VERMONT SUPERIOR COURT
Chittenden Unit
175 Main Street, PO Box 187
Burlington VT 05402
802-863-3467
www.vermontjudiciary.org

CIVIL DIVISION
Case No. 744-8-19 Cncv

Hubbard et al vs. Hubbard et al

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This partition matter came on for an evidentiary hearing on May 18, 2021. Prior to the hearing, at a hearing on Plaintiff's motion for summary judgment, the parties waived any right to proceed before a panel of commissioners. Subsequently, on that same motion, the court determined that Plaintiffs are entitled to a partition of jointly owned property at 187 Chapin Road in Essex ("the Property"), and that partition in kind is not a viable approach. It determined further that the fair market value of the Property is $266,000, as established by an appraisal submitted with Plaintiffs' motion. Thus, what remained for determination was the parties' respective contributions to the Property and hence, the payments to be made by one side to the other in the event of a partition by assignment or the distribution of proceeds in the event of a partition by sale. Accordingly, the court set those matters for an evidentiary hearing. The court's entry required, "Any party claiming to have invested in the property in any way shall bring all evidence of such investment to that hearing."

At the hearing, the evidence was completed, both sides waived the right to submit proposed findings and conclusions, and the court took the matter under advisement. Then, unfortunately, the case fell through the cracks—for which the court apologizes profusely. Having reviewed its notes and the entire hearing recording, the court now makes the findings and conclusions below by a preponderance of the credible evidence. On those findings and conclusions, the court orders partition by assignment.

Findings

In their summary judgment papers, which were not contested, Plaintiffs established that in June 1994, Florence E. Hubbard ("Florence"), who then owned the Property, conveyed title to herself and her son Plaintiff Michael D. Hubbard ("Michael") as joint tenants with right of survivorship. They subsequently conveyed title to themselves and Plaintiff Wendy Hubbard. As a result, Florence had a one-half undivided interest in the Property, and Plaintiffs together had a one-half undivided interest. In August 2017, Florence conveyed a life interest to herself and a remainder interest in the Property to her

five other children, including Defendants. She died intestate in March 2018. This left the title a co-tenancy, with Plaintiffs holding a one-half interest in the Property and Florence's other children together holding the other half. One of those children then conveyed his interest to one of the Defendants, leaving the four Defendants, collectively, owning a one-half interest in the Property.

From the time he became a joint owner of the property through a time in 2014, Michael undertook the sole responsibility for all costs of ownership of the Property—mortgage payments, property taxes, capital improvements and major repairs. In 2014, he stopped paying taxes, but continued to make mortgage payments and to pay for the lion's share of capital improvements and major repairs; he did this through the time of his mother's death. By that time, he had fully retired all mortgage obligations. Over time, he made a total of $276,200.89 in mortgage payments, and $64,392.16 in property tax payments.

For much of this time, Defendants Donna Hubbard ("Donna") and Jeffrey Hubbard ("Jeffrey") lived with their mother (and, for a time, their brother Michael) in the Property. At their mother's direction, they each paid Michael $300 a month to help with the mortgage and tax obligations—Donna, a total of $18,000, and Jeffrey, a total of $32,400. After Michael stopped paying taxes in 2014, Florence paid taxes until her death, and Donna paid them thereafter. While the precise amount of these payments does not appear from the evidence, a fair inference, extrapolating from amounts well established by Plaintiffs' Exhibit B and suggested by Donna's testimony, is that these payments came to no more than $32,000.

Twice since 1994, Michael refinanced the Property. Each time, in addition to paying off prior mortgage obligations, the refinancing provided cash back to Michael, which he then used for capital improvements. A 1999 refinancing yielded $47,727.80 in cash back; a 2003 refinancing yielded $30,337.91. Over time, Michael reinvested these monies and at least an additional $25,000 of his own money into the Property. There is no evidence that he made any of these expenditures without Florence's agreement or approval. Thus, for accounting purposes, all of Michael's mortgage payments are properly considered as payments towards a shared capital obligation. The same is obviously true of his property tax payments. The bottom line is that over time, Michael made payments totaling $365,593.05 towards the ownership of the Property.

