

**East King County Bar Association  
Real Property, Probate and Trust Section**

**Partition Actions - the Ultimate Breakup**

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## PARTITION - THE ULTIMATE BREAKUP

By Rebecca K. Wiess

### I. OVERVIEW

Partition is the final legal answer to the question of how to separate out multiple simultaneous ownerships of real property. The statutory procedure is at RCW Chapter 7.52. These materials lead a practitioner through the procedure, with emphasis on the most common sequences of events. The statute is old. It has had no substantive amendments since 1881. It is complex, and there is substantial room in some particulars for suggestions to the Court on how to shape the process.

Partition can be called a sledge hammer solution. It is not designed to get the maximum benefit from a property sale and it doesn't always incorporate all the niceties when dividing acreage, but it gets the job done. It is expensive: in addition to attorneys, the parties end up paying for three referees, a surveyor, an appraiser, and a title search - and plaintiff fronts all costs. Partition is most often used as a threat or a prod to get antagonistic owners to come to the negotiating table. Only occasionally is it necessary to have a court divide or sell property. But the threat of a forced division or sale works because it is real: the court will get the job done if the parties can't agree.

Partition actions have two different end points: the property is physically divided, or the property is sold and the money divided. Most of the time the end-point is obvious at the beginning, so only the portion of the statutory procedure relevant to that end-point will be used.

Partition can be a four phase process. Most suits will not involve all of the phases, and many will substitute an agreed process for part of the court proceedings.

*Phase 1* is a quiet title proceeding, if it is necessary to decide who is in title before dividing up the interests. This is done within the partition, not as a separate action.

*Phase 2* is deciding whether the property should be physically divided or sold.

This is only occasionally an issue.

*Phase 3* is to divide or sell the property, whichever is appropriate. This stage is often done by agreement, rather than court procedure.

*Phase 4* is to clean up the money issues: costs, attorney fees, claims between the parties, etc.

The most common type of partition involves tenants in common who can't agree on disposition of a single family house. There is no issue about physically dividing the house. The heart of the case will be in negotiations for a sales mechanism. If the parties don't agree, the court has no choice but to order a

sheriff's sale. This does not bring a market price, so most cases arrive at an agreement to list and sell through a real estate agent in a normal market transaction.

Acreage can be divided. Here the parties are more likely to let the judge decide if they can't reach agreement on how to divide the land. The problem here is that the costs and fees are high, but no land is being turned into cash to pay them.

## II. PARTIES AND PROPERTY

RCW 7.52.010 grants the right to partition to persons who "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."

remainderman  
can't bring  
partition  
action.

One not in title cannot bring a partition, so the beneficiary of a constructive trust cannot partition, Houghton v. Callahan, 3 Wn. 158, 28 P. 377 (1891). Possession is interpreted broadly, so even if one co-tenant has actual possession of the entire parcel, another co-tenant can partition. Co-tenants include joint tenants. When former spouses become tenants in common because property was not disclosed or otherwise not disposed of in the dissolution decree, then either may partition, and the action should be brought as a separate suit, not a family law proceeding. Infants and incompetents can be included, but they must act through a guardian meeting the requirements of 7.52.450-470.

Non-parties who are in possession are not affected by a partition, so adverse possession or prescriptive easement claims of non-parties continue after partition.

Fee title, or any lesser estate can be partitioned. Partition cannot be had between a life estate and a remainder interest for the sole purpose of cashing out the life estate and vesting title in the remainderman, Easley v. Easley, 78 Wn. 505, 139 P. 200 (1914), but RCW 7.52.300 allows for circumstances when "a due regard for the interests of all the parties" may require that a life estate be sold. The common areas of a condominium cannot be partitioned unless the condominium is terminated, RCW 6.34.268.

Parties may contract away the right to partition, but only for a specified period, or only in deference to a contract mechanism for sale of the property. Washington Pulp & Paper Corp. v. Robinson, 166 Wn. 210, 6 P.2d 632 (1932).

