First Commerce Title

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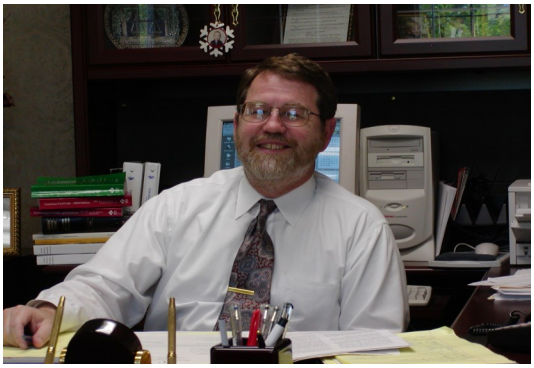
Co-Ownership & Partition-Part Two

from the desk of David M. Touchstone

Let's get back to the Romans. They just didn't have much use for "you children play nice." The old Romans were *serious* folks. If there's a problem, nuke it. The way to nuke a co-ownership problem is to partition the property. If co-owners can't agree, divide the property.

Sounds good, huh? Let's dig a little deeper, for like the old saying goes, "the devil's in the details." Louisiana law provides for two types of partition: partition in kind and partition by licitation. Bear in mind that co-owners can agree at any time to voluntarily divide the property. I handle those routinely. But oftentimes co-owners can't or won't agree to a voluntary partition. When that's the case, any of the co-owners can file a lawsuit against his fellow co-owners and ask a judge to partition the property. This is an absolute right. The only time that this right is not available is if the co-owners have entered into a written agreement not to partition the property; parties are allowed to enter into such an agreement, but only if the agreement is for a term that is not greater than fifteen years. In all but those instances in which co-owners have entered into a fifteen year non-partition agreement, co-owners have an absolute right to provoke a partition legal action. When the matter reaches the judge, he has to make a decision as to whether to partition the property in kind or by licitation. If the judge partitions the property in kind, that means that he physically divides the property by allotting the land to the co-owners according to their fractional interests. For instance if there is a forty acre tract at issue and one of the co-owners owns an undivided ½, another owns an undivided 1/4, and two others each own an undivided 1/8, the court will award them respectively 20 acres, 10 acres, 5 acres and 5 acres. In some instances such as this, the Court will order a survey, and with the surveyor's assistance, divided the land on a survey plat. If nobody appeals, that's the end of the matter.



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As I said, the other method of judicial partition is by licitation. Partition by licitation means that the judge orders the property to be sold by the sheriff at a public auction. In such instances, after deducting his cost for conducting the public auction of the property from the bid proceeds, the sheriff refers the net proceeds to a notary public who was appointed by the judge. The notary then under-

takes a process by which he divides the cash among the co-owners according to their respective fractional interests, making adjustments for any costs owed by one co-owner to another or any money owed to a third person having a recognized claim against the interest of one or more of the co-owners.

In most cases, in fact in the vast majority of cases, the court orders the property to be partitioned by licitation. In a licitation ruling, in effect, the judge is throwing his hands up and saying: "I can't figure out a good way to divide this land by allotting shares to the co-owners." This would seem to go against the grain of the law, because the law requires that "…unless the property is indivisible by nature or cannot conveniently be divided, the court *shall* order the partition to be made in kind." The problem here is that the "nature" of the property almost always prevents the judge from ordering that the property be partitioned in kind. Here's a typical scenario: six co-owners owning various fractional interests in a forty acre tract are involved in a partition case. Part of the forty is hill land with timber, part is pasture land and part is in a swampy creek bottom. A country road cuts diagonally across the corner of the property. Now how is a judge going to make a fair allocation by allotting different sized tracts (due to different sized fractional interests) in which each co-owner gets some hill land, some pasture land, some swamp land, and each of them has some frontage on the public road? When you get into these things, it always seems that there are facts that make it too difficult for the judge to divide the property in kind. So, judges do the best that they can and this almost always is an order to partition by licitation.

Here's the problem with licitation. The sale is a public auction and is for cash – cash that must be paid by the high bidder to the sheriff within a few days of the public auction. Want to know what's worse? There are investors who go about buying up undivided interests, just so that they can provoke a partition. These investors have cash, and lots of it. They are in a position to outbid the other co-owners. Well, you might be thinking to yourself, "why is it a bad thing that an investor is going to bid the price up?" In one sense, it isn't a bad thing. The higher the bid, the more each co-owner gets for his share. But, the reality is that land sold at public auction is rarely sold for even close to its retail market value. In most instances, none of the co-owners who may have been holding their interests for a long time have the cash to go toe to toe with the investor. So, none of these folks are able to purchase and hang on to the land and they don't get near as much for it as if they simply had listed the property with a real estate agent and found a buyer in a non distressed retail setting. Every chance I get to advise a client who holds an undivided interest to get out of that situation as quickly as possible, I give that advice. Sooner or later, it's just a matter of time, a person holding a fractional interest is going to lose a lot of value by not having taken care of the situation when he had a chance. Co-owners holding fractional interests, especially when there is a number of them, are always well advised to sell their interests to one another, or to a third person, or make a voluntary partition of the property – anything to escape co-ownership.

