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One of the petitioners paid for a dumpster at the property for the clutter and trash that had accumulated after his sibling moved in. (DEPOSIT PHOTOS)

Remaindermen can seek property damage costs in partition case

Contribution claim not beyond scope of action, Appeals Court says

Eric T. Berkman (https://masslawyersweekly.com/author/eric-berkman) 2023

Remaindermen can seek property damage costs in partition case/ Dumpster with items from- 8/ Dumpster with items from- %20costs%20in%20partition%20case)

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The Appeals Court has ruled that as part of an action to partition property previously subject to a life estate, two of the remaindermen could seek costs they incurred mitigating property damage caused by a third remainderman.

Prior to the partition, petitioners James Lodigiani and Anne Betramello and respondent Nina Pare were given remainder interests in their parents' Longmeadow home, subject to a life estate held by their father, Leonard Lodigiani.

Pare eventually moved in to help care for her father and disabled brother. Pare's hoarding habits caused significant health code issues that her co-remaindermen siblings paid to remedy, for which they sought contribution from her share of a partition sale.

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A Probate Court judge found that because Leonard, who died the day after the partition sale, had the sole duty as life tenant to preserve the property for the remaindermen's benefit, the contribution claim was beyond the scope of the partition action.

Instead, the judge divided the sale proceeds equally, ruling that the petitioners needed to bring a separate action against their father's estate if they wished to recoup their cleanup costs.

The Appeals Court reversed the decision.

A blue and white banner for a webinar. The text reads: "WEBINAR SUPREME COURT INCREASES BURDEN ON EMPLOYERS FOR RELIGIOUS ACCOMMODATIONS Wednesday, September 13, 2023 10:00 AM - 11:15 AM Hosted by MASSACHUSETTS Lawyers Weekly REGISTER NOW".

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BBO's bar counsel makes move to executive director

Rodney S. Dowell's professional home address – 99 A High St. in Boston – has not changed (though[...])

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“Nina had her own duty as a remainderman not to impair the rights and interests of her coremaindermen,” Judge Sookyong Shin wrote for the panel. “It was therefore within the [Probate Court] judge’s authority to consider whether to account for the property damage caused by Nina when determining how to equitably divide the proceeds from the partition sale.”

The 14-page decision is *Lodigiani, et al. v. Pare, et al.*, *Lawyers Weekly No. 11-086-23* (<https://masslawyersweekly.com/2023/08/23/real-property-partition-contribution/>).

‘Fair arguments on both sides’

Pare’s appellate counsel, Jessica R. Sofio of Westborough, said the case presented an unusual set of facts worthy of the Appeals Court’s attention.

“It seemed reasonable to review what constitutes an equitable division in this particular case,” Sofio said. “When there’s a presumption that [proceeds from a partition sale] are evenly split, courts aren’t always certain as how best to exercise their authority as to what’s equitable and what factors go into that decision.”

Sofio added that a review of the whole record would show additional factors that could play into an equitable division on remand. For example, she said, Pare made contributions toward the care of her father and disabled brother; she may have had mental health issues; and she was not represented by counsel during the Probate Court proceedings.

“It’s definitely an interesting case,” Sofio said. “I think there were fair arguments on both sides.”

Karen M. Lodigiani of Cohasset, who represented the petitioners, could not be reached for comment prior to deadline.

“The partition statute envisions a certain level of judicial economy and efficiency in addressing all issues related to property and parties, and that’s important. This decision lets them keep everything in one court in front of one judge.”

– Harry M. Haytayan Jr., Waltham

Harry M. Haytayan Jr., a Waltham trial attorney who handles property and probate disputes, said he thought the Appeals Court reached the correct decision.

“The partition statute envisions a certain level of judicial economy and efficiency in addressing all issues related to property and parties, and that’s important,” he said. “This decision lets them keep everything in one court in front of one judge. The parties are all there, and the issues and facts will be litigated there without having to try the same facts twice.”

Jenna R. Wolinetz, a real estate and trust litigator in Waltham, said the Appeals Court surveyed case law from other states and concluded that remaindermen do indeed have a duty not to commit waste against the estate.

“Any other conclusion would be completely illogical,” Wolinetz said. “It would give any remainderman carte blanche to live in a home with a parent and destroy it with absolutely no financial ramifications. It would give people permission to act poorly.”

Boston estate planning and elder law attorney Eric D. Correira said that given the health code issues, the petitioners had little choice but to pay for the cleanup of the property.

