COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00153-CV

JAY WARNE CARTER JR. APPELLANT

V.

ERWIN LEE HARVEY SR. APPELLEE

FROM THE 78TH DISTRICT COURT OF WICHITA COUNTY
TRIAL COURT NO. 181,517-B

CONCURRING AND DISSENTING OPINION

I agree with much of the majority opinion. I agree that appellant Jay Warne Carter Jr. cannot bring a derivative equitable-adjustment claim because the claim belonged to a dissolved corporation; therefore, the trial court did not err by granting partial summary judgment in favor of appellee Erwin Lee Harvey Sr. I also agree that Matthew Carter, Carter's son and the owner of the removable turbine located on the real property at issue in this appeal, is not a necessary party to Harvey's partition suit because Matthew has no possessory interest in

the real property. Accordingly, I agree with the majority that the trial court's order for partition by sale is not void, as asserted by Carter, based on the absence of a necessary party. And although I agree with the majority that this case presents "unique" and "distinct circumstances," I believe that the evidence—even though unique and distinct—was legally insufficient to support the trial court's finding that the property was "not susceptible to a fair and equitable partition in kind because to do so would impair significantly the value of the tract of land."

The majority carefully and fully sets out the relevant facts and the applicable law, which I need not repeat except to highlight the bases of my respectful disagreement. Of course, Harvey had the burden to overcome the law's preference for partition in kind by showing that a partition in kind would be unfair and inequitable. *See Champion v. Robinson*, 392 S.W.3d 118, 123 (Tex. App.—Texarkana 2012, pet. denied); *see also* Tex. R. Civ. P. 770. Part of that showing includes whether the property can be divided in kind without materially impairing its value. *See Cecola v. Ruley*, 12 S.W.3d 848, 855 (Tex. App.—Texarkana 2000, no pet.) (op. on reh'g). The classic example of this tenet is a Persian rug: the rug's value is destroyed if the rug is cut in half, which renders partition in kind unfair and inequitable. *See id.*

The only evidence before the trial court here showed that the tract was susceptible to a partition in kind. Harvey's expert, Jim Henderson, testified that he only considered whether Carter's desired partition—his partitioned 1/8 interest of the 49-acre tract would include the location of the turbine—was feasible and

that this desired partition was not feasible because of the need for access to the land under the turbine. In short, because of the turbine's location relative to the access road, Henderson concluded that there was no way to partition the tract in kind such that Carter's 1/8 interest—valued at $26,428—included that portion where the turbine was located. But Henderson testified that if the location of the turbine was not considered, a partition in kind of the property between the two owners was possible. And although Carter testified that it would be "hard" for him to "take the wind turbine out of the picture," he would accept other in-kind partitions.

The majority recognizes this testimony but concludes that the trial court could have reasonably determined a partition in kind would be unfair and inequitable based on the parties' "incongruous, competing concerns"—Carter "would not be satisfied" unless he received his proposed partition, while Henderson and Harvey rejected Carter's proposed in-kind partition as unfair and inequitable. This holding would seem to allow any party to a partition suit to thwart a request for a partition in kind by refusing to budge from a proposed, yet unworkable, partition (as did Carter) or by opining that the proposed partition—and only the proposed partition—would impair the property's value (as did Harvey). But Carter's proposed partition does not begin and end the factual question to be determined by the trial court: whether the tract is susceptible to partition in kind. *See* Tex. R. Civ. P. 761. The trial court is not tasked with determining a specific and appropriate partition; that is the job of the appointed

commissioners and, if appointed, the surveyor. *See* Tex. R. Civ. P. 761, 764, 768–69; *Yturria v. Kimbro*, 921 S.W.2d 338, 343 (Tex. App.—Corpus Christi 1996, no writ) ("The commissioners, rather than the trial court or jury, have been entrusted with the authority and the duty of actually dividing the land according to the value of the respective shares."). The trial court merely determines whether **a** partition in kind is feasible, fair, and equitable. *See* Tex. R. Civ. P. 761; *Yturria*, 921 S.W.2d at 341–42. Indeed, Carter could not seek a partition in kind of only a portion of the tract; the entire 49-acre tract was subject to the trial court's susceptibility determination. *See Battle v. John*, 49 Tex. 202, 210 (1878). A party's request to be allotted a described portion of the tract does not confine either the trial court's equitable determination to that specific request or the commissioners' in-kind partition report if such a partition is ordered. *See* 57 Tex. Jur. 3d *Partition* §§ 28, 59 (2016); *see also Yturria*, 921 S.W.2d at 342 ("[T]he existence and value of improvements is a question for the factfinder, while the exact manner of valuing the real property on which they are situated and dividing that property into shares among the parties is accomplished by the commissioners."). It follows, then, that to overcome the preference for in-kind partition, Harvey had to show that any partition in kind of the 49-acre tract would be inequitable or unfair because any partition would impair the entire tract's value. *Cf.* 57 Tex. Jur. 3d *Partition* § 61 ("Although the court may determine that each of two claimants is entitled to one-half of the land, the commissioners have the . . . duty[] to divide the land according to the value of the respective shares.").

