IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2010-TS-01705

BETTY LOCKHART **APPELLANT**

VS.

RICHARD COLLINS, ET AL. **APPELLEES**

BRIEF OF APPELLEES

ORAL ARGUMENT IS NOT REQUESTED

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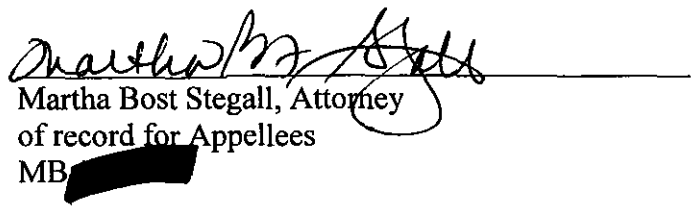
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons might have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualifications or recusal.

Appellants incorporate by reference those persons identified in Appellant's Certificate of Interested Persons, being the parties, attorneys of record and trial court judge.



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I. STATEMENT OF THE CASE

Introduction

This appeal arises from a Complaint filed by Betty Lockhart, within an estate proceeding wherein she was appointed administratix of the estate, seeking partition **by public sale of** 160 acres located in Monroe County that is homesteaded by Defendants Bolin Hamilton and wife, Orene Hamilton (hereinafter "the Subject Property"). Lockhart, whose only interest in the Subject Property is a life estate in an undivided ¼ interest, did not request partition in kind, and made no allegation that partition in kind was not feasible or that partition by sale was in the parties' best interests. Moreover, Lockhart's request for partition by sale implies that she has standing, i.e., that she has an indefeasible fee simple title, which she does not.

Review of Pertinent Conveyances[1]

The parties' various interests in the Subject Property are shown by the following conveyances.

By Warranty Deed dated September 3, 1947, and recorded in the Office of the Chancery Clerk of Monroe County on the same date in Book 118, Page 146 (R. 37), R. T. Ray conveyed the Subject Property to W. E. Lockhart and Bolin Hamilton as tenants in common. W. E. Lockhart was the father of Defendant Orene Hamilton and father-in-law of Defendant Bolin

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[1]In each deed, the Subject Property is described as follows:

> The Southeast Quarter of the Northeast Quarter of Section 22, Township 14, Range 17 West, containing 40 acres, more or less.
> AND
> The West Half of the Northwest Quarter and the Southeast Quarter of the Northwest Quarter of Section 23, Township 14, Range 17 West, containing 120 acres, more or less.

The description of the property shows that partition in kind is easily feasible. As shown hereinbelow, at most Lockhart has standing to seek partition in kind to determine which 40 acres of the 160 is burdened with her life estate. She has no standing to seek partition by sale.

Hamilton. Bolin Hamilton and Orene Hamilton are the parents of Defendant Peggy Collins, their only child, who is married to Defendant Richard Collins.

The Last Will and Testament of W. E. Lockhart was probated in 1990, and is filed for record in the Office of the Chancery Clerk of Monroe County in Will Book 15, Page 290 (R. 38). Through his Last Will and Testament, W. E. Lockhart devised his undivided ½ interest in the Subject Property equally to his two children,[2] J. C. Lockhart, now deceased, who was husband of Plaintiff Lockhart and in whose estate proceeding the subject Complaint for partition was filed, and Defendant Orene Hamilton. Accordingly, at that point in time, the only persons with a freehold interest in the Subject Property were Bolin Hamilton, who held an undivided ½ fee simple interest, and Orene Hamilton and J. C. Lockhart, who each held an undivided ¼ fee simple interest.

By deed dated February 20, 1990, but not filed until March 20, 2007, the month of J. C. Lockhart's death, J. C. Lockhart, joined by his wife, Plaintiff Betty Lockhart, conveyed his fee simple interest in the subject property to his son (her step-son), Joel C. Lockhart, by Warranty Deed filed as Instrument No. 20072186 (R. 41).[3]

By Quitclaim Deed dated August 17, 2007, and recorded in the Office of the Chancery Clerk of Monroe County on the same date as Instrument No. 2007005824 (R. 43) Defendants Bolin Hamilton and wife, Orene Hamilton, quitclaimed their interests in the subject property (1/2 undivided interest in Bolin and ¼ undivided interest in Orene) to their only child, Defendant Peggy Collins, reserving a life estate.

