CHANGES IN THE STATUS OF PROPERTY RIGHTS

Drafting considerations for common situations involving spouses, joint owners, fiduciaries, and entities

Matthew J. Badders
DROUGHT, DROUGHT & BOBBITT LLP
2632 Broadway Street, Suite 400-South
San Antonio, Texas 78215
Phone: 210-225-4031
MJB@ddb-law.com

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Numerous writings and resources exist on the subject of changing *ownership* of property. Changing ownership, obviously, changes the status of property rights from the grantor and the grantee. However, little seems to be directly written on the more seldom situations when the status of property rights change by some means other than ownership, necessarily. This article seeks, at a high level, to review some of those unusual situations, the documents which must or should be prepared to accomplish or respond to such changes, and drafting considerations for those documents. Specific considerations are grouped based on *whose* property rights are changed in these common client categories-- spouses, joint owners, fiduciaries, and entity managers.

1. For what audience are we drafting documents?

First, a preliminary note regarding drafting. For whom are we writing documents other than our client, the judge, or the jury? In scrivening any document, remember the audience in practice. In the particular context of real estate, the grantor, grantee, holders of title, or persons put on notice by public records are not the only audience to remember. In practice, three often overlooked – but special -- audiences for real property drafting to which the documents described in this article are tailored to address are (a) successors in interest, (b) title examiners, underwriters, and title insurance policy issuers, and (c) bureaucrats in places such as county clerk offices, lenders' customer service centers, home owners' associations, or other places where bargaining power against our clients is tremendous yet undeserved. In practical application, these audiences are more important than initially considered.

1.1. Successors in Interest. Successors in interest are, of course, subsequent grantees themselves, but on a more nuanced consideration, personal representatives of estates, corporate officers, and fiduciaries. The eyes of a successor in examining or attempting to ascertain changed rights reflected in a document will not have been the same eyes who bore witness to the circumstances that gave rise to the status change. Stated otherwise, 'a page of history is worth a volume of logic,' and a successor in interest does not have the benefit of the figurative page of history—so they are left with only the volume of logic.

1.2. Title Policy Issuers. Anyone who has ever cleared problems on Schedule C of a title policy knows what pains title examiners and policy issuers endure when trying to ascertain changed rights not abundantly clear from a vesting deed. Even when the academic and scholarly

answer is within a series of documents, our clients are only *better* served if we draft with a view towards making it easier to explain these circumstances to the title company on the eve of a closing. These are the folks who must be able to find the proper documents themselves, the applicable provision in such document, and an understanding of rights or obligations from the document itself.

1.3. Bureaucrats. As just mentioned, the understanding of rights reflected in documents may be certain to the parties and lawyers who prepared documents on clients' behalf, but complicated concepts must be understood by the lowest common denominator of intelligence in our society. Imagine, for example, your client trying to identify himself to a call-center customer service representative (who must only communicate with the proper person on a particular account) as "the vice president of a corporation that is named as the next successor trustee under a revocable living trust who is the reversionary holder of real property subject to a life estate".

For whom we draft documents surrounding changes in property rights is one consideration, but the documents we draft and circumstances requiring them are considered in the context of whose property rights get changed.

2. Changes in the Status of Property Rights of SPOUSES:

2.1. By Community Property Partition. Section 4.102 of the Texas Family Code expressly gives spouses the right to partition their community property. Simply put, a piece of (presumptive or actual) community property can be partitioned by agreement so that each spouse owns a portion of the property as his or her respective, separate property.

2.1.1. Particular Fact Patterns to Consider when Drafting. Unique issues may be created in the years following a partition agreement, based on the conduct or changed circumstances of the parties. Foresight in drafting can protect clients ahead of time, and here are a few of the future contingencies that could (or should) be addressed in drafting partition agreements or resulting related documents. Suggested language or example provisions are difficult to provide because the situations, although not uncommon, will be very fact specific, and drafting provisions in contemplation of these situations will depend on your particular client's objectives.

2.1.1.1 The Future Refi. Here is a fact pattern: Husband and wife have a properly drafted partition agreement regarding the wife's house, owned outright. The husband works and has income; the wife does not. Sometime much later, they want to take advantage of low interest rates and good credit. They jointly refinance the property because the wife put up her collateral, but the husband's income was

necessary to underwrite the loan. The Deed of Trust and Real Estate Lien Note are in both of their names. The forms prepared by the bank are standard, and do not provide custom drafting, nor did they even remember the partition agreement their lawyer prepared years ago when they closed the refinance. Husband's income is used to repay the mortgage with significant equity increasing over the years due to a rising market.

Issues which could have been addressed in the partition agreement under these facts:

- The partition agreement will likely already contain a provision regarding income from separate property, but what about obligations from separate property?
- What about appreciated value?
- Should it be the right of one spouse or either spouse to re-affirm the partitioned community property by reimbursing the other spouse? What pre-set requirements can be contained in the partition agreement providing the formula or answer to resolve this situation?

2.1.1.2. Removal of FF&E. Here is a fact pattern: husband and wife engage you to prepare a partition agreement in conjunction with the purchase of a farm while married. The wife's investment portfolio is partitioned as her separate property, and the husband's closely-held business is partitioned as his separate property, and at that time, they are mostly equal in value. The farm is community property, with a mortgage to be paid from community property income. The farm comes with furniture, fixtures, and equipment. Eventually, the husband removes the equipment from the community property farm, where it is unused, to his separate property business, where it is used to its full capacity for profit. Divorce or death of the husband exposes and confronts a result—the husband's separate estate is significantly more valuable than the wife's because of the use of community property equipment.

