IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IMO THE REAL ESTATE OF	)	
	)	
NANCY WEBER,	)	
	)	
Petitioner,	)	
	)	
v.	)	C.A. No. 7443-ML
	)	
JOAN WEBER,	)	
	)	
Respondent.	)	

MASTER'S REPORT

Date Submitted: November 5, 2013
Final Report: February 17, 2014

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LEGROW, Master

The last stage of this partition proceeding involves the distribution of proceeds of the sale of the subject property. The parties' dispute boils down to two issues: first, the interpretation of the operative deed and what percentage ownership that deed conferred on the parties, and second, whether the respondent and her son are entitled to contribution from the petitioner for repairs and improvements the respondent made to the property. For the reasons that follow, I conclude that the parties each owned 50% of the property, and that the respondent is entitled to a small portion of the contribution she seeks. This is my final report in this action.

BACKGROUND

The petitioner, Nancy Weber ("Nancy"),[1] married Eugene Weber, Jr. ("Eugene") in August 1995. It was a second marriage for both; Nancy had four children from a previous marriage, while Eugene had two children from a previous marriage. One of Eugene's children, Joan Weber ("Joan"), is the respondent in this action. For the bulk of their marriage, Nancy and Eugene lived at 21063 Crazy Lane, Bay Vista, Rehoboth Beach, Delaware (the "Property"), a home that Eugene initially owned in his sole name. On August 23, 1996, Eugene executed a deed transferring the property from his name to Nancy and Eugene jointly as husband and wife (the "1996 Deed").[2]

It is fair to say that the relationship between Nancy and Joan was not close. By the time of trial, the parties' mutual dislike was palpable, but the origins of the animosity are disputed and largely irrelevant. In 2003, Joan's name was added to the deed. According

[1] I use certain of the parties' first names for the sake of clarity. No disrespect is intended.
[2] Joint Trial Exhibit ("JX") 4.

to Joan's testimony, Eugene told Joan that he wanted to add her name to the deed, and Joan then consulted an attorney who prepared the deed at Joan's direction and without speaking to Eugene.[3] Eugene asked Nancy to sign the deed, and she obliged. The deed, dated February 20, 2003 (the "2003 Deed") vested title to the Property in:

> Eugene Weber, Jr., and Nancy Weber (as to an undivided 50% interest) and Joan Weber (as to an undivided 50% interest), as joint tenants with right of survivorship, of [21063] Vista Crazy Lane, Bay Vista, Rehoboth, Delaware.[4]

On the same date, Eugene and Nancy placed a mortgage on the Property in connection with a home equity loan they received from PNC Bank (the "Mortgage").[5] Although there initially was some dispute about the matter, Nancy now concedes that she is responsible for the payments Joan made toward the Mortgage after Eugene's death, as well as for the balance that remained on the Mortgage at the time the property was sold. Those payments and the Mortgage balance total $24,360.64.[6]

In February 2011, long-existing tensions in Eugene and Nancy's marriage reached a boiling point, and Nancy decided to move out of the Property and to Florida to live with her daughter. Joan's son, Scott Vickers ("Mr. Vickers"), moved into the Property shortly thereafter. Both Joan and Mr. Vickers encouraged Nancy to leave the Property. When Mr. Vickers and his wife moved into the Property, they terminated the lease on a home

[3] *Weber v. Weber*, C.A. No. 7443-ML (June 21, 2013) (TRIAL TRANSCRIPT) (hereinafter "Tr.") at 160-63.
[4] JX 3.
[5] Pre-Trial Stipulation and Order (hereinafter "Pre-Trial Order") at 3, ¶ 2(6).
[6] Resp't's Post-Trial Answering Br. (hereinafter "Answering Br."), Appendix Ex. A (7,528.48 for Mortgage payments + $16,832.16 balance on the Mortgage at the time of sale).

they were renting and agreed to maintain the Property and care for Eugene, who was in poor health, in exchange for living in the Property rent-free.[7]

Eugene passed away on September 18, 2011. After that time, Mr. Vickers and his wife continued to live in the Property and maintain it, and did not pay rent to the owners. Nancy was not aware that either Mr. Vickers or Joan were making repairs or improvements to the property. After Eugene's death, Nancy and Joan engaged in various negotiations regarding the property and its ownership. Although the parties discussed a buyout of Nancy's interest, that never came to fruition, and Nancy filed this partition action.

