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In re Estate of Ronald E. McKillip, deceased. Cinthia S. Shields, appellee, v. Sandra K. McConville, appellant, and Laura Klaus, appellee.

820 N.W.2d 868

Filed September 21, 2012. No. S-11-822.

1. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court.
2. **Partition: Equity: Appeal and Error.** A partition action is an action in equity and is reviewable by an appellate court de novo on the record.
3. **Decedents' Estates: Appeal and Error.** Equity questions arising in appeals involving the Nebraska Probate Code are reviewed de novo.
4. **Jurisdiction: Appeal and Error.** It is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
5. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.
6. **Decedents' Estates.** A proceeding under the Nebraska Probate Code is a special proceeding.
7. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.
8. **Final Orders: Words and Phrases.** A substantial right under Neb. Rev. Stat. § 25-1902 (Reissue 2008) is an essential legal right.
9. **Final Orders: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken.
10. **Final Orders.** Substantial rights under Neb. Rev. Stat. § 25-1902 (Reissue 2008) include those legal rights that a party is entitled to enforce or defend.
11. **Final Orders: Appeal and Error.** A substantial right is not affected when that right can be effectively vindicated in an appeal from the final judgment.
12. **Partition.** Under Nebraska's partition statutes, the partition of the subject property may take one of two forms: (1) partition in kind, where the property is physically divided, or (2) partition by sale, where the property is sold and the sale proceeds are divided.
13. ____. As between a partition in kind or sale of land for division, the courts will favor a partition in kind, since this does not disturb the existing form of inheritance or compel a person to sell his property against his will, which, it has been said, should not be done except in cases of imperious necessity.

14. **Partition: Presumptions: Proof.** It is generally held that until the contrary is made to appear, the presumption prevails that partition in kind is feasible and should be made, and that the burden is on those who seek a sale of the property in lieu of partition in kind to show the existence of a statutory ground for such sale.
15. **Partition.** A sale in partition cannot be decreed merely to advance the interests of one of the owners, but before ordering a sale, the court must judicially ascertain that the interests of all will be promoted.
16. ____. The generally accepted test of whether a partition in kind would result in great prejudice to the owners is whether the value of the share of each in case of a partition would be materially less than the share of the money equivalent that could probably be obtained for the whole.
17. **Jurisdiction: Appeal and Error.** Once an appellate court acquires equity jurisdiction, it can adjudicate all matters properly presented and grant complete relief to the parties.
18. **Decedents' Estates: Executors and Administrators: Appeal and Error.** An executor is not required to give bond when the executor appeals in a representative capacity, but if he or she appeals to protect his or her individual interest, a bond is required, the same as any litigant.

Appeal from the County Court for Red Willow County: ANNE PAINE, Judge. Reversed in part, and in part vacated and remanded for further proceedings.

Terrance O. Waite, David P. Broderick, and Patrick M. Heng, of Waite, McWha & Heng, and J. Bryant Brooks, of Mousel, Brooks, Garner & Schneider, P.C., L.L.C., for appellant.

G. Peter Burger, of Burger & Bennett, P.C., for appellee Cinthia S. Shields.

HEAVICAN, C.J., WRIGHT, CONNOLLY, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

WRIGHT, J.

NATURE OF CASE

This is an action for partition of the real property in the estate of Ronald E. McKillip. At the time of his death, McKillip owned four tracts of land in Red Willow County, Nebraska. His will left the property in his estate to his three daughters, "share and share alike." The probate court confirmed ownership of the real estate to the daughters in equal shares.

One daughter brought an action to partition the real estate, and the county court appointed a referee. The referee determined

that a partition in kind of the real estate was not possible and recommended a public sale. Although the personal representative objected to the report of the referee, the court approved the report and concluded that the real estate could not be partitioned in kind "without great prejudice to the owners." The court ordered the referee to sell the real estate, and the personal representative timely appealed.

SCOPE OF REVIEW

[1] The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court. *State v. State Code Agencies Teachers Assn.*, 280 Neb. 459, 788 N.W.2d 238 (2010).

[2] A partition action is an action in equity and is reviewable by an appellate court de novo on the record. *Channer v. Cumming*, 270 Neb. 231, 699 N.W.2d 831 (2005).

[3] Equity questions arising in appeals involving the Nebraska Probate Code are reviewed de novo. *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 794 N.W.2d 700 (2011).

