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LET MY PEOPLE GO: A PROPOSAL TO UPDATE AND REFORM CALIFORNIA PARTITION LAW

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California is not Alabama, and the TransAmerica building is not the same as a farm in middle Tennessee. Neither of these statements is remarkable, but the recent change in the partition law[01] treats them identically. This is a mistake.

Currently, California partition law contains provisions crafted to solve problems relating to the loss of generationally owned farmland resulting over the course of a century in Georgia, Louisiana, and South Carolina. These changes to the law, however, fail to expressly limit its scope to such agricultural property, or to address the reasons that people seek a partition remedy in the 21st century.

As a result, even though the Law Revision Commission explicitly cautioned that the Partition of Real Property Act (the "Act")[02] should not apply to "commercial" or "investment" property, it does. Now, office buildings in downtown Los Angeles, multi-family property in San Francisco, mansions in La Jolla, and vacation rentals in Palm Springs are subject to laws for which they were never intended.

Unfortunately, thirty-five millions of Californians are subject to laws created to solve a relatively narrow problem that never existed in California. Overall, the Act as currently written is a bad fit for California and has made life harder for everyday Californians. There must be a better balance between limiting property loss and spurring unnecessary litigation costs by empowering unsavory acts due to vague legal mechanisms.

THE GOOD

At the outset, there are many positive revisions to California partition law contained in the Act, which was largely inspired by a law review article by Thomas Mitchell in the Alabama Law Review in 2014.[03]

First, even though California law has allowed private sales—as opposed to auction sales—in partitions since 1976, the Act states a clear preference for such sales.[04] Previously, Code of Civil Procedure section 873.520 shifted the preference for private sales.[05] Nevertheless, the clarified emphasis on private sales in the Act is consistent with the goal that all owners of partitioned property receive the highest economic return possible.[06] It is the right idea.

As Mitchell's article discusses, the idea appears to be to create a disincentive for

persons to purchase a share of an interest in real estate at a discount, only to then force a partition sale using unfair leverage. The article fails to take into consideration, however, that California law already previously provided such a safeguard for decades through the Home Equity Sales Contract Act.[07] For example, this act prohibits any person from consummating a transaction that involves a residence in foreclosure if such person takes unconscionable advantage of the property owner.[08] That law provides certain protections of persons who sell interests in real estate when they are in distressed situations, unless the buyer takes steps to make the property their primary residence.[09] Because California law has already included such statutory protections, the need for the Act's provisions is greatly diminished here.

While the laws in Appalachia and the South likely do not contain such protections and the pre-existing availability of private sales for partitions since 1976, the background law in California makes such provisions less necessary than they might be in other states.[10]

Second, the Act's requirement to appoint a licensed real estate sales person is an effective way to reduce the overall costs for partitions.[11] Otherwise, a court may make the mistake of appointing professional receivers or other attorneys to facilitate the contemplated partition.[12] Indeed, courts often appoint a receiver or third-party attorney whose only function is to then retain a realtor, adding nothing to the process other than increased costs and in many cases dragging out the overall process.[13] Because these receivers or attorneys get paid hourly, they lack any incentive to actually resolve the problem by selling the property as quickly as possible.[14]

As Mitchell's article identifies, one of the primary evils with the prior system was the inclusion in the process of unsavory lawyers who sold the property for less than fair market value, or professional receivers who otherwise manipulate the process only for their own benefit.[15] When the entire point of the process is simply to separate the parties' real estate interests through the legal system to obtain the highest value for all involved, these functionaries are a terrible fit for the actual problem at hand. The Act's requirement to use a licensed real estate salesperson employs the right tool for the job and therefore aligns with the approach employed in other judicial sales.[16]

Third, the Act's inclusion of a partition by appraisal adds substantial fairness to the process by permitting a current owner to assess the real estate based on an objective measure.[17] That said, scholars have recognized the fundamental problem with appraisals adduced in court proceedings.[18]

Even though the California partition law previously contained this solution, including through a full credit bid, the renewed emphasis is laudable.[19] In a number of instances, this is a good option for all involved as a far more cost-effective solution given the higher costs of closing escrow. It is a creative alternative that also serves the ends of justice.

THE BAD

As the Mitchell article notes, the Act is only a mere first step in the process of reforming partition law to serve the greater ends of justice.[20] Although it was clearly designed with the best intentions to solve a problem in the South, there does not appear to have been any discussion whatsoever regarding how its provisions would interact with California's Code of Civil Procedure and pre-existing partition law in the state of California.[21] As a result, unintended consequences have become rampant within the current iteration of the law.

