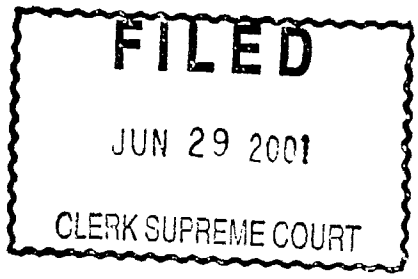
IN THE COURT OF APPEALS OF IOWA

No. 1-260 / 00-0747
Filed June 29, 2001



MARTHA GARRETT,
Plaintiff-Appellant,

vs.

GARY HAUENSTEIN, MARY HARDESTY and DALE HAUENSTEIN,
Defendants-Appellees.

Appeal from the Iowa District Court for Mahaska County, Daniel P. Wilson, Judge.

Martha Garrett appeals from the district court ruling dividing the parties' three farms upon her petition for partition. **AFFIRMED.**

Greg A. Life of Life Law Office, Oskaloosa, for appellant.

Donna Ruth Beary, Des Moines, for appellees.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

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MILLER, J.

Martha Garrett appeals from the district court ruling partitioning the parties' three farms upon her petition for partition. She contends (1) the order partitioning the farms is not an equitable and practicable determination of the relative interests involved, and (2) an oral agreement transferring one farm to the defendants and two farms to her is enforceable as a valid agreement of transfer and should be recognized. The defendants Gary Hauenstein, Mary Hardesty and Dale Hauenstein request appellate attorney fees. We affirm.

I. BACKGROUND FACTS

Upon their mother's death, various farm property was distributed to the plaintiff, Martha Garret, and her brother Jack Hauenstein. There were three separate farms known as the West Farm, the Home Place, and the South Farm. [1] Martha and Jack each received an undivided one-half interest as tenants in common and thereafter operated the farms as a partnership.

Jack died in August of 1993 and his children, the defendants, Gary Hauenstein, Mary Hardesty and Dale Hauenstein (hereinafter "the defendants"), inherited his undivided one-half interest in the land. The previously established partnership continued after Jack's death with the defendants assuming Jack's role until 1998. From September 1993 to June 1998 Gary Hauenstein lived on the West Farm and operated the three farms together as a cow-calf operation. He received $400 per month from the partnership for his services.

In 1998 the parties attempted to dissolve their partnership but could not agree on certain terms. A written agreement was drafted regarding the

[1] The West Farm has a house, the Home Place has a house, and the South Farm has no house.

dissolution of the partnership and a division of the assets, however no final written agreement was ever entered into by the parties. The draft agreement would have given the West and South Farms to Martha and the Home Place to the defendants. It also would have divided other partnership assets, including the horses, and would have required payment of $33,000 salary to Gary and $800 for tax work to Martha. In June of 1998 Gary Hauenstein moved from the West Farm to the Home Place and received the partnership's horses. Martha took control of the West and South Farms.

Martha filed a petition for partition of the three farms. The district court awarded the West Farm to her, the Home Place to the defendants, and ordered the South Farm be sold. The court also ordered an appraisal of all three farms and that the proceeds from the sale of the South Farm be used to reconcile between the plaintiff and the defendants any difference between the values of the West Farm and Home Place, with any remaining proceeds to be paid one-half to the plaintiff and one-half to the defendants.

Martha appeals the district court's order. She contends the order partitioning the farms is not an equitable and practicable determination of the parties' relative interests. She also claims that the parties entered an oral agreement which should have been recognized and enforced. We address these two claims in reverse order.

II. SCOPE AND STANDARDS OF REVIEW

This case was tried in equity and thus our scope of review is de novo. Iowa R. App. P. 4. We give weight to the findings of fact made by the trial court, especially with respect to the credibility of witnesses, but are not bound by those

findings. *Owens v. Brownlie,* 610 N.W.2d 860, 865 (Iowa 2000). We review the facts and the law and adjudicate rights anew on those propositions properly presented, provided the issue has been raised and any error preserved in the course of trial court proceedings. *In Interest of Voeltz*, 271 N.W.2d 719, 722 (Iowa 1978). We examine the entire record and adjudicate anew rights on issues properly presented. *State ex rel. Blackwell v. Blackwell*, 534 N.W.2d 89, 90 (Iowa 1995).

