Rel: May 21, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190623

Ann Langford

v.

Harriett Broussard

Appeal from Hale Circuit Court
(CV-17-900065)

STEWART, Justice.

Ann Langford appeals from a judgment entered by the Hale Circuit Court ("the trial court") in favor of Harriett Broussard regarding the

administration of an estate and the sale and division of real property. For the reasons discussed below, we affirm the judgment.

Facts and Procedural History

Mary Walker Taylor ("the mother") died in January 1998 leaving a will ("the will") that appointed two of her daughters, Ann and Harriett, as coexecutors of the will and provided, in pertinent part:

> "TWO: I have intentionally omitted my beloved daughter, Mary Elizabeth Taylor, from taking under this will for I have done for her during my lifetime and I know that my family will not let her suffer.
>
> "THREE: I give, devise and bequeath all of my property, both real, personal and mixed of which I die seized and possessed or to which I may be entitled to at the time of my death equally unto my two daughters, Harriet K. Taylor and Ann Taylor Langford, in fee simple absolutely.
>
> "Should one of my said daughters predecease me, or should we die in a common disaster then the deceased daughter's share hereunder to her child or children, per stirpes, and if she has no child or children then to the survivor of my said daughter in fee simple absolutely."

(Emphasis in original.)

In February 1998, Harriett and Ann filed in the Hale Probate Court ("the probate court") a petition to probate the will. Harriett, Ann, and

Mary Elizabeth Taylor, Ann and Harriett's sister who had been omitted from the will, filed a waiver of notice in which they each accepted service of notice of the filing of the petition for the probate of the will and waived further notice of the proceedings. The probate court admitted the will to probate. Thereafter, according to the materials in the record, it does not appear that any other action was taken in the probate court with respect to the administration of the estate.

Almost 20 years later, in October 2017, Harriett filed a petition in the trial court to, among other things, remove the administration of the estate from the probate court to the trial court. In her petition, Harriett also sought either the sale for division of certain real property pursuant to § 35-6-59 et seq., Ala. Code 1975, or, if the trial court determined that any of the real property was "heirs property," the partition by sale of the heirs property, pursuant to § 35-6A-1 et seq., Ala. Code 1975, the Alabama Uniform Partition of Heirs Property Act. The trial court entered an order pursuant to § 12-11-41, Ala. Code 1975, removing the administration of the estate from the probate court. Ann filed an answer to the petition in which she denied that the real property could not be equitably partitioned

and in which she asserted that the certain real property could not be sold or divided because Harriett had failed to join one or more indispensable parties (i.e., Harral Landry and George Landry[1]).

The action involved four parcels of real property: (1) approximately 1,358 acres in Hale County, containing pastureland and timberland, jointly and equally owned by Harriett and Ann ("the farm property") ; (2) a house and land on Tuscaloosa Street in Greensboro jointly and equally owned by Harriett and Ann ("the Tuscaloosa Street property"); (3) a parcel consisting of approximately 505 acres and subject to a lease with Weyerhaeuser Corporation of which Ann owned a 25% interest, Harriett owned a 25% interest, and Harral Landry and George Landry each owned a 25% interest ("the Weyerhaeuser property"); and (4) a property referred to by the parties as the Main Street Commercial Building, of which Harriett owned a 25% interest and Ann owned a 75% interest ("the

[1]Both Harral Landry and George Landry were eventually added as defendants to the action and later dismissed from the action by agreement.

commercial property"). The trial court appointed Robbie Hoggle to survey the properties and Calvin Perryman to appraise the properties.

The trial court held a hearing on January 22, 2018, after which the parties submitted briefs regarding their positions on the division of the estate property. In her brief, Ann argued that a portion of the proceeds from the mother's estate should be set aside to care for Mary. Ann asserted in her brief that the mother had not left anything to Mary because it would have affected government assistance that Mary received and that, as a result, the mother had left everything to Ann and Harriett for them to care for Mary. In her brief, Harriett argued that the mother had intentionally disinherited Mary and that Mary was not entitled to a portion of the mother's estate.

In November 2018, the trial court entered an order finding that all four parcels of property constituted heirs property and noting that the appraisal of the properties had been filed with the court. Ann filed a notice that she disputed the accuracy of the appraisal of the farm property and requested a hearing for the trial court to set the value of that property. Ann asserted, among other things, that Perryman had failed to

take into account varying soil conditions of the farm property and had failed to consider comparable sales in determining the value of the farm property. Ann stated that she had hired a different appraiser, Bobby Moorer, who would provide a report supporting her assertions.

The trial court held a hearing on April 5, 2019, to determine the value of the farm property. Ann called Moorer, who testified that he valued the farm property at approximately $3,093,000. According to Moorer, he had valued the bare land at $2,473,700, using the value of comparable properties, and then had added the value of the timber and the value of an improvement on the farm property. Moorer testified that he had valued the timber at $584,775 based on an appraisal by Tony Logan, a registered forester. Moorer acknowledged that Perryman had valued the timber at $152,178 in his appraisal. Moorer testified that he had assigned a value of $2,277.61 per acre to the farm property.

Tony Logan, the registered forester, testified that the farm property contained 288 acres of merchantable timber and 49 acres of pre-merchantable timber. Logan acknowledged that Hunter Brown, the forester used by Perryman, had determined that there were 323 acres of

timberland and that 48 acres contained pre-merchantable timber. Logan also acknowledged a discrepancy in the values he and Brown had assigned for the timber, and he testified that their difference of opinion regarding how many acres contained merchantable and pre-merchantable timber could account for that discrepancy. Brown also testified, and he could not explain the discrepancy between his value and Logan's value, but he acknowledged that values were based on individual opinions and that they could vary.