In addition to the ownership contributions noted above by Florence, Donna, and Jeffrey, Defendant Harold Hubbard ("Harold") undertook occasional capital contributions; he made repairs to the roof and repaired the house's gray water line. The total value of these improvements—materials, equipment, and labor—came to no more than $1,200. While Harold testified that he had records

showing that his mother also made payments towards capital expenses, no party produced any evidence to support this assertion. Thus, the court cannot find that apart from tax payments, Florence made any capital contributions.

In addition, for all the time that they resided at the Property, Florence and Donna paid utilities; during times that he lived in the house, Michael also paid utility bills. Jeffrey mowed lawns and did handyman work around the place. None of these contributions, however, are properly considered capital costs; rather, they are costs of occupancy, properly borne by the actual occupants. Thus, these payments do not result in additions to the capital accounts of any of the parties.

Conclusions

As noted above, the court has already determined that Plaintiffs are entitled to a partition of the Property, and that partition in kind, as provided in 12 V.S.A. § 5169, is not a viable approach in this case. In such a case, "the court may order [the property] assigned to one of the parties, provided he or she pays to the other party such sum of money, at such times and in such manner as the [court] judge[s] equitable." *Id.* § 5174. If a party "will not take such assignment and pay such sum," the court may order the property to be sold at public or private sale. *Id.* § 5175. This is essentially a last resort. "[P]artition by sale is not a favored remedy . . . [P]artition in kind is preferable to assignment, and assignment is preferable to sale." *Wilk v. Wilk*, 173 Vt. 343, 346–47 (2002). The statute "should be interpreted to give the trial court as many options as possible to achieve equity between the parties." *Id.* at 346.

In determining the amount one party must pay to the other for an assignment, the court looks principally to the teachings of *Whippie v. O'Connor*, 2010 VT 32, 187 Vt. 523. There, the Court suggested the following procedure:

> Absent a compelling alternative approach, once cotenancy is established, the partitioning court should split the property in half and then consider equitable factors in the following order. First, the court may determine the contributions of each party towards the actual expenses of the house, including mortgage, insurance, taxes, utilities, repairs, and improvements. . . . Second, the court should credit against contribution claims a rental value offset for any period of exclusion of a party ousted from the premises by the cotenants in possession.

Id. ¶ 15 (footnote omitted). The court also is mindful that in a partition action, " 'courts should consider all relevant circumstances to ensure that complete justice is done.' " *Wilk v. Wilk*, 173 Vt. 343, 346 (2002) (quoting 7 R. Powell, Powell on Real Property § 50.07[3][a], at 50–40 (M. Wolf ed. 2001)).

The findings above lead to the conclusion that Plaintiffs' investments in the Property total $365,593.05, while Defendants' (including credit for their mother's capital contributions) total $83,600. In this calculation, the court does not include contributions over time to the payment of utilities and other costs of occupancy, as distinguished from costs of ownership; the evidence does not suggest that any party paid more or less than her or his fair share of those costs. Equally, there being no evidence that any party was ousted from possession, the court does not apply a rental value offset to the contributions of either side. The resulting difference is $281,993.05—more than the value of the Property. This being the case, Plaintiff is entitled to a partition by assignment. Because the difference in the parties' investments in the property exceeds its fair market value, equity requires no payment from Plaintiff to Defendants in consideration of their equitable share in the Property; that share, effectively, is a negative balance. Equally, however, equity does not require that Defendants both assign their share to Plaintiff and pay him on account of their equitable deficit. Instead, the court will order that Defendants assign their interest in the Property to Plaintiff, and that Plaintiff in exchange acknowledge the satisfaction of any and all obligations Defendants may owe with respect to the Property.

ORDER

The court hereby orders partition of the property located at 167 Chapin Rd., Essex, by assignment of Defendants' interest to Plaintiffs. Neither party shall be obligated to make any further payment to the other. Plaintiffs' counsel shall prepare the form of judgment required by V.R.C.P. 58 and a proposed deed for the court's approval. If, upon the court's approval, Defendants fail to sign the deed within 30 days, Plaintiffs' counsel may submit a substitute decree for the court's signature and recording in the Essex town records. In either event, Plaintiffs shall be responsible for preparing any other documents (property transfer tax return and the like) associated with the recording, and for paying any required fees. Upon their receipt of either a fully signed deed or the court's decree, Plaintiffs shall file with the court and serve Defendants a Notice of Judgment Satisfied.

Electronically signed pursuant to V.R.E.F. 9(d): 11/2/2022 7:48 PM

Samuel Hoar, Jr.
Superior Court Judge