

6-1-2016

Breaking Up is Hard to Do: Developments in Partitioning Real and Personal Property in Marital, Business, and Personal Relationships in Florida Jurisprudence

Harry M. Hipler

Follow this and additional works at: <http://repository.law.miami.edu/umblr>

 Part of the [Business Organizations Law Commons](#), [Family Law Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

Harry M. Hipler, *Breaking Up is Hard to Do: Developments in Partitioning Real and Personal Property in Marital, Business, and Personal Relationships in Florida Jurisprudence*, 24 U. Miami Bus. L. Rev. 81 (2016)

Available at: <http://repository.law.miami.edu/umblr/vol24/iss3/4>

Breaking Up is Hard to do: Developments in Partitioning Real and Personal Property in Marital, Business, and Personal Relationships in Florida Jurisprudence

Harry M. Hipler^{*}

This article focuses on partition of real and personal property in Florida in the 21st century. It discusses questions and issues about partitioning real and personal property, so that private lawyers who practice in a variety of areas can familiarize themselves with how partition proceedings work. Partition of real and personal property is not restricted to one area of the law. Instead, it relates to and bleeds over into a multitude of areas of the law making it necessary for all practitioners to be familiar with the area of partition. Partition is now provided in all 50 states, and Florida's partition law is regulated by Chapter 64, Florida Statutes. Partition may seem simple and straight forward for the purpose of dividing jointly owned real and personal property, nonetheless the partition process can be cumbersome, unpredictable, and confusing. When joint owners of real and personal property – whether they are married, unmarried live-in companions, cotenants as business partners and shareholders, or beneficiaries of real and personal property – come to a decision to part ways they often find that breaking up their undivided interests is hard to do. Today's lawyers' will come in contact with disputes regarding joint ownership of real and personal property especially on account of an improving economy. Cotenants are no longer reluctant to divide and sell their real property on account of the increased value of their

^{*} Harry M Hipler. M.A., Political Science, Florida International University, 2013; M.U.R.P., Florida Atlantic University, 2007; LL.M, Tax, University of Miami, 1981; J.D., University of Florida, 1975. "AV" Rated – Martindale Hubbell Law Directory. The author practices primarily in the areas of commercial litigation, local government law, and domestic relations. He has also authored a variety of articles appearing in law related publications in the areas of domestic relations and local government law.

jointly held real property in light of a growing and stronger economy.

*This article discusses issues pertaining to partition, including the following: stating a cause of action for partition and whether property is divisible or indivisible; exceptions to mandatory partition; what is property according to Chapter 64, Florida Statutes; treatment of a deposit and down payment when purchasing jointly titled real property; applicability of the statute of limitations to a partition actions; maximizing interests in real and personal property partition actions and the importance of a written agreement upon separation; contractual and statutory provisions for entitlement to attorney fees; other causes of actions that may be consolidated in a partition proceeding; personal and constructive service of process; when does jointly titled property vest in a cotenant upon death of an cotenant; setoffs and credits in jointly titled marital residence; the benefits and burdens of cotenants of jointly own real and personal property; homestead property and forced sale in partition; “ouster” of one cotenant and the effect of ouster on setoffs and credits; nonexistent and void ab initio marriage and its effect on joint ownership in partition; effect of *Obergefell v. Hodges* and same-sex marriage on partition.*

I. INTRODUCTION	83
II. STATING A CAUSE OF ACTION FOR PARTITION UNDER CHAPTER 64, FLORIDA STATUTES	85
A. <i>Chapter 64, Florida Statutes, requires two or more cotenants</i>	85
B. <i>Property indivisible and not subject to partition without prejudice to the owners, or property divisible subject to partition without prejudice to the owners</i>	87
C. <i>Location matters: local vs. transitory actions</i>	88
III. EXCEPTIONS TO MANDATORY PARTITION OF JOINTLY TITLED REAL PROPERTY	89
IV. “PROPERTY” ACCORDING TO CHAPTER 64 OF THE FLORIDA STATUTES	91
V. TREATMENT OF A DEPOSIT AND DOWN PAYMENT WHEN PURCHASING JOINTLY TITLED REAL PROPERTY	97
VI. THE APPLICABILITY OF THE STATUTE OF LIMITATIONS TO PARTITION ACTIONS	100
VII. MAXIMIZING INTERESTS IN REAL AND PERSONAL PROPERTY	

PARTITION ACTIONS: IS THERE A WRITTEN AGREEMENT SETTING FORTH JOINT OBLIGATIONS AND HOW WILL THE PROPERTY BE DIVIDED AND/OR SOLD UPON SEPARATION?.....	101
VIII. CONTRACTUAL AND STATUTORY PROVISIONS FOR ENTITLEMENT TO ATTORNEY FEES	103
A. <i>Florida Statute Section 64.081 provides a basis to award attorney fees in a partition action</i>	104
B. <i>Chapter 742 can form a basis for an award of attorney fees ..</i>	105
C. <i>Dissolution of Marriage and Florida Statute Section 61.16(1) for an award of attorney fees</i>	106
D. <i>Florida Statute Section 57.105 can be a basis to award attorney fees for claims and defenses where the party and/or his or her attorney knew or should have known that there was no basis in law or fact for claims or defenses</i>	107
IX. OTHER CAUSES OF ACTION CAN BE CONSOLIDATED WITH A PARTITION ACTION WHERE THE PARTIES OWN JOINTLY TITLED REAL PROPERTY	108
X. PERSONAL OR CONSTRUCTIVE SERVICE OF PROCESS IN A PARTITION ACTION.....	109
XI. “TILL DEATH DO US PART”: WHEN DOES JOINTLY TITLED PROPERTY VEST IN A COTENANT WHEN PARTITIONING REAL AND PERSONAL PROPERTY?	111
XII. DETERMINING SETOFFS AND CREDITS IN JOINTLY TITLED MARITAL RESIDENCE	117
XIII. BURDENS AND BENEFITS OF JOINTLY OWNED REAL PROPERTY BY COTENANTS	119
XIV. HOMESTEAD PROPERTY FROM FORCED SALE AND PARTITION.....	121
XV. OUSTER OF ONE COTENANT BY ANOTHER OUT-OF-POSSESSION COTENANT: WHAT EFFECT DOES OUSTER HAVE ON SETOFFS AND CREDITS AS APPLIED TO JOINTLY TITLED REAL PROPERTY? ..	122
XVI. NONEXISTENT AND <i>VOID AB INITIO</i> MARRIAGES.....	126
XVII. <i>OBERGEFELL V. HODGES</i> , SAME-SEX MARRIAGE, AND PARTITION.....	128
XVIII. CONCLUSION	132

I. INTRODUCTION

When joint owners of real and personal property—whether they are married, unmarried live-in companions, cotenants as business partners and shareholders, or beneficiaries of real and personal property—come to a decision to part ways, they often find that breaking up their undivided

interests is hard to do.¹ Partition—the legal procedure in which joint owners break up their undivided joint ownership in real and personal property—has roots dating back to Roman law, where cotenants were permitted to partition and sell jointly-held land.² An action for partition of land is an ancient common law remedy that was initially established to allow cotenants to divide land held jointly.³ In England, the process through which joint owners broke up their undivided ownership dates back to thirteenth century England during the reign of Henry III and applied to land held as joint tenants and tenants in common.⁴ Although partition existed during England’s feudal period, it was limited and not available to most.⁵ In 1539, during the reign of Henry VIII, partition developed to all forms of joint ownership except tenancies by the entireties.⁶ Partition is now provided for in all 50 states of the United States,⁷ and in Florida, it is regulated by Chapter 64 of the Florida Statutes.⁸ Partition seems like a simple and straightforward concept and procedure for the purpose of dividing jointly owned real and personal property, yet the partition process can be cumbersome, unpredictable, and confusing.

This article focuses on partition of real and personal property in Florida in the 21st century and discusses issues in the procedure so that private lawyers practicing in different areas of the law can become familiar with how partition proceedings work. Partition of real and personal property is not boxed into one area of the law. Rather, it is a part of many areas of the law including, but not limited to: family

¹ Neil Sedaka, *Breaking Up Is Hard to Do* (1962); Neil Sedaka, *Breaking Up is Hard to Do* (Rocket Records 1972). “Breaking Up is Hard to Do” is a song recorded by Neil Sedaka, and co-written by Sedaka and Howard Greenfield. Sedaka recorded this song twice, in 1962 and 1975, in two extremely different arrangements, and is considered to be his signature song.

² See Jonathan I. Charney, *Partition in the Modern Context*, 1967 WIS. L. REV. 988, 988 (1967); William H. Loyd, *Partition*, 67 U. PA. L. REV. 162, 163 (1919).

³ See *Garcia-Tunon v. Garcia-Tunon*, 472 So. 2d 1378, 1379 (Fla. 2d DCA 1985).

⁴ A.C. Freeman, *Cotenancy and Partition: A Treatise on the Law of Co-Ownership as it Exists Independent of Partnership Relations Between the Co-Owners* (S. Whitney & Co.) (1874); William H. Loyd, *Partition*, 67 U. PA. L. REV. 162 (1919); Robert Ludlow Fowler, *Novel Partition Procedure*, 3 COLUM. L. REV. (1903).

⁵ *Id.*

⁶ William H. Loyd, *Partition*, 67 U. PA. L. REV. 162 (1919); Robert Ludlow Fowler, *Novel Partition Procedure*, 3 COLUM. L. REV. (1903).

⁷ See *Ark Land Co. v. Harper*, 599 S.E. 2d 754, 758 (W. Va. 2004) (citing Phylliss Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 WASH. U.L.Q. 737, 752 (2002)); Crystal Chastain Baker and Shunta Vincent McBride, *A Primer on Heirs Property and Georgia’s New Uniform Partition of Heirs Property Act: Protecting Owners of Heirs Property*, 19 GA. BAR J. 16, 18 (Oct. 2013).

⁸ FLA. STAT. §§ 64.011 – 64.091 (2015).

disputes in dissolution of marriage proceedings; real estate (land and property ownership, residential and commercial transactions, and contract creation and interpretation); legal ownership interests in real and personal property; landlord-tenant; estate planning (wills, trusts, inheritance, and probate); elder law; mineral and agricultural rights; judgment liens and collections; title insurance disputes; business associations and corporations; tax; and of course, general civil litigation. Partition bleeds over to a multitude of areas of the law, making it necessary to become familiar with partition proceedings and issues. This familiarity becomes even more necessary on account of a high volume of disputes occurring among families and non-families alike when cotenants decide to divide and sell their real and personal property.

II. STATING A CAUSE OF ACTION FOR PARTITION UNDER CHAPTER 64, FLORIDA STATUTES

A. *Chapter 64, Florida Statutes, requires two or more cotenants*

Where real or personal property is owned by two or more cotenants, Florida Statute Section 64.031 provides that a partition “action may be filed by any one or more of several joint tenants, tenants in common, or coparceners against the cotenants, coparceners, or others interested in the lands to be divided.”⁹ The names of the owners are important in determining whether a partition action may be filed by two or more cotenants, but even if only one name or title is listed as the owner of real and personal property, it is still possible to go behind the entity’s name and title in seeking a partition, at least as to a corporation. In *Kay v. Key West Development Co.*, there were two stockholders who owned one-half of the capital stock.¹⁰ The owners took title in the name of the corporation that was formed and organized solely for the purpose of owning the real property.¹¹ One stockholder and a beneficiary of a deceased stockholder’s estate could not agree upon a sale or division of the real property, resulting in a deadlock.¹² The Florida Supreme Court ruled that the trial court may disregard the corporate entity and go behind the actual title, thereby allowing the stockholders to be treated as persons in interest permitting the real property to be divided and/or sold without destroying the legal existence of the corporation in a partition suit.¹³

⁹ FLA. STAT. § 64.031 (2015).

¹⁰ *Kay v. Key West Development Co.*, 72 So. 2d 786 (Fla. 1954).

¹¹ *Id.* at 786.

¹² *Id.* at 787.

¹³ *Id.* at 789. Had the real property been acquired as a tenancy in common, the remedy of partition would have still been available; the fact title was taken in a corporate name

If only one person or entity owns real or personal property, a partition action is not sustainable. Section 64.031 has codified the general rule that the partition statute does not apply to real and personal property owned by a single person or entity.¹⁴ In *Shephard v. Ouellete*,¹⁵ the district court held that the partition statute did not provide a basis to order judicial sale of a partnership's parcel of real property in a partnership dissolution proceeding since the parcel was owned solely by the partnership as a single entity.¹⁶

A partition action is unavailable to the owner of a life estate applying for partition of real property against remaindermen, even where a cotenant shares an interest in the remainder interest.¹⁷ Remaindermen have no present possession during the existence of a particular estate, and are not entitled to partition, because the interests by the remaindermen are successive to the interests in the life estate.¹⁸ Similarly, "a tenant in common who has no immediate right to possession of property has no right to seek a partition[]," because in order to maintain a complaint for partition, the plaintiff must show title and an immediate right to possession.¹⁹ Thus, if legal title is not established in the plaintiff,

should not preclude a similar result. The Florida Supreme Court in *Kay* ordered the sale of the corporation's sole asset and the distribution of the sale proceeds to the shareholders by sustaining the use of the partition statute as a basis to order a sale. *Id.* See also *Fernandez v. Yates*, 145 So. 3d 141, 144-45 (Fla. 3d DCA 2014). The principle announced in *Kay*, however, does not extend to corporate officers or directors, but is confined to shareholders. See *Perdomo v. Cabrera*, 963 So. 2d 736, 736 (Fla. 3d DCA 2007).

¹⁴ FLA. STAT. § 64.031 (2015).

¹⁵ *Shephard v. Ouellete*, 854 So. 2d 251 (Fla. 5th DCA 2003).

¹⁶ *Id.* at 251-52. "The partition statute does not apply to property that is owned by a single entity. Because the property was owned solely by the partnership, a partition action did not lie." *Id.* at 254. See also *Buchman v. Canard*, 926 So. 2d 390, 392 (Fla. 3d DCA 2005). FLA. STAT. §689.045 (2016) (concerns conveyances to or by a partnership, and provides that title in a partnership "must be conveyed or encumbered in the partnership name," by allowing one general partner to execute the document on behalf of the partnership. In both a general and limited partnership, "one of the general partners is authorized to execute and record . . . an affidavit stating the names of the general partners" that may be duly recorded in the county where the real property is located. Thus, it would appear that real and personal property placed in the name of the partnership is a partnership interest and constitutes partnership property.) See FLA. STAT. § 620.8201 (2015) (specifically provides: "(1) A partnership is an entity distinct from its partners."). FLA. STAT. § 620.8307(1) (2016) (provides that a partnership can "sue and be sued"). Thus, a partnership is a single entity.

¹⁷ FLA. STAT. §64.031 (2015); *Anderson v. Russell*, 975 So. 2d 585 (Fla. 1st DCA 2008); *Garcia-Tunon v. Garcia-Tunon*, 472 So. 2d 1378 (Fla. 2d DCA 1985); *Barden v. Pappas*, 532 So. 2d 707 (Fla. 5th DCA 1988).

¹⁸ *Garcia-Tunon*, 472 So. 2d at 1379.

¹⁹ *Cannon v. Morris*, 407 So. 2d 372, 373 (Fla. 1st DCA 1981); *Lambert v. Lambert*, 403 So. 2d 484, 484 (Fla. 1st DCA 1981).

partition is not available even if the plaintiff might have an equitable interest in the land.²⁰ Where a surviving sibling is granted a life estate by a will of jointly held tenants in common real property, there is no right to seek partition until the life estate terminates.²¹ A life tenant in the entire real property lacks any present joint interest with any other person, which makes partition untenable.²² Interests that are successive and not concurrent cannot be partitioned.²³

B. Property indivisible and not subject to partition without prejudice to the owners, or property divisible subject to partition without prejudice to the owners

Where a request for partition complies with Chapter 64 of the Florida Statutes and is uncontested by the opposing party, the property is indivisible and not subject to partition without prejudice to the others; the failure to grant partition, divide the property, and order a sale in accordance with the parties' interests and, more specifically, Florida Statute Section 64.041, constitutes reversible error, as partition is a matter of right.²⁴ Chapter 64 provides strict guidelines for partition and, if this statute is not followed, a district court has the authority to reverse the trial court's proceedings.²⁵ On the other hand, if the property is divisible without prejudice to the owners, a partition in kind is justified so that the property apportioned to the parties will be divided in accordance with the owners' interests without a sale.²⁶

In either event, a trial court is authorized to decide whether real property is divisible or indivisible without appointing commissioners as

²⁰ Rountree v. Rountree, 101 So. 2d 43, 44 (Fla. 1958); Dietrich v. Winters, 798 So. 2d 864, 866 (Fla. 4th DCA 2001).

²¹ Chin v. Estate of Chin, 15 So. 3d 894, 895 (Fla. 3d DCA 2009).

²² *Id.*

²³ Barden v. Pappas, 532 So. 2d 707, 709 (Fla. 5th DCA 1988).

²⁴ FLA STAT. § 64.041 (2015); Pantuso v. Pantuso, 335 So. 2d 361, 362 (Fla. 2d DCA 1976); Brennan v. Brennan, 122 So. 3d 923, 925-27 (Fla. 4th DCA 2013); Gullledge v. Gullledge, 82 So. 3d 1113, 1114-16 (Fla. 2d DCA 2012). Thus, if the trial court orders the sale of the marital home in the final judgment, the final judgment must fix a reasonable deadline for refinancing and by which the sale must take place if there is no refinancing, and if the final judgment fails to do so, then the district court is authorized to reverse. Marks v. Stein, 160 So. 3d 502 (Fla. 2d DCA 2015). *See* Blanchard v. Commonwealth Oil Co., 116 So. 2d 663, 668 (Fla. 3d DCA 1959) (suggesting that there must be ample allegations to support a partition proceeding, and without ample pleadings for partition, there cannot be a partition of property without following the requisite statutory procedure.), *See* Hodges v. Hodges, 128 So. 3d 190 (Fla. 5th DCA 2013); Watson v. Watson, 646 So. 2d 297, 297 (Fla. 5th DCA 1994).

²⁵ Marks 160 So. 3d 502 (Fla. 2d DCA 2015).

²⁶ Schroeder v. Lawhon, 922 So. 2d 285 (Fla. 2d DCA 2006).

provided by Florida Statute Section 64.061.²⁷ In any partition proceeding, the parties must carefully follow Chapter 64 of the Florida Statutes or risk reversal if the procedure is found to be defective.²⁸ The same rule applies where the trial court neglects to partition real property where one or both parties make a request: if the trial court leaves the partition count open without a deadline for division or sale, then the district court may reverse and remand to the trial court to correct such a deficiency.²⁹ In such a situation, the district court is authorized to reverse the trial court's ruling and remand the case to the trial court to partition the real property at a definite point in time for division or sale of the property.³⁰

C. *Location matters: local vs. transitory actions*

Florida Statute Section 64.022 provides that “[p]artition shall be brought in any county where the lands or any part thereof lie”³¹ There is a split among the appellate courts as to whether a court can compel the sale of real property or order a change in title for real property located outside the court's geographical boundary. In local actions—where proceedings against the property have a fixed location—the jurisdiction and venue lies only in the state and county where the subject real property is located.³² Under this view, the appellate courts have held that a trial court in a dissolution of marriage or partition action cannot sell or transfer real property located outside the territorial boundary of the court.³³ Where the action is personal or transitory—an action on a debt, contract, dissolution of marriage, or other suit relating to a person—a defendant has the right to be sued in the county of his or her residence or where the cause of action arose.³⁴ Under this view, a court has inherent jurisdiction to compel a sale of foreign real property located outside of the geographical boundary of the court as a part of its

²⁷ Geraci v. Geraci, 963 So. 2d 904, 906 (Fla. 2d DCA 2007).