Perryman testified, but neither party asked many questions about his appraisal of the farm property. He testified that, even though a creek prevented easy access to the timber on the farm property, a buyer would find a way to get the timber out because of its high value. Perryman was also asked about one comparable property that he had used in valuing the farm property, and he testified that it was sufficiently comparable in size.

On May 6, 2019, the trial court entered an order setting the value of the four parcels of property. The trial court found, in pertinent part:

> "The parties presented such evidence as they desired at the hearing and the Court, after considering the Court-ordered

appraisal and the other evidence of value offered by the parties, concludes as follows:

"The total value, assuming sole ownership of the fee simple estate in accordance with [§] 35-6A-6(d), [Ala. Code 1975,] is as follows:

"Parcel One, referred to by the parties as Taylor Farm Tract - $3,500,000.00

"Parcel Two, referred to by the parties as the Weyerhaeuser Property - $435,482.00

"Parcel Three, referred to by the parties as the Main Street Commercial Building - $165,121.00

"Parcel Four, [on] Tuscaloosa Street - $54,000.00

"....

"As to the Farm, Mr. Perryman appraised the Farm at $3,500,000 and [Ann] hired Mr. Moorer and he appraised the Farm at $3,092,975. It is significant that the foresters hired by each had different values for the timber. However, even if the Court uses Mr. Moorer's value of the timber, there is still an issue with Mr. Moorer's appraisal of the bare land.

"Mr. Moorer's appraisal of the Farm was based upon three components. First, he appraised the bare land and added to that the value of the timber and the value of improvements. He appraised the bare land at $2,473,700 and, based upon 1,358 acres, that is a per acre value for the bare land of $1,821.57.

> "However, he used the comparable sales approach in appraising the bare land and he adjusted the per acre values of the comparable sales to make sure that, as he testified, [he] compared 'apples to apples.' However, the average adjusted per acre value of his comparables is $2,271.25 per acre for the bare land and the lowest adjusted per acre value of his comparables is $2,148 per acre. Multiplying either by 1,358 acres increases the value of the bare land, and when added to Mr. Moorer's timber value and improvements value, exceeds the total value for the Farm as appraised by Mr. Perryman. There was no explanation given by Mr. Moorer for this discrepancy and the Court accepts Mr. Perryman's appraised value of the Farm.
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> "This Order shall serve as notice to the parties of the value of each parcel.
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> "The respondent, Ann Langford, has not requested partition by sale, but did request the option to purchase her interest in the Main Street Commercial Building. Since she did not request partition by sale, in accordance with [§] 35-6A-7(d)(e)(1)(2), [Ala. Code 1975,] the Court orders that no later than thirty days from the date hereof, should the respondent, Ann Langford, desire to buy the interest of the petitioner, Harriett Broussard, in one or more of the parcels of property described above, she shall send notice to the Court and to the other parties stating that she elects to buy the interest of the petitioner, Harriett Broussard...."

In compliance with the trial court's order, Ann filed a notice that she intended to purchase Harriett's interest in all the properties. Specifically, Ann stated that "she intends to purchase the interest owned by Harriett

Broussard, in all real estate owned in part or in whole, by the Estate of Mary Walker Taylor, Deceased, in accordance with the Court's property values as set out in said Order." (Emphasis added.)

Thereafter, Harriett filed a motion seeking additional time in which to remove cattle that she had been keeping on the farm property in the event that Ann purchased that property, and she asked the trial court to hold a hearing on the remaining issues, which she stated included a division of certificates of deposit, cash, stock, and jewelry in the mother's estate and an ascertainment of the amount Ann had allegedly misappropriated from the mother's estate.

On June 19, 2019, the trial court entered an order directing Ann to pay a total amount of $1,927,150.75 to purchase Harriett's interests in the properties by October 1, 2019. In that order, the trial court also set the matter for a hearing on September 4, 2019, and it identified the following remaining issues:

"1. The division of the Certificates of Deposit.

"2. The division of the cash.

"3. The division of the bank stock.

> "4. The division of the jewelry and other personal effects of their mother.
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> "5. Ascertainment of the amount the Respondent Ann Langford owes to [Harriett] based upon erroneous previous charges to the estate.
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> "6. Dismissal of defendants, Harral and George Landry.
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> "7. The amount of time, if any, that the Petitioner, Harriett Broussard, needs for removal of the cattle after October 1, 2019."

On September 4, 2019, the trial court held a bench trial. Before the trial began, Harriett and Ann entered stipulations regarding issues 4, 5, 6, and 7, and the trial court stated that it would allow testimony regarding care for Mary and that it would reserve ruling on whether Mary was entitled to a portion of the mother's estate. The trial court also stated that it would not consider an assertion by Ann that she had been ousted from the farm property and, thus, was entitled to rent for the use of her share of the farm property during her ouster.

Ann called Mary to testify. Mary testified, among other things, that, at the time of the trial, she was 71 years old, that she lived with Ann, that she had everything she needed, and that she was doing "great."

Ann testified that Mary had suffered a brain injury at birth and that she required someone to care for her. Ann testified that Mary was very active in her church and in other areas of her life. At a previous hearing, Ann had testified that Mary can read and write, and that she can walk, but that she has limitations with her motor skills. Ann had also testified at a previous hearing that Mary has a "wonderful memory" and that she enjoys socializing, reading, working word puzzles, and going on trips. The trial court admitted, over objection, an exhibit of a proposed budget for Mary.

