

**OKLAHOMA
REAL PROPERTY PARTITION: PROCEDURE AND FORMS**

BY:

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OKLAHOMA BAR ASSOCIATION
REAL PROPERTY LAW SECTION

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(C:\mydocuments\bar&papers\papers\255 Partition Procedure and Forms (OBA-RPLS)

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State Univ. of N.Y. at Stony Brook [M.S. (Urban and Policy Sciences) 1974]; &
Oklahoma City University [J.D. (Law) 1978].

PRACTICE: Oil/Gas & Real Property Litigation (Arbitration, Shared Surface Use, Quiet Title,
Condemnation, & Restrictions);
Condo/Home Owners Association Creation & Representation; and
Commercial Real Estate Acquisition & Development.

MEMBERSHIPS/POSITIONS:
OBA Title Examination Standards Committee (Chairperson: 1992-Present);
OBA Nat'l T.E.S. Resource Center (Director: 1989 - Present);
OBA Real Property Law Section (current member, former Chairperson);
OKC Real Property Lawyers Assn. (current member, former President);
OKC Mineral Law Society (current member); and
BSA: VC & Chair, Baden-Powell Dist., Last Frontier Council (2000-2007); former
Cubmaster, Pack 5, & Asst SM, Troop 193, All Souls Episcopal Church

SPECIAL EXPERIENCE:
Court-appointed Receiver for 5 Abstract Companies in Oklahoma
Oklahoma City University School of Law adjunct professor: "Oklahoma Land Titles"
course (1982 - Present);
Vernons 2d: Oklahoma Real Estate Forms and Practice, (2000 - Present) General Editor
and Contributing Author;
Basye on Clearing Land Titles, Author : Pocket Part Update (1998 – 2000); Contributing
Author: Pocket Part Update (2001-Present)
Oklahoma Bar Review faculty: "Real Property" (1998 - 2003);
Chairman: OBA/OLTA Uniform Abstract Certif. Committee (1982);
In-House Counsel: LTOC & AFLTICO/AGT/Old Republic (1979-1981);
Urban Planner: OCAP, DECA & ODOT (1974-1979).

SELECTED PUBLICATIONS:
*"The Real Estate Mortgage Follows the Promissory Note Automatically Without an
Assignment: The Lesson of BAC Home Loans", 82 OBJ 2938 (December 10,
2011); and*
*"An Introduction to the Transfer on Death Act & Changes Coming in 2011", TitleGram
Newsletter (October 14, 2011); and*
*"Oklahoma's Marketable Record Title Act: An Argument for its Application to Chains of
Title to Severed Minerals after Rocket Oil and Gas Co. v. Donabar", 82 The
Oklahoma Bar Journal 622 (March 12, 2011).*

SPECIAL HONORS: Okla. Bar Assn. 1997 Maurice Merrill Golden Quill Award;
Okla. Bar Assn. 1990 Earl Sneed Continuing Legal Education Award;
Okla. Bar Assn. 1990 Golden Gavel Award: Title Exam. Standards Committee.

TABLE OF CONTENTS

AUTHOR'S RESUME

A. SUMMARY OF PARTITION PROCEDURE AND FORMS

B. OKLAHOMA STATUTES

1. 12 O.S. §1501.1 – Petition for Partition – Contents
2. 12 O.S. §1502 – Civil Procedure
3. 12 O.S. §1503 – Civil Procedure
4. 12 O.S. §1504 – Answer - Contents
5. 12 O.S. §1505 – Court Shall Make Order Specifying Interests of Respective Parties
6. 12 O.S. §1506 – Appointment of Commissioners to Make Partition
7. 12 O.S. §1507 – Commissioner to Allot Portions
8. 12 O.S. §1508 – Commissioner to Take and Subscribe an Oath
9. 12 O.S. §1509 – Duty of Commissioners – Report – Notice of Time Limit for Filing
Exception or Election
10. 12 O.S. §1510 – Civil Procedure
11. 12 O.S. §1511 – Judgment
12. 12 O.S. §1512 – Purchase at Appraised Value
13. 12 O.S. §1513 – Order for Sheriff to Sell Property
14. 12 O.S. §1514 – Civil Procedure
15. 12 O.S. §1515 – Costs, Attorney's Fees and Expenses
16. 12 O.S. §1516 – Power of Court to Make Order
17. 12 O.S. §1517 – Sale of Property that Cannot be Partitioned - Procedure
18. 12 O.S. §2012 – Defenses and Objections - When and How Presented – By Pleading
or Motion

C. OKLAHOMA CASES

1. Cox v. Lasley, 1981 OK 111, 639 P.2d 1219
2. Wolfe v. Stanford, 1937 OK 21, 64 P.2d 335
3. Wilson v. Hartman, 1976 OK 10, 545 P.2d 742
4. Dewell v. Lawrence, 2002 OK CIV APP 105, 58 P.3d 223

D. ATTORNEY GENERAL OPINIONS

1. Must owners of the surface and minerals sell both, if demanded; 1982 OK AG 126

E. FORMS

1. §5.160 – Introduction
2. §5.161 – Petition
3. §5.163 – Petition form
4. §5.164 – Notice of Hearing petition for partition form
5. §5.165 – Order for Partition form

6. §5.166 – Commissioners’ Oath form
7. §5.167 – Report of commissioners form
8. §5.168 – Final decree: division in kind form
9. §5.169 – Sheriff’s deed: Taking property in kind
10. §5.170 – Notice of time limit for filing exception to the report of commissioners or election to take property at appraisement form
11. §5.171 – Affidavit of mailing notice of time limit for filing exception to the report of commissioners or election to take property at appraisement form
12. §5.172 – Election to take property at appraisement form
13. §5.173 – Final decree: election to take property at appraisement form
14. §5.174 – Sheriff’s deed: election to take property at appraisement form
15. §5.175 – Final decree: property to be sold at sheriff’s sale form

F. LIST OF PUBLISHED ARTICLES (Available On-Line) by Kraettli Q. Epperson

A. SUMMARY OF PARTITION PROCEDURE AND FORMS

PARTITION: GENERAL PRINCIPLES

- Land owned by 1 or more Co-tenants.
- 1 or more Co-tenants desire to end shared ownership
- One Co-tenant can compel partition by absolute right
- Options:
 - Voluntary sale to other owner
 - Voluntary division “in kind”
 - Voluntary sale to third party
 - Involuntary partition (equitable proceeding):
- ❖ Alternative #1: division “in kind”, absent “manifest injury”
- ❖ Alternative #2: appraise & offer to sell to one of the owners; divide proceeds
- ❖ Alternative #3: sell at public sale; divide proceeds equally
- Public policy prefers “in kind” division
- Commissioners must attempt to divide “in kind”
- Court must use “owelty” to permit division “in kind”
- Court does not need consent to divide “in kind”, or to use “owelty”
- Division “in kind” through “owelty” :
 - Divide land into functional parcels
 - Appraise all tracts
 - Recipient of more valuable tract pays ½ of difference to recipient of less valuable land
- Court supervises the process:
 - Court confirms ownership interests
 - Court appoints three commissioners
 - Court instructs commissioners
 - Court orders distribution or sale
 - Court confirms sale

PARTITION: STATUTES, CASES & AG OPIN.

Title 12 Section:

- 1501.1: Petition contents
- 1502: Unknown interests set forth
- 1503: Join creditors
- 1504: Answer contents
- 1505: Specify interests & direct partition
- 1506: Appoint commissioners
- 1507: Allot particular tracts to parties
- 1508: Commissioners’ oath
- 1509: Commissioners’ report & deadlines
- 1510: Filing exceptions to report
- 1511: Absent exceptions, partition ordered
- 1512: Election to purchase by party
- 1513: Sheriff’s sale @ 2/3 minimum
- 1514: Sheriff’s return & deed
- 1515: Apportion costs among parties
- 1516: Equitable power of court
- 1517: \$5,000 accelerated procedure
- 2012: Answer deadlines
- ✓ Cox v. Lasley, 1981 OK 11—Right to partition in kind, including minerals
- ✓ Wolfe v. Stanford, 1937 OK 21—Right to partition in kind, including minerals
- ✓ Wilson v. Hartman, 1976 OK 10—Right to partition is absolute
- ✓ Dewrell v. Lawrence, 2002 OK CIV APP 105—Must consider unequal parcels and owelty
- ✓ 1982 OK AG 126—Owners of surface and minerals cannot resist partition


PARTITION: TIME FRAME

- 20+20 days to file Answer/Counterclaim after Petition
- Filing of Commissioners’ Report
- 10 days to mail and/or publish Report and Notice of 20 day deadline to Except or Elect to buy
- Total of 20 days to Except or Elect to buy
- Normal sale time frame and notice, and confirmation of sale

B. OKLAHOMA STATUTES

OSCN Found Document: Petition for Partition - Contents

Page 1 of 2

 www.oscn.net
THE OKLAHOMA STATE COURTS NETWORK
[Home](#) [Courts](#) [Court Dockets](#) [Legal Research](#) [Calendar](#) [Help](#)
[Previous Section](#) [Top Of Index](#) [This Point in Index](#) [Citationizer](#) [Next Section](#) [Print Only](#)
Title 12. Civil Procedure

Oklahoma Statutes Citationized

Title 12. Civil Procedure

Chapter 28 - Partition

Section 1501.1 - Petition for Partition - Contents

Cite as: O.S. §, ____

A. When the object of the action is to effect a partition of real property, the petition must describe the property and the respective interests of the owners thereof, if known.