Issues which could have been addressed in the partition agreement under these facts:

- Could or should a provision in the instrument have been drafted to recognize and include FF&E either expressly as community regardless of possession, or expressly as separate regardless of source?

- Could or should a provision be included to discuss the income derived from the FF&E? Can such provision make different results based on its location or based on its operator?

- Consider a provision that addresses the appreciated value of separate property or community property FF&E based on its use. In the fact pattern, could or should the present value of the husband's closely held, separate property business be included in the community? Certainly that would have a higher value than the underlying equipment itself.

- Consider the function of timing in any of these drafting considerations. Would it suit the parties to put a reasonable window of time for FF&E to be considered community or separate based on their removal?

2.1.1.3. New assets and future assets. Some realistic fact scenarios: a married couple engages you to prepare a partition agreement. Later, one of the spouses creates a new business entity, acquires an existing business entity by mutating separate property, or receives by gift or inheritance, a closely held business entity and contributes community property towards its enhancement.

In any of these scenarios, draftsmanship is limited in its ability to help, because such assets or financial obligations cannot be fully disclosed as they don't exist at the time of the partition agreement. The typical Family Code provisions and case law regarding tracing would be helpful, but the goal of drafting is to avoid resorting to statutes and case law in subsequent litigation.

One drafting consideration is, to the extent possible, consider what the default presumption as to new or future assets. The best practice would be a supplement to the partition agreement, discussed below.

2.1.1.4. Estate planning. One fact pattern: Husband and wife have a properly drafted partition agreement from many years ago, confirming the ranch as the husband's separate property. They consult an estate planner who was uninvolved in the partition agreement. He recommends and prepares a revocable living trust. Husband and wife "fund" their revocable trust by deeding the ranch to themselves as trustees, believing themselves otherwise protected based on their partition agreement or altogether forgetting about the partition. Husband dies, the revocable trust continues for the benefit of the surviving wife, then on her death, remaining trust assets pass as she appoints in her last will. Husband's will, leaving

"all of his separate property" to his children from a prior marriage, is never probated.

With the proliferation of estate planning strategies all designed to avoid probate, it is worth considering an exception or at least mention in the partition agreement as to the effect of future estate planning transfers. One suggestion is a provision with words to the effect of:

> Future transfers by either spouse of the separate or remaining community property made the subject of this Agreement are not to be construed as an amendment or conversion of separate property in the absence of an express written agreement to do so, provided that such transfer is to a trust or entity under the control or ownership of such party either directly or in a fiduciary capacity. Transfer of a spouse's separate property into a community property entity under the sole direction and control of a spouse shall not, by itself, be construed as to defeat such property's separate property character, and vice versa for transfers of community property into separately owned or controlled entities.

2.1.2. Particular Documents to Consider:

2.1.2.1. ***The Partition Agreement***. To accomplish a partition of community property at all, the preparation and proper drafting of a partition agreement not merely a recommendation. It is *required* because one spouse cannot convey his or her interest in community property to a third party as a means of effectuating a partition. The property can only be partitioned upon compliance with Chapter 4 of the Family Code and the Texas Constitution. *Dalton v. Don J. Jackson, Inc.*, 691 S.W.2d 765 (Tex.Civ.App. 1985).

Much has been written on the subject itself of drafting such agreements. In general, the requirements are that a partition agreement must:

(1) be in writing; Fam. Code §4.104, *see also, Miller v. Miller*, 700 S.W.2d 941, 951 (Tex. App.-Dallas 1985, writ ref'd n.r.e.);

(2) identify the community property being partitioned or exchanged;

(3) contain the specific intent of the parties "to partition or exchange the community property into separate property", *see Pankhurst v. Weitinger & Tucker*, 850 S.W.2d 726, 730 (Tex.App.-Corpus Christi 1993, writ denied);

(4) in the agreement itself, have the effect of actually partitioning or exchanging the property; it cannot be that a future action must occur in order

for it to take effect, *see Collins v. Collins* 752 S.W.2d 636, 637 (Tex.App.-Fort Worth 1988, writ ref'd);

(5) follow the full disclosure or wavier of full disclosure of both spouse's financial obligations and property to each other before signature; Fam. Code §4.105(a)(2);

(6) be signed by both spouses voluntarily; Fam. Code §4.104(a)(1); *Recio v. Recio*, 666 S.W.2d 645, 649 (Tex.App.-Corpus Christi 1984, no writ); and

(7) be notarized.

Unlike most other mutual agreements, the community property partition agreement does not need consideration to make it valid. Fam. Code §4.005.

With respect to the "full disclosure", who will prepare exhibits or other information about each spouse's financial obligations? Consider or revisit the provision often found in general boilerplate as to how to interpret ambiguities. Should any ambiguity in interpretation be resolved by adopting the interpretation most favorable to the spouse holding the separate property, the spouse who prepare the disclosure (typically included as an exhibit or attachment), or against the spouse whose counsel prepared the partition agreement (in the case of spouses represented by separate counsel)?

2.1.2.2. ***Marital Partition Deed***. The partition agreement itself may be recorded in the deed records to give constructive notice to good faith purchasers, and for creditor protection, it should be. See Fam. Code §4.106. When preparing the partition agreement, bear in mind the potential inadvertent disclosure of otherwise private information.

However, it may be that the benefits of creditor protection do not outweigh the need for privacy—particularly for high-net-worth clients. Note that Section 4.106 does not require recording to make the partition agreement enforceable as between the spouses, it only establishes constructive notice to creditors. However, we return to considerations of title and bureaucrats. Particularly in the case of more complicated partitions involving multiple properties, it may be advisable to record a deed as to each particular community property partitioned, so that the title is as clear as possible without extensive research into an extensive – although recorded – partition agreement.

