



# PARTITION

A means of ending co-tenancy



# History of Partition

- Established in 1540 by King Henry VIII in Great Britain
- Parties were required to agree to a partition and could appeal to the King's Court if they could not agree on how the property was to be divided
- Was extremely common in the American postcolonial era where large land holdings were being broken up
- Many of Washington state statutes on Partition date back to the late 1800's
- Much less use today because of the creation of interest holders who are not possessory (i.e. LLC interest holders), and it is increasingly expensive and less economically feasible



# Voluntary vs Involuntary (judicial/statutory)

## *Voluntary*

- By agreement: written, oral, or combo
- Written: by deed, contract, or other form of agreement
  - Is specifically enforceable and should be duly executed with proper formalities
- Oral: Statute of Frauds Issue
- Written and Oral: May be given effect if there has been part performance and detrimental reliance. Parole evidence may be utilized.



# Voluntary vs Involuntary (judicial/statutory)

*Involuntary*

RCW 7.52.010 – Enabling Statute

## **Persons entitled to bring action.**

When several persons hold and are in possession of real property as tenants in common, in which one or more of them have an estate of inheritance, or for life or years . . .

- Requires more than one person to have a possessory interest as a tenant in common
- Estate of Inheritance = an estate which may descend to heirs



# Voluntary vs Involuntary (judicial/statutory)

RCW 7.52.010 – Enabling Statute

## **Persons entitled to bring action.**

... according to the respective rights of the persons interested therein, and for sale of such property, or a part of it, if it appear that a partition cannot be made without great prejudice to the owners.

- Can be by sale or physical partition according to the respective rights of the party



# Tenants in Common Refresher

- Presumptive form of cotenancy
- Only requires equal rights of possession
- They own separate estates, i.e separate title
- Can own unequal shares (Absent intent, it assumed they own equal shares)
  - Ex: unequal contribution to purchase price
- Each cotenant has a right to possess the whole
  - Can't adversely possess or seek rent from cotenant in possession unless "Ouster"



# Tenants in Common Refresher

- Necessaries v Repair/Improvements
  - Necessary to preserve estate for all co-tenants = Right of Reimbursement
  - Taxes, mortgage debt, lien claims, etc
- Repair/Improvement
  - Right of Reimbursement for necessary repairs, i.e roof, foundation
  - No Right of reimbursement for improvements unless improvement enhanced the value of the common premises and only to the extent they did



# Common Partition Scenarios

- Investment Property
- Boyfriend/Girlfriend
- Decree of Dissolution that did not dispose of community real property
- Devise to Heirs
- Nonprobated real property





# Where must an action be brought?

- Action In Rem, i.e, made against or affecting a thing
- Superior Court has Jurisdiction via RCW 2.08.010
- Venue is proper in county of situs via RCW 4.12.010(1)
- Partially Equitable Action – is an absolute right
  - Right to Jury Trial has not been openly addressed, but it has been held as a not prejudicial error to deny
    - See, *In re Wren's Estate*, 163 Wash. 65, 77, 299 P. 972, 976 (1931)



# Defendants

- Litigation Guarantee is important
- Necessary:
  - All persons with a possessory interest in the property, whether known, unknown, or contingent
  - Any party with a recorded judgment or decree against any party or property (RCW 7.52.030)
- Permissive: Lien creditors, i.e. mortgagee, mechanics lien, etc.

Practice Pointer: I always name mortgage holders for notice purposes, especially if in pre-foreclosure or there is a threat the property may be prior to final adjudication



## Notice (7.52.040 & .050)

- All tenants in common, who are known,
- All lien creditors who are made parties to the suit,
- All persons unknown, having or claiming an interest or estate in the property.
- Service by Publication available upon affidavit – to be used for parties that are unknown, known and reside out of the state or cannot be found



## In Kind v By Sale

- In Kind – physical partition of property
- By Sale: only if physical partition cannot be made without great prejudice
- By sale is the most common – impossible to divide single family homes/platted properties, etc.
- Burden is on party proposing sale – must show physical attributes of property make partition in kind impracticable and that interest of party are better promoted by sale



# Pleading Partition

- Legal Description of Property
- State Tenant in Common Interests, Attach Deeds
- Any additional pertinent facts, including grounds for any rights to contribution or offset
- State purchase and cost of litigation guarantee, attach guarantee
- State whether partition to be in kind or by sale and, if by sale, justification therefore
- Verify w/ Signature of Client



# Answering a Partition Complaint

RCW 7.52.060

- Answer should include the nature and extent of the Defendant's interest, and if a lien creditor – how the lien was created, the amount secured and remaining due, and any other security
- *See, Leake v Hayes*, 13 Wash 213 (1895): Regardless of the answer filed by the defendant " it was the primary duty of the court to determine the respective rights and interests of all the parties to the action."
- The Court will determine the respective rights and will not rely on bare averments of a party



# Defenses: Most are generally unsuccessful

- Agreement – \*more about this later
- Improper Joinder
- Error in Deed
- Sovereign immunity
- Joint Tenants w/ Right of Survivorship
- Nonconsent



# Attorney's Fees and Costs

RCW 7.52.480

- Fees and costs of partition to be paid by the parties entitled to share in the lands divided in proportion to their respective interests
  - See exception in *Hamilton v. Huggins*, 70 Wn. App. 842, 850, 855 P.2d 1216, 1221 (1993)
- Should litigation arise between only some of the parties, the court can require these additional expenses be paid by those parties
- Fees and Costs can include litigation guarantee, attorney fees, costs of sale, litigation costs, etc.