B. 1. Except as provided for in this subsection, in any action involving the partition of a mineral estate, in addition to the requirements of subsection A of this section, the petition shall specify and the plaintiff shall establish at trial by a preponderance of the evidence that:

a. one or more of the co-owners of the mineral estate are

frustrating the development objective of the plaintiff

for the estate; and

b. an order of the Corporation Commission to pool and

develop said minerals pursuant to Section 87.1 [52-87.1] of

Title 52 of the Oklahoma Statutes and a plan of

unitization created pursuant to Sections 287.1 [52-287.1]

through 287.15 [52-287.15] of Title 52 of

the Oklahoma Statutes would not effectuate a realization of

the development objective.

2. The provisions of this subsection shall not apply to any action involving the partition of a mineral estate, if the person requesting the partition owns the surface estate or any part thereof and also owns an interest in the mineral estate.

Historical Data

R.L. 1910, § 4940; Laws 1970, c. 40, § 1, emerg. eff. March 2, 1970; Laws 1971, c. 65, § 1, emerg. eff. April 9, 1971; Laws 1984, c. 205, § 1, emerg. eff. May 14, 1984; Laws 1985, c. 120, § 1, emerg. eff. May 31, 1985.

Citationizer[®] Summary of Documents Citing This Document

Cite Name	Level	
Oklahoma Court of Civil Appeals Cases		
Cite	Name	Level
2007 OK CIV APP 85, 188 P.3d 255	WILLIS v. WILLIS	Cited

Citationizer: Table of Authority

Cite Name	Level	
Title 52, Oil and Gas		
Cite	Name	Level
52 O.S. 87.1,	Common Source of Supply of Oil - Well Spacing and Drilling Units	Cited
52 O.S. 287.1,	Unitized Management and Operation of Oil and Gas Properties	Cited
52 O.S. 287.15,	Monopolies - Agreements Hereunder Not Violative of Antitrust Laws	Cited



[Home](#) | [Courts](#) | [Court Dockets](#) | [Legal Research](#) | [Calendar](#) | [Help](#)
[Previous Section](#) | [Op. Of Index](#) | [This Point in Index](#) | [Citationizer](#) | [Next Section](#) | [Print Only](#)

Title 12. Civil Procedure

Oklahoma Statutes Citationized

Title 12. Civil Procedure

Chapter 28 - Partition

Section 1502 - Title 12. Civil Procedure

Cite 89: O.S. §. ____

If the number of shares or interests is known, but the owners thereof are unknown, or if there are, or are supposed to be, any interests which are unknown, contingent or doubtful, these facts must be set forth in the petition with reasonable certainty.

Historical Data

R.L. 1910 Sec. 4941.

Citationizer® Summary of Documents Citing This Document

Cite Name	Level
Oklahoma Attorney General's Opinions	
Cite	Name
1982 OK AG 125	Question Submitted by: The Honorable Maxine Kinschke, Oklahoma House of Representatives
	Cited
Oklahoma Court of Civil Appeals Cases	
Cite	Name
1973 OK CIV APP 16, 517 P.2d 809	LITTLE v. PENNEY
	Cited

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[Home](#) | [Courts](#) | [Court Dockets](#) | [Legal Research](#) | [Calendar](#) | [Help](#)
[Previous Section](#) | [Top Of Index](#) | [This Point in Index](#) | [Citationize](#) | [Next Section](#) | [Print Only](#)

Title 12. Civil Procedure

Oklahoma Statutes Citationized

Title 12. Civil Procedure

Chapter 28 - Partition

Section 1503 - Title 12. Civil Procedure

Cite as: O.S. §. ___

Creditors having a specific or general lien upon all or any portion of the property, may be made parties.

Historical Data

R.L. 1910 Sec. 4942.

Citationizer® Summary of Documents Citing This Document

Cite Name	Level
Oklahoma Supreme Court Cases	
Cite	Name
1950 OK 129, 225 P.2d 164, 203	EMERY v. GOFF
Cite 618.	Cited

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Cite Name Level
 None Found.



Home	Courts	Court Dockets	Legal Research	Calendar	Help
Previous Section	Top Of Index	This Point in Index	Citationize	Next Section	Print Only

Title 12. Civil Procedure

Oklahoma Statutes Citationized

Title 12. Civil Procedure

Chapter 28 - Partition

Section 1504 - Answer - Contents

Cite as: O.S. §. ____

The answers of the defendants must state, among other things, the amount and nature of their respective interests. They may also deny the interests of any of the plaintiffs, or any of the defendants.

Historical Data

R.L. 1910 Sec. 4943.

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Cite Name Level

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[Home](#) [Courts](#) [Court Dockets](#) [Legal Research](#) [Calendar](#) [Help](#)
[Previous Section](#) [Top Of Index](#) [This Point in Index](#) [Citationize](#) [Next Section](#) [Print Only](#)

Title 12. Civil Procedure

Oklahoma Statutes Citationized

Title 12. Civil Procedure

Chapter 28 - Partition

Section 1505 - Court Shall Make Order Specifying Interests of Respective Parties

Cite as: O.S. §. ___

After the interests of all the parties shall have been ascertained, the court shall make an order specifying the interests of the respective parties, and directing partition to be made accordingly.

Historical Data

R.L. 1910, Sec. 4944.

Citationizer[®] Summary of Documents Citing This Document

Cite Name	Level	
Oklahoma Attorney General's Opinions		
Cite	Name	Level
1982 OK AG 126.	Question Submitted by: The Honorable Maxine Kincheloe, Oklahoma House of Representatives	Cited
Oklahoma Court of Civil Appeals Cases		
Cite	Name	Level
2007 OK CIV APP 85, 166 P.3d 255.	WILLIS v. WILLIS	Cited
Oklahoma Supreme Court Cases		
Cite	Name	Level
1952 OK 450, 261 P.2d 785, 207 Okla 552.	WILLIAMS v. NEAL	Cited
1965 OK 178, 406 P.2d 300.	FROST v. BLOCKWOOD	Cited
1966 OK 132, 418 P.2d 697.	MELVIN v. SHAW	Cited
1967 OK 79, 426 P.2d 359.	DIEHL v. HIERONYMUS	Cited

Citationizer: Table of Authority

Cite	Name	Level
None Found.		



[Home](#) | [Courts](#) | [Court Dockets](#) | [Legal Research](#) | [Calendar](#) | [Help](#)
[Previous Section](#) | [Top Of Index](#) | [This Point in Index](#) | [Citationize](#) | [Next Section](#) | [Print Only](#)

Title 12. Civil Procedure

Oklahoma Statutes Citationized

Title 12. Civil Procedure

Chapter 28 - Partition

Section 1506 - Appointment of Commissioners to Make Partition

Cite as: O.S. §. ____

Upon making such order, the court shall appoint three commissioners to make partition into the requisite number of shares.

Historical Data

R.L. 1910 Sec. 4945.

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Cite Name	Level
Oklahoma Attorney General's Opinions	
Cite	Name
1962 OK AG 128.	Question Submitted by: The Honorable Maxine Kinschke, Oklahoma House of Representatives
	Cited
Oklahoma Court of Civil Appeals Cases	
Cite	Name
2007 OK CIV APP 85, 188 P.3d 255.	WILLIS v. WILLIS
	Discussed

Citationizer: Table of Authority

Cite Name Level
None Found.


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Home	Courts	Court Dockets	Legal Research	Calendar	Help
Previous Section	Top Of Index	This Point in Index	Citationize	Next Section	Print Only

Title 12. Civil Procedure

Oklahoma Statutes Citationized

Title 12. Civil Procedure

Chapter 28 - Partition

Section 1507 - Commissioner to Allot Portions

Cite as: O.S. §. ____

For good and sufficient reasons appearing to the court, the commissioners may be directed to allot particular portions to any one of the parties.

Historical Data

R.L. 1910, Sec. 4946.