- Date and Timing of Recording. It is recommended that a deed memorializing a partition be recorded at the same time or concurrently with the recording of the partition agreement itself. An effective date on the instrument can accomplish this even if executed after the actual partition agreement.

- Grantor and Grantee. For consistency, the grantee's name should always appear followed by the phrase "as [his/her] sole and separate property."

- Consideration. In this part of the deed, make reference or mention of the existence of the partition agreement. Words simply to the effect of:

  > In consideration of the terms and mutual promises and covenants of that certain Partition Agreement executed between the Grantor and Grantee pursuant to Section 4.102 of the Texas Family Code.

  The usual "$10" is unnecessary, as the Family Code expressly provides that consideration was not necessary for the partition.

- Property Description. Other items to be addressed in drafting relate to the income and expenses. It may be worth mentioning in the description of the property, depending on the terms of your underlying partition agreement, something along the lines of:

  > All of Grantor's right, title, and interest in and to (including but not limited to the fee simple and future rents, royalties, and income derived from) the following described real property: . . .

- Payment of ad valorem taxes. Terms of the partition agreement may be well served to be further described in the partition deed, particularly the obligation to pay ad valorem taxes and the consequence of the source of funds. However, more harm than good could result if scrivening is not carefully done to be consistent with whatever the terms of the partition agreement dictate, if any, as to the result of expending community property income or principal towards separate property real estate.

- Exceptions to Conveyance and Warranties. As indicated above, once a community property asset is partitioned, it may be conveyed by the spouse to third parties. One consideration in preparing not just the partition agreement, but also the deed, is what kind of string, if any, the community may want to have attached. A particularly useful option can be found with rights of first

opportunity or rights of first refusal. However, rather than including in the partition agreement, it would be more fitting to include in the partition deed so as to place third parties on notice and underwrite the enforceability of the rights. An example of an agreement granting first rights is included in the appendix, and it may be part of a deed reserving such rights, or independently prepared and recorded.

2.1.2.3. *Supplements* to the Partition Agreement. As illustrated in the various fact pattern scenarios above, the conduct of the parties following a partition agreement, or the acquisition of new assets, makes drafting in advance of the fact impossible to adequately address. Instead, the use of supplements to partition agreements is encouraged. An example form of such a supplement is included in the appendix materials, and as it illustrates, the same requirements for the partition agreement itself are involved in the supplement.

A different drafting mechanism that may be a better option for clients is to adjust the default arrangement between then as to what properly constitutes a recharacterization. An example of such a provision may be as follows:

> Any further changes, transfers, mutations, mergers, transactions, or recharacterizations (each a "Change Event") of the Property subject to this agreement made during the continued marriage of the Parties, is voidable at the option of either spouse if such purported Change Event is not contemporaneously accompanied by a written reference to this Agreement acknowledged by the Parties. It is the Parties' intent with this provision that the purposes of this Agreement and the partitions made by this Agreement, are not later defeated by accident or oversight, unintentional scrivening, or facilitation by third parties unaware of this Agreement.

At the very least, it would seem to require magic words for a subsequent conveyance which would run contrary to the partition agreement to have a tenable position against enforcement by the spouse injured by the conveyance. But, this is not to mean that properly partitioned community property can accidentally become community again so easily. More on that in the section that follows.

2.2. By Separate Property Conversion. Separate property has a way of becoming, presumptively, community property. This may be intentional, or under certain conditions, unintentional. Two types of documents on this point:

2.2.1. ***Conversion Agreements***. Under Section 4.202 of the Texas Family Code, we find the opposite of the partition and exchange agreement. A conversion agreement allows spouses to convert separate property into community property. The requirements of this type of agreement are much like the partition and exchange agreement: (1) in writing; (2) must identify the property being converted; (3) must contain the fair and reasonable disclosure of the legal effects of converting so as to put both spouses on notice, and; (4) must be notarized. Like the partition and exchange agreement, a conversion agreement does not have to be supported by consideration.

This is relatively less common, but theoretically it would be simpler to effect based on the strong (yet rebuttable) presumption of community property in Texas. Perhaps for this reason, the legislature gave us express language to include in a conversion agreement to accomplish the "fair and reasonable disclosure of the legal effects of converting". When it comes to partition agreements, the legislature did not offer us any analogous or such elaborate language regarding statements of intent.

In Section 4.205(b) of the Texas Family Code, we are told that fair and reasonable disclosure of the legal effect is accomplished if the following language appears in bold-faced type, capital letters, or underlined in the conversion agreement:

> "THIS INSTRUMENT CHANGES SEPARATE PROPERTY TO COMMUNITY PROPERTY. THIS MAY HAVE ADVERSE CONSEQUENCES DURING MARRIAGE AND ON TERMINATION OF THE MARRIAGE BY DEATH OR DIVORCE. FOR EXAMPLE:
>
> "EXPOSURE TO CREDITORS. IF YOU SIGN THIS AGREEMENT, ALL OR PART OF THE SEPARATE PROPERTY BEING CONVERTED TO COMMUNITY PROPERTY MAY BECOME SUBJECT TO THE LIABILITIES OF YOUR SPOUSE. IF YOU DO NOT SIGN THIS AGREEMENT, YOUR SEPARATE PROPERTY IS GENERALLY NOT SUBJECT TO THE LIABILITIES OF YOUR SPOUSE UNLESS YOU ARE PERSONALLY LIABLE UNDER ANOTHER RULE OF LAW.
>
> "LOSS OF MANAGEMENT RIGHTS. IF YOU SIGN THIS AGREEMENT, ALL OR PART OF THE SEPARATE PROPERTY BEING CONVERTED TO COMMUNITY PROPERTY MAY BECOME SUBJECT TO EITHER THE JOINT MANAGEMENT, CONTROL, AND DISPOSITION OF YOU AND YOUR SPOUSE OR THE SOLE MANAGEMENT, CONTROL, AND DISPOSITION OF YOUR SPOUSE ALONE. IN THAT EVENT, YOU WILL LOSE YOUR MANAGEMENT RIGHTS OVER THE PROPERTY. IF YOU DO NOT SIGN THIS AGREEMENT, YOU WILL GENERALLY RETAIN THOSE RIGHTS."
>
> "LOSS OF PROPERTY OWNERSHIP. IF YOU SIGN THIS AGREEMENT AND YOUR MARRIAGE IS SUBSEQUENTLY TERMINATED BY THE DEATH OF EITHER SPOUSE OR BY DIVORCE, ALL OR PART OF THE SEPARATE PROPERTY BEING CONVERTED TO COMMUNITY PROPERTY MAY BECOME THE SOLE PROPERTY OF YOUR SPOUSE OR YOUR SPOUSE'S HEIRS. IF YOU DO NOT SIGN THIS AGREEMENT, YOU GENERALLY CANNOT BE DEPRIVED OF OWNERSHIP OF YOUR SEPARATE PROPERTY ON TERMINATION OF YOUR MARRIAGE, WHETHER BY DEATH OR DIVORCE."

When the legislature writes it for us, there is not much in the way of drafting considerations. However, one drafting consideration may come in the form of whose side we represent in a proposed conversion transaction. For instance, imagine preparing a conversion

agreement in a situation in which one spouse rich in separate property is under the hen-pecking of their spouse who has only to gain. For the lawyer whose client would be prejudiced by conversion to community property (who realized it at the time and was reluctant to acquiesce), would it serve such a client's legal interests to deliberately omit the statutorily approved language and thereby plant the seed of unenforceability?

2.2.2. Gift Deeds between Spouses. Section 3.005 of the Texas Family Code refers to gifts between spouses, and provides, succinctly, that if one spouse makes a gift of property to the other spouse, the gift is presumed to include all the income and property that may arise from that property. The statute makes no mention of the characterization of the gift received by the donee spouse.

Community property cannot be gifted between spouses, because they already own it through the community.

A separate property interest can be gifted, but in the absence of the formalities of the conversion agreement, described above and in Section 4.202 of the Family Code, the donee spouse receives it as separate property. This is also consistent with Section 3.001(2) of the Texas Family Code, which expressly provides that separate property consists of property acquired by gift during marriage. It is widely accepted that spouses may gift or transfer separate property between themselves. For example (included in the appendix), if husband owned a parcel of real estate prior to marriage and signed a deed granting wife an undivided one-half interest in the property, both husband and wife would each own a one-half separate property interest in the real estate as tenants in common.

Gifting community property into separate property involves and requires, generally, a partition agreement as discussed above, with the formalities of Family Code §§ 4.104 and 4.105. However, partition agreements are not the only means by which community property may be transformed into separate property. For instance, in the *Matter of Marriage of Morrison*, a deed from a husband to a wife with no consideration created a presumption that the husband gifted the real estate to the wife such that the entire property became her separate property. 913 S.W.2d 689, 693 (Tex. App. 1995), writ denied (Apr. 12, 1996).

In any gift deed, and not just that between spouses, note the requirements of Section 5.021 of the Property Code. It must be signed, written, describe the property, and actually delivered. Case law as to deed, generally, further requires the document set forth (1) the intent of the grantor, (2) the delivery of the property to the grantee, and (3) the gift to be accepted by the grantee. On this third point, consider a field for the donee spouse to sign indicating his or her acceptance.

3. Changes in the Status of Property Rights of JOINT OWNERS:

3.1. By Partitions in-kind or by sale. Here is a common fact pattern: a group of siblings inherits a single piece of real estate. Perhaps by intestacy, or perhaps under a Will with such nonsense language as 'share and share alike.' And, sure enough, the siblings end up in disagreement. Perhaps a longstanding rivalry. Perhaps it's over expenses such as taxes and maintenance. Or perhaps, one wants to sell the property, but another does not. Does this sound familiar?

Fortunately for the co-owner, Texas law does not force joint owners of real property to maintain joint ownership with other persons if he or she does not want to. Instead, joint owners of real property may compel a partition, and no reason is necessary. This longstanding public policy makes sense in the context of our state's founding and settlement. Public policy protected expansion, settlement, agriculture, and commerce in what was almost entirely rural territory. This policy was thwarted when joint tenants were fighting over a farm. Hence, the state recognizes an absolute right of owners to get out of the circumstance creating the problem rather than preferring legal avenues for continuing joint ownership and gridlock. Ultimately, this accomplishes the state's public policy interest of getting land back into productive use and ownership rather than litigation.

The absolute right of a partition is found in the Property Code, which states, rather succinctly in Section 23.001:

> A joint owner or claimant of real property or an interest in real property or a joint owner of personal property may compel a partition of the interest or the property among the joint owners or claimants under this chapter and the Texas Rules of Civil Procedure.

Case law then tells us what this means. "Partitions may be in kind (meaning that the property is divided into separate parcels and each parcel is allotted to a separate owner) or by sale (meaning that property is sold, and sale proceeds are divided among the owners)." *Bowman v. Stephens*, 569 S.W.3d 210 (Tex.App.—Houston [1st District] 2018, no pet.). The right to a partition is absolute so long as the petitioning party is a joint owner of the land to be partitioned and has an equal right to possess it with the other joint owners, subject to leases.