Ann also testified at length about various cows and bulls that she had witnessed on the farm property. According to Ann, Harriett had a cattle operation on the farm property but many of the cows were not Harriett's. Ann testified that the mother had previously leased the farm property to Jimmy Broussard, Harriett's former husband, and that the most recent lease, which had expired in December 2016, had been for $18,000 per year. Ann submitted numerous pictures of the cows and trailers loaded with cows. The trial court sustained Harriett's objection to the admission of that evidence and advised Ann that she could make an

offer of proof, but she did not do so at that point. Eventually, after the witnesses had testified, Ann's attorney made the following offer of proof regarding the rejected ouster claim:

> "That the overall testimony of these various witnesses would be that there is a family farming operation conducted on the [farm] property, that not all the cattle are Miss Broussard's cattle. Other people's cattle have been there and have been sold from there.
>
> "....
>
> "All these factors indicate that Miss Harriett Broussard has ousted Miss Ann Langford and that Miss Langford is entitled to three years' rent on the farm -- on her interest in the farm."

In response, Harriett argued that the mother's interests in the four parcels of real property had devolved to Harriett and Ann at the mother's death and that, thus, the properties were not part of the administration of the mother's estate but, rather, were only the subject of her claims under the Alabama Uniform Partition of Heirs Property Act. Harriett argued that Ann had not asserted an ouster claim, that this action was not the appropriate action in which to pursue such a claim, and that Ann could commence a separate action to pursue such a claim. Both parties

filed posttrial briefs. Ann attached deposition testimony to her posttrial brief, which the trial court struck on Harriett's motion.

On September 30, 2019, the trial court entered an order, pursuant to which Ann was required to pay $1,927,150.75 by October 1, 2019, to purchase Harriett's interests in the properties. Ann sought a three-week extension to finish acquiring a loan to purchase Harriett's interests. The trial court granted Ann's request, extending the deadline to October 22, 2019, over Harriett's objection. On October 21, 2019, Ann sought another three-week extension, also based on difficulties with the loan process. The trial court granted the request and extended the deadline to November 12, 2019. On October 29, 2019, Ann filed a notice informing the trial court that she could not obtain financing to purchase the farm property but that she intended to purchase Harriett's interests in the Weyerhaeuser property and the commercial property.

On November 12, 2019, Ann filed a motion asking the trial court to reconsider the appraisal submitted by Perryman. In her motion, Ann stated that she had hired Edwin Tillman, who, Ann asserted, had noted problems with Perryman's credentials and appraisal. Harriett filed a

response in which she asserted, among other things, that Ann had never objected to the court's valuation of the properties contained in its May 6, 2019, order. Harriett also filed a motion asking the trial court to declare that Ann's time to purchase Harriett's interests in the properties had expired, and she filed a notice of her intent to purchase Ann's interest in the farm property.

On November 13, 2019, the trial court denied Ann's motion to reconsider Perryman's appraisal. Ann filed another motion to reconsider, to which she attached documents from Tillman. Harriett filed a motion requesting that the trial court strike the attachments and deny Ann's most recent motion to reconsider. It does not appear that the trial court ever ruled on Harriett's motion to strike.

The trial court held a hearing on December 16, 2019, at which it heard arguments regarding Ann's most recent motion to reconsider. On December 23, 2019, the trial court entered an order in which it denied Ann's motion but allowed Ann until the first week of January 2020 to purchase Harriett's interests in the properties. The trial court ordered that, if Ann failed to meet that deadline, her right to purchase Harriett's

interests in the properties would be deemed to have expired and Harriett would have the option to purchase Ann's interests in the properties. That same day, the trial court entered another order with detailed findings. The relevant portion of that order provides:

> "At some point, [Ann and Harriett] became estranged, but [they] have each equally contributed to the financial maintenance and support of [Mary] up to this date. Any shortfall of Mary's expenses is borne equally by the two sisters through the use of the 'Estate' account or the 'Store' account.
>
> "The Estate has not been closed and the real property was never divided between [Harriett] and [Ann], prior to this suit.
>
> "....
>
> "The Suit
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> "The Complaint contains two separate claims. The first was filed by [Harriett] as joint tenant in common with [Ann] for the four parcels of real estate. She asked the Court to determine if the property was 'Heirs Property' under the statute and to partition or sell the properties.
>
> "The second aspect dealt with dividing and closing the Estate. [Harriett] asked for the division of the personal property and accounting by [Ann] and for the Court to close the Estate.
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> "[Ann] did not file any claims in the Estate portion of the case pertaining to their sister, Mary, nor did she file any claim

contending loss of rent or use due to [Harriett's] cattle business on the Taylor farm [property] which is one of the four parcels.

"In connection with the partition of the real estate, the Court ordered that this was 'Heirs Property' and ordered an appraisal and a survey. After a valuation hearing, [Ann] exercised her option under the 'Heirs Statute' to purchase all four properties. On June 19, 2019, the Court entered an order setting forth the values of those four properties and that [Ann] would be paying the purchase price ordered by the Court [$1,927,150.75] on October 1, 2019. The only thing left ancillary to the real estate was the removal of the cattle by [Harriett] and it has been stipulated and agreed that after [Ann] pa[id] the money on October 1, that [Harriett] [would] remove the cattle from the farm on October 2. (The issue of payment and appraisal was taken up at an additional hearing set December 16, 2019. The Court entered an order based upon that hearing. That order is incorporated herein by reference.)

