


Anderson v. Anderson
 Minn.App.,1997.

Court of Appeals of Minnesota.
 Bernhard ANDERSON, et al., Respondents,
 v.
 Mark ANDERSON, et al., Appellants.
 No. CX-96-1414.

March 18, 1997.
 Review Dismissed May 28, 1997.

In action for partition of four parcels of farmland, the Watonwan County District Court, [Terence M. Dempsey, J.](#), ordered partition in kind with owelty to equalize partition. Appeal was taken. The Court of Appeals, [Kalitowski, J.](#), held that: (1) partition in kind with owelty effected equitable and fair division of property; (2) appointment of referees was not required; and (3) district court was not required to consider capital gains tax consequences resulting from partition and owelty.

Affirmed.
 West Headnotes
[1] Partition 288 

[288](#) Partition
[288II](#) Actions for Partition
[288II\(A\)](#) Right of Action and Defenses
[288k10](#) k. Nature and Scope of Remedy in General. [Most Cited Cases](#)
 Action for partition of real estate is statutory and court is guided by principles of equity in its decisions.

[2] Appeal and Error 30 1008.1(14)

[30](#) Appeal and Error
[30XVI](#) Review
[30XVI\(D\)](#) Questions of Fact, Verdicts, and Findings
[30XVI\(D\)3](#) Findings of Court
[30k1008](#) Conclusiveness in General
[30k1008.1](#) In General
[30k1008.1\(8\)](#) Particular Cases and Questions
[30k1008.1\(14\)](#) k. Real Estate

Cases. [Most Cited Cases](#)
 On appeal, district court's findings of fact in partition action shall not be set aside unless clearly erroneous.

[3] Partition 288 77(4)

[288](#) Partition
[288II](#) Actions for Partition
[288II\(B\)](#) Proceedings and Relief
[288k76](#) Determination as to Mode of Partition
[288k77](#) Actual Partition or Sale
[288k77\(4\)](#) k. Pleading and Proof.

[Most Cited Cases](#)
 Until the contrary appears in partition action, presumption prevails that partition in kind should be made. [M.S.A. §§ 558.01, 558.14](#).

[4] Partition 288 77(4)

[288](#) Partition
[288II](#) Actions for Partition
[288II\(B\)](#) Proceedings and Relief
[288k76](#) Determination as to Mode of Partition
[288k77](#) Actual Partition or Sale
[288k77\(4\)](#) k. Pleading and Proof.

[Most Cited Cases](#)
 Person requesting sale has burden of proving that partition in kind cannot be made without great prejudice to owners. [M.S.A. §§ 558.01, 558.14](#).

[5] Partition 288 84


[288](#) Partition
[288II](#) Actions for Partition
[288II\(B\)](#) Proceedings and Relief
[288k80](#) Relief Incidental to Partition
[288k84](#) k. Owelty, and Lien Therefor.

[Most Cited Cases](#)
 Method of owelty should be used when equal division in partition action cannot be had without great prejudice to owners and sale is likewise disadvantageous.

[6] Partition 288 77(3)

[288](#) Partition

[288II](#) Actions for Partition
[288II\(B\)](#) Proceedings and Relief
[288k76](#) Determination as to Mode of Partition
[288k77](#) Actual Partition or Sale
[288k77\(3\)](#) k. Grounds for Determination. [Most Cited Cases](#)

Partition 288 84


[288](#) Partition
[288II](#) Actions for Partition
[288II\(B\)](#) Proceedings and Relief
[288k80](#) Relief Incidental to Partition
[288k84](#) k. Owely, and Lien Therefor.
[Most Cited Cases](#)
Partition in kind with owely effected equitable and fair division of four parcels of farmland, where parcels could not be divided equally without impairing value of property, sale would be prejudicial to owners of residence located on two parcels, and awarding those parcels to nonowners would, due to parties' inability to cooperate with each other, interfere with owners' use of residence.

[7] Partition 288 91

[288](#) Partition
[288II](#) Actions for Partition
[288II\(B\)](#) Proceedings and Relief
[288k91](#) k. Officers, Commissioners, and Referees to Make Partition or Sale. [Most Cited Cases](#)
Appointment of referees was not required in partition action, where four parcels had clearly defined undisputed property lines, both parties agreed that it was not appropriate to break up two parcels, and district court relied on expert testimony in making its findings as to value of land. [M.S.A. § 558.04.](#)

[8] Partition 288 84

[288](#) Partition
[288II](#) Actions for Partition
[288II\(B\)](#) Proceedings and Relief
[288k80](#) Relief Incidental to Partition
[288k84](#) k. Owely, and Lien Therefor.
[Most Cited Cases](#)


Partition 288 91

[288](#) Partition
[288II](#) Actions for Partition


[288II\(B\)](#) Proceedings and Relief
[288k91](#) k. Officers, Commissioners, and Referees to Make Partition or Sale. [Most Cited Cases](#)
Determination as to amount of owely in partition action is for the court, rather than referees. [M.S.A. § 558.04.](#)

[9] Appeal and Error 30 842(1)

[30](#) Appeal and Error
[30XVI](#) Review
[30XVI\(A\)](#) Scope, Standards, and Extent, in General
[30k838](#) Questions Considered
[30k842](#) Review Dependent on Whether Questions Are of Law or of Fact
[30k842\(1\)](#) k. In General. [Most Cited Cases](#)
Construction of statute is question of law fully reviewable by appellate court.