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Cite Name	Level
Oklahoma Court of Civil Appeals Cases	
Cite	Name
1999 OK CIV APP 34, 702 P.2d 99, 61 OEL 1002	Elipop v. Nelson
2002 OK CIV APP 105, 58 P.3d 223	DEVIRELL v. LAWRENCE
Oklahoma Supreme Court Cases	
Cite	Name
1997 OK 79, 426 P.2d 368	DIEHL v. HIERONYMUS
1970 OK 184, 475 P.2d 383	KEEL v. KEEL
1971 OK 49, 484 P.2d 616	CHESMORE v. CHESMORE

Citationizer: Table of Authority

Cite	Name	Level
None Found.		



[Home](#) | [Courts](#) | [Court Dockets](#) | [Legal Research](#) | [Calendar](#) | [Help](#)
[Previous Section](#) | [Top Of Index](#) | [This Point in Index](#) | [Citationize](#) | [Next Section](#) | [Print Only](#)

Title 12. Civil Procedure

Oklahoma Statutes Citationized**Title 12. Civil Procedure****Chapter 28 - Partition****Section 1508 - Commissioner to Take and Subscribe an Oath**

Cite as: O.S. §. ____

Before entering upon their duties, such commissioners shall take and subscribe an oath that they will perform their duties faithfully and impartially, to the best of their ability.

Historical Data

R.L. 1910 Sec. 4947.

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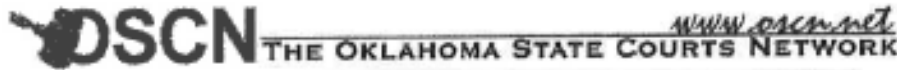
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None Found.

Citationizer: Table of Authority

Cite Name Level

None Found.



[Home](#) | [Courts](#) | [Court Dockets](#) | [Legal Research](#) | [Calendar](#) | [Help](#)
[Previous Section](#) | [Top Of Index](#) | [This Point in Index](#) | [Citationize](#) | [Next Section](#) | [Print Only](#)

Title 12. Civil Procedure

Oklahoma Statutes Citationized

Title 12. Civil Procedure

Chapter 28 - Partition

Section 1509 - Duty of Commissioners - Report - Notice of Time Limit for Filing Exception or Election

Cite as: O.S. §. ____

A. The commissioners shall make partition of the property among the parties according to their respective interests, if such partition can be made without manifest injury. But if such partition cannot be made, the commissioners shall make a valuation and appraisal of the property. They shall make a report of their proceedings to the court, forthwith. For the purpose of this section the term "party" shall mean one who has been adjudged to own an undivided interest in the property involved in the action.

B. Within ten (10) days after the report of commissioners is filed with the court clerk, the attorney for the plaintiff shall forward by certified mail to the attorney of record for every other party in the case and to each party not represented by an attorney, a copy of the commissioners' report and a notice stating that the time limit for filing an exception or an election to take the property at the appraisal, if partition cannot be made, is not later than twenty (20) days from the date the report was filed. Before the expiration of the said twenty (20) days, the court may fix a different and longer period for the filing of an election. The mailing of notice as required herein shall be certified by affidavit to be filed, attached to the original notice. If a party has been served by publication, the notice of said time limit shall be published in one issue of a newspaper qualified to publish legal notices, at least ten (10) days prior to the expiration of the date to file exception or election.

C. The time limit for filing an exception or an election to take property at appraisal, as prescribed in subsection B of this section, shall be calculated from the date the report of the commissioners is filed in the case. On failure of the attorney for plaintiff to give notice within the time prescribed in subsection B of this section, the court, on application of any party, may extend the time for filing an exception or an election for the period not to exceed twenty (20) days from the date the application is heard.

Historical Data

R.L. 1910, § 4948. Amended by Laws 1974, c. 166, § 1, eff. Oct. 1, 1974; Laws 1975, c. 75, § 1, eff. Oct. 1, 1975; Laws 1979, c. 68, § 1, eff. Oct. 1, 1979; Laws 1995, c. 232, § 1, eff. Nov. 1, 1995.

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Oklahoma Attorney General's Opinions		
Cite	Name	Level
1962 OK AG 128.	Question Submitted by: The Honorable Maxine Kirchheiss, Oklahoma House of Representatives	Discussed
Oklahoma Court of Civil Appeals Cases		
Cite	Name	Level
1995 OK CIV APP 83, 901 P.2d 232, 66 O&J 2089.	Barth v. Barth	Cited
2005 OK CIV APP 88, 126 P.3d	LIVELY v. HOWARD	Cited

703.		
2008 OK CIV APP 11,	<u>RODGERS v. TWEDT</u>	Discussed
Oklahoma Supreme Court Cases		
Cite	Name	Level
<u>1852 OK 125, 243 P.2d 980, 238</u>	<u>SMITH v. NORTON</u>	Cited
<u>Okla 422.</u>		
<u>1857 OK 78, 426 P.2d 368.</u>	<u>DIEHL v. HIERONYMUS</u>	Discussed
<u>1951 OK 315, 237 P.2d 885, 205</u>	<u>COON v. MITCHELL</u>	Discussed
<u>Okla. 338.</u>		

Citationizer: Table of Authority

Cite Name Level
None Found.



[Home](#) | [Courts](#) | [Court Dockets](#) | [Legal Research](#) | [Calendar](#) | [Help](#)
[Previous Section](#) | [Top Of Index](#) | [This Point in Index](#) | [Citationize](#) | [Next Section](#) | [Print Only](#)

Title 12. Civil Procedure

Oklahoma Statutes Citationized

Title 12. Civil Procedure

Chapter 28 - Partition

Section 1510 - Title 12. Civil Procedure

Cite as: O.S. §. ____

Any party may file exceptions to the report of the commissioners, and the court may, for good cause, set aside such report, and appoint other commissioners, or refer the matter back to the same commissioners.

Historical Data

R.L. 1910 Sec. 4949.

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Cite Name	Level
Oklahoma Attorney General's Opinions	
Cite	Name
1952 OK AG 126	Question Submitted by: The Honorable Maxine Kinchase, Oklahoma House of Representatives
	Cited
Oklahoma Supreme Court Cases	
Cite	Name
1951 OK 89, 381 P.2d 280	HERRON TRUST v. SWARTS
1950 OK 120, 225 P.2d 164, 239 Okla. 610	EMERY v. GOFF
	Discussed
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Citationizer: Table of Authority

Cite	Name	Level
None Found.		



[Home](#)
[Courts](#)
[Court Dockets](#)
[Legal Research](#)
[Calendar](#)
[Help](#)

[Previous Section](#)
[Top Of Index](#)
[This Point in Index](#)
[Citationize](#)
[Next Section](#)
[Print Only](#)

Title 12. Civil Procedure

Oklahoma Statutes Citationized

Title 12. Civil Procedure

Chapter 28 - Partition

Section 1511 - Judgment

Cite as: O.S. §. ___

If partition be made by the commissioners, and no exceptions are filed to their report, the court shall render judgment that such partition be and remain firm and effectual forever.

Historical Data

R.L. 1910 Sec. 4950.

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Cite Name	Level
Oklahoma Supreme Court Cases	
Cite	Name
1951 OK 89, 351 P.2d 280.	HERRON TRUST v. SWARTS
	Level
	Cited

Citationizer: Table of Authority

Cite	Name	Level
None Found.		



[Home](#) | [Courts](#) | [Court Dockets](#) | [Legal Research](#) | [Calendar](#) | [Help](#)
[Previous Section](#) | [Top Of Index](#) | [This Point in Index](#) | [Citationize](#) | [Next Section](#) | [Print Only](#)

Title 12. Civil Procedure

Oklahoma Statutes Citationized

Title 12. Civil Procedure

Chapter 28 - Partition

Section 1512 - Purchase at Appraised Value

Cite as: O.S. §. ____

If partition cannot be made, and the property shall have been valued and appraised, any one or more of the parties may elect to take the same at the appraisal, and the court may direct the sheriff to make a deed to the party or parties so electing, on payment to the other parties of their proportion of the appraised value. Such election shall be filed within twenty (20) days of the filing of the commissioners' report provided that the court may, before expiration of the said twenty (20) days, fix a different and longer period for the filing of elections.

Historical Data

R.L. 1910, Section 4951; Laws 1953, p. 60, Section 1; Laws 1974, c. 166, Section 2, eff. Oct. 1, 1974.