The right is "absolute" in the sense that there is no effective defense to such an action that is properly brought by someone who qualifies. *Spires v. Hoover*, 466 S.W. 2d 344, 346 (Tex.App.—El Paso 1971, writ ref'd n.r.e.). Note, however, that the right to partition may be waived or contracted away by agreement of the parties. *Dimock v. Kadane*, 100 S.W.3d 622, 625

(Tex.App.—Eastland 2003, pet. denied). Note also that personal as well as real property is mentioned in Chapter 23 of the Property Code, meaning that the absolute right to partition extends to such things as furniture, fixtures, and equipment on real property.

The fight in a partition action is not about whether or not to do it. For instance, there is no statute of limitations to a partition. *Hipp v. Fall*, 213 S.W.2d 732,737 (Tex.App.—Galveston 1948, writ ref'd n.r.e.). It always boils down to ***how*** to do it, and that is where proper drafting is crucial once factfinders have finished their job.

As mentioned in the cited case, *Bowman*, it can be in-kind or by sale. Generally speaking, the law favors partition in-kind over a forced sale. "If the property can be divided in-kind without materially impairing its value, a sale will not be ordered, but when dividing the land into parcels causes its value to be substantially less than its value when whole, the rights of the owners are substantially prejudiced." *Cecola v. Ruley*, 12 S.W.3d 848, 855 (Tex.App.—Texarkana 2000, no pet.). See also *Carter v. Harvey*, 525 S.W.3d 420 (Tex.App.—Fort Worth [2nd Dist.] 2017, no pet.) and *Bowman*, *Id*. Looking back, again, to the context of this policy, it makes sense to consider farms and ranches as more easily divisible (and valuable once agriculturally productive again), than a single-family residence in a subdivision.

For all types of partition, the following documents and pleadings are helpful, and provided as examples with this article:

3.1.1. ***Original Petition for Partition of Real Property***.

Parties, Jurisdiction, Venue, (basic) facts, and Relief Requested are going to be relatively straightforward for the reasons discussed above, and this is illustrated in the example and form petition included in the appendix.

Facts as to the particular desired means of partition will vary, as with any real property, on what it is, where it is, and, most importantly, how your client wants to see it divided. In circumstances where no one has a preference, or when the petitioner is not an equitable interest holder (think a Trustee who needs to make a partial distribution of a trust asset), the appointment of commissioners to determine the proper method may be involved under either Rule 761 of the Texas Rules of Civil Procedure or Texas Estates Code §360.153.

Other Causes of Action. If the circumstances involve other issues than merely partition, the most common of which seems to be a suit over inequitable advancement of expenses, then those separate causes of action should certainly be included in the petition.

However, because the right of partition is absolute, an order for partition itself, apart from the other causes of action, may be obtained by summary judgment.

Exhibits would most helpfully include the often extensive metes and bounds description of rural real property, which of course, is the type of property most often partitioned in-kind. For property in a subdivision, the legal description can easily be included in the facts section of the pleading without creating a disruption to the reader. Other helpful, but not necessary exhibits are recommended to include a survey of the overall property, a survey or illustration of the manner in which partition in kind is desired, and for ease of reference, any vesting documents as to how the joint owners found themselves in joint ownership with one another, such as a will, trust instrument, or heirship illustration.

3.1.2. ***Order of Partition***. Going back to the introductory comments, remember a future audience of this document will be not only the court and the litigants, but also successors-in-interest, title policy issuers, and bureaucrats.

Exhibits. It is recommended that exhibits such as surveys or graphic illustrations be generously included to reflect what the court's rulings on these cases. In cases with more causes of action that just the partition, is recommended that a separate order be prepared, entered, and filed, as to only the partition in kind, with a separate final judgment entered on the other causes of action. One can reference the other, without forcing future title examiners, successors, or bureaucrats to sift through dozens or hundreds of pages of what will be, in their future contexts, irrelevant verbiage.

Removing Clouds on Title? Thinking particularly with a view towards title policy issuers, in the context of cases that settle or reach an agreement for partition, consider including in the order, a judgment quieting title as may be appropriate for the circumstances. A serious advantage to doing so at the same time of an order of partition is that you most likely have 'all parties whose interests could be affected by the declaration' present before the court anyway, as required by Section 37.006(a) of the Civil Practice and Remedies Code.

Recording. It is recommended to file a certified copy of the Order for Partition in the deed records of the county where the property sits. This is with a view in mind of successors in interest who may need the background. It also fits with the previous recommendation of keeping an order for partition separate from a final judgment on other causes of action.

3.1.3. ***Partition Deed***. For partitions in-kind, why go further with a deed when we already have an order? Isn't this a bit redundant? Yes, it is, but it is recommended with a particular view to the audiences. Although the order (especially one quieting title) vests title, the world of the bureaucrats will have difficulty understanding that an order makes a valid conveyance and that properly recording a certified copy of such order in the deed records puts all parties on record notice. How will the county clerk's grantor/grantee index reflect the chain? It is recommended to make, perhaps even as an exhibits to the Order, a separate Partition Deed so that the future is clear for successors in interest, title policy issuers, and even bureaucrats.

Date. Is it the date of the order, or some sort of effective date based on the facts of the case?

Consideration. In litigated cases where partitions result from settlement, carefully consider any confidentiality obligations in a settlement agreement. We would not want to create a new cause of action for violating such a provision if we recite too many details about it as the basis for consideration. The failsafe by default is "at least $10. . .", but there is some benefit to successors in interest in properly identifying the actual consideration paid. This is especially so if your grantee-client intends to sell the property partitioned during lifetime, at which time he will have to explain to the IRS his or her cost basis.