# Order of Sale or Partition

RCW 7.52.080

- If court determines partition cannot be made without great prejudice then they may order a sale and appoint one or more referees for that purpose
- Should court choose to partition in kind “it shall decree a partition according to the respective rights of the parties . . . , and appoint three referees”
- Court has power to designate a portion remain undivided for owners whose interest remain unknown
- Referee appointed to partition in kind can report that partition in kind is unfeasible – court will then amend order and set for sale



# Order of Sale or Partition

What is great prejudice?

- Typically relates to pecuniary issues
- We feel the partition of the property is not justified for the following reasons: to partition in a fair and equitable manner, all of the acreage should be divided into percentages as related to the parties involved. This would also pertain to the water and furniture and fixtures. We feel to do this would destroy the usefulness of the property. *Hegewald v. Neal*, 20 Wn. App. 517, 523, 582 P.2d 529, 532 (1978)
- Burden is on party proposing sale
- Court has great flexibility to fashion a remedy



## Order of Sale or Partition

- In partitioning between three cotenants tract of shore land suitable for summer homes, it is proper to divide tract into three strips with equal shore frontage, and to require tenant receiving most valuable strip to pay sum to other tenants to equalize division. *Falk v. Green* (1929) 154 Wash. 340, 282 P. 212.
- In accordance with flexibility afforded courts in partition actions, court of equity may consider enhancement in value occurring from necessary improvements placed on property by cotenant. *Leinweber v. Leinweber* (1963) 63 Wash.2d 54, 385 P.2d 556.
- Court properly ordered that property be partitioned in such manner that plaintiff should receive entire benefit of improvements he had placed thereon, where he had erected dwelling house at time when he owned small undivided interest in land, and thereafter owner of 33/36ths of property had deeded it to him and defendant. *Bishop v. Lynch* (1941) 8 Wash.2d 278, 111 P.2d 996.



## Partition in Kind – How is it done?

RCW 7.52.090

- The referees shall divide the property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, designating the several portions by proper landmarks, and may employ a surveyor with the necessary assistants to aid them therein.
- The referees shall make a report of their proceedings, specifying therein the manner of executing their trust, describing the property divided and the shares allotted to each party, with a particular description of each share.



## Partition in Kind – How is it done?

- Report should take into consideration present value of the property, as well the possibility of future subdivision. *Von Herberg v. Von Herberg*, 6 Wash.2d 100, 106 P.2d 737 (1940)
- Court has power to set aside report and to direct new allotment. *Hamlin v. Hamlin*, 90 Wash. 467, 156 P. 393. (1916)
- Failure to object to referee allotments will render the matter concluded *Murray v. Chamberlain*, 126 Wash. 642, 219 P. 8. (1923)
- Trial court was required to base its partition of property on present value of resulting parcels at time of partition, and to consider effect on that value of possible future subdivision. *Carson v. Willstadter*, 65 Wn. App. 880, 830 P.2d 676 (1992)



## Partition in Kind

- Can divide property into unequal shares to equalize values
  - By value of land, interest, or assumption of debt
- Owelty (“owe” not owl): Equalization payment to offset unequal land division (RCW 7.52.440)
  - Owelty payment should be equal to one-half of any disparity. *See, Carson v. Willstadter*, 65 Wn. App. 880, Wash.App.887, 830 P.2d 676, 680 (1992)
  - Although ordinarily owelty is effectuated by the award of money to the party receiving the smaller quantum of property, it may take place by the imposition of the obligation to pay off the encumbrances upon the party receiving the larger portion. *Von Herberg v. Von Herberg*, 6 Wn.2d 100, 121, 106 P.2d 737, 746 (1940)



# Who can be a Referee?

- RCW's are silent.
- Quasi-judicial officer reporting directly to the court
- An effective partition referee is a knowledgeable third party who is able to remain neutral
- Lawyers, accountants, real estate appraisers, brokers, or developers may all be suitable
- In depth knowledge of real estate and former service as referee should be prerequisites



# Appointment of a Referee

- Generally nominated by one of the parties
- In some instances, the judge may be familiar with a person who has previously performed this function in another matter over which the judge presided.
- Nomination Motion should include CV and representative matters that referee has taken previously
- Stipulate if possible - Best if all sides can agree on a candidate.
- It is a poor and expensive strategy to turn the selection of the Referee into a battle





