



Celebrating 40 Years in Southwest Florida

REAL ESTATE · BUSINESS · CONSTRUCTION

Florida Bar Board Certified Attorneys

## **The Board-Certified Attorney's Explanation of Partition and Solutions to Joint Tenant Disputes**

**BY: KEVIN F. JURSI NSKI, B.C.S. AND KARA JURSI NSKI MURPHY, LL.M., B.C.S.  
FLORIDA BAR BOARD CERTIFIED REAL ESTATE ATTORNEYS**

On a weekly basis, our law firm is contacted by prospective clients inquiring as to their rights under Florida law as it relates to their ownerships held as joint tenants. This is an area of the law that our firm has seen significant growth.

Generally, the joint tenancies were initially created among close friends, significant others, or, more often than not, are family members who find themselves in a situation where they jointly own property with another person or persons. Issues then arise as to maintenance, repair, expenses, rental and sale of the real property, especially in a growing market, which sometimes results in disputes over one or more joint tenants not paying their proportional share, a disagreement as to one joint tenant making use of the property or alternatively a disagreement on whether the property should be listed for sale.

Disputes among joint tenants often times result in a lawsuit for "Partition" under Florida Chapter 64. Our firm has represented (and currently represent) numerous clients in Partition Actions.

There are two (2) approaches to a Partition Action:

- A. The Legal Approach, which involves initiating a suit; and
- B. The Pragmatic Approach, which is avoidance of litigation in favor of a negotiated or, perhaps, mediated resolution to the problem.

To better understand these two approaches, we should start with a fundamental overview of what Partition is and how it is useful to the joint tenants in protecting their rights and resolving their differences.

### **1. Overview of Partition Action and Florida Statute Chapter 64**

Partition is a statutory cause of action under Florida Statute Chapter 64. As we explain to our clients, "partition" is based upon old English law. During that time, when disputes arose between property owners, the King would send an authorized representative to settle the dispute

between the parties. That dispute generally involved division of the property based upon a determination by the King's representative as to how the property would be divided between the parties based upon ownership and use of the property in dispute.

This has evolved from history until now. Under statutory Florida law, the concept is a physical division of the property which, generally, only can be done with raw land save certain exceptions or, alternatively, a partition of the sale proceeds of the property after the property is sold. The net closing proceeds are allocated to the respective joint tenants in proportion to their ownership interest after taking into consideration the contributions of each joint tenant as to their proportionate share of the property expenses.

## **2. Description of Partition under Florida Statute Chapter 64**

A simple description of Partition Action, initiated under Chapter 64, is a legal proceeding by one or more of the joint tenants in which they enlist the authority of the Court to force the sale of jointly-owned property. Under Florida law, a joint tenant/co-owner of the real property may file a lawsuit against the other joint tenant/co-owner of the real property when there is a disagreement or lack of agreement to list and sell the property.

Partition is defined as follows:

“The division of co-owned property into separate assets for each owner. Partition is a judicial proceeding, traditionally in equity but also in law, by which one or more co-owners of property request that the property interests be divided so that each has an independent property interest that is no longer intermingled with the others’ interests.”

It is important to keep in mind that a partition is a “matter of right” under Florida law and, thus, the Court will certainly grant the need to sell the Property to divide the parties’ respective ownership interests.

Prior to filing a Partition Action, the joint tenant(s) should retain a qualified real estate attorney to review any agreements or provisions, including the deed to the property, to examine as to whether there are any provisions pertaining to partition.

Non-partition language is not generally contained in the standard statutory warranty deed form, but it can be included. The review of the non-partition agreement should address whether such restriction is for a reasonable and definite period of time and not be otherwise unduly restrictive, see e.g., Haddad v Hester, 964 So. 2d 707 (Fla. 3d DCA 2007). In the Haddad case, the Court found that an agreement not to partition for the life of the tenants was not unreasonable.

It should be noted that even in the event that the property is held as a joint tenancy with a right of survivorship, it is an estate subject to an equitable partition action, although, the right of a joint tenant to partition the estate may be waived. Haddad v. Hester, 964 So. 2d 707, 709-10 (Fla. 3d DCA 2007.)

