EMOTIONAL AND TECHNICAL CHALLENGES TO MEDIATING PARTITION ACTIONS

Partition actions come in many shapes and sizes. Although they often present significant challenges in the context of mediation, they can be successfully mediated if the emotional overlay that accompanies them is recognized and the numerous technical issues that permeate them are identified and addressed both before and during the mediation session. This article will explore not only some of the situations that give rise to partition actions, but also, how, if brought to an experienced mediator at the right time, they can be resolved without resorting to expensive litigation.

In the context of this article, partition is simply the physical division or sale of real property held by two or more co-owners, usually joint tenants or tenants in common. The equitable remedy of partition is governed under the statutory scheme of CCP §§872.010-874.240. Although courts have wide discretion to "fashion" a fair result, they have no discretion to deny partition, absent the existence of a preexisting agreement between the co-owners not to partition, or conduct by the parties amounting to waiver or estoppel. That is because partition is a matter of right. Co-owners, whether in business together or in romantic relationships who have "fallen out of bed" with one another cannot be forced by the court to stay together! The parties' physical, mental or financial health may be at the genesis of the dispute, but it is those very issues that the mediator confronts and which need to be part of the resolution strategy.

As a mediator, I have encountered a wide variety of disputes between co-owners. A simple situation was where two families purchased a vacation home together and because their children had grown and preferred to take vacations with their friends, rather than with their parents, one family had no interest in continuing to own the property. Another case involved individuals who bought a duplex together for investment. After some years, one wanted to sell and trade up to a more sophisticated investment vehicle whereas the other remained content to own and operate the duplex as a residential income-producing property. There was no real "falling out". Their needs and interests were just no longer aligned.

A more complicated situation might occur where warring individuals, whether in a joint venture or partnership have bought, developed and operate commercial property. One accuses the other of not pulling his weight, taking too much time away from the operation, not properly accounting for business expenses, soliciting but not disclosing business opportunities or entering into deals that conflict with their business. The relationship has soured. The business partnership may be readily dissolved, but what to do with real property becomes the bigger problem. Add another wrinkle, such as where one of the co-owners leases part of the property from the partnership or both co-owners lease some or all of the property to an unrelated third party tenant.

Among the most contentious cases I have mediated are those involving "common law" marriages or unmarried, cohabiting couples who buy property together. Some may later marry, others not. When the relationship falls apart, recrimination may give rise to a flood

of emotional reaction not dissimilar to that in a true marital dissolution, except there the Family Code labels as community property any property acquired during marriage in the form of joint tenancy, tenancy in common, community property etc. But consider the case where, before marrying, a husband and wife bought property as "joint tenants". Such property, not governed by the Family Code will be subject to division or sale under the partition statute, absent transmutation or similar behavior.

Several cases have involved disputes among same-sex couples that bought and occupied property together. In one memorable instance, one of the "partners" had sold his property and when the falling out occurred, had nowhere to return to. Add to any "nontraditional" relationship the entrance into the picture of a new "partner" and one has the makings of a truly challenging mediation!

Mediation also increasingly occurs in the context of family trust disputes. Consider four siblings, all beneficiaries under their deceased parents' trust, which includes the former family home and another property currently leased to one of the siblings. Three accuse the eldest sibling, as successor trustee following the death of the surviving parent, 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 and seek to "surcharge" their sister's interest with not only the alleged losses but also attorney's fees and costs of prosecuting the partition/accounting action. The sibling who is renting from the trust enjoys a below-market rent and wants to continue as a tenant. The disputants risk spending all their time, energy and the trust estate in litigation.

Any or all of these fact patterns can easily result in litigation that gets out of control. Given the procedural requirements and attendant expenses of a partition action, parties and their advisors should consider the alternative of mediation to explore voluntary partition by sale, physical division or appraisal and buy-out.

