

PARTITION OF REAL PROPERTY IN CALIFORNIA



Partition Of Real Property - General Concepts

When a parcel of real property is jointly owned by two or more parties and the request of one of the owners to divide the interests of the parties is opposed, the party desiring the division of interests may do so by bringing an action for "Partition" in Superior Court against the other owners.

Partition does not create a new title in real property, but divides up the existing interests of the owners. Partition is usually accomplished by a court action but it may also be made by the parties without court action.

Partition is ordinarily available as a matter of right, but the right may be waived.

Types Of Joint Interests In Real Property Subject To Partition

"The ownership of property by several persons is either: 1. Of joint interests; 2. Of partnership interests; 3. Of interests in common; 4. Of community interest of husband and wife." (C.C. 682.)

Joint Interest (Joint Tenancy): "A joint interest is one owned by two or more persons in equal shares, by a title created by a single will or transfer." (C.C. 683(a))

The distinguishing feature of joint tenancy is the right of survivorship. The title of each tenant extends to the whole estate. Hence, upon the death of one tenant, the entire estate survives to the others, to the exclusion of the heirs of the decedent.

Tenancy In Common: A tenancy in common, which is a cotenancy without the right of survivorship, exists where several persons own property not as joint tenants or partners. (C.C. 685.) And an interest created in favor of several persons, not acquired in partnership for partnership purposes, or as community property, nor expressly declared to be in joint tenancy, is presumed to be a tenancy in common. (C.C. 686.)

Rights, Duties, And Obligations Of Cotenants Prior To Partition

Possession And Use: Each cotenant is equally entitled to share in the possession of the entire property, and neither can exclude the other from any part of it. One who is ousted by another may, after demand for entry and refusal, recover possession and damages, the damages ordinarily consisting of his share of the value of the use and occupation from the time of the ouster.

Insurance: There is no obligation on the part of a cotenant to insure the other cotenant against loss of the latter's interest. And, since a fire insurance policy does not insure the property but indemnifies the particular insured for damage to his interest, a noninsuring cotenant is not entitled to any part of the proceeds paid to the insuring cotenant.

Protection Against 3rd Parties: One cotenant can bring or defend an action against third persons for enforcement or protection of rights in the property.

Contribution: One who pays taxes, interest or other charges against the property is entitled to contribution from the other.

Compensation: In the absence of an agreement, a cotenant, like a partner, is ordinarily not entitled to compensation for services rendered in care and management of the property, e.g., leasing it, collecting rentals, supervising repairs, or making minor repairs. However, he may become entitled to compensation by implied contract where he makes repairs or improvements, or furnishes other services or materials, with the acquiescence of the other cotenants.

Accounting For Rents And Profits: Where the tenant in possession leases the property to a third person, other tenants may bring suit to require him to account for rents collected from such third person. However, if one tenant in common or joint tenant is in sole possession of the property, the other tenant cannot recover rent for his occupancy, or profits derived from the property by the occupant's own labor, nor can he have an accounting thereof.

Agreements And Transfers: One joint tenant or tenant in common cannot ordinarily bind the other by an agreement relating to the property.

Leases To Third Parties: One joint tenant may give a lease of part of the property, even against the other's objection, provided that the other's rights are not prejudiced; i.e., the other joint owner cannot obtain cancellation of the instrument, but is entitled to share possession with the lessee.

Easements And Licenses: One cotenant cannot give an easement good against the others. It has been held, however, that a cotenant can give a license to another to enter on the land, and this license may, under proper circumstances and where there is no objection by the other tenant, become irrevocable.

Homestead: Any dwelling in which the owner or his spouse resides may, to the extent of his or their interest (with minor exceptions), be declared a homestead. (C.C.P. 704.910, 704.920.)

Termination Of Contenancy Without Legal Action

Death Of A Cotenant: Since the basic characteristic of joint tenancy is the right of survivorship, death of one joint tenant terminates the tenancy.

Transfer Of Joint Tenancy Interest To Other Joint Tenant: A joint tenancy is terminated where one of two such tenants transfers his interest to the other.

Contract Eliminating Right Of Survivorship: Joint tenants may, by a simple contract without any conveyance, agree to eliminate the right of survivorship; the effect will be to terminate the joint tenancy and create a tenancy in common.

Conveyance Of Joint Tenancy Interest To Third Party Party: A conveyance of his interest by one joint tenant to a third party destroys the unity of title and makes the grantee a tenant in common with the other joint tenant.

