COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2021-P-0361

SUFFOLK, ss.

CHARLES R. DUNN, Petitioner - Appellee,

V.

BARBARA A. HOWARD, Respondent - Appellant.

ON APPEAL FROM THE LAND COURT DIVISION OF THE TRIAL COURT

BRIEF FOR THE RESPONDENT/APPELLANT,

BARBARA HOWARD

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June 14, 2021

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STATEMENT OF THE ISSUES

1. Whether an action for partition of real property pursuant to G.L. c. 241 severs joint ownership of real property at any stage of the proceeding prior to the conveyance of the property or the entry of the final decree pursuant to G.L. c. 241, §16, thereby converting the joint tenancy to a tenancy in common, and if so, at what stage in the action for partition does the severance occur.
2. Whether G.L. c.241 §26 confers upon Dunn's heirs at law any standing to proceed on behalf of the deceased joint tenant.
3. Whether the Court erred by denying the motion of the respondent, Barbara Howard, to dismiss the petition for partition following the death of the Charles Dunn, the petitioner and joint tenant of the subject property.

STATEMENT OF THE CASE

Charles Dunn filed a petition for partition pursuant to G.L. c. 241 on July 29, 2020. Appendix at 16. (Hereinafter, references to the Appendix will be cited as "(R.A. page)." Barbara Howard filed an answer, affirmative defenses and objection on August 17, 2020. R.A.24. On September 14, 2020, the Land Court (Foster, J.) issued an interim order appointing a commissioner. R.A.28. In the interim order, the court made a finding that the property was "held by the two parties in equal shares as joint tenants and could not be advantageously divided." R.A.29.

On December 11, 2020, the court issued a warrant to the commissioner to sell the property. R.A.56. On December 16, 2020, the court issued an amended warrant which corrected some typographical errors, without making any substantive changes to the original warrant. R.A.64.

On February 1, 2021, the commissioner filed a report and a motion asking the court for leave to enter into a purchase and sale agreement with proposed buyers. R.A.72. On February 1, 2021, the Court asked the Commissioner to file a proposed purchase and sale agreement. R.A.7. The Court did not take any action

on the motion of the Commissioner for approval of the purchase and sale agreement. R.A.7.

Dunn passed away on February 16, 2021. R.A.91. On February 19, 2021, Howard filed a motion to stay proceedings as a result of the Dunn's death. R.A.93. A week later, on February 26, 2021, Howard filed a motion to dismiss the proceedings for lack of subject matter jurisdiction, pursuant to Mass.R.Civ.P. 12(b)(1). R.A.97. An opposition to the motion to dismiss was filed on behalf of Dunn. R.A.101. That same day, the court held a hearing on the respondent's motion to stay proceedings. R.A.8. The matter was taken under advisement. R.A.8.

On March 4, 2021, the court issued a memorandum and order Howard's motion to stay proceedings and her motion to dismiss. R.A.103. The court allowed the commissioner's motion for authority to enter a purchase and sale agreement. R.A.103.

On March 11, 2021, Howard timely filed a notice of appeal to the single justice of the Appeals Court, as well as a motion to stay certain provisions of the memorandum and order dated March 4, 2021. R.A.109. On March 11, 2021, Land Court issued an order staying all proceedings in the partition, including the

commission's authorization to execute a purchase and sale agreement, until the court could hold a hearing on the respondent's motion. R.A.9.

Following a hearing on March 12, 2021, Land Court stayed all proceedings, including the commissioner's authorization to execute a purchase and sale agreement, until March 15, 2021 to allow the respondent to seek a stay from single justice of the Appeals Court. R.A.9.

On March 15, 2021, a single justice of the Appeals Court (2021-J-0104; Meade, J.) instructed the commissioner to take no further action to consummate the conveyance of the property. R.A.9. On April 2, 2021, the single justice issued a decision declining to grant Howard relief, inasmuch as Howard was appealing from an interlocutory order. R.A. 111. Instead, the single justice granted leave for Howard to file the instant appeal. R.A.111. A timely notice of appeal was filed on April 9, 2021. R.A.113.

STATEMENT OF FACTS

Dunn and Howard purchased a property located at 25 and 27 Glenarm Street, Dorchester, MA ("the Property"). R.A.16. They purchased the property on February 23, 1993. R.A.17. The deed to Dunn and Howard conveyed the property to them as joint tenants. R.A. 21.

The property consists of two parcels. R.A.35. A residence is situated on the parcel identified as 25 Glenarm Street, and was built around 1902. R.A.35. The second parcel, at 27 Glenarm Street, consists of 3,750 sq. ft. of vacant land, with a deed restriction stating the parcel can only be used for open and green space. R.A.35.

Dunn filed the petition for partition pursuant on July 29, 2020. R.A.16. The commissioner was appointed by an interim order dated September 14, 2020. R.A.28. In December 2020 and January 2021, the Commissioner received offers to purchase the property. R.A.75,76.

On February 16, 2021, Dunn passed away at age 93. R.A.91. The deadlines for signing the purchase and sale agreement and the closing were extended to March 15, 2021 and April 23, 2021, respectively. R.A.8. After March 3, 2021, the commissioner was subject to

stays preventing any further action with respect to the purchase and sale agreement. R.A.9.

SUMMARY OF THE ARGUMENT

This case presents to this Court an issue that has yet to be decided in the Commonwealth of Massachusetts: at what point does the joint ownership of real property get severed in a petition for partition when the partition is by sale of the property? In this matter, the lower court erred by denying Howard's motion to dismiss for lack of subject matter jurisdiction because after Dunn's death, Howard was the survivor of the two joint owners of the property, thereby making her the sole owner.

The survivorship aspect of a joint tenancy exists until an event occurs that disturbs one of the four unities of joint ownership: unity of interest, unity title, unity of time and unity of possession. *Infra* at 15-16. A joint owner of real property retains the ability to sever the joint tenancy by taking certain actions. *Infra* at 17.

With respect to a partition by sale, however, G.L. c.241 does not define when the joint tenancy is severed. Rather, the operative act of the commissioner conveying the subject property constitutes the

definitive act that disturbs the four unities and thereby severing the joint tenancy. *Infra* at 22.

Partition by division of the property severs the joint tenancy upon the issuance of the final decree by the court. *Infra* at 26. Partition by set off severs the joint tenancy upon the happening of another operative act, the payment of money. *Infra* at 26-27.

A provision of G.L. c.241, §26 mentions the possible involvement of the heirs or devisees of the deceased owner in a partition action. *Infra* at 27-28. Section 26, however, does not give the heirs or devisees of the joint owner rights that simply do not exist. *Infra* at 28-30.

Accordingly, the lower court erred by denying Howard's motion to dismiss for lack of subject matter jurisdiction because at the instant of Dunn's death, Howard became the sole owner of the property leaving the court no jurisdiction in an action for partition.

ARGUMENT

I. STANDARD ON REVIEW

Howard's challenge to the Land Court's subject matter jurisdiction raised by her motion to dismiss under rule 12(b)(1) involves a matter of law, which this Court reviews *de novo*. Indeck Maine Energy, LLC

v. Comm'r of Energy Res., 454 Mass. 511, 516, (2009)(reviewing *de novo* the issue of standing challenged by a rule 12(b)(1) motion). "Because the question of subject matter jurisdiction goes to the power of the court to hear and decide the matter, [this Court can] consider matters in the record outside the face of the complaint." 311 W. Broadway LLC v. Zoning Bd. of Appeal of Bos., 90 Mass. App. Ct. 68, 73 (2016).

"In reviewing a motion to dismiss under rule 12(b)(1) or (6), 'we accept the factual allegations in the plaintiffs' complaint, as well as any favorable inferences reasonably drawn from them, as true .'" Sullivan v. Chief Justice for Admin. and Mgmt. of the Trial Court, 448 Mass. 15, 20-21 (2006)(*quoting* Ginther v. Comm'r of Ins., 427 Mass. 319, 322 (1998)). "A motion to dismiss will be granted only where it appears with certainty that the non-moving party is not entitled to relief under any combination of facts that he could prove in support of his claims." Id. at 21.

II. BY VIRTUE OF THE SURVIVORSHIP ASPECT OF JOINT OWNERSHIP OF REAL PROPERTY, HOWARD, AS THE SURVIVOR OF THE TWO JOINT OWNERS, BECAME THE SOLE OWNER OF THE PROPERTY IN AS MUCH AS DUNN'S

DEATH OCCURRED PRIOR A CONVEYANCE BY THE COMMISSIONER.

A fundamental principle of property law holds that upon the death of a joint tenant, the interest of the deceased joint tenant passes to the surviving joint tenant(s) immediately upon the death of the joint tenant. Russo v. Inzirillo, 360 Mass. 862, 862 (1971). If there is only one surviving joint tenant, the survivor becomes the owner of the entire estate. Attorney General v. Clark, 222 Mass. 291, 294-295 (1915).

In the case at hand, that simple, well-established principle interacts with a statutory scheme, G.L. c. 241, with respect to the partition of real property. The question of how the death of a joint tenant affects the interest of the surviving joint tenant(s) during an action for partition has yet to be decided in Massachusetts. To fully understand the issue at hand, a closer examination of the principles underlying joint ownership becomes necessary, as well as a review of the partition statutes.

"A joint tenancy is created by the common law and the incident of survivorship grows out of the

application of common law principles wholly independent of statute." Weaver v. City of New Bedford, 335 Mass. 644, 646 (1957). Joint ownership of property is described as having four unities: unity of interest, unity of title, unity of time and unity of possession. Knapp v. Windsor, 60 Mass. 156, 161 (1850). A joint tenancy terminates upon a disturbance of these unities, such as where a tenant "aliens his interest, or creditors levy on his interest, or he partitions under G.L. c. 241, s 1." West v. First Agr. Bank, 382 Mass. 534, 552 n. 4 (1981). Thus, *West* makes clear that the severance of a joint tenancy occurs at some point during a partition, but the point at which severance occurs in a partition remains undefined.

In this matter, Dunn's death, occurring after he filed the petition for partition yet before the sale of the property or the entry of judgment on the commission's report, requires this Court to determine at what point during the action for partition the joint ownership of real property is severed, destroying the most important characteristic of joint tenancy – survivorship.

An action for partition is controlled by statute, G.L. c. 241. Partition can be by division (see section 16), by sale (section 31) or setoff to one of the owners. (section 14). While the case at hand involves partition by sale of a property, the death of a joint tenant and the severance of the joint tenancy could certainly arise during partition by division or partition by set-off.

III. WITH PARTITION BY SALE, THE OPERATIVE EVENT DESTROYING THE JOINT TENANCY OCCURS UPON THE CONVEYANCE OF THE SUBJECT PROPERTY BY THE COMMISSIONER'S DEED.

As a starting point, we know "[t]he mere institution by a joint tenant of partition proceedings does not work a severance of the tenancy." Minnehan v. Minnehan, 336 Mass. 668, 671 (1958), citing Dando v. Dando, 37 Cal.App.2d 371 (1940); Ellison v. Murphy, 219 N.Y.S. 667 (1927). Logically, the filing of a petition should not destroy a joint tenancy because nothing prevents the petitioner from withdrawing the petition or seeking a dismissal of the matter. Should a joint owner of real property truly desire to sever a joint tenancy, he/she has the option to avoid a partition altogether and simply convey his/her interest to

another. Att'y Gen. v. Clark, 222 Mass. 291, (1915)(stating a joint owner of property retains the ability at any time to terminate the joint tenancy by transfer or conveyance of his/her interest). Nothing in chapter 241 provides any statutory support for the severance of the joint tenancy at the time the petition is filed.