"That left pending the Estate matters and the Court requested proposed orders on the issues to be resolved concerning the Estate. At that time [Ann], and for the first time, contended that two issues remained in the case: (1) that the personal property of the Estate should not be distributed, but some amount should be held for the benefit of their sister, Mary, and (2) as part of the Estate that [Ann] claimed rent or damages as a result of [Harriett's] occupation of the farm [property] for her cattle operation. The Court determined that those two matters were outside the scope of the future hearing and limited the issues involved in this hearing, eventually set for September 4, 2019.

"....

"At the September 4 hearing, the Court allowed [Ann] to present evidence concerning financial support for their sister, Mary. The Court allowed [Ann] an offer of proof concerning the issue of 'ouster' because of [Harriett's] cattle business on the farm.

"Dividing the Personalty and Closing the Estate

"[Harriett] and [Ann], as joint executrixes, continue to hold the personal property in the Estate. That personal property is described as follows:

"1. Nine Certificates of Deposit. ...

"2. 1,700 shares of Citizens BancShares, Inc. stock. ...

"3. The amount in the Taylor/Langford Account (Store Account) ... is $6,827.04. The balance in the Mary W. Taylor Estate File Account ... is $97,273.07. ...

"The requirements of the Bank for the redemption or transfer of this property was testified to by Lisa Cochrane and is summarized in her report ....

"4. The [mother's] jewelry ....

"It is [Harriett's] position that this is the property jointly and equally owned by [Harriett] and [Ann] and it should be divided by the Court so that the Estate can then be closed. It is [Ann's] position that money should be withheld from [Harriett] and [Ann] to be used as needed for and by their sister, Mary Elizabeth Taylor. However, [Ann] has never filed any pleading in this case requesting the same and [Harriett] has not agreed to the trial of that issue. The only reference was in a brief filed by [Ann]. [Ann] asserted from the witness

stand that she could pursue the issue as a sister. Mary Elizabeth has never been a party in this case.

"[Harriett] then briefed this issue on June 27, 201[9] .... The Court finds that Mary Elizabeth Taylor has been omitted from the Will by the express words necessary to do so. Wilder v. Loehr, 211 Ala. 651, 101 So. 591 (1924). [The mother] expressly used the word 'intentionally' and explained why. Then she bequeathed all of her property equally to [Harriett] and [Ann] 'to be theirs in fee simple absolutely.' Tucker v. Bradford, 599 So. 2d 611 (Ala. 1992); Guion v. Guion, 100 So. 2d 351 (Miss. 1958); Quigley v. Spencer, 172 A. 253 (R.I. 1934).

"In short, the Court finds the defendant, [Ann], asks this Court to refrain from dividing the personal property (a) in order to hold the money for an excluded heir; (b) without any right to do so; and (c) contrary to the express terms of the Will. [Harriett] asks that the Court order the equal division of the personal property between her and [Ann], award [a] broach to [Harriett], and close the estate and the Court agrees.

"[ANN]'S CLAIM IN THIS CASE FOR
USE OF THE FARM AGAINST [HARRIETT]

"Real property devolves immediately to the devisees and, thus, [Harriett] and [Ann] are and have been co-tenants of the real property. Accordingly, the personal representative is generally not in possession or control of the real property. Schlumpf v. D'Olive, 203 So. 3d 57 (Ala. 2016).

"There has been no counterclaim filed in this case by [Ann] against [Harriett] as a joint tenant and this claim for the rent has never been [pleaded] or become any part of this lawsuit. It certainly cannot be a claim against the Estate when one of two joint tenants used the property. The claim that

> [Ann] attempts to present is not part of this lawsuit. It has been properly excluded by the Court.
>
> "Furthermore, the Court grants [Harriett's] Motion to Strike the Deposition Excerpts offered by [Ann] in her post-trial brief. That violates Rule 32, [Ala. R. Civ. P.]
>
> "However, the Court finds from the evidence put on by [Ann] that there was no 'ouster.' She has never been denied entry to the [farm] property. In fact, she testified that she has gone onto the farm [property] almost daily and sometimes at night. She had over one hundred photographs she has taken over the past three years of the [farm] property. She knows which cows have which brands. She knows about the cows and bulls coming and going. There is no lock on the gate. [Harriett's] son, Taylor, is there daily and he has never even attempted to prevent her from entering the [farm] property. There has been no ouster. Spiller v. Mackereth, 334 So. 2d 859 (Ala. 1975).
>
> "This claim is not part of the Estate and the Court finds that [Ann] has proven there has been no ouster.
>
> "....
>
> "Since the Court is able to dispose of the personalty in the Estate and the accounting has been stipulated [to] by the parties, the same constitutes a full and final settlement of the Estate. The Court, therefore, orders the Estate closed and discharges [Harriett] and [Ann] as executrixes of the Estate of Mary Walker Taylor."

On January 14, 2020, after Ann failed to pay the $1,927,150.75 to purchase Harriett's interests in the properties, the trial court entered an

order finding that Ann's right to purchase the farm property had expired and that Harriett had 90 days in which to purchase that property. The trial court further ordered that, "[i]f [Ann] has an objection to the same and/or if [she] is not agreeable to the proposal set forth in [Harriett's] motion for the sale of the farm [property], the commercial property and the Weyerhaeuser property, then she shall notify the Court within three days of this Order." Ann did not file any objection. On February 11, 2020, the trial court entered an order, based upon the agreement of the parties, to sell the Tuscaloosa Street property at a public sale.

On March 24, 2020, after a hearing, the trial court entered an order "Pursuant to [§] 35-6A-7(e)(4)(A) of the Code of Alabama, and the agreement of the parties," divesting Ann of any interest in the farm property and vesting Harriett with all interest in the farm property upon payment of $1,750,000 to the trial-court clerk. That same day, the trial court entered an order approving the sale of the Tuscaloosa Street property for $42,000 to Taylor Broussard, Harriett's son.

