

28. PARTITION [Details]

Cross Reference Note:

Law reviews: For article, "Partition Comes of Age", see 50 Colo. Law. 32 (Dec. 2021).

§ 38-28-101. Action - who may maintain

Actions for the division and partition of real or personal property or interest therein may be maintained by any person having an interest in such property.

History:

L. 49: p. 544, § 1. CSA: C. 122, § 24. CRS 53: § 103-1-1. C.R.S. 1963: § 103-1-1.

Case Note:

ANNOTATION

Law reviews. For article, "Joint Tenancy in Colorado", see 26 Dicta 313 (1949).

There is nothing inalienable about the right of partition; and a tenant in common may contract it away. *Twin Lakes Reservoir & Canal Co. v. Bond*, 157 Colo. 10 , 401 P.2d 586 , cert. denied, 382 U.S. 901, 86 S. Ct. 236, 15 L. Ed. 2d 155 (1965). See also *McIntire v. Midwest Theatres Co.*, 88 Colo. 559 , 298 P. 959 (1931).

Partition by tenants in common and joint tenants same. There is no difference in a partition action as to property held by tenants in common and property held by joint tenants. *Merth v. Hobart*, 129 Colo. 546, 272 P.2d 273 (1954).

Partition not imposable by marriage partner following divorce. Partition action may not be imposed by one of the marriage partners upon the other following divorce. *Harrod v. Harrod*, 34 Colo. App. 172, 526 P.2d 666 (1974).

Partition of marital property after the entry of the final dissolution decree is permissible, but the partition order must not conflict with explicit provisions of the decree. In such cases, the trial court is not required to treat the partition as a disposition of marital property but instead may consider the parties' equitable arguments and enter orders to partition the leaseholds equitably to promote the ends of justice. *Wilson v. Prentiss*, 140 P.3d 288 (Colo. App. 2006).

The court's function in a partition action is not to create new interests in property owned by tenants in common, but is merely to sever their unity of possession. *Keith v. El-Kareh*, 729 P.2d 377 (Colo. App. 1986).

Court cannot issue order directing sale of property under partition statute on grounds of "waste" or through its equitable powers where the two parties hold separate concurrent estates and have no interest in common. Federal Deposit Ins. Corp. v. Mars, 821 P.2d 826 (Colo. App. 1991).

This section does not abrogate the common law rule that a life estate interest cannot be partitioned from a successive, non-concurrent remainder interest in the same property. Therefore, as a matter of law, a mother could not partition her life estate in a three-room addition to her daughter's property from the daughter's remainder interest in the addition. Beach v. Beach, 74 P.3d 1 (Colo. 2003).

Applied in First Nat'l Bank v. Energy Fuels Corp., 200 Colo. 540 , 618 P.2d 1115 (1980); Martinez v. Martinez, 638 P.2d 834 (Colo. App. 1981); Fry & Co. v. District Court, 653 P.2d 1135 (Colo. 1982).

§ 38-28-102. Parties

All persons having any interest, direct, beneficial, contingent, or otherwise, in such property shall be made parties.

History:

L. 49: p. 544, § 2. CSA: C. 122, § 25. CRS 53: § 103-1-2. C.R.S. 1963: § 103-1-2.

Case Note:

ANNOTATION

Law reviews. For article, "Joint Tenancy in Colorado", see 26 Dicta 313 (1949). For article, "Partition: A Little-Known Remedy", see 17 Colo. Law. 1063.

Obvious intent of the joinder requirement in this section is that all persons having interests in the real property be represented in the partition action so that they may protect their interests and be bound by the results. Fry & Co. v. District Court, 653 P.2d 1135 (Colo. 1982).

When estate beneficiaries are not indispensable parties. Estate beneficiaries are not indispensable parties to a partition action commenced by the personal representative, where the personal representative is acting on behalf of all the estate beneficiaries to segregate their collective interests in the real property to be partitioned, so that he can perform his statutory duty to settle and distribute the estate expeditiously and efficiently. Fry & Co. v. District Court, 653 P.2d 1135 (Colo. 1982).

Applied in Beardshear v. Beardshear, 143 Colo. 293, 352 P.2d 969 (1960).

§ 38-28-103. Complete adjudication

The court shall make a complete adjudication of the rights of all parties to such property.

