

## **ROGER STALEY SEMINAR OUTLINE – PARTITION**

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### **I. Partition Defined:**

Partition is the division of real or personal property between co-owners. The division may be voluntary (by agreement) or compulsory (by judicial proceedings).

A judicial Partition action is in the nature of an *in rem* action. Its object is the Partition of property between co-owners.

Florida has had a statute governing Partition since 1844 - §64.011 - 64.091, Florida Statutes.

### **II. Items That Can be Partitioned**

- 1) Real or personal property
- 2) Mineral rights
- 3) Horses
- 4) Tangible and intangible personal property – (see § 64.091)

### **III. Jurisdiction §64.011.**

All actions for Partition are in chancery, which means Circuit Court.

- It's an equitable proceeding.
- Partition is a matter of right between co-owners unless there is an agreement against Partition or some waiver (express or implied), estoppel or other equitable defense against it.
- Equitable defenses include but are not limited to laches, unclean hands, estoppel and waiver.
- Other causes of action can be joined with a Partition action (even a quiet title action).

### **IV. Parties to the Action §64.031**

- The Partition action maybe filed by anyone or more of several joint tenants, tenants in common, or coparceners, against their cotentants, coparceners, or others interested in the lands to be divided.
- Parties must be concurrent co-owners, such as tenants in common. Successive owners, e.g. life estate holder against remaindermen, won't work.
- The co-owner must have an immediate right to possession.
- All cotenants must be joined as parties in the Partition action.
- Other parties can be joined as proper parties, including a mortgagee.
- One claiming an equitable interest in the property against the true title holder cannot seek Partition.
- Special statutes authorize personal representatives (§733.814) and trustees of an express trust [§736.0816(4)] standing to sue for Partition.
- Partners of a partnership cannot use Partition to divide real property owned by the partnership since the property is owned by a single party, the partnership. Dissolution of the Partnership is the proper remedy.

**V. Venue - § 64.022**

- Suit must be filed in the county where the lands or any part thereof lie.
- § 64.022 supercedes the general venue statute.

**VI. Elements for the Complaint - §64.041**

The complaint must allege:

- Legal description of the property;
- Names and residences of all co-owners or other persons interested in the property, according to the best knowledge and belief of plaintiff;
- The quantity, percentage, share held by each;
- Statement that plaintiff does not know name, residence or extent of interest of any co-owner or claimant, if applicable;
- Any other matters necessary to enable the court to adjudicate the rights and interests of the parties [e.g. allegations for: (1) an accounting of expenses; (2) recovery of reasonable rental value during time a co-owner is ousted from possession; (3) improvements made by a co-owner];
- The statutory pleading requirements are jurisdictional.

**Lis Pendens - §48.23**

Refer to Form 1.918, Florida Rules of Civil Procedure. This form was substantially rewritten due to the amendments to §48.23, Florida Statutes (2009). Section 48.23 provides that the notice must contain the names of all of the parties, the name of the court in which the action is instituted, a description of the property involved or affected, a description of the relief sought as to the property, and one of the following: the date of the institution of the action, the date of the clerk's electronic receipt, or the case number. If the case number is used to satisfy the requirements of §48.23, it should be inserted in the case caption of the notice.

**VI. Relief Available from the Court:**

1. Determines whether the property is subject to Partition;
2. If the property is subject to Partition, then the court determines whether the property is divisible or not;
3. If the property is not divisible, then the property is sold by public or private sale;
4. The court also determines the interests of the parties (e.g. percentage interest):
  - a) If one co-owner paid more of the purchase price than another co-owner, the law presumes a gift of one to the other such that the co-owners own 50/50. If you represent the co-owner who paid more, make sure you put on evidence to overcome this presumption unless a gift was truly intended.
  - b) The court can make equitable adjustments: **HOTLY CONTESTED ISSUE!**
    1. *See generally, Biondo v. Powers*, 743 So.2d 161 (Fla. 4th DCA 1999).
    2. Improvements made in good faith, not to gain advantage and not for purpose of hindering Partition. Not based on cost of improvements but rather on enhanced value of the property as a result of the improvements.
    3. Contributions - taxes, insurance, mortgage payments, repair costs.
    4. Rental value of the property but only when one cotenant has ousted the other, based on reasonable rental value - actual rental paid.

\*Florida Bar Journal article - very good on equitable adjustments is Hipler, *Partitioning Real Property in Dissolution of Marriage Actions and Suits Between Unmarried Cotenants: Credits, Setoffs, Ouster, Division and Sale*, 82 Fla. B.J. 58 (2008).

- c) The court can also decide incidental issues - e.g. lien issues between the cotenants.

## **VII. Selling the Property §64.071**

- If the property cannot be Partitioned in kind (meaning actually split up) "without prejudice to the owners," then the court may order the property sold by public or private sale [oftentimes by special master].
- If the property is sold on credit, at least 1/3 of the purchase monies shall be paid down unless the parties consent otherwise.
- The sale must be confirmed by the court (unless sold by the clerk under §45.031).
- The money must be paid into court before any conveyance under the sale is made.
- I have always preferred a private sale, either by private auction or solicitation of offers with approval of the court. This allows for more creativity for the manner in which the sale is conducted and can be tailored to the type and value of the property.

## **VIII. Costs and Attorney's fees §64.081**

- Each party must pay a share of the costs (including attorney's fees) commensurate with the services rendered and benefits derived based on equitable principles in proportion to the party's interest.
- No award of attorney's fees if Partition is not granted. So this statute is much different than a prevailing party fee statute.
- If the property is sold, the fees and costs may be paid out of the proceeds of sale.
- Taxes must be paid out of the proceeds of sale.