

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

KIM E. AYVAZIAN
MASTER IN CHANCERY

CHANCERY COURTHOUSE
P.O. Box 581
Georgetown, Delaware 19947

August 15, 2007

Gerald Z. Berkowitz, Esquire
Berkowitz & Schagrin, P.A.
1218 Market Street
P.O. Box 1632
Wilmington, DE 19899

Jason C. Powell, Esquire
Ferry, Joseph & Pearce, P.A.
P.O. Box 1351
Wilmington, DE 19899

RE: In the Matter of Real Estate of Dillard M. Wells v. Elva Wells
C.M. 12196-NC

Dear Counsel:

On August 25, 2005, Petitioner Cheryl S. Wells filed a petition for partition of real property (“the property”) known as 442 Bethune Drive, Dunleith Estates, Wilmington, Delaware. Petitioner is the surviving spouse of Dillard M. Wells (“the decedent” or “Dillard Wells”). Respondent is the decedent’s former wife, Elva Wells. The property was acquired in 1951 by the decedent and Respondent, as tenants by the entirety. The decedent and Respondent were legally divorced in 1997, and by operation of law the former tenancy by the entireties devolved into a tenancy in common. Immediately after his divorce, the decedent married Petitioner. When the decedent passed away in 2003, he devised all his real and personal property to Petitioner.

According to the petition, Respondent has refused to purchase Petitioner's one-half interest in the property and, despite Respondent's exclusive occupation and use of the property, Respondent has failed to pay rent, property and other taxes to Petitioner. As a result, Petitioner now seeks a judicial sale of the property, and an equitable distribution of the net proceeds.

On July 10, 2006, Respondent filed a motion to dismiss, alleging that the Family Court had exclusive original civil jurisdiction over this matter pursuant to 10 Del. C. § 921(14). After briefing on the motion to dismiss was completed, Petitioner filed a motion for partial summary judgment on December 20, 2006. Following briefing on the motion for partial summary judgment, I requested oral argument, which took place on April 12, 2007. This letter is my final report on Respondent's Motion to Dismiss and Petitioner's Motion for Partial Summary Judgment.

In support of her motion to dismiss, Respondent argues that the partition action should have been filed in Family Court pursuant to 10 Del. C. § 921(14) because Petitioner simply stands in the shoes of the decedent, who was Respondent's former husband, and the action involves real property acquired during their marriage. In opposition, Petitioner contends that: (1) the matter belongs in this Court because neither the decedent nor Respondent specifically requested that the Family Court retain jurisdiction over property division matters at the time of their divorce; and (2) the actual parties here are not persons who were formerly married to each other, as required by 10 Del. C. § 921(14).

Included in the Family Court's exclusive original civil jurisdiction are:

(14) Petitions by persons formerly married to each other seeking an interest in or disposition of jointly titled real property, acquired during their

marriage where such property was not disposed of (i) by agreement of the parties, or (ii) by virtue of ancillary proceedings pursuant to § 1513 of Title 13. In dividing said property the Family Court shall apply equitable principles unless there is a written agreement signed by the parties regarding the disposition of said property. Unless there is a written agreement signed by the parties the Family Court shall not consider the factors enumerated in § 1513 of Title 13. This subdivision shall apply to all actions filed after July 11, 1989[.]

The plain language of this subsection limits the scope of the Family Court's jurisdiction to "petitions by persons formerly married to each other" in actions involving jointly titled real property. 10 Del. C. § 921(14). "When a statute limits the jurisdiction of a court, it must be strictly interpreted." *Sanders v. Sanders*, 570 A.2d 1189, 1192 (Del. 1990) (citing *Theisen v. Hoey*, 51 A.2d 61 (Del. Ch. 1947)). Although the property at issue here was once marital property, the marriage ended in divorce nearly ten years ago, and Respondent's former husband died approximately two years before the partition action was filed by his surviving spouse, who had inherited his interest in the property. Since the parties here are **not** persons who were formerly married to each other, the partition action falls within the jurisdiction of this Court, *see* 10 Del. C. § 341, 25 Del. C. § 721, not the Family Court. *Compare Savage v. Savage*, 2006 WL 2576867 (Del. Ch. Sept. 7, 2006) (Family Court had exclusive jurisdiction where former wife filed action in Chancery Court against former husband, seeking to add her name to deed of the marital home as tenant in common or as a joint tenant with former husband). As a result, Respondent's motion to dismiss must be denied.

