

Handling a Real Estate Divorce: A Practical Guide

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I. INTRODUCTION

Handling a real estate co-ownership dispute involving unmarried partners is often mistakenly considered to be a simple matter, simpler even than the divorce of a married couple. Indeed, California's statutory partition process¹ provides a concise and seemingly linear march towards an equitable and efficient end for every variety of co-ownership not involving a married couple. The fact remains, however, that filing a partition action rarely leads to a quick or affordable solution.

Whether the parties are business partners, former friends, extended family members or ex-lovers, chances are that one or more real life issues will complicate the matter significantly. When this occurs, it is likely that neither a partition sale nor a settlement agreement will be readily accomplished. Oftentimes the parties' particular factual conflicts will not be directly addressed by the broad brush-stroke statutory and case law available in this area. In some instances, the parties will not be able to afford litigation and, in others, the sense of injustice over a forced sale will plague every effort to settle without litigation.

Moreover, it is inevitable that everyone involved will feel disappointed, angry and resentful at having to deal with the break-up, especially since the costs of a forced sale of a highly-leveraged property can wipe out nearly all of the equity.

For these and other reasons, it is imperative that the lawyer handling a real estate "divorce" approach these cases not just with a knowledge of the partition statutes, but equally with a practical, economic and strategic eye. The following analysis offers a guide for the lawyer who chooses to handle such matters, including, when all else fails, some tips on how best to survive the judicial partition process.

II. SUMMARY OF THE LAW

Real estate divorces involving every variety of co-ownership (other than community property) are resolved according to a well-developed set of procedural and substantive rules, few of which have changed over decades of real estate practice. The procedural rules, as well as the basic substantive doctrines, are set forth in the Code of Civil Procedure section 872.010 *et seq.* Since the right to partition is nearly absolute and the legal doctrines involved are not in themselves complicated, reviewing the partition option is the place where every lawyer and client should begin. It is quite likely that the costs and time involved in a partition sale will be sufficient to prod even the most recalcitrant client to consider a reasonable settlement proposal.

Here are the key features of the statutory partition procedure:

- Jurisdiction is in the county of the property, not where the parties reside.
- Principles of equity apply throughout the proceeding,² and claims of ownership can be based upon express or

implied contracts, fiduciary duty claims or joint venture or partnership arguments—even by a party who is not on title. A written agreement between co-owners is *not* required.³

- Everyone with an "interest" in the property is a defendant, including lenders and lienholders, although these are usually "silent" defendants who stand by, awaiting a final result.
- Absent a settlement by the parties or where the court orders that the property is "acreage" that can readily be divided, the property will be sold by a referee and/or a broker, subject to a court confirmation and possibly an overbid (the right of a stranger to come into court with an offer higher than that which was negotiated by the referee on the open market), with the proceeds of sale to be divided by the court.
- All costs of sale, generally including attorneys' fees of *all* parties, are paid before the proceeds are divided between the owners, usually on a pro-rata basis.
- The partition action may also include an accounting of each party's contributions or improvements, an adjudication of claims of "waste" by one or more parties and related claims of money owed or contractual obligations breached.

Concurrently with this initial review, the lawyer and the client both must pay close attention to the difficulties that will arise if the partition process is used to resolve the co-ownership conflict. Partition cases usually present numerous practical difficulties, and these concerns should be kept closely in mind when reviewing the statutory provisions.

These problems may include a long delay before the court actually orders the property sold, difficulty in preparing and marketing a property for sale in the midst of a conflict, the minutiae of the financial records if there is any claim for excess reimbursement and the abundance of individual contractual claims. Add to this the problems of occupying, managing and paying for the property during the time it can take for the matter to be resolved, and it should be clear that some quick and practical solutions are needed.

After analyzing the seemingly streamlined procedures of partition in light of the particular problems facing your client, it is likely that you will recommend that the client first pursue options other than a partition sale.

