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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-1026

Filed 19 December 2023

Johnston County, No. 19 SP 654

VIVIAN L. MATTHEWS, Petitioner,

v.

LINDA M. HERRING and husband, WILLIAM G. HERRING; WILLIAM GARY MATTHEWS and wife, RAE ANN MATTHEWS, Respondents.

Appeal by Petitioner from order entered 11 March 2022 by Judge John W. Smith in Johnston County Superior Court. Heard in the Court of Appeals 9 August 2023.

*Edward Eldred, Attorney at Law, PLLC, by Edward Eldred for petitioner-appellant.*

*Spence, Carter & Reed, P.A., by Robert A. Spence, Jr., for respondents-appellees.*

MURPHY, Judge.

On appeal from a commissioners' report dividing property for a partition in kind, the trial court acts as factfinder and determines whether the partition was fair and equitable. The trial court's findings of fact are supported by competent evidence, and these findings support its decision to affirm the Commissioners' report.

**BACKGROUND**

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Petitioner Vivian Matthews appeals from the trial court's order confirming the Commissioners' report in a partition action. Petitioner and her siblings, Respondents Linda M. Herring and William Matthews, owned 88 acres of land in Johnston County as tenants in common. These 88 acres consisted of a 2.90-acre parcel located on NC 50 Highway in the Town of Benson city limits, a 5.67-acre parcel located on NC 50 Highway adjacent to the Town of Benson city limits, and a 79.85-acre parcel located approximately one mile north of the Town of Benson city limits.

On 19 November 2019, Petitioner sought an actual partition of the three parcels of land pursuant to N.C.G.S. Chapter 46. On 18 December 2019, Respondents joined in Petitioner's prayer for relief. Pursuant to N.C.G.S. § 46-7, the Clerk of the Johnston County Superior Court appointed three Commissioners to partition the land: Royce Lambert, a surveyor; Marc Jones, an appraiser with many years of experience; and Rose Hammond, a real estate broker with 34 years of experience. The trial court ordered the Commissioners to "allot 2/3 of the lands to [Respondents] as tenants in common, and 1/3 of the lands to [] Petitioner[.]"

The *Preliminary Report of Commissioners*, filed on 22 April 2020, stated, in relevant part:

Research was made concerning land transactions that have occurred in recent time in the area of the properties. It was noted that there are several land transactions adjacent to, and nearby, the two smaller parcels. These were transactions of 'raw' lands that were purchased for future residential subdivision development. The transactions

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indicated that a value of \$15,300[.00] per acre reasonably represents the 2.9-acre and the 5.67-acre parcels. Transactions of 'raw' lands in the area of the 79.85-acre parcel indicated that a value of \$13,100[.00] per acre reasonably represents the 79.85-acre tract. This indicates values of \$44,370[.00] for 2.9-acres, \$86,751[.00] for 5.67-acres and \$1,046,035[.00] for 79.85-acres.

The process has resulted in the following recommendations by the Commissioners:

To the Petitioner, the 2.90-acre tract on NC 50, value consideration is \$44,370[.00] and a 26.566-acre portion, value consideration of \$348,015[.00], of the 79.85-acres, including the [approximately] 4.2-acres on the east side of NC 50 and [approximately] 22.3.66-acres on the northern side of the western portion of the land . . . . Total value consideration is \$392,385[.00].

To the Respondents, the 5.67-acre tract on NC 50, value consideration of \$86,751[.00] and a 53.284-acre portion, value consideration of \$698,020[.00] acres, of the 79.85-acre parcel and being the remaining portion of the western side of NC 50. Total value consideration is \$784,771[.00].

The Report of the Commissioners also noted:

We also were of the understanding, following the meeting with the parties involved, the parties have differing desires in the division of the property. The [P]etitioner indicated a desire to have their one-third share be part of the 79.85-acre tract, and to include the portion of the total tract, [approximately] 4.0 acres, that is located on the eastern side of [the] NC 50 Highway. It was also stated that a value of the parcels was desired. Per comments by the attorney for [ ] Respondents, their desire is to have their ownership as a combined two-thirds, and that the intent was not to sell the lands. We kept these items in mind as the division of the land was contemplated.