Petitioner has moved for partial summary judgment, seeking an order allowing the partition and/or sale of the property, on the ground that there are no genuine issues of material fact in dispute. Petitioner contends that the following facts are undisputed: (1) Dillard Wells and Respondent acquired title to the property on May 2, 1951, as tenants by

the entireties; (2) Dillard Wells and Respondent were legally divorced on December 24, 1997, which dissolved the tenancy by entireties into a tenancy in common; (3) Dillard Wells and Petitioner were legally married on January 3, 1998; (4) Dillard Wells executed his Last Will and Testament on July 22, 1999, devising all his real and personal property to Petitioner; (5) Dillard Wells died on November 7, 2003, devising his interest in the property to Petitioner; and (5) upon Dillard Wells' death, a tenancy in common was created between Petitioner and Respondent, each holding an equal interest in the property.

In considering a motion for summary judgment, the Court must determine whether “the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *See Ginsburg v. Philadelphia Stock Exch., Inc.*, 2007 WL 1662661, at *2 (Del. Ch. May 31, 2007) (quoting Ct. Ch. R. 56(c)). All evidence is to be viewed in a light most favorable to the non-moving party. *Id.* (citing *Acro Extrusion Corp. v. Cunningham*, 801 A.2d 345, 347 (Del. 2002)). However, the non-moving party may not rest on its pleadings if the moving party has presented facts which, if undisputed, would entitle it to summary judgment. The burden then shifts to the non-moving party to show that some material fact remains disputed. *Id.* (citing *State of Wis. Inv. Bd. v. Peerless Sys. Corp.*, 2000 WL 1805376, at *6 (Del.Ch. Dec. 4, 2000)).

In her Response to Petition for Partition, Respondent admitted that the tenancy by the entireties was destroyed by operation of the law when she and Dillard Wells were divorced, but denied that she and Petitioner each received a one-half interest in the

property. *See* Docket Item 4. In her Answer to Form 30 Interrogatories, Respondent averred that Dillard Wells abandoned the property, and therefore she should receive sole title to the property. *See* Docket Item 13.

Respondent was a full-time homemaker and approximately 73 years old when she and Dillard Wells were divorced in December 1997. *See* Docket Items 4 and 13. By the time Petitioner filed the partition action in August 2005, Respondent was approximately 81 years old, and had lived in the property since 1951. *See* Docket Item 13. The factual record in this case is quite sparse, and it is unclear who paid the taxes and any mortgage payments on the property after the divorce. If the property is sold pursuant to a court order, certain facts will have to be determined for the equitable distribution of the net proceeds to take place. These facts may have a bearing on possible equitable defenses to the partition action. *See, e.g., In re Black*, 1984 WL 21870 (Del. Ch. June 19, 1984). In the interest of judicial economy, therefore, I am reserving my decision on Petitioner's Motion for Partial Summary Judgment until a factual hearing can be held to determine: (1) whether any equitable defenses are applicable to this case; and (2) how the net proceeds should be distributed if the house is sold.

The seven-day period for taking exceptions to my final report is stayed until after the trial. Counsel shall confer, and present a form of stipulated trial scheduling order to the Court. In the meanwhile, I request that the parties consider alternative solutions to this dispute, other than a judicial sale of an elderly woman's home. If the parties are willing to elect voluntary mediation pursuant to Chancery Court Rule 174, Master Sam

Glasscock has offered to serve as mediator and to waive the mediator's fee.

Very truly yours,

Kim E. Ayvazian
Master in Chancery

cc: Register in Chancery – New Castle County