First, while the Act improves partition law by including an appraisal option, it fails to provide an explicit mechanism or guidelines for how it should work. For example, the Act simply states that "this act applies to real property held in tenancy in common" and "the court shall determine the fair market value of the property by ordering an appraisal."[22] That seems simple enough. It is not.

The Act does not identify how a court would order such an appraisal. Is it the court's duty to order it *sua sponte* on the filing of every case? Does a court commit error if it fails to request it *sua sponte*? If the court is not required to order it, is it error if no party ever requests it? Is it required if no party wants it? Can either party file a motion for an appraisal? When is such a motion allowed? Is an appraisal option required even if the other party does not want it? As the pleadings determine the outer materiality of the dispute, is a party required to plead a request for it in their answer? Must the court grant summary judgment first, before an appraisal can be ordered? Can the partition proceed if the non-petitioning party does not request an appraisal? If the court determines that the determination of value requires an appraisal, then who pays for it? If the party with the appraisal option refuses to pay for the appraisal and the appraisal is not completed, is the court prohibited from ordering the sale? Questions abound.

Similarly, the Act never addresses how it operates when some owners are tenants in common, but other owners

are joint tenants. Because the Act applies only to tenants in common, this title situation makes the applicability of the Act totally uncertain.

These are not idle questions. The basic premise of the Act was to ensure the continuation of family ownership of farmland in the South and Appalachia.[23] Because the Act was focused on solving a consequence of partition actions, it did not address any of the reasons that this remedy would be sought in the first place. While there is nothing necessarily wrong with wanting to maintain family ownership of generationally-owned farmland, as a concept, it fails to engage with the everyday reasons that regular citizens seek court relief.[24]

Generally, people do not ask for a partition to harm a co-owner or as an investor-backed maneuver to deprive another of their property.[25] As clearly envisioned by the Act, siblings often inherit property from their parents. Never considered, however, are the reasons why a sibling fails to cooperate in the sale. For example, it is common for people with substance abuse or mental health issues to inherit property from a relative.

Frequently, a relative who has inherited real property has not visited the property in years and simply wants to dispose of it because they are unable to manage it.[26] It is not usually the case that they deliberately fail to resolve what to do with the inherited property with the other relative who has also inherited the property. Sometimes, a party that inherits land may not be cooperative or may be totally unable to be located. In other severe instances of chemical dependency, a troubled relative who has inherited land may be using the property to sell narcotics and may have created a public nuisance that creates potential liability for the relative who also inherited the land and now co-owns the property. These relatives who inherited the land as co-owners may seek a partition remedy not to harm anyone else, but simply to limit their own troubles.[27]

Another example to support why parties may seek a partition action is a failure to compromise when siblings inherit real property. For example, one sibling who inherits real property may need to sell to assist another relative with dementia or other debilitating disease, and the other sibling who also inherited the land may refuse to sell for their own personal reasons. In that instance, because the family members do not agree on whether to sell or keep the inherited land, it merely denies care for the mutual family member who is ill and forces the caregiver to suffer severe adverse financial consequences, including shouldering the legal bills and costs associated with the partition action.

The Act's provisions for an appraisal to be offered to someone with schizophrenia or a heroin addiction, and arguable prohibition on sale until it is done, simply adds cost, time, and burden to the process to one who never wants to avail themselves of the option. Similarly, by elongating the process with an appraisal option that is subject to an unclear procedure, it can inadvertently adversely affect someone with the best intentions by forcing them to bear a triple burden of lawyers' fees, appraisal costs, and supportive care, all at the same time.[28]

Because the Act fails to provide a clear procedure for the appraisal option, thus dragging out litigation in court, the Act burdens an innocent party for forcing them to pay expenses until the matter is resolved. This is totally unjust, and it happens every day across California.

Second, because the Act was created to address inherited farmland in Appalachia and the American South, it does not consider the reality of real estate in California. Namely, real estate in California is expensive. Because real estate in California is so expensive, virtually everyone acquiring real estate, even through inheritance, also acquires a mortgage. The Act, however, fails to take into consideration land that is subject to partition also being subject to a mortgage.