FACTS

At the time of his death, McKillip was survived by three daughters: Sandra K. McConville, Cinthia S. Shields, and Laura Klaus. McKillip's will left his estate to his daughters "share and share alike." The estate included four tracts of real estate valued at $565,000 in the amended inventory, as well as cash and certificates of deposit in excess of $720,380. McConville was named personal representative of the estate.

Tract 1 is a 5-acre rural residential property with a house on it. The property is close to McCook, Nebraska, and shares a water well with tract 2. Tract 1 was valued at $190,000 by the court. The amended inventory valued the property at $196,000, as adjusted for roof repairs.

Tract 2 consists of pastureland (62.74 acres) and cropland (19.49 acres). It was valued at $102,000. Tract 2 could be developed as a subdivision or rural lots. Tracts 1 and 2 are adjoining, and a well on tract 1 is used to water livestock on tract 2.

Tract 3 is about 6 miles from the Kansas state line. It contains mostly cropland, but also some marginal pastureland. Water for livestock is available from a neighboring property. Tract 3, which consists of approximately 161 acres, was valued at $124,000.

Tract 4 is 2 miles north of the Kansas state line and a few miles southwest of tract 3. Tract 4, which totals approximately 240 acres, consists of dryland fields and pastureland. A windmill and two dams provide water for livestock. It was valued at $143,000.

On October 14, 2010, Shields filed in Red Willow County Court a complaint for partition of the real estate. Shields alleged that she, McConville, and Klaus were owners of the real estate but could not agree on an equitable division of the property or how to collectively manage it. McConville, as both a defendant and the personal representative of the estate, filed an answer alleging that a physical partition of the estate was possible and was in the best interests of the parties.

At a hearing, the county court confirmed ownership of the real estate in the three sisters. In a written order, the court found that Shields was entitled to partition of the real estate and it appointed a referee to make the partition and report his findings to the court. In his report, the referee noted that there was a great deal of animosity among the sisters and that no division of the real estate would result in an equitable partition for reasons including the differing land values and uses.

McConville objected to the referee's report, and a hearing was held. The referee testified that an in-kind distribution could not be equitably made. He noted that Shields had requested tracts 1 and 2, but stated that granting her request would have led to an unequal distribution of the value of the real estate. A significant factor in the referee's decision to recommend a public sale was that "[t]hese people obviously can't see eye to eye on anything."

Shields testified she wanted a "fair" distribution of the real estate. Klaus testified that she wanted her share of the property in kind and that she believed the land could be equitably

divided without a sale. She did not believe that she could successfully bid on the property if it were sold.

McConville testified she wanted the land to stay in the family. To her, the land meant more than money. McConville proposed an in-kind distribution in which tract 4 would be combined with 19.49 acres of dryland crop ground from tract 2 for a total appraised value of $181,980, which would be given to one sister. Another sister would get the rest of tract 2 combined with tract 3, for a total appraised value of $187,020. The third sister would receive tract 1, which had an appraised value of $190,000. McConville claimed this distribution would keep each share of the property within a half percent of 33⅓ percent of the total value of the land based on the appraised value. She testified that a referee's sale would put undue financial burden on the estate, costing over $25,000.

The court determined that physical partition of the real estate was not possible without great prejudice to the owners. It approved the referee's report and ordered the referee to sell the land at public sale. McConville appealed, and the court set a supersedeas bond of $50,000, which McConville posted. After the appeal was perfected, the referee filed a motion for fees and costs. The court awarded referee fees and costs of $3,691.93, payable from the assets of the estate. We moved the case to our docket under our statutory authority to regulate the dockets of the appellate courts. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

ASSIGNMENTS OF ERROR

McConville assigns, summarized and restated, that the county court erred (1) in adopting the referee's report and ordering partition by sale instead of a partition in kind and failing to consider personal assets from the estate in effectuating a partition in kind; (2) in appointing a referee to conduct the partition rather than the personal representative; (3) in requiring the personal representative to post a supersedeas bond; (4) in ordering the sisters to pay referee fees, because the fees were ordered after the appeal was filed; and (5) in excluding portions of Shields' deposition.

ANALYSIS

Final Order

[4,5] It is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties. See *In re Estate of Potthoff*, 273 Neb. 828, 733 N.W.2d 860 (2007). Generally, for an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. *State v. Riensche*, 283 Neb. 820, 812 N.W.2d 293 (2012).

