

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

SAM GLASSCOCK III
VICE CHANCELLOR

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: August 26, 2011

Decided: August 29, 2011

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Re: *Donna Moore v. Ronda Carolyn Davis, et al.*
Civil Action No. 4377-VCG

Dear Counsel:

This matter came before me on a Petition for Partition of a five acre parcel near Ellendale (the “property”). The property has been sold by a Trustee, the Trustee’s Return has been accepted, and the proceeds of the sale (net of expenses and the Trustee’s fee)—approximately \$21,000.00—have been placed in escrow. The property is owned in common by the Petitioner, Donna Moore, and her five co-tenants, the Respondents Ronda C. Davis, Patricia A. Rogers, Thomas R. Moore, Jr., Shawn M. Moore and Steven Moore. The Petitioner has filed a claim against the proceeds of the sale for her attorney’s fees of about \$6,000.00,¹ and to reimburse her for the cost of an appraisal of the property she ordered in connection with her partition request.

In general, Delaware follows the “American Rule,” according to which each party bears his own fees and costs.² There are exceptions to the American Rule however. The Petitioner, citing *Korn v. New Castle County*,³ argues that her

¹ The Petitioner also seeks reimbursement for property taxes paid on the property, advanced by her boyfriend, Wayne O’Neal. The Respondents do not oppose repayment of taxes paid by Mr. O’Neal, and that issue forms no part of this Opinion.

² See, e.g., *P.J. Bale, Inc. v. Rapuano*, 888 A.2d 232 (Del. 2005). Court costs in connection with partition actions are routinely assessed against all co-tenants, and all parties have agreed to that practice here. See 25 Del. C. § 735.

³ 922 A.2d 409, 410 (Del. 2007).

attorneys' fees should be borne by all of the co-tenants under one of these recognized exceptions, the "common fund" or "common benefit" doctrine.

The common benefit exception allows the successful litigant to recover attorneys' fees if the litigation creates a monetary benefit that is shared by others. Historically, this exception has been applied to business enterprise litigation where, for example, a stockholder may recover funds for the benefit of the entire corporation. The exception is premised on the equitable principal that those who benefit from litigation would be unjustly enriched if the entire cost of the action were borne by the successful plaintiff.⁴

In their arguments on this issue, both the Petitioner and the Respondents point to facts which may not be of record, due to the summary nature of this proceeding. However, even if I accept the facts most favorable to the Petitioner, the Common Fund doctrine does not apply. Petitioner's counsel points out that one of the co-tenants was living on the property at the time the partition was filed, and that the other co-tenants were not receiving an equal benefit from the property. He also points to the fact that the property taxes were not being paid on the property. There is no allegation, however, that the Petitioner or the other co-tenants were excluded from the property, and in any event, remedies were available for any ouster of the co-tenants and for equalization of tax expense among the co-tenants, without a resort to partition.⁵ The Petitioner also suggests that the co-tenants inherited their interest in the property without benefit of an estate being opened on behalf of their predecessor-in-title. She suggests, therefore, that the partition served in lieu of the opening of an estate or a quiet title action in perfecting title to the property. In Delaware, however, title to real property vests in intestate heirs upon the death of their predecessor, regardless of whether an estate is opened.⁶ Any benefit of clearing title incidental to the partition is purely theoretical in any event, as the five Respondents (as evidenced

⁴ *Id.*

⁵ See *Carradin v. Carradin*, 1980 WL 268076, at *2 (Del. Ch. Sept. 22, 1980).

⁶ See *In re Estate of Morrell*, 1995 WL 783075, at *4 (Del. Ch. Dec. 26, 1995) ("[R]eal estate, at the death of a decedent, passes directly to the intestate heirs, if there is no will, and directly to the persons named in the will as the new owners, if there is a will."); see also *In re Harris' Estate*, 44 A.2d 18, 19 (Del. Orph. 1945) ("It is well settled in Delaware that the title to real estate descends to the heirs or vests in the devisees immediately upon the death of the testator subject to be divested if it be necessary to sell it for the payment of debts of the deceased.").

by their opposition to the partition) were content to continue to own the property jointly with the Petitioner.

