SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Account by Kristine M. Schroeder as the Executrix of the Estate of

LILLIAN MARCUCILLI-STUART a/k/a LILLIAN A. MARCUCILLI,

Deceased.

File No. 327294

Dec. No. 814

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In this accounting proceeding, the petitioner Kristine M. Schroeder has moved for partial summary judgment seeking a declaration that the parties' shares of the net proceeds of the sale of the decedent's residence located at 13 Clearwater Avenue, Massapequa, New York ("the Residence") is to be determined by the respective contributions of the decedent and the objectant, Erwin Stuart, toward the purchase price of the residence. For the reasons that follow, the motion is granted.

The decedent, Lilian Marcucilli-Stuart, died on January 29, 2003, survived by her husband, Erwin Stuart, and her daughter, Kristine M. Schroeder. Letters testamentary issued to Kristine on April 22, 2003. Kristine is the residuary beneficiary under the decedent's will. The decedent's spouse, by his attorney-in-fact, filed a petition for a determination of the validity and effect of the exercise of his right of election.

Petitioner has filed an account of her proceedings which asks that the surviving spouse's elective share of the estate be determined and that the respective property rights in the Residence be determined. The Residence was the subject of a partition action in the Supreme Court, Nassau County, Index No. 5890/04, which has been consolidated with this proceeding.

Schedule J of the accounting sets forth the property rights in the Residence of 77.4% to the petitioner and 22.6% to Erwin Stuart and his son, Sanford Stuart. Erwin has filed objections to the account, including an objection to the percentages set forth in Schedule J.

The Residence was purchased by the decedent and Erwin on July 2, 1992, prior to their marriage. They took title as joint tenants with right of survivorship. The purchase price of the residence was $305,000.00. Petitioner claims that the decedent sold her personal residence located at 31 Massapequa Avenue, Massapequa, New York, for $262,250.00, of which the decedent used $236,160.37 towards the purchase price of the Residence, constituting 77.4% of the $305,000.00 purchase price. By deed dated November 30, 1999, the decedent then transferred her entire interest in and to the Residence to Kristine and retained a life estate for herself. Similarly, by deed dated April 16, 2002, Erwin transferred his entire interest in and to the Residence to his son, Sanford, likewise retaining a life estate for himself. The Residence was sold on August 18, 2005 with the net proceeds of sale being $609,548.60.

The objectant argues that the instant motion is procedurally insufficient because it is supported only by counsel's affidavit and not by an affidavit of a person having knowledge of the facts. Objectant also claims that the petitioner's theory of equitable distribution of the proceeds of sale is applicable only in matrimonial actions and is inapplicable to an estate. According to objectant, the petitioner has failed to provide any precedent for applying the theory of equitable distribution to a surviving spouse or any proof that such an arrangement was intended by him and the decedent. Additionally, objectant contends that the petitioner has failed to provide any information regarding the contributions of the parties other than the initial investment. According to objectant's counsel, the objectant contributed approximately $400,000.00 for expenses

necessary to the maintenance of the Residence.

Petitioner's counsel has submitted a reply affirmation wherein he argues that objectant has failed to show how the factual distinctions in the matrimonial cases applying the concept of contribution somehow compel a different result in the instant case. Morevoer, counsel claims that, according to the case law, the only factors to be taken into account are the respective initial contributions of the parties and improvements made. Petitioner argues that carrying expenses, such as electric bills, oil bills and water bills, represent living expenses and are not to be factored into the formula.

ANALYSIS

The sole issue before the court on this motion is how the proceeds of sale from the Residence should be distributed.

A. EFFECT OF THE MARRIAGE SUBSEQUENT TO THE PURCHASE

The Residence was purchased by the decedent and the objectant at a time prior to their marriage as joint tenants with right of survivorship. After the purchase, the decedent and objectant were married. The marriage of the parties, however, did not convert the joint tenancy into a tenancy by the entirety (EPTL 6-2.1[4]; 6-2.2[b]; *Hiles v Fisher*, 144 NY 306 [1895]; *Novak v Novak*, 135 Misc 2d 909 [Sup Ct, Dutchess County 1987]). Thus, the decedent and objectant took title to the property as joint tenants with right of survivorship and continued to hold the Residence as such even after their marriage.

B. NATURE OF A JOINT TENANCY

Joint tenancy is a form of co-ownership of real or personal property existing between two or more persons. In a joint tenancy, "each person has exactly the same right in that interest as his

co-tenant or co-tenants" (5 Warren's Heaton on Surrogate's Court Practice §62.02 [7th ed]). Joint tenancy gives each joint tenant an equal right to share in the enjoyment of the estate during their lives (*Anonymous v Anonymous*, 2 Misc 3d 1002, 2004 NY Slip Op 50080[U] [Sup Ct, New York County 2004]); however, "[j]oint tenancy does not create equality of interests, but rather, the right of survivorship" (*Furnace v Comins,* 263 AD2d 856, 857 [2d Dept 1999], quoting *Novak v Novak*, 135 Misc 2d 909, 910 [Sup Ct, Dutchess County 1987]).