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Cite Name	Level
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Cite	Name
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Oklahoma Court of Civil Appeals Cases	
Cite	Name
2005 OK CIV APP 98, 125 P.3d 793.	LIVELY v. HOWARD
2005 OK CIV APP 11.	RODGERS v. TWEDT
1981 OK CIV APP 75, 640 P.2d 996.	Glass v. Carlie
Oklahoma Supreme Court Cases	
Cite	Name
1981 OK 45, 358 P.2d 1074.	HART v. PHARACH
1981 OK 89, 381 P.2d 280.	HERRON TRUST v. SWARTS
	Discussed at Length

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Cite Name Level
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[Home](#) | [Courts](#) | [Court Dockets](#) | [Legal Research](#) | [Calendar](#) | [Help](#)
[Previous Section](#) | [Top Of Index](#) | [This Point in Index](#) | [Citationize](#) | [Next Section](#) | [Print Only](#)

Title 12. Civil Procedure

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Title 12. Civil Procedure

Chapter 28 - Partition

Section 1513 - Order for Sheriff to Sell Property

Cite as: O.S. §. ____

If none of the parties elect to take the property at the valuation, or if several of the parties elect to take the same at the valuation, in opposition to each other, the court shall make an order directing the sheriff of the county to sell the same, in the same manner as in sales of real estate on execution; but no sale shall be made at less than two-thirds (2/3) of the valuation placed upon the property by the commissioners.

Historical Data

R.L. 1910 Sec. 4952.

Citationizer® Summary of Documents Citing This Document

Cite Name	Level
Oklahoma Attorney General's Opinions	
Cite	Name Level
1982 OK AG 120.	Question Submitted by: The Honorable Maxine Kincheloe, Oklahoma House of Representatives Cited
Oklahoma Court of Civil Appeals Cases	
Cite	Name Level
1961 OK CIV APP 75, 640 P.2d 556.	Glass v. Carlin Cited
Oklahoma Supreme Court Cases	
Cite	Name Level
1961 OK 88, 361 P.2d 280.	HERRON TRUST v. SWARTS Cited
1965 OK 173, 406 P.2d 300.	FROST v. BLOCKWOOD Cited

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[Home](#) | [Courts](#) | [Court Dockets](#) | [Legal Research](#) | [Calendar](#) | [Help](#) |
[Previous Section](#) | [Top Of Index](#) | [This Point in Index](#) | [Citationize](#) | [Next Section](#) | [Print Only](#)

Title 12. Civil Procedure

Oklahoma Statutes Citationized

Title 12. Civil Procedure

Chapter 28 - Partition

Section 1514 - Title 12. Civil Procedure

Cite as: O.S. §. ___

The sheriff shall make return of his proceedings to the court, and if the sale made by him shall be approved by the court, the sheriff shall execute a deed to the purchaser, upon the payment of the purchase money, or securing the same to be paid, in such manner as the court shall direct.

Historical Data

R.L. 1910 Sec. 4953.

Citationizer[®] Summary of Documents Citing This Document

Cite Name	Level
Oklahoma Attorney General's Opinions	
Cite	Name
1982 OK AG 125	Question Submitted by: The Honorable Maxine Kinchols, Oklahoma House of Representatives
	Discussed
Oklahoma Supreme Court Cases	
Cite	Name
1981 OK 59, 361 P.2d 280	HERRON TRUST v. SWARTS
	Cited

Citationizer: Table of Authority

Cite Name Level
 None Found.



[Home](#) | [Courts](#) | [Court Dockets](#) | [Legal Research](#) | [Calendar](#) | [Help](#)
[Previous Section](#) | [Top Of Index](#) | [This Point in Index](#) | [Citationize](#) | [Next Section](#) | [Print Only](#)

Title 12. Civil Procedure

Oklahoma Statutes Citationized

Title 12. Civil Procedure

Chapter 28 - Partition

Section 1515 - Costs, Attorney's Fees and Expenses

Cite as: O.S. §. ____

The court making partition shall tax the costs, attorney's fees and expenses which may accrue in the action, and apportion the same among the parties, according to their respective interests, and may award execution therefor, as in other cases.

Historical Data

R.L. 1910 Sec. 4954.

Citationizer[®] Summary of Documents Citing This Document

Cite Name	Level
Oklahoma Court of Civil Appeals Cases	
Cite	Name
1984 OK CIV APP 14, 870 P.2d 182, 85 O.B.J. 1038.	Headland Federal Sav. and Loan Ass'n v. Camp
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Cite	Name
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	Discussed at Length

Citationizer: Table of Authority

Cite Name Level
 None Found.



[Home](#) | [Courts](#) | [Court Dockets](#) | [Legal Research](#) | [Calendar](#) | [Help](#)
[Previous Section](#) | [Top Of Index](#) | [This Point in Index](#) | [Citationize](#) | [Next Section](#) | [Print Only](#)

Title 12. Civil Procedure

Oklahoma Statutes Citationized

Title 12. Civil Procedure

Chapter 28 - Partition

Section 1516 - Power of Court to Make Order

Cite as: O.S. §. ____

The court shall have full power to make any order, not inconsistent with the provisions of this article, that may be necessary to make a just and equitable partition between the parties, and to secure their respective interests.

Historical Data

R.L. 1910 Sec. 4955.

Citationizer® Summary of Documents Citing This Document

Cite Name	Level
Oklahoma Court of Civil Appeals Cases	
Cite	Name
1990 OK CIV APP 34, 782 P.2d	Elippo v. Nelson
98, 61 OK 1802.	
2003 OK CIV APP 65, 71 P.3d 58.	NEWTON v. NEWTON
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Cite	Name
1991 OK 89, 361 P.2d 280.	HERRON TRUST v. SWARTS
1992 OK 253, 379 P.2d 589.	McMANUS v. HULL
1996 OK 145, 418 P.2d 941.	MAUCH v. MAUCH
1997 OK 79, 428 P.2d 388.	DIEHL v. HIERONYMUS
1975 OK 79, 537 P.2d 341.	SUN INVESTMENT AND LOAN CORP. v. McINTYRE

Citationizer: Table of Authority

Cite Name Level
None Found.



[Home](#) | [Courts](#) | [Court Dockets](#) | [Legal Research](#) | [Calendar](#) | [Help](#)
[Previous Section](#) | [Top Of Index](#) | [This Point in Index](#) | [Citationize](#) | [Next Section](#) | [Print Only](#)

Title 12. Civil Procedure

Oklahoma Statutes Citationized

Title 12. Civil Procedure

Chapter 28 - Partition

Section 1517 - Sale of Property that Cannot be Partitioned - Procedure

Cite as: O.S. §. __

A. In addition to other provisions of law, if, upon the filing of the commissioners' report, it appears that the property cannot be partitioned in kind and the value of the property does not exceed Five Thousand Dollars (\$5,000.00), the court may forthwith dispense with further regular partition proceedings and make an order directing the sheriff of the county to sell the property, in the same manner, as in sales of real estate on execution at not less than two-thirds (2/3) of the appraised value.

B. In addition to the notice required for sales of real estate on execution, notice of the sale shall be mailed with return receipt requested at least twenty (20) days prior to the sale, to all persons owning an interest in the property or to their attorneys at their respective last-known address.

C. If it can be established to the satisfaction of the court, prior to the sale, that such property is of a value in excess of Five Thousand Dollars (\$5,000.00), such sale shall not be held and the court shall appoint other commissioners to reappraise the property or refer the matter to the same commissioners.

D. Confirmation of such sale shall be set for hearing not less than ten (10) days after the day of sale. A written notice of hearing on the confirmation of the sale shall be mailed, by first-class mail, postage prepaid, to all persons having an interest in the property as previously determined by the court whose names and addresses are known, at least ten (10) days before the hearing on the confirmation of the sale, and if the name or address of any such person is unknown, such notice shall also be published in a newspaper authorized by law to publish legal notices in each county in which the property is situated. If no newspaper authorized by law to publish legal notices is published in such county, the notice shall be published in some such newspaper of general circulation which is published in an adjoining county. The notice shall state the name of the person or persons being notified by publication and shall be published once at least ten (10) days prior to the date of the hearing on the notice of confirmation of the sale. An affidavit of proof of mailing and of publication, if publication is required, shall be filed in the case.

E. Upon such hearing, if satisfied with the validity and fairness of the sale, the court shall order the sheriff to issue a sheriff's deed to the purchaser of the property and, after apportionment of costs, attorney fees and expenses, direct disbursement of the sale proceeds to those persons legally entitled to receive the same.

Historical Data

Laws 1980, c. 80, § 1, eff. Oct. 1, 1980; Laws 186, c. 227, § 5, eff. Nov. 1, 1986.

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Cite	Name	Level
None Found.		

Citationizer: Table of Authority

Cite	Name	Level
None Found.		



[Home](#) [Courts](#) [Court Dockets](#) [Legal Research](#) [Calendar](#) [Help](#)
[Previous Section](#) [Top Of Index](#) [This Point in Index](#) [Citationize](#) [Next Section](#) [Print Only](#)

Title 12. Civil Procedure

Oklahoma Statutes Citationized

Title 12. Civil Procedure

Chapter 39 - Oklahoma Pleading Code

Section 2012 - Defenses and Objections - When and How Presented - By Pleading or Motion

Cite as: O.S. §. ____

A. WHEN PRESENTED. 1. Unless a different time is prescribed by law, a defendant shall serve an answer:

a. within twenty (20) days after the service of the summons and petition upon the defendant,

b. within twenty (20) days after the service of the summons and petition upon the defendant, or within the last day for answering if applicable; provided, a defendant may file a reservation of time which shall extend the time to respond twenty (20) days from the last date for answering. The filing of such a reservation of time waives defenses of paragraphs 2, 3, 4, 5, 6, and 9 of subsection B of this section.