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[2] No party disputes that his wife, Maudie, to whom he devised a life estate, predeceased W. E. Lockhart.

[3] The deed failed to state that the only ownership interest that J. C. Lockhart had to convey was an undivided ¼ interest; regardless, the law is settled that one cannot convey a greater interest in property than he has. Moreover, although Lockhart's petition portrayed her as holder of a life estate in the entire Subject Property, the parties later stipulated that Lockhart's interest was limited to a life estate in an undivided ¼ interest. (R. 63)

By Quitclaim Deed dated May 13, 2008, and recorded in the Office of the Chancery Clerk of Monroe County on May 15, 2008 as Instrument No. 2008003014 (R. 46), Joel C. Lockhart conveyed his undivided ¼ interest to Defendants Richard Collins and wife, Peggy Collins, subject to the life estate of Betty Lockhart.

By Quitclaim Deed dated May 13, 2008, and recorded in the Office of the Chancery Clerk of Monroe County on May 15, 2008 as Instrument No. 2008003019 (R. 49), Peggy Collins quitclaimed her remainder interest in the Subject Property to herself and her husband, Richard G. Collins.

Accordingly, the parties' respective interests are as follows: Lockhart has a life estate in an undivided ¼ interest. Defendants Bolin Hamilton and wife, Orene Hamilton have a life estate in the remaining undivided ¾ interest. Defendants Richard Collins and wife, Peggy Collins, are remaindermen of the entire acreage. The Hamiltons have resided on the property continuously since the 1940s, and Defendant Peggy Collins grew up on the property. Lockhart resided on the property during the time of her marriage to the decedent (his second marriage), but voluntarily left and has not resided on the Subject Property since the decedent's death in 2007.

Trial Court Proceedings

The court proceeding in which the Complaint for partition was filed involves the intestate estate of J. C. Lockhart, deceased. The decedent's interest in the Subject Property was extinguished by his death, he having only a life estate interest in an undivided ¼ interest by virtue of the conveyances described above. (R. 41)

Plaintiff Betty Lockhart, widow of decedent, was appointed Administratrix of the estate by Order dated August 3, 2007. (R.E. 4) Despite the estate having no interest in the Subject Property, in February, 2010, approximately 2½ years after opening the estate, Lockhart filed a

Complaint within the estate proceeding seeking to partite by public sale the Subject Property. Significantly, Lockhart's Complaint requested as follows:

> That the above described real property **be sold at public sale,** pursuant to §11-21-27[4], Mississippi Code of 1972, as amended, and the net proceeds of the sale be divided 48.421% to [Lockhart] and 51.579% to the Defendants.

(R. 10, emphasis added).

Though not apparent from her argument on appeal, Lockhart has only requested partition by sale; she has never sought partition of in kind, *i.e.*, she never requested the trial court to partite in kind the property in order to determine which 40 acres would be subject only to her possessory interest by virtue of her life estate, and which 120 acres would be subject only to the Hamiltons' possessory interest by virtue of their life estates.

Despite having only a possessory interest by virtue of her life estate an undivided ¼ interest, Lockhart petitioned the trial court to order that the entire Subject Property – an undivided ¾ interest in which her stipulation acknowledges she has no interest in whatsoever - be partited by public sale and to award her almost 50% of the sale proceeds.[5]

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[4] Miss. Code Ann. §11-21-27, entitled "Land sold when not capable of division" states in part as follows:

> If, after a judgment for partition . . . it shall appear from the report of the masters . . . that a just and equal division of the land cannot be made, or that a sale will better promote the interest of the cotenants, the court shall order a sale of the land, or such part thereof as may be deemed property, and a division of the proceeds among those interested, as provided for.