In the circumstance that the property is the homestead property, then a closer evaluation must be made, specifically:

- a. Article X, Section 4 of the Florida Constitution (Intestacy Statute) prohibits the partition of a homestead property. (Hoskin v. Hoskin, 329 So. 2d 19, 19 (Fla. 3d DCA 1976).
- b. As contrasted and distinguished by the following case:

“Considering the terms and purpose of the homestead provisions of the Constitution, it is manifest that a judicial sale, if necessary for purposes of partition among the beneficiaries of a homestead, is not included in the exemption from forced sale under process of any court. There is nothing in the Constitution indicating a purpose that homestead property may not be partitioned even by judicial process if that be necessary to a complete enjoyment of the property by those upon whom it is cast by the statutes of the state upon the death of the owner of the homestead. The exemptions 'inure to the widow and heirs,' and not to the widow and minor children. See Miller v. Finegan, 26 Fla. 29, 7 So. 140, 6 L.R.A. 813; Godwin v. King, 31 Fla. 525, 13 So. 108. *The purpose of the law is to exempt the homestead property from forced sale for the debts of the owner who is entitled to the exemptions, . . .*” (Emphasis supplied.)”  
Tullis v. Tullis, 342 So. 2d 88, 89-90 (Fla. 1st DCA 1977)

Issues related to the division and partition of homestead property are discussions that require a review of a number of factors and you are encouraged to contact legal counsel to address these issues. Our law firm, Jursinski & Murphy, PLLC ([www.JMlawFL.com](http://www.JMlawFL.com)) can assist you on this particular subject.

If there is language in the deed or documents pertaining to non-partition, then the right to partition has been waived and no such action under Chapter 64 may proceed.

### **3. The Court Has the Authority to Order the Property Transferred and Can Do So In a Number of Ways**

In a Partition Action, the Court, sitting in equity, can fashion a number of remedies for the parties, which generally follow the formats identified in the Statute as follows:

- a. By the Special Magistrate/Commissioner listing the property for sale through a Florida licensed real estate broker or, if the Special Magistrate/Commissioner is a Florida licensed real estate broker, by the Special Magistrate/Commissioner. Florida Statute §64.061(4) states:

*“APPOINTMENT OF SPECIAL MAGISTRATE WHERE PROPERTY NOT SUBJECT TO PARTITION.—On an uncontested allegation in a pleading that the property sought to be partitioned is indivisible and is not subject to partition without prejudice to the owners of it or if a judgment of partition is entered and the court is satisfied that the allegation is correct, on motion of any party and*

*notice to the others the court may appoint a special magistrate or the clerk to make sale of the property either at private sale or as provided by s. 64.071.”*

- b. By judicial sale by public auction. *See*, Fla. Stat. §64.071. My experience is that this is not the best approach as well as the fact that it is rarely utilized.
- c. By a private sale between the parties pursuant to a written agreement, generally after a Mediation, if a suit is filed. I describe this as the Pragmatic Approach. A recent court case identified this format which, in my experience, is a practical solution even after litigation ensues. This approach has been identified in a recent Second District Court of Appeals case, Marks v. Stein, 160 So. 3d 502, 503 (Fla. 2d DCA 2015), which directs the parties to resolve their differences in, perhaps, an amicable fashion. The Marks vs. Stein case states as follows:

*“The procedure of allowing the parties to negotiate a settlement between them, perhaps with one joint tenant buying the other joint tenant’s interest, affords the parties a fixed reasonable time within which to make a voluntary sale of all or part of such property for cooperative maximization of the sales price. The rationale for requiring a reasonable deadline by which the voluntary sale must occur is to give the parties an opportunity to secure a higher sales price than they might at a judicial sale, while ensuring finality in the event a private sale does not occur. Although the courts have developed this third remedy in the context of dissolution proceedings, its use is not limited to marital disputes*  
Marks v. Stein, 160 So. 3d 502, 503 (Fla. 2d DCA 2015)”

Again, in our experience, the best results are often when the parties in dispute agree to sell the property to a third-party purchaser or one joint tenant agrees to the purchase the other tenant’s interest in the property.

#### **4. The Root of the Dispute: Oftentimes There is a Disagreement as to the Rights, Duties and Obligations of Joint Tenants**

Under Florida law, joint tenants have certain rights, duties, and obligations as it pertains to the real property, which they hold as joint tenants. For example: if you own 50% of the property, you have the right to 50% of the profits on the property and/or a claim to utilize 50% of the property if the property is not being rented.

However, as 50% owner of the property, you also have the duty and obligation to remit payment for 50% of the ongoing expenses of the property which include real estate taxes, insurance, maintenance, mortgage payments (where applicable), assessments for HOA or condo fees (where applicable), and any additional expenses that are related to the property.