2. A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within twenty (20) days after the service upon the party.

3. The plaintiff shall serve a reply to a counterclaim in the answer within twenty (20) days after service of the answer or, if a reply is ordered by the court, within twenty (20) days after service of the order, unless the order otherwise directs.

4. The party requesting a summons to be issued or filing a counter-claim or cross-claim may elect to have the answer served within thirty-five (35) days in lieu of the twenty (20) days set forth in this section.

5. The service of a motion permitted under this section or a motion for summary judgment alters these periods of time as follows: If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within twenty (20) days after notice of the court's action, unless a different time is fixed by order of the court.

B. HOW PRESENTED. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

1. Lack of jurisdiction over the subject matter;
2. Lack of jurisdiction over the person;
3. Improper venue;
4. Insufficiency of process;
5. Insufficiency of service of process;
6. Failure to state a claim upon which relief can be granted;

7. Failure to join a party under Section 2019 of this title;
8. Another action pending between the same parties for the same claim;
9. Lack of capacity of a party to be sued; and
10. Lack of capacity of a party to sue.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered 6 of this subsection to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and all parties shall be given reasonable opportunity to present all material made pertinent to the motion by the rules for summary judgment. A motion to dismiss for failure to state a claim upon which relief can be granted shall separately state each omission or defect in the petition, and a motion that does not specify such defects or omissions shall be denied without a hearing and the defendant shall answer within twenty (20) days after notice of the court's action.

C. PRELIMINARY HEARINGS. The defenses specifically enumerated in paragraphs 1 through 10 of subsection B of this section, whether made in a pleading or by motion, and the motion to strike mentioned in subsection D of this section shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial. If the court determines that venue is proper, the action shall not be dismissed for improper venue as a result of the jury's verdict or the subsequent ruling of the court on a demurrer to the evidence or a motion for a directed verdict.

D. MOTION TO STRIKE. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by this act, upon motion made by a party within twenty (20) days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense. If, on a motion to strike an insufficient defense, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for partial summary judgment and all parties shall be given reasonable opportunity to present all materials made pertinent to the motion by the rules for summary judgment.

E. CONSOLIDATION OF DEFENSES IN MOTION. A party who makes a motion under this section may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this section but omits therefrom any defense or objection then available to the party which this section permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in paragraph 2 of subsection F of this section on the grounds there stated. The court in its discretion may permit a party to amend a motion by stating additional defenses or objections if an amendment is sought at least five (5) days before the hearing on the motion.

F. WAIVER OR PRESERVATION OF CERTAIN DEFENSES.

1. A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, failure to state a claim upon which relief can be granted, or lack of capacity of a party to be sued is waived:

a. if omitted from a motion that raises any of the defenses or objections which this section permits to be raised by motion, or

b. if it is not made by motion and it is not included in a responsive pleading or an amendment thereof permitted by subsection A of Section 2015 of this title to be made as a matter of course. A motion to strike an insufficient defense is waived if not raised as in subsection D of this section.

2. A defense of failure to join a party indispensable under Section 2019 of this title may be made in any pleading permitted or ordered under subsection A of Section 2007 of this title or at the trial on the merits. A defense of

another action pending between the same parties for the same claim or a defense of lack of capacity of a party to sue may be made in any pleading permitted or ordered pursuant to the provisions of subsection A of Section 2007 of this title or at the pretrial conference.

3. Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

4. A waiver of the defense in paragraph 6 of subsection B of this section does not preclude a later contention that a party is not entitled to any relief as a matter of law, either by motion for summary judgment, or by demurrer or motion at or after trial.

G. FINAL DISMISSAL ON FAILURE TO AMEND. On granting a motion to dismiss a claim for relief, the court shall grant leave to amend if the defect can be remedied and shall specify the time within which an amended pleading shall be filed. If the amended pleading is not filed within the time allowed, final judgment of dismissal with prejudice shall be entered on motion except in cases of excusable neglect. In such cases amendment shall be made by the party in default within a time specified by the court for filing an amended pleading. Within the time allowed by the court for filing an amended pleading, a plaintiff may voluntarily dismiss the action without prejudice.

Historical Data

Added by Laws 1984, SB 417, c. 164, § 12, eff. November 1, 1984; Amended by Laws 2000, SB 1332, c. 380, § 4, eff. November 1, 2000 ([superseded document available](#)); Amended by Laws 2002, HB 1939, c. 468, § 23, emerg. eff. November 1, 2002 ([superseded document available](#)); Amended by Laws 2004, HB 2713, c. 181, § 5, eff. November 1, 2004 ([superseded document available](#)).

Citationizer® Summary of Documents Citing This Document

Cite Name	Level	
Oklahoma Court of Civil Appeals Cases		
Cite	Name	Level
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<u>1987 OK CIV APP 93, 748 P.2d 130, 59 OBJ 32.</u>	<u>Petroleum Rental Services, Inc. v. Inter-South Properties Corp.</u>	Cited
<u>1988 OK CIV APP 19, 785 P.2d 328, 61 OBJ 257.</u>	<u>Eade v. Woodman of the World Life Ins. Soc.</u>	Cited
<u>1989 OK CIV APP 25, 774 P.2d 481, 60 OBJ 1665.</u>	<u>Curlee v. Norman</u>	Discussed
<u>2000 OK CIV APP 134, 15 P.3d 519, 71 OBJ 3329.</u>	<u>IN THE MATTER OF ADOPTION OF A.D.H.</u>	Cited
<u>1989 OK CIV APP 47, 778 P.2d 937, 60 OBJ 2221.</u>	<u>Langford v. Anderson</u>	Discussed
<u>1990 OK CIV APP 55, 798 P.2d 232, 61 OBJ 2746.</u>	<u>Rodriguez v. Molinar</u>	Cited
<u>1990 OK CIV APP 71, 816 P.2d 575, 62 OBJ 3028.</u>	<u>McFadyly v. Tredway</u>	Cited
<u>1990 OK CIV APP 78, 802 P.2d 1282, 62 OBJ 160.</u>	<u>Lasler v. City of Moore</u>	Cited
<u>1991 OK CIV APP 63, 814 P.2d 181, 62 OBJ 2889.</u>	<u>City of Guthrie v. International Ass'n of Firefighters, Local 2145</u>	Cited
<u>1991 OK CIV APP 93, 819 P.2d 1381, 62 OBJ 3607.</u>	<u>Betts v. Brown</u>	Discussed
<u>1991 OK CIV APP 95, 823 P.2d 380, 63 OBJ 387.</u>	<u>Brown v. B & D Land Co.</u>	Cited
<u>1991 OK CIV APP 113, 820 P.2d 1353, 62 OBJ 3779.</u>	<u>Proctor v. Caudill</u>	Cited
<u>1991 OK CIV APP 123, 821 P.2d 1098, 63 OBJ 133.</u>	<u>Grand Federal Sav. Bank v. Klinzberg</u>	Cited
<u>1992 OK CIV APP 3, 825 P.2d 638, 63 OBJ 718.</u>	<u>Hatcher v. Sumster</u>	Cited