Specifically, the Act states that it allows the non-petitioning party to "buy all the interests of the co-tenants that requested partition by sale."[29] In other words, the Act could be interpreted to permit the non-petitioning party to buy only the equity interest of the petitioning party, thus leaving both parties on the mortgage and legally obligating one person to pay the mortgage for a property they no longer own until the mortgage expires, which in many cases could exceed twenty years. Indeed, the Act does not use the words "mortgage," "promissory note," or "deed of trust."[30] The Act assumes that all real estate in California is worth the same amount as a farm in a remote part of Tennessee owned free-and-clear for generations.

Consider the following example of an unmarried couple that may purchase a property for their future. When the relationship breaks down, domestic violence may occur.[31] After the court issues a domestic violence restraining order, the victim is very eager to sever their relationship with their abuser. When the couple owns property together, the abuser will frequently use commonly owned property ownership to continue to abuse their victim.

For instance, when property is purchased jointly, both parties are often on the mortgage. When the victim flees the property to live with family or to shelter at a safe haven, the abuser can stop paying the mortgage, which damages the victim's credit rating and may force the victim to make the requisite mortgage payment as another form of abuse. When the victim flees the residence co-owned with the abuser, the victim needs to acquire a new residence. If the abuser is able to damage the victim's credit by not paying the mortgage, the shared property becomes a way to hold the victim hostage. This is a very common tactic used in domestic violence situations.

Because the Act fails to consider that real estate in California may be more valuable than in Alabama and focuses solely on the loss of generationally-owned farmland, it does not address the treatment of the utterly commonplace matter of a mortgage. By failing to include any provision at all for mortgages, the Act inadvertently creates another tool for the abuser in a domestic violence situation to use against their victim.

Third, section 874.317(d) of the California Code of Civil Procedure states that the purchase price under the appraisal option should simply be the appraised price multiplied by the co-tenant's fractional ownership of the entire parcel. This is a grossly unjust provision. If read literally, it could lead to undervaluing an owner's interest by hundreds of thousands of dollars.

Arguably, this provision requires anyone exercising that option to forego claims for reimbursement for expenses and investment made for the property. Historically, parties involved in a partition had a right to claim reimbursement for amounts expended that exceeded their ownership share. Legally, this term is called "claims for contribution."[32] These adjustments extend to payments for taxes, mortgages, or improvements to the property.[33] The Act appears oblivious to this bedrock of California partition law.[34]

One example of the effects of the above oversight is as follows: Two friends may decide to purchase property together for an investment but contribute different amounts while assuming ownership in equal parts. In California, the law is that parties take ownership in equal parts when the deed is silent as to that topic. In fact, it is not a common occurrence in residential real property transactions for parties to explicitly identify their ownership shares in the acquisition deed, which leads to the legal presumption of co-equal ownership.

The reality, however, is often very different. For instance, two friends decide to purchase a ski cabin in Lake Tahoe with the idea of using it as a vacation rental. Their plan is such that one friend who lives in San Francisco will invest most of the money, while the other friend who lives in Sacramento invests their time into the maintenance and operation of the ski cabin. Eventually, the one who initially invested their time fails to live up to their end of the bargain. In this hypothetical, the "operating partner" (the one who lives in Sacramento) may refuse to sell the investment property because they are getting the full benefit of the use of the Tahoe ski cabin as a co-owner, even as they fail to bear any of the burdens of ownership.

This is a crisis for the monetary investor, who lives in San Francisco. Without a property manager overseeing the operations of the ski cabin, this investor has to incur additional costs while also contributing to the mortgage for the cabin (and likely also paying their own mortgage for their own primary residence). This joint ownership investment has now become a financial anchor that is drowning them economically. Should they seek to terminate the real estate relationship through a partition, the law as written arguably deprives them of any claim for their monetary contribution because it fails to imagine that such claims exist.[35]

To further illustrate the financial impact of a partition in this example of the cabin in Tahoe, assume that for a $1 million cabin near Lake Tahoe, the monetary investor placed an initial down payment of $200,000 plus another $100,000 in mortgage payments, with an outstanding mortgage of $200,000 towards the purchase of $500,000 for the cabin. Assuming that the $500,000 cabin appreciates to $1 million over the course of several years, there is theoretically $800,000 in possible equity to be split between the parties.