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On 30 April 2020, Petitioner filed her exceptions to the Commissioners' report, alleging in relevant part:

1. There is a potential encroachment on the northern corner of the 79.85 parcel, which was not evaluated or assessed by the Commissioners. If the potential encroachment does exist, the same could devalue land that was partitioned to Petitioner . . . .
2. [N.C.G.S. § 46-10] requires that for an actual partition, land shares should be partitioned based upon value, rather than acreage. Here, the per acre values assigned to each parcel were not based upon an appraisal, and do not account for the varying types of land present in this action – including cropland, residential, woodland/timberland, and/or flood areas.

On 27 January 2021, the Clerk of the Superior Court ordered the Commissioners to “supplement their report by evaluating and assessing the impact of the potential encroachment on the northern corner of the 79.85-acre parcel” in response to Petitioner’s Exceptions. The Clerk further ordered the Commissioners to “[state] in more detail the effect of the value of the woodland and the blue line stream on the parcels as apportioned under the current Report of Commissioners.”

The Commissioners filed their response on 14 April 2021. Pursuant to the order, the Commissioners reported that they conducted “limited research and ha[d] conversed concerning the Exceptions raised by [] Petitioner.” As to the encroachment, the Commissioners stated that the “specific impact is not able to be determined until

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a formal survey of the subject property is performed, and thus no impact is able to be determined at this time.” Further, the Commissioners noted

that the wooded [area] of the lands allocated to [] Petitioner is impacted by a USGS defined blue line stream. This is located in the wooded area and from an agricultural viewpoint, has limited to no impact. Potential future use, such as residential development, may or may not be affected and this cannot be determined without evaluation of the site by a licensed soils scientist.

The Commissioners also noted that they considered the superior lands allocated to Petitioner located on the eastern side of NC 50 Highway as an “offset to the wooded area and blue line stream.”

On 26 August 2021, the Clerk confirmed the Commissioners’ report. The next day, on 27 August 2021, Petitioner appealed the confirmation to the Johnston County Superior Court. Following a bench trial, the trial court affirmed the Clerk’s confirmation of the Commissioners’ report, finding that the partition was fair and equitable. Petitioner timely appealed.

**ANALYSIS**

We review a trial court’s order confirming a partition to determine “whether there was competent evidence to support the trial court’s findings of fact and whether its conclusions of law were proper in light of such facts.” *Tarr v. Zalaznik*, 264 N.C. App. 597, 600 (2019). “Competent evidence is evidence ‘that a reasonable mind might accept as adequate to support the finding.’” *Ward v. Ward*, 252 N.C. App. 253, 256,

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*disc. rev. denied*, 369 N.C. 753 (2017) (quoting *Forehand v. Forehand*, 238 N.C. App. 270, 273 (2014)). “Upon determining that there is competent evidence to support the trial court’s findings, this Court is bound by the trial court’s findings of fact, even if there is evidence in the record that would sustain findings to the contrary.” *Id.* “A trial court’s conclusions of law, however, are reviewable *de novo*.” *Lyons-Hart v. Hart*, 205 N.C. App. 232, 235 (2010).

Petitioner argues that (A) the trial court’s findings of fact 10, 20, 26, and 28 are not supported by competent evidence and finding of fact 17 is “problematic” and (B) the trial court erred by concluding that the partition of the land would not result in a substantial injury to Petitioner.

The challenged findings of fact read as follows:

10. The [trial] court heard the testimony of the Commissioners and finds that their explanations for the foregoing conclusions and assessments are reasonable and supported by facts which they were able to articulate; and the [trial] court finds that the greater weight of all of the evidence supports those conclusions and . . . concurs.

. . . .