The parties stipulated to the appointment of William Schab, Esquire, as the trustee authorized to sell the property in a partition sale. The property was sold on February 18, 2013 to the highest bidder at auction for a price of $400,000.[8] The sale was approved on March 22, 2013, and the parties turned to the meat of the matter: determining how the proceeds of the sale should be divided. In addition to the parties' dispute regarding the percentage of their respective ownership in the property, the trial in this action also addressed Joan's counterclaim seeking a set-off from the sale proceeds for certain improvements, maintenance, and repairs she performed on the Property.[9] Mr. Vickers also filed a "Bill of Particulars at the return of sale hearing, contending he was entitled to reimbursement for his work on the Property.

[7] Tr. 53-55; Answering Br. at 6.
[8] *See* Trustee's Return of Sale (Mar. 20, 2013).
[9] Resp't's Answer and Counterclaims ¶ 7.

At trial, Joan valued the improvements, maintenance and repairs she performed on the property at $61,944.38. That figure included expenses incurred and labor performed by both Joan and Mr. Vickers, and encompassed: (1) expenses for materials to repair or improve the home, (2) contractors hired to repair the home, (3) taxes and insurance, (4) utility bills, including electric and cable, and (5) "labor" costs assigned to both Joan and Mr. Vickers.[10] Joan did not maintain all the receipts associated with the expenses she incurred to repair and improve the property, nor did she maintain records of the time she spent working on the property.[11] She attributed a value of $10,000 to the work she performed on the property, and $18,000 to Mr. Vickers's work on the property, but conceded that both figures were arbitrary sums based on her own estimation of the value she and Mr. Vickers put into the Property.[12] At trial, Joan conceded that Mr. Vickers's Bill of Particulars was more accurate than the figure she assigned to his work, and she withdrew her claim for $18,000 for his labor.[13] Joan also conceded at trial that Nancy was not responsible for electric or cable bills after she moved out of the Property.[14]

In the appendix to her post-trial brief, Joan submitted a revised estimate of expenses for improvements and maintenance to the house.[15] That revised estimate, which totals $29,497.09, includes material costs of $9,673.61,[16] bills for a plumber, a roofer,

[10] JX 7.
[11] Tr. at 178-79, 181.
[12] *Id.* at 181-83.
[13] *Id.* at 183-84.
[14] *Id.* at 179.
[15] Answering Br. Ex. A
[16] *Id.* (Lowes, Home Depot, Nuttle Lumber, "Miscellaneous material," Millsboro Carpet, Carpet installer, Tile Market).

and a carpenter who were retained to work on the property for a total cost of $3,560,[17] costs associated with lawn maintenance, including the purchase of a riding lawnmower for a total cost of $1,405,[18] taxes and insurance for a total cost of $2,321.20,[19] and "Tidewater," Delaware Solid Waste Authority, and "Sussex County Utility" costs of $2,537.28,[20] plus $10,000 for Joan's labor.

Joan also directed Mr. Vickers to prepare and file a statement of claim against the proceeds of the partition sale.[21] Mr. Vickers did not retain any receipts or maintain any time records associated with repairs or improvements he made on the property.[22] Instead, he prepared an after-the-fact estimate of the "monetary value" of the repair or improvement by contacting contractors who worked in the home improvement industry to determine what they would charge for similar work.[23] Using this methodology, Mr. Vickers seeks reimbursement of $8,350.00 from the proceeds of the sale. That amount includes both materials and labor, but without any breakdown between the two.

The record Joan established at trial does not reveal much about Mr. Vickers's process, including how much information he provided to the contractor regarding the scope of the work performed. Nor does Mr. Vickers's Bill of Particulars provide sufficient information for either the Court or Nancy to test the value assigned to any item. The bill submitted by Mr. Vickers does not assign a dollar figure to any item, but instead

[17] *Id*.
[18] *Id*. (Mulch, plants and flowers, riding mower, gasoline for lawn equipment)
[19] *Id*. (flood insurance, homeowners' insurance, property taxes)
[20] *Id*.
[21] Tr. at 64-65.
[22] *Id.* at 70-72, 73-74.
[23] *Id.* at 69-71.

only lists the total amount "due."[24] Mr. Vickers's testimony did not clarify this issue.[25] In addition to painting and making repairs and improvements to the property, Mr. Vickers's claim includes spraying for insects, maintaining the lawn, and cleaning, although he testified that he agreed to "maintain" the home in exchange for living on the Property rent-free.[26]

A one-day trial was held on June 21, 2013.[27] Shortly before trial, the parties stipulated to a "partial distribution" of $20,000 each from the escrowed sales proceeds. While the parties were engaged in post-trial briefing, Nancy requested an additional $20,000 partial distribution, which I granted over Joan's objection. Post-trial argument was held on November 5, 2013. This is my final post-trial report.