Other courts that considered the question of whether filing petition stores a joint tenancy have responded by stating that the filing of the petition alone does not sever a joint tenancy.

> The interest of the parties, being that of joint tenancy, could have been severed by conveyance by either party of his interest or by a judgment of partition. Until such severance the rights of the parties remained unchanged, including the right of survivorship. I do not think the commencement of this action [of partition] constituted a severance. If the plaintiff had seen fit to discontinue the action at any time before judgment, the parties would still have remained joint tenants with the right of survivorship. Had the plaintiff placed his interest in the hands of a real estate broker for sale, clearly this would not have amounted to a severance until he had actually conveyed such interest. It seems to me that the commencement of the action amounted to no more than a request by the plaintiff that the court order the property to be sold, and that no severance

> would occur until the granting of a judgment in the action decreeing a partition and sale. Ellison v. Murphy, 128 Misc. 471, 472 (1927).

The California case relied upon by the Court in *Minnehan*, Dando v. Dando, 37 Cal.App.2d 371 (1940) arrived at a similar holding:

> Among other things it brought before the trial court the fact that the plaintiff had died since the action was commenced. Upon hearing the respective parties, and when it transpired that the plaintiff had died before the date of the trial, it is patent there was nothing left to partition. That is so because upon the death of Susie May Dando, her husband, Albert B. C. Dando, became the sole owner of the entirety by survivorship and in virtue of the original grant creating the tenancy. That was the common-law rule and it obtains in this state except as modified by statute. We have no statute declaring that the mere fact one joint tenant files an action in partition works a severance of the tenancy. Dando v. Dando, 37 Cal.App.2d 371, 372-373 (1940)(citation omitted).

After a petition is filed, the next significant procedural step at which an action in partition might sever a joint tenancy occurs when a court issues an interlocutory decree. This interlocutory decree, often referred to as an interim order, is issued pursuant to G.L. c. 241, §10. With the interlocutory

decree, the court determines that partition shall be made and determines in what proportions the shares shall be set off. G.L. c. 241, §10. "A decree ordering partition, although denominated 'interlocutory', is final by its nature: 'once rendered, it is a conclusive determination of the rights of all parties to the proceedings under the petition, and no question any longer remains open concerning either ownership or title, or their individual shares and interest.'" Asker v. Asker, 8 Mass. App. Ct. 634, 637 (1979), citing Brown v. Buckley, 11 Cush. 168, 168 (1853). As a conclusive determination of the rights of the parties, the interlocutory order is subject to immediate appeal. Morgan v. Jozus, 67 Mass. App. Ct. 17, 20 (2006).

Here, the interlocutory decree established that Dunn and Howard owned the property as joint tenants. Dunn's death after the issuance of the interlocutory decree does not change the type of tenancy established by the interlocutory decree. See Wilder v. Steeves, 1 Mass. App. Ct. 822, 823 (1973)(rescript). In *Wilder*, a father and daughter owned a parcel of land as joint tenants. Id. In the daughter's petition for

partition, the daughter accurately alleged that the parties owned the property as joint tenants. Id. The interlocutory decree, however, stated that the parties owned the property as tenants in common, and ordered the sale of the property. Id. The father died after the issuance of the interlocutory decree, but before the sale of the property. Id. After her father's death, the daughter moved to dismiss her petition and enjoin the sale of the property. Id. She did so apparently believing that as a joint tenant, she retained the survivorship interest in the property. The *Wilder* Court held that the interlocutory decree "conclusively determined the rights of the parties; and following its entry no question remained open concerning either ownership or title." Id. In other words, the interlocutory decree conclusively determined the father and daughter owned the property as tenants in common. The interlocutory decree determines the rights of the party by establishing the nature of the tenancy. Section 10 makes no reference at all to the severance of a joint tenancy by the issuance of an interlocutory order.

IV. WITH PARTITION BY SALE, THE OPERATIVE EVENT DESTROYING THE JOINT TENANCY OCCURS UPON THE CONVEYANCE OF THE SUBJECT PROPERTY BY THE COMMISSIONER'S DEED.

The only point at which a joint tenancy is severed in an action for partition by sale has to occur when the commissioner conveys the property. "The operative instrument in a partition by sale…[is] the deed of the commissioner." Cowden v. Cutting, 339 Mass. 164, 169–70 (1959). When a commissioner makes partition by sale and conveys the property, the commissioner conveys the interest of the owners of record. Buron v. Brown, 336 Mass. 734, 736 (1958). At that point, the joint owners no longer have possession of the property. The conveyance thereby destroys one of the four unities of title that remain the common-law hallmark of a joint tenancy.

The conveyance by the commissioner severs the joint tenancy, a principle that aligns the common-law aspect of joint tenancy with the statutory provisions of chapter 241. Until the point of conveyance, any joint tenant could take some action to destroy the joint tenancy. See, e.g., Hurley v. Hobbs, 260 Mass, 618, 622 n.3 (1971). If the owners remain joint

owners up until the conveyance, the right of survivorship exists until the conveyance as well. Should a joint owner of property die after the conveyance, the joint tenancy has already been severed, so the heirs of the joint tenant would have a legal right to the share of sale proceeds attributable to the deceased owner.

After the conveyance, the sale proceeds are handled according to statutory provisions. Section 16 allows the court to accept the return of the commissioner, to amend the return, or to "commit the case anew to the same or to other commissioners have the same powers as those originally appointed…" G.L. c.241, §16. After the return is accepted and confirmed by the court, the court enters a decree "that the partition be firm and effectual forever." Id.

Although section 16 provides for a final decree to be entered, "[t]he statute plainly does not condition the finality of the sale on confirmation of proceedings under § 16 or any other provision." Buron v. Brown, 336 Mass. 734, 736 (1958). Rather, the final decree represents the final determination of the individual rights and interest of the common owners in

the property. Cowden, 339 Mass. at 170. The conveyance itself represents the point at which the joint tenancy is severed.

A. The Death of a Joint Tenant After the Acceptance of an Offer to Purchase but Before the Conveyance by the Commissioner Would Not Prejudice the Rights of a Third Party Buyer.

One other aspect of a partition by sale merits consideration. As had occurred in this case, a joint owner could die after a written offer to purchase has been accepted by the commissioner. The rights of the third party buyer would seemingly complicate the analysis, but the rights of the prospective buyer(s) have already been legally defined. See, McCarthy v. Tobin, 429 Mass. 84, 87 (1999). The prospective buyer(s) would have the ability to enforce the purchase agreement against the commissioner, who was has become the agent of the owners by operation of law. Buron, 336 Mass. at 736.

Should a joint owner of property die after the commissioner accepts a written offer to purchase but before the conveyance by deed, the surviving joint owners must recognize that the prospective third party purchaser could specifically enforce the offer to purchase. McCarthy, 429 Mass. at 89. "It is well-

settled law in this Commonwealth that real property is unique and that money damages will often be inadequate to redress a deprivation of an interest in land." Greenfield Country Ests. Tenants Ass'n., Inc. v. Deep, 423 Mass. 81, 88 (1996). The surviving joint tenants would be powerless to stop the conveyance because the commissioner as the agent of the surviving joint tenants (Buron, 336 Mass. at 736), so the commissioner would be obligated to convey the property.

Thus the prospective buyer(s) could proceed with the purchase of the property from the commissioner. McCarthy, 429 Mass. at 87. If a joint tenant dies after the commissioner accepts a written offer to purchase the property but before the conveyance, the interest of the deceased joint tenant in the property passes to the surviving joint tenant(s) by operation of law. Att'y Gen. v. Clark, 222 Mass. at 294. Consequently, the surviving joint tenant(s) would receive the proceeds of the sale in the proportions attributable to the surviving joint tenant(s) at the time of the conveyance by the Commissioner. Id.

V. THE OPERATIVE ACT TO SEVER A JOINT TENANCY IN PARTITION BY DIVISION OCCURS WITH THE ENTRY OF A FINAL DECREE, AND IN PARTITION BY SET OFF BY THE PAYMENT OF FUNDS.

In addition to a partition by sale, partition can be made by division and by set-off. Chapter 241, however, already has statutory provisions to address the finality of partition by those two methods. With respect to partition by division, section 18 states the final decree entered in accordance with section 16 operates to transfer the interests in the property:

> The partition by division, when confirmed and established by a final decree under section sixteen…shall be conclusive upon all persons named in the petition or interested in the land ... G.L. c. 241, §18.

Section 16 requires the commissioner to record the decree at the registry of deeds or in accordance with G.L. c.185 for registered land. The recording of the final decree by the commissioner provides a defined point at which joint tenants no longer have possession of the property. At that point, the joint tenancy has been severed.

The third method of partition occurs by set off. Set off can occur by payment of money to one or more of the other owners of the property. G.L. c. 241, §14. Set off becomes conclusive upon the payment of the

money as ordered by the court. Thayer v. Thayer, 24 Mass. 209, 219 (1828).

VI. G.L. C.241, §26 DOES NOT CONFER RIGHTS UPON DUNN'S HEIRS THAT WOULD CONTRADICT THE SURVIVORSHIP ASPECT OF JOINT OWNERSHIP OF PROPERTY.

While at first glance G.L. c.241, §26 might appear to imply Dunn's heirs have a right to continue an action for partition at any time following his death, but a closer reading makes it clear that Dunn's heirs do not retain any rights that might contradict the principle of Howard being the surviving joint tenant. Section 26 provides as follows:

> If a party named in the petition has died prior to the filing thereof, or dies during its pendency, and such fact did not appear during the proceedings, his heir or devisee shall be entitled to the share of land set off to him or his share of the proceeds of a sale. If his death is made known to the court during the proceedings, the share or portion formerly belonging to him may be assigned or set off in his name to be held and disposed of as if the partition had been made prior to his decease, and his heir or devisee may recover the portion assigned to him, or his share of the proceeds, by appropriate action. The court may, however, in any case arising hereunder, if there has been a sale, order his share of the proceeds to be paid to his personal representatives pending

> settlement of his estate, or deposited under section thirty-four to await their appointment. G.L. c.241, §26.

Any attempt by Dunn's heirs to assert rights according to section 26 would be understandable, but misguided. The first sentence of section 26 appears to give standing to "a party named in the petition [who] has died prior to the filing thereof…" Sec. 26. This sentence cannot be isolated by Dunn's heirs to assert legal interests that simply do not exist. This Court must "look at the statute in its entirety when determining how a single section should be construed." Boss v. Town of Leverett, 484 Mass. 553, 557 (2020). Read as a whole, section 26 does not circumvent the principles of a joint tenancy. A deceased joint owner of property who died *prior to the filing of the petition* would have no interest in the property, in as much as his/her interest passed to the surviving joint tenant(s) immediately upon his/her death. Attorney General v. Clark, 222 Mass. at 294-295. Consequently, the heirs of the estate of a joint owner who died prior to the filing of the petition could be neither a petitioner nor a respondent in an action for partition. Although Dunn's heirs might attribute great significance to this first sentence, this Court

cannot "adopt a literal construction of a statute if the consequences of doing so are absurd or unreasonable, such that it could not be what the Legislature intended." Ciani v. MacGrath, 481 Mass. 174, 178, (2019)(citations omitted).