Correspondingly, Miss. Code Ann. §11-21-11 states in part, "If, upon hearing, the court be of the opinion that a sale of the lands . . . will better promote the interest of all parties than a partition in kind, or if the court be satisfied that an equal division cannot be made, it shall order a sale of the lands ..." This Court has held that partition in kind is legally preferable to partition by sale, where there is no substantial proof that sale would better promote the parties' interest. *Shaw v. Shaw, infra.* Lockhart's Complaint does not allege that partition in kind was not feasible or that partition by sale would better promote the interest of anybody; she simply requests partition by public sale. Of course, the Hamiltons' interest is to remain on the land they have called home for the last seven decades, and their interests would not be served through their forced removal caused by partition by sale.

[5] Lockhart asserted that because she has a life estate interest, because she was 76 years old and because an IRS table used for gift tax valuation purposes, which she attached as an exhibit to her Petition (R.12-15),

Defendants opposed the partition by public sale of the 160 acres, asserting that Lockhart had no standing to seek partition by sale under Miss. Code Ann. §11-21-27; and that, pursuant to Miss. Code Ann. §11-21-1(2), the property is not subject to partition since it is homesteaded by the Hamiltons who are not in agreement with partition.

Following a hearing on Defendants' Motion to Dismiss Plaintiff's Complaint, the trial court granted the motion, holding as follows:

1. As holder of a life estate of an undivided ¼ interest in the subject real property, Lockhart had standing to seek partition (R. 65-69);

2. Partition, however, is not available to Lockhart, in light of the language of §11-21-1(2), because the property is homesteaded by Defendants Bolin and Orene Hamilton, who did not agree to, and instead opposed, partition (R. 69-71).

Lockhart filed a Motion to Alter or Amend Judgment, which was denied. In the *Order Addressing Post-Trial Motions*, the trial court found that sale in the first instance of the Subject Property under §11-21-11 was not warranted. (R.75).

II. SUMMARY OF THE ARGUMENT

Two statutes were considered and relied upon by the trial court in reaching her ruling dismissing Lockhart's Complaint for partition of the Subject Property by public sale, being (1) Miss. Code Ann. §11-21-3, which pertains to those with standing to request partition by decree of chancery court; and (2) Miss. Code Ann. §11-21-1, which deals only with partitions by

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indicates that were she, at her then-current age, to be conveyed a life estate interest in real property, the value of the gift for tax purposes would be 48.421% of the total value of the property, then she is entitled to 48.421% of the net proceeds from court-ordered sale of the 160 acres, despite the fact that she has no interest whatsoever, by deed or otherwise, in an undivided ¾ interest.

agreement and by arbitration, but not by court decree, and which has been amended to remove authority of chancery courts under §11-21-3 to order partition of homesteaded property.

Lockhart's appeal pertains only to the applicability *vel non* of §11-21-1 in a situation where those with homestead interest are not the plaintiff and defendant, but instead are co-defendants in joint opposition to partition requested by another.

The trial court correctly held that, where parties in interest do not agree to partition in accordance with §11-21-1, her authority to decree partition at the request of those otherwise with standing to seek partition does not exist where the property at issue is homesteaded, regardless of whether partition is requested by one spouse against the other, or by one person against a married couple that homesteads the property.

Additionally, the trial court correctly held that partition of the Subject Property by sale is not warranted.

Lastly, in order to have standing to seek partition that affects more than possessory interests, the party seeking partition must herself have an indefeasible fee interest (either in her own right or through joinder of remaindermen in her request for partition). Where partition by sale is pursued, the party must show that partition in kind is not feasible, or that partition by sale will better promote the parties' interests. Not only is Lockhart without an indefeasible fee interest necessary to affect the non-possessory interests of Defendants Richard and Peggy Collins (which must be affected for a sale to occur), she made no effort to show that partition in kind was not feasible or that sale would better promote the parties' interests.[6]

[6] Defendants have never disputed that Lockhart could have the property partited in kind, resorting to filing a petition in court to obtain such and naming the Hamiltons as Defendants had she unsuccessfully requested the Hamiltons to reach an agreement with her over how to partite their respective possessory interests between a 40-acre section and a 120-acre section. Of course, the Collins, as remaindermen, would not be proper parties to a possessory proceeding to partite the possessory interests of Lockhart and the Hamiltons.