Civil Code Section 683.2(a): Under C.C. 683.2(a) a joint tenant may, without the joinder or consent of other joint tenants, sever his interest in a joint tenancy in real property by any of the following means:

1. Execution and delivery of a deed conveying legal title to the joint tenant's interest to a third person (whether or not pursuant to an agreement requiring the third person to reconvey legal title to the joint tenant).
2. Execution of a written instrument evidencing the intent to [*pg.482] sever the joint tenancy (including a deed that names the joint tenant as transferee).
3. Execution of a written declaration that the joint tenancy is severed as to the joint tenant's interest.

The means of severance provided by C.C. 683.2(a) are in addition to any other methods by which a joint tenancy may be severed. (C.C. 683.2(a).)

C.C. 683.2(c) states that severance of a joint tenancy of record by deed, written declaration, or other written instrument pursuant to C.C. 683.2(a) does not terminate the right of survivorship of the other joint tenants in the severing joint tenant's interest unless one of the following requirements is satisfied:

1. Recordation before death of severing joint tenant: The instrument effecting the severance is recorded in the county where the real property is located before the death of the severing joint tenant.
2. Recordation after death of severing joint tenant: The instrument effecting the severance was executed and acknowledged before a notary by the severing joint tenant not earlier than 3 days before the death of the severing joint tenant, and is recorded in the county where the real property is located not later than 7 days after the death of the severing joint tenant.

Court Action To Partition Real Property

Parties: If real property is owned concurrently or in successive estates, any owner of an estate of inheritance or an estate for life or for years may sue to partition. (C.C.P. 872.210(a)(2).) This provision includes remaindermen but excludes lienholders as potential plaintiffs. Any coowner of personal property may bring a partition action (C.C.P. 872.210(a)(1)), including owners of successive estates (C.C.P. 872.020, 872.710(c)).

Actions by spouses or putative spouses for division of community, quasi-community, or quasi-marital property are expressly excluded from the revised law. (C.C.P. 872.210(b).)

Persons having or claiming interests "in the estate as to which partition is sought" must be joined as defendants if the interest is of record or is actually known to the plaintiff. (C.C.P. 872.510.) "Interests" includes liens, and joinder of additional parties may be necessary under C.C.P. 389. However, holders of interests in oil or gas

leases or similar pooling arrangements may be omitted as parties and thus left unaffected by the judgment. (C.C.P. 872.540.)

If partition of all interests is sought, the plaintiff may join "all persons unknown claiming any interest in the property." (C.C.P. 872.550.) Such joinder is required if the name of a defendant is unknown to the plaintiff. (C.C.P. 872.520(a).) If the nature of a defendant's interest is uncertain or contingent, the complaint must so state and must further allege the name, address and legal disability of the owner of any contingent interest insofar as known to the plaintiff. (C.C.P. 872.520(b).) The court must order joinder of additional parties and appoint guardians ad litem as required by C.C.P. 372 et seq. (C.C.P. 872.520(c))

If a person who should be joined is known to be dead, the plaintiff must join the decedent's known personal representative as a defendant. (C.C.P. 872.530(a).) If none is known, defendant must so state in an affidavit and join the decedent's testate and intestate successors and all persons claiming by, through, or under the decedent. (C.C.P. 872.530(b)(1)(2).)

The Complaint: C.C.P. 872.230 specifies the necessary allegations of the complaint:

1. A description of the property. Both the legal description and the street address or common designation must be given for real property. For tangible personalty, its usual location must be stated. (See C.C.P. 872.240, permitting partition of real and personal property in one action.)
2. The plaintiff's interests as owner and lienholder.
3. All interests of record or known to the plaintiff that the plaintiff reasonably believes will be affected by the action. Interests of record in personal property include security interests filed under the Commercial Code.
4. The estate to be partitioned and a prayer for partition.
5. If a sale of the property is sought, facts justifying the sale.

The complaint must also state the existence and location of any title report procured by the plaintiff (C.C.P. 872.220(a)) and the court may order procurement of a title report by any party (C.C.P. 872.220(b)).

Lis Pendens: Notice of the pendency of an action to partition real property must be recorded by the plaintiff in all counties in which the property is located (C.C.P. 872.250(a)), and a supplemental notice must be recorded for all additional property added to the action (C.C.P. 872.250(b)). If the notice is not recorded, the court must order recordation and stay the action until this is done. (C.C.P. 872.250(c))

Answer: The answer must set forth the interests that the defendant claims in the property, including any liens. (C.C.P. 872.410(a)) Liens must be described by date, character, and amount due. (C.C.P. 872.420.) Additional expenses related to the lien may be alleged, but it is no longer necessary to disclose additional security. The answer must state facts tending to controvert the allegations of the complaint not admitted by the defendant. (C.C.P. 872.410(b).) It may also set forth the defendant's affirmative claims for contribution or other compensatory adjustment.

(C.C.P. 872.430) If the defendant seeks a sale, the answer must justify it by allegations of fact. (C.C.P. 872.410(c).)