Shields asserts that this appeal may be premature. Thus, we first address whether the county court's order directing the referee to sell the real estate is a final order.

In the case at bar, we are presented with the partition of real property in an estate proceeding. All the assets of the estate were left to McKillip's daughters, "share and share alike." Thus, a partition in a probate proceeding is only one phase of the administration of the estate. It is part of the distribution of the assets in the estate.

[6,7] Our case law has established that a proceeding under the Nebraska Probate Code is a special proceeding. *In re Estate of Potthoff, supra*. Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered. *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012).

We review the partition action in this case pursuant to § 25-1902(2). In *In re Estate of Rose*, 273 Neb. 490, 730 N.W.2d 391 (2007), we considered whether a determination by the probate court regarding a family allowance and the inclusion of certain property in an augmented estate was a final order. The county court had retained jurisdiction to determine the size of the augmented estate. We concluded the court's order was made during a special proceeding but that it did not

affect a substantial right. Because the size of the augmented estate had not yet been determined, we held that the rights affected in the court's order could be considered in an appeal from the final judgment establishing the augmented estate.

We reached a different result in *In re Estate of Potthoff, supra*. In that case, the fundamental issue was the computation of the probate estate. During the probate proceedings, a question arose as to whether notices to sever joint tenancies in property held by the deceased and his estranged wife were effective to sever the joint tenancies. The court found the notices were not effective and awarded the estranged wife all property held by her and the deceased in joint tenancy. The daughter appealed from the order.

In concluding that the order was final and appealable, we distinguished our holding in *In re Estate of Rose, supra*, because the order of the probate court in *In re Estate of Potthoff, supra*, resolved the separate issue whether the deceased's interest in the property was part of the probate estate. Following the court's order, there was nothing left to decide on that issue. We recognized that the rights of the parties could not be effectively considered in an appeal from the judgment in which the probate estate was finally completed. We stated that it was not uncommon for the probate of an estate to remain open for years and that if that occurred, by the time the probate estate was finally settled, the property in question may have been disposed of or its value substantially reduced.

[8-11] In the case at bar, if the order for partition affects a substantial right of the devisees, then it is a final order. A substantial right under § 25-1902 is an essential legal right. *Big John's Billiards v. State, supra*. And a substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken. *Id*. Substantial rights under § 25-1902 include those legal rights that a party is entitled to enforce or defend. *Id*. A substantial right is not affected when that right can be effectively vindicated in an appeal from the final judgment. *In re Estate of Potthoff*, 273 Neb. 828, 733 N.W.2d 860 (2007).

Deciding when an order affects a substantial right has been "a source of trouble because the substantial right requirement has never had any real content." See John P. Lenich, *What's So Special About Special Proceedings? Making Sense of Nebraska's Final Order Statute*, 80 Neb. L. Rev. 239, 284 (2001). "[I]t is much more efficient to review orders affecting the disposition of the estate's assets before those assets leave the estate." *Id*. at 292.

> In the context of multifaceted special proceedings that are designed to administer the affairs of a person, the word "case" means a discrete phase of the proceedings. An order that ends a discrete phase of the proceedings affects a substantial right because it finally resolves the issues raised in that phase.

Id. at 295.

The county court's order directing the referee to sell the property would affect the right of the devisees to receive the real estate in kind and would force them to sell their interests in the land. The distribution of the real estate is a discrete phase of the probate proceedings and would finally resolve the issues in that phase of the probate of the estate. It could be months before an appeal from the order of confirmation would be finally resolved. In the interim, distribution of the assets of the estate would have to wait until that phase of the probate was finally resolved regarding distribution of the real estate. The sale of the real estate would diminish the right of the devisees to have the real estate distributed in kind.

While it may have been possible for the parties to appeal after a sale and confirmation, judicial economy, if nothing else, requires resolution of this issue before a sale is held. To delay review of the order of sale until after the sale and its confirmation would be a waste of judicial resources and would significantly delay completion of the probate of the estate. Distribution of the real estate is a major issue in the resolution of these proceedings. The assets of the estate belong to McKillip's three daughters. Distribution of the real estate is the major source of contention among them. Resolving the distribution of the real estate will finally settle the issues raised in this phase of the probate.

