
FOR SALE

Partition Comes of Age

BY JAY PICKARD

This article discusses the nuts and bolts of partition actions under CRS §§ 38-28-101 et seq.

A 1988 *Colorado Lawyer* article by Fletcher Thomas covered the "little-known" remedy of partition.[1] In the decades since, the remedy has come of age in Colorado. This article looks at how partition currently functions under CRS §§ 38-28-101 et seq., with a focus on real property divisions.

Why Partition?

The Thomas article cited "estate distribution" as the most common use of partition at that time. But partitions today are useful in a variety of situations, given the relatively high prices in the current local housing market. As of December 2020, the average closing price for a detached residential property in the Denver metro area was $615,766 (with a median price at $513,000).[2] Thus, commonly owned real and personal property, including joint ownership by non-married couples, families, and others who pooled resources to acquire property, can be divided effectively through partition, which allows an offset for the parties' contributions toward such property.[3]

History of Partitions

Partition actions have a long history, but they were not originally an action at common law like many other equitable proceedings.[4] Rather, "(t)he remedy of the writ of partition was (first) made available to joint tenants and tenants in common by a statute in the reign of Henry VIII."[5] It was only later that chancery courts (courts hearing cases of equity) assumed jurisdiction.[6] Today, "[a] partition action is an equitable proceeding that is governed by statute" at CRS §§ 38-28-101 et seq.[7] This history indicates the long-standing need of joint owners to resolve disputes regarding their joint ownership.

Partition Actions

Partition is an action "for the division and partition of *real* or *personal property* or *interest therein* . . . maintained by any person having an interest in such property."[8] Accordingly, partition actions are suitable for dividing real property, personal property, and interests[9] associated with such ownership. But partition is used almost exclusively to divide joint ownership of real property because real property disputes generally involve higher amounts in controversy relative to personal property disputes.

In addition to what a partition *is*, it is helpful to understand what it *is not*. Partition is not a claim for determining ownership in a specific piece of property; that is accomplished through

declaratory judgment, quiet title, permanent orders, or other similarly situated proceedings. It also does not resolve claims for civil theft, conversion, rent, unjust enrichment, promissory estoppel, ouster, constructive eviction, or replevin. To resolve such claims, the best practice is to plead them as separate causes of action in addition to the partition claim.

The Parties

The parties to a partition action must include all title owners. It is common practice to also include all lenders, lien and easement holders, creditors, holders of a transcript of judgment secured on the party, and those similarly situated who carry any "interest" in the property, such as a life estate holder or remainderman. It is advisable to order a title report and a litigation guarantee before commencing a partition action.

As to estates, the personal representative is an indispensable party,[10] but the individual beneficiaries are not. Mortgage holders are typically a named party initially or otherwise included as an indispensable party. There is limited case law that contemplates the possibility that a mortgage holder would not be an indispensable party if its interests would not be impacted by the partition action.[11] Mortgage holders may contact initiating counsel upon filing even when they are not named in the suit, so the best practice is to include the mortgage holders and work for the efficient disposition of their interests. Further, when including mortgage holders, it is best to stipulate early on to the security of their interests. This helps mortgage holders avoid unnecessary attorney fees and consequently shields clients who may be responsible for those fees under the terms of most standard forms of deeds of trust.

When filing a partition action, it is prudent to also consider recording a notice of lis pendens in the county clerk and recorder's office. A lis pendens is proper for any civil action that "affects title to real property" and gives notice to prospective purchasers.[12]

Defenses

The case law limits defenses in partition actions to (1) waiver by contract or other restrictions (e.g., restrictions in deeds, homeowners' association declarations, or deeds of trust);[13] (2) non-contemporaneous interests (e.g., life estates and remainder interests);[14] and (3) claims for a homestead exemption.[15] While these defenses seem narrow, the defense of waiver may have a broad application, considering it can be either express or implied.[16]

Although partition is still referred to as an equitable proceeding, courts are surprisingly reluctant to deny a partition under equitable defenses (e.g., unclean hands, estoppel, or hardship[17]), often citing that "the right to partition is absolute."[18] Procedurally, the equitable nature of partition actions means they are tried to a judge rather than a jury, though a judge may appoint an advisory jury as in other equitable proceedings.[19]

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In addition to the case law defenses, one more "defense"—which is more of a caveat—exists to the "absolute" right to partition: a previous dissolution of marriage between the parties. The law on this topic is set forth in *Wilson v. Prentiss*, which held that a party to a dissolution of marriage proceeding "may seek statutory partition after the entry of the final dissolution decree, but that the partition order must not conflict with explicit provisions of the decree."[20] *Wilson* addressed a previous ruling on this topic in *Harrod v. Harrod*, where the court stated, "[w]hile the parties in a divorce action may agree to the formal partition of marital property as the form of final settlement of their financial obligations, a partition action may not be imposed by one of the marriage partners upon the other following a divorce."[21] *Wilson* identified this language as dicta because *Harrod* involved a dissolution and a partition action that were brought contemporaneously, not a separate partition action following a divorce.[22]

When bringing a partition action post-dissolution, practitioners should also consider either an alternative or contemporaneous CRCP 60 motion to set aside or modify the decree, depending on whether the property at issue was wholly, partially, or not at all addressed in the decree.

Partition "In Kind" versus Partition "By Sale"

There are two paths to divide property in partition, "in kind" and "by sale." In Colorado, "partition in kind is favored over partition by sale, and the former should be ordered unless doing so would result in manifest prejudice to the parties."[23] "Manifest prejudice may be shown when either (1) the physical characteristics of the land make it impracticable to divide into parts that correspond to the parties' respective interests; or (2) the value of the whole parcel is materially greater than the sum of its parts."[24] Essentially, "manifest prejudice" means that any possible property division would not work toward the goal of fairness for the situation.

Historically, situations where the physical characteristics of the land were so unique that they could not be divided equitably in relationship to the parties' interests were deemed to be manifestly prejudicial, and the property had to be sold. But in *McNamara v. Mossman*, the Colorado Supreme Court held that

partition in kind would be appropriate where such separation was based on each parcel's *value*, even where the physical characteristics were not conducive to equitable division. In practice, however, even though a commissioner or the court might deem a valuation equal, parties often do not want to agree with this, so practitioners should preserve the ability to seek division by sale to best protect their client's interests.

It may be possible to determine at the outset that a property cannot be divided in kind due to zoning ordinances, other local land use restrictions, or the inherent nature of the real property (e.g., residential property).[25]

Martinez v. Martinez governs partitions by sale and provides that if the court finds that manifest prejudice would result from a partition in kind, it must divide the parties' interests, and then "to reach an equitable result, compute the contribution of each tenant."[26] Where courts have deviated even slightly from this formula the cases have consistently been remanded with orders to follow the formula expressly.[27] The result is that partition actions are in fact less like actions in equity, which generally allow courts more flexibility, and more like actions in law, which require strict adherence to statutes and precedent.

As an alternative to sale, or perhaps a caveat to sale, there is authority permitting a party to purchase the other party's interest in the property under a first right of refusal.[28] However, no authority affirmatively requires either party to buy out the other party.

Accounting for Contributions

Under *Martinez*, the directives are clear: The court must sever the unity of possession but cannot create new interests in the property between co-owners.[29] In practice, this means that the court first assigns a value to the property and then allocates such value between the co-owners in proportion to their title interests. For example, if two parties were listed as co-tenants,[30] each would have an undivided one-half interest in the property absent an agreement otherwise between them. Next, the court performs an accounting of each parties' respective contributions toward the property, such as for acquiring the property and paying taxes, to reach an equitable result.[31] Courts may also "create easements to facilitate the equitable division of the property."[32] Courts and practitioners have gone awry when they invert this process and begin by taking each parties' respective contributions and then assigning a relative ownership percentage based on these contributions.

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To illustrate application of the *Martinez* rule, assume the parties are each co-tenants with an undivided one-half interest where the plaintiff contributed $80,000 and the defendant $20,000 to acquire the property. It would be improper for the court to allocate 80% ownership to the plaintiff and 20% ownership to the defendant. Rather, the court must first assess half of the property's value to each party and then offset their contributions. While the proper calculation would actually result in the same 80% to 20% allocation of interests in this hypothetical where the property had $100,000 in equity, the methods become disparate as the equity amount varies from the contributions. For example, assuming instead that there is $200,000 in equity in the property, the plaintiff's interests are properly calculated as half the equity in the property ($100,000) plus half of the plaintiff's contribution ($80,000÷2=$40,000) minus half of the defendant's contribution ($20,000÷2=$10,000). Thus, the plaintiff's resulting interest is $130,000 ($100,000+$40,000-$10,000), and the defendant's interest is $70,000 ($100,000+$10,000-$40,000).

In contrast, had the court simply allocated an 80/20 percentage split, the plaintiff's interest would be $160,000 and the defendant's interest would be $40,000. So under *Martinez*, the parties equally share in the growth of the equity in the property in proportion to their respective interests regardless of their contributions during the period of ownership.

The debate in partition actions usually centers around what qualifies as a "contribution." Contributions include down payments on the property[33] and property improvements (referred to in the case law as "enhancements"). The value credited for an improvement is the amount that the enhancement increased the value of the property;[34] it is *not* the amount of money expended for the enhancement. Consequently, proof of payment toward a property enhancement is only relevant to prove which party contributed toward the enhancement. The actual amount of such payment is irrelevant.

Further, authority exists for counting payments toward encumbrances on the property

as a party's contribution.[35] But courts disagree about counting payments toward the interest portion of a mortgage payment as a contribution. One approach reasons that if the mortgage is in both parties' names or both parties agreed to share in the expense of the mortgage, when one party pays the mortgage, the payment benefits the other party. The idea is that both parties agreed the mortgage was a necessary expense for the acquisition and maintenance of the property, so both are equally obligated for the expense. Accordingly, when one party bears the full burden of the expense, that party should be credited. This theory is supported by case law crediting a party with a contribution where one tenant paid an encumbrance on the estate and the court's authority to apportion any lien among the parties under CRS § 38-28-110.[36]

The other approach reasons that the payments toward interest do not result in an equity increase and therefore should not count toward a party's contribution. This approach is more viable when one party makes the full mortgage payment for a long period of time. That party's resulting contribution can be so great that the *Martinez* calculation could result in negative equity in the other party. While this position is not supported by case law, consideration of the equities would seemingly disfavor any calculation that would result in a negative contribution.

As to third party rent for use of a property, if one tenant receives such rent to the exclusion of the other tenant, the court will make an accounting of the rents.[37] On the other hand, rent between co-tenants is not generally allowed absent an agreement or proof of an ouster.[38]

As to other miscellaneous expenses, payments for homeowners' association dues may count toward a party's contribution when viewed as the payment of a potential encumbrance on the property, such as taxes or assessments, though no appellate authority exists on this point. Payment toward the basic upkeep of the property for energy and water bills could also possibly count toward a party's contribution based on the theory that such expenses prevented liens against the property. However, arguments for counting expenses such as cable TV, internet, moving expenses, groceries, or other gifts or transfers between the parties will not likely be successful because their character differs from payments of potential encumbrances on the property.

Accomplishing the Sale

A court order to partition by sale must also address how to sell the property. Colorado has consistently granted the party residing at the property the opportunity to purchase the property at the decreed price.[39] The partition statute contemplates the appointment of "one or more disinterested commissioners"[40] to handle the sale. The Thomas article explains the process when a commissioner is appointed.[41] Most parties are willing to agree on a real estate broker and terms and conditions of sale to avoid the cost and complexity of a commissioner.

Family law practitioners are usually more willing to agree to a broker with minimal additional terms surrounding the sale (real estate practitioners often insist on a receiver or special master). They typically appoint a broker, agree on a sale price and forced acceptance if the offer comes back within (x)% of the price, and appoint an arbitrator to resolve any disputes along the way. Real estate practitioners tend to follow this procedure as well but also negotiate the terms and conditions of the specific listing agreement. Regardless of which approach is taken, an arbitrator is useful for deciding relatively minor issues without going back to court.

Of course, the parties incur additional third-party expenses when using commissioners, brokers, and arbitrators.[42] Because these transactional costs will cut into sale proceeds, they should be considered as part of the settlement discussions and risk analysis.

Other Property Interests

As stated above, partition is available for other kinds of interests in addition to those in real property. For example, membership interests in a limited liability company (LLC) are typically deemed the personal property of the member.[43] However, there is no unity of possession for LLC interests, so it can be argued that such interests cannot be partitioned. This argument has been supported in other jurisdictions.[44]

LLC membership interests in Colorado are often identified as percentages, which arguably would support partition of those interests. There is no Colorado appellate authority directly on point, but the district court in *Gagne v. Paula Knaus Academy Park* denied a request for partition of LLC interests, primarily citing the Colorado Limited Liability Company Act, CRS § 7-80-702(1), among other reasons.[45] The primary barrier for partitioning most LLC interests is the waiver of partition found in typical LLC operating agreements.

With regard to partitioning partnership assets, there is no binding precedent in Colorado, but courts in other states have tackled it:

> To the extent that the court determines that the provisions of the partition statutes are a suitable remedy, such provisions may be applied in a proceeding for partnership accounting and dissolution, or in an action for partition of partnership property, where the rights of unsecured creditors of the partnership will not be prejudiced. Accordingly, property of a partnership may be partitioned in a partnership accounting even though the property is held in the name of one partner.[46]

Further,

> an action by a partner against a copartner for the partition of partnership real estate will not lie until the creditors of the partnership have been paid and the interests of the partners adjusted. The same rule applies to personal property of the partnership. The judgment in an action between partners may award a partition of partnership real property.[47]

When partitioning personal property, a practitioner's best argument will be based on who paid for the item. If a single party paid for the item, the other party must prove that the property was gifted to him or her. Because most personal property is not titled, joint ownership may be a subject matter jurisdiction bar to most claims for partition of personal property.

Practice Pointers

It's common for practitioners and litigants to get lost in the weeds about what really matters in a partition action.[48] Practitioners should

pay attention to their ultimate duties in a partition action; it is not enough to simply file a complaint. Practitioners must be prepared to show the court:

- valuations,
- ownership verifications,
- full accountings of contributions made,
- accurate calculations,
- expert opinions to support the above facts when necessary, and
- arguments to support or reject partition in kind or by sale.

As with any other case, prepared practitioners will best guide the court toward a favorable decision for the client. Better yet, proper preparation can help clients reach a settlement out of court and avoid the many uncertainties that a trial entails.

Conclusion

Partition actions have become more prevalent in recent years, though appellate authority on partition actions remains thin. Despite its equitable nature, partition resembles an action at law by requiring strict adherence to the *Martinez* formula and not recognizing common equitable defenses.

Practitioners handling partitions should consider whether they are dealing with a partition in kind or by sale and devote their case preparation to identifying and proving their client's specific contributions. Sales should be handled in the most cost expedient manner available. Finally, partition of interests other than those in real property may or may not be feasible depending on whether the particular interest involves a unity of possession. CL