III. TYPICAL CLIENTS AND THEIR PARTICULAR NEEDS

Although each configuration of clients warrants a different type of resolution, experience teaches that there are recurring

features common to certain types of co-ownership arrangements. Since it is often those features of the co-ownership which create many of the client's problems, these same features should, hopefully, help to shape the solutions.

A. The "Shotgun Marriage"

Many real estate divorces involve "shotgun marriages"—i.e., where people with no prior relationship have joined together to buy a duplex or an apartment with a friend, new lover, social acquaintance or distant relative—usually because of the high cost of real estate. It is unlikely that these co-owners ever saw an attorney or signed a co-tenancy agreement, or if they did, they probably have not been following it carefully. For these clients, a quick business-based solution often works best.

B. The Long Term Relationship

Conversely, other real estate divorces involve long-term relationships of a more intimate nature. There is frequently a closer emotional tie but because of the closer relationship, there may be a greater disparity between the presumptions of the title or co-tenancy agreement and the financial realities of the arrangement. Unmarried partners, especially gay and lesbian couples who are concerned about will contests from distant relatives, often choose joint tenancy for inheritance reasons without having any real idea of the equal-ownership presumption they are creating.

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Moreover, long-term couples frequently become more generous over time than they initially anticipated or than is implied by the documents. Co-owners who are members of an extended family may be overly flexible and informal in their dealings with one another. Then, when a dispute arises they may regret the obligations they have created and bemoan the lack of documentary evidence supporting their claims. For divorces involving a long-term personal relationship, a more comprehensive kind of mediated resolution may be necessary, one that deals with the emotions as well as the finances.

C. Cases of Financial Hardship

In those cases where the financial results of a real estate divorce will be devastating, other kinds of solutions may need to be developed. For instance, if there is to be a forced sale at a down time in the market, many clients will lose their entire investment and will never again own real estate. The thought of paying \$20,000 in attorneys' fees and facing a two-year lawsuit

will be disastrous—and surely something they never anticipated. In these situations, you may want to consider postponing the sale, renting the property out or reallocating the financial burden to the party who can best shoulder the hardship.

If none of these approaches will work, selling the property may be the only alternative, and unless some very quick and equitable solutions are found, the financial consequences of protracted litigation will only add to these horrible consequences. Practical advice about whether to retain or dispose of the property may be as important as any legal analysis.

IV. FINDING SOLUTIONS: A STEP-BY-STEP GUIDE

A. The Immediate Challenges

Whatever your client's particular situation, there are certain questions and problems that will demand everyone's immediate attention. If the parties have a cotenancy agreement, many of these details should be spelled out and your task will be far simpler. In such a case, your primary challenge will be enforcing the terms of the agreement.

1. Joint Tenancy Issues

The first issue is how title is held. If the property is held in joint tenancy, your client should consider immediately severing the joint tenancy to avoid having the property pass to the co-owner in the event of a tragedy prior to the partition. This is a simple matter of recording a deed so stating. Before severing the joint tenancy, however, be sure to look at a copy of the existing deed rather than simply taking your client's word as to how title is held.⁴

Remember, if your client chooses to sever the joint tenancy, make sure the client either has a valid will in place to establish who will receive the property in case of a calamity or understands the consequences of intestacy. Also, be certain to remind your client, in writing, that this change will also cut off *his* automatic right to inherit the property if the co-owner dies.

2. Possession Disputes

The second immediate issue is that of possession. Unless there is an agreement to the contrary, all co-owners have a legal right to occupy the property. This can create some very intense conflicts. In a large group co-tenancy, chances are that each co-owner has the right to possess his or her unit and a duty to keep making pro-rata payments, and so possession is not likely to be a problem. For single-family residences, however, possession is bound to be one of *the* hottest issues. Each situation will demand its own solution, but some things are certain:

- Since neither party has the right to "evict" the other in a summary court proceeding, an agreed-upon solution is always the best.
- If one person is moving out, the parties should sign an agreement stating that vacating the property is not a concession regarding ownership rights; if both plan to stay, the logistics of sharing the house should be thoroughly discussed and documented.
- Since the vacating party will incur rental costs elsewhere, some written agreement regarding an adjustment to the

payment arrangements is usually justified; keep in mind that monthly payments for the mortgage should probably be allocated differently than recurring tax obligations or special repair expenses. Often the occupying party will pay an amount equal to the fair rental value, with the remaining monthly obligations shared equally.

