

## May 2010 California Continuing Education of the Bar

### Partition

**Right of first refusal in tenancy in common agreement modified, but did not waive, statutory right to partition.**

*LEG Invs. v Boxler* (2010) 183 CA4th 484, \_\_\_ CR3d \_\_\_

In an opinion certified for partial publication, the court of appeal reversed the trial court and held that a right of first refusal in a tenancy in common (TIC) agreement did not constitute an absolute waiver of the statutory right to partition. Rather, the TIC agreement modified the right to partition by requiring compliance with the right of first refusal provision before filing a partition action.

In 1998, LEG Investments purchased a 50-percent undivided interest in a Lake Tahoe vacation home, subject to an existing TIC agreement, as cotenant with Thomas and Donalee Boxler. The TIC agreement included a right of first refusal to the other owner if either of the owners received a bona fide offer for purchase of the interest. The right of first refusal provided for the same price and terms as the bona fide offer. In 2003, after numerous disputes over cleaning, landscaping, maintenance, and repairs, LEG offered to sell its interest or purchase the Boxlers' interest for \$750,000. The Boxlers declined both offers. In 2005, C.R. Gibb, a real estate investor with many years of experience in the Lake Tahoe market, offered to purchase LEG's interest in the property for \$1.4 million, subject to Gibb's approval of the Boxlers as co-owners. LEG submitted the Gibb offer to the Boxlers, who declined, stating: "We will not be exercising our right of first refusal for your bona fide offer of \$1,400,000." After meeting the Boxlers, Gibb did not approve them as co-owners and withdrew the offer. In May 2006, LEG filed a complaint for partition by sale.

Under [CCP §872.710\(b\)](#), a co-owner of property has a right to partition unless barred by a valid waiver. In the trial court, the parties brought motions for summary adjudication on the Boxlers' affirmative defenses of express and implied waiver. The court of appeal viewed the issue as a matter of contract interpretation, based on the parties' intent. The court concluded that permitting partition after a right of first refusal is declined does not conflict with the purpose of the right of first refusal, whether its purpose is to control the admission of new owners (see *Harrison v Domergue* (1969) 274 CA2d 19, 78 CR 797) or to give the nonselling owner the right to purchase the selling owner's interest at the market price for a fractional interest, as contended by the Boxlers. The parties did not dispute that Gibb had made a bona fide offer to purchase LEG's interest. The court noted that the contract included no express waiver and that treating a right of first refusal as an implied waiver of the right of partition was a disfavored restrictive covenant to be narrowly construed. The court noted the preference for an interpretation favoring unencumbered use and alienation of property. The court concluded that the Boxlers' interpretation of the right of first refusal as essentially a perpetual waiver of partition for the life of the agreement was unnecessary to the purpose of that right and contrary to the policy favoring partition. In sum, the court held that the right of first refusal modified the statutory right to partition by requiring compliance with the right to first refusal provision and that LEG had complied with those provisions.

**COMMENT:** *I asked Christine Tour-Sarkissian, who covers tenancies in common in her Real Estate Transactions and Real Estate Litigation courses at Golden Gate University and practices family and real estate law in San Francisco, to comment on lessons to be learned from this case. Thank you, Christine.—RB*

Disputes between co-tenants can be worse than bitter divorces; this case presents a good illustration of that. At the end of this litigation (if it ever comes to an end), these parties will have spent more money fighting than what their properties might ever be worth. When one party is motivated by anger or the need to be proven right, even the best-drafted attorney fee clause may not be able to stop the litigation from getting out of hand. These parties appear to have had unlimited funds to engage in this litigation, far beyond any notions of economic sense or rationality.

The court rejected the Boxlers' argument that the right of first refusal constituted a perpetual implied waiver of the right to partition, saying that that would be contrary to the law favoring partition. Indeed, how else can one co-tenant, faced with an intractable other co-tenant sabotaging his attempts to get out of a caustic relationship through the sale of his interest to a third party, possibly resolve that impasse except through partition?

One wonders whether LEG did not see this problem coming when it purchased its interest from the prior owners; that the Boxlers were difficult co-tenants was probably known not only to those owners but to their predecessors as well (the original co-tenants of the Boxlers). Did the price LEG paid reflect such knowledge? I do not mean to say that there ought to have been some assumption of risk by LEG at the time of its purchase, since we do not know all of the underlying facts, but this opinion should make any attorney consider recommending that TIC purchasers (and their brokers) engage in heightened due diligence regarding not only the interest being sold but also the character of the other co-tenant they will be ending up with.

How a broker should go about investigating such matters and disclosing them may be a difficult issue, since that goes beyond what our disclosure statutes currently require. Brokers' associations might consider recommending that sellers be asked to complete a questionnaire that covers these issues (although I do not know to what extent a seller in a contentious relationship would be eager to be provide much information, lest he be forced to discount his price and/or face a defamation action, but this is surely material information that affects value).

With regard to drafting future tenancy in common agreements, attorneys might consider making the parties fiduciaries, since the fear of liability for punitive damages might deter them from being too difficult. (However, be careful that this does not cause the agreement to be recharacterized into a partnership for tax purposes.)

While an agreement that specifically provided for a right to partition after a sale fell through might have helped LEG in this particular case, the best-drafted agreement will still not deter those bound and determined to fight.—*Christine Tour-Sarkissian*