



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

PATRICIA W. GRIFFIN
MASTER IN CHANCERY

CHANCERY COURTHOUSE
34 The Circle
GEORGETOWN, DELAWARE 19947

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David J. Weidman, Esquire
Sergovic Carmean Weidman McCartney & Owens, P.A.
25 Chestnut Street
P.O. Box 751
Georgetown, Delaware 19947

Richard E. Berl, Jr., Esquire
Hudson Jones Jaywork & Fisher, LLC
34382 Carpenter's Way, Suite 3
Lewes, Delaware 19958

RE: *Brinda R. Clarke v. Dianne L. Gatts*
C.A. No. 2019-0958-PWG

Dear Counsel:

This is a partition action involving two jointly owned properties located in Delaware with one co-tenant seeking partition by sale of the two properties and the other asking for partition in kind, with owelty. I recommend that the Court grant partition in kind and award owelty to equalize the values received by both co-tenants. This is a final report.

I. Background

Harley Hickman (“Decedent”) and Respondent Dianne L. Gatts (“Gatts”) acquired real property at 33655 Village Drive, Unit 4, Eagle Point, Lewes, Delaware (“Eagle Point”) as joint tenants with the right of survivorship on October 24, 2007. On July 18, 2018, they purchased a lot located at 33230 Cherry Court, Lewes, Delaware (“Angola By-The-Bay”) as tenants in common.¹ They began construction on the house at Angola By-The-Bay but construction was halted in March of 2019 when the long-term relationship between Decedent and Gatts ended.² The house is not yet completed and \$93,360.00 is needed to complete construction on the house.³ On June 3, 2019, Decedent conveyed his interest in both properties to his daughter, Petitioner Brinda R. Clarke (“Clarke”), leaving Gatts and Clarke as equal tenants in common of both properties.⁴ Decedent died

¹ Pet’r’s Tr. Ex. 5. The deed listed Decedent and Gatts as tenants by the entirety but they were not married, so they held the property as tenants in common. *See Banks v. Banks*, 135 A.3d 311, 322, n. 52 (Del. Ch. 2016) (“A tenancy by the entireties ‘is the tenancy by which husband and wife at common law hold land conveyed or devised to them by a single instrument which does not require them to hold it by another character of tenancy.’”); *Spry v. Estate of Connor*, 2002 WL 260688, at *2 (Del. Super. Feb. 22, 2002) (even if the deed describes the tenancy as “tenants by the entireties,” “the general rule in Delaware is where two parties are not married, they take property as tenants in common”).

² Pet’r’s Tr. Ex. 21.

³ Pet’r’s Tr. Ex. 25. The total cost of the original construction contract was \$284,250.00. Pet’r’s Tr. Ex. 7.

⁴ Pet’r’s Tr. Ex. 19; Pet’r’s Tr. Ex. 20.

on September 13, 2019. Gatts currently resides at Eagle Point.⁵ Clarke filed a petition on December 2, 2019 seeking a partition sale of the properties at public auction.⁶ Gatts filed an answer and counter-petition on December 30, 2019 seeking a partition in kind, with owelty, or compensation to equalize the values of the property received by each co-tenant.⁷ Following discovery, an evidentiary hearing was held on September 16, 2020 concerning whether partition in kind, with owelty, or partition by sale should be ordered. A preliminary bench ruling was issued during the hearing, with a final written order or master's report memorializing and expanding on the ruling to follow.

II. Analysis

The issue in this case is whether partition in kind, with owelty, is appropriate. In a partition action, Delaware law favors a division of land in kind, rather than through a division of the proceeds from the sale of the property.⁸

⁵ Trial Tr. 57:18-20.

⁶ Docket Item ("D.I.") 1.

⁷ D.I. 7. Gatts also sought relief related to property in Venice, Florida, but that property is not a part of this litigation since it may not be partitioned by this Court and is already subject to litigation between the parties in Florida. *See* Resp's Tr. Ex. H.