<u>1992 OK CIV APP 10, 841 P.2d 908, 83 OBJ 3688.</u>	<u>Copsey v. Bandoni</u>	Discussed
<u>2000 OK CIV APP 141, 15 P.3d 1252, 72 OBJ 179.</u>	<u>CONATZER v. AMERICAN MERCURY INS. CO., INC.</u>	Cited
<u>2000 OK CIV APP 142, 16 P.3d 473, 72 OBJ 180.</u>	<u>HOWARD v. CRAWFORD</u>	Cited
<u>1992 OK CIV APP 60, 842 P.2d 355, 83 OBJ 3774.</u>	<u>Childers v. Independent School Dist. No. 1 of Lincoln County</u>	Cited
<u>1992 OK CIV APP 155, 842 P.2d 773, 84 OBJ 38.</u>	<u>Rocks v. State Through Oklahoma Corp. Com'n</u>	Discussed at Length
<u>1993 OK CIV APP 75, 852 P.2d 923, 84 OBJ 1771.</u>	<u>Overholt v. Independent School Dist. No. 2, Tulsa County</u>	Cited
<u>1993 OK CIV APP 87, 861 P.2d 319, 84 OBJ 3008.</u>	<u>Terraron, Inc. v. Farnam Energy Corp.</u>	Cited
<u>2001 OK CIV APP 4, 18 P.3d 1085, 72 OBJ 418.</u>	<u>HERITAGE VILLAGE APARTMENTS LTD. v. OKLAHOMA FINANCE AGENCY</u>	Cited
<u>2001 OK CIV APP 33, 23 P.3d 954, 72 OBJ 1112.</u>	<u>MASON v. BD. OF REGENTS OF THE UNIV. OF OKLAHOMA</u>	Discussed
<u>1994 OK CIV APP 27, 871 P.2d 446, 85 OBJ 1206.</u>	<u>Security First Nat. Bank v. Knowles</u>	Discussed
<u>1994 OK CIV APP 34, 872 P.2d 951, 85 OBJ 1432.</u>	<u>Grider By and Through Gdder v. Independent School Dist. No. 89</u>	Cited
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<u>1994 OK CIV APP 87, 881 P.2d 750, 85 OBJ 3365.</u>	<u>Williams v. Independent School Dist. No. 7 of Harrah</u>	Cited
<u>1994 OK CIV APP 134, 882 P.2d 1108, 85 OBJ 3411.</u>	<u>Stotts v. Church of Jesus Christ of Latter Day Saints</u>	Cited
<u>1994 OK CIV APP 105, 891 P.2d 800, 86 OBJ 884.</u>	<u>State ex rel. Mary v. One (1) Pioneer CD-ROM Changer, MDL No. DRM-605-A, Ser. No. ML 851621</u>	Discussed at Length
<u>1994 OK CIV APP 179, 892 P.2d 957, 86 OBJ 1161.</u>	<u>Ferguson Pontiac-GMC, Inc. v. Hanson</u>	Discussed
<u>1994 OK CIV APP 181, 894 P.2d 435, 86 OBJ 1387.</u>	<u>Sedbrook v. Rouse</u>	Discussed
<u>2001 OK CIV APP 101, 29 P.3d 616, 72 OBJ 2447.</u>	<u>WEEKS v. MANCHESTER</u>	Cited
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<u>2002 OK CIV APP 46, 46 P.3d 180.</u>	<u>HULL v. WELLSTON IND. SCH. DIST. 1004</u>	Cited
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<u>667, 68 OBJ 3960.</u>		
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<u>1997 OK CIV APP 81, 950 P.2d</u>	<u>Fair Meadows and State Insurance Fund v. Ward</u>	Cited
<u>845, 68 OBJ 4038.</u>		
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<u>926, 69 OBJ 1920.</u>		
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<u>1077, 70 OBJ 1236.</u>		
<u>1999 OK CIV APP 37, 976 P.2d</u>	<u>Campbell v. American International Group, Inc.</u>	Cited
<u>1102, 70 OBJ 1406.</u>		
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<u>665, 70 OBJ 1375.</u>		
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Oklahoma Supreme Court Cases		
Cite	Name	Level
<u>1987 OK 63, 740 P.2d 724, 58 OBJ</u>	<u>Winters By and Through Winters v. City of Oklahoma City</u>	Cited
<u>2058.</u>		
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<u>323.</u>		
<u>1988 OK 63, 770 P.2d 878, 59 OBJ</u>	<u>Silver v. Stasher</u>	Discussed at Length
<u>1234.</u>		
<u>1988 OK 142, 766 P.2d 1387, 59</u>	<u>Wilhelm v. Gray</u>	Cited
<u>OBJ 3429.</u>		
<u>1989 OK 73, 775 P.2d 261, 60 OBJ</u>	<u>Fraser v. Bryan Memorial Hosp. Authority</u>	Discussed at Length
<u>1202.</u>		
<u>1989 OK 100, 778 P.2d 1270, 60</u>	<u>Meadows v. Fain</u>	Discussed at Length
<u>OBJ 1736.</u>		
<u>1989 OK 107, 777 P.2d 832, 60</u>	<u>Hulsev v. Mid-America Preferred Ins. Co.</u>	Cited
<u>OBJ 1737.</u>		
<u>1989 OK 124, 781 P.2d 1188, 60</u>	<u>Kelly v. Abbott</u>	Discussed at Length
<u>OBJ 2356.</u>		
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<u>OBJ 1042.</u>		
<u>1991 OK 20, 807 P.2d 248, 62 OBJ</u>	<u>Youns v. Walton</u>	Discussed
<u>807.</u>		
<u>1991 OK 23, 809 P.2d 1286, 62</u>	<u>Sargent v. Central Nat. Bank & Trust Co. of Enkl. Okl.</u>	Cited
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<u>2189.</u>		
<u>1991 OK 108, 819 P.2d 714, 62</u>	<u>Wilson v. Still</u>	Cited
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1444.		
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1930.		
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OBJ 2048.	County, Okl.	
1993 OK 4, 846 P.2d 1088, 84 OBJ	Great Plains Federal Sav. and Loan Ass'n v. Debnor	Discussed at Length
334.		
1993 OK 11, 847 P.2d 772.	Oklahoma Breast Implant Cases, In re	Cited
1993 OK 41, 850 P.2d 1087, 84	Haney v. State	Cited
OBJ 1068.		
1993 OK 114, 861 P.2d 285, 84	Dyke v. Saint Francis Hosp., Inc.	Discussed
OBJ 2384.		
1993 OK 130, 862 P.2d 71, 84 OBJ	Proush v. Edinger, Inc.	Discussed
3004.		
1994 OK 85, 880 P.2d 371, 85 OBJ	Indiana Nat. Bank v. State Dept. of Human Services	Cited
2320.		
1994 OK 88, 880 P.2d 902, 85 OBJ	Groce v. Foster	Discussed
2414.		
1994 OK 130, 880 P.2d 855, 85	Brown v. Founders Bank and Trust Co.	Discussed at Length
OBJ 3981.		
1994 OK 108, 888 P.2d 126, 85	Fert v. Oklahoma Natural Gas Co., a Div. of Oneok Inc.	Discussed
OBJ 3215.		
1997 OK 38, 948 P.2d 882, 88 OBJ	National Diversified Business Services, Inc. v. Corporate Financial	Discussed at Length
1187.	Opportunities, Inc.	
1997 OK 37, 936 P.2d 816, 88 OBJ	A-Plus Janitorial & Carpet Cleaning v. Employers' Workers'	Discussed at Length
1288.	Compensation Assoc.	
1998 OK 139, 915 P.2d 358, 87	WASHINGTON v. STATE ex rel. DEPT. OF CORRECTIONS	Discussed at Length
OBJ 1335.		
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2210.		
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2338.		
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3420.		
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3142.		
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	AUTHORITY	
2002 OK 69.	In re Amendments to the Rules for District Courts of Oklahoma	Cited
1995 OK 39, 894 P.2d 1108, 88	Dolson v. Rainbolt	Cited
OBJ 1413.		
1995 OK 108, 905 P.2d 778, 88	Haves v. Estes, Inc.	Discussed at Length
OBJ 3261.		
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3016.		
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2006 OK 53, 141 P.3d 548.	MONEYPENNEY v. DAWSON	Discussed at Length
1995 OK 47, 915 P.2d 910, 87 OBJ	Sheffer v. Jettan	Discussed at Length
1193.		
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	OKLAHOMA LEGISLATURE	
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2308.		
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2008 OK 1, 178 P.3d 1204.	DARROW v. INTEGRIS HEALTH, INC.	Discussed at Length
2008 OK 5, 177 P.3d 585.	GENS v. CASADY SCHOOL	Cited
1995 OK 90, 928 P.2d 280, 87 OBJ	Beshara v. Southern National Bank	Discussed at Length
2292.		

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<u>1999 OK 33, 987 P.2d 1165, 70 O&J 1353.</u>	<u>Patel v. OMH Medical Center, Inc.</u>	Discussed
Oklahoma Session Laws - 2002		
<u>Cite</u>	<u>Name</u>	<u>Level</u>
<u>2002 O.S.L. 468, 2002 O.S.L. 468.</u>	<u>Civil procedure: conforming certain procedural requirements. Effective date.</u>	Discussed
Title 12, Civil Procedure		
<u>Cite</u>	<u>Name</u>	<u>Level</u>
<u>12 O.S. Rule 4.</u>	<u>Motions</u>	Cited

Citationizer: Table of Authority

<u>Cite Name</u>	<u>Level</u>
Title 12, Civil Procedure	
<u>Cite</u>	<u>Name</u>
<u>12 O.S. 2012.</u>	<u>Defenses and Objections - When and How Presented - By Pleading or Motion</u>
<u>12 O.S. 2012.</u>	<u>Defenses and Objections - When and How Presented - By Pleading or Motion</u>

C. OKLAHOMA CASES

OSCN Found Document: Cox v. Lasley

*General Right to
Partition - In Kind - Including minerals*

Page 1 of 4



[Home](#) [Courts](#) [Court Dockets](#) [Legal Research](#) [Calendar](#) [Help](#)
[Previous Case](#) [Top Of Index](#) [This Point in Index](#) [Citationize](#) [Next Case](#) [Print Only](#)

Oklahoma Supreme Court Cases

Cox v. Lasley
1981 OK 111
639 P.2d 1219
Case Number: 53597
Decided: 09/29/1981
Supreme Court of Oklahoma

Cite as: 1981 OK 111, 639 P.2d 1219

JIM COX, APPELLANT,

v.