This he did not do. Carter, Harvey, and Henderson all agreed that a partition in kind of the tract was possible, and none testified that a partition other than Carter's proposal would impair the tract's value.[1] They disagreed on the feasibility of Carter's proposed partition in kind, not on whether the tract was "susceptible of partition" at all. Tex. R. Civ. P. 761. Henderson and Harvey testified regarding the effects of access rights to the tract's value if the tract were partitioned in kind as Carter requested, both concluding that its value would be impaired. Henderson stated that the northern portion of the tract was worth more because it has access to the road, while the southern portion was less valuable because it does not have access, which Carter agreed with. But access rights do not affect a tract's susceptibility to partition in kind; easements causing the least amount of damage to the tract must be granted by the appointed commissioners to provide "reasonable ingress and egress . . . through a public road or an existing easement appurtenant to the tract." Tex. Prop. Code Ann. § 23.006(a), (c) (West 2014). Accordingly, I disagree with the majority's apparent consideration of access rights in its review of the trial court's susceptibility determination. *See Champion*, 392 S.W.3d at 124 ("[T]he fact that the property has only a single road does not require a conclusion that the tract is incapable of partition."). I also disagree with the majority's apparent inclusion in its analysis of

[1]In fact, Henderson seemed to agree that a partition in kind that would "take something off of the very north end that was equivalent to . . . a one-eighth interest" could maintain the tract's value regardless of the location of the turbine.

the cost to remove the turbine. Neither Carter nor Harvey owned the turbine or would have to bear any portion of the cost for its removal; thus, the cost to remove the turbine was not an equitable consideration affecting the tract's value.

While I recognize that the susceptibility of a tract to in-kind partition is a question of fact for, in this case, the trial court, our natural deference to a trial court's factual finding cannot arise if there are no facts to support it or if the opposite is conclusively established. *See Daven Corp. v. Tarh E & P Holdings, L.P.*, 441 S.W.3d 770, 777 (Tex. App.—San Antonio 2014, pet. denied); *Champion*, 392 S.W.3d at 123. Here, no evidence established that the tract was not susceptible to in-kind partition because a partition would impair the tract's value. And this is not a case where the tract's size is unusual, the ownership pool is so numerous, or the interests are so fractional that a partition in kind would be logistically impossible or not feasible. *See, e.g.*, *Champion*, 392 S.W.3d at 124. Although much evidence established that Carter's proposed partition was not feasible and would impair the value of the tract, that was not the question the trial court was to answer. The trial court was to determine susceptibility to partition in kind, not the feasibility of Carter's best-case partition scenario. *Compare* 57 Tex. Jur. 3d *Partition* §§ 51–52 (delineating susceptibility considerations, including the size of the property, the fractional interests at issue, and "[s]ubstantial economic loss"), *with id.* § 61 (recognizing commissioners determine allotment of specific property to fractional owners based on equality of value).

The admitted evidence reveals that Harvey did not meet his burden of proof to show that the tract was not susceptible to a partition in kind because it would be unfair and inequitable. *Cf. Cecola*, 12 S.W.3d at 854 (concluding evidence legally sufficient to support in-kind partition where evidence showed partition was possible, land could be divided into tracts, and record did not establish nonsusceptibility as a matter of law); *Horrocks v. Horrocks*, 608 S.W.2d 733, 735 (Tex. Civ. App.—Dallas 1980, no writ) ("Unless [the party with the burden of proof] met this burden, the [parties without the burden of proof] were entitled to a summary judgment recognizing such title and to a partition of the contested property."). Accordingly, I would conclude that the evidence was legally insufficient to support the trial court's finding that the tract was not susceptible to an in-kind partition because no evidence supports such a finding. In short, I believe that the unique, distinct, and undisputed evidence admitted before the trial court compelled a finding of susceptibility to partition and the entry of a decree directing the partition in kind of the tract based on Carter's 1/8 share and Harvey's 7/8 share. *See* Tex. R. Civ. P. 761. Because the majority does not, I respectfully dissent to this portion of the majority.

/s/ Lee Gabriel

LEE GABRIEL
JUSTICE

DELIVERED: June 29, 2017