COURT OF CHANCERY
OF THE
STATE OF DELAWARE

LEO E. STRINE, JR.
VICE CHANCELLOR

New Castle County Courthouse
Wilmington, Delaware 19801

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Decided: March 1, 2006

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RE: IN THE MATTER OF THE REAL ESTATE OF JAMIE'S L.L.C. AND TILLMAN B. COX, C.M. NO. 10810-N

Dear Counsel:

This case involves a request to partition land (the "Property") in New Castle County previously owned by two brothers, Tillman B. Cox ("Tim") and Aubrey Cox ("A.J."), as tenants-in-common. The Property, which consists of four lots, on the corner of Kirkwood Highway and Newport Gap Pike, was used by the Cox brothers in connection with their ownership and operation of a used-car business on the Property. As of 1994, title to the Property was held by the brothers as tenants-in-common[1] although no percentage of ownership is specified in the deeds of title nor was a written agreement ever entered into between the brothers relating to the Property.

[1] Some of the parcels have been titled at various times in the name of the partnerships or one of the brothers and his respective spouse as tenants-in-common.

In 2002, A.J. transferred his interest in the Property to his son, Doyle Cox, and to his son's wife, Jamie Cox. That interest in the Property then was transferred to Jamie's L.L.C., an entity belonging to A.J.'s son and daughter-in-law in return for a $1 million mortgage. Jamie's L.L.C. ("Petitioner") then brought this action seeking partition. At present, Tim and Jamie's L.L.C. are co-owners of the Property that is the subject of the petition to partition. Tim opposed the petition filed by Jamie's L.L.C. requesting partition through a sale on several grounds, including manifest injustice, waiver of the right to partition, and the failure by Jamie's L.L.C. to prove the properties divided are worth substantially less than as a whole. In the event the court held that partition was appropriate, Tim maintained that his contribution of personal funds towards the acquisition and improvement of a portion of the Property entitles him to a greater than a fifty-percent share of the Property if the partition is in kind or to a greater than a fifty-percent share of the proceeds if a partition sale is ordered.

This action was referred to the Master. During the course of the extensive proceedings before the Master, he issued several important decisions, including a written opinion on a motion for summary judgment, a bench ruling on whether partition was appropriate and the appropriate type of partition, and a post-trial opinion on the percentage of ownership held by each brother.[2] Unsatisfied with the outcome in which the Master determined that Jamie's L.L.C. is entitled to partition through sale and equal

[2] *See In re Real Estate of Jamie's LLC*, 2005 WL 2429229 (Del.Ch. Sept. 20, 2005) (hereinafter "Master's Report I"); *In re Real Estate of Jamie's LLC*, 2005 WL 2429225 (Del. Ch. Sept. 20, 2005) (hereinafter "Master's Report II").

distribution of those proceeds, Tim has exercised his right to file exceptions from the final Master's Reports (the "Reports") that contain the determinations justifying the Master's grant of partition. Those exceptions are now before me.

I. Standard Of Review

The standard of review for a master's findings, both factual and legal, is de novo.[3] The mere fact that exceptions are taken to the Master's factual determinations does not itself require a new trial; rather, it is often the case that the court can read the record that is relevant to the exceptions raised and draw its own factual conclusions.[4] As the Supreme Court ruled in *DiGiacobbe v. Sestak*, "[o]nly where exceptions raise a *bona fide* issue as to dispositive credibility determinations will a new hearing be inevitable. In those cases the new hearing can be limited to the witness or witnesses whose credibility is at issue."[5] Thus, under *DiGiacobbe*, I must review the findings in the Master's Reports in order to determine whether "dispositive credibility determinations" were made by the Master that I must hear separately in a new trial.

II. The Master's Reports

It is clear from the Master's well-reasoned Reports that he thoroughly considered the issues before him. Master's Report I addressed the motion for summary judgment on Tim's defenses to the partition action filed by Jamie's L.L.C. That Report recommended granting summary judgment on the right to partition the Property and indicated the Master's intent to grant summary judgment — contingent upon receipt of a report in the

[3] *See DiGiacobbe v. Sestak*, 743 A.2d 180, 184 (Del. 1999).
[4] *Id.*
[5] *Id.*

form of an affidavit prepared by an appraiser for Jamie's L.L.C. — on the issue of whether there should be a partition through sale rather than a physical partition.[6] The Master, however, denied summary judgment on the issue of implied waiver of the right to partition. He explained that the factual development required to assess the waiver issue was the same as would be required to determine the division of the proceeds of the partition sale and stated that the interests of judicial economy recommended waiting for further factual development on this issue.[7]