Accordingly, it is respectfully submitted that trial court correctly ruled in dismissing Lockhart's Complaint for partition because homesteaders of the property are in opposition and partition by sale is not warranted. It is also respectfully submitted that Lockhart, holder of a life estate only, had no standing to seek partition by sale.

Questions of a party's standing and of statutory construction are subject to de novo standard of review. *See, Gartrell v. Gartrell,* 27 So.3d 388 (Miss. 2009)(de novo review of question of standing); *Loveless v. City of Booneville,* 972 So.2d 723 (Miss.App. 2007)(de novo review of statutory construction). Chancery court findings on factual matters, *e.g.,* that partition by sale of particular property is not warranted, are subject to manifest error standard of review. *Georgian v. Harrington,* 990 So.2d 813 (Miss. App. 2008) (standard of review for chancellor's findings is manifest error).

III. ARGUMENT

A. Lockhart, as Holder of a Life Estate in an Undivided ¼ interest, Had No Standing to Seek Partition by Sale Affecting Interests of Remaindermen

Miss. Code Ann. §11-21-3, pertaining to partition by court decree, states as follows:

> Partition of land held by joint tenants, tenants in common, or coparceners having an estate in possession or a right of possession and ***not in reversion or remainder***, whether the joint interest be in the freehold or in a term of years not less than five (5) years, may be made by judgment of the chancery court of that county in which the lands or some part thereof, are situated; or, if the lands be held by devise or descent, the division may be ordered by the chancery court of the county in which the will was probated or letters of administration granted, although none of the lands be in that county.
>
> However, any person owning an ***indefeasible fee simple title*** to an undivided interest in land may procure a partition of said land and have the interest of such person set apart in fee simple free from the claims of life or other tenants, remaindermen or reversioners, provided the life or other tenants, and other known living persons having an interest in the land, are made defendants if they do not join in the proceeding as plaintiffs.

(emphasis added).

The first paragraph of the statute has remained essentially the same since it was first enacted in 1857. *See*, Ch. 35, Art. 48 (Miss. Code of 1857); Ch. 26, Art. 1 §1809 (Miss. Code of 1809; Ch. 71, §2553 (Miss. Code of 1880); §3097 (Miss. Code of 1892); Ch. 103, §3521 (Miss. Code of 1906); §2833 (Hemingway's Code of 1917); Ch. 55, §2920 (Miss. Code of 1930); Ch. 4, §961 (Miss. Code of 1942). The second paragraph of §11-21-3 was added by statutory amendment in 1946. Until the second paragraph was added by amendment, partition was only be a possessory proceeding; it could not affect the rights of non-possessory remaindermen [such as Defendants Richard and Peggy Collins] or reversioners. As stated in *Hemphill v. Mississippi State Hwy. Comm.*, 145 So.2d 455, 461 (Miss. 1962), "Prior to the 1946 amendment, partition was a possessory proceeding only, and the court could not adjudicate rights of owners of future interest." (citing *Lynch v. Lynch*, 196, Miss. 276, 17 So.2d 195 (1944); *see e.g., Lawson v. Bonner, infra; Black v. Washington*, 3 So. 140 (1887)(absence of unknown remaindermen, or fact that defendant had life estate in ¼ undivided interest, "is not a bar to partition among those having an interest in possession.")

i. Partition affecting non-possessory interests is unavailable to Lockhart

As a result of the 1946 amendment adding the second paragraph, now those with indefeasible fee simple title may seek partition that affects the interests of remaindermen. This is what Lockhart was improperly attempting to do with the Collins' remainder interest. However, having only a life estate in an undivided ¼ interest, Lockhart has no standing to affect by partition the interests of remaindermen. Instead, as shown below, she would only have standing to seek partition in kind as to those parties holding life estates. Because Lockhart's Complaint sought only partition by sale, affecting the interest of the remaindermen, the trial court's order

dismissing the Complaint and denying her post-trial motion to alter or amend the judgment should be affirmed.[7]

ii. Lockhart is without standing to seek partition of anything more than possessory interests

Because Lockhart does not have an indefeasible fee simple title, she may only pursue partition to the extent permitted by the first paragraph of §11-21-3, which expressly affords the right of partition only to (1) joint tenants, (2) tenants in common, or (3) coparceners with possessory interests, but not when reversionary or remainder interests exist, as they exist in this appeal.