## More About Lien Creditors

- Lien creditors who have not been made parties shall be added before an order of sale will be filed - RCW 7.52.150
- Referee, if appointed, shall ascertain the priority of all liens and what amount remains due - RCW 7.52.170
- Twenty day notice to be provided to each lien creditor to provide affidavit of proof and to provide amount due - RCW 7.52.190
  - Easiest to do with supplemental complaint in coordination w/ referee
- Referee shall receive evidence and report the names of creditors whose liens are established as part of their report - RCW 7.52.190



# Distribution of Proceeds from Sale

- Proceeds of sale to be distributed by referee or plead into court - RCW 7.52.250
- If no Referee, seek distribution via agreement. If parties cannot agree then plead into court and resolve via motion
- In typical non-referee situations, fashioning a settlement agreement in which agreed portions become part of the escrow instructions is cost effective endeavor
- Court has broad equitable powers – proof can be provided for offsets or unequal distributions based on other outstanding issues (utilities, taxes, etc.)



# Distributions of Proceeds from Sale

RCW 7.52.220

The proceeds of the sale of the encumbered property shall be distributed by the decree of the court, as follows:

- (1) To pay its just proportion of the general costs of the suit.
- (2) To pay the costs of the referee.
- (3) To satisfy the several liens in their order of priority, by payment of the sums due, and to become due, according to the decree.
- (4) The residue among the owners of the property sold, according to their respective shares.



# Distributions of Proceeds from Sale

## Examples

- The court may, in the exercise of its equitable powers and in order to do full justice to all parties concerned, impose a lien upon the interest in the property owned by the one who has benefited by possession, and may provide for the payment of the judgment from the proceeds of the sale in a partition action. *McKnight v. Basilides*, 19 Wn.2d 391, 408, 143 P.2d 307, 316 (1943)
- Where condemnation proceedings were prosecuted against cotenant in possession, who was record owner of land, and sum is awarded and paid to him when in fact he had inherited only one-half interest, in action subsequently brought for partition he should account as trustee to other heirs who were not parties to condemnation. *Legg v. Legg*, 34 Wash. 132, 75 P. 130. (1904)



## Distributions of Proceeds from Sale

- “Where two or more persons are joint purchasers or owners of real or other property, and one of them, acting in good faith and for the joint benefit, makes repairs or improvements upon the property which are permanent, and add a permanent value to the entire estate, equity may not only give him a claim for contribution against the other joint owners, with respect to their proportionate shares of the amount thus expended, but may also create a lien as security for such demand upon the undivided shares of the other proprietors. *Leake v. Hayes*, 13 Wash. 213, 220, 43 P. 48, 50 (1895)



# Restraints on Partition

## Common Interest

- *Carter v. Weowna Beach Cmty. Corp.*, 71 Wn.2d 498, 502, 429 P.2d 201, 204 (1967)
- It is not available where a cotenant, by his own acts, is estopped or has waived his right by express or implied agreement, or where his cotenant's equitable rights will be minimized or defeated, or in violation of a condition or restriction imposed upon the estate by one through whom he claims.
- The plaintiffs in the instant case purchased their property with full knowledge of the rights and privileges of the other purchasers. They may not now claim the absolute right to sell the property in a manner destructive of these rights and in violation of their own agreement and the restrictions imposed on the estate by the original grantor through whom they claim.



# Restraints on Partition

## By Agreement

- The right of partition by a tenant in common of real property is absolute, in the absence of an agreement to hold the property in such a tenancy for a definite and fixed time. *Hamilton v. Johnson*, 137 Wash. 92, 100, 241 P. 672, 675 (1925)
- Generally, an agreement never to partition is not enforceable. *Schultheis v. Schultheis*, 36 Wn. App. 588, 590, 675 P.2d 634, 636 (1984)
- The court should determine a reasonable term for the agreement rather than find the agreement void
- Factors in determining a reasonable time: whether the agreement had been ignored before, the terms and intent of the agreement, original parties to the agreement, partition principles themselves
- Exception - the curious case of *Reilly v. Sageser*, 2 Wn. App. 6, 13, 467 P.2d 358, 363 (1970)



# Modern Partitions

- Owelty: *Matter of Marriage of Reynolds*, 80276-3-1, 2021 WL 1177366, at \*1 (Wash. Ct. App. Mar. 29, 2021)
- Common Interest: *Bellevue Farm Owners Ass'n v. Stevens*, 13 Wn. App. 2d 1052, review denied, 196 Wn.2d 1020, 474 P.3d 1039 (2020)
- Partition in Kind: *Matter of Estate of Larson*, 11 Wn. App. 2d 1050
- Court determining the respective interests of the parties: *Stotzky v. Riggers*, 10 Wn. App. 2d 1023, review denied, 195 Wn.2d 1006, 458 P.3d 773 (2020)





## Questions?



STAMPER RUBENS, P.S.  
ATTORNEYS AT LAW

CASEY CLIFTON

*Attorney at Law*

TEL. 509.326.4800

FAX 509.326.4891

[www.stamperlaw.com](http://www.stamperlaw.com)

720 West Boone • SUITE 200 • Spokane, WA 99201