In a bench ruling issued on May 4, 2004, the Master decided two main issues: (1) that partition was appropriate and that the right to partition had not been waived; and (2) that a partition in kind was not appropriate and that a partition through a forced sale was therefore required. The Master found that a partition sale was appropriate after receiving additional documentation from the appraiser for Jamie's L.L.C. The Master determined that there was no evidence of a waiver of the right to partition the Property because it was the testimony of both Tim and A.J. that they never considered the possibility of partition.[8] Each testified that he had never discussed it with the other.[9] The Master also determined that a partition in kind was not feasible because the evidence, which was unrebutted, demonstrated that the value of the Property divided into two parcels would be less than if it was maintained as a whole parcel.[10]

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[6] *See* Master's Report I at 9.
[7] *Id.* at 8.
[8] *See* Bench Ruling Tr. at 3.
[9] *See* Trial Tr. at 105, 125-28, 206-07, 243, 250.
[10] *See* Bench Ruling Tr. at 4.

The sole issue considered in Master's Report II was the percentage of ownership held by each of the parties to the partition. This question was limited only to a part of the Property known as the "back lot."[11] On this issue, the Master found that the record demonstrated that Tim meant to make a gift of 50% of the back lot to A.J. As support for this finding, the Master cited Tim's pleadings and testimony.[12] Specifically, the Master stated that Tim's position that he gave the Property to his brother, subject to an agreement that it never be partitioned, was "only what Tim himself intended" and that both A.J. and Tim were "quite candid"[13] that they never considered the possibility of partition of the property.[14]

III. Exceptions To The Reports

Tim asserts four exceptions to the recommendations in the Reports. He maintains the record supports that: (1) a waiver of partition was made; (2) a partition in kind can be made equitably; (3) the proceeds of any partition sale should not be divided equally between the parties; and (4) he purchased several of the parcels comprising the Property and that he paid for improvements to the Property with his own personal funds. The latter two exceptions are related and I will address them together. Tim also contends that

[11] This area of property is along the Newport Gap Pike. Because the "front lot" was purchased with funds generated from the partnership and each brother was liable on the mortgage, the Master stated that "[t]here is no question the brothers acquired an equal ownership interest" in the front lot. *See* Master's Report II at 4.
[12] *Id.* at 6.
[13] *Id*.
[14] The Master notes other facts in the record that are not dependent upon credibility determinations, such as the division of labor and contributions of each partner and that although Tim paid a disproportionate amount of the purchase price of the back lot the Property was titled in a way that "appears to show" a fifty-percent ownership interest in his brother, to support his finding. *Id.* at 5.

the Master made two credibility determinations that must be heard by this court under the requirements of *DiGiacobbe*. First, that the Master's characterization of the "guarded" nature of his testimony at trial as compared to his earlier testimony and pleadings was a dispositive credibility determination, which led the Master to err in concluding that proceeds from the sale of the Property should be divided equally. Second, Tim alleges that the Master's description of any attempt to assign ownership interests in the Property as "unfair and speculative" was a dispositive credibility determination not consistent with the evidence in the record that Tim used personal funds to acquire the back lot and to make improvements to the Property. Tim submits that these dispositive credibility determinations require this court to conduct a new hearing.

IV. Legal Analysis

A. Was The Right To Partition Waived?

The right to partition is a property right. Delaware law is clear that a co-tenant in common is entitled to partition the property owned in common as a matter of right absent specific defenses.[15] In addition, any relinquishment of the right to partition, such as waiver through contract, must be made by "clear affirmative words or actions."[16] As the Master correctly found, no such defenses exist nor was this right to partition ever waived by either of the brothers.

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[15] *See* 25 *Del. C.* § 721; *Kuck v. Cropper*, 1978 WL 22465, at *3, (Del. Ch. Dec. 5, 1978) (citing 68 C.J.S. *Partition* § 21).

[16] *Libeau v. Fox*, 880 A.2d 1049, 1057 (Del. Ch. 2005) (quoting *In re Appraisal of Ford Holdings, Inc. Preferred Stock*, 698 A.2d 973, 979 (Del. Ch. 1997)), *aff'd in relevant part*, __ A. 2d __, 2006 WL 196379 (Del. 2006). *See also* 4 DAVID A. THOMAS, THOMPSON ON REAL PROPERTY §38.03(a)(2)(i)(C) (2005) ("It is not sufficient that the parties have merely contemplated they would not partition the property.").

