



TRUSTS AND ESTATES

Partition Rights of Deceased Joint Tenant's Estate

By Robert M. Harper

In *Orlando v. Deprima*, the Supreme Court, Kings County, recently addressed whether a joint tenancy is severed when one of the joint tenants with rights of survivorship dies during an action to partition the real property that is the subject of the joint tenancy. The court answered that question affirmatively, noting that a deceased joint tenant's interest in the real property terminates upon their death.

This article discusses the *Orlando* decision and the circumstances in which a deceased joint tenant's estate may be entitled to the partition of jointly held real property.

In *Orlando*, the plaintiff and her two siblings, the defendants, owned property as joint tenants.¹ The plaintiff commenced an action to partition the property and then prevailed on a motion for partition as a matter of right. However, the plaintiff died before she obtained a judgment in the partition action.

Following the plaintiff's death, her husband, the executor of the plaintiff's estate, sought to be substituted into the action. The plaintiff's husband also moved for a judgment declaring that he had an ownership interest in the property as the plaintiff's successor-in-interest. The defendants opposed the plaintiff's husband's motion, arguing "that the partition action did not ripen sufficiently so as to sever the joint tenancy."

Upon consideration of the parties' contentions, the Supreme Court granted the plaintiff's husband's motion to be substituted into the action as the executor of her estate. However, the court also denied the plaintiff's husband's request for a judgment declaring him to have an interest in the property. As the court explained, the prevailing rule is that a partition action among joint tenants "does not survive the death of one of the tenants." Accordingly, given that the plaintiff died before securing a judgment in the partition action, the plaintiff's interest in the property passed to the surviving



Robert M. Harper

joint tenants upon her death and her husband was not entitled to a partition of the property as the plaintiff's successor-in-interest.

Nevertheless, there are several circumstances in which the representative of a decedent's estate may be entitled to the partition of property the decedent owned as a joint tenant. For example, where the parties agree, in writing,

to the partition of the property or an interlocutory judgment of partition is entered before the decedent's death, the representative of the decedent's estate may be able to pursue the pending partition action. *O'Brien v. O'Brien* and *Zalewski v. Zalewski* illustrate this point.

In *O'Brien*, the plaintiff commenced an action to partition property he owned with the defendants as joint tenants.² The parties to the partition action eventually stipulated to all of the material facts and referred the matter, by court order, to a referee for "a computation of the interest and liabilities of the joint tenants."

The plaintiff however, died before the Supreme Court, Oneida County, confirmed the referee's report and entered a judgment in the action. After the plaintiff's death, the plaintiff's wife, the executor of the plaintiff's estate, moved for an order substituting her into the partition action and confirming the referee's report. The defendants opposed the plaintiff's wife's motion on the ground that the plaintiff's interest in the property terminated upon his death.

Given that the parties stipulated to the material facts and that the only dispute that existed concerned the allocation of credits among the parties, the court concluded that there "[was] little question that all parties consented to partition." The court also explained that "[w]hen the parties agree, in writing, that there shall be a partition it is not necessary that it be reduced to judgment or prescribed in a deed." Accordingly, the court confirmed the referee's report and directed that the sale of the property proceed.

In *Zalewski*, the plaintiff sought to partition real property he owned with the defendants.³ He even obtained an interlocutory judgment that fixed the rights of the respective parties and provided for the appointment of a referee to supervise the sale of the property. However, the plaintiff died between the entry of interlocutory judgment and the referee's sale.

Following the plaintiff's death, a creditor of his estate made a motion to substitute into the action. Although the County Court, Kings County, denied that motion, the court also explained that the substitution of a successor into the action as a plaintiff was unnecessary. As the court explained, the interlocutory judgment was for "all intents and purposes a final judgment." Indeed, it "declare[d] the right, share or interest of each party in the property, and direct[ed] a sale." Accordingly, the personal representative of the deceased plaintiff's estate could claim an interest in the plaintiff's share of the proceeds associated with the property and the substitution proposed by the creditor was unnecessary.

In sum, a joint tenant's right to pursue a partition action generally terminates upon the tenant's death. However, there are several circumstances in which the personal representative of the joint tenant's estate may continue to prosecute a partition action after the tenant's death. These circumstances arise where the parties to the action agree, in writing, to the partition of the property or where an interlocutory judgment declaring the parties' rights is entered before the deceased joint tenant's death.

Note: The author is an associate in the Trusts and Estates Department at Farrell Fritz, P.C.

¹ *Orlando v. Deprima*, No. 24564/04, 2008 WL 5330516 (Sup. Ct., Kings County Dec. 18, 2008).

² *O'Brien v. O'Brien*, 89 Misc.2d 433 (Sup. Ct., Oneida County 1976).

³ *Zalewski v. Zalewski*, 118 Misc. 346 (County Ct., Kings County 1922).