STATE OF MICHIGAN

COURT OF APPEALS

In re JOSEPH STEPHEN JONES, Deceased.

ARDYS DOUGHERTY,

Petitioner-Appellant/Cross-Appellee,

v

DANIEL ZAIL JONES and PATTI J. JONES,

Respondents-Appellees/Cross-Appellants.

UNPUBLISHED
May17, 2007

No. 264956
Manistee Circuit Court
LC No. 03-000056-DA

Before: Schuette, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Petitioner Ardys Dougherty (Ardys) appeals as of right and respondents, Daniel Zail Jones (Daniel) and his wife Patti J. Jones, cross appeal from the probate court's judgment,[1] following a bench trial, dividing real property and allocating the debt of the decedent, Joseph Stephen Jones. We affirm.

I. Factual Background

In March 2003, Joseph Stephen Jones died testate, leaving five children. Under the decedent's will, his most significant asset, 160 acres of real property, was devised to two of his children, Ardys and Daniel, as tenants in common. In April 2003, Ardys commenced an informal probate proceeding as the personal representative of the decedent's estate. Notice was published in a local newspaper on April 16, 2003, that all claims by creditors will be forever barred unless presented within four months. In May 2003, the probate court ordered supervised administration of the decedent's estate. Ardys continued as the personal representative of the estate, but was replaced by Mark Otto in August 2003.

[1] Because this appeal does not involve any matter pertaining to Patti J. Jones, we shall refer only to "Daniel" rather than both parties jointly for purposes of our opinion.

Daniel filed claims against the decedent's estate both before and after Otto's appointment. In a claim filed on July 3, 2003, Daniel requested $17,000 for 21 head of cattle. In a second claim filed on August 22, 2003, Daniel sought $2,000 for a breeding bull. After Otto provided written notice that he was denying the July 3, 2003, claim, Daniel filed a complaint challenging Otto's decision. Daniel later moved to sell the real property, while Ardys moved to partition the property. Following a bench trial at which both Ardys and Daniel sought to have the real property partitioned, the probate court ordered partition, awarding Daniel the northern 80 acres and Ardys the southern 80 acres of the property. The probate court also allocated responsibility for the outstanding balance of a mortgage loan on the property between Ardys and Daniel, allocated estate expenses between Ardys and Daniel, and awarded $11,000 to Daniel for his cattle claim, relying on the approximate amount of cattle sold to two buyers as the basis for the award. All other claims pertaining to cattle were dismissed.

II. Partition of Real Property

On appeal, both Ardys and Daniel challenge the probate court's valuation of the real property that was partitioned between them. Ardys argues that the probate court erred by considering the value of topsoil and timber in the valuation, while Daniel argues that the probate court erred in determining that the two halves awarded to each party were relatively equal in value.

Under the Michigan Estate and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*,[2] a probate court has concurrent legal and equitable jurisdiction to authorize the partition of real property. MCL 700.1303(1)(c). In a partition action, a court must determine the value of the use of the premises, MCR 3.401(A), but the action itself is equitable in nature. See *Albro v Allen*, 434 Mich 271, 284; 454 NW2d 85 (1990), and MCL 600.3301. In general, this Court reviews dispositional rulings on equitable matters de novo, *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005), but we will not reverse unless the trial court's factual findings were clearly erroneous or "we conclude that we would have reached a different result had we occupied the lower court's position." *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 582; 458 NW2d 659 (1990). When reviewing the probate court's factual findings for clear error, we give deference to the probate court's superior opportunity to judge the credibility of witnesses appearing before it. MCR 2.613(C); *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993). Conclusions of law are reviewed de novo. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

We reject Ardys's claim that the probate court erred by considering the value of timber and topsoil on the land to find that each of the parcels of real property were of approximately equal value. Whether the parties actually intended to remove timber and topsoil is not material because the highest and best use method, which underlies the probate court's valuation, "recognizes that the use to which a prospective buyer would put the property influences the price that the buyer would be willing to pay." *Dep't of Transportation v Haggerty Corridor Partners*

[2] The EPIC was effective April 1, 2000, before the decedent's death. MCL 700.8101; *In re Smith Estate*, 252 Mich App 120, 126-127; 651 NW2d 153 (2002).

Ltd Partnership, 473 Mich 124, 127 n 3; 700 NW2d 380 (20055) (Young, J.), quoting *Edward Rose Bldg Co v Independence Twp*, 436 Mich 620, 633; 462 NW2d 325 (1990). The highest and best use of property is the most profitable and advantageous use that an owner may make of the property, even if the property is vacant or presently used for a different purpose, so long as there is market demand for the use. *Detroit/Wayne Co Stadium Auth v Drinkwater, Taylor & Merrill, Inc*, 267 Mich App 625, 633-634; 705 NW2d 549 (2005).

Here, expert testimony indicated that a market demand existed for the timber and topsoil on the land, but that the value of the timber and topsoil in the southern half was substantially greater than the value in the northern half. According to the expert appraisal witness, Matt Kieffer, topsoil and timber could be removed from the land, with some limitations, without affecting the value of the real property for development. Kieffer valued the northern half at $450,000 and the southern half at $330,000, without considering the value of the timber or topsoil to a prospective buyer. Because it could reasonably be inferred from the evidence that the removal of timber and topsoil would be a harmonious, and not a mutually exclusive, use of the real property for development purposes, Ardys has not demonstrated that the probate court was acting under an incorrect view of the law when determining a value for each half of the real property, as a whole. See *In re Condemnation of Lands in Battle Creek for Park Purposes*, 341 Mich 412, 422; 67 NW2d 49 (1954) (mutuality exclusive uses cannot be combined, but fixtures, improvements, and mineral deposits can generally be valued together with the land as a whole).