Shields relies upon *Peterson v. Damoude*, 95 Neb. 469, 145 N.W. 847 (1914), to support her argument that there is no final order in this case. In *Peterson*, the partition action was not a special proceeding but was commenced under what is now codified at chapter 25 of the Nebraska Revised Statutes. The only question related to the partition itself, and there was no final order until the sale of the property had been confirmed by the court. *Peterson* was a civil partition action not involved in a probate proceeding.

In *Trowbridge v. Donner*, 152 Neb. 206, 40 N.W.2d 655 (1950), two sisters each owned a one-half interest in certain farmland as tenants in common. It was not a probate matter. One sister alleged the property must be sold because partition in kind was not possible without great prejudice to the owners. The other sister claimed the real estate could and should be partitioned in kind without great prejudice to the owners. The partition was commenced under chapter 25 of the Nebraska Revised Statutes and was not a special proceeding.

In this special (probate) proceeding, the rights of the devisees to retain the real estate in kind is a substantial right that is affected by the order to sell the property. Therefore, the order is a final, appealable order.

Partition by Sale or In Kind

We proceed to consider the merits of the personal representative's claim that the property should be divided in kind.

A partition of property within a probate action is an equitable proceeding. See *Channer v. Cumming*, 270 Neb. 231, 699 N.W.2d 831 (2005). Equity questions arising in appeals involving the Nebraska Probate Code are reviewed de novo. *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 794 N.W.2d 700 (2011). Accordingly, this court conducts a de novo review of the county court's decision to partition the property by sale.

Neb. Rev. Stat. § 30-24,109 (Reissue 2008) provides:

> When two or more . . . devisees are entitled to distribution of undivided interests in any real or personal property of the estate, the personal representative or one or more of the . . . devisees may petition the court . . . to

> make partition. [T]he court shall partition the property in the same manner as provided by the law for civil actions of partition.

[12] Under Nebraska's partition statutes, the partition of the subject property may take one of two forms: (1) partition in kind, where the property is physically divided, or (2) partition by sale, where the property is sold and the sale proceeds are divided. *Channer v. Cumming, supra*.

[13] In *Channer*, we noted that this court has long expressed a preference for partition in kind.

> "'As between a partition in kind or sale of land for division, the courts will favor a partition in kind, since this does not disturb the existing form of inheritance or compel a person to sell his property against his will, which, it has been said, should not be done except in cases of imperious necessity.'"

270 Neb. at 239, 699 N.W.2d at 837-38, quoting *Trowbridge v. Donner, supra*. See, also, *Nordhausen v. Christner*, 215 Neb. 367, 338 N.W.2d 754 (1983) (noting preference exists but stating it can be overcome).

[14,15] It is generally held that until the contrary is made to appear, the presumption prevails that partition in kind is feasible and should be made, and that the burden is on those who seek a sale of the property in lieu of partition in kind to show the existence of a statutory ground for such sale. See *Trowbridge v. Donner, supra*. A sale in partition cannot be decreed merely to advance the interests of one of the owners, but before ordering a sale, the court must judicially ascertain that the interests of all will be promoted. See *id*.

In this case, there was no dispute as to what property constituted the assets in the estate. There was no dispute as to the value of the real estate, and there was no claim that the value of the real estate as one parcel was greater than the value of the sum of the individual tracts. There was evidence that two of the devisees, McConville and Klaus, wanted to retain the real estate for personal and sentimental reasons. Shields requested a partition and testified that she wanted the distribution of the real estate to be fair.

[16] The statutory ground for a sale is a showing that partition cannot be made without great prejudice to the parties. See Neb. Rev. Stat. §§ 25-2181 and 25-2183 (Reissue 2008). The generally accepted test of whether a partition in kind would result in great prejudice to the owners is whether the value of the share of each in case of a partition would be materially less than the share of the money equivalent that could probably be obtained for the whole. *Trowbridge v. Donner*, 152 Neb. 206, 40 N.W.2d 655 (1950) (citing 40 Am. Jur. *Partition* § 83 (1942)).

Whether partition in kind will result in great prejudice to the parties requires comparing two amounts. The first is the amount an owner would receive if the property were divided in kind and the owner then sold his portion of the property. The second is the amount each owner would receive if the entire property were sold and the proceeds were divided among the owners. If the first amount is materially less than the second amount, great prejudice has been shown. See *id*.

