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## Partition action dismissed after death of joint tenant

*Commissioner had accepted purchase offer by time of passing*

By: Eric T. Berkman April 22, 2022

The Supreme Judicial Court has decided that a partition action should have been dismissed after the plaintiff died, even though the partition commissioner had already accepted an offer to purchase the property.

Plaintiff Charles R. Dunn and defendant Barbara A. Howard owned real property in Dorchester as joint tenants with a right of survivorship.

During proceedings to partition the property, Dunn passed away age 93.

A Land Court judge proceeded to deny Howard's motion to dismiss the petition, despite Howard's argument that with respect to a partition by sale, the operative act that severs a joint tenancy is a conveyance of the property by deed to a buyer.



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But the SJC reversed.

"When Dunn died, Howard became the sole owner of the property," Justice Elspeth B. Cypher wrote for the court. "At that time, neither Dunn nor his heirs held 'a present undivided legal estate in' the property entitling them to maintain an action for partition. Howard's motion to dismiss therefore should have been allowed on the grounds that Dunn's heirs lacked standing."

In so ruling, the SJC rejected the estate's argument that under G.L.c. 241, §26, of the Massachusetts partition statute, because Dunn died during the pendency of the partition, his heirs inherited his interest in the property as though the partition had been completed before his death.

### At first reading

Daniel B. Walsh of Plymouth, who represented Howard, said the issue presented in the case is likely to occur again in the future.

He also conceded that language in Section 26 appeared at first reading to give a decedent's heirs the right to step into his shoes in the partition. The language states that if a "party named in a petition" has died before the filing of or during the pendency of a partition action, his heir or devisee shall be entitled to the share of land set of to him.

"So this decision clarifies that the joint tenancy [with right of survivorship] precluded the heirs from having any rights in the partition matter," Walsh said.

Boston attorney Denzil D. McKenzie, who represented Dunn's estate, said he and his client disagreed with the court's interpretation of Section 26.

"But we accept the [SJC's] ruling on the matter of the termination of a joint tenancy," he said. "We may not like when it occurs, because it occurred at the very, very end of the partition process, but it serves to bring certainty and clarity to a very thorny area of the law."

At the same time, McKenzie was skeptical of the SJC's distinguishing of the case from its 1999 *Tobin v. McCarthy* decision.

In *Tobin*, the SJC deemed a firm offer to purchase such that the seller's acceptance created a binding contract — entitling the buyer to specific performance — as sufficient to sever a joint tenancy.

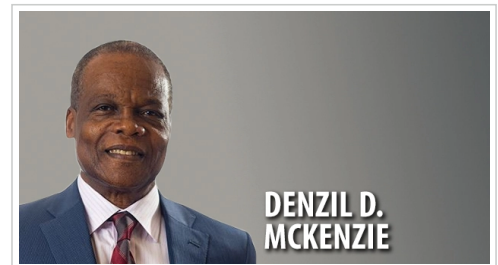
The SJC found that the parties contemplated finality via a signed offer, whereas in *Battle* all conditions inherent to the partition process had to be met, culminating in confirmation of sale and issuance of the commissioner's report.

"I have a long history of serving as a partition commissioner myself and it is very rare to see a commissioner's report," McKenzie said. "The statute calls for it, but in your typical partition proceeding, the game ends when the deed is recorded, not when the court enters the final decree or the commissioner renders the final report."



**"It struck me that the court would have at least signaled the Legislature by saying Section 26 is confusing and that [the Legislature] may do well to clarify it — but it didn't do so."**

**— Denzil D. McKenzie, Boston**



Meanwhile, McKenzie predicted a "slew of law review articles" would be written around the SJC's interpretation of Section 26 and what the Legislature may have contemplated in enacting it.

"It struck me that the court would have at least signaled the Legislature by saying Section 26 is confusing and that [the Legislature] may do well to clarify it — but it didn't do so," he said.

Waltham probate and real estate lawyer Leo J. Cushing also disagreed with the SJC's interpretation of Section 26.