Tim, however, maintains that he and A.J. waived the right to partition the Property through an implied waiver. As evidence of this waiver, he cites to at least a thirty-year course of dealing between the brothers and his belief that there was an implicit agreement never to sell the Property but to pass it on to their children upon their deaths. A.J. testified, however, that he and Tim never discussed or made an agreement not to sell the Property and never discussed partition or any other division of the property.[17] There also is evidence in the record that during this litigation, Tim asked A.J. to execute an agreement preventing partition, which A.J. reviewed and refused to sign.[18] Tim's testimony is consistent with A.J.'s to the extent that no such conversations occurred between them discussing partition but differs in that he believed there was an implied waiver or understanding they would never sell the property.[19]

Based on both the lack of documentary evidence to support evidence of waiver and the consistent testimony of the brothers that neither a written agreement nor an oral discussion occurred even mentioning relinquishing the right to partition, the Master correctly found that the record demonstrates that no such agreement or understanding of waiver ever occurred. Absent clear or affirmative words or conduct, a waiver of partition does not exist. The record is clear that the standard required to waive the right to partition has not been satisfied. Thus, I find that the right to partition was not relinquished by an implied waiver.

[17] Trial Tr. at 104, 105, 109, 125-128 (testimony of A.J. Cox).
[18] Trial Tr. at 207.
[19] Trial Tr. at 206, 207, 236, 243, 250, 261 (testimony of Tim Cox).

B. Whether Partition In Kind Could Be Equitable?

Tim takes exception to the Master's finding that the proper partition of the property is through a sale and distribution of the proceeds rather than a partition in kind. He questions whether Jamie's L.L.C. met its burden to demonstrate that a partition in kind could not be made equitably.

Consistent with Delaware law, the Master found that when property may not be equitably partitioned in kind it must be partitioned through a sale.[20] The Delaware Supreme Court has explained that because of the unique nature of real property "[t]he Delaware statutory scheme expressly provides that an order to sell the real property becomes appropriate *only after* the Court of Chancery determines that 'a partition [in kind] of the premises would be detrimental to the interests of the parties entitled.'"[21]

The Master determined that a partition in kind could not be equitably achieved after hearing expert testimony by a licensed real estate appraiser offered by the Petitioner. The expert opined that "the property cannot be partitioned to produce an equitable value division."[22] The expert explained that the Property could not be equitably partitioned primarily because the highest-value use of the Property is as commercial property and that the Property is too small to be subdivided into two commercial parcels. Thus, the appraiser explained the aggregate value of the Property subdivided is less than the value as a single unit. Based on this testimony, the Master concluded that a sale of the Property

[20] Delaware, like most states, has enacted a partition statute. *See* 25 *Del. C.* § 701 et seq.; *Peters v. Robinson*, 636 A.2d 926, 929 (Del. 1994).
[21] *Peters*, 636 A.2d at 929 (Del. 1994) (explaining the standard for partition by sale). *See* 25 *Del C.* §§ 721, 729.
[22] Trial Tr. at 140.

is required because a partition in kind would be detrimental to the parties' financial interests.

Tim did not challenge the expert testimony presented by the Petitioner nor did he present his own expert licensed in real estate appraisals. Thus, Tim failed to present any evidence that rebutted or cast doubt on the reliability of the expert's testimony as to the highest use of the Property.[23] Because both parties stipulated to the expertise of the Petitioner's witness as a real estate appraiser, the Petitioner met its burden. A review of the testimony presented by the appraiser convinces me that the Master was correct in concluding that a partition in kind would fail to achieve an equitable division and would harm the parties entitled to the Property by failing to maximize the value of the Property. Accordingly, under the statutory scheme established by Delaware law, the Property must be sold, as the Master found.

C. Are The Ownership Interests Equal And How Should The Proceeds From A Sale Be Divided?

Tim contends that the Master erred in concluding that the proceeds from a partition through sale should be divided equally between him and A.J. because he contributed the funding for the acquisition of the back lot and improvement of parts of the Property and should therefore receive a greater share of the proceeds. Although the front lot part of the Property was funded through profits generated by both Tim and A.J. and through a mortgage on which both brothers were liable, the Master did find that the

[23] Tim relies on a single New Jersey case from 1973 to challenge whether Delaware's standard of "detrimental interest" is met thereby justifying a sale of the Property. That case is not binding on this court nor does the Delaware statute require "substantial" detrimental interest as seems to be required under New Jersey law. *See Levitt v. Leonard*, 307 A.2d 625 (N.J. Supr. 1973).

record was unrebutted that there had been a greater contribution by Tim towards the acquisition of the back lot part of the Property.[24] The Master, however, concluded that Tim had intended to make an absolute gift to A.J., both his brother and his business partner, and that he intended a gift of half the back lot he had acquired using his own funds. Accordingly, the Master determined that Tim's greater investment of capital in the Property need not be offset when the proceeds from the sale were divided. The Master's conclusion was based on evidence showing Tim intended to make a gift and that there is no evidence that Tim ever intended to give his brother anything less than an equal share of the Property. I find that the Master's gift and distribution of proceeds analysis is correct and that Tim intended to make a gift of fifty percent of the back lot to A.J., particularly in view of the lack of evidence that Tim intended anything other than to share the Property equally.