Let's talk about a couple of wrinkles on the law of co-ownership. A few months ago, just for fun, I was surfing the pages of a fairly obscure area of the law when I discovered a little nugget whose existence had previously escaped my attention. In 2003, the Louisiana legislature enacted a law that declares that if a co-owner owning less than an undi-

vided 15% interest in the land initiates a legal action to partition the land, the other co-owners can prevent the partition of the property by requesting a court ordered appraisal, after which the requesting co-owners can pay the minority co-owner the appraised amount and acquire his interest. This is a nice little trick to thwart an investor who buys a small interest co-owner out just to force the property to a partition public auction.

If you are an astute reader, and I know that you are, you may have been wondering what happens to the interests of persons who have certain rights in a co-owner's fractional interest. Let's take, for instance, a judgment. If one of the co-owners owns an undivided ¼ interest in property, and one of his creditors has recorded a judgment in the parish mortgage records where the co-owned land is situated, the judgment attaches to the interest of the co-owner. If the judgment holder is aware that his debtor owns an undivided ¼ in the land, the judgment holder is entitled to seize and provoke a sheriff sale of his debtor's interest in the land. Oftentimes, no one is aware of all the facts until a title search is made in conjunction with a planned partition legal action. The question becomes how to shuck the judgment from the title to the property. The law supplies an answer. If the judge partitions the property in kind, the judgment will follow the share that the judgment debtor co-owner is allotted. If, on the other hand, the judge orders the property to be partitioned by licitation, the judgment will be stripped from the title by the public auction sale and the judgment holder's claim will be referred to the cash proceeds that the notary would otherwise have distributed to that co-owner. However, in order to strip the judgment from the title, the attorney who drafts the partition suit has to include the judgment holder as a notice defendant. If the attorney fails to do this, he deserves a bumpkus award. However, you might be surprised how often lawyers make this goof.

Let's talk about some special situations. The first is husbands and wives, or rather, former husbands and wives. There is a special partition law for ex-spouses. Remember that in the co-owner section of this article, I said that ex-spouses, unlike other co-owners, are forbidden by law from selling their undivided interests in community property to third persons. The reason for this is that all of their community property is supposed to be maintained in one mass until the judge can divide it. The community property partition statute gives the trial judge very substantial latitude to divide the ex-spouses' community property. For instance, he can allot to one of them the house, a car, a certificate of deposit, and the household furniture while allotting to the other the community owned business, the other car, a pension, and an equalizing promissory note due from the first spouse guaranteed by a mortgage on the house.

Here's another special situation. Remember the co-owner scenario in which Dad and Mom bought a house together, had three kids, and then Dad died? As I said, Mom owns an undivided ½ interest in the house, and each of the kids owns an undivided 1/6, subject to a right of usufruct in favor of their mother. Although I have covered the meaning and uses of usufruct in another article, a real quick refresher is in order here. Simply put, Mom's right of usufruct gives Mom an absolute right to exclude the kids from entry into the property. Further, if there were an oil well out behind the house when Dad died, Mom gets to keep receiving all the royalty money, her half as well as Dad's half which Mom gets pursuant to her right of usufruct on Dad's half. What happens if one of the kids, a son having just graduated from law

school, being a mean and bitter person, and uninformed of the wise old adage that "a little knowledge is a dangerous thing" takes it upon himself to file a partition suit to force Mom out of the property? Can he do it? [You are supposed to whistle the Jeopardy music here for sixty seconds.] The answer is, er, "not really." The ungrateful son can force a partition of the "naked ownership", that is to say, all of the ownership of the property less a usufruct interest on one hundred per cent of the property. Whoever buys the property will have to wait for Mom to die or to remarry; only then will the usufruct clear off the title. The reason the ungrateful son cannot partition a full interest in the property is that he does not own a usufruct interest. The ungrateful son has some rights pursuant to Civil Code Article 542 which states: "The naked ownership may be partitioned subject to the rights of the usufructuary." In order for there to be a court ordered partition of the usufruct, there must be another owner of the usufruct right, in effect a co-owner of the usufruct, who joins in the partition proceeding to move the court to partition the usufruct. Since, in our scenario, Mom is the only owner of a usufruct interest, her right of usufruct survives the partition suit.
It is also possible for a co-owner to partition less than all the rights he has a legal right to partition. For instance, cousins and siblings may co-own a tract of land on which a mineral lease is kicking out royalties like a broken coke machine, and the cousins and siblings are fighting like cats and dogs about use of the surface of the land. If one of them seeks my advice, I am going to advise that a partition suit be filed, but that the *minerals be reserved.* This will have the advantage of making the conflict about the surface go away while retaining for the co-owners their nice stream of income who will continue in a state of co-ownership of the minerals after the partition sale of the surface. Otherwise, if the minerals are not reserved and are included in the partition, whoever buys the property will end up with all the royalty money. Bidding on property in this fashion will dramatically affect the amount of money needed to buy the property, will probably cause a great big capital gain for all concerned and, perhaps, put the bid price out of reach for any of the co-owners so that a stranger ends up buying the property.
On the assumption that this stuff is probably more interesting to me than it is to you, I'd better give my fingers and your eyes a rest. Thanks for spending some time with me.