

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

ON REHEARING

NO. 03-19-00684-CV

**Fry Sons Ranch, Inc. and James Andy Fry,
Individually and as Sole Director of Fry Sons Ranch, Inc., Appellants**

v.

**Joseph Nathan Fry, Press Allen Fry, and Edward Heath Fry, All Individually and as
Representatives and Majority Shareholders of Fry Sons Ranch, Inc., and as
Beneficiaries of The Press Fry Family Trust, Appellees**

**FROM THE 33RD DISTRICT COURT OF BURNET COUNTY
NO. 45181, JUDGE MICKEY RAY PENNINGTON, JUDGE PRESIDING**

MEMORANDUM OPINION

This appeal arises from a dispute between four brothers over ranch property owned by Fry Sons Ranch, Inc., a closely held corporation. In their lawsuit, three of the brothers—Joseph Nathan Fry, Press Allen Fry, and Edward Heath Fry (collectively, the “Three Brothers”), allege that the fourth brother, James Andy Fry, wasted corporate assets and breached his fiduciary duty to them as shareholders in the corporation. In addition to other relief, the Three Brothers seek a judicial partition of the ranch property. *See* Tex. R. Civ. P. 756 (petition to partition real property).

On March 6, 2019, the trial court signed an order directing that the ranch property be partitioned in kind and appointing commissioners to determine how the property should be divided. *See id.* R. 761 (court shall determine whether property is susceptible to partition in kind and appoint commissioners to make partition). On September 13, 2019, after the commissioners complained to the trial court that they had been unable to access the property, the trial court signed an order granting the Three Brothers' application for appointment of a receiver to take possession of the property and to work with the commissioners to effectuate the partition.

On September 27, 2019, Fry Sons Ranch, Inc. and James Andy Fry (collectively, the "Ranch Defendants") filed a notice of interlocutory appeal. *See* Tex. Civ. Prac. & Rem. Code § 51.014 (permitting interlocutory appeal from receivership order). In three issues, the Ranch Defendants challenge the trial court's March 2019 order of partition and the trial court's September 2019 order appointing a receiver. In response, the Three Brothers have filed a motion to dismiss arguing that the Ranch Defendants' appeal of the September 2019 order appointing a receiver has become moot. Although more than ten days have passed since the Three Brothers filed their motion to dismiss, the Ranch Defendants have not filed a response to the motion. *See* Tex. R. App. P. 42.3.

An appellate court is prohibited from deciding moot controversies. *National Coll. Athletic Ass'n v. Jones*, 1 S.W.3d 83, 86 (Tex. 1999). A case is moot if a justiciable controversy ceases to exist between the parties or the parties have no legally cognizable interest in the outcome. *City of Krum v. Rice*, 543 S.W.3d 747, 749 (Tex. 2017) (per curiam). "Put simply, a case is moot when the court's action on the merits cannot affect the parties' rights or interests." *Id.* (quoting *Heckman v. Williamson County*, 369 S.W.3d 137, 162 (Tex. 2012)). A case may

become moot at any stage of the legal proceedings, including during the appeal. *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005) (orig. proceeding).

The record in this case reveals that on June 23, 2020, the commissioners filed a report to the trial court, providing a legal description of the property; specifying division lines for the property; and allotting two parcels, based on value, between the Three Brothers, jointly, and their brother James Andy Fry. *See* Tex. R. Civ. P. 768 (commissioners shall divide real property), 769 (commissioners shall report completed partition in writing to court). On September 1, 2020, the trial court signed an order discharging the receiver and dissolving its September 2019 receivership order. As a result, the issues in this appeal concerning the receivership order have become moot. *See Waite v. Waite*, 76 S.W.3d 222, 223 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (concluding that trial-court order dissolving prior receivership order while interlocutory appeal was pending rendered appeal moot); *see also R-ZAQ, Inc. v. Mohawk Servicing, LLC*, No. 08-15-00065-CV, 2015 Tex. App. LEXIS 4227, at *2 (Tex. App.—El Paso Apr. 24, 2015, no pet.) (mem. op.) (concluding that order terminating receivership and discharging receiver rendered appeal of receivership order moot). *But see Garcia v. Marichalar*, 185 S.W.3d 70, 72 (Tex. App.—San Antonio 2005, no pet.) (explaining that trial court retains jurisdiction to dissolve interlocutory order while appeal from order is pending, unless doing so would “interfere[] with or impair[] the effectiveness of the relief sought or that may be granted on appeal”). Because mootness deprives a court of subject-matter jurisdiction, we conclude that we lack jurisdiction over the Ranch Defendants’ attempt to appeal the September 2019 order appointing a receiver.

In their motion to dismiss, the Three Brothers also argue that the appeal is untimely to the extent the Ranch Defendants have raised issues related to the March 2019

partition order. Unlike most other proceedings, a partition case involves two or more final appealable orders. *Giffin v. Wolfe*, 610 S.W.2d 466, 466-67 (Tex. 1980) (per curiam); *Long v. Spencer*, 137 S.W.3d 923, 925 (Tex. App.—Dallas 2004, no pet.). This is because a partition proceeding is a multi-step process, and at each step decisions are made upon which other decisions will be based. *Id.* at 925-26. An appeal at each step “provides a practical way to review controlling intermediate decisions before the consequences of any error do irreparable harm.” *Id.* at 926. Consequently, a trial court’s order directing that property be partitioned is a final appealable order. *See id.* at 925.

The deadline for the Ranch Defendants to file a notice of appeal from the trial court’s March 2019 partition order was June 4, 2019. *See* Tex. R. App. P. 26.1(a) (when party timely files certain post-judgment motions, such as request for findings of fact and conclusions of law, notice of appeal is due within 90 days after judgment is signed). Because the Ranch Defendants did not file an appeal until September 27, 2019, the Ranch Defendants’ appeal of the March 2019 partition order is untimely, and we lack jurisdiction to consider the Ranch Defendants’ issues related to the order.¹ *See Freeman v. Freeman*, No. 14-08-00800-CV, 2009 Tex. App. LEXIS 4768, at *2 (Tex. App.—Houston [14th Dist.] June 25, 2009, no pet.) (mem.

¹ In their appellants’ brief, the Ranch Defendants argue that their appeal of the March 2019 partition order is not untimely because the partition order was not final when it was signed. The Ranch Defendants assert that the subsequent September 2019 receivership order modified the March 2019 partition order and that, consequently, the March 2019 order did not become final and appealable until September 2019. *See* Tex. R. Civ. P. 329b(h) (providing that if judgment is modified, corrected, or reformed in any respect, time for appeal shall run from time modified, corrected, or reformed judgment is signed). We disagree with the Ranch Defendants’ assertion that the March 2019 partition order was modified. The record reveals that the stated purpose of the September 2019 receivership order was to enforce the Court’s prior partition order, and the receivership order did not modify, correct, or reform the partition order in any respect.

op.) (declining to address argument on appeal that plaintiff lacked standing to bring suit for partition of property because appeal was untimely).

Accordingly, we grant the appellees' motion and, without reference to the merits, dismiss this appeal for want of jurisdiction.

Chari L. Kelly, Justice

Before Chief Justice Rose, Justices Baker and Kelly

Dismissed on Appellees' Motion on Rehearing

Filed: November 13, 2020