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A T T O R N E Y S A T L A W

Irreconcilable Differences with your Co-Owners? Consider Partition of Real Property

By: Ian M. Guthrie, Esq.

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Real property is often owned by multiple parties as co-owners, usually as tenants in common or joint tenants. Co-owners may eventually want to go their separate ways. Perhaps they can work out the sale of the property on their own. If they have a written co-owners' agreement it may provide for how to sell or divide the property. However, if the co-owners can't agree, any co-owner may file a partition action to force the division of the property. In a partition action the court usually appoints a referee to sell the property, pay cost and liens and distribute the net proceeds to the owners according to their ownership interests. The parties may need an accounting among the owners for expenses that benefited the property or unaccounted for rent. A partition action can be a little bit like a divorce -- the more the parties can agree on, the less cost they will incur.

A co-owner has an absolute **right to partition** unless she has waived that right, for instance, in a co-ownership agreement. **Waiver** may be written or oral, express or implied. However, proving an oral waiver may be difficult. Implied waiver may be shown by conduct inconsistent with partition. Even successive interests like **life and remainder estates** may be partitioned if in the best interest of all parties. Remainder beneficiaries have successfully partitioned property subject to a life estate where the owner of the life estate was not paying property taxes or maintaining the property. Partition of partnership property is subject to partnership law. Community property may not be partitioned.

Partition is governed by CCP §§872.010–874.240 and any co-ownership agreement between the parties. There are three methods of partition: (1) sale and division of the proceeds; (2) appraisal and purchase by a party; or (3) physical division sometimes referred to as partition in-kind. Historically, division in kind was preferred. However, any division in kind must comply with the Subdivision Map Act and other land use regulations and is therefore often not feasible. A plaintiff seeking partition by sale must still establish that a sale would be fairer than physically dividing the property. Partition by appraisal requires that the parties agree to this method. This article discusses the first two methods.

A partition action is begun by filing a **complaint**. Before filing, the plaintiff co-owner needs to identify all possible co-owners, lessees, lien holders and others with recorded or unrecorded interest in the land. The complaint must identify and name as defendants all persons with an interest of record who would be materially affected. Anyone not named will not be bound, so the plaintiff needs to consider who might be proper defendants other than his or her co-owners. The plaintiff should try and negotiate with **interested parties** before filing, if possible.

Any **secured lender** must be named. Any trust deeds or mortgages on the property must be dealt with, typically by paying them off on sale of the property. A co-owner should review any trust deeds and talk to the lender before filing to avoid triggering a default or unnecessary costs. Hopefully, the lender and all parties will stipulate to the lien and how it will be treated.

The best way to determine interests of record is to obtain a **litigation guaranty** policy from a title company. The plaintiff must also record a notice of pendency of action called a **lis pendens**. This puts anyone who might buy or finance the property on notice and establishes the plaintiff's priority over later liens.

Co-ownership disputes can become contentious, especially where multiple owners are simultaneously using the property or where one co-owner is not accounting for rents. In those circumstances a co-owner can apply to the court for

immediate relief and the court can issue a temporary restraining order, injunction or appoint a referee to take charge of the property.

A co-owner who is named as a defendant must file an **answer** stating the nature of his interest, her preference as to the method of partition, asserting any waiver or similar right, such as a right of first refusal, and any claims for contribution and adjustments.

Both the plaintiff and defendant should seek **reimbursement** of money spent to maintain, improve or preserve the property for the benefit of all, with interest from the date of the expenditure, and an **accounting of rents**. A partition action requires an accounting of charges and credits to each co-owner's share. Credits include expenditures in excess of the co-owner's fractional share for necessary repairs, improvements that enhance the value of the property, taxes, payments of principal and interest on mortgages, and other liens, insurance for the common benefit, and protection and preservation of title. *Wallace v. Daley* (1990) 220 Cal.App.3d 1028, 1035-1036. Any rents paid by third parties must be accounted for. If a co-owner has sole possession of the property the other co-owners are not entitled to rents absent an express agreement such as a lease. However, if the occupying tenant is seeking reimbursement for expenses, the other co-owners may be entitled to an offset for the fair rental value of the occupant's use. *Hunter v. Schultz* (1996) 240 Cal, App. 2nd 24, 31.

The court will usually try the parties' right to partition and interest in the property first and enter an **interlocutory** (preliminary) judgment determining the parties' interests and method of partition. The court will order division by sale unless the parties agree to partition by appraisal or the court determines division in kind is possible.

If the court orders **partition by sale** the court will appoint a receiver to complete the sale under the court's supervision. Notice of sale must be given and the public allowed to submit public or private bids. Any sale must be confirmed by the court

and is subject to overbid. A co-owner may object to the bid and the court should consider any such objection but no co-owner has a veto. A **co-owner may bid**, in which case he can use his share of proceeds as a credit. So, a 50% owner would only need to come up with one half of the bid price plus costs.

The **proceeds of the sale** will be distributed per the court's order. Proceeds are paid in the following order; (1) costs of sale; (2) allowed costs of partition; (3) liens; and (4) then the balance to the owners in proportion to their interests as determined by the court. So, the proceeds will first pay, broker's fees, escrow fees, title fees, recording fees and all other fees related to the sale. Next the costs of partition are paid which are discussed below. Then any trust deeds, tax liens or other liens are paid. Finally, the balance is paid to the co-owners in the percentage of their interest.

Costs of partition include all costs for the common benefit of the parties including referee's fees, and fees of third parties employed by the referee such as appraiser and attorneys. Costs of partition include; "reasonable **attorney's fees** incurred or paid by a party for the common benefit." Any party may seek her fees and the court must apportion fees among the parties. It is up to the court to decide if the fees were incurred for the common benefit. Payment and apportionment of fees are determined at the conclusion.

Once the interests of the parties have been decided the parties may agree to **partition by appraisal** rather than partition by sale. The court cannot force partition by appraisal if the parties do not agree. Absent an agreement, the property will be partitioned by sale. If the parties want to proceed with partition by appraisal then the process is that they agree that one will buy the other out at an appraised price and a referee is appointed to obtain the appraisal and the parties complete the sale according to the agreement. The agreement can be creative such as providing that the winner of a coin toss may buy the other out at the appraised price. The agreement must be in writing, name the parties, identify their interests, name the party or parties who will be the buyer(s) name the referee, and the date as of which the appraisal is to be made. It should set out the

terms of the sale including deposits, financing and the status of title. It should cover all the points covered in a real estate purchase agreement. The agreement must be filed with and approved by the court. If the court approves the agreement it will appoint the referee.

Once appointed the referee will obtain an appraisal of the property and the interests involved and report to the court. The court then holds a hearing to determine the adequacy of the report. If the court determines the appraisal to be fair it will confirm the report and order the property to be sold at the appraised price according to the terms of the parties' agreement. Once sale is completed the court will enter judgment confirming the transfer.

We hope this article is helpful. If you have questions please contact, Ian Guthrie, 805 966-2985, ian@slgl-law.com.