Get a litigation title report to determine all parties with a title interest. Make sure any minors or incompetents have appropriate guardians. Look for adverse possession, and decide if it is necessary to deal with that issue as part of the partition. Unprobated deaths in the chain of title may require that you make a

diligent search for heirs, and that you name unknown heirs as parties. Depending on circumstances, you may do a quiet title to eliminate unknowns, or leave money for them with the court clerk after a sale.

### III. PLEADING

The requisites of the complaint are in RCW 7.52.020. A sample complaint is included at the end of these materials. Plaintiff should list all other title holders, including unknowns, as defendants. The body of the complaint must include a legal description of the property, and the relationship of each defendant to the property, including unknown, uncertain or contingent interests. If the property is to be sold, lien holders should not be made parties, so long as they will be paid off from the sale proceeds. If the property is to be divided you may want to include lien holders in order to rearrange which portion of the property is subject to what lien, per RCW 7.52.030. Also include any monetary claims against defendants that should be considered in phase 4 of the proceedings, as when co-owners have improperly failed to contribute to taxes or maintenance, or when one co-tenant has made improvements on the property, or where there are unrelated money disputes but plaintiff is looking to defendant's share of sale proceeds to pay those claims.

Venue is in the county where the property is located. RCW 4.12.040.

Answers of title holders should set out any title disputes, be clear on whether defendant thinks the property should be divided or sold, and make any monetary claims that should be considered in phase 4 of the proceedings. Answers of lien holders must give particulars on the lien, described in RCW 4.52.060.

The statute describes a notice to defendants, RCW 4.52.040. This notice is the summons and complaint, if personally served. Where personal service is not possible, expand the summons to include a brief description of the property, RCW 7.52.050, make a motion for permission to publish, and publish per RCW chapters 4.28 and 65.16. Allow plenty of time - published unknowns have 60 days to answer.

Plaintiff should file and record a lis pendens to give notice to any successors to named parties.

The answer should identify any disputes on title interests affecting the property, be clear on whether defendant seeks sale or partition, and set out all issues which defendant wants included in the final accounting.

If defendant makes counterclaims on money issues, plaintiff should make a reply.

Partition is an equitable matter, so there is no right to a jury. The court may grant a jury as a matter of discretion, State ex. rel. Hill v. Lichtenberg, 4 Wn. 553, 30 P. 659 (1892).

#### IV. PHASE 1 - TITLE ISSUES

The court must determine any title issues before dividing or selling property, RCW 7.52.070, Witzel v. Tena, 48 Wn.2d 628, 295 P.2d 1115 (1956). A decision on title issues is immediately appealable, you do not have to wait until partition is complete, Bishop v. Lynch, 8 Wn.2d 278, 111 P.2d 996 (1941). Note that the steps leading up to a sale or division may proceed simultaneous with the title issues, but the Court can't make a decree for partition or sale before disposition of title issues.

#### V. PHASE 2 - SALE OR DIVISION?

If the parties do not agree on sale or on division as the proper disposition, then the Court must decide which procedure is appropriate. Statute favors physical division, unless it cannot be made "without great prejudice to the owners," RCW 7.52.080. This means a material pecuniary loss; the burden of proving a loss is on the one asserting it, Hegewald v. Neal, 20 Wn.App 517, 582 P.2d 529 (1978).

#### VI. PHASE 3A - PARTITION

If the property is to be divided, the basic procedure is in RCW 7.52.080-.100. The court appoints three referees. The referees may hire a surveyor. The referees make a report recommending a particular division of the property. There may be a minority report from a dissenting referee. The court may confirm their report, in whole or in part, or reject it and appoint new referees. If any one party has made improvements, those should be included in the improver's share if possible. If there are multiple parcels, not all owned by all the parties, then a party should receive out of the parcels he owns, if possible. If a division cannot be made which is proportional in value, calculated as fair market value at the time of partition, to the fractional interests of the parties, then the difference is made up with owelty - money paid by one party to another to make up the difference, RCW 7.52.440, although infants without resources and unknowns cannot be charged owelty. Mortgages which are not to be paid off are deducted from property value, so the partition is based on net property values. Some useful cases on partition procedures are Carson v. Willstadter, 830 P.2d 676 (1992); Cummings v. Anderson, 94 Wn.2d 135, 614 P.2d 1283 (1980); Bishop v. Lynch, 8 Wn.2d 278,

Make sure an interlocutory appeal is avail. here.