The appraiser testified that sale of the real estate as a whole would not bring a greater amount than sale of the tracts individually. The tracts had different uses, and the value of the tracts would not be enhanced by being sold together. Only tracts 1 and 2 were contiguous. Tracts 3 and 4 were south of McCook near the Kansas border and were not contiguous. The tracts would typically be sold separately.

The referee's report was based in significant part upon his determination that the devisees could not agree about anything. The burden was on Shields to show by a preponderance of the evidence that partition in kind would result in great prejudice to the devisees. She did not prove that the land would be more valuable if the tracts were sold together. Shields testified she did not believe the land could be divided so that her father's land remained in the family, but that is not competent evidence that the real estate should be sold. She has not rebutted the presumption that the real estate should be distributed in kind.

McConville and Klaus testified it was their opinion that the land could be equitably divided in kind and that this was their

preference. They wanted a partition in kind for sentimental and personal reasons. Klaus' testimony indicates that the devisees had different financial means and that a sale would not provide her with an equal opportunity to purchase the property.

McConville presented a proposal for distribution in kind, which was rejected by the court:

> 1. Separate 19.49 acres of dryland cropground from Tract #2, at its appraised value of $2,000.00 per acre, and combine it with Tract #4 for distribution to one of the owners. Combined appraised value of Tract #4 with the 19.49 acres from Tract #2 is $181,980.00.
>
> 2. Combine Tract #2, less the 19.49 acres, with Tract #3 for distribution to one of the owners. Combined appraised value of Tract #3 and Tract #2 (less the 19.49 acres) is $187,020.00.
>
> 3. Distribution of Tract #1 to one of the owners. Appraised value of Tract #1 is $190,000.00.

McConville's proposed distribution was evidence that it was possible to convey the real estate to each sister in shares close to equal in value.

Shields failed to sustain her burden to establish that partition in kind could not be had without great prejudice to the parties. We therefore conclude that a partition in kind is feasible and that the county court erred in accepting the referee's report and ordering partition by sale.

Remedy

[17] Since the county court erred in ordering the sale of the property, this court may consider an appropriate remedy for the partition in kind of the real estate. A partition action is an action in equity. *Channer v. Cumming*, 270 Neb. 231, 699 N.W.2d 831 (2005). Equity questions arising in appeals involving the Nebraska Probate Code are reviewed de novo. *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 794 N.W.2d 700 (2011). Once this court acquires equity jurisdiction, it can adjudicate all matters properly presented and grant complete relief to the parties. *Mogensen v. Mogensen*, 273 Neb. 208, 729 N.W.2d 44 (2007).

We therefore proceed to apply equitable principles to the partition of the real property to resolve the dispute. The facts necessary for a partition in kind are not in dispute. The appraiser's valuation of the property is not contested, nor is his testimony that sale of the tracts as a whole would not bring a greater amount than sale of the tracts individually. All the property, both real and personal, is to be divided equally among the sisters.

We reject McConville's proposed distribution in kind for the following reasons: Tracts 1 and 2 should not be separated. Separating 19.49 acres is not practical and would create more problems than it would solve. A well on tract 1 provides water to tract 2, and separating tracts 1 and 2 would require arrangements for tract 2 to continue to utilize the well on tract 1 or would necessitate the expense of drilling a new well on tract 2, which may not be feasible.

Accordingly, tracts 1 and 2 should be awarded to one of the devisees. Tract 3 should be awarded to another devisee along with cash from the estate. Tract 4 should be awarded to the remaining devisee along with cash from the estate. The amended inventory of the estate shows that tracts 1 and 2 are valued at a total of $298,000 ($196,000 and $102,000 respectively). (We employ the figures from the amended inventory to account for $6,000 in roof repair to the house on tract 1 not covered by the appraisal.) Tract 3 is valued at $124,000, and tract 4 is valued at $143,000.

The estate contains cash assets in the amount of $720,380.42, and the will directs that the personal property be divided among the devisees. For purposes of this partition, each sister should receive $298,000 in real estate or a combination of real estate and cash from the estate to equalize the distribution. This is accomplished by awarding one sister tracts 1 and 2, one sister tract 3 and $174,000 in cash assets, and the third sister tract 4 and $155,000 in cash assets. Following these distributions, each sister will have received $298,000 from the estate, either in real estate or real estate and cash. Cash assets of $391,380.42 will remain in the estate for later distribution along with other assets of the estate.