"It appears the SJC ignored very clear language in Section 26 to reach a result it wanted to get to on the facts of this case," Cushing said. "Effectively, they have rewritten a statute by declaring that 'a party named in the petition'

does not include one who owns a property as a joint tenant with right of survivorship.”

On the other hand, Sheryl J. Dennis, an estate planning attorney in Wellesley Hills, said she found the decision well-reasoned.

“It’s really following the statute,” Dennis said. “You in some ways feel bad for the decedent’s heirs because they’re left out. But the property was held as a joint tenancy with right of survivorship, so frankly, on [Dunn’s] death, it goes to the surviving joint tenant.”

Dennis added that the most important takeaway for real estate attorneys is to be very careful with how properties are held, because what happened here could happen to anybody.

The system worked as it was supposed to, according to Harry M. Haytayan Jr. of Waltham.

“Had the judge acted [before Dunn passed away], the SJC would have come to a different conclusion on the sale,” he said. “But timing in life is everything, and the record reflects that the right of survivorship is there and Mr. Dunn died the day before the hearing.”

Swansea attorney Eric D. Correira said the case provides a cautionary tale for anyone who owns real estate as joint tenants.

“While there are times when a joint tenancy is preferred, most unrelated people should own real estate as tenants in common to have full control over who will receive their interest when they pass away,” he said.

A decision in favor of Dunn’s heirs “would have completely upended basic concepts of property law taught during the first week of law school,” Correira added.



### Untimely death

On Feb. 23, 1993, Dunn and Howard took title to property in Dorchester as joint tenants by deed from the prior owner.

On July 29, 2020, when Dunn was in his early 90s, he filed a petition with the Land Court seeking partition by sale.

The parties stipulated that the property could not be advantageously divided, and though they told the judge they were engaged in settlement discussions, Dunn moved for appointment of a commissioner, which the judge allowed.

On Sept. 14, 2020, the judge appointed a commissioner and, on Dec. 11, 2020, issued a warrant for sale of the property.

The warrant authorized the commissioner to market and sell the property but provided that the sale would be subject to review and approval of the court and would not be consummated without judicial approval on application of the commissioner.

On Jan. 20, 2021, the commissioner accepted an offer to purchase the property and filed the commissioner’s report and motion for authority to enter a purchase-and-sale agreement on Feb. 1, 2021.

Dunn passed away on Feb. 16, 2021, a day before the scheduled hearing on the matter.

Howard subsequently moved to dismiss the petition, arguing that with Dunn’s death, his interest in the property vested with her as surviving joint tenant.

### Battle v. Howard

**THE ISSUE:** Should a partition action be dismissed after the plaintiff dies even though the partition commissioner has already accepted an offer to purchase the property?

**DECISION:** Yes (Supreme Judicial Court)

**LAWYERS:** Denzil D. McKenzie of Boston (petitioner); Daniel B. Walsh of Plymouth (defense)

Judge Robert B. Foster denied the motion and approved the sale, while staying execution to allow Howard to pursue an appeal.



### Severed tenancy

Taking up Howard's appeal on its own motion, SJC rejected the estate's argument that, under *McCarthy*, the buyer obtained an equitable right to possess the property when the commissioner accepted the buyer's offer, destroying the unity of interest required to maintain a joint tenancy.

"Our conclusion in *McCarthy* was based on the parties' manifest intent to be bound by the terms of the unconsummated agreement," Cypher wrote. "Here, the terms of any agreement between the buyer and the commissioner would have been subject to approval by the judge and the parties' right to object under the amended warrant."

The SJC was similarly unpersuaded by the petitioner's argument that, under Section 26, Dunn's heirs succeeded to his property interest.

"The introductory language of the first sentence of § 26, 'If a party named in the petition has died *prior to the filing thereof*, or dies during its pendency ... his heir ...' (emphasis added), suggests that this section was intended to apply to forms of joint ownership other than joint tenancies," Cypher said. "If a joint tenant dies prior to the filing of a petition for partition, sole ownership of the property vests in the surviving joint tenant, and no partition is to be had."

Accordingly, the SJC concluded, Battle lacked standing to continue the partition action.

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