

PARTITION

DISCLAIMER

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In some estate plans, parents will leave farm or ranch real estate to their children as tenants in common, meaning the children will each own an undivided interest in the real estate. Wills, for example, that divide property equally between the children, or provide that the heirs “share and share alike,” where real estate is involved, will often result in the children owning such land as tenants in common. The land itself will not be physically divided among them. Let’s take an example. Mom and Dad own 240 acres and they have three children. Under the share and share alike instructions of the parents’ wills, the three children come to own the 240 acres as tenants-in-common, each of them having what is called an undivided one-third interest. (An alternative for the parents might have been to divide the 240 acres into three separately deeded tracts of land and leave one presumably 80-acre parcel to each of the kids. Of course, the lay of land often makes physical division difficult, whether because it would be unequal or because it would significantly lower the value of the real estate.)

As tenants in common, the three children each possess under the law something called a right of partition, or the ability to divide the property. Such partition may be voluntary or involuntary. After all, people who own things together don’t always get along. In a voluntary partition, the owners exchange deeds, with all owners signing each deed, and each deed conveying to one of the owners a specific part of the property. If the owners cannot agree on a voluntary partition, any of the owners has a right, as a tenant in common, to go into court and ask the court to divide the property, or, if it cannot be equally divided, then to sell the property and split up the money. Thus a partition action may result in a *partition in kind* or a *partition by sale*. In the former, the property is physically divided between the owners. In the latter, it is sold and the money is divided.

How does a court decide which route to choose? There is a legal preference for partition in kind, which means that a court will try to find a way to physically divide the property between the co-owners.¹ In other words, just because one of the owners, say the owner who brought a partition action in court, wants the property to be sold does not mean that it will be sold. So how does a court go about determining which is the correct remedy, partition in kind or by sale? A partition in kind will not occur if it would result in “great prejudice” to any of the owners. To determine whether or not great prejudice exists, the court compares two amounts. The first is the amount an owner would receive if the property were divided in kind and the owner then sold his portion of the property. The second is the amount each owner would receive if the entire property were sold and the proceeds were divided among the owners. If the first amount is materially less than the second amount, great prejudice has been shown, and the court will order a partition by

¹ In Nebraska, prior to 1943 (as in most states prior to enactment of statutes), partition in kind was the sole remedy, regardless of the difficulties such partition might create.

sale. Often the determining factor is whether or not the land would sell for more as a single tract as opposed to its value as divided tracts.

How Does Partition Work?

Typically, it begins when one of the co-owners files a complaint (the partition action) in court.² The other owners are named as parties to the action, as well as mineral rights holders, lessees, and, sometimes, creditors who have liens upon the property. The court first determines each party's share or interest in the real estate: how much of an interest or share does each party own. After this determination, which takes the form of a judgment, the court appoints between one and three referees as officers of the court "to make partition into the requisite number of shares." The first duty of the referee(s) is to report to the court whether or not partition in kind could be done without great prejudice to the owners. This report does not finally answer the question of whether or not the property can be physically divided among the owners. It is the duty of the court to rule on the referee's report and, in the context of such a hearing, the parties may advance their positions, i.e. for or against partition by sale.

The court has the power to direct the referee to allot specific portions of the land to particular individuals. It also has the authority to try to balance the shares through other compensation. If no such direction is given, the shares are drawn by lot. The court also has authority to order the sale of part of the property and the partition in kind of other parts.

If the court approves the referee's determination that the property cannot be physically divided without great prejudice to the owners, the court will order the property to be sold by the referee at public auction in the same manner in which a sheriff's sale is conducted. The referee(s) provides a bond before the sale. After the sale, the referee files a report with the court on the outcome of the sale. The court has the authority to disapprove the sale. If the sale is approved, the court orders the referee to execute conveyances of title to the purchasers once the entire purchase price has been paid.

A partition action can include other issues, such as contributions that any of the owners have made to the value of the property for which they believe they are entitled to compensation. Claims secured against the partition property are also often dealt with as part of the partition proceedings. Owners of remainder interests cannot pursue a partition action if a life tenant (life estate holder) objects.

