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## TENANCY IN COMMON – PARTITION AVAILABLE NOTWITHSTANDING RIGHT OF FIRST REFUSAL PROVISION

Yet another recent California Court of Appeal decision highlights the need for precise drafting of real estate documents. In *LEG Investments v. Boxler*, 2010 Cal. App. LEXIS 442 (April 1, 2010), the court affirmed the right of one co-tenant to obtain judicial enforcement of its right to “partition by sale” despite inclusion of a right of first refusal provision in the co-tenancy agreement between the parties. The court interpreted the right of first refusal provision as a modification, rather than a waiver, of the otherwise applicable right of partition.

### Facts and Circumstances

LEG Investments owned an undivided 50 percent interest in a vacation home at Lake Tahoe as a co-tenant with the Boxlers. The written tenancy, in common agreement between LEG and the Boxlers, provided that, prior to sale of its interest in the property, the selling co-tenant must offer the non-selling co-tenant the right to purchase the selling co-tenant’s interest in the property at a price and on terms no less favorable than the price and terms of the bona fide offer received from a third party. The tenancy in common agreement did not expressly address the rights of the co-tenants to seek partition.

Disputes arose between LEG and the Boxlers as to the use and maintenance of the jointly owned property. To exit the troubled co-tenancy relationship, LEG offered either to sell its interest in the property to the Boxlers, or to purchase the Boxlers’ interest in the property, for a price of \$750,000. The Boxlers refused both offers. Thereafter, LEG obtained an offer from Gibb to purchase its interest in the property for a price of \$1,400,000. Pursuant to the terms of the tenancy in common agreement, LEG offered the Boxlers the opportunity to purchase the LEG interest in the property upon the same terms and conditions offered by Gibb. The Boxlers declined, and LEG attempted to close its sale to Gibb. After meeting the Boxlers, Gibb disapproved the Boxlers as co-owners of the property and withdrew his offer to purchase.

After continued fruitless discussions with the Boxlers regarding maintenance and operation of the property and possible sale of LEG’s interest or the entire property, LEG filed an action for partition seeking a judicial sale of the property. LEG alleged that the relationship between the co-tenants had deteriorated so badly that partition was the only available remedy. LEG further alleged that, by nature of the property, physical division of the property was impracticable and that partition by sale was the only viable remedy.

The trial court found in favor of the Boxlers on the basis of its determination that the right of first refusal provision in the tenancy in common agreement constituted a waiver of the right to partition. The court went on to award the Boxlers nearly \$87,000 in attorneys fees.

### Legal Analysis

The appellate court reversed the decision of the trial court. It ordered that the trial court enter an order directing that the property be partitioned by sale and vacated the award of attorneys fees to the Boxlers.

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In doing so, the appellate court noted that under California Code of Civil Procedure, Section 872.710, a co-owner of property has an absolute right to partition unless barred by a valid waiver. The appellate court rejected the Boxlers' argument (based upon *Harrison v. Demergue*, (1969) 274 Cal. App. 2nd 19) that the right of first refusal provision in the tenancy in common agreement constituted an implied permanent waiver of the parties' right to seek partition.

The appellate court concluded that allowing the selling co-tenant to seek partition after compliance with the right of first refusal provision was consistent with the purposes of the provision – to control the admission of new co-owners and allow the non-selling co-owner to purchase the other co-tenant's interest at a price which reflects the fractionalized nature of the ownership interest. The appellate court further concluded that interpreting the right of first refusal provision as a perpetual waiver of the right of partition would frustrate the policy behind the remedy of partition (permanent resolution of all disputes about property and removal of all obstructions to its free enjoyment) and unduly restrict a co-owner's right of alienation of its property.

### Take Away

This case underscores the importance of careful and complete analysis and drafting of real estate documents. The dispute between LEG and the Boxlers could have been completely avoided had the tenancy in common agreement expressly addressed the parties' rights with regard to partition. Good drafting requires analysis not only as to formation and operational issues, but also as to default, termination, and exit issues. All too often these issues are overlooked or avoided and the result is unnecessary litigation with its concomitant delay, burden, and expense.

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