On March 27, 2020, the trial court entered a final judgment in which it ordered the following:

"1. The Respondent, Ann Langford, has paid the sum of money into Court for the reallocation of the interests in both the Weyerhaeuser Property and the Commercial Property. Therefore, the Clerk is Ordered, after deduction of 1% for the payment into the General Fund, to pay the balance to the Petitioner, Harriett Broussard.

"2. Upon payment to the Petitioner, Harriett Broussard, she shall be divested of any right, title or interest in and to the Weyerhaeuser Property and in and to the Commercial Property.

"3. It is further Ordered that upon presentment to the Clerk by the Respondent, Ann Langford, of a Clerk's Deed conveying the interest of Harriet Broussard to the Respondent in the Weyerhaeuser Property and the Commercial Property, that the Clerk shall execute and deliver said deed to the Respondent, Ann Langford, vesting in the Respondent all of Petitioner, Harriett Broussard's, interest in and to the Weyerhaeuser Property and the Commercial Property.

"4. The Court has previously entered its Order on March 24, 2020, approving the reallocation of the interest in the Farm [property] divesting Ann Langford of any right, title or interest in and to the same and to vest 100% in the Petitioner, Harriett Broussard, upon her presentment and payment of $1,750,000.00 to the Clerk of this Court. Since the Respondent has indicated (but is not bound) that there may be an appeal forthcoming on the issue of the appraisal of the Farm [property], [Harriett] may delay payment until the expiration of the time for appeal or the conclusion of all appeals.

"5. The Court has previously approved the public sale of [the] Tuscaloosa Street [property].

> "6. Therefore, all four of the properties have been disposed of leaving only ministerial actions by the Clerk in connection with the Weyerhaeuser Property, the Commercial Building and the Farm [property] and, therefore, this is the Final Judgment in this case, costs taxed as paid."

Ann filed a motion to amend the final judgment in which she argued only that Harriett should not be permitted to delay payment for the farm property pending an appeal. The trial court granted the motion and ordered Harriett to pay the money into court to receive the deed to the farm property without waiting for the conclusion of any appeals. Ann appealed to this Court.

Discussion

I. Harriett's motion to dismiss or strike

Harriett filed with this Court a motion to dismiss or strike two of Ann's arguments as noncompliant with Rule 3(e), Ala. R. App. P., which concerns the filing of the docketing statement. Harriett argues that Ann did not include on the docketing statement her issues concerning whether the trial court was required to add Mary as a party and whether the trial court erred in failing to find that the farm property could not be equitably divided before allowing Harriett to purchase it. As discussed below, an

appellant may challenge a trial court's failure to add a necessary party for the first time on appeal. See Capitol Farmers Mkt., Inc. v. Delongchamp, [Ms. 1190103, Aug. 28, 2020] ___ So. 3d ___, ___ (Ala. 2020). Therefore, Ann's failure to include that issue on the docketing statement would not preclude her from raising it on appeal. With regard to Ann's argument that the trial court was required to find that the farm property could not be equitably divided before permitting Harriett to purchase Ann's interest in that property, Ann has raised that argument for the first time on appeal and, therefore, we decline to address that issue. See Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala. 1992). Accordingly, this Court finds it is unnecessary to grant Harriett's motion to dismiss or strike, and we deny the motion.

II. Whether Mary was a necessary party

Ann argues that the trial court erred in failing to add Mary as a party to the action because, she asserts, Mary was entitled to receive a share of the mother's estate. Ann also argues that the trial court erred in failing to appoint a guardian ad litem to represent Mary's interests

because, she asserts, Mary is non compos mentis.[2] Harriett argues that Ann raises these arguments for the first time on appeal, that Mary should not have been added as a party because she was not entitled to receive anything under the unambiguous terms of the will, and that there is no evidence to support Ann's assertion that Mary is non compos mentis.

Although Ann did not attempt to add Mary as a party during the trial-court proceedings, a challenge to a trial court's failure to add a necessary party may be raised for the first time on appeal. Capitol Farmers Mkt., ___ So. 3d at ___. However, "the absence of an indispensable party does not deprive the circuit court of subject-matter jurisdiction." Miller v. City of Birmingham, 235 So. 3d 220, 230 (Ala. 2017)(citing Campbell v. Taylor, 159 So. 3d 4 (Ala. 2014)).

Rule 19, Ala. R. Civ. P., entitled "Joinder of Persons Needed for Just Adjudication," provides, in pertinent part:

> "(a) Persons to Be Joined If Feasible. A person who is subject to jurisdiction of the court shall be joined as a party in

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[2]"Non compos mentis," which is Latin for "not master of one's mind," is defined as "insane" or "incompetent." Black's Law Dictionary 1263 (11th ed. 2019).

> the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party."

