

## EMOTIONAL AND TECHNICAL CHALLENGES TO MEDIATING PARTITION ACTIONS

Partition actions come in many shapes and sizes and can be successfully mediated if the goals of the parties become part of the resolution strategy and technical issues are addressed.

Partition is the physical division or sale of real property held by two or more co-owners. The equitable remedy is governed by CCP §§872.010-874.240. Courts have discretion to “fashion” a fair result, but because partition is a matter of right, they have no discretion to deny partition, absent a preexisting agreement between co-owners not to partition, or conduct amounting to waiver or estoppel.

Partition may be necessary where two families purchased a vacation home together. Their children have grown so one family no longer wants the property. One of two individuals who bought a duplex for investment wants to trade up to a more sophisticated investment whereas the other remains content to own the duplex. There may be no real “falling out”. Their needs and interests are simply no longer aligned.

A more contentious scenario might involve partners who developed, own and operate commercial property. One accuses the other of neglecting the property, not accounting for business expenses, concealing business opportunities or making deals that conflict with their business. The relationship has soured. The partnership may be readily dissolved, but the fate of the real property remains.

Nowadays unmarried, cohabiting or same -sex couples buy property together. Some may later marry, others not. When the relationship falls apart, recrimination may give rise to a flood of emotion not dissimilar to a true marital dissolution. Perhaps one who sold his or her home may have nowhere to return. Add to any “nontraditional” relationship the entry of a new “partner” and complications abound! Whilst the Family Code considers as community any property acquired during marriage, these scenarios are not governed by the Family Code and will be subject to division or sale under the partition statute.

Family trust disputes often result in partition actions. Consider four adult siblings, all beneficiaries under their deceased parents’ trust, which includes the former family home or other property. Three accuse the eldest, a successor trustee of mismanagement, self-dealing, comingling her own funds with trust funds and making gifts to non-beneficiaries. They demand sale of the real property and an accounting, seek to “surcharge” their sister’s interest with the alleged losses and claim attorney’s fees for prosecuting the partition/accounting action.

Given the procedural requirements and attendant expenses of partition actions, parties and their advisors should consider the alternative of mediation to explore voluntary partition by sale, physical division or appraisal and buy-out.

Many partition disputes require at least two mediation sessions. The first may involve the circumstances surrounding when, why and how the relationship was established and needs to be terminated. In this session personal attacks and recriminations, typical in marital dissolutions or will contests may predominate. Emotional parties may cast blame for the current situation, without realizing such tactics are not conducive to reaching what must usually be a “business judgment” decision. The mediator may encourage some venting but should soon move to reality checking with parties, reminding them that the court could impose a forced sale if they can’t or won’t negotiate a fair and practical solution.

Potential pitfalls are best raised in pre-mediation telephone calls with the mediator where an efficient and cost-effective process is discussed. Liens and encumbrances on title will affect an owner’s ability to negotiate a sale, physical division or a buy-out. Although an existing mortgage does not automatically bar partition the lender may object and has the right to intervene in the partition lawsuit to request the court to adjust its rights and obligations vis-à-vis all co-owners. Lenders will not generally permit one or more co-owners without strong financial statements to take over the loan while releasing others. Pre-payment penalties may hamper negotiations. To be productive lenders and other lien holders should participate in mediation, which may involve several “mini mediations” with them.

Not surprisingly, co-owners do not always think through many of these issues when property is first acquired, since the prospect of future disputes may be far from the parties’ minds. When they arise, these issues can cause friction and are often addressed by a court-appointed referee whose fees are paid from the sale proceeds of the property or by the parties. Such added expense may be minimized using a mediator having substantive knowledge in real estate and secured transactions and with the skill to wade through these complex issues.

Other questions explored in an initial mediation will include tax considerations, including IRC§ 1031 exchanges and how the timing of a sale can benefit from market conditions. Escrow fees and commissions must be considered. Will the property be auctioned or sold through private contract? Can the listing price be agreed, will an experienced broker’s opinion suffice or is a formal appraisal essential? Absent an early acceptable offer, will the parties defer to the listing broker to decide the timing and size of price reductions? How can the property be readied for sale and will the parties split the cost or shall it be born in the same percentages as ownership interests are held?

Consideration must be given to the impact of the Subdivision Map Act (Govt. C §§66410-66499.37) if the property is to be physically divided since even a court-ordered physical division is subject to compliance with the act, with zoning and local ordinances and whatever general plan exists. It cannot be overstressed that counsel who represents parties in partition actions should be prepared to confront these issues at mediation and, if necessary, obtain specialized advice before even embarking on a partition action or scheduling mediation.

When one party contemplates buying out the other's interest an appraisal may be necessary to determine value. In a court action for partition, the court-appointed referee will likely choose an appraiser to appraise the property, the parties' interests in it and report to the court. This can be costly and time-consuming. Where the parties have already agreed on a buy-out, but can't agree on value, the mediator's role might expand to suggesting the appointment of two appraisers whose median or average is accepted or who appoints a third appraiser whose valuation is used. The mediator's personal knowledge of the appraisers and their reputations as well as a familiarity with the art and science of appraisal is often instrumental when impasse occurs.

In one buy-out, one strategy discussed by the authors of California CEB *Real Property Remedies and Damages* is to ask the parties to commit to a particular dollar value amount for which they would be equally willing to buy and sell. Thus, with two equal owners, each should be asked to designate a price at which they would be willing to both buy the other's interest and also sell their own interest. Parties unwilling to buy for the same price they expect to sell may have difficulty justifying their position in mediation.

After the first session, a second one is often necessary to deal with ancillary accounting issues. Here too, parties sometimes get wrapped up in minutia, insisting that every penny be accounted for, a process that can take up more time and cost more to sort out than the value of disputed amounts.

Sometimes one co-owner may have contributed the down payment and closing costs whereas another made some or all of the mortgage payments. This will impact who enjoys the mortgage interest or other deductions. Utilities and maintenance expenses and contribution of "sweat equity" become important. Often, written agreements, receipts for materials and records of time spent are usually non-existent. The amounts involved may not warrant the retention of CPAs, yet neither side will give up what each claims as legitimate out-of-pocket expenditures requiring reimbursement. Division of money can lead to heated arguments, threats to scuttle the mediation and potential impasse.

A technically knowledgeable and flexible mediator who patiently employs facilitative and evaluative techniques to shifting dynamics can bring value to the partition process, by creating a roadmap, exploring settlement options and accomplishing the parties' goals. Although the mediation may not end with a "group hug", parties who feel heard, their feelings, needs and interests validated are more willing to compromise.

Malcolm Sher, based in Walnut Creek, is a full time mediator who specializes in resolving real property and business cases involving significant emotional issues. In many of his cases, the disputants are from diverse cultural and ethnic backgrounds. He can be contacted through his web site at [www.sher4mediatedsolutions.com](http://www.sher4mediatedsolutions.com).