Grantor and Grantee. This is a tricky one and might depend on the nature of any warranty given. Most often it is simply the other joint owners or purported joint owners. In drafting the settlement agreement, be mindful of whether or not it serves a clients' interest to make an admission that the adverse party ever held any interest at all (in which case, you're preparing a quitclaim or quitclaim with warranty, which comes with its own unique issues).

Exceptions to Conveyance or Reservations. Again, here is one where any settlement agreement must be carefully evaluated against the drafting. Are there pending obligations of the other party? Are there special rights reserved, such as ROFRs, as part of a settlement? Does your boilerplate language properly cover existing oil and gas leases or other third parties? Very often, the partition in kind case involves a ranch with existing leases which commenced multiple grantors prior.

Warranty. This could be the subject of its own article just on partition deeds, but in general, the special warranty is almost certainly always the way to go. An exception to this preference by default would be if your client as a grantee has plans for future conveyances, in which case, advocating for a general warranty from your grantor is worthwhile. Consider also the previous recommendation regarding the order of partition

and the thought to include a judgment quieting title. If not representing a would-be grantee, and the order includes judgment quieting title, then a general warranty may not be as dangerous as it would be otherwise.

Acceptance by Grantees. From litigation, it only adds to the finality and desired conclusion of the matter to include express acknowledgment of acceptance of the property conveyed by a deed by its grantees. This is regardless of language in a "final" judgment, and regardless of your comfort in the finality of the settlement agreement. Those three other parties discuss early on might not and often will not be privy to those documents, and it gives them some assurance as to the certainty of the conveyance made when made.

3.1.4. Other Documents to Consider will vary widely based on the circumstances, but just a few ideas which might be considered when preparing and drafting partition case settlements:

- Notice to tenants or third parties in interest such as HOA's
- Assignments of Interest in rents for property subject to leases
- Revised Memorandums of Oil, Gas, and Mineral Leases
- Tenant estoppel certificates
- Loan modification agreements (often the act of partition alone is defined in deeds of trust or real estate lien notes as an event of default)
- Loan subordination agreements (often settlements or judgments are affected by secured liens on the other shares following partition)

3.2. By Survivorship. Joint owners often hold their property as tenants in common with some form of a right of survivorship or pre-designated transferees by operation of law. Joint owners may also have different rights which change based on the nature of the interest, as with life estates, reversions, or contingent future interests.

3.2.1. Transfers on Death Deed ("TODD"). In 2015, Chapter 114 of the Texas Estates Code was enacted to statutorily created and authorized the TODD. Its main purpose is to allow a property owner, whose main asset is their home, to transfer their interest in the property to designated beneficiaries, outside of the probate. Some drafting issues surround the preparation of such instruments, suggesting that transfers with a retained life estate may be the more attractive alternative. These particular issues include:

- In 2019, the statutory version of the form was repealed because the poorly written form created more confusion and problems than intended.

- Estates Code 114.104 provides a "claw back" period of up to 2 years, allowing unpaid creditors to revoke the transfer on death back into the deceased owner's probate estate, to pay the creditors.

- Title companies often refuse to write insurance policies for the property during the two year "claw back" period, or at best, it will appear on Schedule B to the policy. As a result, beneficiaries are unable to sell or refinance the property during these first two years after death.

- The TODD overrides any contrary provision in the owner's Will, even if the Will is signed after the TODD. The only way to revoke a TODD is by either expressly revoking the TODD altogether or revoking the prior TODD by naming a new beneficiary. The revocation is not effective until the instrument is filed the in the county clerk's office where the property is located. See Estates Code 114.057.

- The beneficiary takes the property, subject to all conveyances, encumbrances, assignments, contracts, mortgages, and liens. In some instances, this can lead to a beneficiary not being able to pay off the lien obligations and forcing either a sale of the property, if possible, or a foreclosure.

To memorialize the transfer, it is useful for the public records to reflect the transferor's death. One means is by recording the death certificate—but be mindful of sensitive information and social security numbers, which may and should be redacted. Another is by affidavit of fact, but a question lingers for subsequent case to clarify-- at what point is a creditor placed on constructive notice?

3.2.2. Right of Survivorship Agreement. Estates code 112 provides for survivorship agreements between spouses, and Section 112.052 provides the very simple language required. Often, this is done to avoid probate, but a title company may be hesitant to issue a policy without a personal representative joining the transaction. Section 112.101 provides a summary proceeding to adjudicate a survivorship agreement if it becomes an issue, which is an attractive option to the more cumbersome declaratory judgment action under Section 37 of the Civil Practice and Remedies Code (requiring notice to all persons whose interests would be affected, meaning, notice to all potential heirs at law).

It is recommended that the survivorship agreement be either recorded or contained in the context of a vesting deed to the spouses. Sections 112.203 through 205 detail the consequences of survivorship agreements to certain third parties with and without

constructive notice. The implication of which, is that the survivorship agreement and the surviving spouse is better served with the survivorship agreement recorded.

4. Changes in the Status of Property Rights of FIDUCIARIES.

The most common--and predictable--change in the status of property rights for a fiduciary typically comes in the form of a change of fiduciary. That is, how is a trustee named in a trust agreement, a successor executor appointed under a will, or an Asset Manager hired to administer property to communicate their position and authority to third parties, or secure the acknowledgment of third parties as to such fiduciary's rights and powers? Some options and best practices.