LOUINA WALKER LASLEY, JIMMY WALKER, JR., TED V. TUCKER, DR. THOMAS E. NIX, JR., EXECUTOR
OF THE ESTATE OF HARVEY B. PLATT, DECEASED, AND ANNIE BEAR WALKER TIGER, APPELLEES.

Appeal from the District Court of Seminole County; Bob Howell, Trial Judge.

¶10 Appeal from a judgment of the District Court of Seminole County, Oklahoma, Seminole Division, denying partition of the mineral interest under a tract of land in Seminole County, Oklahoma.

Mattingly & Conyers, Seminole, for appellant.

Carlross Wadlington, Ada, for appellees Louina Walker Lasley, Jimmy Walker, Jr., and Annie Bear Walker Tiger.

LAVENDER, Justice:

[639 P.2d 1220]

¶1 The evidence is not in dispute.

¶2 Appellant (plaintiff below) is the owner through assignment of 1/15th mineral interest and the assignee of the working interest under a 40-acre tract of land in Seminole County, Oklahoma. The lease involved is a departmental oil and gas lease made by the allottee, a restricted Indian of the Seminole tribe, with the approval of the Secretary of Interior on September 11, 1925. Appellees (defendants below) own severally the balance of the mineral interest, having acquired their respective interests by assignment or by inheritance from the original allottee. Defendants Louina Walker Lasley and Jimmy Walker, Jr. are restricted Indian heirs or devisees of the allottee, and their interests can only be assigned with the consent and approval of the Secretary of the Interior, or his authorized representative. The lease has a noble history of production, having produced 1,278,502 barrels of oil from inception to December 1978. Declining production reduced its yield to 192 barrels in 1977 and 170 barrels in 1978. Present production is limited to "skimming", that is, bailing oil which rises to the surface in the well casing. Plaintiff acquired the working interest in the lease in 1969, and thereafter acquired his 1/15th mineral interest by assignment to him.

¶3 Plaintiff testified that the Department of Interior had refused him permission to use a salt water disposal well on an adjoining property, demanding that salt water produced in the operation of the lease be put back into the land covered by the lease. Plaintiff further testified that the cost of drilling a disposal well on the lease was prohibitive. Defendants refused to sell their mineral interest to plaintiff.

¶4 Plaintiff brought suit below for the partition of the mineral interest, his avowed objective being to force the sale

of the mineral interest since it cannot be partitioned equitably in kind and to purchase the mineral interest of defendants on partition sale, thereby divesting the restricted Indian owners of their title to the minerals, and, in turn, thereby terminating the Department of Interior's jurisdictional power to prohibit plaintiff's use of the salt water disposal well in place on the adjoining property.¹

¶5 The United States filed its Election Not to Remove the Cause to the United States District Court, and did not appear at the trial of the cause. At the conclusion of the trial, the court below denied plaintiff's prayer for partition and entered judgment in favor of the defendants.

¶6 Partition of property including mineral rights is looked upon with favor and the burden rests upon the one seeking to prevent partition to plead and prove [639 P.2d 1221] facts showing it would be inequitable to enforce the right.² The purpose and effect of a partition proceeding is to terminate the joint ownership of the property and the relation of the parties with reference thereto.³ A mineral interest in and to oil and gas in place constitutes an interest in real estate. The general rule is that all property capable of being held in co-tenancy is subject to partition by judicial proceedings, the partition being either in kind or by appraisal and sale.⁴ The parties here stand in the position of joint owners of the minerals in place and not that of co-lessees. The fact that the plaintiff in addition to owning a fractional interest in the minerals owns the working interest under an oil and gas lease does not militate against his right to obtain partition of the mineral interest owned by the plaintiffs and the defendants.⁵

¶7 Defendants contend that plaintiff having previously acquired the working interest as assignee of a producing lease placed himself in a position inconsistent with the obligations of the lease by acquiring a portion of the mineral interest, and this precludes him from partition of the mineral interest. Defendants cite *Carolina Mineral Co. v. Young*, 220 N.C. 287, 17 S.E.2d 119, 151 A.L.R. 383 and *Twin Lakes Reservoir & Canal Co. v. Bond*, 157 Colo. 10, 401 P.2d 586 (1965) as authority. While both cases are consistent with the holding of our Court of Appeals in *Rodkey v. Rees*, supra, both are factually distinguishable from the case before us. In both *Carolina* and *Twin Lakes* the petitioner's interest in the estate sought to be partitioned was acquired after the petitioner had acquired an interest in a separate estate in connection with which the petitioner was bound by a contractual commitment which would have been thwarted by the granting of partition, so that partition of the mineral estate would thereby have relieved the petitioner from a legally binding contractual obligation to the substantial detriment of those for whose benefit the contract was made. In the case before us, no such contractual obligation was attached to the working interest acquired by the plaintiff, and as we have heretofore pointed out, his ownership of an interest in the leasehold estate prior to his acquisition of an interest in the minerals does not thereby and of itself impair his right to partition.

¶8 Partition in kind of oil and gas rights is proper where there has been no development on or near the property and there is no other reason to believe one portion of the tract involved is more valuable for oil purposes than another. Where partition in kind cannot properly be allowed, partition may be accomplished through sale and division of the proceeds.⁶

¶9 Prevention of partition of oil and gas rights on the ground that such remedy would constitute an instrument of fraud or oppression is a matter of defense to be pleaded and proved.⁷

¶10 The fact that none of the defendants consented to the conveyance of a fractional interest in the minerals to the plaintiff in the case before us does not effect plaintiff's right to partition. The right of one of several co-tenants to separately convey or lease his interest without the consent of his co-tenants is recognized in this jurisdiction. The fact that a conveyance by one co-tenant may have some effect upon a partition brought by or against the nonconsenting co-tenant does not destroy the validity or effect of the conveyance, nor give the nonconsenting co-tenant a greater or lesser right of partition than the existing status of the estate warrants.⁸

[639 P.2d 1222]

¶11 An action for partition is one of equitable cognizance.⁹

¶12 Inequitable hardship and oppression, or the use of partition as an instrument of fraud or oppression are defenses to an action for partition; but they are affirmative defenses with the burden of their proof being upon the party interposing them.¹⁰ Defendants neither pleaded such defenses nor proffered evidence in support thereof. The fact that defendants do not desire partition does not constitute a defense to an action for partition in the

absence of additional considerations.¹¹

¶13 Whether the circuitous route embarked upon by the plaintiff whereby he seeks to inter salt water produced from the lease into adjoining land is meritorious, or whether the same holds out any prospect of success are matters which are not before us and on which we do not therefore pass judgment.

¶14 The judgment of the court below is reversed and the cause remanded for further proceedings consistent with our rulings herein.

¶15 REVERSED AND REMANDED.

¶16 IRWIN, C.J., BARNES, V.C.J., and HODGES, DOOLIN, HARGRAVE and OPALA, JJ., concur.

¶17 SIMMS, J., dissents.

Footnotes:

¹ The land was restricted in the hands of the allottee during his lifetime under § 1 of Act of Congress of May 27, 1906, 35 Stat. 312, and any conveyance of any interest of any of his heirs or devisees, who are of one-half or more degree of Indian blood has to be approved under § 1 of Act of August 4, 1947, (61 Stat. 731-732), by the district court of the county wherein the land is situated.

² Sweeney v. Bay State Oil & Gas Co., 192 Okl. 28, 133 P.2d 536 (1943); Rodkey v. Rees, Okl.App., 527 P.2d 1150 (1974); Komarek v. Perrine, Okl., 382 P.2d 748 (1963).

³ Sweeney v. Bay State Oil & Gas Co., *supra*.

⁴ Colonial Royalties Co. v. Hinds, 202 Okl. 660, 216 P.2d 958 (1950).

⁵ Colonial Royalties Co. v. Hinds, *supra*.

⁶ Wolfe v. Stanford, 179 Okl. 27, 64 P.2d 335 (1937); 143 A.L.R. 1092; 173 A.L.R. 854; Chesmore v. Chesmore, Okl., 484 P.2d 516 (1971).

⁷ Wolfe v. Stanford, *supra*.

⁸ Wolfe v. Stanford, *supra*.

⁹ De Mik v. Cargill, 485 P.2d 229 (Okl. 1971); Rodkey v. Rees, *supra*.