17. Ms. Matthews, the Petitioner, testified that she had looked on the County GIS and the projected soil types for the 79 acres on the west side of Hwy 50. She expressed concern that the land impacted by the swell, a blue line stream when not dry, was not going to perk as well as the higher land and was wooded. She also felt there would be wetlands in the area of the stream though the area is now dry. She remembered water in the stream last winter. While the [trial] court is sympathetic with her concerns, [it]

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finds that her concerns are speculative at best and not supported by any credible facts or circumstances that would show that the division of the property as proposed by the [C]ommissioners is unequal or inequitable. No substantial or credible evidence shows that any further soil testing or further appraisals would show that her allotted portions of the entire estate is undervalued or unequally valued, whether the values arise from its appraisal as farmland or as development properties. The [trial c]ourt asked her if she had an opinion as to whether the line drawn by the Commissioners was fair and whether she would draw the division line in the 79 acres west of Hwy 50 differently from the Commissioners to reach a fair division. She responded that she did not have an opinion as to the line but added that she would like a consideration of soil types and an equal division of crop land. There is no credible evidence before the [trial] court that soil types would affect the overall value of any tract in a reliable and measurable way if marketed to a developer. While witnesses and the parties may speculate about the effect of soil types, those speculations do not rise to credible evidence to support the Petitioner's contentions.

....

20. Commissioner Marc Jones, the appraiser, testified, and all of the evidence shows by its greater weight, that the 4.2-acre portion of the farm on the east side of highway is a superior and more desirable parcel, and the Commissioners allocated all of that 4.2 acres to the Petitioner as she requested it. That did affect the division as the Commisioners had to take into account that the Petitioner received the superior land, the 4.2 acres of the farm, and that the total farm needed to be divided 2/3rds to her siblings and 1/3 to the Petitioner. However, whether a buyer would see the swell at the north of the 79.85 acres on the west side as a benefit or disadvantage, the Petitioner's receipt of the prime 4.2-acre tract fully compensates her on a value basis.

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....

26. [Commissioner Jones's] testimony shows that the Commissioners thought the possible small encroachment of a swimming pool at the low, back northwestern corner of the parcel allocated Petitioner on the west side of Hwy 50 to be insignificant in its effect on the value of the tract. The small square footage of the pool and [its] [curtilage] did not impact a 79.85-acre farm division. In fact, it would likely be of higher value than the per acre value as the adjoining owner would likely want to buy the encroaching area, if there is any, and maybe purchase some buffer. Therefore, it did not significantly affect the division.

....

28. The [trial c]ourt finds the testimony of the Commissioners to be detailed, point on, highly credible, and persuasive in this *de novo* consideration . . . . The [trial c]ourt further notes that the expert witness of the Petitioner, an MIA appraiser, did not find any fault with the Commissioner[s'] division being fair and equitable to the parties. The [trial c]ourt further notes that though the Petitioner expressed concerns, she had no expert to verify the concerns, and in her testimony, she could not say how the division, or specifically the division line in the 79.85-acre farm, should be changed to be more equitable. Neither the Petitioner nor her expert witness proffered any substantial evidence that any alternative division than that recommended by the Commissioners would distribute to her a more equal division of the entire jointly held property than the one she is receiving. She has shown no likelihood that any further studies, surveys, appraisals, or referrals would yield any information that would affect the fairness of the recommended partition, and no substantial evidence suggests that a different result is likely by pursuing them.

**A. Competent Evidence**

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“Whether a partition in kind is ‘fair and equitable’ is a ‘question of fact to be determined by the [j]udge of the [s]uperior [c]ourt upon an appeal from a judgment of the clerk affirming the report of commissioners.” *Robertson v. Robertson*, 126 N.C. App. 298, 303 (alterations in original), *disc. rev. denied*, 347 N.C. 138 (1997) (quoting *West v. West*, 257 N.C. 760, 762 (1962)). “Our review of this issue is limited to an assessment of whether the trial court’s findings of fact are supported by competent evidence and whether those findings support the court’s conclusions of law and ensuing judgment.” *Ward*, 252 N.C. App. at 262.