A joint tenant, by definition, is one of two or more persons having "one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession." *See,* Black's Law Dictionary; *see also, Wilder v. Currie, infra.* Coparceners are those whose interest arises as an heir by descent from the same ancestor. *See*, Black's Law Dictionary. Clearly, Lockhart is neither a joint tenant nor a coparcener. Therefore, to have a right of partition, Lockhart must be a tenant in common. As shown below, she is not a tenant in common with all Defendants.

According to *Wilder v. Currie*, 95 So.2d 563, 567 (Miss. 1957), "Tenants in common are united only by their right to possession of the property." Pursuant to this definition, Lockhart is a tenant in common with Bolin and Orene Hamilton, as they all have a right to possession of the property, but is not a tenant in common with the remaindermen, Richard and Peggy Collins. Stated differently, as holders of life estates in an undivided ¼ interest and undivided ¾ interest,

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[7] Lockhart requests this court to "render a decision reversing the ruling of the Chancellor prohibiting the partition of the land in this case, and *remanding the case to the lower court for further proceedings pursuant to Lockhart's Complaint for Partition.*" (See, Brief of Appellant, p. 11, emphasis added). Even if this Court were to rule that §11-21-1 applies only where the spouses whose homestead interest will be affected are Plaintiff and Defendant, remand to the lower court in this appeal is improper in light of Lockhart's lack of standing to seek the relief of partition by sale requested in her Complaint.

respectively, Lockhart and the Hamiltons are the only persons who have a right to possession of the Subject Property. Defendants Richard and Peggy Collins, as remaindermen of both Lockhart's and the Hamiltons' life estates, do not presently have the right of possession and are not joint tenants, tenants in common, or coparceners.

The case of *Belew v. Jones*, 56 Miss. 341 (1897), reversed a ruling granting partition by sale between two parties, one having only a life estate *pur autre vie*, and the other having the remainder interest to the life estate, and fee simple title to the remaining interest. In rejecting partition by sale, this Court held as follows:

> In this case, there is neither unity of title or possession between Mrs. Jones and Belew. The latter has a freehold estate, per autre vie, in a part of lot 85, which is separated and distinguished from the residue of the lot by metes and measures. ***His possession is separate and exclusive.*** Mrs. Jones has a fee-simple estate in so much of the lot, ***and exclusive possession, as is not embraced in the life-estate.*** She may have a reversion after the termination of the life estate, -- a reversion to that part of the lot covered by that estate; but the remedy of the statute is expressly denied to those who hold in remainder or reversion. * * * The statute . . . denies [partition] as to any part of the premises, because [Mrs. Jones] is not a tenant in common, or joint tenant, or any part of it, either with Belew or any other person. [cit.omit.] **The test of the right to a sale is, whether the parties could have partition of a particular tract.**

Id. at 345 (emphasis added). While the person seeking partition by sale was the one who held fee simple title in a portion of property and remainder interest in the rest, there does not appear to be any logical reason for the outcome to have been different had the person seeking partition by sale been the holder of only a life estate.

The case of *Lawson v. Bonner*, 40 So. 488 (Miss. 1906), analyzed a claim for partition under §3097 of the 1892 Code, which was identical to the first paragraph of §11-21-3 and, therefore, determinative of whether Plaintiff has standing to pursue the relief for partition by sale that she requested in her Complaint for Partition. In this case, as the result of the terms of their sister's will, Bonner held fee simple title in an undivided ½ interest in certain property, and

Lawson held a life estate in the remaining undivided ½ interest, the remainder left to the children of the testatrix's two brothers. Bonner filed a complaint for partition, naming as Defendants Lawson and the children of the two brothers.