With recognition to the principle that the joint tenancy is severed at the time the property is conveyed by the commissioner, the rest of section 26 has a logical interpretation. The second sentence addresses "the share or portion formerly belonging to [the deceased joint owner]." G.L. c.241, §26. If the deceased joint owner died after conveyance of the property, section 26 states that the deceased joint owner's share of those sale proceeds "may be assigned or set off in his name to be held and disposed of as if the partition had been made prior to his decease, and his heir or devisee may recover the portion assigned to him, or his share of the proceeds, by appropriate action." Id. The application of this section would seamlessly direct the proceeds to the joint tenant's heirs or devisees, if the joint tenancy is severed at the time the commissioner conveys the property. "[A] statute should be read as a whole to

produce an internal consistency. Telesetsky v. Wight, 395 Mass. 868, 872–73(1985).

The third sentence of section 26 also can be clearly and easily applied in cases when the joint interests gets severed at the time of the conveyance by the commissioner, because the provision provides for the sale proceeds being paid to the deceased joint owner's personal representative. In those situations in which a joint tenant dies after the property is conveyed, the sale proceeds allocated to the deceased joint tenant become party of his/her estate.

Consequently, when reading the statute in its entirety, section 26 does not confer any rights on Dunn's heirs. The well-established principles of joint ownership of property discussed above make it clear that Dunn's interest in the Property passed to Howard at the time of his death. This Court must interpret Section 26 in a manner "to ascertain and effectuate the intent of the Legislature in a way that is consonant with sound reason and common sense." Ciani v. MacGrath, 481 Mass. at 178. Sound reason and commons sense dictate that section 26 does not provide Dun's heirs with rights that do not exist at common law.

VII. THE COURT ERRED BY DENYING HOWARD'S MOTION TO DISMISS IN THAT AFTER THE DEATH OF ONE OF TWO JOINT OWNERS, THE COURT LACKED THE SUBJECT MATTER JURISDICTION NEEDED TO PARTITION THE PROPERTY.

The lower court erred by denying Howard's motion to dismiss which argued that Land Court no longer had subject matter jurisdiction for the petition for partition after Dunn's death. Upon his passing, Dunn's interest in the property immediately passed to Howard by operation of law. With respect to this Property, Dunn's heirs, either directly or indirectly through his estate, have no standing to prosecute the action for partition.[1]

Section 1 states that, "Any person, except a tenant by the entirety, owning a present undivided legal estate in land, not subject to redemption, shall be entitled to have partition in the manner hereinafter provided." This section clearly identifies those who could maintain an action for partition: "any person, other than a tenant by the entirety, owning *a present undivided interest* in land." Id., (emphasis added). The heirs have no legal interest whatsoever in this Property. Lacking a

[1] Section 26 refers only to heirs, not to administrators of the estates of the deceased interest holder. Administrators or personal representatives are statutorily barred from being a party to an action for partition. Richards v. Richards, 136 Mass. 126, 127 (1883); G.L. c.241, §1.

present undivided interest in the property, the heirs have no standing to maintain the action.

With an action for partition being a purely statutory procedure, partition can be maintained only in the instances specifically provided in the statute. See Cummings v. Wajda, 325 Mass. 242, 242 (1950)(addressing standing to bring summary process action). "Where a statute requires that a certain claim can only be brought by a stated number of specified plaintiffs in a particular court, we have treated these requirements as jurisdictional, and we have been reluctant to infer jurisdiction on some other basis." Dunn v. Att'y Gen., 474 Mass. 675, 689 (2016). Dunn's heirs simply do not have standing to maintain this action for partition.

Hence, the lower court should have allowed Howard's motion to dismiss. She filed the motion to dismiss pursuant to Rule 12(b)(1), which allows a party to file a motion to dismiss a matter for "lack of jurisdiction over the subject matter." Mass.R.Civ.P. 12(b)(1). Lack of subject matter jurisdiction by a court cannot be waived. Cohen v. Cohen, 470 Mass. 708, 713, (2015). In fact, "[w]henever it appears by suggestion of a party or

otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Mass.R.Civ.P. 12(h)(3). This court has the authority, if not the obligation, to dismiss this matter. "Standing can be addressed by an appellate court *sua sponte* even if not raised properly on appeal." Pugsley v. Police Dep't of Bos., 472 Mass. 367, 371 (2015). "Accordingly, this Court must take note of lack of jurisdiction whenever it appears, whether by suggestion of a party or otherwise. Mass.R.Civ.P. 12(h)(3)." Litton Bus. Sys., Inc. v. Comm'r of Revenue, 383 Mass. 619, 622 (1981).

While dismissal of the petition may seem harsh with respect to Dunn's heirs, it is important to remember that Dunn could have changed his interest to be a tenancy in common, had he been so inclined. Yet from the time he purchased the Property with Howard in February 1993 until the day of his passing, Dunn took no such action. The deed to Dunn and Howard created a joint tenancy with both parties presumably knowing the consequences. See Sze v. Sze, 2018 WL 6710595 at *3 (2018) (16 MISC Case No. 000723)(Long, J.). Upon Dunn's death, his interest in the property transferred to Howard, thereby fulfilling Dunn's presumed

intention. See, Hurley v. Hobbs, 360 Mass. 618, 622 (1971).

CONCLUSION

For the foregoing reasons, Barbara Howard became the sole owner of the property upon the passing of Charles Dunn, making her the sole owner of the property leaving the land court with no subject matter jurisdiction in this action for partition, requiring the allowance of the respondent's motion to dismiss.

Respectfully submitted,
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By her attorney,

/s/ Daniel B. Walsh

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June 14, 2021

ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

SUFFOLK, ss. MISCELLANEOUS CASE

No. 20 MISC 000299 (RBF)

CHARLES R. DUNN,
Petitioner,

v.

BARBARA A. HOWARD,
Respondent.

MEMORANDUM AND ORDER DENYING RESPONDENT'S MOTION TO STAY AND MOTION TO DISMISS, ALLOWING COMMISSIONER'S MOTION FOR AUTHORITY TO ENTER PURCHASE AND SALE AGREEMENT, AND STAYING EXECUTION OF THE PURCHASE AND SALE AGREEMENT

Charles R. Dunn and Barbara A. Howard took title to the property at 25-27 Glenarm Street, Boston, Suffolk County, Massachusetts (property) as joint tenants by a deed from Cornelius Brown, dated February 23, 1993, and recorded with the Suffolk County Registry of Deeds in Book 18061 Page 058. On July 29, 2020, Mr. Dunn filed the petition in this action, seeking partition of the property, pursuant to G. L. c. 241. On September 4, 2020, the court conducted a case management conference, at which counsel for petitioner and respondent appeared, and at which the parties agreed, and the court so found that the property was held by the two parties in equal shares as joint tenants and could not be advantageously divided. The parties indicated that they had been engaged in settlement discussions and would continue to explore alternative dispute resolution, but

petitioner made an oral motion for appointment of a commissioner, which was allowed.

On September 14, 2020, the court entered its Interim Order appointing as commissioner attorney Robert J. Cotton (Commissioner). On December 11, 2020, the court issued its Warrant for the sale of the property, and on December 16, 2020, issued the Amended Warrant to the Commissioner. The Amended Warrant authorized the Commissioner to market and sell the property, with court approval required for any purchase and sale agreement the Commissioner proposed to enter. On January 30, 2021, the Commissioner accepted in writing an offer to purchase the property for $650,000, and on February 1, 2021, filed the Commissioner's Report and Motion for Authority to Enter into Purchase and Sale Agreement (Motion for Authority). The court set a response date and set down a hearing on the Motion for Authority for February 19, 2021. On February 16, 2021, Mr. Dunn passed away, and Notice of Petitioner's Death was filed the next day. On February 19, 2021, the Respondent's Motion to Stay Proceedings (Motion to Stay) was filed. At the hearing on the Motion for Authority that day, the court gave the parties one week to file briefs on the question of the parties' joint tenancy; namely whether Mr. Dunn's death served to vest full title in Ms. Howard, or whether this partition action destroyed the joint tenancy. The court also asked the Commissioner to seek extensions of the deadlines to execute the purchase and sale agreement and for closing.

On February 26, 2021, Ms. Howard filed the Respondent's Motion to Dismiss Petition for Partition Pursuant to Mass.R.Civ.P. 12(b)(1) (Motion to Dismiss), the Memorandum of Law in Support of Respondent's Motion to Dismiss Petition for Partition Pursuant to Mass.R.Civ.P. 12(b)(1), the Respondent's Statement of Facts in Support of Respondent's Motion to Dismiss Petition for Partition Pursuant to Mass.R.Civ.P. 12(b)(1), and the Appendix of Cases in Support of Respondent's Motion to Dismiss Petition for

Partition Pursuant to Mass.R.Civ.P. 12(b)(1). The same day, the Petitioner's Opposition to the Respondent's Motion to Stay Proceedings and Her Motion to Dismiss and the Petitioner's Memorandum of Law in Support of His Opposition to the Respondent's Motion to Stay Proceedings and Her Motion to Dismiss were filed.

The court heard the Motion to Stay and the Motion to Dismiss on February 26, 2021. At the hearing, the Commissioner reported that the buyer had agreed to an extension of the deadline for executing the purchase and sale agreement to March 15, 2021, and an extension of the closing date to April 23, 2021. After hearing, the court took the Motion for Authority, Motion to Stay and the Motion to Dismiss under advisement. This Memorandum and Order follows.

Mr. Dunn and Ms. Howard took title to the property in 1993 as joint tenants. A joint tenancy is "an interest in property which, upon the death of one joint tenant passes by right of survivorship to his cotenant." *Attorney Gen. v. Clark*, 222 Mass. 291, 294 (1915). Thus, absent this partition action, the death of Mr. Dunn would result in his interest in the property vesting in Ms. Howard, leaving her with a 100% interest. In the Motion to Dismiss, Ms. Howard argues that the partition action did not change the joint tenancy and that she is now the sole owner of the property. As she is the sole owner, she argues, there is no longer a "present undivided legal interest" in the property that would give rise to a right to partition, G.L. c. 241, § 1, and this partition action must be dismissed for lack of subject matter jurisdiction. Mr. Dunn (or more, accurately, his estate) argues that the partition action destroyed the joint tenancy and converted it to a tenancy in common, and, therefore, Mr. Dunn's estate still holds his 50% undivided interest and the partition can go forward.

Massachusetts and authorities in other states agree that "[t]he mere institution by a joint tenant of partition proceedings does not work a severance of the tenancy." *Minnehan v. Minnehan*, 336 Mass. 668, 671 (1958); *Sze v. Sze*, 2018 WL 6710595 at *1 (2018) (16 Misc.Case No. 000723) (Long, J.); see, e.g., *Dando v. Dando*, 99 P.2d 561, 562 (Cal. Dist. Ct. App. 1940); *Heintz v. Hudkins*, 824 S.W.2d 139, 143 (Mo. Ct. App. 1992); *Stiff v. Stiff*, 168 N.W.2d 273, 275 (Neb. 1969). At some point in its proceedings, however, a partition action does serve to destroy a joint tenancy. *Sze*, *supra*; see *West v. First Agric. Bank*, 382 Mass. 534, 536 n.4 (1981) (joint tenancy destroyed by partition). In *Sze*, the court discussed when that point of destruction occurs in partition proceedings. The court held that the "tenancy remains joint until the time the property is actually conveyed," unless the title had been declared to be something other than a joint tenancy by an unappealed interlocutory order. *Sze*, *supra* at *2 (emphasis in original); see G.L. c. 241, § 18 (partition by sale is conclusive upon parties). As no conveyance of the property had been made or was being made, the Sze court found that the death of one of the joint tenants resulted in the title to the property vesting in the two remaining joint tenants. Id. at *2-*3.