- A detailed agreement regarding access to the property and the disposition of personal possessions should be formalized.
- A time line for resolving ownership issues should be proposed, and if possible, a non-judicial process should be agreed upon.

If possession disputes escalate and no compromise can be achieved, there are two methods of obtaining judicial assistance. First, if a partition action has been filed, either party can seek a temporary restraining order and/or an injunction "ejecting" a co-owner pending trial. While it may be difficult to meet the statutory requirements for an injunction absent waste or threats of violence, chances are the court will try to find an equitable solution. Even more likely, the filing of the papers alone will prompt the attorneys to work out an appropriate interim solution—though this is an expensive way to get the parties' attention.

In extreme cases where violence occurs or is threatened, there is a statutory solution that sometimes solves the problem: seek a civil restraining order requiring the "problem" partner to vacate the premises—assuming that your client isn't the one causing the problems. Some courts are reluctant to issue such an order, seeing it as an end-run around the ejectment process; therefore, this strategy probably will only work where there have been incidents or threats of violence or damage to the property. Make sure that you make it clear to the court that the parties are cohabitants: A recent case holds that domestic violence prevention orders under Civil Code section 6300 are not applicable to a subletting or boarder situation, as these are not the "household members" being protected under the domestic violence laws.⁵

Nonetheless, if your clients find themselves in what is essentially a domestic violence situation, seeking a restraining order is a low-cost solution that definitely should be considered. Even if the petition never gets as far as a court hearing, initiating the process is often very effective at forcing the parties to resume negotiations and to work out their own solutions.

3. Structure the Interim Finances

The third immediate challenge is to resolve the inevitable disputes about interim finances. Absent an ouster, all owners have a continuing duty to pay their pro rata share of the financial obligations regardless of possession, but rarely is everyone willing to do so in the middle of a break-up—especially a domestic break-up. An owner out of possession can argue that his or her obligations should be offset by the rental value inuring to the benefit of the other owner.⁶

Unlike the readily available procedures for married couples, it can be very difficult to get a court's attention during the first few months of a partition lawsuit. It is, therefore, best to work out an interim arrangement that reflects the practical realities of the parties' situation. If one person has moved out and is incurring additional rental costs, the remaining person should pay more of the ongoing costs—especially if the total costs are less than the rental value of the property. However, if one party has

vacated the property voluntarily (as opposed to as a result of an ouster or a TRO) and the ongoing property costs exceed the rental value, then it is fair that the vacating owner contribute some portion of the monthly upkeep costs. In order to protect the vacating party, however, it is important to have a written agreement that allows for a subsequent accounting and a balancing of the property's books.

If one party simply refuses to pay his or her equitable share of the ongoing property costs, there are really only three possible legal solutions available to the other party: (1) "advance" funds on behalf of the non-paying owner and make a claim for reimbursement at the final allocation of funds or buy-out; (2) seek an injunction forcing the delinquent party to pay his or her share; or (3) let the payments fall behind. Surprisingly, depending upon the equity in the property and the risk to the parties' credit records, letting things slide may actually be to everyone's benefit. A pending foreclosure is certain to get everyone's attention, and it may be just what is needed to bring the parties to a quick resolution.

B. Assessing the Areas of Conflict

Once these immediate matters have been addressed, your next task is to assess what the conflict is truly about. Doing so requires certain extra-legal skills, as oftentimes the real conflict is not what is presenting itself as the apparent conflict. What appears to be a dispute over the property's value may actually be a means of stalling an inevitable move-out; a battle over the value of a party's contribution may be a surrogate for a conflict over perceived emotional betrayals. This is especially true if the co-owners are former lovers, in which case you may find yourself dealing with something that is more of a domestic relations dispute than a real property matter.

