



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-15-00283-CV

ALICE L. TOLEDANO, TRUSTEE
OF THE HEDRICK FAMILY TRUST

APPELLANT

V.

JESSE B. HOLMAN, JR.

APPELLEE

FROM THE 367TH DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. 2011-50588-367

MEMORANDUM OPINION¹

I. INTRODUCTION

Appellee Jesse B. Holman, Jr. filed suit seeking partition of real property located in Denton County. After having entered a partition decree and after having appointed commissioners to partition the property, the trial court adopted

¹See Tex. R. App. P. 47.4.

the commissioners' partition report. In three points, Appellant Alice L. Toledano argues that the trial court erred by adopting the commissioners' report, that the trial court improperly allocated court costs against her, and that there is insufficient evidence to support the trial court's judgment that she pay Holman \$1,402.44 as reimbursement for property taxes. We will affirm.

II. BACKGROUND

In 1993, Holman and his sister, Olive Hedrick, inherited equal ownership of two adjacent parcels of land (Lot 2A and Lot 3) which constitute the property involved in this litigation. Later, Hedrick conveyed her interest in the property to the Hedrick Family Trust. Toledano, one of Hedrick's three children, is a co-trustee of the Hedrick Family Trust. Holman filed this suit seeking to partition the property. After holding a hearing, the trial court entered a decree ordering that Lot 2A and Lot 3 be partitioned in a manner awarding Holman fifty percent of the property plus a portion of property equal to the value of the ad valorem taxes that Holman had paid on the property for 2011 and 2012. The trial court's partition decree also ordered that the property be partitioned in such a way that Toledano's partition include the improvements found on Lot 2A. In its partition decree, the trial court appointed three commissioners and ordered that once they had partitioned the property accordingly, they were to prepare and file a written report.

In their report, the commissioners partitioned the property by allotting all of Lot 3 to Holman plus .609 acres of Lot 2A. Specifically describing which portion

of Lot 2A was to be allotted to Holman, the report states “approximately .609 acres as indicated by crosshatch on Exhibit ‘A’ which is attached hereto and incorporated into this Report by reference.” Exhibit A of the report appears to be a map containing the representation of several adjoining parcels of land. Near the center of the map, there are two adjoining parcels of land, and one of the parcels has a portion of it highlighted by crosshatching. Also on Exhibit A, a notation reads “.609 Acres [H]olman.” In their report, the commissioners allotted the remaining portion of Lot 2A to the Hedrick Family Trust.

After the commissioners’ filed their report, Toledano filed objections to the report. The record does not contain Toledano’s objections, but at the hearing regarding her objections, all parties seemed to agree that Toledano was objecting to what she perceived as a lack of clarity as to the location of the southern border of the portion of Lot 2A that was allotted to Holman. There is no dispute regarding the northern, eastern, and western borders of the portion of Lot 2A allotted to Holman.

One of the commissioners, Daphne Zollinger, testified at the hearing. Zollinger testified that she is a real estate broker, an accredited land consultant, and a certified commercial investment member. Zollinger said that she is a member of local, state, and national realtor associations. Zollinger averred that the commissioners’ report submitted to the trial court was the agreed-upon report by the three appointed commissioners. According to Zollinger, the southern border of Lot 2A that was allotted to Holman ran along the northern side of a road

that is located on the portion of Lot 2A allotted to Toledano. Zollinger averred that at the end of the road, the southern border of Holman's tract jogged up and then over in order to allow a house to come within the portion of Lot 2A allotted to Toledano.

Zollinger also averred that she had previously worked with surveyors and that a surveyor could utilize the commissioners' report, including Exhibit A, which details the acreage and a rough outline of the allotted portion, along with the information in the report—that the improvements found on Toledano's portion of Lot 2A belonged to Toledano—to “prepare a survey and mark the boundaries.” Zollinger further stated that the purpose of a commissioners' report was to allocate the acreage to the parties but that if a party wished to have an “exact[]” or “legal description of a property,” they should enlist a surveyor.

Holman's wife, Mayme Holman, testified at the hearing. Mayme testified regarding the taxes that Holman had paid on the property over the years. According to Mayme, Holman paid half of the taxes on the property for the years 2013 and 2014. During Mayme's testimony, Holman introduced copies of tax appraisals for the property for the time period since the trial court had entered its partition decree. The trial court also allowed Holman to introduce a spreadsheet, which demonstrated that Holman had paid \$1,402.44 in taxes that were attributable to the improvements found on the property that had been awarded to Toledano in the partition decree.