Under the prior law, the San Francisco-based investor would have a right to first recover their contributions of $300,000, and then the remaining equity of $500,000 would be split between the parties for a possible total payment of $550,000 for this investor.[36] Under one interpretation of the Act as written, in the alternative, the San Francisco-based investor could recover only his $400,000 share of the appraised value of $1 million times his ownership share of 50%. That is, the Act appears to deprive him of any reimbursement for his investment contrary to current law. Our faithful investor, rather than the negligent friend, receives the worse treatment under the law even though he is blameless. In other words, the Act appears to reward the party that failed to uphold their end of the agreement with the investment partner. This is

a serious moral hazard. Moreover, this entire discussion assumes there is even an agreement in the first place about the relative fractional ownership shares of the parties. This may not be the case.[37]

While clearly not written to incentivize such behavior, this is simply another example where a law written to solve the problems of cheap, inherited land in Appalachia is a poor fit for the realities of real estate and business in California.

THE NECESSARY REFORMS

First, the Act requires an appraisal option when it is not necessarily desired. Even when a party lacks the means to buy out the other party, or even afford an appraisal, the Act forces that party to take an approach that they may not even want. Instead, like other rights of first refusal, the Act should simply specify that the right to purchase the petitioner's interest must be exercised or waived. While there is nothing inherently wrong with the requirement of an appraisal in a partition action, the right of the non-petitioning party should operate as it was intended to be: a right of first refusal.[38]

In a partition action, the procedure should require the party seeking to exercise the right of first refusal to (1) state so in their answer,[39] (2) waive all other defenses to the partition action,[40] (3) expressly state the parties' ownership percentages,[41] (4) transmit $1,500 as a reasonable appraisal cost to the other party when filing their answer, or within thirty (30) calendar days, whichever is earlier, (5) post a bond for likely equity distribution, and (6) if the appraisal amount is not deposited timely or the bond not paid timely, then the appraisal option would be waived. This would align with other similar provisions of law and be the most equitable under the circumstances.[42]

For example, in California, the Code of Civil Procedure requires a party requesting a jury trial to deposit a certain amount with the court before the first case management conference; otherwise, it is waived.[43] This provision ensures that all parties are timely apprised of how the case will proceed at trial and forces parties to think harder about the need for such a trial—and its impacts on others—by actually making a monetary commitment. The requirement of a timely deposit of an appraisal amount in partition cases would have a similar effect.

If a party wants to exercise the appraisal option, then it is only fair that they actually pay for exercising that right and put their money where their mouth is. This is what happens in other contexts of the law. For instance, when a governmental entity seeks to take property through eminent domain, the law in California requires the public entity to offer to pay the reasonable costs of compensation to the party whose land is being taken.[44]

Likewise, as the appraisal option effectively serves as a preliminary injunction pending the buyout or sale, it is only fair that the party seeking to exercise these rights comply with a similar provision.[45] As the bond in a preliminary injunction is required to cover damages to the enjoined party caused by its issuance if it is finally determined that they cannot pay.

Similarly, Code of Civil Procedure section 1263.025 provides, in pertinent part:

> (a) a public entity shall offer to pay the reasonable costs, not to exceed five thousand dollars ($5,000) of an independent appraisal ordered by the owner of the property that the public entity offers to purchase under a threat of eminent domain, at the time the public entity makes the offer to purchase the property. The independent appraisal shall be conducted by an appraiser licensed by the Office of Real Estate Appraisers.

In other words, the proposed revision would simply require the party who seeks an appraisal to provide payment for it and provide the other party with the ability to acquire one. By providing the other party with the power to acquire the appraisal, this would ensure that the non-partitioning party did not seek out an unduly high appraisal through an unscrupulous acquaintance. Much as one of the purposes of the revision to the partition law was to limit the influence of unethical court-appointed parties, such as receivers, this revision would prevent any divided loyalty by making payment come from one party, and the selection of the appraiser from another, much in the same way that eminent domain law currently operates in California. Each party would share a claim to the appraiser's loyalty and thereby reduce any claims of bias.

Moreover, this would arguably eliminate the problem of requiring an appraisal even if the other party does not respond to the complaint during the pendency of the entire suit. The law favors those who assert their rights over those who sit on them.[46] If the other party never appears, the appraisal option should not be required.

Similarly, in California, the "sham pleading" doctrine prohibits parties from pleading directly contradictory positions as being contrary to the interests of justice.[47] As discussed above, parties frequently use the delay from the

appraisal portion of the partition process to remain on the property and unduly prolong the litigation. Again, the Act does not take into account the value of time and the strain of delay on litigants from the litigation process itself. If a party is sincere about purchasing the interest of the other co-owner and quickly ending the litigation, then that party should not also seek to block the purchase and sale altogether. This mutually exclusive proposition is not that difficult to grasp, and the law should not embrace parties who are insincere. To that end, this provision would eliminate the need for the cost of an appraisal where one may not even be needed because there is a fundamental dispute over the ownership of the property. If a party is not an owner, then that party should not have a right to automatically buy the property simply as an assumed 50 percent owner, which is what the partition law currently appears to require.

