

PARTITION OF PROPERTY AND TENANTS IN COMMON AGREEMENT

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It is not uncommon for people to jointly own property with other unrelated people. This typically occurs with investment property. Several people decide to purchase the investment property, rent it out and split the monthly proceeds. If these investors have consulted with a real estate attorney, then that attorney will likely have recommended that they execute a tenancy in common agreement that will govern each party's voting and management rights, property financing, allocation of income and expenses, and establish a right of first refusal if either party wants to sell. A right of first refusal means that if either party wants to sell their interest in the property, then the other party has the first right to purchase the seller's interest in the property before it can be sold to any third party.

In the recent case of LEG Investments v. Boxler (2010) 183 Cal.App.4th 484, a California Appellate Court ruled that a tenancy in common agreement that contains a right of first refusal does not waive a party's right to file a partition action. Under California's partition statute (which is located in California Code of Civil Procedure section 872 et seq.), any owner of a jointly owned property can file a lawsuit against the other owner and ask the court to either (i) divide the property among the two owners, or (ii) supervise the sale of the property and split the proceeds between the owners. In most partition actions, the plaintiff is asking the court to sell the property and divide the proceeds between the owners. This is what occurred in the LEG case.

LEG and the Boxlers jointly owned a vacation home in Lake Tahoe. LEG had purchased a 50% interest in the property from a previous owner. The original owners had signed a tenancy in common agreement that gave each owner a right of first refusal if either owner wanted to sell his or her interest in the property. The agreement was for 30 years and was binding on all future owners. Therefore, both LEG and the Boxlers were bound to the agreement. LEG received an offer to purchase its interest in the property. LEG informed the Boxlers of the offer and the Boxlers declined to exercise their right of first refusal to purchase LEG's interest on the same terms and conditions of the offer. The prospective purchaser met with the Boxlers and determined that the Boxlers were unreasonable people and the prospective purchaser backed out of the purchase (which the purchaser was entitled to do under the purchase agreement).

Upon the potential purchaser cancelling the transaction, LEG then filed a partition action against the Boxlers and asked the trial court to sell the property. The Boxlers argued to the trial court that the right of first refusal in the tenancy in common agreement effectively waived LEG's right to file a partition lawsuit. The tenancy in common agreement did not address a partition lawsuit nor did it expressly approve of, or prohibit, either owner from filing a partition lawsuit. The trial court agreed with the Boxlers and ordered that LEG could not proceed with the partition lawsuit.

LEG appealed the trial court's ruling and the Court of Appeal heard the case. The Appellate Court overturned the trial court and ruled that LEG could proceed with its partition action.

The Appellate Court started its analysis by citing the general policy for allowing partition actions, which is to "permit cotenants to avoid the inconvenience and dissension arising from sharing joint possession of land . . . (and) the policy of facilitating transmission of title, thereby avoiding unreasonable restraints on the use and enjoyment of property." The Appellate Court noted that the partition statute does allow the parties to contractually waive the statutory partition right, which waiver may be done by contract and be either express or implied. The Boxlers argued that the right of first refusal in the tenancy in common agreement was an implied waiver of the right to partition. The Appellate Court disagreed.

The Appellate Court noted that the tenancy in common agreement did not mention either partition or waiver. It stated that a right of first refusal has, in certain cases, been an implied waiver of the right to partition. However, it determined that there was no such waiver in this case. The Appellate Court reasoned that any restrictive covenant (such as establishing a right of first refusal before being able to sell an interest in real property) "must be construed strictly where it is subject to more than one interpretation" and that the "unencumbered use and alienation of the property is to be preferred." The Appellate Court determined that it was more important to protect the rights given to property owners by the California legislature (such as the partition right) than to take those rights away by enforcing a contract that does not even address the specific partition right.

The Appellate Court went on to state that LEG had complied with the express terms of the tenancy in common agreement in that once LEG had received an offer to purchase its interest, LEG offered its interest to the Boxlers. The Boxlers expressly declined to exercise their purchase right by delivering a written notice to LEG stating the Boxlers's intent not to purchase LEG's interest. Since LEG had conformed with the tenancy in common agreement and had not tried to get around the agreement in any way, the Appellate Court held that LEG could proceed with a partition action in order to liquidate its interest in the property.

Any individual that owns property with one or more other people should enter into a written tenancy in common agreement with the other owners. A well-drafted tenancy in common agreement will address the various situations that may arise in the future with respect to the property and will spell out what should happen in those situations. Such an agreement can resolve many problems before they become issues between the owners. Anyone that does own real property with other individuals and that does not have a tenancy in common agreement should consult with a real estate attorney about preparing such an agreement.

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