²⁸ Marks, 160 So. 3d at 507-09.

²⁹ Kumar v. Kumar, 84 So. 3d 399 (Fla. 2d DCA 2012); Konz v. Konz, 63 So. 3d 845, 846 (Fla. 4th DCA 2011); Collingsworth v. Collingsworth, 624 So. 2d 287, 290 (Fla. 1st DCA 1993).

³⁰ Brennan v. Brennan, 122 So. 3d 923, 925-27 (Fla. 4th DCA 2013); Gullede v. Gullede, 82 So. 3d 1113, 1114-17 (Fla. 2d DCA 2012); Pantuso v. Pantuso, 335 So. 2d 361 (Fla. 2d DCA 1976).

³¹ FLA. STAT. § 64.022 (2015).

³² See Brown v. Brown, 169 So. 3d 286, 287 (Fla. 4th DCA 2015); Polkowski v. Polkowski, 854 So. 2d 286, 286-87 (Fla. 4th DCA 2003); Denison v. Denison, 658 So. 2d 581, 582 (Fla. 4th DCA 1995); Harvey v. Mattes, 484 So. 2d 1382, 1383-84 (Fla. 5th DCA 1986).

³³ *Id.*

³⁴ Goedmakers v. Goedmakers, 520 So. 2d 575, 579 (Fla. 1988).

power to create an equitable distribution plan in a Final Judgment of Dissolution of Marriage.³⁵ In *Gil v. Mendelson*,³⁶ the district court held that the trial court could order the sale of Israeli real property, where the pleadings requested that the trial court take jurisdiction and equitably distribute all real and personal property of the parties.³⁷

III. EXCEPTIONS TO MANDATORY PARTITION OF JOINTLY TITLED REAL PROPERTY

There are circumstances where a trial court can lawfully refuse to partition real property if the facts fall within one of the few exceptions of the parties' right to partition. These exceptions include: where a grantor executes a deed in favor of a grantee conferring a life estate,³⁸ a trial court grants exclusive use and occupancy to the former spouse and minor children until they turn age 18 or graduate from high school, whichever occurs later but not later than age 19;³⁹ severe health reasons of a joint

³⁵ See *Gil v. Mendelson*, 870 So. 2d 825, 826 (Fla. 3d DCA 2003). The reasoning in *Gil* was that title and sale of the real property, other than the marital residence, were related to the dissolution of marriage action, which is a personal action of the parties. When the parties ask for equitable distribution in their pleadings, "pleadings filed by the parties invoke the trial court's in personam jurisdiction to equitably distribute all property owned by the parties, regardless of the property's location." *Id.*

³⁶ *Gil* also suggests that the court has jurisdiction and authority to equitably distribute all of the parties property located in many different places because the parties have submitted themselves to the jurisdiction of the court. The Israeli real property in *Gil* was inextricably intertwined in the dissolution of marriage; therefore, it is difficult to separate the real property portion of the case from the equitable distribution portion. The district court also decided that entitlement to credits could be considered and applied against the former spouse's one-half interest in the real property upon sale.

³⁷ *Id.*

³⁸ *Kumar v. Kumar*, 84 So. 3d 399 (Fla. 2d DCA 2012). *Bucacci v. Boutin*, 933 So. 2d 580 (Fla. 3d DCA 2006).

³⁹ *Phillips v. Phillips*, 83 So. 3d 903, 904-05 (Fla. 2d DCA 2012); *Durand v. Durand*, 16 So. 3d 982, 983 (Fla. 4th DCA 2009); *Wiggins v. Wiggins*, 415 So. 2d 861 (Fla. 5th DCA 1982). *Contra Dottaviano v. Dottaviano*, 170 So. 3d 98, 100 (Fla. 5th DCA 2015) (describing that the husband was made the primary residential parent of the parties minor son and granted exclusive use and occupancy of the home until majority or emancipation of the minor child. The wife asked for partition, but the trial court rejected her claim. On appeal, the district court reversed and ordered partition by ruling that "special circumstances" existed because the parties lacked other substantial marital assets, there was a large difference in relative earning power between the spouses, the family had lived in the marital home for a short period of time when they separated, the payments related to the marital home were substantial, and the husband could find a place for himself and the minor child to live that was less expensive. While the district court based its ruling on "special circumstances", it would appear that a better reason for its ruling requiring partition of the marital residence is that in an equitable distribution design or

owner in a dissolution of marriage proceeding that forms a basis for an award of lump sum alimony;⁴⁰ agreement by co-owners not to partition real property;⁴¹ trial court distributions where one marital asset is exchanged for another in an equitable distribution design or plan in a dissolution of marriage proceeding pursuant to Florida Statute Section 61.075;⁴² and “manifest injustice” that should only be involved in extreme cases where fraud, oppression, unclean hands, or overreaching will result if partition were granted.⁴³ However, for the most part, Florida appellate court decisions upholding partition and division or sale of real property suggest that partition is a matter of right in those persons holding an undivided interest in real property.⁴⁴ Implicit in these decisions are strong policy reasons in favor of title passage. Partition and sale of the whole is beneficial to trade and commerce as it maximizes real estate’s aggregate value, whereas physical division without sale tends to provide for an inefficient fragmentation of real estate.⁴⁵ Upon sale, title passes without any loss of economic value and with a minimum amount of dissention and inconvenience that can arise from the joint ownership and possession of real estate.⁴⁶

plan in a dissolution of marriage proceeding, a trial court pursuant to FLA. STAT. § 61.075 (1) is authorized to divide the parties’ assets “to do equity between the parties.”).

⁴⁰ *Durand*, 16 So. 3d at 983.

⁴¹ *Condrey v. Condrey*, 92 So. 2d 423, 426 (Fla. 1957); *Haddad v. Hester*, 964 So. 2d 707 (Fla. 3d DCA 2007) (affirmed a trial court ruling where the parties were estopped and waived partition by creating a life estate in themselves and a remainder to the parties’ children. The Marital Settlement Agreement contained express language for both parties to keep the real property with the intention of passing it to the children. *Green v. Green*, 16 So. 3d 298, 300 (Fla. 1st DCA 2009) (parties agreed to extend the time for exclusive use and occupancy of their child beyond majority age on account of a debilitating condition which caused her to remain dependent, and it was only after she died at age 27 that the jointly owned property was subject to partition.).

⁴² FLA. STAT. § 61.075 (2015); *Green*, 16 So. 3d at 299; *Durand*, 16 So. 3d at 984.

⁴³ *Condrey*, 92 So. 2d at 427; *Forehand v. Peacock*, 77 So. 2d 625, 626 (Fla. 1955); *Durand*, 16 So. 3d at 984.

⁴⁴ *Rose v. Hansell*, 929 So. 2d 22 (Fla. 3d DCA 2006); *Brennan v. Brennan*, 122 So. 3d 923, 925-27 (Fla. 4th DCA 2013); *Gulledge v. Gulledge*, 82 So. 3d 1113, 1114-17 (Fla. 2d DCA 2012); *Pantuso v. Pantuso*, 335 So. 2d 361, 362 (Fla. 2d DCA 1976).

⁴⁵ See Thomas J. Miceli and C.F. Sirmans, *Partition of Real Estate: Or, Breaking Up is (Not) Hard to Do*, 29 J. LEGAL STUD. 783 (2000); Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163 (1999).

⁴⁶ See *Brennan*, 122 So. 3d at 926; *Kumar v. Kumar*, 84 So. 3d 399, 400 (Fla. 2d DCA 2012); *Barden v. Pappas*, 532 So. 2d 707, 708 (Fla. 5th DCA 1988). These district court decisions among others emphasize that parties to dissolution of marriage or partition are entitled to a final resolution in the division and sale of joint assets at the conclusion of the proceedings. See also Harry M. Hipler, *Partitioning Real Property in Dissolution of Marriage Actions and Suits Between Unmarried Cotenants: Credits, Setoffs, Ouster, Division, and Sale*, 82 FLA. BAR J. 58 (2008).

IV. "PROPERTY" ACCORDING TO CHAPTER 64 OF THE FLORIDA STATUTES

Most litigation concerning partition concerns real property between: spouses in dissolution of marriage actions; unmarried business owners; unmarried partners with or without children, who jointly own real property as tenants by the entireties (married); joint tenants with a right of survivorship (married and unmarried); or tenants in common (usually unmarried but there is nothing to prohibit married couples from owning property in this form).⁴⁷ Yet, there is a question as to what constitutes "personal property" within the definition of the partition statute Florida Statute Section 64.091 provides that, "the laws applicable to partition and sale for partition of real estate are applicable to the partition and sale for partition of personal property and the proceedings therefor, as far as the nature of the property permits."⁴⁸ Personal property has been defined as tangible and intangible property belonging to an individual, excluding any real estate or other buildings.⁴⁹ As long as the personal property is jointly owned, Florida courts have held that, for purposes of partition, personal property includes: a stallion owned by "syndication;"⁵⁰ race horses;⁵¹ a registered thoroughbred colt;⁵² oil, gas, and other mineral rights in land,⁵³ even where the surface rights to the land are not jointly owned,⁵⁴ life insurance;⁵⁵ and a purchase promissory note where

⁴⁷ See *Tronconi v. Tronconi*, 466 So. 2d 203, 206-07 (Fla 1985); *Brandt v. Brandt*, 525 So. 2d 1017, 1020 (Fla. 4th DCA 1988); *Hodges v. Hodges*, 128 So. 3d 190 (Fla 5th DCA 2013); *Gulledge*, 82 So. 3d at 1114; *Kumar*, 84 So. 3d at 399; *Coristine v. Coristine*, 53 So. 3d 1204 (Fla. 5th DCA 2011). While married couples usually own real property as tenants by the entireties, there is nothing to prohibit them from owning property as tenants in common. *Beal Bank, SSB v. Almand and Assoc.*, 780 So. 2d 45, 53 (Fla. 2001).

⁴⁸ FLA. STAT. § 64.091 (2015). (stating "The laws applicable to partition and sale for partition of real estate are applicable to the partition and sale for partition of personal property and the proceedings therefor, as far as the nature of the property permits."). Thus, partition should include tangible and intangible personal property.

⁴⁹ THE LAW DICTIONARY, <http://thelawdictionary.org/personal-property/> (last visited Feb. 18, 2016).

⁵⁰ *Reed v. Fink*, 259 So. 2d 729 (Fla. 3d DCA 1972).

⁵¹ *Gambolati v. Sarkisian*, 622 So. 2d 47, 49 (Fla. 4th DCA 1993).

⁵² *Occhuizzo v. Perlmutter*, 426 So. 2d 1060, 1061 (Fla. 3d DCA 1983).

⁵³ *Rudman v. Baine*, 133 So. 2d 760, 761 (Fla. 1st DCA 1961). Florida Statute Section 715.06 was enacted in 1967 and amended in 1997 and allows the surface owner to explore and drill their real property subsurface for all minerals except oil, gas and sulphur without being liable to the owner of the minerals for damages. This statute, however, would appear to be no curb on a partition action on mineral rights, including oil, gas, and sulphur lying underneath the surface as they constitute personal property. FLA. STAT. § 715.06 (2015).

⁵⁴ *Id.*

installment payments are received by two co-owners.⁵⁶ Severed crops, logs, and oranges jointly owned may be regarded as personal property and subject to partition, unless they are specifically reserved or attached to the real estate, in which case they could be considered as part of the real property.⁵⁷ Earth, sand, soil, and gravel existing as part of the land constitutes real property, whereas if those elements have been severed from the earth and secured for use elsewhere, they would constitute personal property as long as they are jointly owned.⁵⁸ Jointly titled brokerage and bank accounts are forms of personal property and are subject to partition.⁵⁹ A jointly titled stock and securities certificate is personal property subject to partition.⁶⁰

If a bank account is opened as a tenancy by the entirety, joint tenancy with right of survivorship, or tenants in common, the decision in *Beal Bank SSB v. Almand and Associates*⁶¹ suggests that such forms of ownership by cotenants constitute legally recognized forms of personal property ownership.⁶² While *Beal Bank SSB* discusses creditors' collection rights as to jointly owned bank accounts, it was not a partition case; the decision provides that bank, brokerage, and securities accounts

⁵⁵ In *Castro v. Hidalgo*, the decedent owned four life insurance policies, but he named the natural children as beneficiaries in only one life insurance policy. Under the policy's terms, if there was no designation of beneficiaries, it was the decedent who was the beneficiary by default. The natural children filed adversarial petitions in the probate proceeding against the stepmother by requesting that the probate court determine the beneficiaries, and after doing so, they asked that the trial court partition the life insurance policies as their personal property if they were named as the beneficiaries. The children suggested that since the beneficiary was silent, it had to be considered as intestate property, making them beneficiaries, whereas the stepmother argued that she was the beneficiary on account of Florida Statute Section 222.13(1). The trial court denied the son's Motion for Judgment on the Pleadings. The children appealed the denial, and the district court dismissed the appeal for lack of jurisdiction. The claims made in the trial court proceeding suggest that life insurance proceeds may be subject to partition of personal property.

⁵⁶ See *Rosen v. Marlin*, 486 So. 2d 623, 627-28 (Fla. 3d DCA 1986).

⁵⁷ See *Simmons v. Williford*, 53 So. 452 (Fla. 1910); *Sanborn v. Franklin Cnty. Lumber Co.*, 46 So. 85 (Fla. 1908); *Wright v. McGinley*, 351 So. 2d 1151 (Fla. 1st DCA 1977).

⁵⁸ See *Pettigrew v. W & H Dev. Co.*, 122 So. 2d 813 (Fla. 2d DCA 1960). Although *Pettigrew* dealt with conversion of personal property, there is no reason to think that its description of personal property will not fit within the definition of personal property for partition purposes.

⁵⁹ See *Beal Bank SSB v. Almand and Assocs.*, 780 So. 2d 45, 53-59 (Fla. 2001); *Julia v. Russo*, 984 So. 2d 1283, 1285 (Fla. 4th DCA 2008); *Mercurio v. Urban*, 552 So. 2d 236, 237 (Fla. 4th DCA 1989); *Lubarr v. Lubarr*, 199 So. 2d 123, 125 (Fla. 3d DCA 1967); *Banfi v. Banfi*, 123 So. 2d 52, 53 (Fla. 3d DCA 1960).

⁶⁰ *Id.*

⁶¹ *Beal Bank SSB*, 780 So. 2d at 45.

⁶² *Id.* at 53-59.

constitute personal property.⁶³ Accordingly, jointly owned bank, brokerage, and securities accounts are subject to partition, division, and sale like real property if such property is indivisible and not subject to partition without prejudice to the others.⁶⁴ If the property is divisible without prejudice to the owners, a partition in kind is justified and the property apportioned to the parties will be divided in accordance with the owners' interests.⁶⁵

Bank, brokerage, and securities accounts are liquid, and the division should be simpler than for real property because there are fewer questions as to fair market value, credits, and setoffs,⁶⁶ whereas in real property there may be divergent claims of fair market value, credits, and setoffs.⁶⁷ To say the least, opposing claims by cotenants are often more complex and intertwined with how much a cotenant may receive when real property is divided and sold based upon payments of maintenance costs, imputed fair rental value, and ouster that can result in an increased equity to one side over another on account of one cotenant's payments on the real property without contribution from the other cotenant.⁶⁸ Bank, brokerage, and securities accounts jointly owned can be more easily divided than their real property counterpart.⁶⁹ Corporate shares of publicly traded stocks should also provide minimal issues as they will have the names of the joint owners and the form of ownership stated on the corporate shares.⁷⁰ One exception is in deciding and applying a marketability ownership interest discount of the fair market value of minority stock in a closely held corporation in an intra-party dispute that results in the ultimate division and buy-out or sale to a third party of a

⁶³ *Id.*

⁶⁴ *See* Marks v. Stein, 160 So. 3d 502, 507 (Fla. 2d DCA 2015); Blanchard v. Commonwealth Oil Co., 116 So. 2d 663 (Fla. 3d DCA 1959).

⁶⁵ *See* Schroeder v. Lawhon, 922 So. 2d 285 (Fla. 2d DCA 2006).

⁶⁶ *See* Mercurio v. Urban, 552 So. 2d 236, 237 (Fla. 4th DCA 1989); Banfi v. Banfi, 123 So. 2d 52, 53 (Fla. 3d DCA 1960).

⁶⁷ *See infra* XII and XIII.

⁶⁸ Ouster and a claim for a setoff of fair rental against a cotenant's reimbursement of maintenance expenses paid from the proceeds of a sale of the property are topics discussed later in this article. *See infra* XV.

⁶⁹ *See Mercurio*, 552 So. 2d at 237; *Banfi*, 123 So. 2d at 53.

⁷⁰ *See Mercurio*, 552 So. 2d at 237 (ruling that the donor was entitled to a "credit of \$2,933.95 representing one-half of the expenses he incurred with respect to the stock certificate" transferred to the recipient. Thus, this district court decision suggests that joint owners in such personal property are treated no differently than cotenants in real property, and both are legally required to contribute their proportionate share of expenses while the owners are joint owners in the respective properties.).

proportionate share of stock or sale to the co-owner upon separation, retirement, or death.⁷¹

A decision on whether something is personal property, as defined in Florida Statute Section 64.091, should be straightforward on account of the statute's broad definition. However, in *Wilson v. Wilson*, there was a dispute in a probate proceeding involving what to do with the decedent's ashes after cremation.⁷² A divorced couple could not agree on where to bury the ashes of their 23-year-old son, who was killed in an automobile accident.⁷³ When the son died, he was single without any children, and he had no will or other specific inter-vivos instructions for the disposition of his body.⁷⁴ His parents were co-personal representatives and sole beneficiaries of his estate; they agreed on having his body cremated but were unable to agree on what to do with his ashes.⁷⁵ The father requested the court to order the ashes divided into two containers by the funeral home so that the ashes could be distributed to the parents in equal portions.⁷⁶ The father petitioned the probate court to declare the ashes "property" and, therefore, partitioned between the former husband and his ex-wife as beneficiaries of the estate under the probate code.⁷⁷ The trial court found that ashes were not "property" and not subject to partition, and denied the father's petition, because the ashes were not subject to ownership.⁷⁸ The district court affirmed and held that the decedent's ashes were not "property" under the probate code; therefore his ashes were not subject to partition in a dispute between the decedent's mother, who wanted to bury decedent's ashes in Florida, and the decedent's father, who wanted to bury the ashes in a family burial plot in Georgia.⁷⁹ The district court reasoned that ashes after cremation were not owned by anyone and that the next of kin only have a limited possessory right to the remains for disposition purposes.⁸⁰

⁷¹ See generally Zenichi Shishido, *The Fair Value of Minority Stock in Closely Held Corporations*, 62 FORDHAM L. REV. 65 (1993); *Boettcher v. IMC Mortg. Co.*, 871 So. 2d 1047 (Fla. 2d DCA 2004); *Erp v. Erp*, 976 So. 2d 1234 (Fla. 2d DCA 2008); *Martin v. Marlin*, 529 So. 2d 1174 (Fla. 3d DCA 1988); *Corlett, Killian, Hardeman v. Merritt*, 478 So. 2d 828 (Fla. 3d DCA 1985); *Biltmore Motor Corp. v. Roque*, 291 So. 2d 114 (Fla. 3d DCA 1974).