III. MERITS

A. Oral agreement.

Martha claims the parties reached an oral agreement that she would receive the West Farm and the South Farm and the defendants would receive the Home Place. She claims the division was in furtherance of a written agreement concerning dissolution of the parties' farm partnership, drafted by Gary; in furtherance of the parties' oral agreement she took control and possession of the West and South Farms and Gary moved from the West Farm onto the Home Place; and these acts of taking possession and control of the farms constitutes evidence of the parties' oral agreement.

Our rules of appellate procedure require that each division of the argument portion of a party's brief state how the issue was preserved for review, with references to the places in the record where the issue was raised and decided. Iowa R. App. P. 14(a)(5). Martha makes no such statement with respect to this issue. Because of the range of interests protected by our error preservation rules, on appeal we will consider whether error was preserved despite the opposing party's omission in not raising this issue at trial or on

appeal. *Top of Iowa Co-op. v. Sime Farms, Inc.*, 608 N.W.2d 454, 470 (Iowa 2000).

We do not review issues, even of a constitutional nature, not presented to the trial court and first raised on appeal. *State v. Farni*, 325 N.W.2d 107, 109 (Iowa 1982); *Estabrook v. Iowa Civil Rights Comm'n*, 283 N.W.2d 306, 311 (Iowa 1979). We have nevertheless reviewed the record to see if such an issue is properly before us. Martha's petition for partition makes no claim of an agreement, oral or written, for division of the farms. Assuming her petition could be read as presenting such an issue, the trial court's ruling and decree of partition nevertheless does not address or resolve such an issue. "Issues must ordinarily be presented to *and passed on* by the trial court before they may be raised and adjudicated on appeal." *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995) (emphasis added). "It is well settled that a rule 179(b) motion is essential to preservation of error when a trial court fails to resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication." *State Farm Mut. Auto. Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206-07 (Iowa 1984) (citations omitted). Martha makes no claim to have presented such a motion to the trial court. We conclude Martha has failed to preserve error on this claim and decline to address the merits.

B. Partition decree.

Martha claims the trial court erred in entering its partition order because the order is inequitable and impracticable. More specifically, she argues the trial court's order will work a disadvantage to her because the West Farm has not been producing hay sufficient to feed the number of cattle the parties, prior to

1998, and she, since 1998, have had on it; hay from the South Farm has been needed and used to feed cattle on the West Farm; and sale of the South Farm will thus "sacrifice the value of the West Farm."

Martha asserts she requested that all three farms be sold and the proceeds divided between the parties, and requested in the alternative that she be awarded sole title to the West and South Farms and the defendants be awarded the Home Place. She correctly points out that our rules of civil procedure favor partition by sale and place on the party objecting to sale the burden to show why sale should not occur. *See Spies v. Prybil*, 160 N.W.2d 505, 508 (Iowa 1968) (citing Iowa R. Civ. P. 278 (now rule 270(b)), and holding that where plaintiff sought partition by sale and defendant prayed for partition in kind the burden was on defendant to show partition in kind to be equitable and practicable). Here the defendants requested that the West Farm and the Home Place be partitioned in kind and the South Farm be sold. Martha asserts that the burden is therefore on the defendants to prove division partly in kind, rather than partition entirely by sale, is equitable and practicable.

Martha would be correct if she in fact sought partition by sale. However, her petition states, "The Plaintiff claims that the real estate can be equitably divided in kind." Further, the prayer of her petition requests "that the real estate described above be divided in kind by order of the court and if unable to be divided in kind that the real estate be sold . . . ." It thus appears that Martha in fact requested partition in kind, and requested partition by sale only as alternative relief, rather than requesting sale, and division in kind in the alternative, as she asserts.

We need not decide, however, which party had the burden of proof under the particular facts of this case. Our rules of civil procedure allow partition partly in kind and partly by sale when partition in kind can conveniently be made of part of the premises but not of all. *See* Iowa R. of Civ. P. 270(c). We will assume the defendants have the burden of proving that partition partly in kind and partly by sale, as ordered by the trial court, is equitable and practicable. For the reasons that follow, we find the defendants have met that burden and partition in the manner ordered by the trial court is in fact equitable and practicable.

The West Farm consists of 252.5 acres, most of which has been in pasture in recent years. It contains some buildings, including a residence, of minimal value. A 1990 appraisal valued the West Farm at $94,380.

The Home Place consists of 193.5 acres. In recent years forty-two of those acres have been cash-cropped, thirty-some acres have been in hay, and the rest have been in pasture. It contains some buildings, including a residence. The evidence indicates the residence and other buildings are of somewhat better quality and greater value than those on the West Farm. The same 1990 appraisal valued the Home Place at $90,547.

