

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-026

JULY TERM, 2019

Jeff D. Burns et al. v. Brian D. Burns*	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 19-025
		Trial Judge: Helen M. Toor

In the above-entitled cause, the Clerk will enter:

Defendant Brian Burns appeals the court’s order in this partition action. On appeal, defendant argues that that the court erred in finding that all parties had an equal interest in the land and the camp, crediting the expert appraiser’s value of the property, declining to give defendant a greater share based on his contributions, giving one plaintiff authority over the sale of the property, and determining that defendant owed a balance on a note. We reverse and remand.

This litigation concerns a .94-acre lot in Bolton that is co-owned by the parties, siblings Theresa, Brian, and David Burns, and their nephew Jeffrey Burns. Theresa, David, and Jeffrey filed this partition action against Brian. The parties attempted to mediate the matter but were unable to come to a resolution. The parties waived the use of commissioners. Following a court trial, the court found the following. A relative gifted the property to the parties in the 1960s. The parties agree that they own equal shares in the land. There are three structures on the land: a log cabin in disrepair, a camp, and a generator shed. Defendant Brian Burns argues that he solely owns the camp. He hired someone to build it in 1992, financed by a \$20,000 loan from Theresa. He signed a note agreeing to pay 8% interest on the loan and has repaid half. With the accrued interest, the amount due on the note at the time of the final hearing was \$22,138.08. For several years, Brian has lived at the camp in the summer.

The town assessed taxes on the land and the camp separately. The parties all paid taxes on the land, except for the last two years, when Jeffrey paid them. Brian paid taxes on the camp. No evidence was introduced as to the amount of taxes or other expenses each party paid.

A certified appraiser valued the property at \$51,600, \$20,000 for the land, \$30,000 for the camp, and \$1600 for the log cabin. The Town assessed the land at \$18,200 and the camp at \$88,400. The court credited the valuation of the expert appraiser and found the value of the land, including structures, was \$51,600. Defendant did not testify or offer any witnesses at trial.

The court found that the lot was too small to be subdivided. Therefore, the remaining options were assigning it or selling it. The court decided to allow Brian to purchase it if he was able. The court directed that Brian was required to pay the other owners the following amounts:

\$12,900 to Jeff and David; and \$35,038.08 to Theresa (\$12,000 plus \$22,138.08 for the balance due on the note). The court provided Brian with 120 days to purchase the property. The court directed that if Brian did not make the necessary payments, then the property would be listed for sale, with Theresa having sole authority to negotiate a sale. Defendant appeals.

Per statute, a person jointly owning property may petition the court to partition the property. 12 V.S.A. § 5161. In response, the court may partition the property, assign it to one party and require payment to the others, or order that it be sold. *Id.* §§ 5169, 5174, 5175. Partition by sale is not favored. In partitioning land owned by tenants in common, there is a presumption they have equal shares in the title. *Whippie v. O'Connor*, 2010 VT 32, ¶ 14, 187 Vt. 523. The partitioning court may then consider “equitable factors” in the following order: first, each party’s contribution towards expenses; and second, any claims of rental value offset for any period of exclusion. *Id.* ¶ 15.

On appeal, defendant first argues that although the parties jointly owned the land, he alone separately owned the cabin built on the land and the cabin was not subject to partition. The trial court recognized that the Town of Bolton assessed the lot separately from the cabin for tax purposes but found that the cabin and land were one property.

The court did not err in concluding that the cabin was part of the real property. The factors for determining if an article is real or personal property are: “(1) the annexation, actual or constructive, of the article to the real estate; (2) its adaptation to the use of the realty to which it is annexed; and (3) whether or not the annexation has been made with the intention to make it a permanent accession to the freehold.” *Sherburne Corp. v. Town of Sherburne*, 124 Vt. 481, 484, (1965). Here, the court’s findings support its conclusion that the cabin is real property in that the cabin is affixed to the ground, adapted to the property, and was built to be part of that property.

Next, defendant argues that the court erred in crediting the expert appraiser’s valuation of the property.¹ Defendant asserts that the town’s assessment of the property reflected the fair market value. The court found that the appraiser’s valuation was more credible than the town’s assessment given that it considered the cost, estimated at \$20,000 a year, to keep the road open in winter. Defendant did not offer a competing appraisal and there was no testimony to explain the town’s higher assessment. “The trial court enjoys broad discretion in assessing the credibility and weight of a witness’ testimony, and we will not second-guess these determinations on appeal.” *In re LaBerge NOV*, 2016 VT 99, ¶ 35, 203 Vt. 98 (quotation omitted). The court acted within its discretion in crediting the reasoning and result of the expert appraiser as to the value of the property.