This Court has previously explained:

> " 'Rule 19, [Ala.] R. Civ. P., provides a two-step process for the trial court to follow in determining whether a party is necessary or indispensable. Ross v. Luton, 456 So. 2d 249, 256 (Ala. 1984), citing Note, Rule 19 in Alabama, 33 Ala. L. Rev. 439, 446 (1982). First, the court must determine whether the absentee is one who should be joined if feasible under subdivision (a). If the court determines that the absentee should be joined but cannot be made a party, the provisions of (b) are used to determine whether an action can proceed in the absence of such a person. Loving v. Wilson, 494 So. 2d 68 (Ala. 1986); Ross v. Luton, 456 So. 2d 249 (Ala. 1984). It is the plaintiff's duty under this rule to join as a party anyone required to be joined. J.C. Jacobs Banking Co. v. Campbell, 406 So. 2d 834 (Ala. 1981).' "

Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1021-22 (Ala. 2003)(quoting Holland v. City of Alabaster, 566 So. 2d 224, 226 (Ala. 1990)). "The question whether a

nonparty is a necessary party is governed by Rule 19(a); the question whether a party is an indispensable party is governed by Rule 19(b)." Ex parte Advanced Disposal Servs. S., LLC, 280 So. 3d 356, 360 (Ala. 2018). If a party is not deemed to be necessary under Rule 19(a), it follows that that party could not be considered "indispensable" under Rule 19(b).

We can determine whether Mary should have been joined as a necessary party by first asking if complete relief could have been afforded between Ann and Harriett in Mary's absence. To make that determination, we must look to the nature of the action. Harriett commenced an action to settle the mother's estate and to partition by sale real property. In settling the estate, the trial court was required to follow the language of the will, which states: "I have intentionally omitted my beloved daughter, Mary Elizabeth Taylor, from taking under this will for I have done for her during my lifetime and I know that my family will not let her suffer."

Ann argues that Mary "has a colorable claim to share her mother's Estate along with her sisters which should be properly presented to and considered by the trial court." Ann's brief at p. 36. The trial court

addressed Ann's contention that Mary was entitled to share in the estate in its December 2019 order and specifically found that Ann had not filed any pleadings in the case making that request, that Harriett had not agreed to try that issue, and that Mary was not a party to the case. Nevertheless, the trial court found that Mary was intentionally omitted from the will, and it declined to set aside money from the mother's estate for Mary's benefit.

In support of her argument that Mary is entitled to inherit a portion of the mother's estate, Ann asserts that the language of the will is ambiguous as to whether it was the mother's intention that Mary would receive nothing from the proceeds of her estate. Ann contends that the language omitting Mary conflicts with the language evidencing the mother's intent that Mary would be provided for, and she argues that the conflict must be considered in light of the presumption that parents do not intend to disinherit their children. Ann also makes numerous other will-construction arguments and cites authorities relating to the construction of wills. However, there was no need to construe terms of the will in this case. "It is an elementary principle that intention must be found in the

instrument itself; that, where the language of the instrument is unambiguous and perfectly clear, there is no field for the play of construction ...." First Nat'l Bank of Montgomery v. Sheehan, 220 Ala. 524, 527, 126 So. 409, 412 (1930). See also Smith v. Nelson, 249 Ala. 51, 54, 29 So. 2d 335, 338 (1947)(explaining that, if a will is unambiguous, "there is no case for construction"). The will clearly divides the mother's estate between Harriett and Ann in fee-simple absolute, and the will unambiguously and intentionally omits Mary.

In Tucker v. Bradford, 599 So. 2d 611 (Ala. 1992), the testator bequeathed his estate to his daughter " 'to divide and disperse as she sees fit or to be held in trust by her alone for any period of time she wishes.' " 599 So. 2d at 612. The testator's will further provided that the daughter " 'may designate at [the testator's] death what portions of [his] estate will go to others according to agreement between her and [the testator].' " Id. This Court held that, "because there are no provisions for [the daughter] to disperse the property to specific beneficiaries, [she] took the property as a beneficiary" and, further, that "the language of the will expressly devise[d] the property of the estate to [the daughter], and ... any

implication that [the testator] did not intend to disinherit the [other family members] is insufficient." Id. at 613. The language of the mother's will in this case was much clearer and expressly disinherited Mary. There is no ambiguity and, therefore, no room for construction.

Accordingly, because Mary was not a beneficiary under the will or a joint tenant of the property devised in the will, she had no actual interest in the outcome of this action for the final administration of the mother's estate and the partition by sale of the properties jointly owned by Harriett and Ann. Therefore, the trial court could settle the estate and divide the properties -- affording complete relief to Harriett and Ann -- without adding Mary as a party. See Rule 19(a)(1). Furthermore, this Court has held that "joinder of the absent parties is not absolutely necessary where determination of the controversy will not result in a loss to the absent parties' interest or where the action does not seek a judgment against them. Morgan Plan Co. v. Bruce, 266 Ala. 494, 497-98, 97 So. 2d 805, 808 (1957)." Byrd Cos. v. Smith, 591 So. 2d 844, 846 (Ala. 1991). Accordingly, because relief could be afforded in Mary's absence and the determination of the action did not "result in a loss to [her] interests,"

see id., Mary was not a necessary party and the trial court was not required to add her as a party to the action.

As mentioned above, Ann also argues that, pursuant to Rule 17(c), Ala. R. Civ. P., the trial court should have appointed a guardian ad litem to represent Mary's interests. We need not reach this issue, however, because of our determination that Mary was not required to be added as a party.[3]

III. Whether the trial court erred in granting Harriett the right to purchase Ann's interest in the farm property without first determining that the farm property could not be equitably divided

Ann argues that the trial court erred in ordering that Harriett could purchase Ann's interest in the farm property and that Ann was divested of her interest in that property without the trial court's first finding that the property could not be equitably divided between them. Ann asserts that she had argued that the farm property could be divided and that, under § 35-6A-6(f) and (g), Ala. Code 1975, the trial court was required to

[3]We also note that, as Harriett points out, any evidence demonstrating that Mary was non compos mentis is lacking from the record and that the trial court had the opportunity to witness Mary and her alleged incompetence because Ann called her to testify.

set the value of the property and then determine the merits of the partition action. Ann further argues, citing § 35-6A-8(a), Ala. Code 1975, that a partition of heirs property must be a partition in kind, rather than a partition by sale, if any party requests it, unless the court finds that partition in kind would result in great prejudice to the cotenants, and that no evidence was presented that the farm property could not be equitably divided. Ann further argues that she did not waive the right to have the farm property partitioned in kind by first offering to purchase Harriett's interest in the farm property and then failing to do so.