Conducting this assessment usually requires communication with the opposing party, either through his or her attorney or directly with the other party if he or she is not represented by counsel. Your own client is often the worst evaluator of these conflicts, especially if it is in your client's interest to minimize his or her partner's point of view. Thus, I always recommend making a phone call, writing a letter, or convening a meeting before making any strategic recommendations to the client. Even if the communication does not result in any settlement, it is your best opportunity to learn firsthand what the fight is really about. That is important, since correctly assessing the nature of the battle is essential for designing an appropriate resolution process.

On that note, I frequently recommend that the parties who were or are involved in a personal relationship consider counseling, to try to separate the emotional issues from the practical and legal ones. Fighting over real estate rarely is helpful in solving emotional crises, and even though you need to be fully mindful of the relationship issues, it is usually better to resolve them separately. In fact, sometimes you may want to try to put the real estate discussion "on hold" for a few months while the counseling goes forward, as it generally is far easier to resolve the real estate disputes after some time has passed. Setting up an interim agreement and identifying the issues to be resolved, however, is essential to making this postponement a productive rather than a destructive hiatus.

C. Resolving the Procedural Questions

The next step is to try to agree on a process for resolving the conflicts. As an alternative to proceeding with a partition action

in Superior Court, you should first consider either (1) direct negotiation between the parties; (2) represented negotiation by the parties' attorneys; (3) mediation with advocates or attorneys present but without a third-party mediator; (4) mediation with a neutral third-party, with or without counsel present; (5) non-binding arbitration; or (6) binding arbitration.

1. Direct Negotiation

Each process has its distinct advantages and disadvantages. Your clients probably have already tried direct negotiation, and unless the stumbling blocks can be overcome quickly, it is unlikely that more negotiation alone will work. However, if one of the other methods can resolve a particularly thorny problem and the parties genuinely feel the sticking point has been resolved, or if consulting with lawyers and letting some time pass has calmed the parties down, it is surprising how effective direct negotiation can be, even without anyone else in the room. If your client intends to follow this path, however, make sure he or she is well prepared by you and that whatever is agreed to is contingent upon your final approval.

2. Represented Negotiation

Represented negotiation, the most common method of resolving these problems, will work only if: (a) both sides use lawyers who know the law and can work rationally towards a solution; (b) all parties are ready to resolve the problem and will listen to their counsel and follow through on the agreements they make; (c) the clients can afford the attorneys' fees associated with protracted negotiations; and (d) the practical "status quo" is stable enough that the parties can tolerate several months of wrangling.

It is typical—even where only a single-family residence is involved—that represented negotiation will take several months and cost each client \$2,000 to \$5,000 in attorneys' fees. Why so long? First, each party generally spends three to five hours with his or her own attorney, evaluating the situation and learning what the results of litigation are likely to be. Then, each side presents its first proposal, usually in letter form, and the other side evaluates and responds to the proposal. Each "round" usually involves a few hours of letter writing, a few hours of client consultation and a few hours of discussion between the attorneys.

Even in the most amicable of dissolutions, two or three "rounds" of negotiation over the big items is typical in domestic disputes. And, in the midst of trying to resolve the big issues, you will probably spend a few hours dealing with smaller problems like necessary repair bills, possession of a car or vitally important equipment or payment of property taxes. Then, if an agreement is reached, a settlement agreement needs to be drafted and implemented.

Therefore, one of the most important things you can do prior to entering into this process is to help your client determine whether it is likely to be worth the time and money involved. In helping your client to answer this question, pay close attention to everyone's behavior. Be attentive to subtle clues of irrational behavior, and make sure your client is tracking the process closely. If it looks like the effort is going to be a waste of time, cut it off early before your client has exhausted his or her litigation funds.

3. Mediation

Mediation is always useful when both sides are represented at the meeting, even if the case isn't resolved. Everyone will learn an enormous amount about the other side's position. You also get to assess the opposition's character and witness potential, and you learn how your own client handles the pressure of a direct confrontation. If you cannot get your client to participate in mediation, you should be certain to explain how much more expensive the formal discovery process can be.