We also reject Daniel's claim that the probate court erred by not simply adding the value of the timber and the topsoil indicated in Robert Talsma's and Carl Lacki's expert testimony to Kieffer's appraisal of each half of the real property. The probate court, as the trier of fact, was free to accept or reject the expert testimony, in whole or in part. The court could reasonably infer from the evidence that the market value of each half of the property, as a whole, was equal. It was not necessary to a proper resolution of the partition dispute that the probate court state a specific monetary value for each half of the property. Because the court's finding that the value of each half of the property was equal is within the range of evidence presented at trial, we cannot conclude that the probate court clearly erred in its value determination. See *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176-177; 530 NW2d 772 (1995); *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994).

We decline to consider Ardys's claim that the probate court erred in denying her request for an access easement across the northern half of the real property awarded to Daniel because Ardys has not cited the factual support for her argument, see MCR 7.212(C)(7) ("[f]acts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court"); *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004), and also fails to cite legal authority for her claim that an access easement should have ordered, *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003) ("[a]rgument must be supported by citation to appropriate authority or policy").

III. Debt Allocation

We also conclude that Ardys has insufficiently briefed her claims regarding the probate court's allocation of the outstanding balance of the mortgage loan on the real property as between herself and Daniel. Ardys has neither cited the factual support nor legal authority for

her claim that she was entitled to a credit for monthly payments made to the decedent during his lifetime. *Derderian, supra* at 388; *Peterson Novelties, Inc, supra* at 14. Further, Daniel's claim on cross appeal that the probate court should have allocated one third of the outstanding loan balance to Ardys is not properly before us because it lacks citation to the factual support for his claim. *Derderian, supra* at 388.

In passing, we note that Daniel's reliance on *W T Rawleigh Co v Bowen*, 308 Mich 122; 13 NW2d 230 (1944), is misplaced because the instant case does not involve an action by the bank to collect on a promissory note. Further, *Kroll v Crest Plastics, Inc*, 142 Mich App 284; 369 NW2d 487 (1985), provides no authoritative holding regarding how liability is allocated between co-obligors of a promissory note. In any event, as indicated in Ardys's brief on cross appeal, the doctrine of equitable contribution can be applied to determine the burden of each co-obligor of the debt. See *Comstock v Potter*, 191 Mich 629; 158 NW 102 (1916); 18 Am Jur 2d, Contribution, § 1. "Since the right to contribution is inherently equitable in nature, it logically follows that where the co-obligors have received unequal benefits from the common obligation, the portion of the contribution that each must bear is according to the benefit that each has received." 18 Am Jur 2d, Contribution, § 22. An agreement may qualify or control the right of contribution, but is not necessary for the right to exist. 18 Am Jur 2d, Contribution, § 7.

Therefore, the existence of an agreement, of lack thereof, between the co-obligors of the original promissory note secured by the mortgage on the decedent's real property is relevant in determining how to allocate the outstanding loan balance that, according to the evidence at trial, was then owed to the bank under terms of a new promissory note that was executed during Otto's administration of the decedent's estate. We conclude, however, that neither party has demonstrated any basis for disturbing the probate court's finding that Ardys's responsibility for the outstanding loan balance was the approximate amount of $28,000 attributable to the credit card debt paid out of the original loan proceeds in 2000.

IV. Estate Expense Allocation

Next, we decline to consider Ardys's challenge to the probate court's decision to divide expected estate expenses equally between herself and decedent. Again, Ardys has insufficiently briefed the factual support and legal authority for her claim to properly present this issue for appellate consideration. *Derderian, supra* at 388; *Peterson Novelties, Inc, supra* at 14.

V. Daniel's Cattle Claims

Finally, both parties challenge the probate court's resolution of Daniel's claims involving cattle. Ardys argues that the probate court erred in concluding that Daniel owned the cattle, while Daniel argues on cross appeal that the probate court merely forgot to award him damages for the value of a slaughtered breeding bull.

Again, we conclude that Ardys has insufficiently brief this claim for appellate consideration. *Derderian, supra* at 388; *Peterson Novelties, Inc, supra* at 14. Further, to the extent that Ardys challenges the probate court's resolution of credibility issues at trial, we defer to the probate court on such matters. MCR 2.613(C); *In re Erickson Estate, supra* at 331.

Daniel's argument regarding the slaughtered breeding bull is not properly before us because it is not included in the statement of the question presented, which is whether the probate court undervalued the sold cattle, not whether damages should have been awarded for the slaughtered breeding bull. This Court need not consider an issue that is not included in the statement of the questions presented. MCR 7.212(C)(5); *Busch v Holmes,* 256 Mich App 4, 12; 662 NW2d 64 (2003). We note, however, that the record does not support Daniel's argument that the probate court forgot any cattle claim. Although the record indicates that Daniel filed cattle claims against the decedent's estate on July 3 and August 22, 2003, the complaint filed by Daniel before trial pertained only to the July 3, 2003, claim for the 21 head of cattle that, according to the trial evidence, were sold. After awarding $11,000 to Daniel for the cattle, based on the approximate amount of the sales to the two buyers, the probate court ruled, "[a]nything else pertaining to the cattle is dismissed." Because Daniel has insufficiently briefed his argument that the probate court was obligated to award him damages for the slaughtered breeding bull, with citation to the factual support and legal authority for his argument, we decline to consider this issue further. *Derderian*, *supra* at 388; *Peterson Novelties, Inc*, *supra* at 14.

Affirmed.

/s/ Bill Schuette
/s/ Peter D. O'Connell
/s/ Alton T. Davis