Trial: Any interest of a party in the property may be put in issue, tried, and determined. (C.C.P. 872.610.) In addition, the court must resolve any other issue necessary to ascertain the state of the title for the purpose of granting relief. (C.C.P. 872.620.) The court must make any necessary determination of the status and priority of liens on the property. (C.C.P. 872.630(a).) A referee may be appointed to take evidence on the issue, ascertain the facts, and report to the court. (C.C.P. 872.630(b).)

Determination By The Court Of Right To Partition

The right to partition depends on the plaintiff's owning a sufficient interest in the property (C.C.P. 872.210) and on the existence of any prerequisites to partition of the particular type of property interests involved.

Partition of concurrent interests is a matter of right unless barred by waiver. (C.C.P. 872.710(b).) Partition of successive estates is allowed only if in the best interest of all parties. In deciding this issue, the court must consider such factors as burdensome expenses, changes in circumstances since creation of the estates, the intent of the creator, and the needs and interests of the successive owners. (C.C.P. 872.710(c).)

Partition of partnership property may be permitted if rights of unsecured partnership creditors will not be prejudiced; alternatively, the partition procedure may be applied in a partnership accounting and dissolution proceeding. (C.C.P. 872.730.)

Determination By The Court Of The Manner Of Partition

Partition is by physical division unless the parties agree on a sale or the court determines that partition by sale would be "more equitable." (C.C.P. 872.810, 872.820.).

The court may order part of the property partitioned by sale and the remainder by physical division. (C.C.P. 872.830.)

The court may appoint a referee to assist its determination whether to order a physical division or a sale. (C.C.P. 872.820(b).)

Partition of property subject to an express trust may be by sale simply in the court's discretion. (C.C.P. 872.840(a).)

Interlocutory Judgment

If the court finds that the plaintiff is entitled to partition, it makes an interlocutory judgment determining the interests of the parties and ordering partition. The judgment may, but need not, determine the manner of partition. (C.C.P. 872.720(a).) If it is "impracticable or highly inconvenient" to determine the interests of all the parties in a single interlocutory judgment, the court may render an interlocutory judgment on the interests of the original concurrent or successive owners "as if such persons were the sole parties in interest and the only parties to the action."

Thereafter, the court may separately adjudge the issues between those owners and persons claiming under them. (C.C.P. 872.720(b).)

Referees

The court must appoint a referee to divide or sell the property. (C.C.P. 873.010(a).) If both division and sale are ordered, separate referees may be appointed for each function or the same referee for both. (C.C.P. 873.020.) With the parties' consent, the court may appoint three referees in place of a single referee. (C.C.P. 873.030)

The court must appoint any person to whom all parties consent (C.C.P. 873.040(a)), and a conservator or guardian may give such consent (C.C.P. 873.040(b)).

C.C.P. 873.010(b) lists some, but not all, of the court's powers concerning referees as follows:

1. Require a referee's bond and fix its amount.
2. Instruct the referee. (See C.C.P. 873.070)
3. Fix the referee's compensation and provide for expenses. (See C.C.P. 874.010)
4. Establish the commencement of the referee's lien for fee and expenses.
5. Require and settle the referee's interim and final accounts, and discharge the referee.
6. Remove the referee.
7. Appoint a new referee.

The referee may perform any acts necessary to exercise his authority. (C.C.P. 873.060.) He or any party may, on noticed motion, petition the court for instructions concerning his duties. (C.C.P. 873.070.)

Rules For Division Of Property

Physical Division: In a physical division, the referee must "divide the property and allot the several portions to the parties, quality and quantity relatively considered, according to their interests in the property as determined in the interlocutory judgment." (C.C.P. 873.210.)

The following rules must be applied to the division insofar as possible without material injury to the parties' rights:

1. Improvements made by a party or the party's predecessor should be allotted to that party. The value of these improvements is excluded in calculating the division and allotment. (C.C.P. 873.220.)
2. If a party's deed, executed before the partition action, purported to convey part of the property to a purchaser, that part should be allotted to the purchaser in accordance with the deed. (C.C.P. 873.230)

3. If the property includes distinct lots or parcels, they should be left intact. (C.C.P. 873.240.) To facilitate division by lots, the parties may join additional property by complaint or cross-complaint.

A lien on a party's undivided interest becomes a lien on that party's allotted share. (C.C.P. 873.260.)

If the division is necessarily unequal, "owelty", i.e., compensation to correct the inequality, may be required from one party to another. (C.C.P. 873.250(a).)