During the lifetimes of the joint tenants, their interests are partitionable (*Novak v Novak*, 135 Misc 2d 909, 910 [Sup Ct, Dutchess County 1987]. In addition, either tenant may sever the joint tenancy during the lives of the joint tenants (7 Warren's Heaton on Surrogate's Court Practice §92.06 [7th ed]). A joint tenant may unilaterally terminate joint tenancy by alienating his share (*Schrier v Tax Appeals Tribunal*, 194 AD2d 273 [3d Dept 1993], *appeal dismissed* 83 NY2d 944 [1944]; *Matter of Sutter*, 138 Misc 85 [Surr Ct, Monroe County 1930], *aff'd* 232 App Div 45 [4th Dept 1931], *aff'd* 258 NY 104 [1932]; 3 Warren's Weed New York Real Property §27.72 [2006]) without the assent of the other joint tenant (*Prario v Novo*, 168 Misc 2d 610 [Sup Ct, Westchester County 1996]). Once the joint tenancy is severed, ownership of the property is transferred to a tenancy in common (*Matter of Lorch*, 33 NYS2d 157 [Surr Ct, Queens County 1941]).

In a partition action, during the lifetimes of the joint tenants, their interests are partitionable on the basis of their separate contributions to acquisition and improvement (*Gasko v Del Ventura*, 96 AD2d 896 [2d Dept 1983], *appeal dismissed,* 61 NY2d 669 [1983]; *Ripp v Ripp*, 38 AD2d 65 [2d Dept 1971], *aff'd* 32 NY2d 755 [1973]; *Novak v Novak*, 135 Misc 2d 909 [Sup Ct, Dutchess County, 1987]); *Cytron v Malinowitz*, 2006 NY Slip Op 51899[U] [Sup Ct, Kings

County, 2006]; *MacCasland v Mandara*, 259 AD2d 993 [4th Dept 1999]). In addition,

> "it has been held that '[e]xpenditures made by a tenant in excess of his obligations may be a charge against the interest of a co-tenant and the court may adjust the equities of the parties in determining the distribution of the proceeds of any sale of the subject premises' (*Tenzer v Tucker*, 154 Misc 2d 468, 471, 584 NYS2d 1006 [1992], citing *Worthington*, 93 AD2d at 517; *Sirianni*, 14 AD2d at 438; *Hosford v Hosford*, 273 AD 659, 662, 80 NYS2d 306 [1948]). It is also well settled, however, that a co-tenant is not entitled to an allowance for improvements which are not in the nature of repairs or restoration and are made for the co-tenants' own purposes without the agreement or consent of the other co-tenants (*Wawrzusin v Wawrzusin*, 212 AD2d 779, 780, 623 NYS2d 255 [1995]; citing *Cosgriff v Foss*, 152 NY 104, 46 NE 307 [1897]; *Scott v Guernsey*, 48 NY 106 [1871]; *Peerless Candy v Kessler*, 123 Misc 735, 205 NYS 883 [1989]."

(*Cytron v Malinowitz*, 2006 NY Slip Op 518 99[U] [Sup Ct, Kings County 2006]).

Here, the objectant does not dispute the amount of the respective initial contributions toward the purchase price of the Residence. Objectant contends that (1) the motion is procedurally defective because it is not supported by an affidavit of a person having knowledge of the facts, (2) the theory of equitable distribution of proceeds to a sale of real property has never been applied in an estates law context, and (3) assuming petitioner's theory of distribution is correct, petitioner has failed to give the objectant credit for carrying costs paid by him.

The court finds objectant's first argument regarding the insufficiency of the motion unavailing. None of the documents annexed to the motion which are relied upon to establish the respective contributions of the objectant and decedent have been refuted.

The objectant's argument that the theory set forth by petitioner is applicable only in the matrimonial equitable distribution context is likewise unavailing. Here, the decedent and objectant took title to the Residence as joint tenants with right of survivorship. In November of