Defendant also asserts that he contributed more to the property, including expenses and insurance, and therefore that he should own a greater share of the property. When property is partitioned, there is a presumption of equal contribution, but “when one cotenant pays more than his or her share of property-related expenses, she or he is entitled to proportionate reimbursement, or credit, from the other tenants to reflect the proportionate burden of co-ownership.” *Whippie*, 2010 VT 32, ¶ 16. Here, the court found that there was insufficient evidence for it to determine how much each person paid for taxes, insurance, and other expenses, and therefore, did not adjust

¹ On appeal, defendant refers to a post-trial memorandum that he submitted. The trial court indicated that defendant submitted arguments in his post-hearing memorandum based on facts not in evidence and therefore that the court did not consider that evidence. Similarly, on appeal, we do not consider evidence defendant submitted in his post-trial memorandum.

the parties' shares. Given the lack of evidence, the court acted within its discretion in declining to adjust the parties' proportionate shares based on payment of expenses.

Defendant's argument is broader, however, than seeking credit for expenses. Defendant asserts a greater percentage of ownership in the property based on the undisputed fact that he built the camp. In partitioning, the court should consider equitable factors in the following order: first, credit each party for contributions made to the property, including building improvements; second, credit against that party for periods of ouster, and last, consider "other equities cognizable in partition." *Id.* ¶ 15. In this case, the only relevant factors are the contribution through improvement and other equitable considerations because the court found there was no ouster. As to the credit for the improvement, "[t]he general rule is that cotenants who pay for discretionary improvements are entitled to a credit for the resultant increase in fair market value, not for the actual costs." *Wynkoop v. Stratthaus*, 2016 VT 5, ¶ 28, 201 Vt. 158.

Here, the record demonstrates that defendant built the camp. Therefore, defendant was entitled to a credit for his contribution to the increase in the fair market value of the property. Because the improvement was financed by Theresa's loan, half of which remained unpaid, the court could either consider Theresa as having financed half of the camp and credit both defendant and Theresa for half of the increased value from this improvement or consider her loan as an additional equitable consideration. Either way, defendant was entitled to some credit for his contribution to the increased value of the property by building the camp. Even though the court has broad discretion in equitably dividing property and can consider relevant circumstances, it must limit its consideration to contributions made to the property. *Whippie*, 2010 VT 32, ¶ 26. The court's decision to require defendant to pay Theresa for the remaining value of the note plus interest went beyond its discretion. Theresa did not plead a separate claim to enforce the note in this partition action; rather, she argued that the note should be repaid before the property could be sold. The relevance of the note in this case is thus that it was used to finance the improvement to the property. In the context of the partition, the court could not simply enforce repayment of the note and the interest.² On remand, the court is directed to recalculate the respective shares of each party in the property—and therefore the amount defendant must pay to obtain the property, taking into account defendant's and/or Theresa's contributions to the increase in value of the property.

Finally, defendant argues that the court erred in giving Theresa authority to choose a realtor, sign a listing agreement, set the listing price, accept an offer, and sign a contract for sale. Defendant asserts that this allows his siblings to list the property for less than its worth and then purchase it. The court has discretion in exercising its equitable authority and executing a partition by sale. See *Currie v. Jane*, 2014 VT 106, ¶ 19, 197 Vt. 599 (noting that this Court reviews "trial court's exercise of discretion in applying the equitable remedy of partition for abuse of discretion"). The court did not abuse its discretion in assigning Theresa the authority to oversee the sale of the property. We note that Theresa will be acting as an agent for the rest of the property owners in this capacity and therefore will have a fiduciary duty of loyalty, prohibiting her from

² Defendant argues that the court erred in concluding that he owed Theresa the balance on the note because the statute of limitations had run. We need not reach this issue because we conclude that the court could not enforce the note as part of the partition action. In any event, defendant did not raise this issue at trial and therefore has not preserved it for appeal. *In re White*, 172 Vt. 335, 343 (2001) (stressing that Supreme Court "will not address arguments not properly preserved for appeal").

using the agency to benefit herself. See In re Estate of Kurrelmeyer, 2006 VT 19, ¶ 17, 179 Vt. 359 (“A fiduciary duty of loyalty is implied in every agency as a matter of law.”).

Reversed and remanded.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice