

Prepared by:

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DAVID J. WILLIS
Attorney at Law
LoneStarLandLaw.com

SUITS TO PARTITION REAL PROPERTY

by David J. Willis
Attorney at Law

“Partition” is the legal term referring to division of real property among joint owners. It may be voluntary, by agreement or partition deed; or, if no agreement is reached, one or more joint owners may seek a court-ordered division by means of a partition suit. It is also possible to file a “friendly” partition action if the parties desire a court decree that ratifies their agreement. Note that partition is not the appropriate remedy when there is no common title or title is in dispute.

There are two kinds of judicially-ordered partition: partition in kind, which refers to the actual physical division of land by metes and bounds; and a judicially-ordered sale of the property, when partition in kind is not feasible or cannot be achieved fairly and equitably.

The right to a partition is absolute so long as the petitioning party is a joint owner of the land to be partitioned and has an equal right to possess it with the other joint owners, subject to any leases. There is no effective defense to such an action that is properly brought by someone who qualifies. *Spires v. Hoover*, 466 S.W. 2d 344, 346 (Tex.App. - El Paso 1971, writ ref'd n.r.e.). However, the right to partition may be waived or contracted away. The real fight in many partition cases is about the *pro rata* shares of the parties and whether or not the property should be partitioned in kind or sold.

Originally an equitable proceeding at common law, partition is now a statutory action. The applicable law is set forth in Texas Property Code Sec. 23.001 *et seq.* and Rule 756 *et seq.* of the Texas Rules of Civil Procedure. Sec. 23.002 specifies that jurisdiction lies in the district court in the county in which the property is located. Rule 756 and the rules that follow set forth the procedure necessary to accomplish a fair and equitable partition. Other than the specific requirements contained in Sec. 23.001 *et seq.* and Rule 756 *et seq.*, partition cases are governed by the same rules and procedures as other civil cases, including entitlement to a jury trial. All parties with an interest in the property must be joined in the litigation.

The goal of a partition suit is well defined. “In a partition suit, the trial court determines whether the partition will be by sale or in kind, the share or interest of the joint owners or claimants, and all questions of law or equity affecting title. The court then allocates to the parties their rightful shares or tracts.” *Johnson v. Johnson-McHenry*, 978 S.W.2d 142, 144 (Tex.App. - Austin 1998, no pet.). Although a partition action does not generally contemplate

monetary damages (except in the event of waste to the property), auxiliary relief such as an accounting for rents and profits may be requested. Contribution and reimbursement issues may also arise as to taxes paid, improvements made, and expenses incurred in connection with the property.

The law favors partition in kind over partition by sale. “The court . . . decides whether the property is ‘susceptible to partition;’ and if not . . . orders a sale of the property.” *Spigener v. Wallis*, 80 S.W.3d 174, 178 (Tex.App.- Tyler 1979, no writ). Susceptibility to partition varies according to the type of property; clearly, a 100 acre farm may lend itself favorably to partition in kind while a single-family residence on a lot and block may not. Economic factors are also a factor. “If the property can be divided in kind without materially impairing its value, a sale will not be ordered. . . .” *Cecola v. Ruley*, 12 S.W.3d 848, 855 (Tex.App.- Texarkana 2000, no pet.). Sales of property are conducted by the sheriff or the constable as in other executions upon judgments; alternatively, the court may direct that a receiver be appointed to sell the property at private or public sale. The proceeds of the sale are returned to the court for distribution.

Note that if the property is sold at public auction, the sheriff is required to notify the parties of the date and time of sale. *Gibson v. Smith*, 511 S.W.2d 327, 328 (Civ.App.-Tyler 1974, no writ). Any party to the suit may bid on the property along with other members of the public.

Rule 761 provides that if the property can be fairly and equitably divided into separate tracts, then the court shall appoint three or more “competent and disinterested persons” to act as commissioners in designing a plan to divide the land, arrive at an estimated value of each share, and allot the shares among the various owners. The commissioners are appointed by means of a “Writ of Partition” that is issued by the clerk of court and accompanied by the court’s order directing that the property be partitioned. The Writ of Partition may also appoint a surveyor to assist the commissioners. A report is then prepared and submitted for the court’s approval. The parties to the suit have 30 days to file objections to the report. If objections are filed, the court must hold a trial on the objections. The court then enters a judgment that may be appealed as in other civil cases, but the appellate court is directed by Rule 781 to give preference on its docket to an appeal of a partition judgment.

If the partition is “in kind,” the final decree results in the parties obtaining exclusive use and possession of their respective tracts along with the power to dispose of same as they see fit, without consent or involvement by the previous joint owners. The judgment, however, does not create any warranties of title that did not exist before.

Costs in a partition action are paid by each party *pro rata* according to the value of that party’s partitioned share. However, the considerable expense and delay involved in meeting the procedural requirements of a partition suit are a powerful incentive for the parties to settle. If a receiver is appointed, the cost (paid for by the sales proceeds) can be disastrous. A surveyor and appraisers are often employed. Additionally, since sheriff sales do not generally obtain the best possible price for real property, the parties should carefully consider the advisability of reaching a settlement agreement that provides for private sale of the property (ie., without court

involvement) at fair market value.

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