Ownership of the property should first be established, before the right to purchase is granted and exercised. Code of Civil Procedure section 873.910 provides that partition by appraisal is possible only when the interests of all parties are undisputed or have been adjudicated. The revised partition law should be in accord.

Indeed, the entire premise of the appraisal option was to encourage the efficient end to partition actions for parties who simply wish to move on from the real estate relationship. Its use in current practice makes a mockery of the intent and merely continues the relationship (which is sometimes abusive), but this time, under the auspices of the law. It should end.

If a party simply wants to purchase the other's interests by appraisal, that petitioning party should be required to waive all other defenses to the claim. In other words, if one party really wants only to avoid litigation, then retaining their defenses serves no purpose to that end. If a party wants to litigate the claims, then, the appraisal option should be waived. It is utterly disingenuous to claim that one wants to avoid litigation through a simple purchase of the other's interest, while also threatening to fight if they dislike the appraisal amount. A litigant should not be allowed to have their cake and eat it too.

Alternatively, the law should be clarified such that any party who waives the right of first refusal, and elects to stand on their defenses, should be subject to the filing party buying out their interests. In California, this has been the law for years through something known as a "full credit bid." Such a provision is worthy of further discussion.

Second, while the revision to partition law attempts to style itself as merely introducing fairness into the partition process, it does not actually provide a "true" valuation option because it provides only one party with an option to purchase based on the appraised value. A "true" appraisal option would permit either party to purchase the other party's interests at whoever can pay the most. In contrast, the laws in other states explicitly permit this more equitable option.[48] California's partition law should be updated to track this provision.

Alternatively, at the very least, the law could provide the appraisal option to the party who is currently in possession of the property. As it currently stands, the party who first files gives the other owner the right of first refusal, regardless of whomever lives there. This disregard for the actual living situation of the parties seems to lack any connection with practical realities.

Otherwise, if one of the fundamental problems that a partition seeks to solve is that wealth is in an unliquidated form that requires a legal mechanism to "unlock" it, then either party should be able to partake in that process based on who values it the most.[49] Specifically, by its very nature, an appraisal is merely a "likely" value of the price that two consenting parties engaging in a free-market arms-length negotiation would reach with full knowledge of all relevant facts. It "approximates" value but does not actually make such a determination.[50]

The Act itself contemplates that the parties could engage in multiple rounds of appraisal by having one conducted only to then have the other party dispute it with a second appraisal, which dispute would likely end only with a third appraisal.[51] Again, the Act fails to envision that both parties involved could attempt to buy the other out for the highest price.

The reality is that, in the instance of a domestic violence situation, the victim who is unfortunate enough to have purchased a home with their abuser could ultimately be forced out of their own home simply because the law also deprives them of the option to remain in their home by failing to include any legal mechanism for their protection. It would be far preferable to provide each party with the opportunity to purchase the other party's interest through some sort of sale mechanism. While there has been speculation that this could provide a moral hazard through unscrupulous real estate investors, the solution is not to eliminate such a mutual buy-out provision,[52] but instead to make it available only to parties who have owned their share in the real estate for a sufficient period of time.

As previously mentioned, in a "full credit bid" scenario, an owner of the property can compete with other prospective purchasers by using their equity in the property as a "downpayment" to be able to pay a higher potential price than others in the marketplace. Such a legal mechanism would provide a true "valuation" for all involved.

Third, the Act should be revised in accordance with the prior law that provided a clear procedural mechanism. While the Act is motivated by considerations of value, costs, and displacement, it does not appreciate the value of time. The longer a partition is prolonged, the more expensive and difficult it becomes.[53] In extreme situations in litigation, a person's financial inability to hire an expert can be fatal to one's case.

Currently, it is widely accepted across California that a party may obtain an interlocutory judgment through a simple noticed motion procedure.[54] Such language is lacking from the Act. This straightforward language would assist all litigants and the court as to the simple procedural mechanism and posture to obtain the Act's benefits.

Additionally, the law should be simplified so that lienholders, e.g., banks holding mortgages on the real estate, may be allowed to file a declaration for non-participation as is allowed for trustees in foreclosure situations.[55] Because many mortgages contain attorneys' fees provisions for any costs associated with the litigation of the property, such a simple fix would ultimately reduce all resultant attorneys' fees on the parties.