⁷² *Wilson v. Wilson*, 138 So. 3d 1176 (Fla. 4th DCA 2014).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 1177.

⁷⁹ *Id.*

⁸⁰ *Id.* at 1177-78.

The rationale in *Wilson* is worthy of discussion. A decedent's corpse is not an asset of the decedent's estate after death, nor does a corpse pass to a decedent's next of kin as an asset of the estate at common law.⁸¹ There are no property rights in the remains of a decedent, as well; rather, there is a limited quasi-property right in a dead body for purposes of burial, sepulture, or such other disposition that is held by a personal representative.⁸² Accordingly, a beneficiary does not have a property right in a dead body and remains other than for the personal representative to follow the decedent's inter-vivos written declaration.⁸³

The problem for the next of kin in *Wilson* was that the decedent did not have a written declaration that provided the next of kin with directions on what to do with his body and remains. If cremation was designated, the decedent could have provided his wishes to the next of kin, his parents, on what to do with his ashes by a written declaration; those wishes could have provided that one or both parents had the right to the ashes and to equally divide the ashes, or that the entirety of the ashes should be spread on land or sea.⁸⁴ Assuming that a written declaration provided the decedent's wishes, the parents would have been required to follow the decedent's wishes. Hypothetically speaking, if the decedent in *Wilson* provided in a written declaration that he wanted both parents to equally divide his ashes and one parent refused to release one-half of the ashes to the other, then the aggrieved parent could have filed an action in the probate court that could have included an action for

⁸¹ *Id.* See also *Crocker v. Pleasant*, 778 So. 2d 978, 988 (Fla. 2001); *Cohen v. Guardianship of Cohen*, 896 So. 2d 950, 954 (Fla. 4th DCA 2005) (“[A] dead body is not properly viewable as property or assets . . .”).

⁸² *Id.* *Wilson*, 138 So. 3d at 1177-78; FLA. STAT. § 497.005 (2015). Commentators have suggested that a dead body constitutes a “quasi-property right.” See John T. Brooks & Jena L. Levin, *May He Rest in Pieces?: Uncertainty in the laws governing the disposition of a loved one's remains* WEALTHMANAGEMENT.COM (Sept. 24, 2014), <http://wealthmanagement.com/estate-planning/may-he-rest-pieces>. As always, it is incumbent to have written directions that clearly express the intent of the decedent specifying what to do with a beneficiary's body, organs, and ashes, so that there is a minimum amount of acrimony by the next of kin, or else a court will have to decide if there is no written declaration by the decedent.

⁸³ FLA. STAT. § 731.201(32) (2015) (provides: “[P]roperty” means both real and personal property or any interest in it and anything that may be the subject of ownership.”). FLA. STAT. § 497.005(39) (2015) (contains a list of “legally authorized” persons and their various priorities for what happens to the decedent's body and remains.) For estate planners, a person has the right to designate what should be done with a body upon death, but for now neither probate nor intestate succession statutes govern what happens to the body of a decedent without written directions. See *Wilson*, 138 So. 3d 1176; FLA. STAT. § 497.005.

⁸⁴ See FLA. STAT. § 497.005; *Winter Haven Hosp., Inc. v. Liles*, 148 So. 3d 507, 513-14 (Fla. 2d DCA 2014); *Kasmer v. Guardianship of Limner*, 697 So. 2d 220 (Fla. 3d DCA 1997).

partition under Chapter 64 of the Florida Statutes because each parent would have been entitled to possession and ownership of the ashes, especially if this designation by the decedent had been stated in the decedent's last will and testament.⁸⁵ Thus, silence by the decedent placed the decision on what to do with the ashes onto acrimonious former spouses in what became a tug-of-war that ultimately wound up being decided by the court.⁸⁶ Still, the rationale and ruling of the district court in *Wilson* should not be questioned as the ashes were neither an asset of the estate nor were they subject to partition without a written declaration by the decedent. Without a court order or the agreement of the next of kin, the ashes were not subject to an equal division by two acrimonious divorced parents without a written declaration or last will and testament by the decedent, who could have provided his wishes upon his death but failed to do so, thereby placing the burden of deciding what to do with the ashes upon the court.

⁸⁵ See *Kasmer*, 697 So. 2d 220. Florida Statute Section 731.201(32) provides: "'Property' means both real and personal property or any interest in it and anything that may be the subject of ownership." FLA. STAT. § 731.201(32). (2015). Chapter 64 requires a right to possession and ownership of divisible or indivisible property. Ashes do not have a monetary value, so, in such a situation where there is a written declaration a trial court may be able to apportion to the parties their equal shares of the ashes, making them subject to partition as long as a written declaration states the decedent's intention that both parents equally divide the ashes. FLA. STAT. § 64.051 (2015).

⁸⁶ Had there been an inter vivos or testamentary directive providing the next of kin with what to do with the remains upon cremation, then the personal representative would have been required to follow the decedent's wishes. If cremation were the decedent's wish, then the personal representative would have had to follow the decedent's directives. If it was decedent's wish to have his or her ashes equally divided between the parents, then, if one of the parents disagreed, the other could have filed a partition action in the probate court. If burial was directed, then burial is what must occur. In such an instance, the trial court in *Wilson* could have found that the ashes could be distributed in accordance with the decedent's written directives. See FLA. STAT. § 497.005 (2015); *Winter Haven Hosp., Inc.*, 148 So. 3d at 513-14; *Kasmer*, 697 So. 2d 220. Still, ashes are not personal property according to *Wilson*, and they are not subject to partition if the parties cannot agree on what to do if there is no written directive providing the next of kin with what to do with the remains upon cremation. *Wilson*, 138 So. 3d 1176. If the last will and testament provided that cremation was the decedent's wish, and that both beneficiaries would equally divide the ashes, then the ashes could have been considered as personal property that were duly possessed and owned by the beneficiaries and subject to probate and partition. See *Winter Haven Hosp., Inc.*, 148 So. 3d at 513-14; *Kasmer*, 697 So. 2d 220.

V. TREATMENT OF A DEPOSIT AND DOWN PAYMENT WHEN PURCHASING JOINTLY TITLED REAL PROPERTY

Where one cotenant makes a full down payment on the purchase of real property, the cotenant not making a down payment should be liable for one-half of the original down payment at the time of division and sale in a partition proceeding.⁸⁷ There is an exception to this generally accepted rule, which requires that each cotenant pay his or her proportionate share of a down payment. In *O'Donnell v. Marks*, an unmarried couple closed upon a home that was purchased for \$210,000.⁸⁸ The entire amount, including closing costs, was paid for by one party from his separate funds received from the exercise of his stock options.⁸⁹ At closing, the real property was deeded to both cotenants, jointly with right of survivorship.⁹⁰ After taking title, one joint tenant incurred and paid for costs and expenses for improvements, repairs, insurance, and taxes thereafter in the approximate amount of \$51,000.⁹¹ The trial court found that both individuals were joint and equal owners.⁹² Accordingly, each had an obligation to pay one-half of the purchase price at closing and for expenses incurred thereafter, leaving the payer with the entire interest in the home in the absence of the joint owner's payment of one-half toward the purchase price and expenses of the house.⁹³ Because one party paid for the entire deposit and costs of the house, while the other co-owner paid for nothing, the trial court concluded that the paying party was entitled to the entire interest in the house upon partition and sale.⁹⁴ The rationale applied by the trial court appears logically correct because both parties are legally required to pay costs and expenses on the real property in accordance with their proportionate ownership interest under the law of partition and co-tenancy.⁹⁵

On appeal, the district court in *O'Donnell* determined that upon purchase, the paying party intended to gift to the other cotenant one-half of the interest in the home on account of the wording of the deed, which

⁸⁷ *Bailey v. Parker*, 492 So. 2d 1175, 1177 (Fla. 1st DCA 1986).

⁸⁸ *O'Donnell v. Marks*, 823 So. 2d 197 (Fla. 4th DCA 2002).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *See Kelly v. Kelly*, 583 So. 2d 667, 668 (Fla. 1991); *McFall v. Trubey*, 992 So. 2d 867, 869 (Fla. 2d DCA 2008); *Schroeder v. Lawhon*, 922 So. 2d 285, 296 (Fla. 2d DCA 2006); *Hawkins v. Hawkins*, 895 So. 2d 1155, 1156 (Fla. 1st DCA 2005); *O'Donnell*, 823 So. 2d at 199; *Bermudez y Santos v. Bermudez y Santos*, 773 So. 2d 568, 570 (Fla. 3d DCA 2000); *Burnett v. Burnett*, 742 So. 2d 859, 861 (Fla. 2d DCA 1999).

provided that the parties were joint tenants with right of survivorship.⁹⁶ The district court concluded that when the payer took title to real property in his own name and another's name at the time of purchase, even though the entirety of the purchase price was paid by one party at closing, there was an intention by the payer to make a beneficial gift of an undivided one-half interest in the property to the other cotenant in the absence of evidence of a different intention.⁹⁷ On the other hand, the district court ruled that once they became joint owners, both were equally liable to pay the home's mortgage, improvements, repairs, insurance, and taxes that are required according to the law of joint tenancies.⁹⁸

⁹⁶ *O'Donnell*, 823 So. 2d at 199.

⁹⁷ *Id.*; *Julia v. Russo*, 984 So. 2d 1283 (Fla. 4th DCA 2008).

⁹⁸ When real or personal property is placed into joint names, the donee can argue that the purported donor intended a gift, which is difficult to refute by the purported donor. See *Julia*, 984 So. 2d at 1285; *Varela v. Bernachea*, 917 So. 2d 295, 298-99 (Fla. 3d DCA 2005); *Mercurio v. Urban*, 552 So. 2d 236, 237 (Fla. 4th DCA 1989). The parties in *O'Donnell* were never married, but the rationale provided in Florida Statute Section 61.075(6)(a)(2)-(3) may still apply, because for all real and personal property placed in both names during a marriage; Section 61.075(6)(a)(2)-(3) provides that all real and personal property held as tenants by the entireties shall be presumed to be a marital asset regardless of who contributed to the deposit. FLA. STAT. § 61.075(6)(a)(2)-(3) (2015) See *Heim v. Heim*, 712 So. 2d 1238, 1239 (Fla. 4th DCA 1998); *Archer v. Archer*, 712 So. 2d 1198, 1199-1200 (Fla. 5th DCA 1998) (ruled that the conveyance of real property to both spouses as tenants by the entireties created a gift and could not be rebutted under the circumstances); *Cattaneo v. Cattaneo*, 803 So. 2d 889, 890-91 (Fla. 5th DCA 2002) (ruled that the evidence in a brief marriage did not overcome the presumption that the husband intended to make a gift of the home that he titled jointly in both spouses' names, even though he had used premarital assets to purchase the home, where the former husband acknowledged that he had the property jointly titled in case something happened to him and to demonstrate to the Immigration and Naturalization Service (INS) that the marriage was not fraudulent. Methods that may be used to rebut a presumption of gift, however, can include: a written side agreement (no doubt this is the best method), placing certain language in the deed that qualifies the deed as not being a gift to a cotenant, how the property was used during the marriage or relationship, if the property was titled as tenants in common rather than tenants by the entirety or joint tenants with right of survivorship, or the execution and recordation of a promissory note and mortgage in favor of the lending party for 50 percent of the deposit as long as each party has separate counsel of his or her choice (another viable method). Of course, the result upon partition and sale could be simpler if both parties equally contributed to the down payment, but that may not occur as both parties do not necessarily enter into a relationship on equal financial footing.). While Florida Statute Section 61.075(6)(a)(2)-(3) applies to marriage, there is no reason to believe that the rationale will not apply equally to unmarried couples who place real and personal property into both names in the absence of clear and convincing evidence to the contrary. See *Julia*, 984 So. 2d at 1285. "In absence of evidence to the contrary, co-tenants are presumed to owe [sic] equal undivided interests." *In re Levy*, 185 B.R. 378, 381 (S.D. Bankr. Fla.1995). "[U]pon the death of a cotenant, the deceased cotenant's interest in the property subject to the tenancy in common, passes to his or her heirs, and not to the surviving cotenant." 12 FLA. JUR.2D *Cotenancy and Partition* § 4 (1998). See, e.g., *Reinhardt v. Diedricks*, 439 So. 2d 936, (Fla. 3d DCA 1983). Taking

A proposition one takes from *O'Donnell* as it relates to an unmarried couple is that if the payer wants to ensure that the entirety of the payer's full deposit toward the purchase of real property is a special equity or credit, then a written agreement signed by both parties providing that the entirety of the purchase price does not constitute a gift. The agreement should also provide that upon partition and sale, the non-paying party will be responsible to the payer for one-half of the down payment.⁹⁹ As a rule, each cotenant is the owner of one-half of the real property. In order to refute any presumption of a gift at a future division and sale, a written agreement should be sufficient to negate any presumption of a gift if the payer contributes the entirety of the down payment toward the purchase price.¹⁰⁰ If a written agreement is not possible, the payer should make the least possible down payment toward the purchase of the real property and obtain a long-term mortgage so that the outstanding balance of the mortgage is paid over a lengthy period of time. In the future, the payer can still argue that the small down payment was not a gift under the rule applicable to joint tenancies and partition because all owners are required to contribute equally in accordance with the ownership interest in the property.¹⁰¹ However, if the court determines that one-half of the entire down payment by the payer to be a gift, the amount lost to the cotenant would be de minimis, thereby resulting in a negligible one-half loss of the donor's deposit without recoupment. Still, once the parties become cotenants upon purchase, both cotenants are required to contribute equally to the home's mortgage, taxes, insurance, maintenance, and improvement until partition and sale.¹⁰² In either event, the district court's rationale and ruling in *O'Donnell* is questionable and logically

title to property in joint names creates a presumption of a gift that may be rebutted. *Sullivan v. Am. Tel. & Tel. Co.*, 230 So. 2d 18, 20 (Fla. 4th DCA 1969). *See also* *O'Donnell*, 823 So.2d at 198 (taking title as tenants in common is an "indication of an intention to make a beneficial gift of an undivided interest to the other party"); *Mercurio*, 552 So. 2d at 237 (stocks owned as tenants in common entitles co-owner to presumption of gift)." Based on this precedent, it is incumbent on the practitioner to recommend to the client that he or she should protect the client's interest with an agreement that ought to be executed well before closing rather than after for reasons known all too well by those parties who have unsuccessfully argued against a gift of a dwelling or financial account that was jointly titled in both cotenants' names and remained jointly titled, until future litigation.

⁹⁹ *See* *Arana v. Hutchison*, 638 So. 2d 564, 565-66 (Fla. 5th DCA 1994); *Carnes v. Harris*, 256 So. 2d 237 (Fla. 3d DCA 1972); *Carman v. Gunn*, 198 So. 2d 76 (Fla. 2d DCA 1967).

¹⁰⁰ *Id.*

¹⁰¹ *See* *Kelly*, 585 So. 2d at 668; *McFall*, 992 So. 2d at 869-70; *Schroeder*, 922 So. 2d at 296; *Hawkins*, 895 So. 2d at 1156; *O'Donnell*, 823 So. 2d at 199; *Bermudez y Santos*, 773 So. 2d at 570; *Burnett*, 742 So. 2d at 861.

¹⁰² *Id.*

inconsistent with Florida law. The decision contradicts a long line of cases that makes each party equally liable for costs incurred for each respective cotenant's ownership interest in jointly owned property.¹⁰³

In future cases handled by the practitioner, should there be no written agreement, the trial court may enter a decision without regard as to what one or both of the parties may have intended had they executed a written agreement about the parties' financial responsibility, property division, attendant credits and setoffs, and any children that were born or adopted during the relationship. Should there be no written agreement, cotenants are warned and reminded of the maxim, *caveat emptor*—"let the buyer beware."¹⁰⁴ Without a written agreement executed by the parties outlining the financial responsibility and ownership of joint owners, a future circuit court will decide the matter on its own when the matter would have been best determined by the parties themselves pursuant to a written agreement.

VI. THE APPLICABILITY OF THE STATUTE OF LIMITATIONS TO PARTITION ACTIONS

The statute of limitations will not bar a partition action because the statute is not applied to equity actions.¹⁰⁵ In *McFall v. Trubey*,¹⁰⁶ the district court ruled that an owner's claim for credit was not subject to the four-year statute of limitations for an action to enforce an agreement not

¹⁰³ *Kelly*, 583 So. 2d at 668; *McFall*, 992 So. 2d at 869-70.

¹⁰⁴ "For centuries, *caveat emptor* ('let the buyer beware') was the applicable rule of law governing disputes arising from the sale of real property . . . Under this ancient doctrine, in the absence of an express agreement to the contrary, the seller of real property was not liable or responsible to the buyer for a defective condition in the real property that existed at the time, the seller transferred possession to the buyer . . . Essentially, a purchaser bought real property at his or her own risk . . . More specifically, this doctrine required the buyer to make his own inspection of the premises before the seller transferred possession and relieved the seller of any liability for defective conditions that existed at the time of transfer . . . The doctrine of *caveat emptor* assigned no duty to the seller to communicate to a buyer the existence of latent defects in the real property unless the seller, by act or implication, represented that such a defect did not exist." *Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n*, 127 So. 3d 1258, 1263 (Fla. 2013).

¹⁰⁵ *McFall*, 992 So. 2d 867; see *Bucacci v. Boutin*, 933 So. 2d 580 (Fla. 3d DCA 2006); *Inglis v. First Union Nat'l Bank*, 797 So. 2d 26, 27-28 (Fla. 1st DCA 2001). Florida Statute Section 64.011 provides that the statute of limitations is not applied in chancery (equity) actions. FLA. STAT. §64.011 (2015). Florida Statute Section 95.11(6) was also considered as a possible defense against a late filed partition action in *McFall*, but the district court rejected the statute of limitations as a bar to a partition suit, because there is no legal action that is equivalent to a partition action. See *McFall*, 992 So. 2d at 869-70; FLA. STAT. §95.11(6) (2015).

¹⁰⁶ *McFall*, 992 So. 2d 867.

founded on a written instrument.¹⁰⁷ Here, the property owner sought credit in a partition action for payment of a cotenant's share of property expenses because the cotenant moved away from the area and stopped paying his share of the expenses in 1987.¹⁰⁸ The owner filed suit in 2004 and asked for credits for their payments of the cotenant's share from 1987 to 2004.¹⁰⁹ The trial court limited reimbursement to expenses paid during the four years before the filing of the lawsuit in 2004, which was for amounts expended after February 2000, and also awarded prejudgment interest on that amount.¹¹⁰ The district court based its decision on the rule of law that all cotenants must pay for their share of property expenses in a tenancy in common in the absence of an agreement saying otherwise.¹¹¹ The district court also suggested that mere inaction without more over a lengthy period of time should not bar a suit for partition on the grounds of laches.¹¹²

VII. MAXIMIZING INTERESTS IN REAL AND PERSONAL PROPERTY
PARTITION ACTIONS: IS THERE A WRITTEN AGREEMENT SETTING FORTH
JOINT OBLIGATIONS AND HOW WILL THE PROPERTY BE DIVIDED AND/OR
SOLD UPON SEPARATION?

Lawsuits involving those who are unmarried and jointly own real and personal property may seek to separate their respective interests. When doing so, the individuals may find themselves entangled in a controversy about how the real and personal property should be divided.¹¹³ When parties become embroiled in their personal differences and seek to separate their respective interests from the other, each will attempt to maximize their share of real and personal property after any credits or setoffs applied in a "buy out" by one cotenant of another

¹⁰⁷ *Id.* at 869-70.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ The district court in *McFall* rejected an award of prejudgment interest because the amounts due to the payer were not damages, but rather they are credits to be awarded in the allocation of the impounded fund upon the sale of the home. "The . . . right to receive these credits did not arise until the properties were sold and the fund created." *McFall*, 992 So. 2d at 870.

¹¹¹ See *Schroeder v. Lawhon*, 922 So. 2d 285, 296 (Fla. 2d DCA 2006); *Hawkins v. Hawkins*, 895 So. 2d 1155, 1156 (Fla. 1st DCA 2005); *O'Donnell v. Marks*, 823 So. 2d 197, 199 (Fla. 4th DCA 2002); *Bermudez y Santos v. Bermudez y Santos*, 773 So. 2d 568, 570 (Fla. 3d DCA 2000); *Burnett v. Burnett*, 742 So. 2d 859, 861 (Fla. 2d DCA 1999).

¹¹² *McFall*, 992 So. 2d at 869-70 (Fla. 2d DCA 2008).

¹¹³ See *Poe v. Estate of Levy*, 411 So. 2d 253 (Fla. 4th DCA 1982); *Dietrich v. Winters*, 798 So. 2d 864 (Fla. 4th DCA 2001); *Julia v. Russo*, 984 So. 2d 1283 (Fla. 4th DCA 2008).

cotenant's interest in the property,¹¹⁴ or upon a private sale of the real and personal property to a third party.¹¹⁵

If there is a domestic partnership agreement providing for financial living arrangements during the parties' unmarried relationship, including the couple's ownership share, maintenance, and expense responsibilities in real property,¹¹⁶ then the agreement can provide provisions for any division, credits, and setoffs in a future partition proceeding, assuming that the parties are unable to amicably divide their real property when they decide to go their separate ways.¹¹⁷ While such agreements have grown in eminence and stature and have become increasingly acceptable by a variety of persons of all ages, they remain the exception rather than the rule because these agreements have been marginalized economically, politically, and socially as family law and policy has been and still remains widely governed by traditional family ideologies.¹¹⁸ Most couples that become involved in unmarried personal relationships, as distinguished from business relationships, fail to see the need for a written agreement that will provide the rights and obligations of the parties.¹¹⁹ After the honeymoon period, the trials and tribulations of living together will occur and may result in the couple's disharmony and breakup. The couple will either stay together and attempt to work out their differences or separate and leave the consequences of any jointly owned real and personal property to a decision by the court and its

¹¹⁴ See *Marks v. Stein*, 160 So. 3d 502, 508-09 (Fla. 2d DCA 2015); *Green v. Green*, 16 So. 3d 298 (Fla. 1st DCA 2009); *Blackmon v. Blackmon*, 969 So. 2d 426, 429-30 (Fla. 1st DCA 2007).

¹¹⁵ See *Marks*, 160 So. 3d at 503; *Blackmon*, 969 So. 2d at 429-30; *Bucacci v. Boutin*, 933 So. 2d 580, 586 (Fla. 3d DCA 2006).

¹¹⁶ See *Bucacci*, 933 So. 2d at 581-82; *Forrest v. Ron*, 821 So. 2d 1163 (Fla. 3d DCA 2002); *Dietrich*, 798 So. 2d at 864; *Posik v. Layton*, 695 So. 2d 759 (Fla. 5th DCA 1997); *Poe*, 411 So. 2d 253.

¹¹⁷ See *Bucacci*, 933 So. 2d at 581-82.

¹¹⁸ See generally *Wakeman v. Dixon*, 921 So. 2d 669 (Fla. 1st DCA 2006); Deborah Zalesne, *The Contractual Family: The Role of the Market in Shaping Family Formations and Rights*, 36 *CARDOZO L. REV.* 1027 (2015); Linda J. Ravdin, *Premarital Agreements and the Migratory Same-Sex Couple*, 48 *FAM. L. Q.* 397 (2014). In light of *Obergefell v. Hodges*, the United States Supreme Court decided that the Constitution guarantees a right to same-sex marriage in all 50 states and has accorded same-sex marriage to universal acceptance in the entire country; only time will tell how swiftly the judicial decision will impact change to traditional family ideologies. *Obergefell v. Hodges*, No. 14-556, slip op. (U.S. June 26, 2015).

¹¹⁹ See Heather Mahar, *Why Are There So Few Prenuptial Agreements?* *HARV. L. SCH. JOHN M. OLIN CTR FOR L., ECON. AND BUS. DISCUSSION PAPER SERIES*, Sept. 2003, 436; Brian H. Bix, *Premarital Agreements in the ALI Principles of Family Dissolution*, 8 *DUKE J. GENDER L. & POL'Y*, 231 (2001); Edward Stein, *Looking Beyond Full Relationship Recognition for Couples Regardless of Sex: Abolition, Alternatives, and/or Functionalism*, 28 *L. & INEQ.*, 345 (2010).

application of the partition statute, assuming that no written agreement was entered into by the parties before they entered into a personal relationship and purchased real and personal property. Had each hired their own attorney to incorporate their wishes into an agreement on how to treat the property after it is purchased, they could have removed or limited the court's discretion upon separation. There is also an additional concern about children who may be born out of wedlock, or what has been called the "new normal."¹²⁰ This can and will add stress and strain to the relationship and increase concerns over how to divide their real and personal property upon separation. In the absence of a written agreement, a circuit court will adjudicate property rights under Florida law on co-tenancies and partition if the parties are not married, and upon reaching a decision the court will provide findings of facts in its final judgment.¹²¹

VIII. CONTRACTUAL AND STATUTORY PROVISIONS FOR ENTITLEMENT TO ATTORNEY FEES

Attorney fees may be awarded by a trial court if there is a contractual or statutory provision to support entitlement to attorney fees.¹²² Two major concerns of an individual in a suit dividing jointly titled real and personal property are: 1) how much the litigation will cost, and 2) whether the law permits recoupment of attorney fees and costs against the opposing party. Thus, a significant issue in partitioning real and

¹²⁰ Jason DeParle & Sabrina Tavernise. *For Women Under 30, Most Births Occur Outside Marriage*, N.Y. TIMES (Feb. 17, 2012), http://www.nytimes.com/2012/02/18/us/for-women-under-30-most-births-occur-outside-marriage.html?_r=0.

¹²¹ See *Fernandez v. Yates*, 145 So. 3d 141 (Fla. 3d DCA 2014); *Cintron v. King*, 961 So. 2d 1010, 1013 (Fla. 4th DCA 2007).

¹²² The legal precedent in this area of the law is reasonably clear. As the Florida Supreme Court has said, "[A]ttorney's fees incurred while prosecuting or defending a claim are not recoverable in the absence of a statute or contractual agreement authorizing their recovery." *Bidon v. Dep't of Prof'l Regulation*, 596 So. 2d 450, 452 (Fla. 1992). In addition, this Court reaffirmed the general rule that "[u]nder Florida law, each party generally bears its own attorneys' fees unless a contract or statute provides otherwise." *Pepper's Steel & Alloys, Inc.*, 850 So. 2d 462, 465 (Fla. 2003); see also *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 832 (Fla. 1993) ("This Court has followed the 'American Rule' that attorney's fees may be awarded by a court only when authorized by statute or by agreement of the parties."); *Florida Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145, 1148 (Fla. 1985) (recognizing that this Court has adopted "the 'American Rule' that attorney fees may be awarded by a court only when authorized by statute or by agreement of the parties."); *Kittel v. Kittel*, 210 So. 2d 1, 3 (Fla. 1967) ("It is an elemental principle of law in this State that attorney's fees may be awarded a prevailing party . . . (1) where authorized by contract; [and] (2) where authorized by a constitutional legislative enactment . . ."). See also *Price v. Tyler*, 890 So. 2d 246, 250 (Fla. 2004).

personal property is what amount, if any, should be awarded in attorney fees to cotenants' attorneys as a necessary component of partition after the attendant credits and setoffs are determined. If the parties have a domestic partnership or joint venture agreement outlining the financial responsibility of co-owners for ownership share, maintenance, and payment of expenses of real property, then the court can follow the terms of the agreement, including any relief for attorney fees should there be a provision for attorney fees in the agreement.¹²³ If the parties do not have a written agreement setting forth their financial responsibility and entitlement to attorney fees between unmarried persons, not limited to same-sex couples living together,¹²⁴ there is no agreement to provide guidelines to the court and the parties.

A. Florida Statute Section 64.081 provides a basis to award attorney fees in a partition action

In disputes involving jointly owned real and personal property where there are no children born or adopted during the relationship, the only basis for an award of attorney fees is Florida Statute Section 64.081.¹²⁵ This statute is far from definitive, but it provides that a party seeking partition is entitled to attorney fees with the amount subject to the trial court's discretion.¹²⁶ Florida Statute Section 64.081 also suggests that attorneys' fees may be awarded commensurate with legal services rendered and that are "of benefit to the partition."¹²⁷ Thus, attorneys' fees may be awarded in actions prior to the partition proceeding, which establish and protect title and interest in property.¹²⁸

What is a court to do if parties cannot resolve their jointly titled real and personal property dispute that results in a partition action? In *Fernandez-Fox vs. Reyes*,¹²⁹ the standard adopted for an award of

¹²³ *Bucacci v. Boutin*, 933 So. 2d 580, 581-82 (Fla. 3d DCA 2006).

¹²⁴ *See Posik v. Layton*, 695 So. 2d 759 (Fla. 5th DCA 1997); *Poe v. Estate of Levy*, 411 So. 2d 253 (Fla. 4th DCA 1982).

¹²⁵ FLA. STAT. § 64.081(2015); *see Fernandez-Fox vs. Reyes*, 79 So. 3d 895 (Fla. 5th DCA 2012); *Robinson v. Barr*, 133 So. 3d 599 (Fla. 2d DCA 2014).

¹²⁶ FLA. STAT. § 64.081(2015).

¹²⁷ *See Diaz v. Sec. Union Title Ins. Co.*, 639 So. 2d 1004, 1006 (Fla. 3d DCA 1994). Attorneys' fees may be awarded for actions *prior* to the partition proceeding, which establish and protect title and interest in property. Florida Statute Section 64.081 provides: "Every party shall be bound by the judgment to pay a share of the costs, including attorneys' fees to plaintiff's or defendant's attorneys or to each of them commensurate with their services rendered and *of benefit to the partition*, to be determined on equitable principles in proportion to the party's interest." FLA. STAT. § 64.081(2015) (Emphasis added).

¹²⁸ *Id.*

¹²⁹ *Fernandez-Fox*, 79 So. 3d 895.

attorney fees was broadly stated to be that parties who seek partition are entitled to attorney fees based upon: the service performed by counsel, the responsibility incurred, the nature of the services, the skill required, the circumstances under which services are rendered, the customary charges for like services, the amount involved in the partition suit, and the ability of litigants to respond.¹³⁰ Thus, *Fernandez-Fox* held that an award of attorney fees is subject to equitable principles in proportion to the party's interest, so that apportionment under the statute means that the "majority interest should bear the greater proportion of [attorney] fees awarded to his own attorney, as well as the minority interest similarly should bear a share of attorney fees in proportion to his or her interest."¹³¹

B. Chapter 742 can form a basis for an award of attorney fees

Where a child is born or adopted outside of marriage, Chapter 742 of the Florida Statutes applies in an action for paternity, parental responsibility, time-sharing, and child support pursuant to Florida Statute Sections 742.045 and 742.031, which specifically provide for attorney fees, suit money, and costs if there is a child born or adopted during the relationship regardless of whether a pleading asserts partition in the same action.¹³² If there is jointly owned real and personal property that needs to be divided, then an action pursuant to Chapter 742 can be consolidated

¹³⁰ *Id.*; see *Robinson*, 133 So. 3d 599.

¹³¹ *Fernandez-Fox*, 79 So. 3d at 897. If the trial court finds that in the final judgment for partition that partition is appropriate, then the trial court must necessarily find that attorney fees and costs are appropriate in accordance with the provisions of § 64.081. See *Robinson*, 133 So. 3d 599, 600.

¹³² FLA. STAT. §§ 742.031, 742.045 (2015); *Dietrich v. Winters*, 798 So. 2d 864 (Fla. 4th DCA 2001). In *Carmenates v. Hernandez*, the district court ruled that in a paternity, time sharing, and child support petition, attorney fees may be requested pursuant to §742.045. *Carmenates v. Hernandez*, 127 So. 3d 631 (Fla. 3d DCA 2013). However, the district court emphasized that: "A paternity action filed under chapter 742 is not to be utilized by formerly cohabiting individuals to determine issues relating to the division or ownership of property." *Carmenates*, 127 So. 3d at 634. While the district court quashed counts asserting conversion and replevin without prejudice to filing a separate action, it did not discuss the propriety of consolidating a partition and paternity and child support action in the same complaint, which has occurred. *Dietrich*, 798 So. 2d at 865. Whether or not introducing a partition action into a paternity and child support action, or vice versa, would be prohibited, may be worthy of debate, but on account of their identity of parties, similarity of issues, and need for shelter by minors, there should be no reason why partition, paternity, time sharing, and child support cannot be joined into one complaint.

into an action under Chapter 64, which can provide for both an award of attorney fees and costs.¹³³

C. Dissolution of Marriage and Florida Statute Section 61.16(1) for an award of attorney fees

In a Dissolution of Marriage, the practitioner has the option to include a separate count for partition that is part of the same proceeding, assuming that the real property is in the name of both spouses, and, by doing so, a court may enter an award of attorney fees pursuant to Florida Statute Section 61.16(1).¹³⁴ Where a practitioner files a Dissolution of Marriage in Count I and a Partition in Count II, the trial court has broad discretion in granting an award of attorney fees to the needier spouse for the entire proceeding,¹³⁵ in equitably dividing the parties' assets and liabilities, and in granting partition of real and personal property pursuant to Florida Statute Section 61.075.¹³⁶ Where attorney fees are requested in a dissolution of marriage action, Florida Statute Section 61.16 provides that "after considering the financial resources of both parties," the trial court may award the needier spouse attorney fees and costs based on a need and ability to pay standard that is founded upon the financial circumstances of the parties.¹³⁷ In contrast, if a partition action involves unmarried persons in a civil action unrelated to Chapter 61 of the Florida Statutes and there are no children born or adopted in the unmarried relationship, rendering Chapter 742 of the Florida Statutes inapplicable, then only Florida Statute Section 64.081 will apply in the absence of a written agreement entered into by the co-owners that provides for attorney fees.¹³⁸

¹³³ See Fla. Stat. § 64.081 (2015) (partition); Fla. Stat. §§ 742.045, 742.031 (2015) (paternity, parental responsibility, time-sharing, and child support).

¹³⁴ FLA. STAT. § 61.16(1) (2015).

¹³⁵ FLA. STAT. § 61.16 (2015). An often cited case is *Rosen v. Rosen*, where the Florida Supreme Court stated that in dissolution proceedings, the financial resources of the parties are the primary factor to be considered in an award of attorney fees to the needier spouse. However, other relevant circumstances to be considered include the scope and history of the litigation; the duration of the litigation; the merits of the respective positions; whether the litigation is brought or maintained primarily to harass; whether a defense is raised mainly to frustrate or stall; and the existence and course of prior or pending litigation. *Rosen v. Rosen*, 659 So. 2d 368 (Fla. 3d DCA 1995) (*quashed in part*, 696 So. 2d 697, 703 (Fla. 1997)).

¹³⁶ FLA. STAT. § 61.075 (2015) (granting the trial court discretion in designing an equitable distribution plan in order to divide the parties' real and personal property). *Santiago v. Santiago*, 51 So. 3d 637 (Fla. 2d DCA 2011); *David v. David*, 58 So. 3d 336 (Fla. 5th DCA 2011); *Guobaitis v. Sherrer*, 18 So. 3d 28, 33 (Fla. 3d DCA 2009); *Prest v. Tracy*, 749 So. 2d 538 (Fla. 2d DCA 2000).

¹³⁷ FLA. STAT. § 61.16 (2015).

¹³⁸ See *Fernandez-Fox vs. Reyes*, 79 So. 3d 895 (Fla. 5th DCA 2012).

D. Florida Statute Section 57.105 can be a basis to award attorney fees for claims and defenses where the party and/or his or her attorney knew or should have known that there was no basis in law or fact for claims or defenses

Florida Statute Section 57.105 can be used as a basis to support attorney fees in favor of the party requesting partition of real and personal property should a cotenant fail or refuse to concur in a partition of real and personal property and entitlement to credits and setoffs one party is entitled to receive against the other.¹³⁹ Florida Statute Section 57.105 has been strictly construed so that the practitioner must follow the statute meticulously to obtain an award.¹⁴⁰ If the statute is followed, and the facts and the law warrant an award, this statute is mandatory, not discretionary.¹⁴¹ Florida Statute Section 57.105 has been amended many times since 1999, making the frivolous standard more liberalized in favor of an award of attorney fees on “any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party’s attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial: (a) was not supported by the material facts necessary to establish the claim or defense; or (b) would not be supported by the application of then-existing law to those material facts.”¹⁴²

¹³⁹ See *Law v. Law*, 163 So. 3d 553 (Fla. 3d DCA 2015) (finding that a law firm, which represented the husband in a mortgage-foreclosure action regarding the marital home and which intervened in a partition and divorce proceeding, had no legal basis to support its claim in the partition and divorce proceeding for proceeds of the foreclosure sale to pay the husband’s outstanding attorney fees, and thus the wife was entitled to attorney fees and costs as sanctions. The home was homestead property subject to protections afforded by the Florida constitution’s homestead provision, and the wife had protected the homestead interest despite not being a title holder where she did not waive that interest. The law firm continued to pursue a claim against the wife after escrowed funds from a partition sale were awarded solely to wife resulting in an award of attorney fees to the wife and against the law firm.). See also *Ratigan v. Stone*, 947 So. 2d 607 (Fla. 3d DCA 2007) (finding that attorney’s fees were awarded as a sanction pursuant to Florida Statute Section 57.105, where the former husband was not forthright and candid about his financial affairs, failed to comply with discovery requests, and engaged in wrongdoing throughout the trial).

¹⁴⁰ See *Matte v. Caplan*, 140 So. 3d 686 (Fla. 4th DCA 2014).

¹⁴¹ FLA. STAT. §57.105 (2015). (states that upon a finding that the party and/or his or her attorney knew or should have known that the claims made had no merit, an award of attorney fees is mandatory, not discretionary). See *Law Offices of Lynn W. Martin v. Madson*, 144 So. 3d 707 (Fla. 1st DCA 2014); *Matte*, 140 So. 3d 686; *Martin Cnty. Conservation Alliance v. Martin Cnty.*, 73 So. 3d 856 (Fla. 1st DCA 2011); *de Vaux v. Westwood Baptist Church*, 953 So. 2d 677 (Fla. 1st DCA 2007).

¹⁴² FLA. STAT. §57.105(1) (2015) (amended on many occasions since 1999. The legislature expanded § 57.105, and its authority to sanction litigants and their attorneys for frivolous litigation. Under the amended statute, a trial court can award a party its

IX. OTHER CAUSES OF ACTION CAN BE CONSOLIDATED WITH A
PARTITION ACTION WHERE THE PARTIES OWN JOINTLY TITLED REAL
PROPERTY

If partition of real and personal property is a cause of action in a dispute among jointly titled property owners, should a practitioner plead alternative causes of action, or is partition an exclusive remedy? Litigants claiming that partition is ripe for consideration should consider making all viable claims in a consolidated complaint. Thus, it is permissible to file an action to quiet title, ejectment, and for adverse possession along with a partition count to establish the rightful owners of real property and then determine what should be done after title is determined.¹⁴³ Florida Rules of Civil Procedure 1.110 (b) and (g) permit litigants' practitioners to allege inconsistent and alternative causes of actions in a complaint as long as the facts and circumstances warrant a claim for relief.¹⁴⁴ Counts that can be consolidated into the same cause of action with partition include: resulting trust, contribution, failure to pay his or her proportionate share of costs and expenses, reformation, fraud, constructive fraud, fraudulent inducement, constructive trust, adverse

attorney fees and costs on "any claim or defense at any time during a civil proceeding" when the trial court finds that a litigant satisfies the statute's provisions. The objective of the 1999 amendment was to reduce frivolous litigation and therefore decrease the cost imposed on the civil justice system and party litigants by expanding the remedies that were previously not available. See *Wendy's of N.E. Fla., Inc. v. Vandergriff*, 865 So. 2d 520, 522-23 (Fla. 1st DCA 2003); *Bridgestone/Firestone, Inc. v. Herron*, 828 So. 2d 414, 417 (Fla. 1st DCA 2002). Courts have noted that as a result of the amendment, the bar for imposition of sanctions has been substantially reduced. See *Mullins v. Kennelly*, 847 So. 2d 1151, 1154-55 (Fla. 5th DCA 2003); *Weatherby Assocs., Inc. v. Ballack*, 783 So. 2d 1138, 1142 (Fla. 4th DCA 2001). § 57.105 was amended again in 2002 to include a safe harbor provision which provides a "pleader a last clear chance to withdraw a frivolous claim or defense . . . or to reconsider a tactic taken primarily for the purpose of unreasonable delay" that allows a claimant to withdraw a claim within 21 days of service of a motion for sanctions. See *Bionetics Corp. v. Kenniasty*, 69 So. 3d 943, 949 (Fla. 2011) (internal citations omitted); *Maxwell Bldg. Corp. v. Euro Concepts, LLC*, 874 So. 2d 709, 711 (Fla. 4th DCA 2004). Under the pre-1999 statute, § 57.105 required "a party to show a complete absence of a justiciable issue of fact or law" in the entire proceeding, not just one claim or count. *Wendy's of N.E. Florida, Inc.*, 865 So. 2d at 523; see *Bridgestone/Firestone, Inc.*, 828 So. 2d at 417. Under the current statute, a litigant can recover attorney fees for any claims or defenses that are unsupported or are frivolous during the onset of the litigation or after it is discovered in the future. See *Wendy's of N.E. Florida, Inc.*, 865 So. 2d at 523; *Bridgestone/Firestone, Inc.*, 828 So.2d at 419.

¹⁴³ See *McGriff v. Leonard*, 83 Fla. 695 (Fla. 1922); *McIntyre v. Parker*, 77 Fla. 690 (Fla. 1919); *Terra Ceia Estates, et al. v. Taylor*, 68 Fla. 261 (Fla. 1914).

¹⁴⁴ Rule 1.110(b) and (g) specifically provide that alternative and inconsistent claims of relief may be demanded in the same complaint. FLA. R. CIV. P. 1.110(b), (g). See *DiChristopher v. Bd. of Cnty. Comm'rs*, 908 So. 2d 492 (Fla. 5th DCA 2005); *Booker v. Sarasota, Inc.*, 707 So. 2d 886 (Fla. 1st DCA 1998); *Johnson v. State Dept. of Health and Rehab. Servs.*, 695 So. 2d 927 (Fla. 2d DCA 1997).

possession, conspiracy, tortious interference with a business relationship, special equity, equitable lien, breach of partnership agreement, equitable accounting, judicial dissolution, injunctive relief, quiet title, breach of contract, unjust enrichment, ejectment, and declaratory judgment.¹⁴⁵ Partition is not an exclusive remedy to compel division and sale of jointly owned real and personal property, although partition may be the principal way. “The goal of an action for partition . . . is to avoid the problems arising from common possession [and ownership] of the property, not to recover possession of the individual moiety.”¹⁴⁶ On the other hand, the goal of many causes of action against a record title owner of real and personal property is to establish a party’s title to real and personal property where there is a question as to who actually owns the subject property.¹⁴⁷

X. PERSONAL OR CONSTRUCTIVE SERVICE OF PROCESS IN A PARTITION ACTION

Jurisdiction is a significant event in any litigation. While it is always best to obtain personal service of process over a defendant, if personal service of process cannot be obtained over a defendant, service of

¹⁴⁵ See *Pakonis v. Clark*, 156 So. 3d 503 (Fla. 3d DCA 2014); *Olesh v. Greenberg*, 138 So. 3d 561 (Fla. 5th DCA 2014); *Castetter v. Henderson*, 113 So. 3d 153 (Fla. 5th DCA 2013); *Van Vorgue v. Rankin*, 41 So. 3d 849 (Fla. 2010); *Chastain v. Chastain*, 119 So. 3d 547 (Fla. 1st DCA 2013); *Jones v. Pfaff*, 77 So. 3d 884 (Fla. 2d DCA 2012); *Flinn v. Flinn*, 68 So. 3d 424 (Fla. 4th DCA 2011); *First States Investors 3300, LLC v. Pheil*, 52 So. 3d 845 (Fla. 2d DCA 2011); *Weiner v. Weiner*, 37 So. 3d 395 (Fla. 4th DCA 2010); *Sanders v. Gussin*, 30 So. 3d 699 (Fla. 5th DCA 2010); *TID Servs. Inc v. Dass*, 65 So. 3d 1 (Fla. 1st DCA 2010); *Mueller v. Marks*, 576 So. 2d 1337 (Fla. 4th DCA 1991); *Inglis v. First Union Nat’l Bank*, 797 So. 2d 26 (Fla. 1st DCA 2001).

¹⁴⁶ *Russell v. Stickney*, 56 Fla. 569 (Fla. 1911); *Diedricks v. Reinhardt*, 466 So. 2d 375, 377 (Fla. 3d DCA 1985). Moiety is seldom used today, but it can mean the one-half of anything, as if a testator bequeaths one moiety of his estate to A, and the other moiety to B, so that each shall take an equal part. Generally, this constitutes a reference to one-half interest in real property as can be the case with joint tenants holding moieties. Where a married couple holds property as tenancy by the entireties, each spouse is said to hold it “per tout,” which means that each spouse holds the total or the entirety rather than a share, moiety, or dividable part. Thus, property held by husband and wife as tenants by the entireties belongs to neither spouse individually, but rather each spouse owns the total sum or the whole.

In a joint tenancy with right of survivorship, each person has only his or her own separate share (“per my”), which share is presumed to be equal for purposes of alienation; whereas, for purposes of survivorship, each joint tenant owns the whole (“per tout”), so that upon death the remainder of the estate goes to the survivor.

See *Beal Bank, SSB v. Almond and Assocs.*, 780 So. 2d 45, 53 (Fla. 2001).

¹⁴⁷ *Beal Bank, SSB*, 780 So. 2d at 54.

process by publication is the alternative way of obtaining jurisdiction over the real and personal property.¹⁴⁸ Florida Statute Section 49.011 (3) provides that service of process by publication is permissible in an action to partition real and personal property, as long as the property is located “within the jurisdiction of the court.”¹⁴⁹ Service of process by publication may be utilized in any case allowed by Florida Statute Section 49.021 “upon any party, natural or corporate, known or unknown,” as long as the defendant cannot be found within Florida for the purpose of service of the summons.¹⁵⁰ The rule permitting service of process by publication has strict requirements that must be followed before a court obtains jurisdiction over the property.¹⁵¹ If jurisdiction is challenged in the future, the burden rests upon the plaintiff to prove that diligent search and inquiry was in fact made and this burden must be met before obtaining a default judgment.¹⁵² Florida law requires that the attorney or plaintiff swear that there has been “diligent search and inquiry” to locate the defendant as evidenced by the return of non-service of the summons.¹⁵³ Florida Statute Section 49.011 requires that the plaintiff or the attorney swear that to his or her knowledge and belief, the defendant has concealed himself or herself so that process cannot be personally served.¹⁵⁴ Notice of the action can then be published.¹⁵⁵ Form 1.924 of the Florida Rules of Civil Procedure requires considerable back-up and

¹⁴⁸ A fundamental requirement of due process of law in any judicial proceeding is notice; “reasonably calculated . . . to apprise interested parties of the pendency of the action” and to give the party so notified an opportunity to present his or her side of the controversy. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Due process considerations take into account the need to serve a party by publication when the circumstances authorize it, but notice by publication is generally regarded as insufficient with respect to an individual whose name and address are known or easily determinable. *Robinson v. Hanrahan*, 409 U.S. 38, 39 (1972); *Lorie v. Calderon*, 982 So. 2d 1199, 1201 (Fla. 3d DCA 2008).

¹⁴⁹ FLA. STAT. § 49.011(3) (2015); *Miller v. Partin*, 31 So. 3d 224, 227 (Fla. 5th DCA 2010).

¹⁵⁰ FLA. STAT. §49.021 (2015).

¹⁵¹ The constructive service statutes located in Chapter 49 of the Florida Statutes is strictly construed against the party who seeks to obtain service of process. *See Martins v. Oaks Master Property Owners Ass’n, Inc.*, 159 So. 3d 142 (Fla. 5th DCA 2014); *Estela v. Cavalcanti*, 76 So. 3d 1054, 1055 (Fla. 3d DCA 2011).

¹⁵² *Martins*, 159 So. 3d at 146.

¹⁵³ *See* FLA. STAT. §§ 49.031, 49.041, 49.051, 49.061, 49.071 (2015).

¹⁵⁴ FLA. STAT. §49.011 (2015).

¹⁵⁵ *See* FLA. STAT. §§ 49.021, 49.041 (2015). Pursuant to Florida Statute Section 49.011, “[s]ervice of process by publication may be made in any court on any party . . . [t]o partition real or personal property within the jurisdiction of the court.” FLA. STAT. § 49.011(3) (2015).

detail to substantiate the claim of diligent search and inquiry upon being challenged.¹⁵⁶

XI. “TILL DEATH DO US PART”: WHEN DOES JOINTLY TITLED PROPERTY VEST IN A COTENANT WHEN PARTITIONING REAL AND PERSONAL PROPERTY?

Where title to property is in the name of both parties as tenants by the entireties—where the parties are married, or joint tenants with right of survivorship—where the parties are either married or unmarried, then both must survive the entry of a final judgment of partition before a cotenant’s proportionate share vests in each cotenant and each becomes a tenant in common. The district court in *Mercurio v. Headrick* considered whether a pending action to partition a joint tenancy with right of survivorship survives one joint tenant’s death during the pendency of the action.¹⁵⁷ The district court in *Mercurio* held that such an action does not survive the death of a joint tenant with right of survivorship.¹⁵⁸ Thus, absent entry of a final judgment of partition before a joint tenant’s death, the partition action is abated, and a surviving cotenant receives full title to the real or personal property consistent with the right of full survivorship.¹⁵⁹ If one joint tenant with right of survivorship dies during the pendency of a partition action before the entry of a final judgment of partition, the interest of the deceased cotenant is automatically transferred to the remaining surviving cotenant.¹⁶⁰ If there are three joint tenants with right of survivorship and one of them dies, each of the two remaining joint tenants ends up with a one-half share of the property. If there are four joint tenants who own real or personal property and one of them dies, each of the three remaining joint tenants ends up with a one-third share of the property. In a joint tenancy with right of survivorship—as distinguished from a tenancy in common—for purposes of survivorship, each joint tenant owns the entirety of the property, so that upon death of a cotenant, the remainder of the estate passes to the

¹⁵⁶ In 2010, the Florida Supreme Court substantially revised the form affidavit of diligent search and inquiry. *In re Amendments to the Florida Rules of Civil Procedure*, 44 So. 3d 555 (Fla. 2010). Form 1.924 requires considerable back-up and detail to demonstrate the claim of diligent search and inquiry. *Id.* If jurisdiction is challenged, the burden rests on the plaintiff, and therefore the plaintiff and the attorney should be prepared to meet its burden to prove that diligent search and inquiry was made. *See Martins*, 159 So. 3d at 1425-46; *Estela*, 76 So. 3d at 1055.

¹⁵⁷ *Mercurio v. Headrick*, 983 So. 2d 773, 774 (Fla. 1st DCA 2008).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *See Beal Bank, SSB v. Almand & Assocs.*, 780 So. 2d 45, 53 (Fla. 2001).

surviving cotenant.¹⁶¹ In the creation of a joint tenancy with right of survivorship, each joint tenant must obtain equal shares of the property with the same deed, title, or other legally binding property ownership documents and it must be created at the beginning.¹⁶² For survivorship purposes, each joint tenant owns the entirety of the property so that upon death, the remainder of the estate passes to the surviving cotenant.¹⁶³ A last will and testament will have no effect on a joint tenancy with right of survivorship, as each joint tenancy owns the entirety of the real property.¹⁶⁴

In a tenancy in common, each cotenant may have different ownership interests of the property as a whole.¹⁶⁵ For example, A and B may each own one-quarter, whereas C may own one-half of the property as a whole. Tenants in common may be created at different times, but each cotenant owns a physically undivided part of each entire parcel. “Each may transfer his undivided . . . interest as he wishes so long as the transfer does not impair the possessory rights of the other tenant[s] in common.”¹⁶⁶ Absent a last will and testament, no tenants in common have a right of survivorship with the other cotenants, and, accordingly, a deceased tenant in common’s interest belongs to his or her estate.¹⁶⁷

The entry of a Final Judgment of Dissolution of Marriage reserving jurisdiction to determine matters collateral to the adjudication of the dissolution retains jurisdiction to consider equitable distribution, attorney fees and costs, and other issues collateral to the Final Judgment of

¹⁶¹ *Id.*; *Sitomer v. Orlan*, 660 So. 2d 1111, 1115 (Fla. 4th DCA 1995).

¹⁶² *Id.*

¹⁶³ *See also* FLA. STAT. § 689.15 (2015); *Shakespeare v. Prince*, 129 So. 3d 412, 414 (Fla. 2d DCA 2014).

¹⁶⁴ *Beal Bank, SSB*, 780 So. 2d at 53; *Morgan v. Cornell*, 939 So. 2d 344, 346 (Fla. 2d DCA 2006).

¹⁶⁵ FLA. STAT. § 64.041 (2015); *Starcher v. Starcher*, 430 So. 2d 991, 992-93 (Fla. 4th DCA 1983).

¹⁶⁶ *Morgan*, 939 So. 2d at 346 (internal citations omitted); *see also* *Davis v. Hinson*, 67 So. 3d 1107, 1110-11 (Fla. 1st DCA 2011).

¹⁶⁷ *See* *Davis*, 67 So. 3d at 1110-11 (“First, the deed was not signed by all of the owners of the encompassing 74-acre tract. It is undisputed that one of the original tenants in common died before the September 1989 deed was signed, leaving her interest in the property to her surviving children. One of her children—Rashunn Lewis—did not sign the deed. Traditionally, when tenants in common convey interest, they convey only their interest in the partial ownership of the complete parcel.”) (internal citations omitted). *See* *Morgan*, 939 So. 2d at 346; *Elmore v. Elmore*, 99 So. 2d 265, 266 (Fla. 1957) (“[O]ne cotenant cannot bind another, absent that other’s consent, by alienating any specific portion of the estate, since each cotenant owns an interest in the whole, which is indivisible except by partition or agreement.”) Therefore, a cotenant cannot convey exclusive possessory rights to a specific portion of their property unless every cotenant agrees to the conveyance. *Id.* *See also* *Julia v. Russo*, 984 So. 2d 1283 (Fla. 4th DCA 2008); *Reinhardt v. Diedricks*, 439 So. 2d 936, 937 (Fla. 3d DCA 1983).

Dissolution of Marriage, and therefore, those issues survive the death of a party and remain in family court. In *King v. King*,¹⁶⁸ the district court ruled that the estate of the deceased former spouse should be substituted in the dissolution of marriage proceeding in place of the ex-husband where the trial court had “expressly retained jurisdiction” because the ex-husband died only after entry of the Final Judgment of Dissolution of Marriage.¹⁶⁹ Thus, it was reversible error to dismiss property issues in a dissolution of marriage proceeding where the trial court bifurcated the dissolution of marriage proceeding by the entry of a Final Judgment of Dissolution of Marriage because death of a party after entry of a Final Judgment of Dissolution of Marriage does not deprive the trial court of jurisdiction to determine issues reserved in family court.¹⁷⁰

On the other hand, a prejudgment mediation agreement or court order that merely provides that marital assets and debts will be divided equally while the dissolution of marriage is pending fails to survive a spouse’s death. In *Marlowe v. Brown*, the spouse died after the husband and wife entered into a prejudgment mediation agreement but before the entry of a Final Judgment of Dissolution of Marriage.¹⁷¹ Neither the agreement nor the order adopting the agreement set forth a plan or design of equitable distribution of assets and liabilities: it failed to specify which disputed parcels of real property were to be partitioned and sold; it failed to provide who would receive complete titles to parcels as part of an equitable distribution plan; and it failed to value assets or determine which party was entitled to them. Instead, the agreement that was incorporated into an order merely contemplated further discovery and negotiation and a subsequent Final Judgment of Dissolution of Marriage that would incorporate a future equitable distribution plan and design.¹⁷² According to *Marlowe*, an interlocutory order in a dissolution of marriage proceeding does not survive the dismissal of a lawsuit when a spouse dies before entry of a Final Judgment of Dissolution of Marriage.¹⁷³

Even more compelling is *Topol v. Polokoff*, where, originally, a husband had his wife designated as a beneficiary of his individual retirement account (IRA), but re-designated his daughters as co-beneficiaries of his IRA after a dissolution of marriage was filed but

¹⁶⁸ *King v. King*, 67 So. 3d 387 (Fla. 4th DCA 2011).

¹⁶⁹ *Id.* at 388-89.

¹⁷⁰ *Fernandez v. Fernandez*, 648 So. 2d 712, 714 (Fla. 1995); *Claughton v. Claughton*, 393 So. 2d 1061, 1062 (Fla. 1980); *Passamondi v. Passamondi*, 130 So. 3d 736, 738-39 (Fla. 2d DCA 2014).

¹⁷¹ *Marlowe v. Brown*, 944 So.2d 1036 (Fla. 4th DCA 2006).

¹⁷² *Id.*

¹⁷³ *Id.* at 1040.

before a Final Judgment of Dissolution of Marriage was entered.¹⁷⁴ An interlocutory order was entered to maintain the status quo and that required him to re-designate his wife as a beneficiary, which he ultimately complied with.¹⁷⁵ He died before the entry of a Final Judgment of Dissolution of Marriage.¹⁷⁶ The district court held that the interlocutory order was temporary and not final; it was entered to preserve the status quo pending a Final Judgment of Dissolution of Marriage, but upon dismissal of the petition for dissolution of marriage, the agreement and interlocutory order re-designating the wife as an IRA beneficiary was a nullity that did not “survive the abatement” of the dissolution of marriage proceeding.¹⁷⁷

The practitioner should keep in mind that until July 1, 2012, beneficiary designations were not automatically changed upon the entry of a Final Judgment of Dissolution of Marriage. Florida appellate courts have addressed beneficiary designations for assets, such as life insurance policies, IRAs, deferred compensation funds, and other beneficiary-designated assets by looking no further than the person named as beneficiary in the policy, plan, or account itself absent a marital settlement agreement providing who was to receive the death benefits of an asset or specifying who was to be the beneficiary.¹⁷⁸ Before the enactment of Florida Statute Section 732.703, absent a change in the beneficiary form upon entry of a Final Judgment of Dissolution of Marriage that incorporated a marital settlement agreement, beneficiary designations were controlling.¹⁷⁹ Life insurance companies and custodians of retirement plan assets do not generally tackle dissolution of marriage in their beneficiary designation forms regardless of the probable intent of the owner. Florida Statute Section 732.703 expands the automatic elimination of ex-spouses from their existing estate plans for beneficiary designations made by or on behalf of decedents who died

¹⁷⁴ Topol v. Polokoff, 88 So. 3d 341 (Fla. 4th DCA 2012).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 342.