Petitioner contends that the trial court’s “fair and equitable determination is an *ultimate* finding of fact” based on our language in *Robertson*. *Robertson*, 126 N.C. App. at 304 (emphasis added) (“Furthermore, the evidence in this record supports the *ultimate finding* entered by the trial court that the partition was fair and equitable.”). “[A]n ultimate finding is a finding supported by other evidentiary facts reached by natural reasoning.” *In re G.C.*, 384 N.C. 62, 65 n.3, 67 (2023). “A trial court’s finding of an ultimate fact is conclusive on appeal if the evidentiary facts reasonably support the trial court’s ultimate finding.” *State v. Fuller*, 376 N.C. 862, 864 (2021). Thus, the trial court’s evidentiary findings of fact must reasonably support the trial court’s ultimate finding of fact that the partition in kind was fair and equitable.

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At the time Petitioner's action was filed, a partition action proceeded with the trial court appointing Commissioners to divide the property among tenants in common according to N.C.G.S. § 46-10, which stated, in relevant part:

[Commissioners] must meet on the premises and partition the same among the tenants in common, or joint tenants, according to their respective rights and interests therein, by dividing the land into equal shares in point of value as nearly as possible, and for this purpose they are empowered to subdivide the more valuable tracts as they may deem best, and to charge the more valuable dividends with such sums of money as they may think necessary, to be paid to the dividends of inferior value, in order to make an equitable partition.

N.C.G.S. § 46-10 (2019) (recodified as amended as N.C.G.S. § 46A-50(a), eff. 1 Oct. 2020; 2020 Sess. Law 23, §§ 2(m), 18).

Petitioner first contends that the trial court's finding of fact 28 is unsupported by competent evidence because her expert witness "did not testify he did not find any fault with the Commissioners' division being fair and equitable[]" but, rather, that "he was 'not sure' he would divide the property any differently and that he 'can't say' the division was unfair *because he did not have enough information.*" Petitioner also argues that she "did not merely say she could not say the division was not equitable[]" but that "she could not say so unless 'the proper tools were involved with it to make a determination of a fair and equitable division.'"

Petitioner's expert witness, the MIA appraiser, testified that partitioning the large tract of land would "diminish the value of it" and that it "would be more difficult

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to split into pieces due to the configuration of the soils on the site.” Although he testified that he did not think “the separated parcels individually will total out what the total parcel price would sell as a whole[,]” he responded to the trial court’s request for clarification that he was “not saying that[]” the current partition is unfair.

Plaintiff’s expert witness also testified that, until a wetlands study is done, it is indeterminable whether there are problems with the ponds, blue-line stream, and wetland on the parcel. However, when the trial court asked whether he “would . . . draw the division line from the larger tract any different from the way that the [C]ommissioners drew it[,]” he responded, “I’m not sure that I would.” This line of testimony provides competent evidence to support the trial court’s finding that “the expert witness of the Petitioner, an MIA appraiser, did not find any fault with the Commissioner[s]’ division being fair and equitable to the parties.”

Similarly, when Petitioner was asked whether she had her own opinion as to where the line should be shifted, she responded:

Not where the line is. I would like to know that I had the full amount of cropland, which would be about 13 acres for each of us. And if that were done, that would exclude this wetland altogether, and we would still have 13 acres of cropland on that side of the highway, apiece. And that, if it were divided equally, I think that would be a fair way of looking at it.

Petitioner testified extensively as to the soil types throughout the parcel and as to her opinion that, according to these soil types, she was allotted less farmland than

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Respondents. However, the record does not show that Petitioner hired a soil scientist or other expert who could verify the availability of cropland on her allotted parcel. In fact, Petitioner testified that she “learned to use” the GIS system of Johnston County and the tools for soil classification and measured the soil herself. The trial court as factfinder weighed the credibility of Petitioner’s evidence and found that “[n]either the Petitioner nor her expert witness proffered any *substantial* evidence that any alternative division than that recommended by Commissioners would distribute to her a more equal division of the entire jointly held property than the one she is receiving” based on competent evidence.