An award of partition in kind was reversed on appeal, the Supreme Court stating as follows:

> Our statutes (Rev. Code 1892, § 3097 et seq.) make it plainly improper to partition any rights in reversion or remainder, or to make reversioners or remaindermen parties to any partition proceeding. The writ and all the proceedings are possessory purely.[8] It was, therefore, manifest error for the court to attempt to deal in any way with the rights of the children of Charles and Richard Lawson. The extent of its power was to have partitioned the land on the west side of the road between Emily Lawson and Laura Bonner, leaving a new partition to be made at the death of the life tenant, Emily Lawson. Our decisions on our statutes have made all this exceedingly plain.
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> * * * We cite no authorities, for the reason that all our own authorities, and the authorities elsewhere, pertinent to the subject-matter have been most discriminatingly collected and analyzed in the very able brief of the learned counsel for the appellant, which we direct to be printed in full.

40 So. at 490. The authority of the appellant adopted by the Court in its opinion was as follows:

> A partition proceeding is purely a possessory action. The joint possession or the right of possession is the basis of the suit, and **there can only be a partition of the land between those persons who have either a joint possession or joint right of possession, and further than this common joint estate the remedy cannot be extended.** It does not follow that, because there is a remainder or reversion in land, there cannot be a partition, nor is it essential that the interest of all co-tenants be equal; but in such a proceeding the court will not deal with the fee simple, **but will partition only the joint possession**, or, in other words, the common estate, being that interest in the land in which there is a co-tenancy. *Black v. Washingto*n, 65 Miss. 60, 3 South. 140; *Cooper v. Fox*, 67 Miss. 242, 7 South. 342; [others cits. omit]

Id. (emphasis added)

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[8] Again, this statement re: partition being a possessory proceeding only remains true to those seeking partition under the first paragraph of §11-21-3, as Lockhart must since she does have the indefeasible fee title necessary to proceed under the second paragraph.

That Lockhart had no standing to seek partition by sale, which necessarily would divest the remaindermen of their remainder interest, is further supported by Miss. Code Ann. §11-21-5, which states in pertinent part as follows:

> Any of the parties in interest, whether infants or adults, may institute proceedings for the partition of lands or for a partition sale thereof, by judgment of court as herein provided. All persons in interest must be made parties except (a) in cases where a part of the freehold is owned by persons owning a life estate therein or a life tenancy therein subject to the rights of remaindermen or reversioners, then, in such event, it shall only be necessary that the person or persons owning or claiming a life estate or life tenancy therein be made parties . . . .

Should she ever choose to do so, Lockhart would have standing against only the Hamiltons to seek an order determining to which 40 (or ¼) acres of the 160 acres to which her life estate applies (in the unlikely event she is interested in partition in kind and, if she is, she is unable to reach an agreement with the Hamiltons). She had no standing to seek more than partition of the possessory interests of herself and the Hamiltons. Because she does not have an indefeasible fee simple title, she has no standing and cannot proceed under the second paragraph of §11-21-3, which is the only avenue of partition available when the rights of remaindermen will be affected. Therefore, her claim for partition by sale as to all interests, including the remainder interests of Richard and Peggy Collins, is plainly improper.

B. Even if Lockhart had had standing to seek partition of the Subject Property by sale, she made no allegation that partition by sale was warranted, and does not argue that the trial court was manifestly in error in finding that it was not.

Miss. Code Ann. §11-21-11 permits partition by sale where sale "will better promote the interest of *all* parties than a partition in kind, or if the court be satisfied that an equal division cannot be made . . . ." (emphasis added). Mississippi jurisprudence holds that partition in kind

is the preferred method of partition. *Georgian v. Harrington*, 990 So.2d at 816. The proof necessary to be granted partition by sale has been stated as follows:

> "Affirmative proof of at least one of these statutory requirements [§11-21-11] must affirmatively appear in the record in order for the court to decree a partition by sale." [*quoting Blair v. Blair*, 601 So.2d 848, 850 (Miss. 1992)] "Further, the chancellor has no authority to decree a sale unless the statutory requisites are 'clearly' met and a 'substantial reason' exists for choosing partition by sale over partition in kind." *Blair*, 601 So.2d at 850 (citing *Shorter v. Lesser*, 98 Miss. 706, 712, 54 So. 155, 156 (1911)). The joint owner seeking a partition sale has the burden of proving that the land is not susceptible to partition in kind and that a sale is the only feasible method of division. *Overstreet v. Overstreet*, 692 So.2d 88, 90-91 (Miss. 1997)

See also, Shaw v. Shaw, 603 So.2d 287 (Miss. 1992)(where the right of partition exists, it will be in kind and not by sale unless the one seeking partition presents substantial proof that sale would better promote interests of parties or that equal partition in kind is impracticable).