[10] Partition 288 84

[288](#) Partition
[288II](#) Actions for Partition
[288II\(B\)](#) Proceedings and Relief
[288k80](#) Relief Incidental to Partition
[288k84](#) k. Owely, and Lien Therefor.
[Most Cited Cases](#)
District court was not required to consider capital gains tax consequences resulting from partition and owely to equalize partition.

[11] Partition 288 84

[288](#) Partition
[288II](#) Actions for Partition
[288II\(B\)](#) Proceedings and Relief
[288k80](#) Relief Incidental to Partition
[288k84](#) k. Owely, and Lien Therefor.
[Most Cited Cases](#)
Purpose of owely of partition is to equalize division of land with respect to interest of each party and not to deal with party's problems in accepting his share as distinguished from fixing his share.
**729 Syllabus by the Court*
1. The district court did not err in ordering a partition in kind of the real estate with owely to equalize the partition.

2. The district court did not err in making the partition without appointing referees.

3. In a partition action, the district court is not required to consider capital gains *730 tax consequences resulting from the partition and owelty.

[Joseph P. Bluth](#), Manahan & Bluth Law Office, Mankato, for Respondents.

[Michael P. Kircher](#), Sunde, Olson, Kircher and Zender, St. James, for Appellants.

Considered and decided by NORTON, P.J., and [KALITOWSKI](#) and [DAVIES](#), JJ.

OPINION

[KALITOWSKI](#), Judge.

This appeal arises from an action for partition of four parcels of farmland. Appellants, Mark Anderson, Marlys Johnson, and Pamela Anderson, challenge the district court's decisions: (1) to award parcels 1 and 2 to respondents Bernhard and Lucille Anderson and parcels 3 and 4 to appellants with owelty to equalize the partition; and (2) not to consider appellants' capital gains tax liability resulting from the award.

FACTS

Appellants and respondents each have an undivided one-half interest, as tenants in common, in four parcels of farmland as fully described in the district court's June 10, 1995, order. Respondents built a home and a garage on parcels 1 and 2, and their driveway and well are shared with appellants. In the partition action brought by respondents, both parties expressed a preference for parcels 1 and 2, and both parties requested that parcels 1 and 2 not be broken up. Respondents sought a partition in kind of the parcels, and appellants sought a sale at a public auction. However, at the hearing appellants testified they would be satisfied if the court awarded parcels 1 and 2 to one party and parcels 3 and 4 to the other, with owelty to equalize the partition. During the pendency of the partition action, respondents sought and obtained a temporary restraining order prohibiting appellant Mark Anderson or his agents from interfering with respondents' use of their residence.

The district court found that parcels 1 and 2 have a fair market value of \$614,000, parcel 3, \$183,900, and parcel 4, \$78,000. The court found breaking up parcels 1 and 2 would materially reduce the value of the property and cause great prejudice to the parties.

The court further found the parties were unable to cooperate with each other and that if appellants were awarded parcels 1 and 2 or purchased parcels 1 and 2 at a public auction, appellants' ownership of parcels 1 and 2 would conflict with respondents' ownership of their residence. The district court therefore ordered an in-kind partition, awarding parcels 1 and 2 to respondents and parcels 3 and 4 to appellants, provided that respondents pay appellants owelty in the amount of \$176,050. The district court stated it did not consider the tax consequences to appellants resulting from the award.

ISSUES

1. Did the district court err in granting an in-kind partition of real estate with owelty to equalize the partition?
2. Did the district court err in making partition without appointing referees?
3. Did the district court err in not considering the capital gains tax consequences resulting from its award?

ANALYSIS

[1][2] In Minnesota, an action for partition of real estate is statutory and the court is guided by the principles of equity in its decisions. [Swogger v. Taylor](#), 243 Minn. 458, 464-65, 68 N.W.2d 376, 382 (1955). On appeal, the district court's findings of fact shall not be set aside unless clearly erroneous. [Beebout v. Beebout](#), 447 N.W.2d 465, 467 (Minn.App.1989).

I.

