IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

I/M/O THE REAL ESTATE OF	)	
JAIME'S LLC AND	)	C.M. No. 19810-NC
TILLMAN B. COX	)	

MASTER'S REPORT
(Equal Division of Proceeds from a Forced Sale)

Date Submitted: October 20, 2004
Draft Report: November 16, 2004
Final Report: September 20, 2005

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GLASSCOCK, Master

This is a partition matter involving land in New Castle County. The property was owned until 2002 by two brothers, Tillman B. Cox ("Tim") and Aubrey Cox ("A.J."). The property was acquired by the brothers in several different parcels purchased from the 1960s through the 1980s. The brothers have maintained an informal business partnership since the 1960s involving automobile sales, real estate investments and operation of trailer parks. Some of the parcels now comprising the property have been titled at various times in the name of the partnership, and in the name of Tim and his wife and A.J. and his wife, as tenants-in-common. As of 1994, title to all the property was held by Tim and A.J. as tenants-in-common. No ownership percentage is specified in the deeds of title. On May 15, 2002, A.J. sold his interest in the property to Jaime's LLC ("Jaime's"), an entity belonging to Doyle and Jaime Cox, A.J.'s son and daughter-in-law. A.J. took back a $1 million mortgage on the property.

Jaime's seeks a partition of the property. In previous reports, I have found that the property is subject to partition, that partition in kind is inappropriate because the aggregate value of the property subdivided into two parcels is less than its value as a single unit, and that leases on the property currently held by Doyle Cox will be extinguished at partition. The sole remaining issue is the percentage of ownership held by each of the parties to the partition. Since Jaime's can have

purchased no more than was held by A.J., I must determine in what percentages the property was held as of the time of the sale from A.J. to Jaime's.

When a property is held by two individuals as tenants-in-common, and the deeds do not specify otherwise, a rebuttable presumption arises that the tenants each own 50% of the property. *E.g.*, Pagliaro, Inc. v. Zimbo, Del. Super., Gebelein, J. (April 16, 1987)(Mem. Op.) at 3-4, *citing* Williams v. Fund, Pa. Super., 116 A.2d 266 (1955). Tim seeks to demonstrate that he is entitled to a larger than 50% share of the proceeds of the sale of the property based on his contention that he provided more than 50% of the funds used to purchase it. He proceeds either under the theory that he is therefore a legal owner of more than 50% of the property, with his brother holding some lesser share; or on a theory of resulting trust.

The property is located at the corner of Kirkwood Highway and Newport Gap Pike. This is a busy commercial corner, and several businesses have operated here in the past, notably the brothers' used car sales business. The property may be divided into two areas conceptually, each requiring separate analysis under Tim's theory that he owns more than a one-half interest in the land. That portion of the property along Kirkwood Highway is known to the parties as the "front lot." It was acquired using funds generated by the partnership between A.J. and Tim, and

through a mortgage on which both parties made themselves liable. There is no question that the brothers acquired an equal ownership interest in this portion of the property. The area of the property along Newport Gap Pike is known by the parties as the "back lot." Tim contends that he purchased the parcels that comprise the back lot using mostly, or solely, his own funds. Jaime's vigorously contests some of Tim's contentions, but it is clear to me that a disproportionate amount of the purchase price of the back lot was paid by Tim. Notwithstanding the fact that Tim claims to have paid for more than a one-half share of the back lot, however, he caused the property to be titled in a way that appears to show a 50% ownership interest in his brother A.J. If Tim's purpose was to make a gift of his disproportionate property interest to A.J., and if that gift was validly made, my analysis may stop there.

Typically, where one purchases an asset and titles it in the name of another, a rebuttable presumption arises that he intended to retain the beneficial ownership and that no gift was intended. *E.g.*, Hudak v. Procek, Del. Supr., 727 A.2d 841, 843 (1999). Where, however, the relationship between the purchaser and the titleholder is such that the titleholder is a natural object of the purchaser's bounty, as where the titleholder is a spouse or child of the purchaser, the presumption is reversed: that is, a gift is presumed. Id. The parties hotly contest what

presumption should arise in the case, as here, where purchaser and titleholder are brothers. I find that I need not make this determination, however, since regardless of any presumption the record here demonstrates that Tim meant to make a gift of whatever interest he held in the property beyond 50%, to A.J.

Since the early 1960s, the brothers have been engaged in various business ventures. They both contributed labor, cash and credit obligations to this informal partnership, and were entitled to the proceeds on a "50-50" basis. With respect to the Cox brothers used-car sales business, which operated off and on for 30-odd years on the property in question,[1] it was A.J.'s job to purchase automobiles and Tim's job to run the lot, sell the autos and keep the partnership's books. According to Tim, he contributed greater time and effort to the business than did A.J. The testimony made it clear that the partnership was run on an informal basis. A.J. was never privy to the financial state of the partnership or how the money was channeled to various assets and liabilities. He merely received whatever salary or share of profits Tim thought it appropriate to give him. Tim was clearly the dominant partner in terms of real estate purchase, sale and lease.