Fourth, although the Writs Act currently applies to partition actions following the entry of an interlocutory judgment, the Act should specifically incorporate these provisions.[56] As currently written, however, the Act's interaction with the Writs Act is not a smooth fit, at best. To the contrary, as these two laws have developed over time, their explicit intersection is ultimately missing. In the domestic violence scenario, the victim who seeks to remove their abuser following the purchase of the property through a partition sale, or in the inheritance scenario, the sibling who seeks to remove their family member who has turned the family home into a drug den, suffers from the failure of the Act to address the procedure for removal. The Act should be revised to streamline this process.

Fifth, rather than requiring an appraisal that can undervalue the property and be unnecessarily time consuming, the law should permit a broker's opinion by a licensed real estate professional.[57] Because appraisers are primarily trained to provide valuations in accordance with federal law to satisfy the obligations of the Truth in Lending Act, their valuations are unduly conservative, which ultimately harms the party seeking to exit the relationship. Moreover, since appraisers are required to physically inspect the property to issue a valid appraisal,[58] a co-owner in possession may delay the appraisal process by refusing entry. Thus, a broker opinion of value would offer a more affordable, easier, and more equitable alternative to a party simply seeking to exit the real estate relationship.

CONCLUSION

While the Act contains many useful and beneficial provisions, reform is necessary to fully harmonize its provisions with pre-existing California law and the realities of real estate in California. To protect domestic violence victims throughout the state and allow people to move on with their lives, the Legislature should consider adopting "clean-up" legislation to make the partition process easier for litigants and the courts.

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Mr. Underwood is considered by many to be the foremost expert on partition law in California. He is the lecturer on partitions for the California Association of Realtors, is a member of the Executive Committee for Real Property for the California Lawyers Association, and regularly speaks to lawyers and real estate professionals around California on Partition Law.

01 The Partition of Real Property Act is a law specific to California, passed in July 2022. It brought significant changes to how partitions are conducted in the state, if the underlying parties are tenants in common. Even though the act is particular to California, it is actually derived from the Uniform Partition of Heirs Property Act.

02 California Code of Civil Procedure sections 874.311 to 874.323 ("CCP").

03 Thomas W. Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 Ala. L. Rev. 1 (2014) ("*Reforming Property Law*")

04 *See* 1975 Cal. L. Rev. Comm., *Recommendation Relating to Partition of Real and Personal Property* (Jan. 1975). *See also* CCP § 873.510 (Sale by Referee), § 873.520 (Sale by Public Auction

or Private Sale), § 873.530 (Public or Private Sale of Part of Property), § 873.670 (Conduct of Sale at Public Auction), § 873.680 (Conduct of Private Sale).

05 CCP § 873.520 superseded CCP § 775, which stated, "All sales of real property made by referees under this chapter must be made at public auction to the highest bidder, upon notice given in the manner required for the sale of real property on execution unless in the opinion of the court it would be more beneficial to the parties interested to sell the whole or some part thereof at private sale."

06 CCP § 874.320.

07 Cal. Civ. Code § 1695.

08 § 1695.13.

09 § 1695.6(e).

10 *See* Thomas W. Mitchell, *Destabilizing the Normalization of Rural Black Land Loss* ("*Destabilizing*"), 2005 Wis. L. Rev. 557, 581 (2005) [Noting that advocates "may have overestimated the degree to which partition sales have been a source of black land loss.")]; *see* Faith Rivers, *Inequity in Equity*, Temp. Pol. & C.R. L. Rev. 1, 31 (2007) ("There is little empirical data documenting claims of African-American land loss" [due to partitions].) ("*Inequity*").

11 CCP § 874.320(b).

12 *See Reforming Property Law*, *supra* note 3, p. 26-28; *see also* John G. Casagrande, Jr., Note, *Acquiring Property Through Forced Partitioning Sales: Abuses and Remedies*, 27 B.C. L. Rev. 755, 778 n.27 (1986) ("*Acquiring Property*").

13 *See Reforming Property Law*, *supra* note 3, p. 26-28; *see also*, *Acquiring Property*, *supra* note 13.

14 *Reforming Property Law*, *supra* note 3, p. 28 (citing Mo. Code Ann. § 528.220 (West 1953 & Supp. 2014)) [providing that compensation be calculated based on number of days of employment].

