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**JUDICIAL PARTITION OF REAL PROPERTY UNDER
TEXAS LAW: A PRIMER**

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I. Overview

A. Partition Defined

Very generally, the partition of real property is the division of previously undivided interests among joint owners or cotenants¹. “Partition” has also been defined to mean a division of land according to quantity and value.² More specifically, a partition of real property involves the act or proceeding by which two or more co-owners cause real property to be divided into as many shares as there are owners, and which vests in each person a specific part of the property with the right to possess it, free from a like right in other persons, who, before partition, had an equal right to possession.³ It has been stated that “the main purpose and ultimate object of a partition suit is compulsory division of the property between the several co-owners according to their respective interests, in order that the same may thenceforward be owned, possessed, and enjoyed in severalty.”⁴

B. Effect on Title

While partition dissolves a tenancy in common⁵, vesting in each owner a sole estate in a specific portion of land, partition affects the right to possession, but not the title to the property.⁶ This is because each party’s interest was already owned by virtue of some prior deed or conveyance. Thus, partition leaves title as it was, but segregates the rights of owners, locating them in distinct parts of the realty, extinguishing such rights in such specified parts as may have been owned by the other parties prior to partition.⁷ The result is to vest the equitable title of the respective shares in the several owners to whom allotments are made, and the legal title remains as before.⁸ However, partition does give each party the exclusive use and occupancy of the allotted portion, together with the right to dispose of the partitioned share as that party sees fit.⁹ Moreover, the effect of a partition is the same whether it is accomplished by parol agreement, by a deed purporting to partition, by warranty deed reciting money consideration, or by a judgment in a partition suit.¹⁰

C. Effect on Outstanding Rights

“A person allotted a share of or an interest in real property in a partition action holds the property or interest in severalty under the conditions and covenants that applied to the property prior to the partition.”¹¹ In a partition of land by joint owners, each owner takes his portion subject to continuous, apparent, permanent, and necessary easements, if any, that exist at the time of partition, or which had existed at the time of their common ancestor or grantor.¹²

The fact that all or part of a tract of land held in cotenancy is subject to liens or encumbrances does not affect the right of the cotenants to partition. For example, in *Lichtenstein v. Lichtenstein Building Corporation*¹³, where co-owners of property which was leased to a tenant obtained a loan on such property secured by a deed of trust, and secured also by an assignment of the lease, it was held that the fact that when the loan was obtained, there was no discussion of any future partition between the parties, did not raise any implied agreement not to partition.¹⁴

D. Warranty of Title

Each party to a partition is deemed to become a warrantor of the title of the shares of the other. This is true whether the partitioning was accomplished voluntarily or by judicial decree. “Partition implies a mutual warranty of title, so that if title to a portion of the partitioned property subsequently fails, the party to whom that portion was allotted is entitled to contribution from the other parties to the partition for the resultant loss.”¹⁵ The warranty is similar to a general warranty as ordinarily expressed in deeds. The purpose of this rule is to preclude a party to the partition from afterwards asserting superior title as a basis of recovery against the other party or parties.¹⁶

E. Methods of Partition

Partition is either voluntary or compulsory.

Voluntary partition is a division of the property by the act of the parties themselves. It is well settled that common owners of land may effect a partition among themselves by written instrument¹⁷, deed¹⁸ or parol agreement.¹⁹ However, all cotenants must participate in a voluntary partition.²⁰ The fairness of a voluntary partition may be attacked only by a proceeding to have it set aside.²¹ Accordingly, voluntary partition made without court intervention should not be disturbed unless the inequalities are substantial.²²

When cotenants cannot agree among themselves to a voluntary partition, by statute, a cotenant may compel partition by judicial proceeding.²³ Moreover, the right to partition is absolute.²⁴

Although the general principle of law is that the right to partition is absolute, it was never intended to interfere with contracts between cotenants modifying or limiting this right, nor to render it impossible for parties to make contracts expressly providing against partitioning.²⁵ Thus, an express agreement not to partition will be honored by the courts,²⁶ and an agreement against partition will be implied when the granting of such relief would destroy the estate sought to be partitioned.²⁷ The right to partition may also be waived.²⁸ Thus, the relinquishment of the right to partition has been characterized as an estoppel or a waiver.²⁹

An example of circumstances in which the right to partition was waived is found in *Inter-City Properties, Inc. v. Gibbs*.³⁰ This case involved three physicians (Gibbs, Ford, and Eames) who, in 1954, purchased property in Galveston County, as co-tenants. In 1955, the physicians entered into a written agreement which, among other things, restricted the use and occupancy of the property, and granted each cotenant a preferential right to purchase the interests of the others.

Years later, a dispute arose among the doctors concerning jointly owned x-ray equipment. As a result of this dispute, Gibbs and Ford filed suit against Eames for conversion of the x-ray equipment, and against Inter-City Properties, Inc., Eames' successor-in-interest to the real estate, for partition. The conversion claim was dropped, and the trial court ordered partition of the realty.

On appeal, the court determined that several provisions of the 1955 contract constituted a waiver of, or barred, a suit for partition. These included “the grants of preferential rights to purchase given each of the co-tenants, the clause restricting occupancy of the property to the parties

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