¹⁷⁷ *Id.* at 343.

¹⁷⁸ For an excellent article outlining the change in the law, see Peter T. Kirkwood & Allison L. Kirkwood, *Estate Planning: Death Soon After Divorce*, 89 Fla. B. J. 33, 37 (2015).

¹⁷⁹ Before enactment of Florida Statute Section 732.703, courts analyzed whether marital settlement agreements specifically provided who would or would not receive death benefits or would be the beneficiary of life insurance, and found general language in agreements insufficient to supersede plain language of beneficiary designations. FLA. STAT. § 732.703(2015). See Crawford v. Barker, 64 So. 3d 1246, 1248 (Fla. 2011); Cooper v. Muccitelli, 682 So. 2d 77, 79 (Fla. 1996); Smith v. Smith, 919 So. 2d 525, 527-28 (Fla. 5th DCA 2005); Luszcz v. Lavoie, 787 So. 2d 245, 247, 249 (Fla. 2d DCA 2001).

on or after July 1, 2012, regardless of the date of execution of the designation form, albeit with some caveats.¹⁸⁰

Will a final settlement stipulation, marital settlement agreement, or final mediation agreement providing details of resolution of a partition or dissolution of marriage action survive the death of a party? What if a spouse dies after the parties execute a marital settlement agreement or final mediation agreement that resolves all of the parties' rights and obligations but before entry of a Final Judgment? As long as a settlement agreement is executed before the entry of a Final Judgment of Dissolution of Marriage or Final Judgment of Partition, and the settlement agreement fully resolves the property and support issues with finality, the final agreement should be enforceable.¹⁸¹ But there is a caveat to this statement. The appellate courts seem to emphasize that it is necessary to enter a Final Judgment of Dissolution of Marriage, and upon its entry, the remaining issues of the dissolution of marriage remain in

¹⁸⁰ FLA. STAT. § 732.703(2)(2015) (provides in pertinent part: "A designation made by or on behalf of the decedent providing for the payment or transfer at death of an interest in an asset to or for the benefit of the decedent's former spouse is void as of the time the decedent's marriage was judicially dissolved or declared invalid by court order prior to the decedent's death, if the designation was made prior to the dissolution or court order. The decedent's interest in the asset shall pass as if the decedent's former spouse predeceased the decedent."). The statute applies only to specific kinds of assets. *See* FLA. STAT. § 732.703(3)-(4) (2015). This law applies to a life insurance policy, qualified annuity, or other similar tax-deferred contracts held within employee benefit plans or outside such plans, employee benefit plans, IRAs, payable-on-death (POD) accounts, and security or other accounts registered in a transfer-on-death (TOD) form. *See* FLA. STAT. §§ 732.703(3)(a)-(f) (2015). The treatment of these types of assets was brought into conformity with wills and revocable trusts for Florida residents. FLA. STAT. § 732.507(2) (2015) (provides that upon the entry of a Dissolution of Marriage, a "will shall be administered and construed as if the former spouse had died at the time" of the Final Judgment of Dissolution of Marriage, unless the will or Final Judgment of Dissolution of Marriage expressly provides otherwise.). FLA. STAT. § 736.1105 (2015) (has the same effect on revocable trusts as the statute governing wills.). It provides that any provision of a revocable trust (which is executed by a husband or wife prior to Final Judgment of Dissolution of Marriage) that affects the settlor's spouse becomes void upon a final Judgment of Dissolution of Marriage. Unless the revocable trust expressly provides otherwise, the trust shall be administered and construed as if the settlor's spouse died on the date of the Final Judgment of Dissolution of Marriage. This statute does not apply to the extent that federal law provides otherwise. Thus, employer-sponsored, tax-qualified employee benefit accounts and plans, such as 401(k)s and other defined contribution plans are governed by the Employee Retirement Income Security Act of 1974 (ERISA), which supersedes any state statute or law that may relate to employee benefit plans. *See* *Egelhoff v. Egelhoff*, 532 U.S. 141, 143-50 (2001). For an excellent article outlining the change in the law, *see* Peter T. Kirkwood & Allison L. Kirkwood, *Estate Planning: Death Soon After Divorce*, 89 Fla. B. J. 33, 37 (2015).

¹⁸¹ *See* *Passalino v. Protective Grp. Sec., Inc.*, 886 So. 2d 295, 297 (Fla. 4th DCA 2004); *Jonas v. Logan*, 478 So. 2d 410, 411 (Fla. 3d DCA 1985); *Snow v. Mathews*, 190 So. 2d 50, 52 (Fla. 4th DCA 1966).

family court so that a judge may adjudicate those issues.¹⁸² Still, when parties execute a final mediation agreement or marital settlement agreement that divides the parties' property and debts in an equitable distribution plan and design, awards attorney fees and costs, and determines entitlement to alimony as a lump sum or for a definite time period and that specifically provides that the settlement agreement's provisions are final and survive the death of one or both spouses, then a final settlement agreement should survive the death of a spouse, even if there is no Final Judgment of Dissolution of Marriage entered.¹⁸³ The same rationale should apply to a partition case, even if there is no Final Judgment of Partition as to a division of property entered before death, as long as the executed agreement provides that it is final and survives the death of the cotenants.¹⁸⁴ To make certain that such an agreement is considered as a final agreement rather than an interlocutory agreement, it would be prudent to provide provisions in any final mediation agreement and marital settlement agreement that state: the terms of the final agreement survive the death of the parties, the agreement is final, and all rights and obligations are settled upon execution.¹⁸⁵ In a dissolution of marriage case, if any alimony is periodic and ends upon the death of either party, then the agreement should specifically state that upon death of either party, there is no further alimony obligation.¹⁸⁶ If an assessment of periodic alimony is to survive the death of either of the spouses and be a charge against the estate of the payer-decedent spouse, then the stipulated agreement should provide that those sums are due and owing by the estate for a definite time.¹⁸⁷ Today, what is more likely and prudent in a final settlement agreement that is incorporated into a Final Judgment is a clause that requires a spouse to obtain a life insurance policy that will serve as a substitute for periodic alimony due and owing

¹⁸² Florida appellate courts have ruled that the entry of a Final Judgment of Dissolution of Marriage reserving jurisdiction to determine matters collateral to the adjudication of the dissolution must retain jurisdiction to consider equitable distribution, attorney fees and costs, and other issues collateral to the Final Judgment of Dissolution of Marriage, and therefore those issues will survive the death of a party and remain in family court after the entry of a Final Judgment of Dissolution of Marriage. *See* *Fernandez v. Fernandez*, 648 So. 2d 712, 714 (Fla. 1995); *Cloughton v. Cloughton*, 393 So. 2d 1061, 1062 (Fla. 1980); *Passamondi v. Passamondi*, 130 So. 3d 736, 738-39 (Fla. 2d DCA 2014); *King v. King*, 67 So. 3d 387, 388, 389 (Fla. 4th DCA 2011).

¹⁸³ *Passalino*, 886 So. 2d at 297; *Jonas*, 478 So. 2d at 411; *Snow*, 190 So. 2d at 52.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *See* *Levine v. Horwitz*, 67 So. 3d 1145, 1146-47 (Fla. 3d DCA 2011).

¹⁸⁷ *See* *O'Malley v. Pan Am. Bank of Orlando, N.A.*, 384 So. 2d 1258, 1260 (Fla. 1980).

at the time and in the future.¹⁸⁸ Otherwise, if the latter language is not placed in the stipulated final agreement, the payer spouse's personal representative may argue that only vested amounts of alimony and support are due and owing up to the date of death without future payments due and owing because the amount due only concerns vested amounts that are subject to a claim in an estate proceeding by the party who is purportedly owed the money by the decedent's estate.¹⁸⁹ When negotiating and writing a settlement agreement, be clear and specific to make certain that a prospective future judge will understand exactly what the parties meant when the final settlement agreement was executed should one of the parties die or have a change of heart and later believe that he or she entered into a bad bargain.¹⁹⁰

XII. DETERMINING SETOFFS AND CREDITS IN JOINTLY TITLED MARITAL RESIDENCE

Florida Statute Section 61.077 provides that the trial court shall determine entitlement to setoffs and credits upon sale of a marital residence in a Final Judgment of Dissolution of Marriage.¹⁹¹ The statute provides: "A party is not entitled to any credits or setoffs upon the sale of the marital home unless the parties' settlement agreement, final judgment of dissolution of marriage, or final judgment equitably distributing assets or debts specifically provides that certain credits or setoffs are allowed or given at the time of the sale."¹⁹² There is no specific statutory provision that requires setoffs and credits in jointly titled real property for persons who are unmarried, yet Chapter 64 of the Florida Statutes and the law of jointly titled real property have been read to permit the assessment of credits and setoffs on jointly titled real property that are owned by unmarried cotenants.¹⁹³

Florida Statute Section 61.077 became effective on October 1, 1997, and its purpose was to compel trial courts to evaluate the statutory factors

¹⁸⁸ FLA. STAT. § 61.08 (3) (2015); *see Sobelman v. Sobelman*, 541 So. 2d 1153, 1153-55 (Fla. 1989); *Massam v. Massam*, 993 So. 2d 1022, 1023-24 (Fla. 2d DCA 2008); *Plichta v. Plichta*, 899 So. 2d 1283, 1287 (Fla. 2d DCA 2005).

¹⁸⁹ *See Blocker v. Ferguson*, 47 So. 2d 694, 697 (Fla. 1950).

¹⁹⁰ *See Ferguson v. Ferguson*, 54 So. 3d 553, 555-57 (Fla. 3d DCA 2011).

¹⁹¹ *See FLA. STAT. § 61.077*; *Swergold v. Swergold*, 82 So. 3d 1148, 1149-50 (Fla. 4th DCA 2012); *Tuomey v. Tuomey*, 74 So. 3d 583, 584 (Fla. 5th DCA 2011); *Cardella-Navarro v. Navarro*, , *on subsequent appeal* 21 So. 3d 906 (Fla. 3d DCA 2009); *Todd v. Todd*, 734 So. 2d 537, 540-41 (Fla. 1st DCA 1999).

¹⁹² FLA. STAT. § 61.077 (2015).

¹⁹³ *See McFall v. Trubey*, 992 So. 2d 867, 870 (Fla. 2d DCA 2008); *Schroeder v. Lawhon*, 922 So. 2d 285, 293-94 (Fla. 2d DCA 2006); *O'Donnell v. Marks*, 823 So. 2d 197, 199 (Fla. 4th DCA 2002).

and determine which party should receive a setoff or credit in a Final Judgment of Dissolution of Marriage.¹⁹⁴ The legislature believed that the receipt of setoffs and credits should not be deferred to a future date when the marital residence was sold.¹⁹⁵ Finality is a necessary goal in any litigation, and former spouses need to know their respective financial responsibility regarding what is typically their main asset—the marital residence—in a dissolution of marriage proceeding.¹⁹⁶ By enactment of Florida Statute Section 61.077, the legislature determined that if a trial court failed or refused to decide the matter of setoffs and credits as it pertains to the parties' marital residence upon the entry of a Final Judgment of Dissolution of Marriage, the case should be reversed so that the trial court can decide the entitlement to setoffs and credits when the Final Judgment of Dissolution of Marriage is entered.¹⁹⁷ Florida Statute Section 61.077 requires the trial court to determine the issue of setoffs and credits upon entry of a Final Judgment of Dissolution of Marriage, and accordingly the practitioner should present all available evidence and arguments concerning setoffs and credits at the final hearing in the dissolution of marriage proceeding, or else silence by counsel and the Final Judgment of Dissolution of Marriage could be deemed a waiver and *res judicata*.¹⁹⁸

Before enactment of Florida Statute Section 61.077, there was confusion about what and when courts could or would do as to setoffs and credits; therefore, it was not uncommon for a circuit court to defer ruling on the former spouses' claims of setoffs and credits until a partition action was filed in the future.¹⁹⁹ By deferring a decision on

¹⁹⁴ FLA. STAT. § 61.077 (2015).

¹⁹⁵ See *Caine v. Caine*, 152 So. 3d 860, 861-62 (Fla. 1st DCA 2014); *Gonzalez Del Real v. Del Real*, 139 So. 3d 442 (Fla. 2d DCA 2014); *Swergold*, 82 So. 3d at 1149-50; *Tuomey*, 74 So. 3d at 584; *Silverman v. Silverman*, 940 So. 2d 615, 618 (Fla. 2d DCA 2006); *Holitzner v. Holitzner*, 920 So. 2d 827, 828 (Fla. 4th DCA 2006); *Garcia v. Hernandez*, 947 So. 2d 657, 661 (Fla. 3d DCA 2007).

¹⁹⁶ *Barrow v. Barrow*, 527 So. 2d 1373, 1377 (Fla. 1988) (“[I]t is in the best interests of all parties that property dispositions in matrimonial matters be concluded, if at all possible, in the dissolution proceedings, including a determination, if possible, of possession of any property held in a cotenancy.”).

¹⁹⁷ *Swergold*, 82 So. 3d at 1149-50; *Tuomey*, 74 So. 3d at 584; *Cardella-Navarro*, 992 So. 2d at 858; *Todd*, 734 So. 2d at 540-41.

¹⁹⁸ FLA. STAT. § 61.077 (2015); see *Kelly v. Kelly*, 583 So. 2d 667, 668 (Fla. 1991); *Wolf v. Wolf*, 979 So. 2d 1123, 1127 (Fla. 2d DCA 2008); *Goins v. Goins*, 762 So. 2d 1049, 1050-51 (Fla. 5th DCA 2000); *Goolsby v. Wiley*, 547 So. 2d 227, 230 (Fla. 4th DCA 1989).

¹⁹⁹ FLA. STAT. § 61.077 (2015); see Robert M. Schwartz, *The Bursting Bubble—Dealing with the Marital Home During a Real Estate Recession*, 83 FLA. B. J. 52 (2009); *Goolsby*, 547 So.2d at 230; *Poole v. Savage*, 525 So. 2d 982 (Fla. 1st DCA 1988); *Dugan v. Dugan*, 498 So. 2d 989, 991-92 (Fla. 1st DCA 1986); *Tinsley v. Tinsley*, 490 So. 2d

financial responsibility, the appellate courts placed the parties' financial responsibility in a state of legal limbo upon entry of a Final Judgment of Dissolution of Marriage. The question of the parties' financial responsibility became drawn out and remained unresolved, and there were questions about which former spouse would receive setoffs and credits in the future regarding the marital residence.²⁰⁰ By the time the case returned for a determination on the financial responsibility of the former spouses, there would likely be a newly assigned judge, who might have a different idea about what was fair and equitable depending on the existing financial circumstances of the parties.²⁰¹

XIII. BURDENS AND BENEFITS OF JOINTLY OWNED REAL PROPERTY BY COTENANTS

If parties are married, then all real and personal property obtained during the marriage from marital efforts, labor, and funds is subject to equitable distribution regardless of the name the property has been titled.²⁰² Partition is not an option for real and personal property titled in

205, 207 (Fla. 3d DCA 1986); *Rutkin v. Rutkin*, 345 So. 2d 400, 401-02 (Fla. 3d DCA 1977); *Whiteley v. Whiteley*, 329 So. 2d 352, 353 (Fla. 4th DCA 1976).

²⁰⁰ It was not unusual for some courts to permit a credit for mortgage principal reduction without interest, while others would allow a credit for the entire mortgage payment (principal, interest, taxes, and insurance). *See Kelly*, 583 So. 2d at 668. When a court grants a 50% credit for the entire mortgage payment, this includes an income tax deduction for the same payer cotenant for mortgage interest and taxes. Can this be considered a form of "double dipping" if the payer receives a 50% credit for the entire mortgage (principal, interest, taxes, and insurance) and an interest and real estate tax deduction from the IRS for the payment of interest and real estate taxes on the home? *See Sell v. Sell*, 928 So. 2d 359 (Fla. 3d DCA 2005); *Buchman v. Canard*, 926 So. 2d 390 (Fla. 3d DCA 2005); *Akers v. Akers*, 582 So. 2d 1212 (Fla. 1st DCA 1991). At a minimum, where courts permit both, the payer cotenant can be considered as receiving a double benefit. *See Roth v. Roth*, 973 So. 2d 580, 586 (Fla. 2d DCA 2008); *Norman v. Farrow*, 832 So. 2d 158 (Fla. 1st DCA 2002).

²⁰¹ *See Wertheimer v. Wertheimer*, 487 So. 2d 90 (Fla. 3d DCA 1986) (ex-wife entitled to one-half of principal, interest, insurance, and taxes, even though there was some question whether only principal reduction should be granted as credit); *Power v. Power*, 387 So. 2d 546 (Fla. 5th DCA 1980) (ex-spouse living in residence was entitled only to reimbursement for one-half of his payment of principal on mortgages and taxes); *Iodice v. Scoville*, 460 So. 2d 576 (Fla. 4th DCA 1984) (former husband was entitled to reimbursement for one-half of both principal and interest payments that he made on mortgage, but not his claim for expenditures for maintenance, repairs and improvements).

²⁰² FLA. STAT. § 61.075(6) (2015) (defines marital assets as those acquired during the marriage resulting from the efforts of either party or from the expenditure of marital funds). *Scott v. Scott*, 643 So. 2d 1124 (Fla. 4th DCA 1994). A trial court must make specific findings regarding what property and liabilities are marital and nonmarital, and which party should receive each item as is required by Florida Statute Section 61.075(1).

only one name,²⁰³ and accordingly, a circuit court in a dissolution of marriage action is authorized to equitably distribute the marital assets and liabilities pursuant to Florida Statute Section 61.075.²⁰⁴ Jointly titled real and personal property held as tenants in common, tenants by the entirety, and joint tenancy with right of survivorship is also subject to equitable distribution in a Final Judgment of Dissolution of Marriage.²⁰⁵ If one or both of the parties' petitions contain a count for partition, then the real and personal property subject to partition should be divided or sold in the future upon the entry of a Final Judgment of Dissolution of Marriage.²⁰⁶ The practitioner should not overlook that, at the end of the dissolution of marriage proceeding, the trial court must determine which party is responsible for the mortgage—principal, interest, taxes, insurance; maintenance; preservation; and improvements. The trial court is also statutorily required to determine which party pays the mortgage and maintenance expenses and receives any setoffs and credits.²⁰⁷ The trial court is also required to make express findings regarding: fair market value of the dwelling; award of credits for amounts paid by one or both of the cotenants; fair market rental value of the dwelling that may be applied as a setoff against the cotenant's claim for the payment of credits; and, if the trial court fails to do so, the district court is authorized to reverse and remand the case back to the trial court to make these express findings.²⁰⁸

Regarding former spouses after entry of a Final Judgment of Dissolution of Marriage and unmarried cotenants, the rule applicable to jointly titled real property is as follows: (1) if one cotenant pays for the entirety of an obligation for which the owners are liable as joint tenants with right of survivorship or tenants in common outside of marriage, the paying party is entitled to have the other cotenant reimburse the paying party for his or her proportionate share of the expenses, which is one-half

See Witt v. Witt, 74 So. 3d 1127 (Fla. 2d DCA 2011); Stewmon v. Stewmon, 66 So. 3d 312 (Fla. 2d DCA 2011); Wagner v. Wagner, 61 So. 3d 1141 (Fla. 1st DCA 2011).