15 Problematically, the Code of Judicial Ethics found in California Rules of Court rule 3.904 does not technically apply to partition referees. It should.

16 *See* Cal. Prob. Code § 10161(a)(b) (Addressing real estate salesperson commissions in probate sales).

17 *See* CCP § 874.316 ("Determination of Fair Market Value")

18 *See* Thomas W. Mitchell, Stephen Malpezzi & Richard K. Green, *Forced Sale Risk: Class, Race, and the Double Discount*, 37 Fla. St. U. L. Rev. 589, 598 (2010) ("*Forced Sale Risk*") (citing *In re Crowthers McCall Pattern Inc.*, 120 B.R. 279, 297 (Bankr. S.D.N.Y. 1990) [describing valuation as "an imprecise tool, perhaps the best we currently have, designed to reach a calculated decision on the basis of the hypotheses and assumptions in light of a set of facts"]). Keith Sharfman, *Valuation Averaging: A New Procedure for Resolving Valuation Disputes*, 88 Minn. L. Rev. 357, 367 n.35 (2003) ("There is what one might call a 'zone of plausibility' in financial valuations, ranging anywhere from plus or minus fifteen to plus or minus thirty percent.")

19 *See* CCP § 873.630 (Credit Sales).

20 The history of Partition Law originates in Roman Law, evolved in Great Britian, and has continued to change in the respective states since the American Revolution. *Acquiring Property*, *supra* note 13, at 758 (citing Buckland & McNair, *Roman Law and Common Law* (2d ed. 1952 at 123); *Turner v. Morgan*, 32 Eng. Rep. 307 (1803); Charles B. Allnatt, *A Practical Treatise on the Law of Partition* 55 (London 1820); 2 Blackstone, Commentaries on the Laws of England, ch. 12, p. 117; A.C. Freeman, Cotenancy and Partition § 542 (2d ed. 1886).

21 *See* CCP §§ 872.010 *et seq.*

22 CCP §§ 874.311, 874.316.

23 Thomas W. Mitchell, *From Reconstruction to Deconstruction* Nw. U. L. Rev. 506 (Winter 2001) (*Reconstruction*).

24 See Evelyn Alicia Lewis, *Struggling with Quicksand: The Ins and Outs of Cotenant Possession Value Liability and a Call for Default Rule Reform*, 1994 Wis. L. Rev. 331, 341.

25 See *Forced Sale Risk*, *supra* note 19, at 607.

26 "In the heirs' property context, the division of property rights and responsibilities can lead to results that defy generally held concepts of fairness." Faith Rivers, *Inequity*, *supra* note 11, at 51 (citing Peter Plastrick, An Heirs' Property Collaborative Initiative for Coastal South Carolina: Draft Proposal 1.3, in The Community Foundation Serving Coastal Carolina 1, 7 (2001)).

27 "This unstable form of ownership grants full rights of ownership to all heirs but fails to equitably distribute the responsibility for the land between heirs." *Inequity*, *supra* note 11, p. 51 citing *Reconstruction*, *supra* note 24, at 508 n 24 ("[T]enancies in common ... fail to distribute rights and responsibilities fairly among the tenants in common."). Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 Yale L.J. 549, 604-06 (2001) (explaining that co-owned land "cannot be managed in any useful way; nor can it be mortgaged; nor can any discrete fraction of the land be sold" and that "'the sale of the land ... becomes inevitable"' (quoting Emergency Land Fund, The Impact of Heir Property on Black Rural Land Tenure in the Southeastern Region of the United States 283-86 (1980)).

28 See *Forced Sale Risk*, *supra* note 19, at 600 ("In extreme situations in litigation, a person's financial inability to hire an expert can be fatal to one's case.") [citing David Medine, *The Constitutional Right to Expert Assistance for Indigents in Civil Cases*, 41 Hastings L.J. 281, 286, 288-89 (1990)].

29 CCP § 874.317.

30 §§ 874.311 *et seq.*

31 *See* Cal. Penal Code § 273.6 (Domestic Violence Restraining Orders).

32 See CCP § 872.130 (Compensatory Adjustment).

33 *Hunter v. Schultz*, 240 Cal. App. 2d 24 (1966).

34 *See* CCP § 873.820.

35 *See Willimon v. Koyer*, 168 Cal. 369 (1914).

36 *Southern Adjustment Bureau, Inc. v. Nelson*, 230 Cal. App. 2d 539, 541(1964).

