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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-071 / 91-349

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ARLENE BIRD,
Plaintiff-Appellee,

vs.

DOROTHY O'KEEFE and THOMAS O'KEEFE,
Defendants-Appellants,

and

FARM CREDIT BANK OF OMAHA, f/k/a FEDERAL LAND BANK OF OMAHA,
Defendant-Appellee.

Appeal from the Iowa District Court for Plymouth County, Edwin L. Mitchell, Judge.

The defendants appeal the district court's decree partitioning in kind property owned by the principal parties in equal shares as tenants in common. **REVERSED AND REMANDED.**

David J. Lawler, Legal Services Corp. of Iowa, Council Bluffs, for appellant.

Charles F. Knudson of Knudson Law Firm, Marcus, for appellee Bird.

Gregory N. Lohr of Baron, Sar, Goodwin, Gill & Lohr, Sioux City, for appellee Farm Credit Bank of Omaha.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

HAYDEN, J.

This partition action involves unimproved farmland equally owned by two sisters as tenants in common. The sisters, Arlene Bird and Dorothy O'Keefe, received their interests in the land from their father's estate. Partition in kind is desirable in order to avoid adverse federal estate tax consequences. The Federal Land Bank of Omaha holds a first mortgage on Dorothy's interest.

In February 1990 Arlene filed a petition to partition the farmland in question. The court entered an order allowing Dorothy and her husband to farm the north ninety-five acres of the land and Arlene to farm the south sixty-five acres. Arlene requested the court to partition the land on the same basis it was farmed for 1990.

The case was tried to the court. Evidence regarding the various ways the property could be split was presented. Arlene's appraiser indicated the fair market value of the north ninety-five acres was approximately $117,562.50 and the fair market value of the south sixty-five acres was approximately $100,750. O'Keefes objected to receiving the north ninety-five acres because the soil was inferior. The crop yield and number of tillable acres were less than the south sixty-five acres. In addition, the north ninety-five acres experienced erosion and flooding problems. O'Keefes proposed the land be partitioned in kind on an equal east-west division.

The district court partitioned the property in kind according to Arlene's request concluding her proposal was equitable and practical. The court appointed a referee to identify and set off the parcels awarded. O'Keefes' posttrial motion asking the district court to amend its judgment or grant a new trial was denied.

O'Keefes appeal, claiming the procedure followed by the district court in partitioning the property is not in accord with the law. In the alternative, O'Keefes contend the partition of the property ordered by the district court is inequitable.

Partition cases lie in equity. Bowman v. Bennett, 250 N.W.2d 47, 49 (Iowa 1977). Therefore, our review is de novo. Iowa R. App. P. 4.

Iowa Rule of Civil Procedure 278 allows for property to be partitioned in kind if it is shown such partition is fair and equitable. After making that determination, the court shall establish the shares and interests of the owners in the property and appoint three referees, unless the parties agree on a smaller number, to physically divide the property based on the shares and interests of the owners. Iowa R. Civ. P. 279 and 283. The referees shall report their proposed partition in kind, describing the respective shares and specific property allotted to each owner, and a hearing shall be held thereon. Iowa R. Civ. P. 286. Upon approval of the proposed partition, the referees shall mark out each parcel by visible monuments. Iowa R. Civ. P. 284.

The decision of the district court is in accord with the law to the extent it found each party was entitled to one-half interest in the value of the entire property and it was fair and equitable to partition the property in kind. However, instead of then appointing referees to allot the property according to the parties' shares and interests, the district court specifically decreed which portion each party would receive. This was error.

"The court may, for good reasons shown, order referees making a partition in kind to allot a particular tract or article to a particular party." Iowa R. Civ. P. 285. The appointment of referees is not required where "from the nature of the property and the character of the partition which the law makes, they can render no aid to the court in the just division of the property." Doan v. Metcalf, 46 Iowa 120, 128 (1877). Such would occur, for example, where the shares of the parties, and the description thereof, are settled by the parties, id., or where the homestead of one of the parties is located on a portion of the property to be partitioned. Dalton v. Dalton, 184 Iowa 391, 396, 168 N.W. 884, 886 (1918).

> But in ordinary cases where the shares of the parties, and the description thereof, are not settled by the law or consent, the services of referees are essential to the just partition of property. While the court may fix the rights and interests of the parties in the property of which partition is sought, it is necessary that the rules settling their rights and interests be applied to the property. This involves division of the property--the quantity set apart to the parties to correspond to the value of the interest of each.

Doan, 46 Iowa at 128.

Arlene contends good cause was shown, thus allowing the district court to dispense with the appointment of referees. She claims by requesting a parcel whose value was less than the parcel to be awarded to Dorothy, and because her plan was based upon the opinion of an appraiser and the O'Keefes' proposal was deemed unworkable, good cause was shown to allow the court to decree a division of the property and the terms thereof. We disagree.

We find no justification to deviate from the requirement of appointing referees to make the actual allotment of the property which corresponds to the value of the parties' interests. Because the parties were entitled under the law to the benefits resulting from the services of referees appointed by the court, we reverse the decision of the district court and remand the case. On remand the district court shall follow the directives of Iowa R. Civ. P. 279 and 283. In light of our holding, we do not reach O'Keefes' alternative assignment of error.

Costs of this appeal are taxed to appellee, Arlene Bird.

REVERSED AND REMANDED.