to TEDRA and RAP 18.1, he has demonstrated neither any legal basis nor any equitable basis for an award of fees from James or the estate of Elma Hayes.

APPELLANT'S REQUEST FOR AWARD OF ATTORNEY FEES AND COSTS ON APPEAL

It is undisputed that James filed the TEDRA petition in Lincoln County Superior Court in response to a request for information from Grant County Superior Court Judge Knodell. It is equally clear that James' sole

purpose in filing the TEDRA Petition in Lincoln County was to determine whether – at the time she executed her 2003 Last Will and Testament – Elma Hayes intended to partition the 1993 Farm Lease in the same manner that she had partitioned the farmland to which the lease pertained.

The uncontroverted testimony of Kenneth D. Carpenter – without regard to admissibility of that testimony on the merits of the issues – establishes that Elma shared with Mr. Carpenter her intention to divide up and distribute the family farm. Attorney Carpenter, who was also counsel for Elma's probate estate, supported James' position at trial. As personal representative of Elma's estate, James has always had – and continues to have – a fiduciary obligation to ascertain and implement his mother's testamentary intent. Both James' initial TEDRA Petition and this appeal are clearly designed to accomplish those objectives.

It would have been inappropriate for the probate court to award fees to either party pursuant to the terms of the 1993 Farm Lease, because neither party asked the probate court to interpret or enforce the terms of that contract. For the same reason, the 1993 Farm Lease does not provide a basis for an award of attorney fees to either party in connection with this appeal. However, at the discretion of this Court, James should be awarded

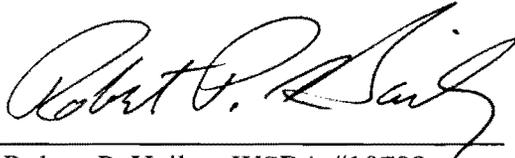
his attorney fees and costs on appeal pursuant to TEDRA and RAP 18.1, to be paid either by his mother's estate, or by Respondent Jerry Hayes personally.

CONCLUSION

The challenged orders issued by the Lincoln County probate court on July 2, 2013 and August 6, 2013 should be reversed, with an award of attorney fees and costs to Appellant James Hayes, and this case should be remanded with directions to enter judgment in favor of James with respect to the issues defined in the TEDRA Petition. However, any issues relating to the interpretation or enforcement of the terms of the 1993 Farm Lease should be referred to Grant County Superior Court Civil Case No. 13200181-7 for resolution.

RESPECTFULLY SUBMITTED, this 30th day of April, 2014.

RANDALL | DANSKIN, P.S.

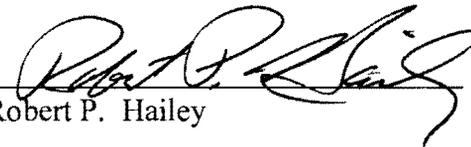
By: 
Robert P. Hailey, WSBA #10789
Attorneys for Appellant James L. Hayes

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the foregoing document on the 30th day of April, 2014, addressed to the following:

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

- Hand Delivered
- U.S. Mail
- Overnight Mail
- Fax Transmission


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 appraisal. 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-tenancy 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

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 co-tenants. (*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-

380 Ill. 429, *433; 44 N.E.2d 434, **436; 1942 Ill. LEXIS 603, ***7

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.