Still, he said, the case highlights the risks a co-owner of real estate takes when contributing costs to a property headed toward partition. That is why he tells his own clients to stop paying all expenses other than homeowner’s insurance and necessary repairs.

“The presumption is that, after partition, the proceeds are split equally, and the less a person has contributed, the less exposure they have to not being paid back,” Correira said. “Plus, by not paying expenses, it often helps put pressure on others to force the partition.”

He also stressed that *Lodigiani* does not affect the general rule that a life tenant is usually responsible for waste.

“Here, the important distinction is that the waste was caused by a remainderman as opposed to a third party,” Correira said. “If it had not been another owner that caused the waste, it would have been the life tenant’s responsibility.”

Meanwhile, Correira added, the timing of the partition sale — where the life tenant died the next day — could not have been worse from a tax perspective.

“If the life tenant had died the day before the sale, there would have been a full step-up in basis and no capital gain,” Correira explained. “Instead, the life tenant died the day after the sale, which means that there was likely some capital gain tax that had to be paid by the children and also the need for a probate.”

Contribution claim

Leonard Lodigiani and his wife, Helen, deeded the property in question to James Lodigiani, Betramello and Pare in 2004 as joint tenants with rights of survivorship, reserving a life estate for themselves.

Helen died three years later, but Leonard and his son John Lodigiani continued to occupy the property.

In or around 2011, Pare moved in and helped care for her father and younger brother.

Lodigiani, et al. v. Pare, et al. (<https://masslawyersweekly.com/2023/08/23/real-property-partition-contribution/>)

THE ISSUE: Could two remaindermen seek to recoup, as part of an action to partition property previously subject to a life estate, costs they incurred mitigating property damage caused by a third remainderman?

DECISION: Yes (Appeals Court)

LAWYERS: Karen M. Lodigiani of Cohasset (petitioners)

Jessica R. Sofio of O’Connor Family Law, Westborough (respondent)

Pare, who had a history of hoarding, apparently continued her habits while living at the property, which was in poor condition by 2014.

That year, James arranged and paid for a dumpster to be brought to the property to clean up accumulated clutter and trash, but Pare’s behaviors allegedly persisted, leading to health violation notices.

In July 2017, James unsuccessfully attempted to eject Pare from the property.

Soon after, he told her that he and Betramello “as majority owners” needed to prepare the property for sale.

In May 2018, Leonard moved himself and John out of the property and obtained a no-trespass order against Pare several months later.



James, Betramello and their families subsequently worked to clean up the property, a year-long process that cost more than \$6,000.

In February 2019, James, Betramello and Leonard filed a joint petition for partition in Hampden Probate Court, naming Pare as respondent.

The petition requested that Leonard be permitted to surrender his life estate and that the property be sold with the proceeds distributed in proportions that included compensating the petitioners for property damage mitigation costs.

The partition sale closed on Jan. 27, 2020, and Leonard died the next day.

At a subsequent bench trial, Judge Claudine T. Wyner ruled that the petitioners' claim for contribution was beyond the scope of the partition action and that the exclusive avenue for them to recoup costs was via an action for waste against Leonard's estate.

Wyner then issued a final decree ordering equal division of the sales proceeds among the parties.

The petitioners appealed.

Broad discretion

Vacating the lower court ruling, the Appeals Court panel emphasized that the overall objective of a partition proceeding is a just and equitable division according to the parties' respective rights.

And while it is presumed that partitioned property should be equally divided, a party can rebut the presumption by demonstrating a beneficial interest different from that indicated by record title, the panel continued.

"A judge making a division therefore has the discretion to depart from the presumption if warranted by the circumstances bearing on the equities and the parties' rights, including any prior financial contributions made by a party to preserve the common estate," Shin wrote, adding that that gave the Probate Court judge broader discretion in dividing the proceeds than she realized and that she indeed could have taken into account property damage that Pare caused while the life tenancy was in existence.

"Our conclusion is buttressed by long recognized exceptions to the general principle that a life tenant is responsible to a remainderman for injuries to the estate; these include exceptions for injuries caused by 'the acts of God,' by 'public enemies,' and, as pertinent here, by 'the reversioner himself,'" Shin said, quoting *Willey v. Laraway*, an 1892 Vermont Supreme Court decision. "This last exception reflects the commonsense notion that remaindermen (or reversioners) who injure the premises by their own acts cannot then hold the life tenant liable for the damage."

Accordingly, the court remanded the case to Probate Court for a determination as to whether the petitioners should, in fact, receive contribution under the circumstances.

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