

Real Estate Law: As property co-owners, common ground can be hard to find

The creator of the idiom “what’s mine is yours...” likely didn’t co-own property with another person.

Real property is often owned by two or more persons as tenants in common, each owning an undivided interest in the property. Such co-owners typically have differing goals and objectives regarding the property, which can lead to disagreement and disputes. Entering into a Tenancy in Common Agreement (“TIC Agreement”) at an early stage can establish a framework for resolving such disputes. Absent a TIC Agreement, the legal remedy of partition may provide the means, albeit inefficient, to end such disputes.

Generally, each tenant in common owns an undivided interest in a parcel of real property with the full right to use and occupy the property. Such interest may be freely transferred, mortgaged, and bequeathed by a co-owner and is subject to attachment by that co-owner’s creditors. Absent an agreement of the parties, it is difficult to determine the legal obligation of a co-owner to contribute to specific replacements, repairs, and maintenance. A TIC Agreement can help minimize the risks to each owner by clarifying exactly what is to happen upon changed circumstances impacting an owner or the property.

TIC Agreements typically contain agreements by the co-owners regarding: (i) how the parties will decide upon, and contribute to, needed repairs and maintenance; (ii) how the parties will share property taxes and insurance costs; (iii) what happens if a co-owner doesn’t pay its share of such costs; (iv) any limitations on how the parties will jointly use and enjoy the property; (v) any limitations upon a party’s ability to mortgage, lease or otherwise encumber the property; (vi) transferability restrictions which identify what happens when



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a co-owner desires to sell, dies, or becomes subject to an action that could result in the attachment of the property interest; and (vii) the waiver of the right of partition. TIC Agreements should be recorded in the applicable county clerk’s office. A properly drafted and considered TIC Agreement, while not preventing disputes that typically arise among co-owners, can provide significant value by establishing a framework for determining how such disputes are to be addressed and resolved. Instances where TIC Agreements can be particularly beneficial include the purchase of property by unmarried persons and the ownership of vacation property by siblings.

While the best practice, the vast majority of tenants in common acquire property without the benefit of a TIC Agreement. Instead, they rely upon their relationship with the other co-owner(s) to handle issues. Such relationships often sour and disputes typically arise. In those circumstances where co-owners are unwilling or unable to reach an agreement on anything and where one co-owner “wants out” and the other co-owner(s) refuse, partition may provide the remedy of last resort.

Article 9 of the New York Real Property Actions and Proceedings Law codifies an Action for Partition. Provided that the right to seek partition has not been previously waived in writing, any “[p]erson holding and in possession of real property as a joint tenant or tenant in common ... may maintain an action for the partition

of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners.” In a partition action, a preliminary determination is whether the property can actually be divided so a co-owner can receive full ownership of his or her allocable share. While such a physical division may work for vacant and unimproved property, it often proves difficult when the land is improved with buildings and structures. Where a physical division would prejudice the other co-owner(s), a successful partition action concludes in a court ordered sale of the property at auction, with the net proceeds (after an accounting) distributed to the co-owners in accordance with their respective interests in the property. While a partition action can be effective to extricate a co-owner from a tenancy in common, it’s not necessarily efficient. A partition action is a lawsuit requiring lawyers, pleadings, court hearings, discovery and, if contested, can take many years, and cost all parties significant sums. And, if the partition action is successful, the end result is an auction of the property, which is not necessarily designed to generate the same price as a typical brokered sale. Finally, in the circumstance where some co-owner(s) don’t want to sell, they may have to bid at such an auction just to keep the property.

Owning real property as tenants in common is a legal relationship. Entering into well considered agreements at the outset can best protect a person’s interests and hopefully avoid painful circumstances later on.

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