Harriett argues that the parties agreed to the disposition of the properties and that, as a result, the trial court was not required to follow the procedures in the statutes upon which Ann relies. Ann argues that she did not agree to the disposition of the farm property, and Ann cites § 34-3-21, Ala. Code 1975, in asserting that any agreement the parties might have reached was required to be made in writing or in open court to be effective. Ann cites a portion of the record from the March 9, 2020, hearing, at which her attorney stated that, if Harriett's attorney "thought that at some point that [Ann] was agreeing to waive any right that [she]

had to appeal the Court's order, he's wrong. At the hearing in Marion we made clear to the Court that we thought the appraisal was incorrect and that the selection of the appraiser was incorrect and we reserved that right on appeal and we still do." First, Ann's attorney stated that he did not agree to waive the right to appeal the appraisal issue -- he did not state that he did not agree to the proposal regarding the sale of the farm property. Second, § 34-3-21 concerns the authority of an attorney to bind his or her client to an agreement, and it does not support Ann's argument.

Regardless of whether there was any agreement, Ann did not first raise in the trial court her argument that the trial court was required to determine that partition in kind was inequitable before allowing Harriett to purchase the farm property. It is well settled that "[t]his Court cannot consider arguments raised for the first time on appeal; rather, our review is restricted to the evidence and arguments considered by the trial court." Andrews v. Merritt Oil Co., 612 So. 2d at 410. See Rodriguez-Ramos v. J. Thomas Williams, Jr., M.D., P.C., 580 So. 2d 1326, 1328 (Ala. 1991)(noting that an appellate court "cannot put a trial court in error for failing to

consider a matter which, according to the record, was not presented to, nor decided by it").

In its January 14, 2020, order, the trial court specifically stated:

> "It is further Ordered that the Petitioner, Harriett Broussard, has until April 13, 2020, to complete her purchase of the farm [property] and to pay 50% of the $3,500,000.00 into Court by that date.
>
> "If [Ann] has an objection to the same and/or if [she] is not agreeable to the proposal set forth in the Petitioner's motion for the sale of the farm [property], the commercial property and the Weyerhaeuser property, then she shall notify the Court within three days of this Order."

Ann did not file an objection or otherwise challenge Harriett's right to purchase the farm property. In addition, Ann did not file any postjudgment motion raising the issue she now seeks to raise on appeal. Ann's postjudgment motion sought to amend the judgment only insofar as it permitted Harriett to delay payment for the farm property pending an appeal. Because Ann did not first raise her argument in the trial court, we will not consider it on appeal.

IV. Whether the trial court erred in denying Ann's request for a new appraisal

Ann argues that the trial court exceeded its discretion in failing to order a new appraisal of the farm property. Ann cites the discrepancy between Perryman's appraisal and Moorer's appraisal, and she asserts that Perryman's appraisal was inaccurate. Ann also relies on a document from Tillman, another appraiser, that found problems with Perryman's appraisal and that she filed with her most recent motion to reconsider the appraisal.

Although Ann initially objected to Perryman's appraisal, the trial court held a hearing on her objection and received ore tenus testimony from Perryman and Moorer. After the hearing, the trial court entered an order in which it listed specific, irreconcilable issues that it had found regarding Moorer's appraisal, and it accepted Perryman's appraisal and fixed the value of the farm property at $3,500,000. Thereafter, Ann filed a motion in which she agreed with the trial court's valuation of the properties and agreed to purchase the properties at that value. In November 2019, only after she could not obtain financing, Ann asked the trial court to reconsider the appraised value of the farm property. The trial court denied Ann's request, and, thereafter, Ann requested that the

trial court reconsider its denial and submitted Tillman's report. After holding a hearing, the trial court declined to order a new appraisal.

Ann does not explain why the ordering of a new appraisal is necessary or what she hopes to gain from such action. Insofar as Ann's position could be construed as arguing that a new appraisal would lower the value of the farm property to allow Ann to purchase Harriett's interest in the farm property -- that argument is moot. " 'The test for mootness is commonly stated as whether the court's action on the merits would affect the rights of the parties.' " Chapman v. Gooden, 974 So. 2d 972, 983 (Ala. 2007)(quoting Crawford v. State, 153 S.W.3d 497, 501 (Tex. App. 2004), citing in turn VE Corp. v. Ernst & Young, 860 S.W.2d 83, 84 (Tex. 1993)). As explained above, Ann failed to lodge a challenge in the trial court to the judgment granting Harriett the right to purchase Ann's interest in the farm property, and, therefore, we are affirming the judgment in that respect. Accordingly, this Court's determination regarding whether a new appraisal should have been ordered would not affect the rights of the parties because Harriett's purchase of Ann's interest in the farm property

stands as ordered in the judgment.[4] Accordingly, Ann has not demonstrated that the trial court erred in refusing to order a new appraisal.

V. Whether the trial court properly excluded Ann's proposed claim of ouster

Ann argues that the trial court erred in refusing to allow her to present a claim of ouster or to recover rent as a consequence of the alleged ouster. Harriett argues that that claim was not properly pleaded or tried by express or implied consent.