The preference for partition in kind over partition by sale was addressed at length in *Mathis v. Quick*, 271 So.2d 924 (Miss. 1973), as follows:

> In the case of *Dailey v. Houston*, 246 Miss. 667, 151 So.2d 919 (1963) this Court held that where one seeks partition by sale he must bring his case clearly within the statute. In that case there were four parties in interest. One of the parties (Mr. Dailey) owned sixty-nine percent (69%) of one parcel and eighty-four and one-half percent (84 1/2%) of another parcel. This Court said:
>
> 'Under these circumstances, it was error for the chancery court to order a partition of the land by sale, rather than in kind. Partition by sale may be had only if the sale of the land 'will better promote the interest of all parties than a partition in kind, or if the court be satisfied that an equal division cannot be made. . . .'' 246 Miss. at 683, 151 So.2d at 926.
>
> We then said:
>
> **'A partition in kind is preferred. The law looks with disfavor upon a sale of land for partition. A person seeking to have a sale must bring his case clearly within the statute. Partition by sale proceedings take from the owner of land his right to keep his freehold.** (Citing cases).' 246 Miss. at 693, 151 So.2d at 926.

> There is nothing in the record in the instant case to indicate that it would be to the best interest of all the parties to sell the property. One witness is of the opinion that the land cannot be equally divided, and another was of the opinion that '(I)t would be very difficult to divide this land and either of these parties to get an equal proportion or equal division of it.'
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> In the case of *Dailey v. Houston, supra*, this Court was careful to point out that no evidence was introduced to show that it would be to the best interest of all the parties to order a sale. We said:
>
> 'There was no evidence introduced on the issue of whether a partition by sale would come within these requirements. In the absence of evidence that a sale will better promote the interests of the parties or an equal division in kind cannot be made, a sale should not be ordered. (Citing cases).' 246 Miss. at 684, 151 So.2d at 927.
>
> In the instant case the appellant has no home other than the land here involved. She does not want the land sold. The appellee requested the court in his original bill (in the alternative) to divide the property. Only two parties are interested in seventy-six (76) acres of land. The law permits the chancery court considerable flexibility in dividing the property between the parties in a partition suit. The court is not required to be exact in an equal division in kind, because the court may require owelty from one cotenant to another to adjust the interest of the parties. Section 966, Mississippi Code 1942 Annotated (Supp.1972).
>
> In the case of *Carter v. Ford*, 241 Miss. 511, 130 So.2d 852 (1961) this Court cited *Cox v. Kyle*, 75 Miss. 667, 669-670, 23 So. 518, 519 (1898) and said that in that case:
>
> "The common law gave the joint owners of land a right to have a partition in kind; and the right of selling the land, and dividing the proceeds, given by the statute, is an innovation upon the common law; and, as it takes away from the owner the right to keep his freehold in kind, it must be strictly pursued, and it must appear from the record that an equal division cannot be made, or that a sale of the land will better promote the interest of all parties than a partition in kind', citing authorities. There was no proof of the necessity or propriety of a sale, and the cause was reversed.' 241 Miss. at 516, 130 So.2d at 854.

Id. at 926-927 (emphasis added).

Assuming for purposes of this argument only that Lockhart had had standing to pursue partition by sale, she did not show that partition by sale would be in the parties' best interest or

that partition in kind was not feasible.[9] On appeal, she has not argued that the trial court's finding that partition of the Subject Property by sale was not warranted. Accordingly, for this further reason, the trial court's dismissal of the Complaint seeking partition only by sale should be affirmed.

C. Miss. Code Ann. §11-21-1 (Supp. 2010), by its terms, applies to any property owned by spouses that is homesteaded

Miss. Code Ann. §11-21-1 was amended effective July 1, 2009 to provide that

> Homestead property exempted from execution [*e.g.*, homestead up to 160 acres] that is owned by spouses shall be subject to partition pursuant to the provision of this section only, and not otherwise.