⁸ *See Peters v. Robinson*, 636 A.2d 926, 929 (Del. 1994) (because of the unique nature of real property, "the Delaware [partition] statute continues the common law preference for a physical, in kind, division of the real property" and "expressly provides that an order to sell the real property becomes appropriate *only after* the Court of Chancery determines that 'a partition of the premises would be detrimental to the interests of the parties entitled'") (citation omitted).

Owelty is predicated on a division of real property,⁹ and has been employed when the value of the real property one co-tenant receives through partition exceeds the value of the other co-tenant's property and the court requires the payment of money, or owelty, to equalize the values.¹⁰ Owelty is not recognized by statute in Delaware and I found no previous Delaware cases awarding owelty (although several cases have mentioned owelty *in dicta*).¹¹ But, owelty has "ancient roots,"¹² and has been found, generally, to be within the broad equitable powers of the court in partition proceedings.¹³ "Most states have recognized or, at one time, employed

⁹ *FTR Farms, Inc. v. Rist Farm, Inc.*, 942 N.W.2d 204, 214 (Neb. 2020) (citation omitted).

¹⁰ *Cf. Onderdonk v. Onderdonk*, 307 A.2d 710, 712-13 (Md. 1973); *Chesmore v. Chesmore*, 484 P.2d 516, 518 (Okla. 1971); *Sayers v. Pyland*, 161 S.W.2d 769, 772 (Tex. 1942); *Updike v. Adams*, 52 A. 991, 992 (R.I. 1902); *Rothert v. Rothert*, 441 N.E.2d 179, 182 (Ill. App. Ct. Oct. 2, 1982).

¹¹ *Lynch v. Thompson*, 2009 WL 707637, at *1, n. 1 (Del. Ch. Mar. 5, 2009), *judgment entered*, 2009 WL 1900464 (Del. Ch. June 29, 2009), *aff'd*, 990 A.2d 432 (Del. 2010) (because it decided the matter on other grounds, the court declined to address the argument that owelty should be given to compensate one of the parties in a partition action); *In re Real Estate of Jaime's LLC*, 2005 WL 2429225, at *3, n. 3 (Del. Ch. Sept. 20, 2005) (a party sought a set off against the other party's share of the proceeds of a partition, as owelty, but the court held there was no basis in the record for set off); *Chalfant v. Cornett*, 1996 WL 162262, at *4 (Del. Ch. Mar. 1, 1996) (the Court mentioned that, should the parties not come to an agreement, the appropriate solution may be to award the property to one of the parties conditioned on the payment of a monetary reward, or owelty, to the other party); *Gordon v. Acuff*, 4 Del. Ch. 63, 68 (Del. Ch. 1871) (discussed that owelty of partition is a charge for equalizing partitions).

¹² *FTR Farms, Inc.*, 942 N.W.2d at 212 ("Under Roman law, property owners used full partitioning remedies, including payments between cotenants to equalize unequal divisions (owelty) . . .").

¹³ *See, e.g., Pino v. Sanchez*, 646 P.2d 577, 578 (N.M. 1982); *Chesmore*, 484 P.2d at 519; *Updike*, 52 A. at 991. Courts have generally employed owelty under general equitable

an owelty award,” with its use authorized either by common law or statute.¹⁴

Courts have conditioned the use of owelty to equalize shares in a partition case on the court’s finding that owelty is equitably necessary, the amount required is fair, the payment imposed is not unreasonably burdensome, and the time for payment is reasonable, considering the condition of the property and the parties.¹⁵ An owelty payment is not “unreasonably burdensome” if “a proportionately small sum is required to equalize the shares.”¹⁶

Considering all of the evidence, I conclude that partition by sale is not warranted in this case because the evidence has not shown that partition in kind, if owelty is granted, would be detrimental to the parties’ interests in this case. Here, it is undisputed that the value of Eagle Point is \$242,335.00,¹⁷ and the value of

powers even when partition statutes, like Delaware’s statute, have not specifically provided for its use. *See FTR Farms, Inc.*, 942 N.W.2d at 212 (“[Of all of the states,] [o]nly Kentucky has expressly held that an owelty award is in opposition to its partition statutes and, therefore, is not recognized); *Rothert*, 441 N.E.2d at 182; *Updike*, 52 A. at 991-92; *Sawin v. Osborn*, 126 P. 1074, 1075 (Kan. 1912) (“While the remedy of partition is statutory, the court in enforcing it has substantially the same powers as were exercised by courts of chancery under the former equity practice.”).