²⁰³ FLA. STAT. §§ 64.031, 64.041 (2015); Dietrich v. Winters, 798 So. 2d 864, 866 (Fla. 4th DCA 2001).

²⁰⁴ FLA. STAT. § 61.075 (2015) (authorizes a circuit court to distribute marital property in an equitable distribution plan and design without the necessity of partition). *See* Durand v. Durand, 16 So. 3d 982, 984 (Fla. 4th DCA 2009); *see* Green v. Green, 16 So. 3d 298 (Fla. 1st DCA 2009).

²⁰⁵ *Id.*

²⁰⁶ *Id.* Pantuso v. Pantuso, 335 So. 2d 361 (Fla. 2d DCA 1976); Brennan v. Brennan, 122 So. 3d 923 (Fla. 4th DCA 2013); Gullede v. Gullede, 82 So. 3d 1113 (Fla. 2d DCA 2012).

²⁰⁷ *See* FLA. STAT. § 61.077 (2015).

²⁰⁸ *See* Kelly v. Kelly, 583 So. 2d 667 (Fla. 1991); Tuomey v. Tuomey, 74 So. 3d 583, 584 (Fla. 5th DCA 2011); Burnett v. Burnett, 742 So. 2d 859, 861 (Fla. 2d DCA 1999); Chaney v. Chaney, 619 So. 2d 440, 441 (Fla. 2d DCA 1993).

if there are two cotenants; and (2) co-owners must each contribute equally to the maintenance and preservation of jointly owned property in accordance with their ownership interest when they become tenants in common after marriage, or if they are joint tenants with right of survivorship if unmarried.²⁰⁹ Thus, when determining each of the parties' credits and setoffs after they become tenants in common upon entry of a Final Judgment of Dissolution of Marriage, once the parties become single upon the entry of a Final Judgment of Dissolution of Marriage, or if they are cotenants and were not married to each other, then they are required to incur and pay their proportionate share of ownership expenses.²¹⁰

The same rule applies to any benefits of owning real property as cotenants. Where a cotenant leases the property to a third party and receives rent under a lease, the rent and other profits are deemed to be received for the benefit of all cotenants in proportion to their ownership interest.²¹¹ Where a cotenant in possession vacates the premises and rents the residence to a third party tenant, the rent benefits all cotenants in proportion to their ownership interest. If there are two record title owners, then one-half of the rent after expenses may be kept by the cotenant receiving the rent, while the other cotenant should receive one-half of the rent after expenses.²¹² If there are three record title owners, then each cotenant is entitled to receive one-third of the rent after expenses, and each must pay one-third of the attendant maintenance and preservation expenses. Accordingly, each cotenant shares the burdens and benefits for their share of expenses and rent in accordance with their ownership interests.

XIV. HOMESTEAD PROPERTY FROM FORCED SALE AND PARTITION

Article X, Section 4(a) of the Florida Constitution provides that homestead property "shall be exempt from forced sale under process of

²⁰⁹ See *Kelly*, 583 So. 2d at 668; *McFall v. Trubey*, 992 So. 2d 867, 869 (Fla. 2d DCA 2008); *Schroeder v. Lawhon*, 922 So. 2d 285 (Fla. 2d DCA 2006); *Hawkins v. Hawkins*, 895 So. 2d 1155, 1156 (Fla. 1st DCA 2005); *O'Donnell v. Marks*, 823 So. 2d 197, 199 (Fla. 4th DCA 2002); *Bermudez y Santos v. Bermudez y Santos*, 773 So. 2d 568, 570 (Fla. 3d DCA 2000); *Burnett*, 742 So. 2d at 861.

²¹⁰ See *Joseph v. Estate of Joseph*, 83 So. 3d 965 (Fla. 3d DCA 2012); *McFall*, 992 So. 2d 867.

²¹¹ *Goolsby v. Wiley*, 547 So. 2d 227 (Fla. 4th DCA 1989); *Rosen v. Marlin*, 486 So. 2d 623, 627-28 (Fla. 3d DCA 1986).

²¹² "A cotenant is accountable to the other cotenant for *actual* rent received from third parties." *Fischer v. Fischer*, 503 So. 2d 399, 401 (Fla. 3d DCA 1987) (emphasis included); see also *Hughes v. Krueger*, 67 So. 3d 279, 282 (Fla. 5th DCA 2011) (internal citation omitted); *Saleeby v. Potter*, 295 So. 2d 130, 132 (Fla. 4th DCA 1974).

any court.”²¹³ However, no Florida appellate court has ruled that the homestead provision of the Florida Constitution “precludes a common owner of property from suing for partition and obtaining a forced sale in order to obtain the beneficial enjoyment” of a cotenant’s interest in the property.²¹⁴ Florida courts have consistently held that there is no claim for a homestead exemption from forced sale in a suit for partition by a cotenant whether that cotenant is a spouse or former spouse,²¹⁵ realty investment company that purchased an undivided interest in the property from one of the other cotenants,²¹⁶ or a former spouse and minor child who live on the subject real property, unless they live there pursuant to a court order that granted them exclusive use and occupancy during a child’s minority.²¹⁷ The fact that marital real property is designated as homestead before, during, or after a Final Judgment of Dissolution of Marriage will not bar partition and sale of real property in favor of a cotenant.²¹⁸

XV. OUSTER OF ONE COTENANT BY ANOTHER OUT-OF-POSSESSION
COTENANT: WHAT EFFECT DOES OUSTER HAVE ON SETOFFS AND CREDITS
AS APPLIED TO JOINTLY TITLED REAL PROPERTY?

The issue of ouster by one cotenant of another out-of-possession cotenant and whether upon ouster there might be a setoff of fair rental value to credits for payments made to preserve the real property are significant issues in partition. If a cotenant in possession seeks contribution for amounts paid toward preservation of real property, a joint owner may argue that one-half of the reimbursable household expenses paid by the cotenant in possession can be setoff by one-half of

²¹³ FLA. CONST. art. X, § 4(a).

²¹⁴ See *Tullis v. Tullis*, 360 So. 2d 375, 377 (Fla. 1978); see *DiGiorgio v. DiGiorgio*, 48 So. 3d 968 (Fla. 3d DCA 2010); *Wescott v. Wescott*, 487 So. 2d 1099, 1100 (Fla. 5th DCA 1986).

²¹⁵ *Id.*

²¹⁶ See *Donly v. Metro. Realty & Inv. Co.*, 72 So. 178 (Fla. 1916); *Black v. Miller*, 219 So. 2d 106 (Fla. 3d DCA 1969).

²¹⁷ Where a trial court grants exclusive use and occupancy to a former spouse during a child’s minority, it constitutes a form of support and what is in the child’s continued best interest, not homestead exemption, and the emancipation of the minor child is a changed circumstance which would divest the former spouse in possession of the right to continued exclusive possession. See *Phillips v. Phillips*, 83 So. 3d 903 (Fla. 2d DCA 2012); *Durand v. Durand*, 16 So. 3d 982 (Fla. 4th DCA 2009); *Sabin v. Butter*, 522 So. 2d 939, 940 (Fla. 3d DCA 1988); *Wiggins v. Wiggins*, 415 So. 2d 861 (Fla. 5th DCA 1982); *Hoskin v. Hoskin*, 329 So. 2d 19 (Fla. 3d DCA 1976).

²¹⁸ See *Sell v. Sell*, 949 So. 2d 1108, 1112 (Fla. 3d DCA 2007) (internal citation omitted); *Partridge v. Partridge*, 912 So. 2d 649, 650 (Fla. 4th DCA 2005).

the fair rental value of the property of an out-of-possession cotenant.²¹⁹ The leading case is *Barrow v. Barrow*, where a Final Judgment of Dissolution of Marriage made the husband and wife tenants in common.²²⁰ The former husband occupied the real property after the Final Judgment, even though the decree was silent as to who was entitled to its possession and the date of any future sale.²²¹ The former wife petitioned for partition years later.²²² The former husband made a claim for a one-half credit of the amounts expended to preserve and improve the property.²²³ The Florida Supreme Court held that when a cotenant in possession seeks a one-half contribution for amounts expended in the preservation of the property, the claim for a credit upon proof of household payments may be setoff by an out-of-possession cotenant of one-half for the fair rental value of the premises if the cotenant in possession holds the real property adversely against the out-of-possession cotenant or as a result of ouster.²²⁴

While the general principle in *Barrow* seems straightforward, applying it can be problematic. First, what does “ouster” mean, and second, how do Florida courts apply ouster to cotenants and their proportionate interest? Generally, the cotenant residing on the real property must do so adversely against the out-of-possession cotenant. Thus, a claim for a one-half credit upon proof of household payments in the preservation of the property by an in-possession cotenant may be setoff by an out-of-possession cotenant for one-half of the fair rental value of the premises upon ouster.²²⁵ Florida appellate court decisions have held that an ouster includes a claim of exclusive right or title by the in-possession cotenant that deprives all beneficial use of the property by the cotenant out-of-possession.²²⁶ Ouster also requires the cotenant in possession to directly or indirectly communicate to the cotenant out-of-possession that he or she intends to deprive all beneficial use of his or her

²¹⁹ See *Joseph v. Estate of Joseph*, 83 So. 3d 965 (Fla. 3d DCA 2012); *McFall v. Trubey*, 992 So. 2d 867 (Fla. 2d DCA 2008).

²²⁰ *Barrow v. Barrow*, 527 So. 2d 1373 (Fla. 1988).

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*; *Joseph*, 83 So. 3d 965; *McFall*, 992 So. 2d 867.

²²⁵ *Weiner v. Weiner*, 37 So. 3d 395 (Fla. 4th DCA 2010); *Goins v. Goins*, 762 So. 2d 1049 (Fla. 5th DCA 2000); *Brisciano v. Byard*, 615 So. 2d 213 (Fla. 1st DCA 1993); *Adkins v. Adkins*, 595 So. 2d 1032 (Fla. 1st DCA 1992); *Fitzgerald v. Fitzgerald*, 558 So. 2d 122 (Fla. 1st DCA 1990).

²²⁶ See *Bailey v. Parker*, 492 So. 2d 1175, 1177 (Fla. 1st DCA 1986); *Vandergrift v. Buckley*, 472 So. 2d 1325 (Fla. 5th DCA 1985).

property.²²⁷ If a final judgment is silent and one cotenant moves into the residence before the other, this does not constitute ouster.²²⁸ “[W]here exclusive possession by a cotenant is sanctioned by court order or agreement of the parties, there can be no offset (of one-half of the fair rental value of the property for the term of the lawful possession) against the claim” for a one-half reimbursement “for necessary and proper expenses incurred in the preservation and protection of the real property.”²²⁹ Thus, exclusive occupancy of the marital home by court order while the minor children reside there is considered to be a benefit, which bars the out-of-possession cotenant from receiving a one-half setoff of the fair rental value of the property.²³⁰ Where a cotenant merely files a petition for dissolution of marriage or complaint for partition, it is insufficient to constitute an ouster as neither cotenant is holding the real property adverse to the other cotenant’s right of possession.²³¹ If a cotenant dies and the beneficiary obtains a non-adverse interest in the real property, such does not demonstrate the required adversity to constitute an ouster.²³² Where exclusive possession by a cotenant is sanctioned by a court order or agreement of the parties, there can be no setoff of one-half of the fair rental value of the property for the term of the lawful possession against the claim of that cotenant for the reimbursement from the proceeds of a sale of the real property for one-half of the necessary and proper expenses incurred in the preservation and protection of the property.²³³

²²⁷ *Coggan v. Coggan*, 239 So. 2d 17, 19 (Fla. 1970); *Atkinson v. Anderson*, 77 So. 3d 768, 770 (Fla. 4th DCA 2011); *Patterson v. Patterson*, 396 So. 2d 821, 822 (Fla. 4th DCA 1981).

²²⁸ *Barrow*, 527 So. 2d 1373.

²²⁹ *Goolsby v. Wiley*, 547 So. 2d 227, 230 (Fla. 4th DCA 1989); see *Kelly v. Kelly*, 583 So. 2d 667, 668 (Fla. 1991); *Sweet v. Sweet*, 993 So. 2d 91 (Fla. 2d DCA 2008); *McCarthy v. McCarthy*, 922 So. 2d 223, 226 (Fla. 3d DCA 2005); *Brisciano*, 615 So. 2d 213; *Fischer v. Fischer*, 503 So. 2d 399 (Fla. 3d DCA 1987); *Wood v. Friedman*, 388 So. 2d 1355 (Fla. 5th DCA 1980).

²³⁰ *Id.* See also *Babb v. Babb*, 771 So. 2d 1215, 1217-18 (Fla. 5th DCA 2000) (“Charles is also correct that he was entitled to receive credit for one-half the rental value of the marital home from the time the youngest child reached age 18 until the time of sale. While Roseanne’s exclusive occupancy of the marital home was considered an aspect of child support, Charles was entitled to receive credit for one-half the rental value of marital home from the time his obligation for child support terminated; namely, the date the youngest child attained age 18. See *Berger v. Berger*, 559 So. 2d 737 (Fla. 5th DCA 1990). Similarly, Roseanne was entitled to receive credit for one-half of all reasonable and necessary expenditures incurred by her for repairs and maintenance to the property. See *Hernandez v. Hernandez*, 645 So. 2d 171 (Fla. 3d DCA 1994).”).

²³¹ *Diedricks v. Reinhardt*, 466 So. 2d 375, 377 (Fla. 3d DCA 1985).

²³² *Coggan*, 239 So. 2d at 19; *Fitzgerald v. Fitzgerald*, 558 So. 2d 122, 124-25 (Fla. 1st DCA 1990); *Diedricks*, 466 So. 2d at 377.

²³³ *Goolsby*, 547 So. 2d at 230.

In light of the decision in *Barrow* and its progeny, a legal ouster must occur against an out-of-possession cotenant in order for him or her to claim one-half of the fair rental value as a setoff of one-half of the monies actually spent to preserve the real property by the in-house cotenant. In requiring a legal ouster to offset one-half of the fair rental value against one-half of the expenses paid to preserve the real property, the courts have followed the common law: possession and occupancy by one cotenant is “presumed to be possession” and occupancy by all cotenants, until the one in possession claims the right or title adversely against the out-of-possession cotenant.²³⁴ In adopting this principle, it is apparent that courts have found a way to increase or decrease the equity of real property after considering each cotenant’s claims for setoff and credit as a way to provide a credit against the non-paying cotenant. If this were not the case, the cotenant who was not paying his or her share of the expenses upon sale would receive one-half of the net sale proceeds, which could include a substantial increment representing formerly unrealized appreciation in the value of the real property. Thus, the cotenant solely responsible for paying the mortgage, including principal, interest, taxes, and insurance, and maintenance costs will have directly increased the parties’ equity, thus protecting the investment from hazards and liens and will receive one-half of the net sales proceeds, less the sum of all such expenses. Such a result is inequitable unless there has been some prior consideration given for the disparity that can be verified.²³⁵ This theory and analysis should also provide cotenants and their practitioners with a degree of predictability of what to expect if there is litigation in the legal system on the matter of ouster and their respective clients’ claims for a setoff and credit.

If there is a voluntary retreat or relinquishment of possession of a residence by one cotenant without an ouster of a cotenant, there can be no one-half credit for the fair rental value to be set off toward one-half of the preservation expenses of the real property.²³⁶ In order to be entitled to a one-half fair rental value setoff by an out-of-possession cotenant against an in-house cotenant who has contributed preservation expenses toward the real property, there must be an ouster that is evidenced by: changing of the locks;²³⁷ actual or constructive eviction against a

²³⁴ *Id.* at 229; *Barrow v. Barrow*, 527 So. 2d 1373, 1377 (Fla. 1988); *Haas v. Haas*, 552 So. 2d 252, 254-55 (Fla. 4th DCA 1989).

²³⁵ *See Goolsby*, 547 So. 2d at 228-29.

²³⁶ *Battista v. Battista*, 585 So. 2d 459 (Fla. 1st DCA 1991).

²³⁷ *Atkinson v. Anderson*, 77 So. 3d 768 (Fla. 4th DCA 2011); *Moraitis v. Galluzzo*, 511 So. 2d 427 (Fla. 4th DCA 1987); *Bailey v. Parker*, 492 So. 2d 1175, 1176 (Fla. 1st DCA 1986).

cotenant;²³⁸ rejection of a party's demand to gain entry into the premises;²³⁹ demand letter setting forth that the party in possession is maintaining exclusive use and occupancy until sale;²⁴⁰ court order granting exclusive possession of the property due to a final judgment for protection against domestic violence as distinguished from a Final Judgment of Dissolution of Marriage awarding exclusive possession of a marital residence to one former spouse;²⁴¹ or any act inconsistent with joint ownership by the party in possession with the cotenant out-of-possession indicating that the out-of-possession party is no longer welcome.²⁴² The legally described situations mentioned in this article and other similar future acts should be sufficient evidence of an ouster that will allow the out-of-possession cotenant to ask for and receive a one-half setoff of the fair rental value of the real property during a period of exclusive possession of the residence by the cotenant in possession that can be setoff against the in-house cotenant's one-half payment of preservation expenses.

XVI. NONEXISTENT AND *VOID AB INITIO* MARRIAGES

Legal chaos can result when couples act as if they are married, but it turns out that they are not married.²⁴³ If it is determined that the "husband" and "wife" were never legally married, then a *void ab initio* marriage places the parties in a position as if no marriage occurred regardless of what they thought or believed.²⁴⁴ Under these circumstances, one or both parties can still file a petition for dissolution of marriage and hope that they fall within the "good faith and in substantial compliance" test of Florida Statute Section 741.211 to support a lawful marriage.²⁴⁵ If it turns out that there was no lawful

²³⁸ *Wolf v. Wolf*, 979 So. 2d 1123, 1127 (Fla. 2d DCA 2008) (internal citation omitted); *Vandergrift v. Buckley*, 472 So. 2d 1325 (Fla. 5th DCA 1985).

²³⁹ *Atkinson*, 77 So. 3d 768.

²⁴⁰ *Joseph v. Estate of Joseph*, 83 So. 3d 965 (Fla. 3d DCA 2012).

²⁴¹ *Wolf*, 979 So. 2d at 1126-28.

²⁴² *See Atkinson*, 77 So. 3d 768.

²⁴³ *See Nottingham v. Denison*, 63 So. 2d 269 (Fla. 1953); William J. Cople III, *CPLR 314(1): Absent Minimum Contacts, Jurisdiction Lacking Over Nonresident Second Wife of Deceased Husband in Action by Domiciliary First Wife to Adjudicate Validity of First Marriage*, 53 ST. JOHN'S L. REV. 816 (2012).

²⁴⁴ *In re Estate of Seymour J. Kant*, 272 So. 2d 153 (Fla. 1972); *Preure v. Benhadj-Djillali*, 15 So. 3d 877 (Fla. 5th DCA 2009); *Kittel v. Kittel*, 194 So. 2d 640 (Fla. 3d DCA 1967).