[3][4] In a partition action, where it can be had without great prejudice to the owners, the law favors partition in kind rather than a sale. [Minn.Stat. §§ 558.01, 558.14 \(1996\)](#); [Swogger](#), 243 Minn. at 467, 68 N.W.2d at 384. "Until the contrary appears, the presumption prevails that partition in kind should be made." *Id.* The person requesting a sale has the burden of proving *731 that partition in kind cannot be made without great prejudice to the owners. *Id.*

[5] Further, when a partition cannot be made equal between the owners without prejudice to the rights or interests of some, the court may require

compensation to be made (owelty) to equalize partition. [Minn.Stat. § 558.11 \(1996\)](#); [Hoerr v. Hoerr, 140 Minn. 223, 225, 165 N.W. 472, 473 \(1917\)](#). The supreme court, however, has stated: Owelty should be decreed with caution. It should not be decreed except when necessary to make an equitable and fair division. A sale on partition may offer the preferable method.

[Hoerr, 140 Minn. at 226, 165 N.W. at 474](#). Nonetheless, the method of owelty should be used when an equal division cannot be had without great prejudice to the owners and a sale is likewise disadvantageous. [68 C.J.S. Partition § 142 \(1950\)](#).

[6] Here, the parties do not dispute the district court's finding that the four parcels of land cannot be divided equally without impairing the value of the property. Further, the evidence in the record supports the district court's finding that a sale would be prejudicial to respondents. Respondents' residence is located on parcels 1 and 2 and ownership of parcels 1 and 2 by appellants would, due to the parties' inability to cooperate with each other, interfere with respondents' use of their residence. In light of these findings, we conclude the district court did not err in determining that partition in kind with owelty is the proper method to effect an equitable and fair division of the property.

II.

[7][8] Appellants argue the district court erred in making partition without appointing referees. We disagree. “[I]n a proper case,” the court shall appoint referees to make partition and set off the shares of the parties as determined by the court. [Minn.Stat. § 558.04 \(1996\)](#). Here, it was not necessary to appoint referees because the property has clearly defined undisputed property lines and both parties agreed that it was not appropriate to break up parcels 1 and 2. In addition, referees were not needed because the determination as to the amount of owelty is for the court, not referees. [Kauffman v. Eckhardt, 195 Minn. 569, 574, 264 N.W. 781, 782 \(1936\)](#). Finally, because expert testimony was offered and relied on by the district court in making its findings as to the value of the land, we reject appellants' contention that an additional hearing was needed.

III.

[9][10] Appellants argue the district court erred in not considering their capital gains tax liability as a result of the partition and owelty. Appellants contend the partition statutes require the court to consider such tax consequences. The construction of a statute is clearly a question of law and thus fully reviewable by an appellate court. [Hibbing Educ. Ass'n v. Public Employment Relations Bd., 369 N.W.2d 527, 529 \(Minn.1985\)](#).

In arguing tax consequences should be considered in a partition action, appellants cite [Aaron v. Aaron, 281 N.W.2d 150 \(Minn.1979\)](#), a marriage dissolution case. In *Aaron*, the supreme court stated:

Generally, courts base the distribution of property on the value of the property at the time of distribution and, therefore, are willing to consider only those tax consequences that arise from the distribution itself.

Id. at 153.

[11] We conclude appellants' reliance on *Aaron* is misplaced. First, the laws and policy governing property distribution in a marriage dissolution are not controlling in a statutory action for the partition of real estate. Second, although appellants seek relief from their immediate tax consequences, when and if respondents or their heirs sell parcels 1 and 2, they will likely face capital gains tax consequences. See [Richmond v. Dofflemyer, 105 Cal.App.3d 745, 164 Cal.Rptr. 727, 732 \(1980\)](#) (court refused to consider capital gains tax consequences in a partition action, because “if respondents choose to sell the property awarded to them in the future, they will face capital gains tax consequences at that time”). Third, the purpose of “owelty of partition” is to equalize the division of the land with respect to the interest*732 of each party and not to deal with a party's problems in accepting his share as distinguished from fixing his share. [Rosanoff v. Skura, 50 Misc.2d 1090, 272 N.Y.S.2d 621, 623 \(N.Y.Sup.Ct.1966\)](#). As the court in *Skura* stated, if the court considers the tax consequences of one of the parties, then next the party who is in a higher tax bracket * * * or who has fewer deductions this year than he anticipates next year will also seek to avoid partition. If such is to be the law, it is for the legislature to say, not the courts.

Id.

In a partition action the district court is to be guided

by the principles of equity in its decisions. [Swogger, 243 Minn. at 464-65, 68 N.W.2d at 382](#). We conclude it was not inequitable and, therefore, not error for the district court not to consider the tax consequences resulting from the partition and owelty.

DECISION

The district court did not err in not appointing referees or by awarding parcels 1 and 2 to respondents and parcels 3 and 4 to appellants with owelty to equalize the partition. Further, the district court did not err in not considering appellants' tax liability resulting from the partition and owelty.

Affirmed.

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560 N.W.2d 729

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