Tim repeatedly stated that he "gave" A.J. the Property.[25] Tim and A.J. owned a business together on and off for more than thirty years and each agreed that profits were shared equally during that time period, regardless of whether their talents, contributions, and efforts were equal.[26] The record is clear that it was Tim's intent that he and A.J. share equally in the ownership of the Property. In addition, not only was the back lot part

[24] Master's Report II at 4.
[25] Trial Tr. at 197 ("I gave it to him, but yet, I didn't really. I felt it was my property, but I put his name on the deeds."), 233-34.
[26] Trial Tr. 183, 194.

of the Property titled in a way that indicated equal ownership,[27] but tellingly the brothers shared equally in the profits they received from leases on various parts of the Property. It is hard to understand how Tim viewed himself to be the beneficial owner of more than half of the Property, when he continually shared the profits from the leases roughly equally with A.J. over so many years.[28] In addition, when at one point the brothers agreed to informally separate the Property into two for a time, Tim let A.J. choose either of those two areas, which then were roughly equal in rental value.

The record is therefore clear that Tim and A.J. had a de facto partnership in which they both contributed labor and capital and in which they shared equally in the liabilities and profits. Tim included A.J. in this informal partnership as an equal partner and the brothers informally divided the responsibilities of the business in such a way that A.J. managed the purchase of automobiles while Tim managed the day-to-day business of selling the automobiles A.J. purchased and kept the business's books and records. The record demonstrates, as the Master stated, that although they were equal partners, Tim was the dominant partner in terms of managing the real estate owned, purchased, and leased by the brothers as well as managing the finances of the business. Tim also claims he did the bulk of the work. Yet, Tim continued to share profits from the business and the leases on parts of the Property equally with A.J. Tim's actions do not suggest he

[27] Absent evidence to the contrary, tenants in common are presumed to hold equal interests in the property. *See Speed v. Palmer*, 2000 WL 1800247, at *5 n.5 (Del. Ch. June 30, 2000) *citing Pagliaro, Inc. v. Zimbo*, 1987 W.L. 10275, at *3 (Del. Super. Apr. 16, 1987).
[28] *See* Master's Report II at 7 n.2.

viewed the Property as anything other than owned equally between himself and A.J. or ever acted in conflict with the idea that his brother was half owner of the Property.

Finally, it is worth repeating the Master's note that no accounting of the partnership was ever undertaken. Because the funds used to purchase the Property came from a combination of funds from the partnership, loans on which both brothers were obligated, and for the back lot from Tim's personal funds, without an accounting it is extremely difficult to in any reliable way sort through how much each partner contributed. The Master correctly highlighted this and noted that any attempt to determine what share of purchase-money funds may have originated from Tim's personal assets is difficult to ascertain because Tim's personal assets are in part derived from the partnership funds which he distributed to himself and A.J. (likely without much, if any, oversight from his brother).

For these reasons, the Master accurately observed that it would involve speculation to now try to award offsets for improvements allegedly paid for by Tim alone. Any amount that Tim contributed from his own funds was intended as a gift to his brother (or even more broadly as a de facto contribution to their partnership) as demonstrated by the long history of generally equal profit sharing by the brothers. Despite Tim's protestations that the parts of the Property he purchased for the business but paid for individually were not a gift,[29] there is no doubt that Tim intended that he and

[29] The parties dispute what legal presumption regarding donative intent should be drawn from the fact that Tim put the title to the portion of the Property he purchased with his own funds in his sibling's name. The Delaware Supreme Court has held that when a person supplying funds places title to the purchased property in the name of a spouse or child there should be a

A.J. would use the Property for their retirement or to pass along to each of their children.[30] Tim admits he never contemplated that at some future date his individual contribution might be reconciled[31] from sharing everything equally to some other proportion in his favor. In sum, the Master was correct to conclude that half of the proceeds from the partition sale should go to Tim and half to A.J.'s successor in interest, Jamie's L.L.C.