²⁴⁵ *See* FLA. STAT. § 741.211 (2015); *Hall v. Maal*, 32 So. 3d 682 (Fla. 1st DCA 2010); *Preure*, 15 So. 3d 877; *Metro. Dade Cnty. v. Shelton*, 375 So. 2d 32 (Fla. 4th DCA 1979); *In re Estate of Litzky*, 296 So. 2d 638 (Fla. 3d DCA 1974). Since 1967, when the Florida legislature abolished common law marriage, there has been only one way of

marriage, the parties still have the option to petition for paternity, time-sharing, child support, and partition of real and personal property for any real and personal property that is in joint names of the parties. In *Betemariam v. Said*, the district court found that the parties' marriage was merely a religious ceremony performed without a marriage license, and therefore, no legal marriage occurred.²⁴⁶ The parties had joint bank accounts and purchased a home, taking title jointly as husband and wife.²⁴⁷ The trial court entered a final judgment of paternity, time-sharing, child support, and for partition of the residence, and ruled that the parties were never legally married; therefore, the court was without jurisdiction to enter equitable distribution or alimony awards.²⁴⁸ The district court affirmed the denial of alimony and equitable distribution as the trial court was without jurisdiction to consider those claims without a legal marriage, but it did sustain a final order as to partition, paternity, time-sharing, and child support.²⁴⁹

Similarly, in *Hall v. Maal*, a year after the marriage ceremony, the parties appeared before the clerk of the court and applied for and received a marriage license.²⁵⁰ However, the license was neither solemnized nor returned to the clerk of the court to be made part of the official records of the county.²⁵¹ In the years following the ceremony, two children were born of the relationship, the parties referred to each other as her "husband" and his "wife," the "wife" was referred to as "Mrs." in the workplace and elsewhere, the parties jointly purchased a home, and the mortgage on the parties' home referred to them as "husband and wife."²⁵² Sometime later, the "wife" filed a petition for

producing a legally cognizable marriage in Florida. See FLA. STAT. §§ 741.01–741.212 (2015). Persons desiring to be married are required to apply for a marriage license, which can be "issued by a county court judge or clerk of the circuit court . . ." FLA. STAT. § 741.01(1) (2015). *Hall*, 32 So. 3d at 686 ("Florida's marriage statute must be read *in pari materia*. Couples who desire to be married must apply for a license. There is a fee for getting a marriage license and that fee is reduced for attending pre-marital counseling. The license is valid for 60 days. The officiant at the ceremony must certify that the marriage was solemnized. The certified marriage license must be returned to the clerk or issuing judge within 10 days and the clerk or judge is required to keep a correct record of certified marriage licenses. Finally, there is a provision by which the marriage may be proved in instances where the license is lost or destroyed. At every turn in Chapter 741, marriages are presupposed to have a license. To depart from the requirement to have a license re-creates common-law marriage as abolished by section 741.211.").

²⁴⁶ *Betemariam v. Said*, 48 So. 3d 121 (Fla. 4th DCA 2010).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Hall*, 32 So. 3d 682.

²⁵¹ *Id.*

²⁵² *Id.*

dissolution of marriage, and requested the usual claims that are part of a Dissolution of Marriage.²⁵³ The “husband” responded by filing an answer and counter-petition to establish paternity, but he denied the existence of a lawful marriage.²⁵⁴ The district court affirmed the trial court and found that a lawful marriage did not exist, but paternity was established along with shared parental responsibility, child support, primary residential custody of the children, and time-sharing.²⁵⁵ While no partition count was part of the proceeding, if the parties jointly owned a residence in both names, then either cotenant could have pled a partition count in these proceedings whether or not they were lawfully married.

XVII. *OBERGEFELL V. HODGES*,²⁵⁶ SAME-SEX MARRIAGE,²⁵⁷ AND PARTITION.

“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”²⁵⁸ This principle was extended by the Supreme Court to same-sex marriage in *Obergefell v. Hodges*,²⁵⁹ where the Supreme Court decided that the Constitution guarantees a right to same-sex marriage in all 50 states, and by its ruling, the majority decided that same-sex marriage was accorded universal acceptance in the entire country.²⁶⁰ Thus, in its ruling, the Supreme Court resolved one of the great civil rights questions in a generation.²⁶¹ The majority in *Obergefell*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 687-88.

²⁵⁶ *Obergefell v. Hodges*, No. 14-556, slip op. (U.S. June 26, 2015).

²⁵⁷ For purposes of this article, “gay” and “same-sex” will be used interchangeably. Measuring sexual identity has presented challenges because it is a complex concept that is rooted in social and political frameworks that have been subject to change over time. See Randall L. Sell, *Defining and Measuring Sexual Orientation: A Review*, 26 ARCHIVES OF SEXUAL BEHAVIOR 643 (Dec. 1997). The majority in *Obergefell* recognized the transformation of homosexuality from being described as a “sickness” to a “normal expression of human sexuality and immutable” following substantial cultural and political developments where same-sex couples began to lead more open and public lives and to establish families. See *Obergefell*, No. 14-556, slip op. at 7-8 (U.S. June 26, 2015).

²⁵⁸ *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

²⁵⁹ *Obergefell*, No. 14-556, slip op. (U.S. June 26, 2015).

²⁶⁰ *Id.* at 12-17, 19, 22-23, 27.

²⁶¹ Beginning in the 1970s, the debate over same-sex relationships and marriage raged on between advocates for both sides as to whether marriage is so fundamental as to constitute a federally guaranteed constitutional right rather than a right determined by each state. See *The History of the Freedom to Marry in the United States*, TIKI-TOKI (March 24, 2016) (retrieved March 24, 2016 from <http://www.tiki-toki.com/timeline/entry/47611/The-History-of-the-Freedom-to-Marry-in-the-United-States/#vars!date=1972-01>

acknowledged the damage that can result to same-sex couples when they experience discrimination and intolerance by state and federal officials after voter referendums and legislative acts place those views into state constitutions and statutes.²⁶² Tyranny of the majority has now become a myth that will not be tolerated by the states and the federal government when it comes to same-sex marriage.²⁶³ In relying on the Due Process and Equal Protection clauses of the Fourteenth Amendment of the Constitution, Justice Kennedy suggested that the founders provided the nation with a Constitution and a Bill of Rights without a specific blueprint for deciding what is or is not on the ultimate list.²⁶⁴ Justice Kennedy suggested that individuals' liberties evolve over time and allows future generations to protect the right of all persons to enjoy liberty as the nation learns its meaning, and when that liberty has arguably been violated, the judiciary is called upon to address that claim.²⁶⁵

According to *Obergefell*, lawful marriage includes traditional marriage between a man and a woman, as well as same-sex marriage in all 50 states, rather than allowing each state to decide whether same-sex marriage should be legalized in accordance with the viewpoints of voters and legislators in each state.²⁶⁶ While great deference was formerly placed on each state's decision in the area of marriage,²⁶⁷ *Obergefell*

-20_02:25:17!); William N. Eskridge Jr., *A History of Same Sex Marriage*, 79 VA. L. REV. 1419 (1993).

²⁶² *Obergefell*, No. 14-556, slip op. at 17-8 (U.S. June 26, 2015).

²⁶³ Tyranny of the majority was extensively discussed by Tocqueville in *Democracy in America*. See Alexis De Tocqueville, *DEMOCRACY IN AMERICA* 235-264 (Harvey C. Mansfield & Delba Winthrop trans., The University of Chicago Press 2002) (1835). Tocqueville expressed great concern about the impact that tyranny of the majority can have on minority communities that has long been recognized as a danger inherent in governments built on democracy. See *Id.* He also emphasized the importance of marriage as the foundation of the family in America in this work. See *Obergefell*, No. 14-556, slip op. at 16 (U.S. June 26, 2015). For a thorough discussion of same-sex marriage and tyranny of the majority, see Harry M. Hipler, *Tocqueville's Slow and Steady Democratic Order in Light of US v. Windsor: Same Sex Marriage, and the Dilemma of Majority Tyranny, Federalism, and Equality of Conditions*. (2013) (unpublished paper), available at http://works.bepress.com/harry_hipler/3.

²⁶⁴ *Obergefell*, No. 14-556, slip op. at 17-23 (U.S. June 26, 2015).

²⁶⁵ *Id.* at 10-11, 24.

²⁶⁶ *Id.*

²⁶⁷ See *U.S. v. Windsor*, 133 S. Ct. 2675 (2013); *Baker v. Nelson*, 409 U.S. 810 (1972) (Minnesota Supreme Court ruled that a state law limiting marriage to persons of the opposite sex did not violate the U.S. Constitution. Baker appealed, and on October 10, 1972, the U.S. Supreme Court dismissed the appeal "for want of a substantial federal question."). Because the case came to the Supreme Court through mandatory appellate review, not certiorari, the dismissal constituted a decision on the merits and established

rejects a state's right to define marriage as the union of one man and one woman, and the decision now prevents state governments from undermining gay marriage.²⁶⁸

Florida may have been on the verge of deciding that the United States and Florida Constitutions guarantee a right to same-sex marriage in all 50 states. Before *Obergefell*, one district court in Florida, in *Brandon-Thomas v. Brandon-Thomas*,²⁶⁹ decided that Florida should be required to allow same-sex couples to dissolve their marriage, as long as they were legally licensed and performed out-of-state on account of the Full Faith and Credit clause of the United States Constitution.²⁷⁰ Another district court in Florida, in *Oliver v. Stufflebeam*,²⁷¹ ruled that same-sex marriage and divorce was barred in Florida on account of the state statute and the Florida Constitution that barred same-sex marriage, and until there was a change in voter sentiment or the Supreme Court decided in favor of same-sex marriage, the district court was bound by the state of the law.²⁷² After the Supreme Court's decision in *Obergefell*, lawful marriage includes traditional marriage between a man and a woman, as well as same-sex marriage in all 50 states. A legal and licensed marriage in one state will have to be recognized in all 50 states.²⁷³

Baker v. Nelson as precedent, although the extent of its precedential effect has been subject to debate.

²⁶⁸ See *Obergefell*, No. 14-556, slip op. at 27 (U.S. June 26, 2015). From the beginning of the deliberation on the enactment of the U.S. Constitution, there has been a debate about political powers reserved for state governments (primacy of voters in referendums or of legislatures and their state representatives) as distinguished from the power of the U.S. Supreme Court to determine what may constitute a federally guaranteed constitutional right in the US Constitution and the Bill of Rights, especially the Fourteenth Amendment, and the Supremacy Clause in determining whether federal or state law controlled. See *Marbury v. Madison*, 5 U.S. 137 (1803). Justice Scalia, in his dissenting opinion in *Windsor*, stated that the U.S. Supreme Court has no power to declare the law because the Constitution grants the people the power to govern themselves. See *Windsor*, 133 S. Ct. 2675. He echoes those views in his dissent. *Obergefell*, No. 14-556, slip op. at 1-9 (U.S. June 26, 2015) (Scalia, J. dissenting). The other side suggests that the U.S. Supreme Court has the power to decide whether there is a federally guaranteed constitutional right under the U.S. Constitution that overrides states' decisions if the right is based on the Bill of Rights and any US Constitutional Amendments. See *Obergefell*, No. 14-556, slip op. (U.S. June 26, 2015). Those same fundamental questions were raised in *Obergefell* where the Supreme Court decided that the due process and equal protection clauses of the Fourteenth Amendment prohibited the States from barring same-sex couples to marry on the same terms accorded to couples of the opposite sex when it determined that marriage is a federally guaranteed constitutional right under the Constitution. *Id.* at 19-23.

²⁶⁹ *Brandon-Thomas v. Brandon-Thomas*, 163 So. 3d 644 (Fla. 2d DCA 2015).

²⁷⁰ *Id.*

²⁷¹ *Oliver v. Stufflebeam*, 155 So. 3d 395 (Fla. 3d DCA 2014).

²⁷² *Id.*

²⁷³ *Obergefell*, No. 14-556, slip op. (U.S. June 26, 2015).

In Florida, what does the U.S. Supreme Court's decision in *Obergefell* mean for partitioning real and personal property of same-sex couples who marry and later file a petition for dissolution of marriage, or those couples who decide to remain unmarried and jointly own real and personal property? The short answer is that the full panoply of rights and obligations provided in Chapter 61 of the Florida Statutes and federal law of an estimated 1,138 marriage rights will apply to *all* married couples.²⁷⁴ The benefits and the burdens of marriage and dissolutions of marriage now apply to traditional and same-sex marriage. What has been lost in the historic same-sex marriage decision and jubilant celebration of it is the certainty of bitter break-ups and the difficulties that go with any dissolution of marriage and partition action where a couple decides to physically and emotionally break up.

There is no reason to believe that the dissolution of marriage rate for same-sex marriages will not be comparable to the dissolution rate of traditional marriages. The nuts and bolts of any marital breakup, including but not limited to division of property and equitable distribution, partition, support and maintenance, time-sharing arrangements if there are children born or adopted during the marriage, and what constitutes marital and non-marital assets and liabilities will need to be resolved.²⁷⁵ Before couples decide to marry, they will have the option to obtain an antenuptial agreement as provided for in Florida Statute Section 61.079 should there be a future dissolution of marriage.²⁷⁶ The same issues of law and fact that have applied to traditional marriage breakups between a man and a woman will now apply to same-sex marriage breakups as lawyers argue their respective clients' cases to judges at trial if dissolutions cannot be amicably resolved. Equal dignity in the eyes of the law for same-sex marriage will apply to all married couples and to established tenets in Florida and elsewhere in the United States for same-sex dissolution of marriages. The system of laws that were once only applicable to marriage between a man and woman will now extend society's tenets to all marriages and dissolution of marriage proceedings that carry both benefits and burdens to all married couples.

For those same-sex couples who decide to remain unmarried, there is still a need for domestic partnership agreements between same-sex couples living together unmarried. By having a written agreement,

²⁷⁴ See Overview of Federal Benefits Granted to Married Couples, HUMAN RIGHTS CAMPAIGN (2015), <http://www.hrc.org/resources/entry/an-overview-of-federal-rights-and-protections-granted-to-married-couples>.

²⁷⁵ FLA. STAT. § 61.075 (2015); *Kaaa v. Kaaa*, 58 So. 3d 867 (Fla. 2010); *Stewmon v. Stewmon*, 66 So. 3d 312 (Fla. 2nd DCA 2011); *Lee v. Lee*, 56 So. 3d 819 (Fla. 2d DCA 2011).

²⁷⁶ FLA. STAT. § 61.079 (2015).

however, many of the challenges between same-sex couples may be alleviated and minimized should they decide to separate from each other in the future. Unmarried couples can provide each other and the court with guidance on what to do with real and personal property jointly titled if there is a written agreement. Without a written agreement, the parties will be subject to Chapter 64 of the Florida Statutes, in so far as partition actions are concerned and judicial decisions on credits, setoffs, and ouster. Each party will be subject to Florida law and a jurist's sound discretion, and that decision may or may not follow what one or both parties intended when they purchased or received the real and personal property from the other years earlier.²⁷⁷ *Obergefell*, however, should have no impact on those same-sex couples who remain single, which has been the law in Florida for many years.²⁷⁸

After *Obergefell*, same-sex couples should have four options: (1) before marriage, the couple can obtain an antenuptial agreement, setting forth their financial responsibilities, or they can marry without obtaining one; (2) the couple can remain single and rely on an existing domestic partnership and cohabitation agreement, or if none exists then each person can hire their own independent lawyer to prepare and review a proposed agreement so that same-sex couples can set forth their financial responsibilities to each other as to jointly titled property and living arrangements; (3) maintain the status quo and remain unmarried without executing a written agreement that will subject same-sex couples to Chapter 64 of the Florida Statutes, in so far as jointly owned real and personal property is concerned; (4) each party can own their separate and distinct real and personal property in their own name as a single person, and then upon a breakup without an amicable resolution, either can consider filing a civil action against the other for an equitable lien, special equity, and any other cause of action permitted under Florida law. We will just have to wait and see what happens in the future.

XVIII. CONCLUSION

Breaking up joint ownership of real and personal property through partition has significant consequences for married and unmarried joint owners with regard to a determination of each party's proportionate ownership share, setoffs, and credits. Although cotenants have a

²⁷⁷ See Sections VII, VIII, IX, *supra*.

²⁷⁸ See *Bucacci v. Boutin*, 933 So. 2d 580 (Fla. 3d DCA 2006); *Forrest v. Ron*, 821 So. 2d 1163 (Fla. 3d DCA 2002); *Dietrich v. Winters*, 798 So. 2d 864 (Fla. 4th DCA 2001); *Posik v. Layton*, 695 So. 2d 759 (Fla. 5th DCA 1997); *Poe v. Estate of Levy*, 411 So. 2d 253 (Fla. 4th DCA 1982).

fundamental right to partition in nearly all circumstances, it is always best for cotenants to agree amongst themselves by mediation or otherwise how to divide their jointly titled real and personal property due to the inherent risk that accompanies partition in civil litigation and dissolution of marriage when deciding issues of joint ownership of real and personal property and any attendant claims of setoff and credit. If settlement cannot be reached, cotenants and married couples chance the risk of allowing a judge to decide disputed issues in a contested dissolution of marriage and partition action that can be costly, time-consuming, and disruptive. There is only a fixed amount of value that real and personal property may have, and absent settlement, there may only be a morsel for everyone if the litigated case is contested, because it is highly unlikely that either party will receive a windfall after costs. Whether real and personal property is jointly owned by a husband and wife, married or unmarried same-sex couples, two or more business partners or shareholders, or two or more unmarried coparceners, the chances are that there will be a dispute about dividing and selling jointly titled real and personal property and the attendant setoffs and credits that cotenants may be entitled to receive upon division and sale. Today's lawyers will inevitably come in contact with disputes regarding joint ownership of real and personal property.

This article has discussed many significant issues in partitioning real and personal property by married and unmarried couples if co-owners cannot settle their differences amicably. Florida law has attempted to prudently shape partition of jointly owned real and personal property in distinctive and characteristic ways. In light of the large number of joint owners of real and personal property,²⁷⁹ potential problems including the apparent risk posed by partition do not seem to have deterred the existence and growth of an abundance of joint owners knowing full well the risks that accompany joint ownership. Partition provides cotenants with an essential way to exit joint ownership for uncooperative joint owners who would otherwise find themselves hopelessly deadlocked and entangled together in joint ownership of real and personal property. Partition is a necessary breakout method designed to prevent joint ownership from becoming a padlock on the use and enjoyment of real and personal property by making it possible to transfer title and promote trade, commerce, and enterprise not only for co-owners but to society in general. There may be no easy way to divide and sell jointly owned real and personal property by unwilling co-owners who may be apt to antagonistically behave in ways that are not in their self-interest and

²⁷⁹ See Clifford.G. Holderness, *Joint ownership and alienability*, 23 INT'L REV. OF L. & ECON. 75 (March 2003).

those of a cotenant. Such conduct will result in unreasonable restraints in the use and enjoyment of real and personal property making it impossible to sell and transfer title.²⁸⁰ Partition's method, if successful, should ultimately end disagreement among co-owners by severing them from each other and their jointly owned real and personal property, so that real and personal property may be transferred and sold with each co-owner receiving an appropriate share of the net proceeds upon sale.

²⁸⁰ See generally John C. Murray, *Options and Related Rights with Respect to Real Estate: An Update*, 47 REAL PROP. TR. & EST. L.J. 63 (2012-2013); Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U. L. REV. 1525 (2006-2007).