Next, Petitioner argues that the trial court’s finding of fact 20 is unsupported by competent evidence. Commissioner Jones testified that the 4.2-acre tract allotted to Petitioner was the “prime piece” of the tract and “offset the detriment of the blue-line stream.” However, Petitioner argues that, “because the [C]ommissioners did not calculate the impact of the detriment, the ‘value basis’ of [Petitioner’s] share cannot be determined. Indeed, the [C]ommissioners admitted they could not do that calculation without . . . a ‘wetlands engineer.’” Nevertheless, Commissioner Jones’s testimony provided competent evidence upon which the trial court could, in its discretion as the factfinder, base this finding of fact:

The acreage on the eastern side of the road is a prime piece of this tract. If you took that out of the equation, I agree with the idea that the part allocated to [Petitioner] would not be equal, or roughly a third and the other be two-thirds.

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That piece of land is considered by myself and -- in our conversations as being superior. So when you take those combined, in discussing that, we felt that the value of the superior 4.19 . . . combined with the western side, those items were offsetting to one another.

Accordingly, finding of fact 20 is also supported by competent evidence.

Although Petitioner does not explicitly challenge finding of fact 17, she contends that it is “problematic” because “the trial court found that no ‘further appraisals’ would show [Petitioner’s] allotted portions were undervalued and unequally valued[]” because “[t]he [C]ommissioners’ report flatly states *no appraisals* were done!” However, this argument omits important context from the trial court’s finding:

While the [trial] court is sympathetic with [Petitioner’s] concerns, [it] finds that her concerns are speculative at best and not supported by any credible facts or circumstances that would show that the division of the property as proposed by the [C]ommissioners is unequal or inequitable. No substantial or credible evidence shows that any further soil testing or further appraisals would show that her allotted portions of the entire estate is undervalued or unequally valued[.]

The trial court did not find that no further appraisals would demonstrate that the property was unequally or inequitably divided, but that Petitioner failed to provide any “*substantial or credible evidence . . . that any further soil testing or further appraisals would show that her allotted portions of the entire estate is undervalued or unequally valued[.]*” As discussed above, Petitioner testified that she performed

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her own soil analyses on the parcel and that she did not have an alternative recommendation as to where the dividing line should be placed. Thus, the trial court's finding that Petitioner failed to provide substantial or credible evidence that any further tests or appraisals would reveal unequal value and that Petitioner provided only her own speculations and concerns as to value is supported by competent evidence.

Petitioner also contends that the trial court's finding of fact 26 is unsupported "by *any* competent evidence" "because [Commissioner] Jones did not testify about the encroachment at all." Although Commissioner Jones did not testify as to the encroachment at the hearing, the Commissioners had been ordered by the Clerk "to supplement their report by evaluating and assessing the potential impact of the potential encroachment on the northern corner of the 79.85-acre parcel" and supplemented as follows:

Potential Encroachment

Per aerial photography, which often is reasonable, but not precise in terms of property lines, there may be an encroachment by a swimming pool associated with a residential use. The specific impact is not able to be determined until formal survey of the subject property is performed, and thus no impact is able to be determined at this time.

If there is encroachment, this is most likely minimal in terms of land mass involved, and would be considered minor in terms of impact on the remainder, and would be

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an issue that would be resolved between the two property owners.

Moreover, the trial court was able to observe the aerial photo of the “possible encroachment.” Based on its own observation of the placement of the swimming pool and the Commissioners’ supplemental response, the trial court’s finding of fact 26 is supported by competent evidence.

