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Top 10 Issues That Arise in Partition Cases

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Partitions

- Partition is the procedure for segregating and terminating common interests in the same parcel of property. Partition is a remedy much favored by the law. The original purpose of partition was to permit co-tenants to avoid the inconvenience and dissension arising from sharing joint possession of land.
 - *Cummings v. Dessel*, 13 Cal. App. 589 (2017).
- Partition in kind: A physical split of the property into two (or more) distinct parcels.
 - C.C.P. § 872.810.
- Partition by sale: An order forcing the sale of a property and splitting the proceeds between the parties by their respective interest in the property.
 - C.C.P. § 872.820.
- Partition by appraisal: one or more parties may acquire the interests of other co-owners in a piece of property at the appraised value of those interests.
 - C.C.P. § 873.910.

Top 10 Issues

1. Is a partition in kind possible anymore?
2. Can an owner Partition only a portion of the real property?
3. When is an owner allowed to make a credit bid?
4. Are legal fees recoverable for litigating offsets issues?
5. Can an owner recover for a co-owner's waste/devaluation of property?
6. Can one partitioning owner recover 100% of the sale proceeds if the partitioning owner paid 100% of all expenses for the property?
7. Can the issue of Partition be disposed of in a motion for summary judgment?
8. Does a lender need to be named in the Partition lawsuit, even if the note/deed of trust is not disputed?
9. What happens if one of the owners dies while the Partition is pending?
10. Can an owner be forced out of the property in preparation for the Partition sale?



1. Is a partition in kind possible anymore?

- Historically, courts have favored partition “in kind” (aka a physical division).
 - does not disturb the existing form of inheritance, or, compel a person to sell his or her property against his or her will.
 - *Cummings v. Dessel*, 13 Cal. App. 5th 589 (2017).
- When courts decide if a partition in kind is proper or not, they look at two types of evidence:
- First, the property is so situated that a division into subparcels of equal value cannot be made.
 - Almost guaranteed to happen if a home is on the property.
 - *Butte Creek Island Ranch v. Crim*, 136 Cal. App. 3d 360 (1982).
- Second, economic evidence shows that division of the land would substantially diminish the value of each party's interest.
 - *Id.*

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Partition In Kind

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- If either of these tests are satisfied, the property is not suitable for partition.
- In addition to these tests, there are many situations in current urban society that make partition in kind impossible:
 - Splitting a house in half
 - Debt on the property
 - Zoning laws
 - Subdivision Map Act (1974)
- The Subdivision Map Act's purpose is to protect both the public and purchasers. These purposes would be defeated if the courts were to recognize avoidance of the statutes by an action in partition.
 - *Pratt v. Adams*, 229 Cal. App. 2d 602 (1964).
- Thus, physical division of real property in a partition action must comply with various provisions of the Act.
 - Gov. Code § § 65000-66499.58.

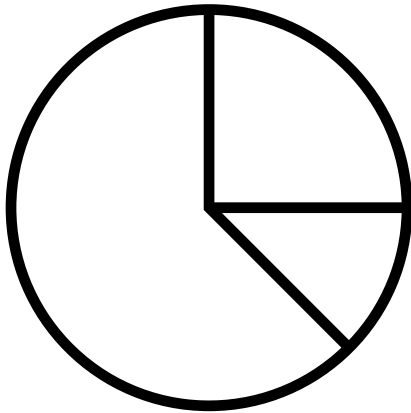
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Partition In Kind

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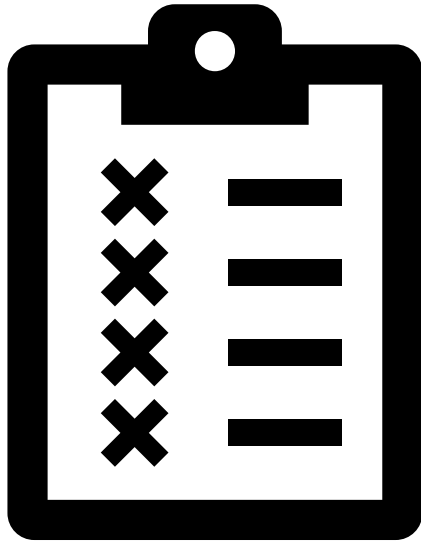
- In situations that implicate any of the circumstances mentioned on the previous slide, which is nearly every property, a partition in kind is improper.
- Note also, the wishes of a predecessor will not defeat an action for partition by sale.
- Outside of extremely rare circumstances (such as a hunting lot in the wilderness or a ranch), partition in kind is no longer suitable and will not be used.