Appellants agree with the trial court's detailed reasoning rejecting Lockhart's argument on this issue, and offer the following for consideration:

Miss. Code Ann. §27-33-17 (1972), as amended, defines "'ownership' and similar words," to include life estate interests. The Hamiltons, therefore, meet the statutory criteria of owning homestead property exempted from execution, *at least to the extent of their life estates in an undivided ¾ interest.* In light of the reasoning discussing in Section II *supra,* should this Court hold that homestead may be partited by court order over the objection of co-defendant spouses, the reasonable interpretation of §11-21-1 is that the type of partition ordered nevertheless may not divest the opposing homesteaders of their respective fractional interest, here being ¾. This, of course, circles back to Lockhart's standing only to have the possessory interests of herself and the Hamiltons divided 40 acres and 120 acres, respectively, instead of the current ¼ undivided interest and ¾ undivided interest in the whole 160 acres. In this interpretation of the amendment to §11-21-11 as applicable to the relatively unusual situation where the life estate interest is as to less than the whole (and should Lockhart ever choose to

[9] *See,* n. 1, *supra.*

partite the property in kind as to the possessory interests), the Hamiltons' homestead interest would then apply to the 120 acres made 100% subject to their life estates. Conversely, no reasonable interpretation of the plain, unambiguous language of §11-21-1 permits homesteaders to be divested of their homestead on the whim of a holder of a life estate in a fractional interest, as Lockhart's Complaint sought to do.

IV. CONCLUSION

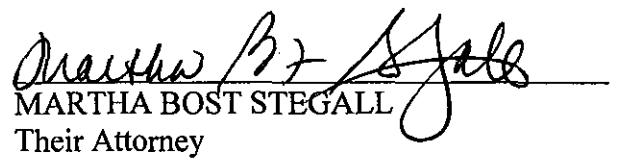
Analysis of this appeal is dependent upon the parties' respective interests in the Subject Property and the type of partition pursued by Lockhart. Lockhart has specifically requested partition by sale, which would divest all parties, including remaindermen, of their interest in the Subject Property. Because Lockhart has only a life estate interest, she has no standing under §11-21-3 to pursue partition that affects the rights of remaindermen.

Lockhart did not pursue the type of partition for which she does have standing: partition to determine which 40 acres is affected by her life estate, and which 120 acres is affected by the Hamiltons' life estate. Accordingly, though the trial court dismissed Lockhart's Complaint for partition on a different basis, the holding was correct and should be affirmed on appeal.

Even if this court were to agree with the trial court's holding that Lockhart had standing, as a holder of a life estate in a fractional interest, to pursue partition by sale, and to further accept Lockhart's argument on appeal that the prohibition against partition of homestead property applies only where partition is sought by one spouse against the other spouse, the trial court's factual finding that partition by sale is not warranted in this case should be affirmed on appeal. Indeed, Lockhart has made no argument that the trial court's finding in this regard was in manifest error.

Respectfully submitted,

RICHARD COLLINS, PEGGY COLLINS, BOLIN HAMILTON AND ORENE HAMILTON, Appellees

BY: 
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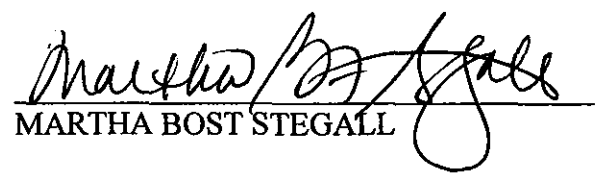
CERTIFICATE OF SERVICE

I, Martha Bost Stegall, attorney for the Appellee, do hereby certify that I have this day served a true and correct copy of the above and foregoing Appellees' Appeal Brief on the attorney for Appellant and the trial court judge by placing said copy in the United States Mail, postage prepaid, addressed to them at their usual post office addresses, as follows:

Carter Dobbs, Jr.
P. O. Box 517
Amory, MS 38821

Chancellor Jacqueline E. Mask
P. O. Box 787
Tupelo, MS 38802

DATED, this the 6th day of June, 2011.


MARTHA BOST STEGALL