At the end of the proceeding, the court will award attorney fees, either to the plaintiff's attorney alone or to all the attorneys in the proceeding, depending on the thoroughness and merit of their pleadings in light of the final judgment of partition. The court will also award a fee to the referee(s). There are often appraisal fees to be paid as well. These fees and costs come out of the proceeds of the property or are otherwise payable by the parties.

² Any joint owner of any real estate or of any interest therein or of any mineral, coal, petroleum, or gas rights, whether held in fee or by lease or otherwise, may compel a partition thereof in the manner provided in sections 25-2170 to 25-21,111.

Clearly, a partition action is intended for situations where a true impasse among the owners has been reached. The owners should exhaust other avenues to try to resolve their differences before resorting to the court.

Can the Right of Partition Be Restricted?

The right of partition is just that, a right, or, as one court stated: “the right to partition is imperative and absolutely binding upon courts of equity.... To invoke this equitable remedy is a matter of right, and not of mere grace.”³ However, an owner of land, in the manner in which he or she transfers it to tenants-in-common (or to joint tenants), can impose certain restrictions that either impair or remove the right to partition. The full range of such possible restrictions is beyond the scope of this article. It is possible to discuss in general how courts judge the enforceability of such restrictions. It should first be noted, however, that the most effective tool against the right of partition is not to title real estate in tenancy in common or joint tenancy, but to consider the use of a trust or an entity (e.g. a corporation, LLC, limited partnership) as the vehicle of ownership.

In the deeding of property to co-owners, restrictions can be imposed – actually written into the deed. Such restrictions in general will be enforced by courts if they are reasonable. And what does that mean? The law tends to be jealous of what ownership means. If you make someone an owner of property, i.e. you transfer ownership to them whether during life or at the time of death, you cannot at the same time impose conditions and restrictions on that ownership which have the effect of making ownership lose its meaning. One of the key aspects of ownership of property is the ability to alienate that property, that is to sell it or lease it or grant liens against it. Restrictions which take away this right of alienation will be carefully scrutinized by a court. They must serve some reasonable purpose and not merely reflect the whimsy, vanity or obsessions of the transferor. If the owner transfers property but reserves a life estate, for example, restrictions in the deed which protect the life estate in general will be effective. (See separate article on *The Life Estate Deed & Future Interests*.) If the owner transfers property to an heir subject to options or rights of first refusal in other family members, those restrictions on ownership in general will be considered reasonable. (See separate article on *Options and Preemptive Rights*.) Creating economic incentives to retain property, so long as they do not actually prevent disposition of the property, are often enforceable.

Again, an owner who wishes to control the enjoyment and use of property beyond his or her own ownership would be advised to explore the use of other ownership structures, such as a trust, a limited liability company or a corporation.

A Word About Severing Joint Tenancy

In addition to the right of partition which each joint owner possesses, joint tenancy may be severed by a unilateral action of one of the joint owners. For example, one of the joint owners might sell his or her interest in the property to a third party. Such a sale typically

³ *Oliver v. Lansing*, 50 Neb. 828, 836-37, 70 N.W. 369, 371 (1897) (quoting *Hill v. Reno et al.*, 112 Ill. 154 (1883)).

severs the joint tenancy and results in a tenancy in common. If there are three joint owners, for example, and one of them sells his one-third interest to a third party, the two remaining original owners will continue as joint tenants with rights of survivorship with respect to one another, but with respect to the new third party owner no right of survivorship exists.

Conclusion

It is true that the right of partition is a right of co-owners in tenancy in common or joint tenancy. Some people in planning their estates wish to guard against this right and the possibility that it could lead to the sale of land which may have long been held in the family. Some effective restrictions can be imposed within a deed to curtail or shape this right. A keen desire to prevent a partition action should look into the use of other ownership structures. However, it may also be said that the right of partition goes some way in compelling co-owners to find a way to get along. It may also be said that if the co-owners cannot get along, perhaps they ought not to share ownership in the first place.

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