111 P.2d 996 (1941); Falk v. Green, 154 Wn. 340, 282 P. 212 (1929); Easley v. Easley, 78 Wn. 505, 139 P. 200 (1914).

A party should make a submission to the referees for consideration in their work if there are factors which affect that party - improvement made by the party, value which will be lost or enhanced depending on how the property is divided, whether a developed portion of the property has a positive or negative cash flow, whether a party can pay owelty. It is better to have these incorporated into the referee's recommendation than to bring them up for the first time in court in opposition to the recommendation. Dividing the property is a more subjective process than it may at first appear.

### VII. PHASE 3B - SALE

If, as in most partitions, the property is to be sold, make every effort to get the parties to agree to list and sell it in a normal market transaction. Since they wouldn't be in a partition if they could agree readily on how to proceed, the sale is normally handled by a court appointed referee. This is typically an attorney. If the parties can agree to a market procedure, then the referee hires a real estate agent and goes through a normal sale procedure. The order appointing the referee should be clear on whether the referee must return to court for approval of a proposed sale, or whether the referee can close without further order. Try to make the order appointing the referee as comprehensive as possible, including an upset price. Proceeds of sale are paid to the court clerk, unless the Court directs otherwise.

There is authority to make a seller financed sale, RCW 7.52.290, -.410, -.420. This may not be appropriate in a simple residential sale, but for commercial property the highest priced sale may include, for instance, a down payment and a note and deed of trust due in six months for the balance. Securities are initially made payable to the Court Clerk, so meet with the Clerk well in advance to agree on procedure. This is probably not a normal transaction for the Clerk. When representing a would-be buyer who would benefit from seller financing, start early to educate the special master or referee that a seller-financed sale is both possible and desirable.

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DWS*

If the parties cannot agree to use a market sale procedure, then the statute directs the referee to proceed "in the manner required for the sale of real property on execution," RCW 7.52.270, with the addition of a preliminary process to bring in lien creditors and determine the amount of their claims, RCW 7.52.150-210. The execution sale procedure is in RCW Chapter 6.21. The sale may be made by either a referee or the sheriff. The Court's order directing the referee to sell the property is equivalent to a writ of execution directed to the sheriff. The referee or sheriff posts and publishes a notice of sale, holds a court-house steps auction, gets

confirmation from the Court, completes the sale, and deposits the proceeds with the Clerk. The process for confirming an execution sale is supplemented by RCW 7.52.370-380. As above, the sale may include seller financing if the court so allows.

When following the full statutory procedure, it may be critical to ask the court to set an upset price, although there is no statutory authority requiring the court to grant the request. Hegewald v. Neal, 28 Wn.App. 783, 626 P.2d 535, cert. denied 455 U.S. 944 (1981), holds that when party does not move for an upset price at the time the Court structures the sale, any later request for an upset price may be denied, and a sale will not be set aside unless the sale price was so low as to shock the conscience.

The parties are entitled to bid their share of the property, and a lien holder may bid his lien amount, RCW 7.52.390.

#### VIII. PHASE 4 - MONEY

The final phase is an accounting procedure. If the property was divided, then financial issues arising from past management or improvement of the property should have been accounted for in setting the property shares, but the costs and fees of the procedure will need to be apportioned. If the property was sold, the accounting will include the historical management issues.

The plaintiff is required to front all the costs, including petitioner's own attorney, the referee(s), surveyor, RCW 7.52.120, which may be allowed as costs at the end. Plaintiff cannot force any defendant to contribute to fronting the costs, nor to investing in preparing the property for sale. At the end, all costs allowed by the court are charged proportionately among the parties, RCW 7.52.480. Fees are apportioned under the same section, but the common law "common benefit rule" separates out fees incurred because of disputes among the parties. In general, look to include plaintiff's fees which are unavoidable and expended for the common good in making a partition as part of the apportioned charges, and expect to have the parties pay their own fees for disputes. In an extreme case, the entire proceeding may be viewed as a dispute, and no fees are apportioned, Hamilton v. Huggins, 70 Wn.App. 842, 855 P.2d 1216 (1993).