In this action, the parties agreed and the court entered as its interlocutory order on September 4, 2020, that Ms. Dunn and Ms. Howard held the property as joint tenants. Thus, they remained joint tenants until the property could be deemed to have been conveyed under the partition. Before Mr. Dunn passed away, the Commissioner accepted an offer to purchase the property; his Motion for Authority, seeking permission to execute the proposed purchase and sale agreement, was pending at Mr. Dunn's death. The question here is whether the property can be deemed to have been conveyed by the partition proceedings when there was an accepted offer to purchase but the

purchase and sale agreement had not been approved and title to the property had not been transferred.

Unlike other jurisdictions, in Massachusetts, "the rights of the purchaser are contract rights rather than rights of ownership of real property." *Laurin v. De Carolis Constr. Co.*, 372 Mass. 688, 691 (1977). Until the purchase money is paid, the seller holds legal title to the property. *Barrell v. Britton*, 244 Mass. 273, 278-279 (1923). Nonetheless, "a purchase and sale agreement bestows a significant interest upon the buyer. The buyer has a contract right which makes the vendor's title subject to an equitable obligation to convey." *McDonnell v. Quirk*, 22 Mass. App. Ct. 126, 130 (1986). Thus, an accepted offer to purchase, if it contains all material terms, is a contract for the sale of the property that is enforceable in equity by specific performance. *McCarthy v. Tobin*, 429 Mass. 84, 87-89 (1999).

Here, the offer to purchase, accepted by the Commissioner, contains material terms for the purchase of the property—price, identity of the property, deposit, closing date. It contemplates negotiation of a purchase and sale agreement, subject to approval by the court, but that is a common term in offers to purchase and in partitions, and does not make the offer to purchase any less of a binding agreement. *Id.* at 88-89. It is potentially enforceable by specific performance; i.e., by an order conveying the property to the buyer. In a partition proceeding, the court has broad equitable powers "over all matters relating to the partition." G.L. c. 241, § 25. Exercising its equitable powers, the court finds that, in this partition proceeding, the accepted offer to purchase is the equivalent of the conveyance of the property as provided for in the accepted offer, and therefore acted to destroy the joint tenancy between Mr. Dunn and Ms. Howard. The parties are to be treated as tenants in common, and Mr. Dunn's estate is entitled to the rights in the property and the sale proceeds as provided in G.L. c. 241, § 26.

Therefore, for the foregoing reasons, the Motion to Stay and the Motion to Dismiss are both DENIED. The Motion for Authority is ALLOWED. The proposed purchase and sale agreement is APPROVED. Execution of the purchase and sale agreement is STAYED until Thursday, March 11, 2021, to allow Ms. Howard to seek a stay or other relief from the Appeals Court.

So Ordered.

By the Court. (Foster, J.) /s/ Robert B. Foster

Attest:

/s/ Deborah J. Patterson

Deborah J. Patterson

Recorder

Dated: March 4, 2021.

April 2, 2021

RE: No. 2021-J-0104
Lower Ct. No.: 20MISC000299

CHARLES R. DUNN
vs.
BARBARA A. HOWARD

NOTICE OF DOCKET ENTRY

Please take note that, with respect to the Petition pursuant to G.L. c. 231, s. 118 filed for Barbara A. Howard by Attorney Daniel Walsh. (Paper #4),

on April 2, 2021, the following order was entered on the docket of the above-referenced case:

RE#4: The respondent to a petition to partition, Barbara A. Howard, has filed a petition in this court, pursuant to G.L. c. 231, s. 118, first para., seeking an order dismissing the petition in the Land Court. At my request, counsel for the petitioner below, Charles R. Dunn has filed a response. Notwithstanding my request that counsel provide the status of any probate proceedings to appoint a personal representative regarding Dunn's estate, it is unclear whether a personal representative has been appointed and whether Dunn's estate will be made a party to this petition. For my purposes here, I assume that the estate will, at some point soon, be substituted as a party to this action in the Land Court and be properly represented.

As an initial matter, I cannot grant the specific relief sought by Howard. Pursuant to the first paragraph of G.L. c. 231, s. 118, a single justice of this court may review an interlocutory order entered by the Land Court. However, the "power to render any judgment and to make any order that ought to have been made upon the whole case, rest[s] solely with a panel of three justices who constitute a quorum to decide all matters required to be heard by the appeals court " (quotations and citations omitted). *Pemberton v. Pemberton*, 9 Mass. App. Ct. 809, 809 (1980). "Under our practice, a single justice ordinarily is reluctant to act on a petition to review an order that is dispositive of the rights of a party." *Commonwealth v.*

Owens-Corning Fiberglas Corp., 38 Mass. App. Ct. 600, 601 n.3 (1995). It appears in these circumstances that I do not have jurisdiction to order the Land Court to dismiss the petition to partition. See Pemberton, 9 Mass. App. Ct. at 809. *Cf. DeLucia v. Kfoury*, 93 Mass. App. Ct. 166, 168 (2018).

As single justice, however, I do have the discretion to grant Dunn leave to take an interlocutory appeal from the order denying her motion to dismiss the petition. *CUNA Mut. Ins. Soc. v. Attorney General*, 380 Mass. 539, 541 (1980). Although it is well established that a single justice may grant a party leave to appeal an interlocutory order pursuant to G.L. c. 231, s. 118, first para., there is little appellate guidance as to when the single justice should override "the general policy disfavoring appeals from interlocutory orders." Id. In other contexts when a judge is considering whether to permit an interlocutory appeal, the primary concern is judicial economy balanced against the hardship to the parties. See *Commonwealth v. Cavanaugh*, 366 Mass. 277, 279 (1974) ("An interlocutory appeal, like a report, may be appropriate when the alternatives are a prolonged, expensive, involved or unduly burdensome trial or a dismissal of the indictment"); *Long v. Wickett*, 50 Mass. App. Ct. 380, 387 (2000) (In considering entry of separate and final judgment, "both the trial court in the first instance and an appellate court on review must ever bear in mind the rule's underlying purpose of balancing the need for immediate review, based on the likelihood of injustice or hardship to the parties of a delay in entering a final judgment as to part of the case, against the appellate courts' traditional abhorrence of piecemeal appellate review, as a matter of sound judicial administration" (internal quotations and citations omitted).

In the petition before me, Howard faces the possibly unnecessary loss of her home in the event she is compelled to await the final resolution of Dunn's petition to partition to appeal. Moreover, the record before me does not disclose any other appellate issues lurking in this case. I admit that it is conceivable that a dispute as to the distribution of the proceeds of a sale could possibly lead to a new appellate issue, assuming arguendo, that Dunn's arguments that

the joint tenancy terminated at the acceptance of the offer prevail. However, in that circumstance, the unappealed interim order that each party owns a 50% interest sets a baseline that makes it unlikely, in my view, that any such dispute would be substantial enough to warrant an appeal. Therefore, it appears that granting Howard leave to take an interlocutory appeal would enable her to pursue timely, not piecemeal, appellate review. For these reasons, I exercise my discretion to permit Howard to pursue an interlocutory appeal from the Land Court judge's order. Howard is granted leave, *nunc pro tunc* to 03/11/2021, to file a notice of appeal from the 03/04/2021 order of the Land Court in docket no. 20 MISC 000299. That appeal shall proceed in accordance with the applicable rules of appellate procedure. So ordered. (Meade, J.). *Notice/Attest/Foster, J.

REGISTRATION FOR ELECTRONIC FILING. Every attorney with an appeal pending in the Appeals Court must have an account with eFileMA.com. Registration with eFileMA.com constitutes consent to receive electronic notification from the Appeals Court and e-service of documents. Self-represented litigants are encouraged, but not required, to register for electronic filing.

ELECTRONIC FILING. Attorneys must e-file all non-impounded documents. Impounded documents and submissions by self-represented litigants may be e-filed. No paper original or copy of any e-filed document is required. Additional information is located on our Electronic Filing page: http://www.mass.gov/courts/court-info/appealscourt/efiling-appeals-faq-gen.html

FILING OF CONFIDENTIAL OR IMPOUNDED INFORMATION. Any document containing confidential or impounded material must be filed in compliance with Mass. R. App. P. 16(d), 16(m), 18(a)(1)(A)(iv), 18(d), and 21.

Very truly yours,

The Clerk's Office

Dated: April 2, 2021

2016 WL 7234738
Only the Westlaw citation is currently available.
Massachusetts Land Court.
Department of the Trial Court, Worcester County.
Kelly McHUGH, Plaintiff,
v.
James ZANFARDINO, Jr., and John Zanfardino, Defendants.
No. 16 MISC 000331(HPS).
|
Dec. 14, 2016.

DECISION ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

HOWARD P. SPEICHER, Justice.
*1 The question to be answered in this quiet title action is whether the recording of an execution by a judgment creditor, without more, severs the joint tenancy of the owners of the subject property, thus converting their ownership into a tenancy in common and defeating one co-owner's right of survivorship upon the death of the other. The answer may seem esoteric, requiring, as it does, an analysis of the archaic language of our statutes pertaining to the levy of executions on land, but the answer has very real consequences, as it determines whether an undivided half-interest in the subject property goes, through right of survivorship, to plaintiff Kelly McHugh ("McHugh"), who was a joint tenant with her deceased co-owner, James Zanfardino, Sr. Alternatively, if the joint tenancy was severed by the recording of the execution, the undivided half interest will go to Zanfardino, Sr.'s heirs, his adult children, James Zanfardino, Jr. and John Zanfardino.

McHugh commenced this action seeking to quiet title to two condominium units, Units 1 and 3, at the 154 Greenwood Street Condominium, located at 154 Greenwood Street in Worcester (the "Units"). She claims that she held the two condominium units in joint tenancy with James Zanfardino, Sr., and that upon his death she became sole owner of the property by right of survivorship. Zanfardino, Sr.'s sons, defendants James Zanfardino Jr. and John Zanfardino, are Zanfardino, Sr's heirs and claim that at the time of Zanfardino, Sr.'s death McHugh and Zanfardino, Sr. were tenants in common, and his share of the Units thus passed to them

upon his death.

PROCEDURAL HISTORY

The plaintiff filed her complaint on June 16, 2016. On motion of the defendants, the court, on June 21, 2016, issued a preliminary injunction enjoining McHugh from selling or otherwise conveying her interest in the Units, but also enjoining the defendants from interfering with McHugh's exercise of rights of ownership of the Units. The plaintiff filed a complaint for contempt on July 11, 2016, and an emergency motion to quash a notice of deposition and for a protective order. On July 15, 2016, the plaintiff filed a motion for summary judgment. The defendants filed a motion to dismiss, and a motion to dismiss the complaint for contempt, as well as a motion to stay the plaintiff's motion for summary judgment. On July 21, the court dismissed the complaint for contempt, denied the defendants' motion to dismiss for failure to join an indispensable party, and ordered the defendants to cooperate with the plaintiff in her exercise of ownership of the property pursuant to the preliminary injunction. The court stayed discovery pending a decision on the plaintiff's motion for summary judgment. Defendant James Zanfardino, Jr. filed his answer on August 10, 2016. A hearing was held on the plaintiff's motion for summary judgment on September 29, 2016, after which the motion was taken under advisement.