For the most part, the partition of real property calls for a business-like approach, where pragmatism will hopefully overcome emotion. However, often there are potential obstacles to a negotiated resolution. Almost always, some form of accounting is necessary to adjust for initial contributions, down payments, mortgage and other carrying and maintenance costs during the co-ownership. Dealing with lenders' interests can complicate matters; especially where the co-owners' preferred resolution of their dispute involves a buy-out by one or more co-owners. Generally lenders will not co-operate in permitting one or more co-owners to take over the loan whilst others are released from the loan. The strength of the individuals' financial statements may soften a seemingly intransigent lender's heart. Depending on the duration of a loan and its terms, the existence of a pre-payment penalty may render an outright sale too expensive after accounting for escrow fees and commissions. There will almost always be tax considerations, although the partition by appraisal provisions may enable parties to avoid tax liability and counsel, CPAs or other tax advisors should carefully research them as part of an overall strategy.

Not surprisingly, potential co-owners do not always think through many of these issues carefully enough when the property is initially purchased, or the partnership established

since the prospect of future disputes may be far from the parties' minds at that time. Thus, when the dispute arises, these issues can cause enormous friction. As part of the partition action, the court will typically appoint a referee to look into these issues and provide a written report to the judge. However, the referee must be paid and this is usually from the sale proceeds of the property or the respective parties personal funds. Frequently, parties who wish to avoid that added expense benefit from the assistance of a savvy mediator with the substantive knowledge in real estate secured transactions and the skill to wade through these complex issues with the parties and their counsel.

So, what can the parties and counsel do to accomplish the settlement of partition disputes within a reasonable time and at a reasonable cost? Perhaps the most important is to choose a mediator who is flexible and who will explore with the parties and counsel as many settlement options as possible. Some may be easy to accomplish; others more complicated.

Prior to initiating the partition action, counsel should ask the clients what their goals are. If everyone agrees that the property should be sold and the net proceeds divided, it may be that the issues in dispute can be narrowed and agreement reached without the intervention of the court. Then the mediator's role might be limited to assisting in the creation of a roadmap to accomplish that end.

Questions to ask include, does one party need money quickly? Can the sale take advantage of market conditions or the possibility of a tax-advantageous IRC§ 1031 exchange for one or more of the parties? Will the sale be at auction or through private contract? Can the market value of the property be agreed upon, at least for listing purposes? Will the parties accept a Comparative Market Analysis by an experienced broker to whom the listing will be awarded or is a formal appraisal absolutely essential? If there is no acceptable offer within an agreed-upon timeframe, will the parties defer to the listing broker to decide on the timing and size of price reductions? What needs to be done to ready the property for sale and will the parties agree to equally split the cost or shall it be born in the same percentages as ownership interests are held? As a mediator who is familiar with these and other issues, I recognize how important it is to identify them early in the dispute and be in a position to assist the parties and counsel in creating a realistic timeline, while at the same time encouraging them to remain engaged in the process of preserving the asset and achieving the goal of sale.

If a buy-out by one party of the other's interest is possible, 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. In other words, in a situation with two equal owners, each one should be asked to designate a price at which they would be willing to both buy the other's interest and also at which they would be willing to sell their own interest. Parties who are unwilling to buy for the same price they expect to sell may have difficulty justifying their position in mediation.

In one of my recent cases, the parties were co-tenants of a professional building in which they were both dentists. One, considerably older than the other and now living on a boat wanted to retire, travel yet continue to operate and manage his personal real estate

holdings and a related consultancy business out of smaller quarters within the professional building. The other, much younger and with a thriving local practice intended to remain there because the space was well configured for the practice of dentistry. They could not agree on whether to sell the building and at what price or to physically partition the space, which, in the initial opinion of an architect and an engineer, would have resulted in a somewhat awkward configuration and require the relocation of dental operatories, a darkroom and specialized x-ray equipment. As a rule, the law favors physical division of property, ("partition in kind") where possible and forced sales are generally disfavored. In this case, however, the relocation of walls, HVAC system and resultant need for a build-out were daunting. Both parties knew that it would be expensive and would probably require both of them to take out a construction loan on which they would be both be obligated and thereby even more closely tied together than ever before.

As the mediator, my role was to listen to and validate the parties' very different needs and interests, assist them in recognizing the other's point of view, and then identify and explore some alternative options. In the end, the parties concluded that the age of the building with its configuration of numerous small rooms would not be easily saleable except for another dental practice. They agreed that they would maintain their ownership interests. The younger dentist would continue to own approximately one half of the total space and rent most of the rest from the retiring dentist. This required only the erection of a single demising wall allowing for a small office to meet the latter's limited needs. Perhaps most beneficial to him was the predictable income from a long- term lease to his former colleague. Once the basic agreement was reached, negotiations then centered on establishing a fair rent and adjustments for maintenance, janitorial and appropriate covenants and indemnifications.