Even with the most reasonable attorneys on each side, it is most likely that a third-party mediator will need to be present for the process to succeed. The reasons for this are psychological and procedural as much as legal; a savvy "neutral" can point out the flaws in everyone's biased reasoning and can undermine even the most arrogant party's position. The mediator also can discern areas of compromise that can clear the air, at least

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somewhat, thus allowing the parties to move on to resolve the more difficult conflicts. Most importantly, the mediator can tone down aggressive attorneys and communicate directly with the clients about the very certain costs and the very uncertain outcomes of a partition lawsuit.

Selecting the appropriate mediator is especially important. It is essential that the mediator be familiar with the real-life workings of real estate, so he or she can present practical solutions. It is equally important that both parties feel comfortable with the mediator, which might require that you discuss the mediator's race, gender or sexual orientation. I prefer an "aggressive" mediator who will push the parties a bit, rather than allow everyone to vent for days on end. Obtain references for any proposed mediator and spend some time talking with the mediator, to be certain that he or she is the right person for the job.

4. Arbitration

At a certain point it may become clear that neither negotiation nor mediation is working, and then it is time to move up the "ADR" ladder. I do not recommend non-binding arbitration, because it is too expensive and time-consuming for these types of cases. Binding arbitration is therefore the best option, and I strongly recommend it to almost all of my clients who reach this point. There are really only two situations where binding arbitration is not appropriate: (a) if your client has a good legal argument but a poor equitable position, where you may need an

appellate court to rule in your favor and it is unwise to waive that right; and (b) if your best strategy is to slow down the process and your client can afford to pay the cost of litigation, the court system may be just where you want to be.

Be careful, though, as pushing a weak case into litigation can end up costing your client a great deal of money if the effort is unsuccessful. Moreover, in extreme cases, the partition statutes allow the court to allocate the costs of a partition lawsuit to one party, if the judge feels the delay was without justification.

If both sides can agree on binding arbitration—and this may take some effort to achieve—you have the choice of either hiring a private individual or using one of the established panels such as JAMS or AAA. If the parties are relatively amicable and the issues are narrowly focused and/or particularly sensitive or personal, I prefer using a self-employed arbitrator. In these situations you probably do not need the formality or “legitimacy” of an institutional host or a retired judge, and a “solo” will usually be less expensive and more comfortable for everyone involved.

On the other hand, if there are major conflicts, large sums of money or particularly complex issues involved, using a retired judge or a senior arbitrator under the aegis of a JAMS, AAA or a similar program can be extremely helpful. Do some comparison shopping, estimate the likely fees, think about the scheduling options and talk candidly with your client about the likely scenarios and possible disadvantages. Choosing your arbitrator is probably *the* most important decision you will make in this process, so be as careful as you can in your selection.

D. Practical Solutions to Substantive Problems

Once you have sorted out the issues and established a fair resolution process, it is time to focus on the substantive issues. Whether you are in the ADR process or stepping into superior court, chances are your dispute will fall into one or more of the following categories:

1. Unequal Contributions

The biggest conflicts between co-owners usually result from unequal contributions by the parties. Often these contributions may or may not be consistent with the provisions of the deed or a tenancy-in-common agreement, especially for domestic couples. Remember, the deed only creates a presumption of ownership, which can be overcome by proof of an agreement to the contrary.⁷ Making matters even more complicated, oral and implied agreements can be enforced if proven. In addition, case law does not resolve whether reimbursements for excess contributions for improvements should be based on the value of the improvements at the time of sale, rather than the cost of the improvements.

2. Methods of Separation

The second most common conflict is whether one of the owners will buy out the other's interest in the property, and if so, on what terms. An internal buy-out generally should be your first choice, as it is by far the least costly solution. It does, however, present three special problems: (a) who has the first right to buy out the other, (b) how the value is to be established, and (c) how the costs of the transfer are to be allocated.