FACTS

The following material facts are found in the record for purposes of Mass. R. Civ. P. 56, and are undisputed for the purposes of the motion for summary judgment:

> *2 1. As of June, 2005, Kelly HcHugh and James Zanfardino, Sr. owned the three-unit residential building at 154 Greenwood Street in Worcester, as joint tenants with a right of survivorship.
>
> 2. On May 11, 2006, McHugh and Zanfardino, Sr. submitted the property at 154 Greenwood Street to the provisions of G.L. c 183A, converting it into a three-unit condominium by filing a master deed recorded at the Worcester District Registry of

Deeds on May 12, 2006 in Book 38949, Page 353.

3. On May 11, 20061, McHugh and Zanfardino, Sr. sold Unit 2 to Mandy Perry by a deed recorded with the Registry on July 13, 2006 in Book 39162, Page 149.

4. On October 18 and 23, 2006, McHugh and Zanfardino, Sr. executed and delivered separate mortgages on Units 1 and 2 to 1-800 Eastwest Mortgage Co. The mortgages, in the amounts of $123,000 and $99,400.00, were recorded with the Registry on October 24, 2006, respectively in Book 40021, Page 134 and Book 40021, Page 156.

5. On August 11, 2008, a writ of execution in the amount of $4,989.65 was recorded against Kelly McHugh in the Registry in Book 43191, Page 358. The execution was brought forward by a notice recorded in the Registry on July 8, 2014 in Book 52528, Page 212.

6. On April 22, 2016, Zanfardino, Sr. died intestate.

7. Zanfardino, Sr.'s heirs are James Zanfardino and John Zanfardino.

DISCUSSION

"Summary judgment is granted where there are no issues of genuine material fact, and the moving party is entitled to judgment as a matter of law." Ng Bros. Constr. v. Cranney, 436 Mass. 638, 643-44 (2002); Mass. R. Civ. P. 56(c). "The moving party bears the burden of affirmatively showing that there is no triable issue of fact." Ng Bros. Constr. v. Cranney, supra, 436 Mass. at 644. In determining whether genuine issues of fact exist, the court must draw all inferences from the underlying facts in the light most favorable to the party opposing the motion. See Attorney Gen. v. Bailey, 386 Mass. 367, 371, cert. denied, 459 U.S. 970 (1982). "An opposing party's failure to file a cross-motion shall not preclude the court from granting dispositive relief to the opposing party if such relief is appropriate." Land Ct. Rule 4.2

The sole dispositive issue raised on summary judgment is a determination of the time at which a writ of execution against a joint tenant's interest severs a joint tenancy, thereby converting it to a tenancy in common. The defendants argue that a joint tenancy severs when a writ of execution on one tenant's interest is first recorded, and McHugh contends that the joint tenancy is not severed until the completion of the levy by sale or setoff. McHugh and Zanfardino, Sr. owned the property at 154 Greenwood Street, and later the two remaining condominium units, as joint tenants. After McHugh and Zanfardino, Sr. had converted the property into a condominium and sold Unit 2, but still owned Units 1 and 3, a creditor recorded a writ of execution against McHugh's interest, but took no further action to complete the levy, other than to keep the execution from expiring by bringing it forward on July 8, 2014. See G.L. c. 236, § 49A. Zanfardino, Sr. subsequently died. If the joint tenancy remained in existence at this point, Zanfardino, Sr.'s interest would have passed to the plaintiff by the right of survivorship. See Petition of Smith, 361 Mass. 733, 737 (1972). However, if the joint tenancy severed upon the recording of the writ of execution, as the defendants argue, then McHugh and Zanfardino, Sr. held the property as tenants in common at the time of his death, and his interest would pass to the defendants as his heirs. Whether the recording of the execution alone severed the joint tenancy turns entirely upon the interpretation of G.L. c. 236, § 12, which governs the effect of a levy on execution on property owned by either joint tenants or tenants in common.

*3 "Our primary duty in interpreting a statute is to effectuate the intent of the legislature in enacting it." Wheatley v. Massachusetts Insurers Insolvency Fund, 456 Mass. 594, 601 (2010). "Statutory language is the principal source of insight into legislative purpose." See Local 589, Amalgamated Transit Union v. Massachusetts Transportation Authority, 392 Mass. 407, 415 (1984). Nonetheless, "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative

discovery is the surest guide to their meaning." Com. v. Garcia, 82 Mass.App.Ct. 239, 245 (2012), quoting United States v. Costello, 666 F.3d 1040, 1043 (7th Cir.2012). Accordingly, "the court begins by looking at the words of the statute—but not in isolation from the statute's purpose or divorced from reason and common sense." DiGiacomo v. Metro. Prop. & Cas. Ins. Co., 66 Mass.App.Ct. 343, 346 (2006). The court "do[es] not employ the conventions of statutory construction in a mechanistic way that upends the common law and fundamentally makes no sense," Suffolk Const. Co. v. Div. of Capital Asset Mgmt., 449 Mass. 444, 458 (2007), nor should it "make a construction which may produce an unworkable scheme or one which allows for frustration of function." Paquin v. Bd. of Appeals of Barnstable, 27 Mass.App.Ct. 577, 580 (1989).

"When a statute is 'capable of being understood by reasonably well-informed persons in two or more different senses,' it is ambiguous." Meyer v. Town of Nantucket, 78 Mass.App.Ct. 385, 390 (2010), quoting Falmouth v. Civil Serv. Comm'n., 447 Mass. 814, 818 (2006). "Where the text is unclear or ambiguous, 'a statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.' " In re E.C., 89 Mass.App.Ct. 813, 816 (2016), quoting Telesetsky v. Wight, 395 Mass. 868, 872 (1985). In doing so, the statute must be read as a whole. See In re Jamison, 467 Mass. 269, 276 (2014).

The statute at issue here, Chapter 236 of the General Laws, governs the process for collecting on an execution after judgment. See generally G.L. c. 236. When a party acquires a writ of execution, it "creates a lien which is then perfected by a levy of execution." Lyons v. Bauman, 31 Mass.App.Ct. 214, 216 (1991). "A levy is the taking or seizure of property pursuant to a writ of execution." LaChance v. Peerless Ins. Co., 36 Mass.App.Ct. 451, 453 (1994). The levy process requires an officer to give notice to the debtor, deposit at the registry of deeds a copy of the

execution and a memorandum, appoint appraisers if necessary, and record a return on execution. See G.L. c. 236, §§ 3, 4, 21, 23. A levy on execution may be completed either by sale or set-off. Although set-off is no longer commonly used, it operates "as an involuntary conveyance to the creditor of a portion of the debtor's real estate which has been levied against." LaChance v. Peerless Ins. Co., supra, 36 Mass.App.Ct. at 453.

*4 G.L. c. 236, § 12, provides for the levy by set-off of property that, as in the present case, has multiple owners. It states as follows:
If land is held by a debtor in joint tenancy or as a tenant in common, the share thereof belonging to the debtor may be taken on execution, and shall thereafter be held in common with the co-tenant. If the whole share of the debtor is more than sufficient to satisfy the execution, the levy shall be made upon such undivided portion of such share as will, in the opinion of the appraisers, satisfy the execution, and such undivided portion shall be held in common with the debtor and co-tenant.

The parties agree that the joint tenancy terminates at the point that the land is "taken on execution," but dispute the meaning of this phrase. McHugh argues that land only becomes "taken on execution" for the purposes of G.L. c. 236, § 12 (and, presumably, the levy "made" for purposes of G.L. c. 236, § 43), at the completion of the levy process after the property has been appraised and sold, and thus only at that point does the joint tenancy between debtor and co-tenant become a tenancy in common, to facilitate the tenancy in common created between creditor and co-tenant. She asserts that the two sentences of Section 12 are alternative applications, the first to be utilized when the execution encompasses the entirety of the debtor's share, and the second for an execution on only a portion of that share. Defendants argue that a "taking" of the land in this context is a term of art that does not refer to an actual divestiture of title, but rather simply signifies the beginning of the levy. They argue that Section 12 contains two steps: the first sentence simply severs the joint tenancy between debtor and co-tenant when the land is "taken on execution", which is an initial discrete event

occurring upon recording of the execution; the second sentence, providing that "the levy shall be made," details the subsequent process for completing the levy and transferring title.

"[T]he meaning of a statute must, in the first instance, be sought in language in which the act is framed ..." Commonwealth v. Dalton, 467 Mass. 555, 557, quoting Commonwealth v. Boe, 456 Mass. 337, 347 (2010). The statute provides no definition for what it means for land to be "taken" in the context of a levy. " 'Words that are not defined in a statute [as here,] should be given their usual and accepted meanings,' derived 'from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions ." MacLaurin v. City of Holyoke, 475 Mass. 231, 239 (2016), quoting Seideman v. Newton, 452 Mass. 472, 477-478 (2008). The usual definition of the word "take" is "[t]o obtain possession or control, whether legally or illegally." Take, *Black's Law Dictionary* (10th ed.2014). As the plaintiff argues, a deprivation of possession or control points towards the completion of the levy rather than its initiation, for it is only upon completion that such possession actually passes to the creditor. See Taylor v. Robinson, 84 Mass. 562, 565 (1861). Nonetheless, it is necessary to divine the intended meaning of the word not only from its own plain definition, but also through the context in which it appears, as terms in a statute are to be interpreted in light of the other words surrounding them. See Chin v. Merriot, 470 Mass. 527, 535 (2015). The language surrounding the appearance of the term "taken on execution" indicates that it does indeed acquire a peculiar meaning for the purpose of Chapter 236. When viewed in relation to other distinct steps in the levy process, it does appear that the land is deemed "taken" at some point prior to the completion of the levy. See G.L. c. 236 § 43 ("A levy by set-off or sale shall be considered as made at the time when the land is taken, and the subsequent proceedings and the officer's return thereof shall be valid ...") (emphasis added); G.L. c. 236, § 4 ("If land ... is taken on execution, the officer shall forthwith deposit in the registry of deeds for the county or district where the land lies a copy of the execution ...") (emphasis added); G.L. c. 236, § 23 (requiring a

return on execution to state "[f]irst, [t]he time when the land was taken on execution ... second, ... that the appraisers were appointed ... third, that the appraisers were duly sworn ... fourth, that they appraised and set off the land ...").

*5 Further supporting this interpretation is its treatment in past cases. Apart from the "words of the law itself ... we may also enlist the aid of other reliable guideposts," and accordingly may "consider the statute in light of the common law." Suffolk Const. Co. v. Div. of Capital Asset Mgmt., 449 Mass. 444, 454 (2007). In cases interpreting G.L. c. 236, the courts have treated land as taken at a point prior to the completion of the levy. See Taylor v.. Robinson, supra, 84 Mass. at 564 ("... some time must necessarily elapse after land is taken before the levy is completed, in order to give notice to the debtor, appoint appraisers, and determine the quantity and value of the land required in order to satisfy the execution ..."); Cowls v. Hastings, 50 Mass. 476, 480 (1845) ("the levy may be considered as taking effect from the time of the original seizure or taking of the land on the execution, and so the officer might, in carrying out this principle, date his entire proceedings as of the day of the commencement of the levy ..."); Still Assocs., Inc. v. Porter, 24 Mass.App.Ct. 26, 30 (1987) ("The property was 'taken on execution' no earlier than January 6, 1978. On that date FDIC placed the execution in the hands of a deputy sheriff who 'forthwith' recorded the necessary documents."). See also Crocker's Notes on Common Forms § 782 (7th Edition, 1955) ("Having made the taking, the officer may proceed by levy by set-off or by sale."). Hall v. Crocker, in particular, pinpoints the time at which the property is "taken on execution" as when the officer accepting the execution undertakes any action for the purpose of pursuing it. See Hall v. Crocker, 44 Mass. 245, 249 (Mass.1841).3 As the defendants suggest, the date the execution is recorded in the registry of deeds may thus be the date the land is "taken on execution."