The Petitioner's principal argument for the application of the common benefit doctrine is a simple one: that Petitioner's effort resulted in an unproductive asset being exchanged for a fund which did not previously exist. Therefore, Petitioner argues, all the owners of the fund have benefitted from her efforts, and she is entitled to have her fees paid out of this fund.

The common benefit doctrine, however, is designed to equitably spread the costs of producing a benefit realized by a group, which benefit, absent the Plaintiff's efforts, *would not exist*. Here, the co-tenants owned a parcel of real estate. The real estate, despite a higher appraised value⁷ proved to have a market value of only \$32,000.⁸ For the Petitioner, presumably, one-sixth of the market value of the property appeared more valuable than her co-tenancy. For the five Respondents, conversely, their real property co-tenancy was more valuable than a one-sixth share of the market value. It is an inherent property of real estate held in common that each owner is subject to a forced exchange of his common interest for either sole ownership of a proportionate subdivision of the property or, if such subdivision is impractical, for the cash equivalent following a forced sale.⁹ Accordingly, despite their opposition, the Respondents were unable to avoid the sale by a Trustee of their interest in the property. Although subjectively the Respondents have an asset of less value after the sale than before, objectively what they have received is equivalent: they exchanged a one-sixth undivided ownership in the property for one-sixth of the net value of the property upon sale. Since, however, the Respondents have been deprived of one asset (an asset which, in fact, they preferred) in exchange for an asset of equal value, there has been no benefit to the class. The exchange is a wash. It would be inequitable for this Court not only to force this exchange (which it is each co-tenant's right to accomplish under the statute), but to also force the Respondents to pay for this privilege. Because I find that no common benefit has been accomplished for the co-tenants, application of the "common benefit" exception is not warranted, and each party must bear his own attorneys' fees.¹⁰

⁷ The property was appraised by the Petitioner in connection with this partition at \$162,000.00.

⁸ The property was sold by a respected local auctioneer after extensive advertising. The auction generated a number of bidders and, I find, generated a true market price.

⁹ See 25 Del. C. § 721 *et seq.*

¹⁰ I note that the Respondents also incurred legal fees in an attempt to avoid the partition.

The Petitioner points to *In re: Real Estate of Mayer* as precedent directing a different result.¹¹ But the rationale of *Mayer* is not applicable here. The Chancellor in *Mayer* noted that the petitioners there faced two burdens in achieving a partition. First, the petitioners litigated to overcome a claim by third parties that those parties owned the property as donees or through adverse possession. Next, the *Meyer* petitioners incurred significant fees in determining the identity of their co-tenants, the other heirs of the petitioners' deceased predecessor in title. Thus, to the extent that the facts can be gleaned from the Chancellor's brief opinion, absent the payment of petitioners' fees from the proceeds of the partition sale, the *Mayer* respondent co-tenants would have received a double windfall: the petitioners both established that the other co-tenants were (unwitting) heirs to real property, and also cleared title to that property by litigation against third party claimants. *Mayer* did not involve, as does the instant case, a dispute among co-tenants as to whether a property should be retained or sold. The *Mayer* rationale is simply inapplicable here.

The Petitioner also seeks to be reimbursed for \$225.00 which she spent to have the property appraised in connection with her Petition for Partition. For the reasons stated above in connection with attorney's fees, the appraisal did not work a benefit for the co-tenants who opposed the sale of the property. It was obtained at the request of and for the benefit of the Petitioner, who wished to sell her interest. Therefore, that cost must be borne by the Petitioner.

For the reasons stated above, the Petitioner's claim for fees and costs, other than Court costs, is denied. The parties should confer and present me with an order for the distribution of the proceeds of the sale.

Sincerely,

/s/ Sam Glasscock III

Vice Chancellor

SGIII/lkpr

¹¹ *In re: Real Estate of Mayer*, 1977 WL 23815 (Del. Ch. June 9, 1977).