The South Farm consists of 153 acres and no residence. It apparently has no substantial buildings. In recent years it has had fifty-four acres in hay, thirty-eight acres in crop share, and five and one-half acres in forest reserve. The rest is in ditches, ponds, and apparently otherwise unproductive ground. The same 1990 appraisal valued the South Farm at $57,600.

Gary likes living on a farm. He wishes to continue doing so and farming part-time. The other two defendants want him to be able to do so. He has made some improvements to the residence on the Home Place since moving there in 1998. The three farms otherwise remain in about the same condition as at the time of the 1990 appraisals. The West Farm and the Home Place are of approximately equal values. The trial court's order partitioning those two farms in kind and the South Farm by sale is thus equitable and practicable unless sale of the South Farm without sale of the West Farm will in fact decrease the value of the West Farm.

The evidence shows that for several years, both prior to and after 1998, no hay was raised on the West Farm and that hay raised on the South Farm was taken to the West Farm to feed cattle kept there. It also shows that hay grown on the South Farm has been used for cattle kept on the Home Place. The need for hay to be brought to the West Farm was not, however, because hay could not be produced on the West Farm. Rather, it was because cattle were kept on the West Farm and the West Farm was kept in pasture needed for those cattle. The testimony of a long-time neighbor, Mr. Van Zante, who has done custom baling for the parties and their predecessors in interest on the farms since 1977, shows without dispute that almost every part of the West Farm has been in hay at one time or another after 1977.

It thus appears that hay being produced on the South Farm and taken to the West Farm (and to the Home Place) was merely the result of two inter-related facts. First, the West Farm could not produce both sufficient pasture and hay for

the number of cattle the parties chose to keep on the West Farm. Second, the parties chose to have the cattle and pasture on the West Farm and grow hay on the South Farm rather than have some cattle, pasture and hay on each of those two farms. The evidence shows the West Farm would produce hay if it were decided to raise hay on it, and could itself support the type of cow-calf operation Gary has in the past operated for the parties on the three farms. It would merely be a smaller operation than the one that existed on the three farms or the one that would exist on the combined West and South Farms. The sale of the South Farm will not in fact sacrifice the value of the West Farm.

For several additional reasons we conclude that even if Martha were correct in asserting implementation of the court's partition decree might have some negative impact on the value of the West Farm, the decree is nevertheless not inequitable or impracticable. First, there is no substantial evidence that selling all three farms, as Martha proposes, would prevent any diminution in value of the West Farm. The South Farm is located some six miles from the West Farm. There simply is no evidence that if all three farms were sold one buyer would be interested in, and able to buy, both the West Farm and the South Farm.

Second, Martha has it entirely within her control to prevent any potential inequity. If the value of the West Farm were in fact dependent in some small measure upon the availability of the South Farm to provide hay for it, nothing prevents Martha from selling the West Farm together with the court-ordered sale of the South Farm.

Finally, nothing in the record suggests that Martha could not keep the West and South Farms together by purchasing the South Farm herself. There is no evidence the farms are subject to any debt. Martha, as the owner of an undivided one-half interest in the South Farm, can purchase the defendants' interest in it for one-half the price for which it sells. Nothing in the record indicates that her ownership of the West Farm and a one-half interest in the South Farm would not provide the wherewithal to buy the defendants' interest in the South Farm if she in fact should decide to do so.

Martha cites several cases that stand for the proposition sale must be ordered when partition in kind would result in the various tracts being of less aggregate value than the entire tract would produce if sold. Those cases, however, each involve only one farm, not three. Each case also involves substantial evidence that partition in kind would result in decreased overall value or would for some other reason be inequitable or impracticable. No such decrease in overall value, inequity or impracticability exists as a result of the trial court's order in this case.

IV. ATTORNEY FEES.

The defendants-appellees request an award of appellate attorney fees and costs. Generally, each party is responsible for its own attorney fees in the absence of a statute or enforceable contractual provision allowing for fee-shifting. *State v. State Police Officers Council*, 525 N.W.2d 834, 837 (Iowa 1994); *Lara v. Thomas*, 512 N.W.2d 777, 786 (Iowa 1994). The defendants cite no statute or rule in support of their request, and make no claim or showing that any

contractual provision would allow fee-shifting. We deny defendants' request for appellate attorney fees.

V. DISPOSITION.

We affirm the trial court's ruling in its entirety, deny the appellees' request for appellate attorney fees, and tax costs to the appellant.

AFFIRMED.

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