Many disputes that relate to the sale or division of property held by tenants in common require at least two mediation sessions. During the first, the circumstances surrounding when, how and why the relationship was established and the reasons it needs to be terminated are discussed. Sometimes the mediator's role starts by patiently listening to the sort of personal attacks and counter-attacks aired in marital dissolutions or will contests. The parties are often highly emotional and will say hurtful things designed to cast blame for the current situation, without realizing such tactics are not conducive to reaching what, in these types of cases must usually be a "business judgment" decision. This is especially true where one party doesn't want to sell or buy out the other's interest, whether because of bad timing or for other reasons but can't or won't accept that the court may impose a forced sale, absent a more fair and practical result.

At the first mediation session, consideration must be given to technical issues that the disputants need to face. Where the property is to be physically divided these include the impact of the Subdivision Map Act (Govt. C §§66410-66499.37), since even a court-ordered physical division in a partition action is subject to compliance with the act, as well as with zoning and local ordinances and whatever general plan exists for the area where the property is situated. It cannot be overstressed that counsel who represents parties in actual or potential partition actions should cover this issue with the client and, if necessary,

obtain specialized advice before embarking on a partition action or even scheduling mediation.

Unless the property is owned free and clear of loans and other liens and encumbrances, they will undoubtedly affect an owner's ability to negotiate a sale, physical division or a buy-out. The existence of a mortgage on the property does not automatically bar a partition action. However, as stated earlier, when a co tenancy is subject to a mortgage, the lender may object to taking a co-borrower off the loan 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. If an outright sale is contemplated the question of pre-payment penalties may hamper negotiations. In many cases the mediation will be premature and thus unproductive unless it includes the active participation and even the attendance of lenders and other lien holders, who should be consulted early in the process. The mediation may also involve one or more "mini mediations" with these other interested parties. All of these potential pitfalls ought to be raised in pre-mediation telephone calls with the mediator where a process is discussed for when and how to bring them to the negotiation table.

When one party prefers to buy out the other's interest a further issue involves the obtaining of one or more appraisals. In the context of a court action for partition, the judge will appoint a referee to oversee the mechanics of the case and the referee will, in turn appoint an appraiser to appraise the property, the parties' interests in it and submit a written report on its value 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 may be helpful in suggesting the appointment of two appraisers whose median or average is acceptable or who appoint a third appraiser whose valuation is accepted. The mediator's personal knowledge of the appraisers and their reputations as well as familiarity with the art and science of appraisal is often instrumental when impasse occurs.

In the partitioning of property, a second mediation may be 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 the disputed amounts. However, because the may be important to the parties, they can't be ignored by the mediator.

In one recent case, one co owner contributed the down payment and the closing costs whereas the other made most, though not all of the mortgage payments. They split the utilities and maintenance, (not always equally) but one contributed "sweat equity" towards the re-modeling of the kitchen, painting and other work. Needless to say, there was no written agreement; receipts for materials and a record of time spent were all but non-existent. The negotiations became heated with threats to storm out of the mediation. The amounts involved did not warrant the retention of CPAs, yet it was clear that neither side would give up what each claimed were their legitimate out-of-pocket expenditures. To achieve peace, it was suggested that one party consider relinquishing a cherished memento to the other and also agree to pay a greater share of the broker commission on the sale of the property. Although the mediation did not end with the singing of Kumbya and a "group

hug", both parties felt they were heard, their feelings validated and they became more willing to compromise on other sticky accounting issues.

The mediation of partition actions is challenging and preferably requires the representation of lawyers with experience in dealing with real property, family law, probate/trust, accounting and tax issues. That is often a tall order but fair results can be achieved where a knowledgeable mediator works with counsel to develop a flexible process, exercises patience and employs both a facilitative and evaluative approach as the dynamics invariably shift.

Malcolm Sher, based in Walnut Creek, is a full time mediator who specializes in resolving real property, business and employment 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.