2. Can an owner Partition only a portion of the real property?



- A trial court has the authority to order a partial division of the property, and a sale of the remainder if it would be more equitable than a division of the whole.
 - *Richmond v. Dofflemyer*, 105 Cal. App. 3d 745 (1980); CCP § 872.830
- However, inherent in this law is the requirement that there must be a portion of the property that is suitable to be partitioned in kind.
- There are also practical considerations that typically work against a partial partition:
 - Is there any point to having half the lawn if the house is sold?
 - Typically land that is suitable for partition is worth less than non-partionable land.
- While it is possible, the properties that would qualify for this are extremely rare.

3. When is an owner allowed to make a credit bid?



- CCP § 873.630 is the statutory basis for credit bids, and states that the court may:
 - (a) Direct a sale on credit for the property or any part thereof;
 - (b) Prescribe such terms of credit as may be appropriate; and
 - (c) Approve or prescribe the terms of security to be taken upon the sale, including the manner in which title to the security is to be taken, whether in a single instrument or several instruments, according to the interests of the parties.
- Thus, you may only credit bid in the court's discretion during a partition.
- Rarely occurs.

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Credit Bid (*Continued*)



- You must notify the court that you want to buy the property in order to be able to credit bid.
 - *Aguilera v. Lyons*, Cal. App. Unpub. 2015 WL 5839779.
- Defendant challenged the courts authority to adjust the party's equity from 50-50 to 65-35 and allow the plaintiff to "credit bid" his equity against the appraised value. Affirmed for plaintiff.
 - *Tacherra v. Tacherra*, Cal. App. Unpub. 2012 WL 3989029.



- In San Francisco: [Defendants] successfully overbid the putative buyers' offer and obtained the property for \$2,021,750. They paid for the property with a \$250,000 cash deposit, a "credit bid" of their combined 50 percent interest in the property, and funds from a new loan.
 - *Matza v. Superior Court*, Cal. App. Unpub. 2012 WL 5077892.
- However, credit bid denied when there had been no preliminary distribution yet.
 - *O'Keeffe v. Daley*, Cal. App. Unpub. 2006 WL 2879415.



4. Are legal fees recoverable for litigating offsets issues?

- C.C.P. § 874.010 states that the costs of partition can include reasonable attorney's fees incurred or paid by a party for the common benefit.
- The question of whether attorney services are for the common benefit “must be decided upon the facts and circumstances in each particular case.” *Villicana v. Lindsay*, 2016 WL 6301218.
- Costs should be awarded in proportion to the litigant's interest in the property. The purpose of the statute is ... to divide the cost of legal services among the parties benefited by the result of the proceeding. *Id.*
- However, even after a partition the remaining issues related to loan proceeds, rents, and lost property are valid reasons for awarding attorney's fees. *Id.*
- Therefore, legal fees are recoverable for offset issues.

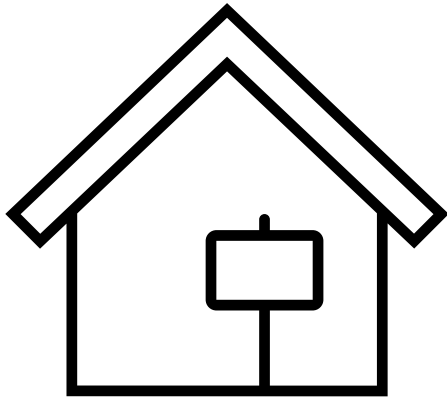
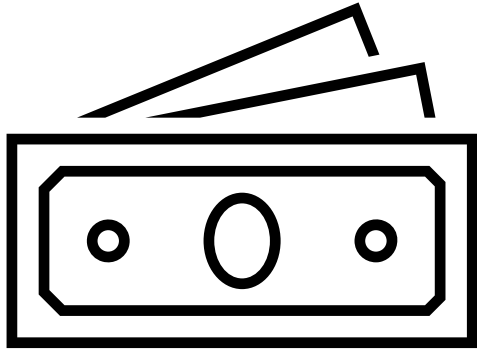


5. Can an owner recover for a co-owner's waste/devaluation of property?

- Waste evolved from protecting owners of succeeding estates against improper conduct of person in possession, to legal means by which any nonpossessory holders of land can restrain harm committed by persons in possession.
 - *Smith v. Cap Concrete, Inc.*, 133 Cal. App. 3d 79 (1982).
- C.C.P. § 732 states that If a guardian, conservator, tenant for life or years, joint tenant, or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefore, in which action there may be judgment for **treble damages**.
- Proof of “conduct which has resulted in substantial depreciation of the market value of land” establishes waste. *Smith*, 133 Cal. App. 3d 79.
- Depreciation of the market value of the property can be shown by even a temporary deprecation in value of the land, it need not be permanent. *Id.*



6. Can one partitioning owner recover 100% of the sale proceeds if the partitioning owner paid 100% of all expenses for the property?