¹⁴ *FTR Farms, Inc.*, 942 N.W.2d at 212.

¹⁵ *Updike*, 52 A. at 992; *see also Pino*, 646 P.2d at 579.

¹⁶ *Chesmore*, 484 P.2d at 518-19; *Sawin*, 126 P. at 1075.

¹⁷ The appraised value of Eagle Point is \$305,000.00. Pet’r’s Tr. Ex. 22. The outstanding balance on the mortgage on Eagle Point is \$62,665.00. Pet’r’s Tr. Ex. 4. Accordingly, the co-tenants’ equity in Eagle Point is \$242,335.00.

Angola By-The-Bay is \$246,640.00,¹⁸ so the difference in the value between the two properties is \$4,305.00. Therefore, for partition in kind to occur, the properties would be divided between the co-tenants and the co-tenant who receives Angola By-The-Bay would pay owelty in the amount of \$2,152.50 to equalize the difference. At the hearing, Gatts indicated her preference is to be awarded title to Eagle Point, since she currently resides there.¹⁹ And, Clarke indicated her preference is to be awarded Angola By-The-Bay, and that she is willing and able to pay the proposed owelty amount within 15 days from the date of the court order in this matter.²⁰ I find the circumstances justify an award of owelty because it is equitably necessary, the amount is fair and not unreasonably burdensome and there is a reasonable time given for payment. In this case, the imposition of owelty allows both co-tenants to obtain ownership of the property they want to keep, and prevents any hardship that would be caused by Gatts having to relocate from her home. The \$2,152.50 assessed in owelty is fair and not unreasonably burdensome, since it represents less than 1% of the value of each co-tenant's share. And a 15

¹⁸ The appraised value of Angola By-The-Bay, if fully completed, is \$340,000.00. Pet'r's Tr. Ex. 24. The appraisal estimated the "as is" value as \$250,000.00 (by subtracting \$90,000.00, which represented the estimated cost of completing the house, from \$340,000.00). Since \$93,360.00 will be needed to complete construction, the co-tenants' equity in Angola By-The-Bay is \$246,640.00. *See* Pet'r's Tr. Ex. 25.

¹⁹ Trial Tr. 82:10-18.

²⁰ Trial Tr. 35:9-23; 91:23; 96:18-20.

day time period for payment is reasonable. Therefore, I order that the properties be partitioned in kind, and impose an award of owelty.

III. Conclusion

For the reasons set forth above, I order that the properties owned by the co-tenants be partitioned in kind, and I award full title of Eagle Point to Respondent Dianne Gatts, and full title of Angola By-The-Bay to Petitioner Brinda Clarke. To address the disparity in values of the partitioned properties, Clarke will pay \$2,152.50 in owelty to Gatts within 15 days of the date this Report becomes final. The co-tenants will execute quitclaim deeds conveying their interest in the property they are not receiving to the other co-tenant, with Clarke's attorney preparing the deed to convey Gatts' interest in Angola By-The-Bay to Clarke, and Gatts' attorney preparing the deed to convey Clarke's interest in Eagle Point to Gatts. This is a final report and exceptions may be taken pursuant to Court of Chancery Rule 144.²¹

Sincerely,

/s/ Patricia W. Griffin
Master in Chancery

²¹ During the hearing, the parties agreed to stipulate to the terms of the bench ruling, which are set forth in this Report. Trial Tr. 97:16-24.