ANALYSIS

I. The Parties' Respective Percentage of Ownership in the Property

The first dispute between the parties is the legal issue of how the 2003 Deed should be interpreted and the percentage ownership it confers on each side as a result of Eugene's death. Nancy contends the 1996 Deed created a tenancy by the entireties and that the 2003 Deed did not destroy that form of ownership, but instead retained 50% ownership for Nancy and Eugene as tenants by the entireties within a larger joint tenancy with Joan. Joan contends the 2003 Deed destroyed the tenancy by the entireties, that the

[24] JX 2.
[25] Tr. at 69-74.
[26] JX 2; Tr. at 54-55.
[27] For reference, parties and judicial officers needing to travel through Delaware for court proceedings are advised not to schedule such proceedings on the Friday of Delaware's "Firefly Music Festival." I will leave for others to determine whether the festival itself is enjoyable. Being stuck in festival traffic, I personally can attest, is less than enjoyable.

2003 Deed did not create a joint tenancy with right of survivorship, and that Nancy, Joan, and Eugene therefore owned the Property as tenants in common, with Joan initially owning 50%, Nancy and Eugene owning 25% each, and Eugene's share passing to Joan under his will.

As an initial matter, Nancy contends that Joan cannot take this position because it conflicts with Joan's position in the parties' joint pre-trial stipulation and order. Although Joan argued through most of the litigation that the 2003 Deed gave her 75% ownership of the Property, she revised that position in the pre-trial order, stating "Respondent now asserts that she holds 2/3 interest in the Property (and Petitioner holds a 1/3 interest) as a result of the three-party tenancy in common that arose by default from the erroneously created joint tenancy with right of survivorship."[28] Joan sought to amend her pleadings to reflect that position.[29] On the morning of trial, however, Joan reverted to her original theory, contending her counsel misunderstood or misinterpreted case law regarding how the deed should be interpreted.[30]

Nancy opposes this shift in position, contending Joan should be bound by the terms of the pre-trial order. Joan argues that Nancy has not been prejudiced, because whatever position Joan adopts does not affect Nancy's position that the parties each own half of the Property. Because I ultimately conclude that Nancy's interpretation of the 2003 Deed is correct, I have considered the most recent position Joan adopted, but disagree that Nancy was not prejudiced by these serial shifts. I therefore recommend that

[28] Pre-Trial Order at 2.
[29] *Id.* at 7.
[30] Tr. at 19-20.

the Court award Nancy $1,000 in attorneys' fees to compensate her for the costs of researching and responding to Joan's shifting positions in the week leading up to trial.

What Joan's shifting positions reveal, more than anything else, is that the interpretation of the 2003 Deed urged by Joan's counsel is little more than an attempt to shoehorn the Deed into Joan's litigation position that Nancy should not receive any of the proceeds from the sale of the Property.[31] The manufactured nature of Joan's interpretation was revealed in several unsupported arguments she advanced in her post-trial brief. For example, Joan argued that a tenancy by the entireties could not exist between Eugene and Nancy in the 2003 Deed because of the "legal maxim … that a deed from a husband and wife to a husband, a wife, and a third party destroys an existing tenancy by the entireties.[32] Joan similarly argued "Delaware prohibits entireties to exist where three people concurrently own property."[33] Joan's brief provided no legal precedent to support these *ipse dixit* contentions, and counsel conceded during post-trial argument that Joan had no supporting precedent to offer. Joan likewise asserted that a tenancy by the entireties could not exist within the 2003 Deed because "[i]t is clear that tenants by the entireties must own the entire (hence the name) unit of real estate, whether it is an apartment, a house, or a farm."[34] Joan's counsel conceded in post-trial argument that this "clear" statement of the law was, in fact, incorrect.

[31] *See* Tr. at 152.
[32] Answering Br. at 12-13.
[33] *Id.* at 14.
[34] *Id.* at 13.

As one might expect from a litigation position driven by achieving a particular end, without regard for whether it is supported by the law, Joan's argument that she owns 75% of the Property is not persuasive. Joan does not appear to dispute that, under the 1996 Deed, Nancy and Eugene owned the property as tenants by the entireties.[35] The case law supports that position.[36] The question is whether that tenancy was destroyed by the 2003 Deed.