37 *See Zaslow v. Kroenert*, 29 Cal. 2d 541, 548 (1946) [Adverse possession between co-owners]; *Estate of Hughes*, 5 Cal. App. 4th 1607, 1610-15 (1992) [same]; CCP § 843.

38 *See Campbell v. Alger*, 71 Cal. App. 4th 200, 206 (1999) [Rights of First Refusal]; *Pellandini v. Valadao*, 113 Cal. App. 4th 1315 (2003).

39 CCP § 431.30.

40 *See* § 872.210; *L.E.G. Investments v. Boxler*, 183 Cal. App. 4th 484, 497 (2010).

41 *See* CCP § 872.410.

42 Cal. Civ. Code § 3513 ("Anyone may waive the advantage of a law intended solely for his benefit"); *see Hambrecht & Quist Venture Partners v. American Med. Int'l, Inc.*, 38 Cal. App. 4th 1532, 1548 (1995) [Failing to raise even a complete defense, like statute of limitations, totally waives it.] ("'O]nce sued, if a defendant does not timely raise a limitations defense, it is waived regardless of how long the plaintiff has delayed' in bringing the action."). In other words, a party must assert their rights; they are not self-executing.

43 CCP § 631; *Turlock Golf etc. Club v. Superior Court* (*Johnson*), 240 Cal. App. 2d 693, 699 (1966).

44 CCP §§ 1255.010, 1255.030.

45 §§ 529, 995.710; *Neumann v. Moretti*, 146 Cal. 31, 32-33 (1905); *Casitas Inv. Co. v. Charles L. Harney, Inc.*, 203 Cal. App. 2d 811, 816. (1962).

46 Cal. Civ. Code § 3527.

47 *See American Advertising & Sales Co. v. Mid-Western Transport*, 162 Cal. App. 3d 875, 879 (1984).

48 *See* Ala. Code § 35-6-100 (1991 & Supp. 2014); Conn. Gen. Stat. Ann. § 52-500 (West 2013 & Supp 2014); Mass. Gen. Laws. Ann. ch. 241, § 14 (2004 & Supp. 2014); Minn. Stat. Ann. § 558.12 (West 2010); Or. Rev. Stat. § 105.210 (2011); R.I. Gen. Laws § 34-15-16 (2011); S.C. Code. Ann. § 15-61-50 (2013); Vt. Stat. Ann. tit. 12, § 5174 (2002 & Supp. 2013); Va. Code Ann. § 8.01-83 (2007); W. Va. Code. Ann § 37-4-3 (Lexis Nexis 2001 & Supp. 2014).

49 *Compare* Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 Cornell L. Rev. 531, 601 (2005) with *Destabilizing*, *supra* note 11, at 582.

50 *Forced Sale Risk*, *supra* note 19, at 598 ("Since valuation can involve a substantial amount of indeterminacy, legal proceedings in which valuation must be determined often provide litigants who have sufficient resources with substantial incentives to hire legal counsel who will engage in aggressive advocacy.").

51 CCP § 874.316.

52 Phyliss Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 Wash. U. L.Q. 737, 751 (2000) (describing partition law as providing a "back door" to outsiders who wish to deprive disagreeing cotenants of their property).

53 See *Inequity*, *supra* note 11, at 51 [citing David Rothermich, *Partitioning Real Property*, 70 Appraisal Journal 283, 283-84 (2002) (estimating that partition suits can take thirteen to twenty-four months)].

54 CCP § 872.720. Generally, the purpose of section 872.120 is to give the broadest possible statutory authorization for powers it already has. Cal. L. Rev. Comm., Comment to Code Civ. Proc. § 872.120; *Richmond v. Dofflemeyer*, 105 Cal. App. 3d 745, 755 (1980); *Hersch v. Boston Ins. Co.*, 175 Cal. App. 2d 751, 753 (1959) (Granting a CCP 1005 motion for interlocutory judgment).

55 Cal. Civ. Code § 29241.

56 CCP § 715.010.

57 *See* 12 U.S.C. § 3355 [Defining a Broker Price Opinion as "an estimate prepared by a real estate broker, agent, or sales person that details the probable selling price of a particular piece of real estate property and provides a varying level of detail]; *Assilzadeh v. Cal. Fed. Bank, FSB*, 82 Cal. App. 4th 399, 411-12 (2000) [Classifying statements contained in a "Broker's Price Opinion" as an agent's opinions relating to value of a property]; Cal. Bus. & Prof. Code §§ 10050, 11302(b).

58 Cal. Civ. Code § 1102.6.