[1] There were periods when portions of the property were vacant, and when other businesses occupied portions of the property.

While Tim indicated in prior pleadings and testimony that A.J. owned half the property and that he intended to make a gift to A.J. of an interest in those parcels for which Tim had paid the purchase price, his testimony at trial was more guarded. He testified variously that he did not intend a gift, that he purchased the property "for my and A.J.'s retirement," and that "I gave [the property] to [A.J.], but yet I didn't really." Tellingly, Tim testified that during an argument with A.J., he spread the deeds on A.J.'s desk and told A.J. "This is what I gave you." Tim's current position (as explained in post-trial briefing) is that he made a gift of the property to A.J., subject to an agreement that it never be partitioned but rather held for his and A.J.'s lifetimes, and then devised to their heirs.

The testimony demonstrated to me that the "agreement" not to partition was in fact only what Tim himself intended should happen with the property. Both Tim and A.J. were quite candid that they never considered the possibility of partition of the property. It was also clear to me that Tim placed the property in A.J.'s and his own name as tenants-in-common intending to make a gift to A.J., and that a valid gift was made at that time. While, as I have said, Tim hoped that the brothers would keep the property during their lifetimes, there is nothing indicating that Tim's gift of his ownership interest in the property was conditional or revokable. As he had included A.J. in their informal partnership on a 50-50 basis (despite the

fact that according to Tim, Tim did the bulk of the work) it was Tim's intent that he and A.J. share equally in the ownership of the property.[2] *See* Shockley v. Foraker, Del. Ch., No 19716, Lamb, V.C. (January 6, 2004)(Mem. Op.) at 3-5.

If I were to find that Tim had not intended a gift, and that his ownership interest in the real property was greater than A.J.'s, I could not decide, based on the current record, what their respective ownership interests would be. The funds used to purchase the property (according to Tim) came in part from loans on which both brothers were obligated, in part from money from the partnership to which both were equally entitled, and in part solely from Tim's pocket. Presumably, those funds provided by Tim ultimately came from his share of the partnership funds, paid by Tim to himself. The problem with attempting to allocate ownership based on contribution here is that there has never been an accounting of the partnership.

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[2] There is another piece of objective evidence indicating equal ownership of the property-in-common by the brothers. By the 1990s, the front lot was being leased to Doyle. The brothers shared the fruits of that lease on a 50-50 basis. The brothers had also agreed that the rest of the property would be separated informally between them, with Tim offering to let A.J. pick the use of either that portion of the back lot along Newport Gap Pike or another section of the property containing a shop building, known to the parties as the "Greytek" building. A.J. chose the Greytek area and Tim began operating a car lot on the rest of the back lot. These two pieces of property were roughly equal in value, and were both eventually leased to Doyle. A.J. received the rental from Doyle for the Greytek area, and Tim for "his" portion of the back lot. In other words, when the property was leased from the brothers to Doyle, both brothers received roughly equal rental value, and Tim did not insist on receiving the lion's share of the income despite his contention that he is the beneficial owner of substantially more than half of the property.

That is, Tim controlled the books of the partnership. He decided when profits would be paid out as salary to himself and to A.J.. He made the investment decisions. He purchased some property using partnership funds and some property using funds which he designated as his own. It would be both unfair and impermissibly speculative to attempt to assign ownership interest in the property based on Tim's designation of the purchase-money funds as being partnership funds or his sole funds, without a full accounting of the partnership. Jaime's LLC, in fact, has requested such an accounting. However, Jaime's LLC was not a party to the partnership, and this is, therefore, an inappropriate forum for such an accounting to take place. Because I have found that, whatever the source of the funds, any imbalance in payments made by Tim constituted a gift to A.J., I need not address the accounting issue further. Of course, nothing in this report precludes either party to the partnership from seeking an accounting.[3]

[3] Tim also argues that he paid a larger portion (by $4000) than A.J. towards the construction of the Greytek Building. He seeks to have this amount set off against A.J.'s share of the proceeds of the sale, as owelty. The Greytek building was built 20 years ago as part of the partnership's land-leasing or car-sales business. There is nothing in the record to indicate to what extent Tim's unequal funding of construction of the Greytek building contributes to the present value of the property. There is simply no basis in the record to set off this contribution against Jaime's LLC's one-half interest in the property. Moreover, any attempt to set-off Tim's greater contribution would suffer from the problem of accounting for the source of Tim's funds, as described above.

Summary

To whatever extent Tim contributed more to the purchase price of the lots comprising the property than did A.J., Tim intended a gift to A.J. It is unfortunate that a lifetime partnership between two brothers has resulted in the unpleasantness of this litigation. It surely was not Tim's intention that the property which he owned in common with A.J. would become the subject of a partition action. Jaime's LLC is the successor to A.J.'s one-half interest in the property, however, and the proceeds of the partition sale must be divided equally between Jaime's and Tim.

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Master in Chancery

oc: Register in Chancery (NCC)