4.1. Trustees; ***Certification of Trust***. Most trust agreements are private and never see the public eye. This is deliberate, and one aspect of the use of trusts that make them attractive asset protection arrangements under the right circumstances. But when dealing with a purported trustee, how do you know who is in charge? The best, if not most common, method is to prepare and record a Certification of Trust. Section 114.086 of the Texas Property Code details a particular form that may be used to evidence a trustee's authority, particularly with regard to real property.

A Certification of Trust under the statute lends itself well to real property. The statute delineates the information it may or must contain, and in the example form, the order of the statute is tracked. Many third parties who regularly do business in Texas recognize and understand Certifications, and do not require review or disclosure of the entire trust agreement. To their credit, a well-drafted certification includes specific notation of the language granting whatever powers or authority a trustee needs recognized, and the final section indicates that the trust assets are liable for a misrepresentation.

A Certification should be recorded in the real property records of (a) the county of the situs of administration, which is important for establishing venue in any future dispute with a trustee, and (b) the county where any real property held in trust is located. In the instance of corporate trustees, attached to the Certification it is recommended to include a corporate resolution or other instrument evidencing the authority of the individual to execute the Certification on behalf of the entity.

4.2. Executors, Administrators, and Personal Representatives. Title theoretically transfers from a decedent to a beneficiary, heir, or devisee immediately on death, and the will, heirship determination, or other administrative documentation is merely to memorialize the conveyance. However, third parties do not understand or accept this theory, and in practice, the conveyance must be proven.

4.2.1. Distribution Deeds and ***Affidavits of Fact***. To put third parties on notice, personal representatives can "distribute" real property from an estate in a memorialization by distribution deed. Of course, the warranty can be special or general. Consideration should always reference the terms of the will or heirship determination. When representing a fiduciary, include language limiting the warranty to only the fiduciary capacity, as provided in the form and example with the appendix.

But what about estates without an administration? Other than affidavits of heirship, which are mostly statutory in substance, a more challenging experience comes in memorializing transfers by probating a will as a muniment of title. In a probate by muniment of title, there is no executor. Nor is there an administration. The purpose of the special probate procedure in Chapter 257 of the Texas Estates Code is simply to recognize the validity and authenticity of a Last Will to convey title, without requiring administration. The probate process is, initially, similar to a regular probate with an administration: an applicant submits the original will and application, provides proof of death, and obtains an Order Probating the Will as a Muniment of Title.

Probate courts are reluctant to accept or sign proposed orders that reference, in any way, particular property of a decedent. This is because it is not required in Estates Code 257, but as a practical matter, it could create a cloud on title if untrue and bring resolution of the matter back to a court with an already crowded docket. So how, then, do we get from Probate Court into the deed records to memorialize the transfer which theoretically effected immediately at death?

Affidavits of Fact are a common and user-friendly method to get a muniment transfer filed publicly, indexed to the property, and put third parties on record notice. A form is included in the materials, along with an example. It is recommended to do the Affidavit of Fact in addition to recording both (i) a certified copy of the Will, and (ii) a certified copy of the Order Admitting Will to Probate as a Muniment of Title. These too, will aid future title examiners in particular to find the conveyance in the index, find the terms of the Will, and find the Order establishing the Will as authentic. Even states that do not have Muniment of Title procedures in their law seem to recognize the Affidavit of Fact coupled with an Order and Will.

4.2.2. Successor Personal Representatives. When an executor, administrator, or guardian resigns or is replaced, often third parties do not know or will only recognize arrangements with the predecessor fiduciary. In these instances, drafting the Order appointing the successor should reference language of reliance for third parties and particularly financial institutions. In the example included with the appendix, the author

personally served and had no trouble securing the cooperation of banks and other financial institutions in recognizing the change and releasing the assets.

4.3. Asset Managers and *Affidavits of Management*. It is common practice for professional or corporate asset managers to be engaged to serve a property owner in such things as the management of oil and gas interests, for example, or the management of real property. In such instances, there are reasons to seek to put the public on notice of this arrangement. In the context of oil and gas, the manager will want their contact information readily available to potential oil companies who would seek to lease unleased mineral interests. In the case of property managers, many forms exist as promulgated by the Texas Association of Realtors or the Texas Real Estate Commission, but in some instances these forms are inadequate.

The deed record, by itself, typically only notifies us of a property's ownership. So how, then, does the potential third party contact the right party for, presumably, legitimate and desired business? Recording a management agreement or management contract itself would do an underlying client the disservice of revealing otherwise confidential information, such as fee schedules. Instead, it is common practice for asset managers to prepare and file an notice in the real property records in the form of an affidavit of agency. These are simple, and there is no promulgated form. The reason the form of a sworn affidavit is preferred is to give the third party a slightly higher degree of confidence in the apparent authority of the asset manager. Included in the appendix is a typical form of such a thing customary for oil and gas management agents.

5. Changes in the Status of Property Rights regarding ENTITIES

For many of our real estate clients, title to the asset is held in a closely-held entity. In these contexts, rights to property can change as a result of provision in the governing documents, or by a change in management. The subject of closely-held entity drafting could be a presentation unto itself, but here are some common drafting considerations for common changes regarding closely held entities.

How does the public ascertain who the proper party is to manage a closely-held entity? Who votes shares of stock when a stockholder dies or becomes incapacitated? What happens when a partner in a partnership divorces or files bankruptcy? Under what circumstances can the status of property rights in a closely-held entity change by the bad act of an equity holder?