1999, when decedent transferred her entire interest in and to the residence to petitioner retaining a life estate, she unilaterally terminated the joint tenancy. At that point, petitioner and the objectant held the Residence as tenants in common (*Matter of Lorch*, 33 NYS2d 157 [Surr Ct, Queens County 1941]). Thereafter, in April of 2002, the objectant transferred his entire interest in the Residence, while retaining a life estate, to his son, Sanford. Thus, at the time of the decedent's death on January 29, 2003, the petitioner and Sanford held title to the residence as tenants in common. Accordingly, their interests are partitionable. Objectant incorrectly argues that petitioner is presenting a "novel" theory by attempting to apply the principles of equitable distribution to the case at bar. In fact, there is nothing novel at all about the theory of distribution suggested by petitioner. What the court is applying are equitable principles, not the equitable distributee statute. In *Quattrone v Quattrone*, (210 AD306 [2d Dept 1994]), the parties purchased vacant land as tenants in common prior to their marriage. One of the parties then built a house on the property and the parties then married and occupied the residence. Incident to a subsequent divorce action, the parties agreed that the property, purchased prior to the marriage, was separate property and not subject to the equitable distribution statute (DRL 236[B][5][6]). The court held, nevertheless, that disposition of the property was subject to equitable considerations and that in reaching an equitable allocation between the parties, the court should consider the parties' separate contributions to acquisition and improvement of the property.

Similarly, in *Novak v Novak* (135 Misc 2d 909 [Sup Ct, Dutchess County 1987]), the parties, like the decedent and objectant here, were not married at the time they took title to the property, but instead held the property as joint tenants. In *Novak*, the court held that the property was "exempt from equitable distribution because . . . [it was] acquired prior to the marriage"

(*Novak v Novak*, 135 Misc 2d 909, 911 [Sup Ct, Dutchess County 1987]). Instead, the court determined that the action was more properly a partition action. The court went on to distribute the proceeds based upon the parties' contributions to the initial investment and improvements made.

Accordingly, the court finds that the proceeds of sale are to be distributed in accordance with the respective contributions of the decedent and her husband Erwin to acquire and improve the property *(Quattrone v Quattrone,* 210 AD2d 306 [2d Dept. 1994]). Also, the court is mindful that "a partition action is equitable in nature and the court may compel the parties to do equity between themselves when adjusting the distribution of the proceeds of sale" [internal citations omitted] (*Kiernan v Martin*, 2008 NY Slip Op 1508 [2d Dept 2008]). In *Kiernan v Martin*, the court noted that one co-tenant might be entitled to "a greater share of the sale proceeds as reimbursement for mortgage and tax payments he allegedly made on the subject real property, and for expenses he allegedly incurred for improvements on the subject real property," although, in that case, the court ultimately found that the plaintiff had failed to substantiate his claim regarding reimbursement. Thus, expenditures made by a tenant in excess of his obligations may be a charge against the interest of the other tenant and the court may take such into account for purposes of adjusting the equities of the parties in determining distribution (*Cytron v Malinowitz*, 2006 NY Slip Op 51899[U] [Sup Ct, Kings County 2006], *Tenzer v Tucker*, 154 Misc 2d 468 [Sup Ct, Nassau County 1992]). Nevertheless, the court must consider the relationship between the parties and whether the co-tenant who paid for such expenditures intended his disparate contributions to be a gift (*Laney v Siewert*, 26 AD3d 194 [1st Dept 2006]).

> "In a partition action, this Court sits both as a court of law, which must evaluate the wording of the deed, and as a court of equity, which must consider issues of fairness and the respective contributions of the parties. In determining the equitable division of the sale proceeds, the Court may consider the nature of the parties' relationship, disparities in down payments and mortgage payments, whether any such disparate contributions to the property were intended to be a gift, the reasonable value of improvements and repairs to the property and the reasonable value of rental payments with regard to an ousted co-tenant" (*C.Y. v H.C.,* 2007 NY Slip Op 51234[U], 16 Misc 3d 1102A [Sup Ct, New York County [2007]).

Here, it appears that the objectant did pay insurance and real estate taxes, as well as other carrying costs, such as utilities on the house. Prior to the decedent's transfer in 1999 of her interest to the petitioner, the decedent and Erwin were joint tenants, and, thus, it is unlikely that objectant would be entitled to any credit. Moreover, for the period after the transfer in 1999 and up until the decedent's death, it may be that such excess contributions made by objectant up until the time of decedent's death were gifts in view of their relationship as husband and wife. While the objectant would not be entitled to reimbursement for insurance payments and utilities or other carrying costs (*Degliuomini v Degliuomini*, 45 AD3d 626 [2d Dept 2007]), he might be entitled to credits for any amount in excess of his share of expenses such as real estate taxes and for improvements made. The issue, however, as to whether the objectant should receive any credit for such expenditures is not susceptible to summary judgment since it requires consideration of the various equities (*Laney v Siewert*, 26 AD3d 194 [1st Dept 2006], *Ranniger v Pevsner*, 306 AD2d 20 [1st Dept 2003]). Accordingly, the issue of whether the objectant is entitled to such a

credit will be addressed at the trial on the petitioner's accounting scheduled for October 2 and 3, 2008. The parties are directed to appear for a conference on April 9, 2008 at 9:30 a.m.

Settle order.

Dated: March 26, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court