In her final challenge to the trial court’s findings of fact, Petitioner contends:

In their supplemental report, the [C]ommissioners acknowledged it was “reasonable” to think “there may be an encroachment by a swimming pool associated with residential use.” In other words, the [C]ommissioners thought it was likely a neighbor built their swimming pool on the land allotted to [Petitioner]. But the impact of that encroachment on the value of [Petitioner’s] allotment, the [C]ommissioners stated, “is *not able to be determined* until formal survey of the subject property is performed, and thus no impact is able to be determined at this time.”

Respondents’ own evidence included a picture showing the encroachment as well as a GIS image the Respondents indexed as “GIS of owner [] whose land encroaches a bit.” No evidence contradicted Respondents’ representations. Accordingly, the undisputed evidence was that the neighbor’s pool was built on [Petitioner’s] portion of the property.

Finding of Fact 10—concurring in the [C]ommissioners’ conclusions set forth in Finding of Fact 9[, which finds that the Commissioners filed the supplemental response discussed above and quotes the supplement,]—is thus not supported. On the evidence before it, the trial court should have found there is an encroachment, not “there may be an encroachment.” At a minimum, the trial court should have definitively resolved the material issue. *See, e.g.,*

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*Rosenthal's Bootery, Inc. v. Shavitz*, 48 N.C. App. 170 [] (1980) (remanding “to find the fact[s] specially from the record evidence as to all material issues raised by the evidence”).

In response, Respondents argue that the Commissioners found in their supplemental report “with far more knowledge and experience than a layman[]” that the swimming pool has not been definitively shown to encroach on Petitioner’s land, and that any encroachment, if it does exist, would be not be prejudicial to Petitioner “namely [because] the effect would be ‘minor’ and ‘minimal.’” In support of this argument, Respondents point to testimony establishing that each Commissioner had many years of relevant experience and took an exhaustive approach to assessing how the land could be divided equally while taking Petitioner’s requests into consideration. Based on the text of the supplemental report and the Commissioners’ experience, the trial court’s finding that the Commissioners had reasonable and articulable explanations for their facts and conclusions reached in the supplemental report is supported by competent evidence.

“An issue is material if, as alleged, facts would constitute a legal defense, or would affect the result of the action or if its resolution would prevent the party against whom it is resolved from prevailing in the action.” *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 654 (1980) (marks and citation omitted). While the trial court may not have definitively found that there was no encroachment, it did definitively find—based on competent evidence—that any encroachment would be minimal, minor, and

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likely resolved by the property owners. The issue of material fact is not whether there is any encroachment, but whether there is an encroachment which impacts the valuation of the parcel in a way that makes the division unfair or inequitable. The trial court properly found that there was not.

The trial court found “[a]s to the ultimate fact at issue . . . that the division made by the Commissioners was fair and equitable.” The trial court’s evidentiary findings of fact—including the challenged findings, all of which we found to be supported by competent evidence—reasonably support this ultimate finding, and this ultimate finding is conclusive on appeal. *Fuller*, 376 N.C. at 864.

### **B. Substantial Injury**

A fair and equitable partition must not result in substantial injury to any party. *See Robertson*, 126 N.C. App. at 300. An actual partition of land works a substantial injury toward a party if the resulting division leaves one cotenant with a share holding a “market value materially less than the value of the share the cotenant would receive were the property partitioned by sale and a cotenant’s rights would be materially impaired.” *Lyons-Hart*, 205 N.C. App. at 237 (quoting *Partin v. Dalton Property Assoc.*, 112 N.C. App. 807, 811 (1993)). Whether a partition may be made without causing substantial injury to any party is a conclusion of law, reviewed de novo. *Sheffer v. Rardin*, 208 N.C. App. 620, 625 (2010).

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The trial court concluded that “[t]he Report of the Commissioners as supplemented should be confirmed as fair and equitable to the parties.” As we upheld the trial court’s finding of fact 1, this conclusion is supported by the trial court’s findings of fact.

**CONCLUSION**

The trial court did not err by finding the partition to be fair and equitable, nor did it err as a matter of law in confirming the Commissioners’ report.

AFFIRMED.

Judges HAMPSON and WOOD concur.

Report per Rule 30(e).