

A rectangular parcel of undeveloped land contained three acres and had 150 feet of frontage on a public street. The applicable zoning ordinance required that a buildable lot contain at least two acres and have frontage of not less than 100 feet on a public street.

A brother and sister owned the land as tenants in common, the brother owning a one-third interest and the sister owning a two-thirds interest. Neither of them owned any other real property.

The sister brought an appropriate action to partition the land and proposed that a two-acre rectangular lot with 100 feet of frontage be set off to her and that a one-acre rectangular lot with 50 feet of frontage be set off to the brother. The brother's defense included a demand that the land be sold and its proceeds be divided one-third to the brother and two-thirds to the sister.

Who will prevail?

- A. The brother, because partition by sale is the preferred remedy, unless a fair price is not the likely result of a sale.
- B. The brother, because the zoning ordinance makes it impossible to divide the land fairly.
- C. The sister, because partition by sale is not appropriate if the subject property can be physically divided.
- D. The sister, because the ratio of the two lots that would result from her proposal conforms exactly to the ownership ratio.

Explanation:

Tenancy in common is shared ownership of property where each co-tenant has a separate share of the property, but the right to possess and enjoy the entire property (ie, separate but undivided interests). A co-tenant may bring an **action to partition** (ie, divide) the property and, absent an agreement to the contrary, a court *must* grant that request. There are two types of partition:

In kind – physical division of the property into distinct lots that are proportionate to each co-tenant's ownership interest

By sale – forced sale of the property where the proceeds are divided in accordance with each co-tenant's ownership interest

Partition in kind is the preferred method of partition. But when **physical division** of the land is impossible, impracticable, or **inequitable**, a court will grant a **partition by sale (Choices A & C)**.

Here, the brother and sister are tenants in common on three acres of undeveloped land with 150 feet of street frontage. The sister proposed a partition in kind where the brother would receive his one-third interest (one acre with 50 feet of frontage). But the ordinance makes it impossible to divide the land fairly since it would prohibit the brother from building on his lot. Therefore, the brother will prevail in his demand for a partition by sale.

(Choice D) Although the sister's proposal divides the land in conformity with the ownership ratio, a partition in kind would be inequitable since the brother would not be able to build on his lot. Therefore, the land will be partitioned by sale and the proceeds will be divided proportionately—ie, one-third to the brother and two-thirds to the sister.

Educational objective:

In a tenancy in common, a co-tenant may bring an action for partition in kind or by sale. If a partition in kind (ie, physical division of the land) is impossible, impracticable, or inequitable, a court will grant a partition by sale.

References

Restatement (First) of Property § 72 (Am. Law Inst. 1936) (right to partition).

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Inequitable partition in kind