5.1. Management Changes. Ordinarily, bureaucrats refer to the Texas Secretary of State's records and the individuals listed under the "management" tab in SOS Direct. How does this get updated in response to a resignation, removal, or voluntary change outside of the annual

meeting? Two methods. One, the annual Public Information Report (Franchise Tax Return) typically prepared by an accountant and filed with the controller *eventually* makes it way to the Secretary of State. The operative word here is eventually, and it can take months.

When the change needs to be updated promptly, an effective means of accomplishing record notice of the change is in the preparation and filing of a Certificate of Amendment. Promulgated Forms are available on the Secretary of State's website, or here: https://www.sos.state.tx.us/corp/forms_boc.shtml Forms 401 through 428 evidence management change of one form or another, and Form 424 is the most common one as it amends the Certificate of Formation for a domestic entity, on which the disclosure of governing persons is made.

When submitted with an extra fee for "expedited processing" by fax, the change can be reflected in the public record as quickly as one or two days. This tends to be a much better alternative to presenting minutes or corporate resolutions to third parties, as such third parties.

5.2. Changing Rights through Governing Documents. With regard to closely-held entities, the governing documents is a powerful but underutilized means of changing the status of rights to property, or preventing such change. By "governing documents" in this context, is intended to include and refer to corporate shareholder agreements, bylaws, LLC operating agreements, LP agreements, or any other arrangement between and among the equity holders of a closely held business entity.

The particular property to which rights may be changed by these governing documents is specifically the owner, member, shareholder, or partner's respective equity interest, LLC membership, shares of stock, or limited partnership percentage. Issues to be addressed when Governing documents can detail what happens on an owner's

5.2.1. Rights of Survivorship. Transfers on death may be accomplished for real property by deed, as discussed above. Transfers on death for assets held at a financial institution may be accomplished by the standard form that accompanies the signature card on an account. In some instances, this is tragic as the inadvertent check of a box on a form can undermine the most well-created estate planning.

One example of a rights of survivorship in a closely-held entities by a husband and wife is as follows:

> Membership interests in this Company are held by the Members as joint tenants with all other Members with rights of survivorship among the other Members. Upon the death of any Member, the remaining Members shall succeed to that deceased Member's shares pro rata in proportion to the percentages of

the shares held by and among the remaining members. If a Member should die, and no other members survive him or her within 30 days, then such deceased Member's shares shall pass through his or her estate.

A different example comes from a partnership among siblings who wish to keep a portfolio of income-producing properties in consolidated ownership and management for the remainder of their lifetimes. The properties were acquired from their parents, and a separate closely-held entity was formed to hold assets between and among the grandchildren cousins. The provision regarding survivorship reads as follows:

Duration. The partnership begins on the date of the Agreement and it shall exist until the date of the last to die of the three limited partners, [Brother], [Sister1], and [Sister2]. Upon termination, all remaining partnership assets and liabilities shall be distributed to and contributed to the [Grandchildren's entity], or its successor(s) in interest, to be held and administered subject to the terms of its governing agreements.

5.2.2. Reversion or Future Interests. The example immediately preceding addresses another subject—revision or future rights to assets held in entities at the end of their term. Governing documents often specify the term or duration of the entity. In most circumstances, it is "perpetual". However, in some, it is for a limited duration such as the lifetime of its equity holder. The governing documents themselves, if there be a limited duration or termination on a triggering event, specify the parties to whom the remaining entity assets get distributed on the entity's termination, and how. Particularly for real estate holding entities—is it desirable for individuals as the former equity holders to receive outright, undivided interests in real property on an entity's termination? Consider provisions for determining how assets get divided and who has discretion at or prior to the term to make the appointment. Management's authority would necessarily, end on the expiration of the term of an entity, which is why these sorts of provisions are usually thought through and addressed in entities with limited term. One message here is, do not presume an indefinite term for entities you did not participate in forming.

5.2.3. Forfeiture Clauses in Entity Documents. In the estate planning and probate context, the so-called "no contest" or "in terrorem" clauses, also known as forfeiture clauses, are rarely enforced and are addressed by statute. *See* Estates Code §254.005 and Property Code §112.038. In general, a beneficiary can lose their benefits under a will or under a trust if they contest the actions of the executor or trustee, unless they bring the action in good faith and with "just cause." There are few cases finding a lack of good faith or just cause, and as such, these provisions in practical application are rarely enforced in the estate

planning context. In the estate plan context, forfeiture clauses are almost always narrowly and strictly construed and are usually construed against forfeiture, if at all possible. *Estate of Newbill*, 781 S.W.2d 727, 728 (Tex.App.-Amarillo 1989, no writ). Certainly, however, they still appear in documents as a deterrent to would-be troublemakers.

The case law, common law prior to codification, and policy analysis of the 'good faith' exception to estate planning forfeiture clauses is that the beneficiary of an estate was not a party who bargained for the will or trust. Instead, it was gratuitous, and the justification for exceptions to enforcement range from actions for mere construction of the documents to a desire to a policy interest in promoting proper administration of an estate or trust. *See* Restatement (Second) of Property, §9.1 (1981).

The entity context is a bit different. Between and among stakeholders in a closely-held entity, the governing document was bargained for. Similarly, there are (theoretically) other rights and remedies available to a non-management or minority equity holder that are not available to estate or trust beneficiaries. They can vote to remove, vote on matters reserved to owners, and exercise remedies under the Business Organizations Code such as the right to demand to inspect books and records.

For this reason, pro-management considerations in preparing entity documents are moving towards and more frequently including forfeiture provisions for the trouble-making minority stockholder. Refer to the example and sample language of such a provision included in the appendix.

No published or unpublished case quite on point has challenged these, but it is a drafting consideration when preparing real estate holding companies, and a drafting consideration when considering the future rights of minority or non-management equity holders.