Joan argues without support that the 2003 Deed destroyed the tenancy by the entireties because that form of ownership may not exist between a husband, a wife, and a third party. When property is conveyed to husband and wife, the law presumes a tenancy by the entireties is created.[37] Nothing in the language of the 2003 Deed rebuts that presumption; the 2003 Deed refers to Eugene and Nancy owning an "undivided" 50% interest in the Property, consistent with a tenancy by the entireties, under which spouses are "owners of the whole estate during their joint lives … as between husband and wife, there is but one owner, and that is neither the one nor the other, but both together.[38] A deed need not specifically refer to the owners as "husband and wife" in order to create the entireties presumption.[39]

Although a tenancy by the entireties may not exist between three individuals, Joan offers no support for the conclusion that a tenancy by the entireties between a husband

[35] *See, e.g.* Answering Br. at 12 ("[the 2003 Deed] destroyed existing tenancy by the entireties").
[36] *Kunz v. Kurtz*, 68 A. 450 (Del. Ch. 1899); *Fischer v. Fischer*, 864 A.2d 98, 103 (Del. Ch. 2005).
[37] *Fischer*, 864 A.2d at 103.
[38] *In re Cochran's Real Estate*, 66 A.2d 497, 499 (Del. Orphan's Ct. 1949).
[39] *Fischer*, 864 A.2d at 103.

and wife may not exist within another form of ownership. There does not appear to be any policy that would discourage that form of ownership. Although the parties did not identify any Delaware law directly addressing the question, in *Bullen v. Davies* the Delaware Supreme Court stated in *dicta* that a deed conveying property to "Dan L. Davies and Elsie M. Davies, his wife, George H. Bullen, Jr. and Patricia D. Bullen, his wife" may have created "a one-half undivided interest in common the Davies hold as tenants by the entireties," and the same tenancy in the Bullens.[40] Thus, this state's highest court has at least suggested a tenancy by the entireties may exist within another form of ownership, and Joan has identified no case law to the contrary.

I therefore conclude Nancy and Eugene owned 50% of the Property as tenants by the entireties, and upon Eugene's death Nancy owned 50% of the Property outright. Eugene's interest in the Property could not pass to Joan under his will because it passed to Nancy by operation of law. I need not determine whether Nancy and Joan owned the Property as tenants in common or joint tenants with right of survivorship. Any survivorship component was avoided by the sale of the Property during Joan's and Nancy's lifetimes, and that issue therefore is moot.

II. Contribution among cotenants for repairs and improvements

Having determined that the parties each owned 50% of the Property, it follows that they are entitled to divide the sale proceeds equally, unless one co-tenant is entitled to contribution from the other. Nancy concedes she is solely responsible for the Mortgage, and therefore her portion of the proceeds should be reduced by $24,360.64, representing

[40] 209 A.2d 89, 93 (Del. 1965).

the payments Joan made toward the Mortgage and the payoff that remained on the Mortgage when the Property was sold. Joan also contends she is entitled to contribution for Nancy's share of repairs and improvements Joan and Mr. Vickers made to the Property, along with taxes, insurance, and certain utilities associated with the Property.

Delaware law requires cotenants to share equally the taxes imposed on jointly-owned property and insurance costs associated with the property, even when one cotenant has exclusive possession of the property.[41] In contrast, in the absence of an agreement or consent by another cotenant, a cotenant in sole possession is not entitled to contribution from the other cotenants for repairs to the property.[42] The law with respect to improvements to property by cotenants is equally clear. Under 12 *Del. C.* § 733, the Court may, as a matter of equity, take into consideration improvements by one cotenant and, "to the extent those improvements have enhanced the value of the property, the improving cotenant will be compensated proportionally out of the proceeds of the sale."[43] In other words, Joan is entitled to contribution for repairs if she can demonstrate Nancy agreed to those repairs, and Joan is entitled to contribution from Nancy for improvements to the Property if she can establish the extent to which those improvements enhanced the Property's value.[44]

Applying those standards, Joan is entitled to very little in the way of contribution beyond the Mortgage. Nancy is obligated to contribute her portion of the taxes and

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[41] *Haygood v. Parker*, 2013 WL 1805602, at *3 (Del. Ch. Apr. 30, 2013) (citing *Carradin v. Carradin*, 1980 WL 2608076, at *2 (Del. Ch. Sept. 22, 1980)).
[42] *IMO Charles B. McCaffrey*, 1995 WL 37794, at *1 (Del. Ch. May 31, 1995).
[43] *Burkett v. Ward*, 2012 WL 6764072, at *1 (Del. Ch. Dec. 19, 2012).
[44] *Haygood*, 2013 WL 1805602, at *5-6; *Wilson v. Lank*, 107 A. 772, 773 (Del. Ch. 1919).