The proportionate share of expenses, the rental and/or use of the property are often what generate the most disputes between joint tenants and, generally, will require an Evidentiary Hearing (trial) on these issues. This adds even more financial burden to the dispute in the form of additional attorney fees and costs.

Here are some of the issues that create disputes among joint tenants and which often lead to a Partition Action:

- a. Rental Use of the Property. One tenant is renting the property and not keeping the other joint tenant informed or not properly crediting the other tenant with the closing proceeds or, in fact, if there is a net profit on the property from the rentals, not sharing the proceeds of said rental equally based upon on the tenant's percentage ownership of the property.
- b. Expenses on the Property. One tenant is being forced to pay more than their percentage share for expenses on the property. Oftentimes, we come across claims by one tenant that they have paid more in expenses and upkeep on the property and have advanced monies on behalf of the other tenant(s) as to costs such as maintenance, and real estate taxes.
- c. Exclusive Use of the Property. One tenant is making use of the property to the exclusion of the other tenant in a disproportionate manner. This can create hard feelings or a claim by one tenant that the property is not being utilized fairly.
- d. One tenant may want to sell the property but the other tenant does not.

## **5. What Actions Can Be Taken By a Joint Tenant When a Disagreement Exists Between Joint Tenants?**

Our law firm is often called when a disagreement arises between the tenants.

For example: There are two title holders, both of which must sign off on any contract or deed for the transfer of the property. But one tenant may not be interested in selling the property. How is this resolved?

This can be legally resolved by a Partition Action. And, as indicated, there are two approaches to partition: the Legal Approach (as we have identified in more detail above) and the Pragmatic Approach.

Let's walk through both and identify the costs and expenses of the two approaches and the ultimate results which the law firm of Jursinski & Murphy, PLLC ([www.JMLawFL.com](http://www.JMLawFL.com)) can achieve for the client.

### **A. The Legal Approach.**

- a. Right to Partition and Appointment of Special Master Under Florida Statute Chapter 64. As indicated above, any joint tenant to the property has a right to petition the

court to appoint a Special Master/Commissioner to take control of the property and sell the property.

- i. This Special Master/Commissioner that is appointed may be an attorney, or may be a lay person or, alternatively, a real estate broker. Either are entitled to reasonable compensation so budget between \$300 to \$400 per hour for the Special Master/Commissioner.
- ii. The ultimate goal is to get the property listed for sale by a licensed Florida real estate brokerage firm at current fair market value. The broker will generally charge between 5% to 6% for the sale of residential property and market rates for the sale of commercial property or raw land if the land or property is not divisible.
- iii. If the tenants cannot agree or do not sign a contract or closing documents, the Special Master/Commissioner is authorized to execute the contract and closing documents and convey the property on behalf of the tenants on title to the property. Budget typical and reasonable closing expenses (documentary stamp tax, title insurance costs and closing fees) generally in the area of 1 ½% to 2% of the total sale.
- iv. Once the property is sold, the proceeds are divided in proportion to the percentage ownership.
- v. The parties initiating the Partition Action are also entitled to reasonable attorney fees and costs as determined by the Court for initiating such partition, see further discussion below regarding Florida Statute §64.081. This adds more attorney fees to both sides of the equation and, generally, the attorney fees cancel each other out.
- vi. Generally, the Court will order Mediation at some stage of the proceedings which, hopefully, should result in a settlement. Add more attorney fees and the costs of a professional Mediator, generally between \$300 to \$400 per hour split between the joint tenants.
- vii. As indicated below, additional costs and fees will be generated in the event an evidentiary hearing and or trial is required.

b. Trier of Fact's Role in a Partition Action to Determine Disputed Issues of Rents and Expenses.

Whether it's a dispute involving expenses that have been paid (or not been paid) by a tenant or an issue arising out of rental proceeds and improper allocation of such rental proceeds between the tenant(s), or a dispute over the use of the property, the Trier of Fact will ultimately determine how to move forward once the property is sold.

Generally, if the dispute cannot be resolved before the sale of the property takes place, then in such event, the Court will, generally, require that the closing proceeds

of the sale be deposited in an escrow account to be held until the Court makes a final determination as to how the closing proceeds will be divided.

Typically, in a partition action, this is the most cumbersome process. It requires an accounting of all of the debits and credits for the property, which includes all parties' monetary contributions for the expenses for the Property. From there, the Court analyzes the parties' intent related to any equity and obligations for payment of expenses. This is done through an evidentiary hearing, where testimony and evidence is presented to the Court.