History:

L. 49: p. 544, § 3. CSA: C. 122, § 26. CRS 53: § 103-1-3. C.R.S. 1963: § 103-1-3.

Case Note:

ANNOTATION

Agreement not to partition implied. If it appears the tenants in common of a tract of land have formulated plans and entered into agreements in reference to the management of the common property and the plans and agreements are of such a character that to grant partition would be to destroy the mutual agreement of the parties, then an agreement not to partition will be implied. *Twin Lakes Reservoir & Canal Co. v. Bond*, 157 Colo. 10 , 401 P.2d 586 , cert. denied, 382 U.S. 901, 86 S. Ct. 236, 15 L. Ed. 2d 155 (1965).

Court may offset contribution to reach equitable result. Once the property has been divided, the court may then, to reach an equitable result, compute the contribution of each tenant and offset any amount owing against the one-half share held by each tenant. *Martinez v. Martinez*, 638 P.2d 834 (Colo. App. 1981); *Keith v. El-Kareh*, 729 P.2d 377 (Colo. App. 1986).

Applied in *Harrod v. Harrod*, 34 Colo. App. 172, 526 P.2d 666 (1974).

§ 38-28-104. Process, practice, procedure

The process, practice, and procedure shall be in compliance with the Colorado rules of civil procedure then in effect.

History:

L. 49: p. 544, § 4. CSA: C. 122, § 27. CRS 53: § 103-1-4. C.R.S. 1963: § 103-1-4.

Case Note:

ANNOTATION

Law reviews. For article, "Partition: A Little-Known Remedy", see 17 Colo. Law. 1063 (1988).

§ 38-28-105. Commissioners - oath - partition - objections

Upon the entry of any order for partition, the court shall appoint one or more disinterested commissioners who shall take oath to fairly and impartially make partition of the property in accordance with the decree of court. Such commissioners shall view the property and make partition thereof in writing, assigning to each party his share, and shall submit the same to the court for confirmation. Objections may be filed by any party within the time fixed by the court.

History:

L. 49: p. 544, § 5. CSA: C. 122, § 28. CRS 53: § 103-1-5. C.R.S. 1963: § 103-1-5.

Case Note:

ANNOTATION

Law reviews. For article, "Partition: A Little-Known Remedy", see 17 Colo. Law. 1063 (1988).

Substitution of commissioner for refusal to serve. Where a commissioner appointed by the court under the provisions of this section to make partition declines to serve, the court may substitute another person in his place without giving notice to the parties, and, if the appointee is objectionable by reason of coming within any of the exceptions enumerated in this section, the objection may be raised after the appointment, or it may be interposed as an objection to the report before its confirmation. *Jordan v. McNulty*, 14 Colo. 280, 23 P. 460 (1890).

Effect of commissioner's failure to sign report. A commissioner's neglecting to sign and acknowledge the report does not do away with the presumption that he did meet and act with the other commissioners in making the partition. *Jordan v. McNulty*, 14 Colo. 280, 23 P. 460 (1890).

§ 38-28-106. Commissioners may divide land

The commissioners appointed by the court, with the approval of the court, may divide any lands involved in such action into lots or parcels, streets, and alleys and file a map or plat thereof in compliance with law and applicable ordinances.

History:

L. 49: p. 544, § 6. CSA: C. 122, § 29. CRS 53: § 103-1-6. C.R.S. 1963: § 103-1-6.

§ 38-28-107. Sale of property - notice

If the commissioners report and the court finds that partition of the property cannot be made without manifest prejudice to the rights of any interested party, the court may direct the sale of such property at public sale upon such terms as the court may fix. Notice of such sale shall be given in the same manner as may be required by law for sales of real estate upon execution.

History:

L. 49: p. 545, § 7. CSA: C. 122, § 30. CRS 53: § 103-1-7. C.R.S. 1963: § 103-1-7.

Case Note:

ANNOTATION

Court cannot issue order directing sale of property under partition statute on grounds of "waste" or through its equitable powers where the two parties hold separate concurrent estates and have no interest in common. Federal Deposit Ins. Corp. v. Mars, 821 P.2d 826 (Colo. App. 1991).