insurance on the Property, which totaled $2,321.20. Beyond that, Joan has not shown that Nancy agreed to pay for any repairs to the Property after Joan and her son took possession of the Property. Joan also has not shown, or even attempted to show, how the improvements to the Property enhanced its value. Instead, Joan's only submissions on this topic assume that the costs of the improvements are equivalent to the value of the improvement. The law in Delaware is otherwise.[45] Although Joan argues that "[i]t does not take an expert to deduce that the fair market value of the [P]roperty increased once [Joan] invested the sums into making it look like a residence, not a slum,"[46] Joan did not offer any testimony regarding what increase in market value may be attributed to the improvements.[47] The same analysis applies to Mr. Vickers's Bill of Particulars. Neither Joan nor Mr. Vickers offered testimony about the extent to which the improvements enhanced the value of the Property, and I therefore cannot assign a value to those improvements.

Even if I could conclude that the value of the improvements derived from their cost, I cannot conclude that the Bill of Particulars submitted by Mr. Vickers, or the revised submission attached to Joan's post-trial answering brief, are reliable measures of those costs. As to Mr. Vickers's submission, the method in which it was prepared, based

[45] *See Wilson v. Lank*, 107 A. at 773 ("the cost of improvements is not necessarily the measure of [a cotenant's] rights to compensation or allowance, but it is the enhancement in value of the premises by reason thereof which is taken into consideration on equitable principle, and this enhancement must be shown.").
[46] Answering Br. at 19.
[47] Indeed, Joan's brief speaks in algebraic equations, where "X" represents the value of the property before the improvements, and "X PLUS some increase in fair market value due to the improvements" represents the value of the Property after the improvements, without any attempt to provide monetary values for either "X" or "X PLUS." *See* Answering Br. at 19.

on calls to a contractor who provided an off-hand estimate to perform similar work, and the fact that Mr. Vickers did not attribute a separate value to each improvement or repair, coupled with Mr. Vickers's concession that the document was prepared well after the fact because he never expected to be paid for his work, makes the entire estimate unreliable. Similarly, although Joan provided receipts for some of the expenses for which she seeks contribution, many of the receipts are duplicative[48] and not readily identifiable as expenses associated with the Property.[49] Joan has not provided any precedent for her request for reimbursement of utilities, and has provided no justification for the arbitrary $10,000 figure she assigned to her "labor" costs. For that separate reason, Joan failed to carry her burden of proof with respect to contribution for repairs, improvements, and utilities.

Finally, Joan argued in her post-trial brief that she was entitled to recovery under the theory that there was a quasi-contractual relationship between Joan and Nancy. As Joan describes this theory, she is entitled to contribution for the value of the services rendered if she shows at trial that she "provided services to [Nancy] … with the expectation that [Nancy] would pay for them, … [and] … that the circumstances should have put [Nancy] on notice that [Joan] expected to be paid."[50] The trouble with this theory, however, is that both Nancy's and Joan's trial testimony contradict it. Joan

[48] *Compare* JX 7 (seeking Lowes expenses for $5,443.15, but associated receipts include duplicative receipts and credit card bills without associated expenses and possibly duplicating other receipts); *with* Answering Br. Ex. A (seeking Lowes expenses of $4,431.30, with no associated receipts and without explaining the variation in figures).

[49] *See* JX 7 (including as "receipts" checks written to various unidentified individuals and credit card bills with no list of associated expenses).

[50] Answering Br. at 20 (quoting *Hynansky v. 1492 Hospitality Gp., Inc.*, 2007 WL 2319191, at * 1(Del. Super. Aug. 15, 2007)).

herself conceded that, when the repairs or improvements were made to the Property, Joan did not maintain receipts or a list of her time because she never expected to be seeking reimbursement for those expenses after the sale of the house.[51] More significantly, the parties agreed that Joan and Nancy never spoke after Nancy left the home and Joan's son took possession of the Property. Joan could not reasonably expect Nancy to pay for improvements about which she had no knowledge, and Nancy was not aware of any circumstances that should have put her on notice that Joan or Mr. Vickers were repairing or improving the Property and expected to be paid.

CONCLUSION

For the foregoing reasons, I recommend that the Court find the parties each owned 50% of the Property under the 2003 Deed, and that the proceeds of sale should be divided evenly, except Joan is entitled to contribution from Nancy for $25,521.24, representing the costs associated with the Mortgage and Nancy's proportional share of the taxes and insurance. I also recommend that the Court award Nancy $1,000 in attorneys' fees. This is my final report and exceptions may be taken in accordance with Rule 144.

Respectfully submitted,

/s/ *Abigail M. LeGrow*
Master in Chancery

[51] Tr. at 181, 187.