Often, once the Property is sold, however, the parties are able to resolve the dispute before the need for the lengthy evidentiary hearing. In part, this is because the property has been sold and the amounts are easily monetizable. The parties can then elect to stop the accrual of attorneys fees and costs by simply dividing the funds held in escrow.

The Court also has to allocate and weigh the attorney fees and costs, per Florida Statute §64.081. The statute addresses the attorney fees and costs as follows:

*“64.081 Costs; taxes; attorneys’ fees.—Every party shall be bound by the judgment to pay a share of the costs, including attorneys’ fees to plaintiff’s or defendant’s attorneys or to each of them commensurate with their services rendered and of benefit to the partition, to be determined on equitable principles in proportion to the party’s interest. Such judgment is binding on all his or her goods and chattels, lands, or tenements. In case of sale the court may order the costs and fees to be paid or retained out of the moneys arising from the sale and due to the parties who ought to pay the same. All taxes, state, county, and municipal, due thereon at the time of the sale, shall be paid out of the purchase money.”*

Ultimately, the Court will make a final decision and adjust the proportionate shares of the tenants' distribution from the net closing proceeds from the sale of the property in the form of a final judgment. Either joint tenant has the right to appeal the Court's findings and if so this will add additional time (approximately one year) and yet another layer of attorney fees and costs, here the appellate costs and attorney fees.

c. Example of a Partition Action and the Attendant Attorney Fees and Costs Incurred

Here's an example of a Partition Action between two (2) tenants in title to the property.

- a. A dispute arises between Owner "A" and Owner "B" over the use of the property.
- b. Owner "A" initiates a Partition Action, under Florida Chapter 64, demanding a sale of the property and a determination of the appointment of a Special

Master and a determination of a distribution allocation of the closing proceeds.

- c. Owner "B" hires legal counsel and responds to the Partition Action and asserts their own defenses as available to Owner "B" as it pertains to the property.
- d. The Court appoints a Special Master.
- e. The Special Master will then charge a fee for his role in the sale of the property and secures the services of a real estate broker.
- f. The Special Master and the appointed real estate broker list the property for sale at current fair market value, negotiate the contract and sale and the parties involved sign the contract documents and the property is sold.
- g. The Special Master fee, the real estate broker fee, and the closing fees, as well as the attorney fees, are all expenses of the Partition Action and will be adjudicated by the Court and allocated between all of the parties involved. Generally, the normal and customary closing fees involved in a real estate transaction are equally divided in proportion to the tenants' interest in the property. The attorney fees are based upon the procedures set forth in Fs 64.081 and determined by the Court, along with a decision as to the distribution of the closing proceeds to be divided between the joint tenants.

For example: if the ownership is 75%/25% and Owner "A" paid more than their share, Owner "A" would be credited for that excess amount from the net proceeds, prior to the division of those net proceeds.

By way of example, there is \$100,000.00 net profit after all attorney fees, court costs, Special Master/Commissioner fees and normal/customary closing costs are paid. However, in our example, Owner "A" paid the mortgage, repairs and the like in the amount of \$10,000 over and above what Owner "A" would have had to pay due to Owner "B" not contributing the \$10,000 due for Owner "B"'s 25% contribution. In such event, and assuming there are net proceeds of \$100,000.00 on the property and using the example in which Owner "A" paid \$10,000.00 of Owner "B"'s proportionate share:

- a. Owner "A" receives:

75% of the \$100,000.00:	\$75,000.00
+ \$10,000.00 reimbursement for Tenant "B" deficiency +	<u>\$10,000.00</u>
<b>Total:</b>	<b>\$85,000.00</b>

b. Owner "B" receives:

25% of the \$100,000.00:	\$25,000.00
- \$10,000.00 deficient contribution amount:	+ <u>\$10,000.00</u>
<b>Total:</b>	<b>\$15,000.00</b>

I have laid out the legal approach, the significant expenses incurred in such action and an example of how net closing proceeds are distributed. However, there is a better way to resolve joint tenancy disputes other than a Partition Action. As I indicated above, there is also a Pragmatic Approach, which if implemented properly is for more financially friendly approach to the joint tenants.

#### B. The Pragmatic Approach

This is an approach we often discuss with our clients, opposing parties and their legal counsel. A forced sale of the property will generate a substantial amount of fees in the net closing proceeds. This includes the aforementioned Special Master fees, court fees, real estate broker fees, as well as attorney fees.