- C.C.P. § 874.140 states that the court may, in all cases, order allowance, accounting, contribution, or other compensatory adjustment among the parties according to the principles of equity.
- Costs that can be claimed include, but are not limited to:
 - Cost of improvements to the extent they increase the property value
 - Taxes paid
 - Initial monies paid to secure the property
 - Costs of maintenance and necessary repairs
- The amount in excess that one party pays can be reimbursed to that party during the partition

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Recovering Sales Proceeds (Continued)



If this amount paid is greater than the sales proceeds for one party, the other party will take 100% of the sale proceeds.



Even though parties paid for the property in equal percentages, the court concluded there was no merit in plaintiff's contention that since the title was taken by parties as joint tenants, defendant is estopped to claim more than one-half interest in the property.

Cosler v. Norwood, 97 Cal.App.2d 665 (1950).



Plaintiff by seeking a partition and an accounting, put in issue the interest of each of the parties to the real property in question. *Id.*

7. Can the issue of Partition be disposed of in a motion for summary judgment?



- When the interests in the property are undisputed, interlocutory judgment for partition is proper.
 - C.C.P. § 872.720.
- Plaintiff simply makes a motion for interlocutory judgment.
- If plaintiff shows that partition is proper, the court must enter an interlocutory judgement for partition.
 - C.C.P. § 872.720(a).
- An interlocutory judgement in a partition action is to include two elements:
 - A determination of the parties' interest in the property; and
 - An order granting the partition.
 - Summers v. Superior Court, 24 Cal. App. 5th 138 (2018).

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Partition SMJ – (*Continued*)



In a rare ruling however, the court found a motion for summary judgment is the appropriate vehicle in which to obtain an interlocutory judgment for partition.

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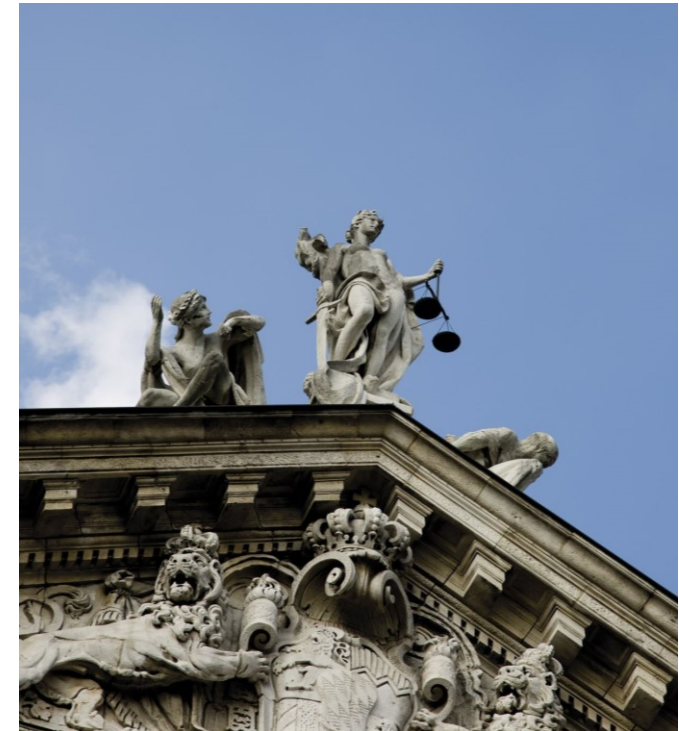
In either case, there must be no triable issues of material fact left as to the right to partition.



Thus, the issue of partition can be disposed of most of the time in a motion for interlocutory judgment, but a motion for summary judgment would also work.