Nonetheless, Section 12's provision that property "may be taken on execution, and shall thereafter be held in common", does not entail a severance of the joint tenancy immediately upon recording of the execution.

"Although statutory language 'is to be construed as written, in keeping with its plain meaning,' ... the language is not to be read in 'isolation,' but '[w]hen the meaning of a statute is brought into question, a court properly should read other sections and should construe them together.' " Commissioners of Bristol Cty. Mosquito Control Dist. v. State Reclamation & Mosquito Control Bd., 466 Mass. 523, 529 (2013) (internal citations omitted). Here, Section 12 functions retrospectively in conjunction with G.L. c. 236, § 43; like the post-completion relation back of the creditor's title provided in Section 43, a joint tenancy is indeed considered to have severed at the start of the levy through Section 12, but this is a determination made only once the levy is completed, and is not implemented until that time.

Section 43 provides, "A levy by set-off or sale shall be considered as made at the time when the land is taken, and the subsequent proceedings and the officer's return thereof shall be valid ..." G.L. c. 236, § 43. "[T]he purpose of fixing definitively when a levy should take effect was to determine the point of time when the title of the creditor should vest ..." Taylor v. Robinson, supra, 84 Mass. at 564. Title is thus considered as vesting at whatever time the levy began, such as at the date of recording, but only by relating back to the date of recording after completion of the levy; this relation back only occurs if and when the levy is actually completed by undertaking the remaining steps necessary to complete the set-off or sale of the property, including the appraisal of the property and the completion of the sale. See G.L. c. 236, § 43; Haskell v. Varina, 111 Mass. 84, 85 (1872) ("[T]he levy takes effect as of the date of the seizure, if the appraisement and the completion of the levy are pursued with reasonable diligence."); Hall v. Crocker, 44 Mass. 245, 247 (1841) ("It seems to be a well settled rule, that the levy shall be considered as taking effect, by relation, from the time when the legal proceedings for making the levy of execution commence, if followed up seasonably by a compliance with the requisites of the law.") (emphasis added); Taylor v. Robinson, supra, 84 Mass. at 564–565 ("[A] levy is to be considered as made at the time when the land is taken ... But by making the subsequent steps in perfecting the levy to

have a relation back to the date of the taking, the right of the creditor is fully protected against all intervening titles ... Until that time [when the subsequent steps are completed] the debtor or those claiming under him may retain the possession and use of the land, and enjoy the rents and profits; no title or seisin passes to the creditor, nor is the execution satisfied.").

*6 If there is no vesting of title in the creditor without completion of the levy, then there is similarly no purpose to severing a debtor's joint tenancy to facilitate the creditor's impending co-tenancy until the levy has been completed. Just as Section 43 establishes that title is considered vested in the creditor as of the date the land is "taken," but only by relation back upon the completion of the levy, Section 12 establishes that the joint tenancy is considered severed as of that same date, but also, only retroactively upon completion of the levy. Thus, while land shall ultimately be deemed to have been "taken on execution" at the initial step of recordation, the consequential Section 12 severance of a joint tenancy is not immediate, but rather a retroactive determination that can be made only after completion of the levy.

Construing the severance accomplished by Section 12 so that it aligns with the vesting of title provided by Section 43 is consistent with the result that would logically be obtained by applying the common law of joint tenancies. "Statutes are also to be construed in the light of preexisting common law." Com. v. Conway, 2 Mass.App.Ct. 547, 552–53 (1974). Joint tenancies have long been characterized by the four unities of time, title, interest, and possession. Knapp v. Windsor, 60 Mass. 156, 161 (1850). A joint tenancy terminates upon a disturbance of these unities, such as where a tenant "aliens his interest, or creditors levy on his interest, or he partitions under G.L. c. 241, s 1." W. v. First Agr. Bank, 382 Mass. 534, 552 n. 4 (1981). Within the context of a levy, upon its completion the creditor ultimately obtains title and a right to possession. See Taylor v. Robinson, *supra*, 84 Mass. at 565. By application of the common law, this transfer of title to a creditor would disturb the unities and mandate a severance of the joint tenancy.

By operation of the statute, Section 43 causes this transfer of title to relate back to the date of initiation of the levy. Applying the aforementioned common law rule in the context of this statutory effect, the breaking of the unity of title would relate back to that same date, and the joint tenancy would accordingly be considered as severed on that date. Section 12 achieves this same result, as it likewise severs the joint tenancy at the date that the transfer of title relates back to; yet this relation back cannot occur until the levy is complete, and the severance occasioned by Section 12 must consequently be delayed until that point as well.

The defendant argues that an interpretation harmonizing Section 12 with the common law renders the statute meaningless and ineffective, because it would only serve to repeat the already well-established common law rule that a joint tenancy severs upon one tenant's conveyance of his or her interest. However, while Section 12's overall operation is consistent with this common law rule, its relation back still serves a particular, specific function that supplements rather than mimics the generally established rule. Moreover, though the general effect of Section 12 may indeed be to reinforce the well-worn precept that severance occurs upon transfer of title, a statute is not meaningless simply because it codifies rules existing in the common law. To the contrary, the persuasiveness of defendant's interpretation, which would sever the tenancy far before any transfer of title, is in fact impeded by its direct derogation from the common law, as "[a] statute is not to be interpreted as effecting a material change in or a repeal of the common law unless the intent to do so is clearly expressed." Pineo v. White, 320 Mass. 487, 491 (1946); EMC Corp. v. Comm'r of Revenue, 433 Mass. 568, 571 (2001) ("It is not to be lightly supposed that radical changes in the law were intended where not plainly expressed."). See also Suffolk Const. Co. v. Div. of Capital Asset Mgmt., supra, 449 Mass. at 458 ("We do not employ the conventions of statutory construction in a mechanistic way that upends the common law and fundamentally makes no sense."). The language of the statute evidences no clear intent to contradict the common law. At most, it ambiguously provides for two competing

interpretations, one comporting and the other conflicting with common law. Given the lack of any clear intent to derogate from the centuries-old principles governing joint tenancies, the statute should be read in a manner consistent with the common law rule that severance of a joint tenancy accompanies disturbance of the unities, meaning, in this case, that the tenancy is only severed upon the transfer of title.

*7 Other courts have come to this same conclusion when evaluating the impact of unperfected executions on joint tenancies. These courts consider a levy that has been commenced but not completed to have no greater an impact than a judgment lien, and accordingly have held that a joint tenancy severs only upon completion of the levy and transfer of title. See Grothe v. Cortlandt Corp., 11 Cal.App. 4th 1313, 1322 (1992) (collecting cases, noting that "nothing in these cases is inconsistent with our conclusion that a recorded levy alone, signifying nothing more than an official designation of the property subject to execution, does not sever the joint tenancy.") (emphasis in original); Knibb v. Sec. Ins. Co. of New Haven, 121 R.I. 406, 411 (1979)4; Van Antwerp v. Horan, 390 Ill. 449, 454 (1945).5 A number of states have gone even further to hold that a joint tenancy does not sever even after sale, but instead continues until the debtor's right of redemption has been entirely foreclosed. See Jackson v. Lacey, 408 Ill. 530, 532 (1951); Frederick v. Shorman, 259 Iowa 1050, 1060 (1966)6; Local Realty Co. v. Lindquist, 96 Utah 297, 303 (1938). There does not, however, appear to be any state that has shifted the moment of severance in the other direction to hold that a joint tenancy in real property severs prior to the completion of the levy.

The Supreme Judicial Court's treatment of tax takings further suggests that the nature of ownership is not affected until a full transfer of title. Because assessed taxes automatically operate as a lien on property, when an individual fails to pay these taxes, a municipality may take that resident's land by creating and recording an instrument of taking. See G.L. c. 60, §§ 37, 53-4. At the time this instrument is recorded, the municipality acquires title to the land, and the right to enter into possession. See G.L.

c. 60, §§ 53-4; Hanna v. Town of Framingham, 60 Mass.App.Ct. 420, 424 (2004). In this way, a recorded tax taking is far closer to perfection than a recorded execution, which passes no title or right to possession upon recording. See Taylor v. Robinson, supra, 84 Mass. at 565. Yet even in the event of a tax taking, the court has recognized only a limited impact on the nature of ownership prior to the completion of the process. Though the municipality may have some form of title, it does not have absolute title until the right of redemption has been foreclosed. See G.L. c. 60, § 53-54; Wulsin v.. Bainton, No. 10-P-619, 2011 Mass.App. Unpub. LEXIS 1005, at *11 (App.Ct. Sep. 13, 2011) (period of adverse possession not interrupted by tax taking where town did not foreclose or take possession). The court likewise found in Hanna v. Town of Framingham that, for the purposes of appealing a zoning bylaw, the taxpayer remains the owner of that property, even where the town has recorded an instrument of taking, if the town has not actually taken possession or foreclosed the right of redemption. See Hanna v. Town of Framingham, supra, 60 Mass.App.Ct. at 425. This suggests that the mere recording of an instrument of tax taking does not alter the fundamental nature of ownership until a true divestiture of all interest in the property comes about.

*8 Finally, it is necessary to examine the underlying effect of each interpretation to determine whether it is sensible and in consonance with the overall purpose of the statute, as "a statute should be construed in a fashion which promotes its purpose and renders it an effective piece of legislation in harmony with common sense and sound reason." Com. v. Soldega, 80 Mass.App.Ct. 853, 855 (2011), quoting Commonwealth v. Griswold, 17 Mass.App.Ct. 461, 462 (1984). "Statutory language is the principal source of insight into legislative purpose." See Local 589, Amalgamated Transit Union v. Massachusetts Transportation Authority, 392 Mass. 407, 415 (1984). "If a liberal, even if not literally exact, interpretation of certain words is necessary to accomplish the purpose indicated by the words as a whole, such interpretation is to be adopted rather than one which will defeat the purpose." Joseph Baker's Case, 55 Mass.App.Ct. 628, 631 (2002), quoting from North Shore Realty Trust v.

Commonwealth, 434 Mass. 109, 112 (2001).

The language and effect of the provisions of G.L. c. 236, taken together as a whole, undoubtedly indicate that the chapter's most general purpose is to provide a process for the satisfaction of a judgment that sufficiently protects the rights of both debtor and creditor. Acknowledging that this is a statement of purpose of exceptional generality, the court still need delve no further, as accomplishment of this purpose is supported by an interpretation of Section 12 that precludes the premature severance of joint tenancy sought by the defendants: such severance serves to accomplish no beneficial purpose whatsoever as to either debtors or creditors, whereas severance at the completion of the levy equitably promotes the rights of both at the expense of neither.

First, severance of the joint tenancy as of the date of the recording of the execution, but only by relation back upon completion of the levy, serves the purpose of protecting a debtor from experiencing irreparable harm to his or her property interest where the creditor begins the levy but does not, or cannot, ultimately collect through the levied real estate. A levy that has begun may be defeated or waived prior to completion so as to be void against the debtor's interest in the property. See G.L. c. 236, § 50. A creditor may also choose to suspend its levy on execution. See G.L. c. 236, § 31. A levy may also simply expire if not pursued in a timely manner. See G.L. c. 236, § 49A. Additionally, a debtor may, of course, simply pay the amount due under the execution prior to the levy's completion, thereby satisfying the judgment and the execution. Were the joint tenancy to sever immediately upon recording, a debtor's interest in the property may be irrevocably harmed even if a creditor's levy is satisfied by payment, voided, or otherwise invalidated: the debtor's interest would be reduced to a tenancy in common, and he or she may be unable to subsequently re-establish the joint tenancy and enjoy its attendant benefits, despite the lack of any successfully pursued levy. The inequity of this result is most pointedly apparent where an execution is recorded, but the debtor immediately pays the amount due; despite having fully satisfied his or her obligations, the debtor's interest in the property

will nonetheless have been harmed. If the joint tenancy instead severs only upon completion of the levy, a debtor's interest is preserved until the creditor seasonably completes the requisite statutory process.