If the property is divided, and a defendant does not voluntarily pay costs during the process, then have the costs entered as a judgement.

If the property is sold, the proceeds need to be divided. If money issues have not been previously fully pled, the court has discretion to start over with new original pleadings on money issues, RCW 7.52.260. The referee may be used to take testimony.



If one co-tenant has made improvements, then the enhanced value of the property (not the cost of the improvements) may be considered in dividing the proceeds, Bishop v. Lynch, 8 Wn.2d 278, 111 P.2d 996 (1941). If one co-tenant has paid taxes, insurance, or other necessary costs of owning the property, then contribution from the other co-tenants may be considered in dividing the property, Leake v. Hayes, 13 Wn. 213, 43 P. 48 (1895).

A frequent and substantial dispute concerns a claim for rent and expenses made by a party not in actual possession against one who has been in possession. The facts in Cummings v. Anderson, 94 Wn.2d 135, 614 P.2d 1283 (1980), Fulton v. Fulton, 57 Wn.2d 331, 357 P.2d 169 (1960), and McKnight v. Basilides, 19 Wn.2d 391, 143 P.2d 307 (1943) are instructive. The overriding judicial concern in all three cases is to do equity. In general, rent from income generating property should be apportioned, and a tenant who has been legally ousted is owed rent by the tenant in possession, but absent ouster, no rent is owed.

Where two unmarried people buy a house together, but make unequal contributions to the purchase and have no co-owner contract, see Cummings v. Anderson, *supra*, for the rules on determining their shares of equity according to their proportionate investments.

## IX. SUMMARY

Partition is forest with a few defined paths. Costs and fees are harder to predict than in many property cases, because the parties may stumble into a procedural mire. As early as possible, determine if there is agreement on procedure, and if not, seek a pre-trial conference with the Court to set procedure. Be detailed: will the court set an upset price, will the sheriff or a referee hold the sale, etc. Courts vary in the amount of structure they will give to the proceeding.

SUPERIOR COURT FOR THE STATE OF WASHINGTON IN AND FOR  
KING COUNTY

ABC	)	
	)	
Plaintiffs,	)	No.
	)	
v.	)	
	)	COMPLAINT FOR
DEF	)	PARTITION AND ACCOUNTING
	)	
Defendants.	)	
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**I. PARTIES AND PROPERTY**

1. Plaintiffs ABC are owners of a one-half interest in real property (hereinafter "the property") in King County, Washington, commonly known as XX, and legally described as YY.

2. Defendants YY are residents of King County, Washington. Defendants are the owners of a one-half interest in the property.

3. The parties jointly purchased the property as tenants in common.

**II. PARTITION**

4. The plaintiffs wish to sell their interest in the property.

5. The parties have been unable to agree on a disposition of the property

which would sever their co-tenancies.

6. The property cannot be reasonably divided without great prejudice to the parties because...

### **III. OTHER PARTIES OF INTEREST**

7. There are no liens or encumbrances appearing of record on the property, and plaintiff has no knowledge of any parties who claim an interest in the property or who will be materially affected by the action other than plaintiff and defendant.

### **IV. COSTS AND ATTORNEY FEES**

8. The prosecution by plaintiff of this partition is for the common benefit of plaintiff and defendants, and the plaintiff has incurred, and will continue to incur, reasonable attorney's fees and costs in the prosecution of this action.

### **V. ACCOUNTING**

9. Reasons why defendant owes plaintiff money on account of the property....

10. Reasons why the distribution of sale proceeds should not be equal, e.g. disproportionate investment in purchase price....

11. Because of these reasons, Plaintiff petitions the Court for an accounting of plaintiff's and defendant's respective interests in the property.

WHEREFORE, having set forth their complaint against the defendants, the plaintiffs pray:

1. For an Order of Sale, directing that the property be sold; and

2. For an Order directing an accounting of all funds expended by Plaintiff and Defendant for the purchase, upkeep, improvement, operation and management of the property.

3. For an award of reasonable costs and fees in bringing this action; and

4. For such other and further relief as to the Court seems just and equitable.

DATED \_\_\_\_\_

\_\_\_\_\_  
Attorney for Plaintiffs