Because the county court did not partition the property in kind, it did not consider which sister should receive which tract. Accordingly, the cause must be remanded to the county court with directions to distribute tract 1 and 2 to one sister, tract 3 and $174,000 to one sister, and tract 4 and $155,000 to one sister in order to equalize the distributions of the real estate using cash from the estate. If the parties cannot agree as to which distribution should be made to each devisee, the court is directed to have the clerk of the court number the shares and then draw the names of the future owners by lot. See Neb. Rev. Stat. §§ 25-2182 and 25-21,102 (Reissue 2008). Section 25-2182 gives a trial court the power to allot particular portions of the land to particular individuals, and unless so allotted, the shares may be drawn by lot, as provided by § 25-21,102. See *Trowbridge v. Donner*, 152 Neb. 206, 40 N.W.2d 655 (1950).

Requiring Referee to Conduct Partition

McConville claims the county court erred in appointing a referee to conduct the partition. We disagree. The county court did not err in appointing a referee to determine whether a partition was appropriate.

Partition of property can occur within a probate action under § 30-24,109. The words "partition" and "partitioned," as used in this section, mean partition in kind. Pursuant to this section, Shields was permitted to request partition of the real estate during the administration of the estate. Section 30-24,109 directs the court to follow the procedures for partition in civil actions. The court is required to appoint at least one referee. Neb. Rev. Stat. § 25-2180 (Reissue 2008). The referee is then required to report to the court if it appears to the referee that partition in kind cannot be made without great prejudice to the owners. § 25-2181.

McConville's reliance upon *In re Estate of Kentopp*, 206 Neb. 776, 295 N.W.2d 275 (1980), is misplaced. That case did not prohibit the court from appointing a referee to determine whether the property should be partitioned in kind or should be sold. See § 25-2180. However, it required that if

the property were to be sold, the sale must be conducted by the personal representative. The last sentence of § 30-24,109 addresses the sale of property that cannot be partitioned in kind. Accordingly, the county court did not err in appointing a referee to determine whether the real estate could be partitioned in kind.

Referee Fees

McConville claims that the county court erred in awarding referee fees after the appeal of the court's judgment was taken to the Nebraska Court of Appeals. We agree. Once the appeal was perfected in the partition action, the county court was without jurisdiction to award attorney fees. See *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995). The county court had no jurisdiction to enter the order for referee fees, and the order is hereby vacated.

Supersedeas Bond

McConville assigns that the county court erred in requiring her to post a supersedeas bond in order to appeal the action. McConville is the personal representative of the estate. Neb. Rev. Stat. § 30-1601(3) (Reissue 2008) states: "When the appeal is by someone other than a personal representative . . . the appealing party shall, within thirty days after the entry of the judgment or final order complained of, deposit with the clerk of the county court a supersedeas bond . . . ."

[18] McConville argues that as the personal representative, she should not have been required to post bond. We conclude that under the circumstances of this case, the personal representative should not have been required to post a supersedeas bond. However, the record discloses that McConville did not obtain the bond as the personal representative but obtained the bond in her own name. An executor is not required to give bond when the executor appeals in a representative capacity, but if he or she appeals to protect his or her individual interest, a bond is required, the same as any litigant. See *In re Estate of Vetter*, 139 Neb. 307, 297 N.W. 554 (1941). Because McConville has prevailed in this action, the cost of

the supersedeas bond is taxed as an expense, and the cost is payable by Shields.

CONCLUSION

In the case at bar, the real estate should be partitioned in kind. Partition is an equitable action, and this court has the authority to grant complete relief. Accordingly, we reverse the judgment of the county court directing sale of the real estate and remand the cause with directions that the court award tracts 1 and 2 to one sister, tract 3 and $174,000 to another, and tract 4 and $155,000 to the third in accordance with our opinion.

The county court did not err in appointing a referee to determine if partition was required. However, the court did not have jurisdiction to order payment of referee fees after the appeal was perfected. Therefore, the October 14, 2011, order awarding fees is vacated.

The county court did not err in requiring McConville to post a supersedeas bond. Since McConville has prevailed in this appeal, the cost of the bond is taxed to Shields.

The judgment of the county court is reversed, and the cause is remanded thereto with directions for further proceedings consistent with this court's opinion.

REVERSED IN PART, AND IN PART VACATED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., participating on briefs.