(a) The Buy-out Option

Unless there was an agreement giving one party the first right to buy out the other's interest in the property, this is bound to be a difficult issue. Determining who has first right to buy out the other must, necessarily, be based upon who is best able to purchase the other's interest. If only one party is in the financial position to buy the property, the question has been effectively answered. The second most important factor should be who genuinely has the greater need for the property. If the house is located near one party's work, has special equipment (such as a home office or an environmentally sensitive interior), that should be important to the decision. And last, the parties should discuss who is willing to pay the most for the right to stay on as sole owner. Some clients conduct an “auction” here, offering first rights to whomever is willing to pay the most above the agreed-upon value.

(b) Valuation

As to valuation disputes, an appraisal is a good place to start, so that each party can evaluate whether a buy-out is feasible and obtain a rough sense of what the price should be. Keep in mind that broker's estimates are usually 10-20% higher than bank appraisals. Remember too, that the party buying out the other probably will face subsequent brokerage fees when he or she eventually sells the property. Some kind of compromise will be necessary, if the parties had no prior agreement on how to handle these issues.

(c) Allocating Transfer Costs

After the estimated value has been set, the issue of whether to deduct brokerage costs must be addressed. Even if a broker is not being utilized at this time, whoever buys the property will probably need to use a broker later on, in connection with a future sale. Thus, in my opinion, the anticipated brokerage cost should probably be split equally between the parties, to reflect the uncertainty about what the buyer actually will do with the property.

From this figure subtract the mortgage due and the certain costs of transfer, and you will have a general range of the property's equity. That is the value that should be allocated between the owners, based upon their pro-rata ownership interest. Determining this value should help resolve any lingering debates about who has the first right of purchase. If only one party can afford to buy out the other one and both parties are willing to resolve the dispute in this manner, the buy-out solution should be chosen.

If neither party has the financial ability to buy out the other one, internal financing should be considered, though it will rarely be a workable option with parties in conflict. If both parties want the property and each can afford to acquire it from the other, several approaches can be used. One can (1) hold an “auction” between the parties and sell to the highest bidding co-owner, (2) enter into mediation as a means of breaking the logjam, or (3) sell the property to a third party. Flipping a coin, as some have suggested, is simply trivializing a major issue.

One of the best methods of breaking this stalemate is to see if the purchasing party will absorb the possible future brokerage costs or pay a higher price for the other's interest, thereby providing the selling party with more funds than she or he would receive in a brokered sale to a third party. Other methods include paying the moving costs of the departing party or grant-

ing concessions on other matters in dispute. Explore all of the possible options, and only move on to a third-party sale when the internal buy-out options have been exhausted.

3. Handling the Costs

Regardless of which solution is chosen, the real estate divorce is going to be expensive for everyone involved. In addition to the brokerage fees for a sale to a third party, there certainly will be transfer taxes and possible escrow fees, and often loan assumption fees and the cost of a new title policy. Part of your job is to try to reduce these costs wherever possible, and here are some practical suggestions:

- If the property is already listed for sale through a broker, try to convince the broker to accept a fixed fee if either party buys out the other one during the marketing process. This can be complicated, as the listing agreement may still be valid and there may be issues of outside buyers having made offers.
- Select a broker who has everyone's trust and who can resolve practical conflicts about marketing and selling the property. This can reduce the need for attorney involvement during the sale process.
- If there is going to be an internal buy-out, consider handling the escrow through an attorney or private escrow service rather than using a title company. This can be especially complicated, as the escrow agent is the agent of both parties. However, if everyone consents it may be the most affordable option. This approach will generally lower the costs, and allows for the option of not obtaining title insurance, which may not be necessary in every situation. If your client elects to go without new title insurance, however, be certain to warn of the possible consequences if a judgment lien is later discovered. Also, if the escrow is not being handled by a title company, make sure the quitclaim is executed at a law office or escrow company, so that you can attest to the validity of the deed if its authenticity is later challenged.
- Inquire whether any city transfer tax can be reduced or avoided, for example, by applying for a domestic partnership exemption or characterizing the value of the property as low as possible.
- For an internal buy-out, inquire whether the bank will allow an assumption or release of a co-borrower without the need of a complete refinance; if this won't work, explore the option of having the selling party remain liable for the loan. If you opt for this approach, be sure to obtain an indemnification from the purchaser in the buy-sell agreement.
- Evaluate the tax consequences to both parties. Sometimes these can be shifted to maximize the total benefit to all parties.