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NOTES

1. Thomas, "Partition: A Little-Known Remedy," 17 *Colo. Law.* 1063 (June 1988).
2. Denver Metro Ass'n of Realtors, Denver Metro Real Estate Market Trends Report at 2 (Dec. 2020), https://www.dmarealtors.com/sites/default/files/content/dmar_markettrendsreport_dec2020.pdf.
3. *Martinez v. Martinez*, 638 P.2d 834 (Colo.App. 1981).
4. Kurtz, *Moynihan's Introduction to the Law of Real Property* at 223 (West Publ'g Co. 12th ed. 1977).
5. *Id.* (citing 31 Henry VIII, c.1 (1539)).
6. *Id.*
7. *Colo. Korean Ass'n v. Korean Senior Ass'n of Colo.*, 151 P.3d 626, 629 (Colo.App. 2006).
8. CRS § 38-28-101 (emphasis added).
9. An "interest" can be any "direct, beneficial, contingent, or otherwise" owned by a party in the specific property. CRS § 38-28-102.
10. *Fry & Co. v. Dist. Court Cty. of Adams*, 653 P.2d 1135, 1137–38 (Colo. 1982).
11. "The trial court's ruling that the partition action could have no effect on the rights and interests of the mortgage holder was correct, the holder of the deed of trust not being an indispensable party." *Beardshear v. Beardshear*, 352 P.2d 969, 971 (Colo. 1960). *See also Granato v. Granato*, 277 P.2d 236, 237 (Colo. 1954). Both cases revolve around the collection of debts from a dissolution proceeding.
12. *Hammersley v. Dist. Court in and for Cty. of Routt*, 610 P.2d 94, 95 (Colo. 1980). *See also* CRCP 105(f).
13. *Colorado Korean Ass'n*, 151 P.3d at 630 (citing *Twin Lakes Reservoir & Canal Co. v. Bond*, 401 P.2d 586 (Colo. 1965)).
14. *Id.* at 630 (citing *Beach v. Beach*, 74 P.3d 1 (Colo. 2003)).
15. *Id.* (citing *Stressler v. Stressler*, 193 A.D.2d 728 (N.Y. 1993)).
16. *Twin Lakes Reservoir and Canal Co.*, 401 P.2d 586 (holding "[a]n agreement not to partition need not be expressed and may be implied. It is settled law that if it appears the tenants in common of a tract of land have formulated plans and entered into agreements in reference to the management of the common property and the plans and agreements are of such a character that to grant partition would be to destroy the mutual agreement of the parties, then an agreement not to partition will be implied," citing *Nagel v. Kitchen*, 44 N.E. 2d 853 (Ill. 1942)). *See also* 37 *ALR 3d* at 962 "Contractual provisions as affecting right to judicial partition" (Lawyers Coop. Publ'g 1960). Based on the preceding cases, the statute of frauds does not seem to apply to a waiver of a party's ability to partition. But this article does not specifically address this issue.
17. Girard, "Equitable and Contractual Defenses to Partition," 18 *Stan. L. Rev.* 1428, 1433 (1966).
18. *Colo. Korean Ass'n*, 151 P.3d at 630.
19. CRCP 39(c).
20. *Wilson v. Prentiss*, 140 P.3d 288, 292 (Colo. App. 2006).
21. *Harrod v. Harrod*, 526 P.2d 666, 668 (Colo. App. 1974) (internal citation omitted).
22. *Wilson*, 140 P.3d at 292.
23. *McNamara v. Mossman*, 230 P.3d 1286, 1288 (Colo.App. 2010) (citing *Young Props. v. Wolflick*, 87 P.3d 235 (Colo.App. 2003)). *See also* CRS § 38-28-07.
24. *McNamara*, 230 P.3d at 1288.
25. Thomas, *supra* note 1 at 1064 (citing *Doan v. Metcalf*, 46 Iowa 120 (1877) and *Waters v. People*, 210 N.Y.S.2d 39 (1966)).
26. *E.g.*, *Martinez*, 638 P.2d at 836.
27. *Id.*
28. *Id.*; *Keith v. El-Kareh*, 729 P.2d 377 (Colo.App. 1986).
29. *Id.* at 379.
30. Note that "there is no difference in a partition suit as to property held by tenants in common and property held by joint tenants." *Merth v. Hobart*, 272 P.2d 273, 275 (Colo. 1954).
31. *Martinez*, 638 P.2d at 836.
32. *Young*, 87 P.3d at 238 (granting an access and utility easement).
33. *Packard v. King*, 3 Colo. 211 (Colo. 1877); *Martinez*, 638 P.2d at 836.
34. *Martinez*, 638 P.2d at 836.
35. *Packard*, 3 Colo. at 214.
36. *Id.* at 211. *See also Martinez*, 638 P.2d at 836.
37. *Packard*, 3 Colo. 211.
38. *Keith*, 729 P.2d at 380.
39. *See Martinez*, 638 P.2d at 836 (holding that the trial court erred in not permitting a limited period of time during which the party residing at the property could pay the decreed amount to the court and receive a warranty deed from the other). *See also Keith*, 729 P.2d at 380 (upholding the lower court's granting of a right to purchase the property from the other party in exchange for a quit claim deed as an alternative to a partition sale).
40. CRS § 38-28-105.
41. Thomas, *supra* note 1 at 1063.
42. There is no authority in Colorado to appoint a "receiver" under a partition action.
43. *JPMorgan Chase Bank, N.A. v. McClure*, 393 P.3d 955, 958 (Colo. 2017); CRS § 7-80-702.
44. *See Sealy v. Clifton, L.L.C.*, 68 A.D.3d 846, 847 (N.Y. 2009). *See also Carey v. Howard*, 950 So. 2d 1131 (Ala. 2006); *PacLink Commc'ns Int'l, Inc. v. Superior Court*, 90 Cal. App. 4th 958 (Cal. Ct.App. 2001).
45. *Gagne v. Paula Knaus Acad. Park*, No. 12CV56, Larimer County Dist. Court, 2012 Colo. Dist. LEXIS 2270.
46. 48 *California Jurisprudence 3d*, Partition § 28 (West Group 3d ed. 2021). *See also* Cal. Code of Civ. Proc. § 872.730.
47. *See also* 68 C.J.S. *Partnership* § 149 (Thomson West 2021); 12 *Business and Commercial Litigation in Federal Courts* § 127:22 Partition of Partnership Assets (Am. Bar Ass'n 4th ed. 2020).
48. This statement is based on the author's informal conversations with several judges about partition actions.