Mayme also testified regarding what she averred were delays in bringing this case to be heard for its final hearing. By Mayme's account, Toledano had refused to accept service, had failed to appear for hearings, had canceled a scheduled mediation and her attorney could not reach her about another mediation, and had failed to appear for a deposition. Mayme averred that on one occasion when a process server attempted and failed to serve Toledano, she knew Toledano was home because her husband could see Toledano from their front yard. Mayme said that Toledano's delays had caused Holman to expend extra monies on this lawsuit. The trial court allowed Holman to introduce an itemized inventory of expenses, which he claimed were incurred because of Toledano's conduct. The expenses listed on the costs sheet totaled \$2,021.50.

Toledano testified at the hearing as well. Regarding expenses, Toledano said that she did not know whether she owed costs related to a deposition. She also said that she thought that she had paid \$412.50 for some of the expenses related to the commissioners' report. Toledano said that the reason she had failed to appear at several of the court-related activities is because she was in Spain on vacation. Toledano said that she was unaware of a scheduling hearing that both she and her attorney failed to appear for. Regarding taxes paid on the property for the year 2013, Toledano claimed that Holman's figures were wrong and that she had paid nearly three quarters of the owed taxes.

Regarding the commissioners' report, Toledano said that she could not determine where her property ended and Holman's began by reading the report.

According to Toledano, the report merely contained “a little scribble on -- on a map there that didn’t have any -- even any dimensions or anything. I don’t understand it at all.”

The trial court approved the commissioners’ report. In its findings of fact and conclusions of law, the trial court found that the commissioners’ report was accompanied by “such field notes and maps as are necessary to make [the report] intelligible.” The trial court also found that the report accurately described the partitions consistent with the partition decree. The trial court further found that Holman had incurred courts costs in the amount of \$2,021.50 and that Holman had paid \$1,402.44 in taxes related to improvements upon the property for the years 2013 and 2014. The trial court concluded that the commissioners’ report complied with the applicable rules of civil procedure and that the report “is not erroneous in any material respect, or unequal or unjust.” This appeal followed.

III. DISCUSSION

A. The Commissioners’ Report

In her first point, Toledano argues that the trial court erred by adopting the commissioners’ report. Specifically, Toledano argues that the report fails to adequately describe the southern boundary between her and Holman’s partitions in Lot 2A.

A partition case consists of two decrees that are both final and appealable. *Griffin v. Wolfe*, 610 S.W.2d 466, 466 (Tex. 1980); *Ellis v. First City Nat’l Bank*,

864 S.W.2d 555, 557 (Tex. App.—Tyler 1993, no pet.). In the first decree, the trial court determines the share or interest of each owner, all questions of law or equity affecting title, and whether the property is subject to partition or sale. Tex. R. Civ. P. 760, 761, 770; *Ellis*, 864 S.W.2d at 557. In this first decree, the trial court also “appoints commissioners and gives them such directions as may be necessary and appropriate.” *Marmion v. Wells*, 246 S.W.2d 704, 705 (Tex. Civ. App.—San Antonio 1952, writ ref’d); see also Tex. R. Civ. P. 760, 761. Upon their appointment, the commissioners “or a majority of them, shall proceed to partition the real estate described in the decree of the court, in accordance with the directions contained in such decree and with the provisions of law and these rules.” Tex R. Civ. P. 766. Once the commissioners have completed the partition, they are to present a written report to the trial court. Tex. R. Civ. P. 769. This report is required to show the following:

- (a) The property divided, describing the same.
- (b) The several tracts or parcels into which the same was divided by them, describing each particularly.
- (c) The number of shares and the land which constitutes each share, and the estimated value of each share.
- (d) The allotment of each share.
- (e) The report shall be accompanied by such field notes and maps as may be necessary to make the same intelligible.

Id.

In the second decree of the partition case, the trial court either confirms or rejects the commissioners' report. See *Ellis*, 864 S.W.2d at 557. That is, if the trial court finds that the report of the commissioners is "erroneous in any material respect, or unequal and unjust," it must reject the report and appoint other commissioners. Tex. R. Civ. P. 771. The party objecting to the commissioners' report has the burden of proving that it is materially erroneous or that it unequally and unjustly partitions the property. *DeMarco v. Van Hees*, 493 S.W.2d 553, 554 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ); *Roberts v. Philpot*, 435 S.W.2d 614, 615 (Tex. Civ. App.—Tyler 1968, no writ). If there is conflicting evidence regarding the issue of the report being materially erroneous or unequally and unjustly partitioned, "the resolution of the conflict is for the trier of fact." *Ellis*, 864 S.W.2d at 557. The trial court's ruling on whether the report is materially erroneous or whether the property is unjustly partitioned will be upheld so long as the ruling is not so against the great weight of the evidence as to be manifestly unjust. *Id.*

Here, because she was the one objecting to the commissioners' report, Toledano carried the burden to prove that the commissioners' report was materially erroneous or unjust. *Id.* The only evidence that Toledano provided at the hearing regarding her objections to the report was her own testimony that she did not understand the crosshatched area on the map that was attached to the report as Exhibit A. In contrast, and even though Holman did not carry the burden of proof, Holman put on evidence that the report was sufficiently

intelligible to allow a surveyor to conduct a survey and provide an exact description of the land because the report gives three defined boundaries (the northern, eastern, and southern boundaries); it describes that the allotted portion of Lot 2A to Holman consists of .609 acres; and it reports that the road and house on Lot 2A are allotted to Toledano. Toledano did not put on any evidence that a survey could not be taken of the allotted partitions of Lot 2A using the report, nor did she put on any evidence that a surveyor would not be able to interpret the report in such a way as to effectuate an accurate survey or description of the allotted acreage.