I always try to sell the principle of the "no-fault" real estate divorce to my clients. The costs of sale, including any loss of equity associated with selling at a bad time in the market, should be borne by all parties equally. Rarely is a break-up only one

person's fault, and it is very rare that a court will ever assess these costs or losses to one party alone.

4. Implementing the Solution

Once an agreement has been reached in principle—either a buy-out or an agreement to sell to a third party—I strongly recommend that a formal buy/sell agreement (or, if appropriate, a settlement agreement) be signed by the parties. Such an agreement should insure that there will not be any future disputes between the parties. It typically includes the following provisions:

- a summary of the past financial transactions involving the property;
- if the transaction is a buy-out a detailed description of the financial structure of the buy-out specifying cash payments, installment payments and/or loan assumptions;
- upon the performance of the provisions of the agreement, mutual releases of all parties as to all issues, including contract and tort claims arising out of the relationship;
- in case of an internal buy-out, an assignment of all rights and liabilities regarding the property, including any rental agreements, service agreements, easements and the like;
- in case of an internal buy-out, detailed procedures for the payment of funds, allocation of costs of transfer, delivery of the deed, the selling party's move-out and possible indemnification for an existing mortgage;
- if the property is to be sold to a third party, detailed procedures for listing the property, covering costs in the interim, preparing the property for sale, marketing it and handling the escrow, including a "bottom line" price that both parties will accept and a formula for allocating costs and distributing proceeds of the sale; and
- conflict resolution procedures for everything covered in the agreement.

This document will serve several purposes. It will force the parties to address the myriad of details inherent in a complex real estate divorce, and it will insure that the basic steps have been agreed upon. Moreover, resolving these issues will generally "clear the air" and allow the parties to move forward to resolve the even greater number of lesser matters, such as moving the furniture, applying for a new loan, dealing with a broker and the like. It is astounding how cooperative people can become once they have resolved their big issues; formalizing the agreement in writing can be extremely useful in advancing this process.

Having a signed agreement also reduces the likelihood that either party will attempt to renegotiate the deal. In many instances it can also serve as escrow instructions if you elect to use a formal escrow. In addition, if you have included a mediation and/or an arbitration clause, you will have an established procedure for resolving any new conflicts that might arise. It may add a few weeks or a few hundred dollars in attorneys' fees to draft and negotiate such an agreement, but my clients and I have never regretted doing so.

It usually is necessary for you to remain involved throughout the escrow process, to be certain that the deed has been properly

recorded and the moneys properly paid. It also is likely that there will be several unanticipated conflicts to resolve, such as disputes over extra fees or conflicts over the mechanism of the actual move-out. I usually encourage my client to tackle as many of these problems as is feasible, to keep costs to a minimum, but some ongoing involvement by the attorneys is almost inevitable.

V. IF PARTITION YOU MUST

Despite all your best efforts, partition litigation may turn out to be the only way to separate the embattled co-owners. If that is the case, there are a few practical steps which should expedite the process and save your client some money.

First, think carefully before adding tort and contract causes of action to your partition complaint. Your client can always claim reimbursement for the value of improvements under the partition statutes⁸ or assert unequal ownership interests based upon the parties' actions and promises. Adding other causes of action, however, can complicate the trial procedure and confuse the allocation of attorneys' fees. Adding extra causes of action may not, therefore, result in any real benefits for your client. If you choose, however, to omit tort claims from your complaint, be sure to explain your reasons for doing so to your client in writing.