D. Did The Master Make Credibility Determinations That Require A New Hearing?

Tim argues that two dispositive credibility determinations were made by the Master that require new hearings by this court. The purported credibility determinations relate to issues that arise from the Master's decision that a partition through sale rather than a partition in kind is appropriate and that the proceeds from the sale should be divided equally. Thus, even if *DiGiacobbe* required this court to hold a new hearing, any new hearing would be limited to whether the brothers had equal interests in the Property and whether the proceeds from a sale should be divided between the brothers equally. I conclude, however, that new hearings are not required because as described earlier there

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rebuttable presumption that that person supplying funds intended to make a gift to the spouse or child. *See Hudak v. Procek*, 727 A.2d 841, 843 (Del. 1999) (applying the presumption of a gift in transactions between parents and child); *Hanby v. Hanby*, 245 A.2d 428 (Del. 1968) (applying the presumption of a gift in transactions between spouses). Like the Master, I do not believe a determination of whether the familial status of siblings also carries this presumption is necessary at this time because the record evidences that Tim meant to make a 50% gift of that property to A.J. Petitioner highlights, however, that several other states have extended this principle to apply to family beyond spouses and parents. *See* Pl.'s Br. at 9.

[30] Trial Tr. at 205, 236 (testimony of Tim Cox).

[31] Trial Tr. at 204-205.

are objective facts in the record that support the Master's findings. I now turn to each of the two claimed dispositive credibility determinations.

First, Tim claims that the Master's characterization of his trial testimony as "more guarded"[32] when compared to earlier testimony he provided is a dispositive credibility determination. Specifically, the Master compared earlier pleadings and testimony by Tim in which Tim indicated he intended to make a gift to A.J. with Tim's testimony at trial in which the Master characterized his testimony as "more guarded."[33] Even assuming, however, the Master did make a credibility determination related to Tim's testimony as guarded, this was not a *dispositive* credibility determination because as described above there is ample evidence in the record to support the conclusion that Tim intended to make an unconditional gift to his brother without the Master's statement in reference to Tim's trial testimony as guarded. For example, Tim testified that he purchased the property for "my and A.J.'s retirement," that he never intended to reconcile the financial contribution he made by paying for part of the Property out of his own pocket, and that once when he showed the deeds to A.J. he pointed out to A.J. "this is what [property] I gave you."[34] In sum, whether or not the Master found Tim's trial testimony more guarded, that conclusion did not form the basis of any substantial part of the Master's determination that Tim intended a gift to A.J. As such, no new hearing on this issue is required.

The second dispositive credibility determination that Tim points to as justification for a new hearing relates to the Master's description of the difficulties of assigning

[32] Master's Report II at 6.
[33] *Id.*
[34] *Id.*

ownership interests in the Property. In his Report, the Master specifically explained that "*if* he were to find that Tim had not intended a gift, *and* that [Tim's] ownership interest in the real property was greater than A.J.'s"[35] then it would be "unfair and impermissibly speculative"[36] to attempt to assign an ownership interest in the Property based on Tim's testimony alone. The Master's context for this statement is important because it is clear from the rest of his Report what the Master found. To wit, the Master found that Tim had given the back lot of the Property as a gift and the Master therefore also found that Tim was not entitled to a greater ownership interest. Thus, the Master's comment has no bearing on his actual findings. The Master was merely highlighting in his Report that assigning ownership shares would be guesswork at best because an accounting of the partnership had never been conducted to ascertain information, such as how much Tim paid out to himself and to A.J. or what percentage of partnership funds were used to purchase parts of the Property.[37]

As important, the Master's statement was an accurate one that is not, at bottom, a credibility determination. He was not casting doubt on Tim's credibility. He was noting the unreliability of relying upon Tim's memory of long-past financial contributions, in the absence of contemporaneous records, evidencing those supposed contributions. For this reason, Tim's complaint about the Master's characterization of the difficulties of assigning ownership interests is not a dispositive credibility determination and a new hearing on the issue of assigning ownership is not required.

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[35] *Id.* at 6 (emphasis added).
[36] *Id.* at 7.
[37] The partnership is not a party to this case.

V. Conclusion

After having conducted a de novo review of the issues raised, and for the reasons stated, I deny the exceptions to the Master's recommendations and affirm his well-reasoned decisions. The attorneys shall schedule a conference with the Master to agree upon a final order. The parties shall meet and confer in an attempt to agree on the form of order. Absent agreement, they shall present their competing forms of order to the Master by March 17, 2006. In the final order, it should be provided that the parties shall bear their own costs. **IT IS SO ORDERED**.

Very truly yours,

Leo E. Strine, Jr.
Vice Chancellor