Toledano seems to argue that because the commissioners' report does not describe Holman's allotted portion of Lot 2A in the same manner as a deed, it fails to be intelligible. But a commissioners' report and a deed are not the same thing. See *Masten v. Masten*, 166 S.W.2d 347, 349–50 (Tex. Civ. App.—Fort Worth 1942, no writ) (holding that trial court did not err by adopting commissioners' report even though commissioners did not consult surveyor). Toledano did not carry her burden of proving that the commissioners' report was materially erroneous or unjust. See *Ellis*, 864 S.W.2d at 557. Based on this record, we hold that the trial court's decision to adopt the commissioners' report was not so against the great weight of the evidence as to be manifestly unjust. Thus, we overrule Toledano's first point.

B. Court Costs

In her second point, Toledano argues that there is insufficient evidence to support the trial court's award of \$2,021.50 in court costs to Holman. Specifically, Toledano argues that only her testimony was credible and that based on her testimony, the trial court should have determined that she had paid portions of the commissioners' costs; that she was not "effective[ly] noticed" of the deposition that she failed to attend; and that "any non-compliance" on her part "could, and should, have been enforced through the Rules of Civil Procedure." We conclude that the evidence and the rules of civil procedure support the trial court's judgment.

In a partition suit, rule 778 requires that the costs shall be "paid by each party to whom a share has been allotted in proportion to the value of such share." Tex. R. Civ. P. 778. But rule 141 provides that "[t]he court may, for good cause, to be stated on the record, adjudge the costs otherwise than as provided by law or these rules." Tex. R. Civ. P. 141. Moreover, rule 141 trumps rule 778 when costs are related to a party's objections to a commissioners' report and not the actual partitioning of the property. *Grimes v. Collie*, 733 S.W.2d 338, 342 (Tex. App.—El Paso 1987, no writ).

Here, the trial court had evidence before it that Toledano had caused Holman to incur the awarded court costs through her and her attorney's dilatory conduct in responding to notices and discovery, and there was evidence that he had incurred court costs defending her objections to the commissioners' report.

See *Powell v. Naylor*, 32 Tex. Civ. App. 340, 74 S.W. 338, 339 (1903, writ ref'd) (“It is the rule in partition suits that defendants are liable for all costs incurred by them in contesting the rights of the successful plaintiffs.”). Based on this evidence, the trial court found that Holman had incurred \$2,021.50 in court costs. The record supports the trial court’s adjudging these costs against Toledano. We overrule Toledano’s second point.

C. Reimbursement for Taxes

In her third point, Toledano argues that there exists insufficient evidence to support the trial court’s judgment awarding Holman reimbursement for taxes he paid in 2013 and 2014 toward property apportioned to Toledano in the partition decree.

Much like in her second point, Toledano completely ignores all evidence supporting the trial court’s ruling and argues that the only “credible” evidence in the record is her testimony that she had paid nearly three quarters of the property taxes assessed against the property in 2013 and her testimony that she paid half of the taxes in 2014. Not only does Toledano ignore the testimony of Mayme that Holman had paid half of the taxes for 2013 and 2014, Toledano wholly ignores the supporting documents that Holman introduced at the hearing.

In a partition suit, a co-tenant who has expended funds to preserve the property, including paying for ad valorem taxes, is entitled to reimbursement from the other co-tenants for their proportionate share. *Sayers v. Pyland*, 161 S.W.2d

769, 771–72 (1942); *Treviño v. Treviño*, 64 S.W.3d 166, 174 (Tex. App.—San Antonio 2001, no pet.).

Here, Holman presented testimony from Mayme, along with corresponding documentation, that Holman had paid half of the property taxes for the improvements on the property that were to be partitioned to Toledano. Thus, we conclude that Holman presented sufficient evidence that he paid taxes for which Toledano should reimburse him. See *Sayers*, 161 S.W.2d at 771–72. We overrule Toledano’s third point.

IV. CONCLUSION

Having overruled all three of Toledano’s points, we affirm the trial court’s judgment.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: WALKER, MEIER, and SUDDERTH, JJ.

DELIVERED: January 12, 2017