The referee must file a report, giving notice to each party who has appeared. (C.C.P. 873.280(a).) The report must:

1. State how the referee has executed his trust. (C.C.P. 873.280(b)(1).)
2. Describe the property divided and each allotted share. (C.C.P. 873.280(b)(2).) The description must be complete and precise.
3. State any recommendations on owelty. (C.C.P. 873.280(b)(2).)
4. State any recommendations on opening or closing roads. (C.C.P. 873.280(b)(3))

On motion of any party, with notice to parties who have appeared, the court may either (1) confirm the report as filed or as modified and enter judgment accordingly, or (2) set aside the report, order a new report, and, if necessary, appoint a new referee. (C.C.P. 873.290(a)(b).)

Sale And Division Of Proceeds Among The Owners:

Property to be partitioned by sale is sold by the referee appointed for that purpose (C.C.P. 873.510), either at public auction or by private sale, as determined by the court. For assistance in this determination, the court may order a report from the referee. (C.C.P. 873.520.) Alternatively, part of the property may be sold at public auction and part at private sale. (C.C.P. 873.530.)

The court must order sale by any methods and terms expressly agreed to by all parties to the action. (C.C.P. 873.600.) This includes parties who have either appeared or been served. The consent of unknown owners can be given only by a guardian ad litem appointed for them.

If the parties do not agree, the court may prescribe any manner, terms, and conditions of sale not inconsistent with the partition statute. (C.C.P. 873.610(a).) Before doing so, the court may ask the referee for a recommendation which, however, can be approved only on noticed motion. (C.C.P. 873.610(b).)

The court may direct a sale on credit, prescribing the credit terms, the security, and the relationship of the security to the parties' interests. (C.C.P. 873.630.)

Notice of any sale must be given as required for the sale of like property on execution, and must include notice to the parties who have appeared and the persons who have asked the referee in writing for special notice. (C.C.P. 873.640(a)) However, notice of a combined sale of real and personal property need only fulfill the requirements for real property sales. (C.C.P. 873.640(b).) The court may order additional notice (C.C.P. 873.640(c)), such as a display or classified advertisement. The notice of sale must include a description of the property and of the time and place of sale, and must state either the principal terms of sale or an

available means of ascertaining the terms from documents. (C.C.P. 873.650(a).) A notice of private sale must state a place for receiving bids (normally the referee's office) and the earliest date of sale. (C.C.P. 873.650(b))

Unless the court orders otherwise, a sale at public auction must be held in the county where the action is pending, and any subject personal property must be present at the sale. (C.C.P. 873.670(a)(b).) The referee may publicly declare a postponement. (C.C.P. 873.670(c).) These provisions generally follow execution sale procedure.

A private sale can be made no earlier than the date stated in the notice and within one year thereafter. (C.C.P. 873.680(a).) Bids must be in writing and delivered after the first publication or posting of notice. (C.C.P. 873.680(b).)

The property may not be sold directly or indirectly to the referee, a party's attorney, or a party's guardian or conservator (acting other than for his ward or conservatee). (C.C.P. 873.690(a))

The referee must make a report to the court which includes a description of the property sold, the purchaser's name, the price, the terms and conditions of sale, any security taken, any amounts payable to lienholders, arrangements for agents' commissions, and recommendations for opening or closing roads. (C.C.P. 873.710.)

purchaser, the referee, or any party may move to confirm or to set aside the sale, giving at least 10 days' notice to all parties and to the purchaser (if not the moving party). (C.C.P. 873.720.) At the hearing, the sale may be vacated if the court makes any of the following findings listed in C.C.P. 873.730(c):

C.C.P. 873.820 requires that the proceeds of sale be applied in the following order:

1. Expenses of sale.
2. Other costs of partition, including a reserve for costs later allowed.
3. Liens in order of priority. This includes liens held by nonparties as well as parties, but excludes liens that remain on the property under the terms of sale.
4. Distribution of the parties' shares of the residue.

The proceeds of the sale must be allocated according to the interests determined in the interlocutory judgment (*supra*, §297). (C.C.P. 872.820.) Proceeds from the sale of trust property are turned over to the trustee. (C.C.P. 872.840(b).)

Agreement For Appraisal And Buy-Out:

An alternative to a division or sale of the property is an agreed partition by appraisal, under which one or more parties acquires the interests of the others at their appraised value

The parties must make a written agreement, filed with the court, describing the property and naming the parties, their interests, the acquiring parties, the date for appraisal, and the persons acceptable as referees. The agreement may also set out various terms of purchase and may condition the partition upon the appraisal's not exceeding a stated figure. (C.C.P. 873.920.) Contingent interests may participate in the agreement through a guardian ad litem.

The court appoints one or more referees, as provided in the agreement, to appraise the property and report to the court. (C.C.P. 873.940.) Confirmation of the report requires a motion of the referee or a party on 10 days' notice. (C.C.P. 873.950.)

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