Trial court abused its discretion in ordering a sale of the subject property without a finding that partition in kind would result in manifest prejudice. Trial court did not find that partition in kind would result in economic prejudice or would be impractical. To the contrary, the trial court ordered an equitable in kind division of the property and specified the extent of necessary easements in the event plaintiffs did not exercise their option to buy defendant's interest. Young Props. v. Wolflick, 87 P.3d 235 (Colo. App. 2003).

Applied in First Nat'l Bank v. Energy Fuels Corp., 200 Colo. 540 , 618 P.2d 1115 (1980).

Cross Reference Note:

For sale of real estate upon execution, see §13-56-201 .

§ 38-28-108. Report - confirmation - distribution

The person making such sale shall make report thereof to the court for confirmation, and upon confirmation, the court shall direct the execution of a proper instrument of conveyance to the purchaser. The court shall direct the distribution of the net proceeds of such sale and any undistributed income from such property among the persons entitled thereto.

History:

L. 49: p. 545, § 8. CSA: C. 122, § 31. CRS 53: § 103-1-8. C.R.S. 1963: § 103-1-8.

§ 38-28-109. Compensation of commissioners - fees and costs

The court shall fix the compensation of the commissioners and the person making the sale and may order the payment thereof, with costs, expenses, and attorney's fees, out of the proceeds of such sale or make any other order which it deems best for the payment of such compensation, fees, and costs.

History:

L. 49: p. 545, § 9. CSA: C. 122, § 32. CRS 53: § 103-1-9. C.R.S. 1963: § 103-1-9.

§ 38-28-110. Powers of court

The court at any time may make such orders as it may deem necessary to promote the ends of justice to completely adjudicate every question and controversy concerning the title, rights, and interest of all persons whether in being or not, known or unknown, and may direct the payment and discharge of liens and have the property sold free from any lien or may apportion any lien among the persons to whom the partition is made.

History:

L. 49: p. 545, § 10. CSA: C. 122, § 33. CRS 53: § 103-1-10. C.R.S. 1963: § 103-1-10.

Case Note:

ANNOTATION

Court's function is to sever unity of possession. A court's function when deciding a partition action is not to create new interests in property held by tenants in common, but is merely to sever the unity of possession owned by the tenants. *Martinez v. Martinez*, 638 P.2d 834 (Colo. App. 1981); *McNamara v. Mossman*, 230 P.3d 1286 (Colo. App. 2010).

Court to assign equal shares to cotenants. In order to allocate to each cotenant his share of the property's enhanced value, the court should begin by assigning each cotenant one-half of the property's stipulated value, and then make adjustments as required by the accounting. *Martinez v. Martinez*, 638 P.2d 834 (Colo. App. 1981).

When partitioning property held by tenants in common, the court should assign one-half of interest in the property to each tenant, and not grant a greater share of the property to either. *Keith v. El-Kareh*, 729 P.2d 377 (Colo. App. 1986).

Then offset amounts for contribution. Once the property has been divided, the court may then, to reach an equitable result, compute the contribution of each tenant and offset any amount owing against the one-half share held by each tenant. *Martinez v. Martinez*, 638 P.2d 834 (Colo. App. 1981); *Keith v. El-Kareh*, 729 P.2d 377 (Colo. App. 1986).

Where expenditures have been made by a cotenant improving jointly owned realty, that cotenant will be allowed the amount by which the improvements enhance the value of the property but not the cost thereof or the original amount expended in making the improvement. *Martinez v. Martinez*, 638 P.2d 834 (Colo. App. 1981).

Trial court abused its discretion in granting plaintiffs an option to purchase defendant's interest in the subject property. This section does not grant a trial court carte blanche to provide partition remedies, particularly where that remedy would contravene the provisions of §38-28-107 . Here, the court found that the parcel could be divided equitably. Neither party occupied the parcel as a primary residence. Furthermore, the trial court granted the plaintiffs, who originally sought to sell their interest in the parcel, an option to buy defendant's interest, while defendant sought to retain his interest in the property in kind. Thus, the trial court abused its discretion in granting the option to the plaintiffs. *Young Props. v. Wolflick*, 87 P.3d 235 (Colo. App. 2003).

Applied in *Harrod v. Harrod*, 34 Colo. App. 172, 526 P.2d 666 (1974).