*9 The defendants argue that the premature severance they favor provides protection to the creditor, because if the joint tenancy remains in effect and the joint tenant dies before the levy is complete, the creditor would be unable to collect. However, this is incorrect. Generally, when a joint tenant dies before a creditor acts to enforce a lien on his interest, the lien is extinguished. See Weaver v. City of New Bedford, 335 Mass. 644, 647 (1957); Henderson v. Town of Yarmouth, 335 Mass. 647, 647 (1957). However, a levy will not be lost by the death of a joint tenant if it is ultimately completed. If the levy is fully completed, the subsequent transfer of title relates back to the time at which the land was first taken. See Taylor v. Robinson, supra, 84 Mass. at 565. This serves to protect creditors by preventing a debtor's interim loss of all interest from defeating an incomplete levy. A creditor therefore may complete the levy even if the debtor conveys his entire interest; he likewise may do so where the debtor dies. See Capen v. Doty, 95 Mass. 262, 264 (1866) ("from the moment of so beginning the levy, if the same is duly and seasonably followed up and completed, ceases to be the estate of the debtor, or to be affected by his death or insolvency ... if he dies after the levy has once begun, the service of the execution may be completed as if both parties were still living."). For the purposes of the levy, a transfer of the debtor's interest through the right of survivorship would differ little from any other living or testate conveyance from which it is well-established that the creditor is protected. A creditor may therefore complete a levy where the debtor dies and passes his or her interest to a joint tenant.7 Accordingly, the fact that the joint tenancy continues after recording of the execution would not impact the creditor's ability to complete the execution in the case of the debtor's death. In terms of creditor protection, early severance thus accomplishes no discernable goal.

Immediate severance of the a joint tenancy thus serves

no rational purpose with regard to the rights of debtors and creditors, and it is the relationship between and effect upon these parties that G.L. c. 236 is intended to regulate. The only conceivable purpose behind the early termination of a joint tenancy as sought by the defendants is to provide a potential benefit to heirs, like those here, who would acquire an interest through an involuntary and fortuitous severance neither induced nor intended by the joint tenant. Nowhere in G.L. c. 236 is there even the faintest indication that, in construing its provisions, the rights of such heirs are to be of any concern at all, let alone paramount to the rights of the parties explicitly governed by the statute.

CONCLUSION

The first iteration of the present G.L. c. 236 dates back as far as 1696, when the Commonwealth enacted a statute governing the taking of real estate by means of an execution. See St. 1696, c. 10, §§ 1–3. A provision governing the particular issue in this case, the impact of an execution on a joint tenancy, was first added in 1783. See St. 1783, c. 57, § 2. Though the statute has been amended since that early time, the operative language in what is now G.L. c. 236, § 12 has remained essentially the same from 1860 to the present. See G.S. c. 103, § 9 (1860). Although the phrasing and construction of the statute are arcane and may seem resistant to easy interpretation, and this inherent difficulty of language does indeed provide the defendants with an argument that is superficially colorable, ultimately their argument is not supported by the considerable case law interpreting the statutory scheme, or by common sense. An execution recorded against the interest of one joint tenant does not immediately convert the joint tenancy to a tenancy in common; the levy must be seasonably completed for severance to occur, and only then does that severance relate back to the date of recording of the writ of execution.

*10 For the reasons stated above, the plaintiff's motion for summary judgment is ALLOWED. Judgment will enter accordingly.

JUDGMENT

This action commenced June 16, 2016 with the filing of a complaint by Kelly McHugh ("McHugh"), asserting a claim to quiet title pursuant to G.L. c. 240, §§ 6–10, with respect to Units 1 and 3 at the 154 Greenwood Street Condominium, created by master deed recorded with the Worcester District Registry of Deeds ("Registry") on May 12, 2006 in Book 38949, Page 353, and located at 154 Greenwood Street, Worcester, Worcester County ("Property").

This case came on for hearing on plaintiff's Motion for Summary Judgment. In a decision of even date, the court (Speicher, J.) has determined that judgment shall enter in favor of the plaintiff on the sole count of the complaint.

In accordance with the court's decision, it is

ORDERED, ADJUDGED and DECLARED, that upon the death of James Zanfardino, Sr. on April 22, 2016, McHugh, as the surviving joint tenant, became the owner of the Property by right of survivorship, subject to any outstanding mortgages and the lien of the writ of execution recorded with the Registry in Book 43191, Page 358, and

It is further

ORDERED, ADJUDGED, and DECLARED, that the defendants James Zanfardino, Jr. and John Zanfardino have no interest in the Property and did not acquire any interest in the Property upon the death of James Zanfardino, Sr., and

It is further

ORDERED and ADJUDGED that this Judgment is a full adjudication of all the parties' claims in this case, and all prayers for relief by any party in this action which are not granted in the preceding paragraphs are DENIED.

It is further

ORDERED that no costs, fees, damages, or other amounts

are awarded to any party.

All Citations
Not Reported in N.E.3d, 2016 WL 7234738
Footnotes

1 Though the parties agreed in the statement of undisputed facts that the conveyance to Ms. Perry occurred at some undisclosed date in June, the deed provided in Exhibit 3 indicates that the conveyance occurred on May 11. This fact is not material to the court's decision.

2 Defendants' opposition not only seeks denial of the plaintiff's motion, but additionally requests that judgment be awarded in their favor.

3 "It is clear from this provision, that the land is deemed legally taken, so as to fix the time at which the levy shall be considered as made, before notice to the debtor to appoint an appraiser, and of course before the appraisers can be sworn ... when an execution has been delivered to an officer, with directions to levy the same on the real estate of the debtor, and the officer accepts the execution with such directions, and consents and undertakes to execute it; any act, done by him, in pursuance of that purpose, is a beginning to execute it, and constitutes a seizure ...".

4 "We now consider whether the levy of execution destroyed the joint tenants' unity of interest. At the time of the levy of the execution, defendant had a mere lien upon the property, which only had the potential of ripening into title following a judicial sale. As a result, the levy of execution only gave rise to an expectation of title in defendant, giving defendant no greater interest than that already possessed. We fail to ascertain how this mere expectation alters the interest of the joint tenants and therefore conclude that the levy does not destroy the unity of interest." (internal citations omitted)

5 "[I]t is clear that if the attaching of a judgment lien upon the interest of a joint tenant does not sever the joint tenancy, the making of a levy upon the interest of the joint tenant debtor would not be

such acts as would sever the joint estate, because of the fact that the levy gives no greater interest than that which the judgment creditor already possessed."

6 "During the continuance of a joint tenancy, each joint tenant has a liability to have his fractional interest taken for the satisfaction of his debts. Any such taking, when completed, works a severance of the joint tenancy. Thus a judgment creditor must not only levy on the land, but sell it, and have any redemption period expire, before the severance is completed."

7 It is worth noting that this is not the case in some other states. See, e.g., Zeigler v. Bonnell, 52 Cal.App.2d 217, 220 (1942) (holding that relation back doctrine only protects the creditor "when the rights of innocent third parties have not intervened", and the non-debtor tenant's receipt of the debtor's interest through survivorship is an innocent intervention). Nonetheless, Capen v. Doty is clear that a creditor's interest is protected even in the event of the debtor's death. See Capen v. Doty, supra, 95 Mass at 264.

2018 WL 6710595
Only the Westlaw citation is currently available.
Massachusetts Land Court,
DEPARTMENT OF THE TRIAL COURT.
SUFFOLK COUNTY.

John SZE, Plaintiff,
v.
Paul SZE and Peter Sze, Defendants.

CASE NO. 16 MISC. 000723 (KCL)
|
Dated: 19 December 2018

MEMORANDUM AND ORDER ON THE EFFECT OF DEFENDANT PETER SZE'S PASSING

By the court (Long, J.)

Introduction

*1 This is a partition action. When it was filed, the owners of the property at issue, 20-22 Sedgewick Street in Boston, were plaintiff John Sze and his brothers, defendants Paul and Peter Sze, as "joint owner[s], with right of survivorship." Peter has since died. Had all three lived, the partition (here by sale, with subsequent division of the net sale proceeds) would have been 1/3, 1/3, 1/3, subject to G.L. c. 241, § 23 adjustments, G.L. c. 241, § 25 accounting, and G.L. c. 241, § 22 costs. Peter's death, however, raises the following question. Is the division now 1/2 John and 1/2 Paul as Peter's survivors, or have the partition proceedings ended the joint tenancy (and, if so, when), converting it to a tenancy in common where John, Paul, and Peter's estate each get 1/3? For the reasons set forth below, I find and rule that the "survivorship" rights remain, resulting in a 1/2, 1/2 split between John and Paul.

Analysis

I begin with the basics.

First, the ownership structure at issue was created as a joint tenancy with right of survivorship, knowing and intending that the survivor(s) would get the deceased(s)' interests. To say that result

"deprive[s] ... Peter's heirs of Peter's interest in the Property"1 misses the point. The intention that survivors receive the deceased(s)' interests is clearly expressed by the nature of the tenancy, and Peter himself, one of the grantors in the deed that created it, joined in that intent.2 See West v. First Agr. Bank, 382 Mass. 534, 536 n. 4 (1981) (joint tenant has right to remainder if he survives the other).

Second, joint tenants have a right to partition. See G.L. c. 241, § 1 ("Any person, except a tenant by the entirety, owning a present undivided legal estate in land, not subject to redemption,3 shall be entitled to have partition in the manner hereinafter provided.").

Third, a joint tenancy is "destroyed" by partition. See West, 382 Mass. at 536 n. 4.

Fourth, "[t]he mere institution by a joint tenant of partition proceedings does not work a severance of the tenancy." Minehan v. Minehan, 336 Mass. 668, 671 (1958) (internal citations omitted). The tenancy continues until a subsequent point and, until that time, the survivorship rights remain. See id.

The question thus becomes this. When, precisely, is that subsequent point when the partition formally destroys the joint tenancy? The defendants argue that point is the date of the interlocutory decree ordering partition and, in their view, that decree was this court's September 22, 2017 Memorandum and Order denying their motion for appointment of a commissioner to determine the "set-off" value of the property and allowing them to purchase John's interest at that price, and declaring instead that a commissioner would be appointed to sell the property on the open market.4 In their view, at that moment, the parties' right to equal division (1/3, 1/3, 1/3) was effectively "locked in" and was not changed by Peter's subsequent death. I disagree.