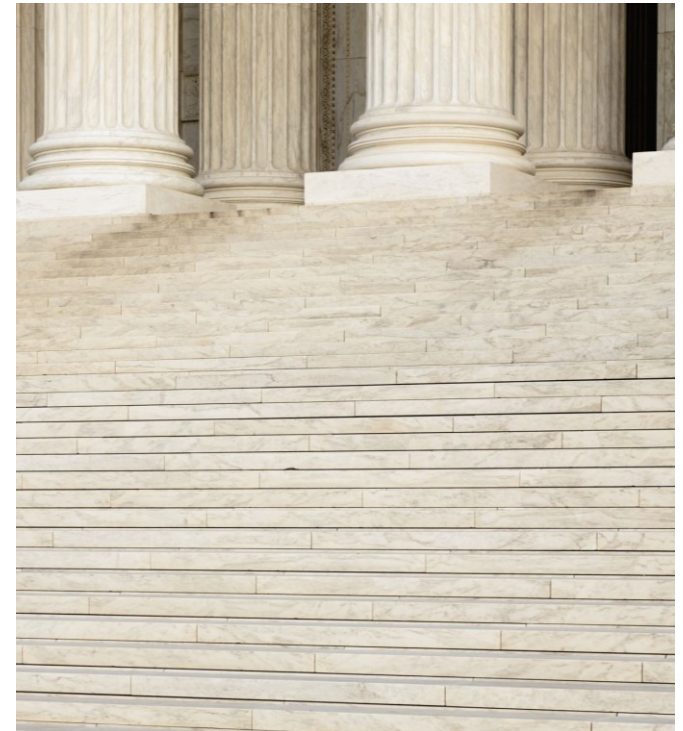
8. Does a lender need to be named in the Partition lawsuit, even if the note/deed of trust is not disputed?

- C.C.P. § 872.230 requires that a complaint for partition state “All interests of record or actually known to the plaintiff that persons other than the plaintiff have or claim in the property and that the plaintiff reasonably believes will be materially affected by the action, whether the names of such persons are known or unknown to the plaintiff.”
- Important that any and all lenders are notified so that partition does not violate the terms of the loan agreement and accelerate amounts due.
- This is even more true if a co-owner is attempting to get a partition in kind.
 - The court cannot apportion the bank’s deed of trust so that only a portion of the real property secures only a proportionate part of the debt.
Cummings v. Cummings, 75 Cal. 434 (1888).
- Can get a stipulation with lenders.
- Thus, the best practice is to reach out to the lender and name them in the partition lawsuit.



9. What happens if one of the owners dies while the Partition is pending?

- A pending action or proceeding does not abate by the death of a party if the cause of action survives. C.C.P. § 377.21.
- On motion after the death of a person who commenced an action or proceeding, the court shall allow a pending action or proceeding that does not abate to be continued by the decedent's personal representative or, if none, by the decedent's successor in interest. C.C.P. § 377.31.
- Thus, a motion to substitute can be made by a successor in interest to replace the deceased
- However, there must be sufficient evidence showing that the individual to be substituted is indeed the rightful successor in interest. *Wash v. Wash*, 2017 WL 4003803.



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Death During Partition

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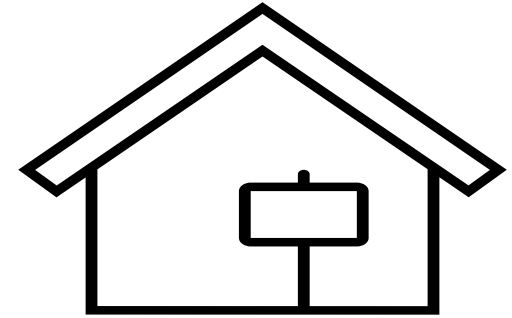
C.C.P. § 377.32 states the requirements of this showing:

The person who seeks to proceed as the decedent's successor in interest must file an affidavit or declaration containing the following:

- The decedent's name;
- Date and place of decedent's death;
- Showing that currently no proceeding is pending in California for administration of the decedent's estate;
- If decedent's estate was administered, a copy of the final order showing the distribution;
- That declarant is the successor in interest as defined in C.C.P § 377.11; and
- No other person has a superior right to be substituted for the decedent.

10. Can an owner be forced out of the property in preparation for the Partition sale?

- The law of ouster recognizes that each co-tenant of jointly owned property is entitled to share in the possession of the entire property and that one cotenant may not exclude the other from any part of it.
 - *Zaslow v. Kroenert*, 29 Cal. 2d 541 (1946).
- Ouster must be proved by acts of an adverse character, such as claiming the whole for himself, or refusing to permit him to enter. *Id.*
- Nothing in the law of partitions overrides this basic tenet of co-ownership. *Id.*
- Thus, forcing an owner out of a property before the partition sale would qualify as ouster.



Thank you

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