Ann contends that she asked in her answer for "any other relief to which she may be entitled," that Harriett was on notice of her proposed claim of ouster through questions she asked during discovery, and that Rule 15(b), Ala. R. Civ. P., requires a trial court to be liberal in granting

[4]The only conceivable way that Ann's rights could be affected by the ordering of a new appraisal would be if the appraised value of the farm property were lowered, which would lower the value of her and Harriett's interests in the farm property. Under such a hypothetical scenario, Ann would be entitled to receive less than what Harriett paid to purchase Ann's interest in the farm property -- an argument Ann does not raise for obvious reasons. Accordingly, Ann has not raised any argument that would indicate that her rights could be affected by the ordering of a new appraisal, further supporting a conclusion that her argument is moot.

an amendment to pleadings and allows for the pleadings to be amended to conform to the evidence.

Ann relies on Johnson v. Montgomery Baptist Hospital, 326 So. 2d 738 (Ala. 1976), in which this Court reversed a trial court's ruling refusing to allow a plaintiff to amend her complaint after the defendant had moved for a directed verdict (now referred to as a judgment as a matter of law, see Rule 50, Ala. R. Civ. P.) based on a variance between the plaintiff's pleadings and the evidence presented at the trial. This Court noted that the defendant had notice of the nature of the plaintiff's claims based on her complaint and that the defendant would not have been prejudiced by the amendment. Johnson is entirely distinguishable from the present case because, here, Ann was the defendant and did not have a complaint or a counterclaim that she sought to amend. Moreover, Ann did not present evidence in support of an ouster claim, because the trial court disallowed that claim. Ann's offer of proof merely showed that Harriett had allegedly engaged in certain activities on the farm property. As discussed more below, such evidence would not have supported a claim of ouster. Accordingly, Johnson does not support Ann's argument.

Ann also cites Spiller v. Mackereth, 334 So. 2d 859 (Ala. 1976), in stating: "A counterclaim for rent as a consequence for ouster is properly considered as a counterclaim in a sale for division." Ann's brief at pp. 56-57. Ann again overlooks the fact that she did not file a counterclaim.

Ann also argues that the trial court, despite ruling that she could not present an ouster claim, erroneously concluded that Ann had not presented evidence indicating that there had been an ouster. As explained above, although the trial court disallowed the ouster claim, it permitted Ann to make an offer of proof. In making that offer, Ann's attorney stated that the proposed testimony would indicate "that there is a family farming operation conducted on the [farm] property, [and] that not all the cattle are Miss Broussard's cattle. Other people's cattle have been there and have been sold from there." Ann's attorney further stated that those "factors indicate that Miss Harriett Broussard has ousted Miss Ann Langford and that Miss Langford is entitled to three years' rent on the farm -- on her interest in the farm."

In the context of this case, ouster would involve "the liability of an occupying cotenant for rent to other cotenants." Spiller, 334 So. 2d at 861.

This Court in Spiller noted that "[t]he normal fact situation which will render an occupying cotenant liable to out of possession cotenants is one in which the occupying cotenant refuses a demand of the other cotenants to be allowed into use and enjoyment of the land ...." 334 So. 2d at 861. Ann argues that the trial court incorrectly determined that she could not establish a claim of ouster because she was not denied physical entry onto the farm property. Ann argues that she could establish ouster by showing that she was denied the use and enjoyment of the farm property.[5] As this Court further explained in Spiller, however:

> "[B]efore an occupying cotenant can be liable for rent in Alabama, he must have denied his cotenants the right to enter. It is axiomatic that there can be no denial of the right to enter unless there is a demand or an attempt to enter. Simply requesting the occupying cotenant to vacate is not sufficient because the occupying cotenant holds title to the whole and may rightfully occupy the whole unless the other cotenants assert their possessory rights."

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[5]Ann acknowledges that the facts in Spiller are different than the facts in this case, but she asks this Court to "imagine" if the facts in Spiller had been the facts allegedly present in this case -- that one cotenant had refused to allow the other to make profitable use of the property. As noted above, those alleged facts were stricken by the trial court, and the members of this Court are not in the habit of using their imaginations, rather than actual evidence and holdings, in deciding cases.

Id. at 862.

As explained above, Ann did not present or proffer evidence indicating that she had demanded the right to enter the farm property but had been denied that right. Likewise, Ann's argument that she could demonstrate ouster by showing that she was denied the use and enjoyment of the farm property also fails because she did not present or proffer evidence indicating that she was denied the use and enjoyment of the farm property.

Ann states in her brief that the proffered evidence would have demonstrated that Ann had received lucrative offers to lease the farm property. However, Ann did not include that proposed evidence in her offer of proof or otherwise attempt to present it at the trial.[6] Although Ann made those allegations in her posttrial brief and attempted to present deposition testimony to that effect, that testimony was stricken by the trial court in its December 23, 2019, order, and Ann did not challenge that

[6]Ann also asserts that the factual record supporting her ouster claim is not as well developed as it would have been if she had been permitted to present her claim. She also asserts that she was prevented from making a proffer of certain evidence. This assertion is not supported by the record.

ruling in the trial court and does not challenge it on appeal. Accordingly, the trial court correctly concluded that Ann had not presented evidence, or demonstrated in her offer of proof, that an ouster had occurred.

Conclusion

Because the judgment is clearly supported by the evidence in the record and Ann has failed to demonstrate any error on the part of the trial court, the judgment is affirmed.

MOTION TO DISMISS OR STRIKE APPELLANT'S ARGUMENTS DENIED; AFFIRMED.

Bolin, Wise, and Sellers, JJ., concur.

Parker, C.J., concurs in the result.