*2 *West* states that joint tenancies are "destroyed" by partition. 382 Mass. at 536 n. 4. But, as noted above, it does not explicitly say when that destruction takes place. *Minnehan* makes plain that

"the mere institution by a joint tenant of partition proceedings does not work a severance of the tenancy." 336 Mass. at 671 (emphasis added, internal citations omitted). The tenancy thus remains joint until the time the property is actually conveyed (a general principle of property law),5 unless it had been declared to be a different type of title in the interlocutory order previously entered in the case6 and that order had not timely been appealed, making that declaration final. Here, the interlocutory order was the Interim Order Appointing Donna Turley, Esquire Partition Commissioner for the Property Commonly Known as 20-22 Sedgwick Street, Boston, MA (Nov. 13, 2017), which declared that the property was owned by the parties as "joint tenants with rights of survivorship." Interim Order at 2. No timely appeal was taken from that declaration even though Peter had died on October 28, 2017, two weeks before the Interim Order was entered and the issue was thus ripe. The first time the issue was raised was in Plaintiff's Motion for Further Orders, which was not filed until Dec. 22, 2017 — long past the 30-day appeal period even if the motion was considered a notice of appeal. The joint tenancy finding could still be vacated, to be sure, see G.L. 215, § 35 ("A warrant or commission...for the partition of land...may be revoked by the court for sufficient cause, and a new commission may be issued or other appropriate proceedings taken"), but I do not find "sufficient cause" to do so. Indeed, quite the contrary. The grantors of the deed that created the joint tenancy — including Peter himself, the party whose widow and children will now not receive a share of the sale proceeds — did so intentionally, knowing its consequences.

Conclusion

*3 For the foregoing reasons, the tenancy between the parties was, and remains, joint. At present, unless one of the remaining joint tenants dies between now and the time the property is sold, the division of the net sale proceeds, after the adjustments referenced above, will be 50-50 between the surviving joint tenants, John and Paul. Wilder does not hold otherwise. All it holds is that the interlocutory order makes its finding of ownership and title final and conclusive unless immediately appealed. It did

not sever a joint tenancy. Rather, it found the title to be a tenancy in common. Here, my interlocutory order declared the tenancy to be joint, and joint it remains.

SO ORDERED.

All Citations

Not Reported in N.E. Rptr., 2018 WL 6710595

Footnotes

1 Defendants' Further Briefing on Joint Tenancy at 1 (Feb. 22, 2018).

2 The deed by which Paul, John and Peter acquired their joint tenancy with right of survivorship came from Paul, John, Peter and Shel Sel (Dec. 21, 1992).

3 Estates in land that are subject to redemption include mortgages and municipal tax takings. Thus, neither a mortgagee nor a municipality that has taken tax title to a property have a right to its partition until the right of redemption has been foreclosed.

4 The defendants' G.L. c. 231, § 118 single justice petition seeking reversal of that denial was denied by the single justice (Rubin, J.) on Oct. 27, 2017.

5 See Attorney Gen'l v. Clark, 222 Mass. 191, 293 (1915) ("A joint tenant, as an incident of his tenure, always may terminate the joint tenancy by transfer or conveyance of his interest."). See generally Alperin, 14C Mass. Practice, Summary of Basic Law (5th Ed.) § 14.28 at 713-714 (Joint tenancy: Severance).

6 There are effectively two final judgments in partition cases, addressing different phases of partition.

The first is the "interlocutory order" entered early in the case, which declares the ownership and title to the property and the consequent right to partition. It is immediately appealable and, if not immediately appealed in timely fashion, is final and binding on the parties on the ownership and title issues. See Wilder v. Steeves, 1 Mass. App. Ct. 822, 823 (1973) (rescript) (unappealed interlocutory

decree appointing commissioner and ordering partition by sale of land owned, according to the decree, as tenants in common, held to have "conclusively determined the rights of the parties; and following its entry no question remained open concerning either ownership or title," citing Brown v. Bulkley, 11 Cush. [65 Mass.] 168, 169-170 (1853); Savery v. Taylor, 102 Mass. 509, 511 (1869); the court thus denied the parties' subsequent petition to change that finding to one of joint tenancy and, in consequence, enjoin the partition sale, even though the parties agreed that the tenancy had been joint). See also Morgan v. Jozus, 67 Mass. App. Ct. 17, 20 (2006) (interlocutory order is "final by its nature" and, if not immediately appealed, "constitutes a conclusive determination."). The policy reason for this is obvious. Partition is an involved process with significant expense (e.g., the commissioner's fees, which can be considerable) and irrevocable consequences (sale to a third party), and the pendency of the partition question (reflected by recorded notice at the Registry of Deeds, see G.L. c. 241, § 7) is a "cloud on title" much like a memorandum of *lis pendens*. Just as a *lis pendens* is immediately appealable because of the "cloud" it creates, see G.L. c. 184, § 15(d), so too is the interlocutory order determining ownership and title and directing partition to occur on that basis. If a right to partition does not exist (if, for example, the property is held in partnership or in trust), this needs to be known before those expenses and conveyance occur, and the third-party purchaser of land partitioned by sale needs to be able to rely on certainty of title. Any uncertainty produces either a lower sale price or results in no sale at all, defeating the purpose of partition. Immediate appealability, conclusive thereafter as to title and ownership, solves this problem.

The second judgment in partition cases, which adjudicates the division of the net sale proceeds after determination of costs, G.L. c. 241, § 22, appropriate adjustments for disproportionate contributions towards necessary property-related maintenance or physical improvements that added to market value, G.L. c. 241, § 23, and other accounting matters, G.L. c. 241, § 25 (e.g., "rent" owned to an

ousted a co-tenant, see Stylianopoulos v. Stylianopoulos, 17 Mass. App. Ct. 64, 69 (1983)), occurs at the conclusion of the case. Once the ownership and title questions have been conclusively determined in the interlocutory order and partition has proceeded on that basis, these are the matters that "remain[ ] to be done...to carry it [the partition] into effect." Brown, 11 Cush. [65 Mass.) at 169.

G.L. c.241 § 1

§ 1. Persons entitled to partition

Any person, except a tenant by the entirety, owning a present undivided legal estate in land, not subject to redemption, shall be entitled to have partition in the manner hereinafter provided. If such estate is in fee, he shall be entitled to partition in fee; if a life estate or a term for years, he shall be entitled to partition thereof to continue so long as his estate endures. A life tenant or a tenant for years of whose term at least twenty years remain unexpired may, in the discretion of the court, have partition of the fee. The existence of a lease of the whole or a part of the land to be divided shall not prevent partition, but such partition shall not disturb possession of a lessee under a lease covering the interests of all the co-tenants.

G.L. c.241 § 10

§ 10. Interlocutory decree; redemption

If it is found that the petitioner is entitled to have partition for the share claimed or for any less share, the court shall make the interlocutory decree that partition be made, and therein determine the persons to whom and the proportions in which the shares shall be set off. The petition shall not be defeated by the payment by a party of a mortgage, lien, tax or other encumbrance upon the land, if the other parties are entitled to redeem from such payment; but the interlocutory decree shall contain such terms and conditions relative to redemption by a contribution on account of any such payment as the court may deem equitable.

G.L. c.241 § 14

§ 14. Indivisible land; partition

If a part of the land cannot be divided without great inconvenience to the owners, or is of greater value than the share of any party, or if all the land cannot be divided without such inconvenience, the whole or any part thereof may be set off to any one or more of the parties, with his or their consent, upon payment by him or them to any one or more of the others of such amounts of money as the commissioners award to make the partition just and equal.

G.L. c.241 § 16

§ 16. Return of commissioners; confirmation; amendments; final decrees; recording

The court may after hearing accept and confirm the return of the commissioners, or set it aside and commit the case anew to the same or to other commissioners having the same powers as those originally appointed; or it may, after a hearing, amend the return, and accept and confirm it as amended. After the return of the commissioners has been accepted and confirmed, the court shall thereupon enter a decree that the partition be firm and effectual forever. If the partition is by division, the commissioners shall record a certified copy of the decree in the registry of deeds for each district where any of the land lies, together with so much of the return, as finally confirmed, as relates thereto; or if any part of the land is registered land, they shall in recording the same comply with section 92 of chapter 185.

G.L. c.241 § 18

§ 18. Conclusiveness of partition

The partition by division, when confirmed and established by a final decree under section sixteen, or the sale if partition is made by sale, shall be conclusive upon all persons named in the petition or interested in the land therein described who appeared in the case or who waived notice or assented in writing to the same, or to whom due notice was given in accordance with section six or eight, or who were represented as provided in section nine, and upon all persons claiming through or under them or any of them, and, if the common title is derived through the settlement of the estate of a deceased person in any probate court within the commonwealth, upon all the heirs and devisees of such deceased person to whom the notice aforesaid was given or who were so represented, and upon all persons claiming through or under them.

G.L. c.241 § 26

§ 26. Death of party named in petition

If a party named in the petition has died prior to the filing thereof, or dies during its pendency, and such fact did not appear during the proceedings, his heir or devisee shall be entitled to the share of land set off to him or his share of the proceeds of a sale. If his death is made known to the court during the proceedings, the share or portion formerly belonging to him may be assigned or set off in his name to be held and disposed of as if the partition had been made prior to his decease, and his heir or devisee may recover the portion assigned to him, or his share of the proceeds, by appropriate action. The court may, however, in any case arising hereunder, if there has been a sale, order his share of the proceeds to be paid to his personal representatives pending settlement of his estate, or deposited under section thirty-four to await their appointment.

G.L. c.241 § 31

§ 31. Partition by sale

In partition proceedings the court may order the commissioners to sell and convey the whole or any part of the land which cannot be divided advantageously, upon such terms and conditions and with such securities for the proceeds of the sale as the court may order, and to distribute the proceeds so as to make the partition just and equal. The sale shall be made by public auction, after like notice as is required for the sale of land by an administrator, and the evidence thereof may be perpetuated in like manner by returns filed with the court in which the proceedings are had; or the sale may be a private sale, upon the terms as the court orders, if it finds after notice, as provided in section 8, and a hearing, or after receiving the written assent of all parties in interest, that the interests of all parties will be promoted thereby. If the sale is by auction, section nineteen of chapter two hundred and four shall apply thereto.

Massachusetts Rules of Civil Procedure
(Mass.R.Civ.P.), Rule 12

Rule 12. Defenses and Objections--When and How Presented--by Pleading or Motion--Motion for Judgment On Pleadings

(a) When Presented.

(1) After service upon him of any pleading requiring a responsive pleading, a party shall serve such responsive pleading within 20 days unless otherwise directed by order of the court.

(2) The service of a motion permitted under this rule alters this period of time as follows, unless a different time is fixed by order of the court: (i) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (ii) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter;

(2) Lack of jurisdiction over the person;

(3) Improper venue;

(4) Insufficiency of process;

(5) Insufficiency of service of process;

(6) Failure to state a claim upon which relief can be granted.

(7) Failure to join a party under Rule 19;

(8) Misnomer of a party;

(9) Pendency of a prior action in a court of the Commonwealth;

(10) Improper amount of damages in the Superior Court as set forth in G.L. c. 212, § 3 or in the District Court as set forth in G.L. c. 218, § 19.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on any motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. A motion, answer, or reply presenting the defense numbered (6) shall include a short, concise statement of the grounds on which such defense is based.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(10) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made

by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may after hearing order stricken from any pleading any insufficient defense, or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, misnomer of a party, pendency of a prior action, or improper amount of damages is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule

7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of a party or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure

I, Daniel B. Walsh, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R.A.P. 16 (a)(13) (addendum);
Mass. R.A.P. 16 (e) (references to the record);
Mass. R.A.P. 18 (appendix to the briefs);
Mass. R.A.P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R.A.P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R.A.P. 20 because it is produced in the monospaced font Courier New at size 12, ten characters per inch, and contains 34, total non-excluded pages.

CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on June 14, 2021, I have made service of this Appendix upon the attorney of record for each party, or if the party has no attorney then I made service directly to the self-represented party by the Electronic Filing System on:

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