These additional fees can be avoided if the joint tenants can agree on a format as to how to solve this property dispute. As Florida Bar Board Certified Real Estate Attorneys <https://www.jmlawfl.com/attorneys/>, the partners in our firm can assist and navigate the implementation of this Pragmatic Approach generally saving time and expense for both joint tenants due to our efforts on behalf of one of the joint tenants.

The right to use the Partition Action often gets the joint tenants to be forced to consider this alternative Pragmatic Approach. Example: One joint tenant does not want to sell the property, while the other wants to sell. The party wanting to sell can offer to purchase the other tenant(s) share of the property for a fair and reasonable sum for the net equity in the property. Or counsel for the joint tenant wanting to sell can demonstrate the practical benefits to list the property for sale without initiating a costly and time-consuming Partition Action.

In the Pragmatic Approach model and using our example above, most of the litigation attorney fees and all of the Court costs and Special Magistrate/Commissioner fees would be eliminated once the parties recognize the expenses related to such a forced sale, which include the aforementioned court costs, etc. Once the parties realized the tremendous expense, it may enable or result in both parties agreeing that there is a better approach to dispose of the property either by:

- a. Immediately getting the property listed for sale;
- b. Structuring a purchase so that one joint tenant could buy the other joint tenant's interest out perhaps at a price that would exceed what the other joint tenant would receive if this property was sold in a forced sale format.

Based upon our experience in handling numerous joint tenant disputes, this Pragmatic Approach should most likely result in the joint tenants saving substantial sums of money and ending up in a better financial position than if a Partition Action was initiated.

## **6. Customizing a Joint Tenant Agreement**

One way to eliminate a potential Partition Action is to have a Joint Tenant Agreement in place before a dispute starts. Our office can assist in creating that.

An example would be as follows: joint tenants live together and have a romantic relationship but realize that they want to hold their property as tenants in common. This could be a result of the fact that either party has heirs or, perhaps, children from their first marriage and does not want their share of the property given to the other joint tenant as would be in a joint tenants with right of survivorship.

In those situations, in order to protect a dispute arising from the heirs, a written and recorded Joint Tenant Agreement could allow for the surviving joint tenant, who did not inherit the property, with the right to purchase the property at some agreed upon price or some agreed upon format for determining the price, thereby protecting the survivor who may want to stay in the property without being forced to sell the property.

This is an example of an agreement that would allow one of the joint tenants to avoid a partition in a specific, customized format tailored to their respective needs.

Our firm has drafted custom Joint Tenancy Agreements based upon our respective client's wishes as it pertains to their future use of the property.

The Law Office of Jursinski & Murphy, PLLC ([www.JMlawFL.com](http://www.JMlawFL.com)) can put together a tailored Joint Tenancy Agreement and further assist you in this matter.

### **Summary**

With the ever-changing real estate and stock market, many joint tenants are exploring different options, some of which include selling property owned by a reluctant co-owner. While this firm specializes in litigation and, thus, understands that not all disputes can be resolved without court intervention, it has often better to utilize the pragmatic approach to resolving such disputes, even if such approach is explored after conducting a pre-suit mediation. In the event that you find yourself in such a situation, The Law Office of Jursinski and Murphy PLLC ([www.JMLawFL.com](http://www.JMLawFL.com)) is here to assist you.

Our office can assist you in the Legal Approach as it pertains to filing and litigating a Partition Action. Alternatively, the Law Office of Jursinski & Murphy, PLLC can assist you with the Pragmatic Approach involving negotiation with the parties over the dispute and an ultimate resolution that should prove to be fair to both joint tenants.

Our firm can identify the issues, lay out the legal remedies available, negotiate and prepare the contracts needed for the resolution of the dispute over the joint tenant property.

In addition, our affiliated title company, Title Masters, LLC ([www.TitleMastersFL.com](http://www.TitleMastersFL.com)), can also assist in the closing of the property and issuance of title insurance to the buyer or remaining joint tenant.

Please call us if we can assist in resolving a joint tenancy dispute.

- Kevin F. Jursinski, B.C.S
- Kara Jursinski Murphy, LL.M (REAL ESTATE DEVELOPMENT)/ B.C.S.

**Disclaimer as to legal advice**

*Please consider the above article as a general discussion of issues surrounding holding title to real property. This article is written for informational purposes only and should not be relied on as legal advice. For specific advice surrounding your property, seek the proper legal counsel.*