Second, be careful about how you handle the requirement of naming all "interested" parties as defendants. If you name *and serve* the bank holding the mortgage or any other similar lienholders, they may soon get involved in the litigation and then demand a hefty payment for attorneys' fees. This can be avoided either by getting a stipulation from the outset that they need not appear, assuring them that all obligations will be kept current, naming them as "Does" and adding them later as needed, or delaying service on them as long as possible.

Third, make every possible effort to segregate the property-selling issues from the distribution-of-proceeds conflicts. See if you can stipulate to a selling procedure immediately, as once the true amount of proceeds are known and the money is sitting in the bank, you may be able to settle the allocation issues—or at least agree to binding arbitration for these money disputes. I often have the parties meet directly with a skilled and personable real estate broker, to see if the broker can convince them to proceed early with a sale at a reasonable price. In addition, if you can agree on a sales procedure you will avoid the need for a referee to supervise the sale, and thus reduce the professional fees of the sale.

Fourth, be creative about finding a way to have your preferred sales procedures ordered early by the court and postponing until later a trial on all other issues. In many counties you can get a quick trial date by labeling your case a "short-cause" one-day matter, on the grounds that the more complicated claims will only be heard after the property is sold. This approach should also enable you to avoid referral to non-binding judicial arbitration. Alternatively, you may want to seek summary adjudication of the right to partition and include in your proposed order specific procedures for the sale. If you end up in front of an active judge who is willing to "take charge" of the process, you may thus be able to jump the queue in getting a judge's help in moving the case forward.

Fifth, stress to your client that (a) his or her hours of maintenance probably will not be reimbursed; (b) the other side probably will not be ordered to pay all of the attorneys' and other professionals' fees; and (c) the other side probably will not be forced to finance your client's efforts to buy the other party out, but rather, the court will order the property sold to a third party.

Judges hearing these cases are extremely reluctant to spend a great deal of time on such adversarial claims, and there is rarely sufficient evidence on either side to support them. In almost every case it is far better to cut a deal and move on.

Sixth, if your client does have a strong case for reimbursement, be prepared to show how her or his effort has increased the value of the property—not just that money was spent. A bizarre paint color or a unique cabinet system may not increase the value of the property, and there is no right of reimbursement for non-essential contributions that do not increase the property's value.

Seventh, if you are fighting over whether to characterize an excess contribution as a gift or a loan, be prepared to present evidence of the parties' entire relationship, personal and financial. The judge will need to see a convincing picture of the overall economic and financial relationship to evaluate the competing versions of the real estate arrangement. This can make for a lengthy and painful trial, and you and your client must both be prepared for the process—as well as the unpredictable results.

VI. CONCLUSION

It is essential that your client remember that dissolving a real estate relationship is primarily a matter of practicalities and finances, even where a personal residence is involved. The greatest loss in any real estate divorce derives from the hard realities of the dissolution itself, and arguing over such matters as the sale procedure or reimbursement for repairs will not significantly reduce the personal and economic pain of the separation. To the contrary, it probably will only increase the parties' attorneys' fees and reduce their share of the sales proceeds.

Your job as a co-owner's attorney is to maximize your client's financial recovery with the least amount of personal and practical pain. Leading your client towards realistic and efficient solutions—which includes making real compromises and avoiding procedural delay or adversarial battles—is, in almost every situation, the most direct path to that goal.

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Endnotes

1. Cal. Civ. Proc. Code § 872.010 *et seq.*
2. *Whorton v. Dillingham* 202 Cal. App. 2d 447 (1988).
3. *Estrada v. Garcia* 132 Cal. App. 2d 545 *Wallace v. Daley* (1955) 220 Cal. App. 3d 1028 (1990).
4. See Matthew Bender's California Legal Forms, Transaction Guide, Volume 6, Comment to Form 27.21.
5. *O'Kane v. Irvine* 96 C.D.O.S. 5081 (1996).
6. *Hunter v. Schultz* 240 Cal. App. 2d 24 (1966).
7. Cal. Evid. Code § 662.
8. Cal. Civ. Proc. Code § 873.220; *Wallace v. Daley* 220 Cal. App. 3d 1028 (1990).