¹⁰ Wolfe v. Stanford, *supra*, n. 6; Williams v. Neal, 207 Okl. 552, 251 P.2d 785 (1953).

¹¹ Henson v. Bryant, Okl., 330 P.2d 591 (1958).

Citationizer[®] Summary of Documents Citing This Document

Cite Name	Level
Oklahoma Court of Civil Appeals Cases	
Cite	Name
<u>1992 OK CIV APP 30, 828 P.2d 451, 89 QB2 1307</u>	<u>Guardianship of Randolph, Matter of</u>
	Level
	Cited

Citationizer: Table of Authority

Cite Name	Level	
Oklahoma Court of Civil Appeals Cases		
Cite	Name	Level
<u>1974 OK CIV APP 42, 527 P.2d 1150</u>	<u>RODKEY v. REES</u>	Cited
Oklahoma Supreme Court Cases		
Cite	Name	Level
<u>1948 OK 203, 216 P.2d 968, 202 Okla. 680</u>	<u>COLONIAL ROYALTIES CO. v. HINDS</u>	Cited
<u>1937 OK 21, 84 P.2d 335, 179 Okla. 27</u>	<u>WOLFE v. STANFORD</u>	Cited
<u>1952 OK 450, 251 P.2d 785, 207 Okla. 552</u>	<u>WILLIAMS v. NEAL</u>	Cited
<u>1958 OK 231, 330 P.2d 591</u>	<u>HENSON v. BRYANT</u>	Cited
<u>1963 OK 78, 382 P.2d 748</u>	<u>KOMAREK v. PERRINE</u>	Cited
<u>1971 OK 48, 484 P.2d 516</u>	<u>CHESMORE v. CHESMORE</u>	Cited
<u>1971 OK 61, 485 P.2d 229</u>	<u>DE MIK v. CARGILL</u>	Cited
<u>1943 OK 32, 133 P.2d 538, 192 Okla. 28</u>	<u>SWEENEY v. BAY STATE OIL & GAS CO.</u>	Cited



Home Courts Court Dockets Legal Research Calendar Help
Previous Case Top Of Index This Point in Index Citationize Next Case Print Only

Oklahoma Supreme Court Cases

WOLFE v. STANFORD

1937 OK 21

64 P.2d 335

179 Okla. 27

Case Number: 23955

Decided: 01/19/1937

Supreme Court of Oklahoma

Cite as: 1937 OK 21, 179 Okla. 27, 64 P.2d 335

WOLFE
v.
STANFORD.

Syllabus

¶0 1. PARTITION - *Right to Partition of Oil and Gas Rights Severed From Remainder of Fee.*

Oil and gas rights, though severed from the remainder of the fee, may be subject to partition, either in kind or by sale, as the circumstances may justify.

2. SAME - *Partition in Kind or by Sale and Division of Proceeds.*

Partition in kind of oil and gas rights is proper where there has been no development on or near the property and there is no other reason to believe one portion of the tract involved is more valuable for oil purposes than another. Where partition in kind cannot properly be allowed, partition may be accomplished through sale and division of the proceeds.

3. SAME - *Discretion of Court as to Partition - Prevention of Partition as Matter of Defense to Be Pleaded and Proved.*

Generally, the right of partition is absolute, but in connection with the partition of oil and gas rights, the court is vested with sufficient discretion in denying or awarding relief to prevent the remedy from becoming an instrument of fraud or oppression. The prevention of partition upon this ground is a matter of defense to be pleaded and proved as such.

4. SAME - *Tenancy in Common - Validity of Conveyance of Undivided Interest in Oil and Gas Rights by One Cotenant in Land Without Consent of Others Regardless of Effect on Rights in Partition Action.*

One of several cotenants in land may convey his undivided interest in the oil and gas rights without the consent of his cotenants. Such a conveyance is not void as to nonconsenting cotenants, nor can it be avoided or ignored by them on the theory that it may alter or affect their rights in a partition action.

Appeal from District Court, Hughes County; Geo. C. Crump, Judge.

Action by C.C. Stanford against C. Dale Wolfe to separately partition surface rights in land. C. Dale Wolfe, as defendant, seeks to partition both surface and royalty. Judgment on the pleadings for the plaintiff, and defendant appeals. Reversed and remanded.

V.R. Biggers, A.S. Norvell, C. Dale Wolfe, and W.M. Haulsee, for plaintiff in error.
Ethel Hamilton and Chas. N. Hamilton, for defendant in error.

BUSBY, J.

¶1 This is an appeal from a judgment of the district court of Hughes county granting a partition of lands subject to oil, gas, and mineral rights and refusing to grant the same relief in connection with such rights. In their brief the

Right to Partition
is involved by
Answer - requesting
it - even so to
Royalty - Action
in equity under
the statute

parties use the term "surface rights" to refer to that portion of the fee remaining after elimination of the oil, gas, and mineral rights. The term is legally inaccurate, but convenient. In this opinion we shall use it in the same sense for the sake of brevity. For the same reason we shall employ the terms "oil rights" and "royalty" in a general sense to include oil, gas, and mineral rights and the authority to explore for and produce the same.

¶2 C. Dale Wolfe is the owner of an undivided one-half interest in both the surface and royalty in 80 acres of land situated in Hughes county, Okla. C.C. Stanford owns the other undivided one-half of the surface. He owns also a fractional undivided interest, but less than one-half, in the oil rights. The remainder of the royalty is apparently owned by W.A. Bean, M.E. Gilbert, J.B. Leftwich, S.B. Turner, W.A. Smith, Harry Allen, and S.F. Russel. The precise fractional interests of the last-named individuals is not reflected in the record. Neither does the record disclose the date or manner in which these individuals acquired their royalty.

¶3 On October 22, 1931, C.C. Stanford, as plaintiff, commenced this action in the district court of Hughes county against C. Dale Wolfe, as defendant. The plaintiff asserted his ownership of an undivided one-half interest in the surface and sought to partition the surface rights only. Thereafter the defendant filed his answer in which he admitted Stanford's interest in the surface, asserted his ownership of an undivided one-half interest in both surface and royalty and named the plaintiff and the individuals previously designated by name in this opinion as the co-owners of the other undivided one-half interest in the royalty. The defendant sought to have the named individuals made additional parties to the litigation and to procure a partition of the entire estate in the land. A

¶4 The plaintiff filed his motion for judgment on the pleadings, which was sustained. The trial court rendered its judgment granting partition of the surface rights, but denied partition of the oil rights, incidentally refusing to make the named royalty owners parties to the suit. The defendant appeals. The order of appearance of the parties is reversed in this court. However, we shall continue to refer to them by their trial court designation.

¶5 A proper treatment of this case requires the consideration of several questions which are specifically or inferentially presented by the briefs. With a view to promoting clarity of expression, we shall state these questions in our own language and rearrange the sequence of consideration.

¶6 The defendant contends and the plaintiff denies that oil rights are subject to partition after they have been carved out of the fee by conveyances. In most jurisdictions, including Oklahoma, partition in some form, that is, either in kind or by sale, is allowed between tenants in common of the right to explore for and produce oil and gas. *Coker et al. v. Vierson et al.*, 170 Okla. 528, 41 P.2d 95 (a case involving royalty interests); *Clark v. Mercer Oil Co.*, 139 Okla. 48, 281 P. 283 (a case involving partition of a producing oil and gas lease). See, also, *Hall v. Douglas*, 102 W. Va. 400, 135 S.E. 282; *Stern v. Great Sou. Land Co.*, 148 Miss. 649, 114 So. 739; *Black v. Sylvania Prod. Co.*, 105 Ohio St. 346, 137 N.E. 904, and *Henderson v. Chesley* (Tex. Civ. App.) 273 S.W. 299 (all cited in *Coker v. Vierson*, supra). See, also, *Fortney et al. v. Tope et al.* (Mich.) 247 N.W. 751, and *Morley v. Smith et al.* (W. Va.) 118 S.E. 135.

¶7 Both law and equity should recognize the necessity of the remedy as a method of avoiding the intolerable situation which would arise upon disagreement between co-owners having a right to the use and possession of the same property. 2 R. C. L., p. 723, par. 8. Generally speaking, the law favors the partition of property held by cotenants in recognition of the principle that property rights are more valuable and the use and enjoyment of property is best promoted when individuals own the same in such a way that they are entitled to exclusive use and enjoyment. Thus courts are adverse to any rule which compels unwilling persons to use their property in common. 2 R. C. L. 716, par. 2. A

¶8 We perceive no sound reason for denying the continued application of the foregoing principle to oil and gas rights held by tenants in common, provided, of course, the remedy of partition in this class of cases is sufficiently within the control of the court having jurisdiction to grant the relief to prevent its use as a weapon of oppression - a matter which will be considered presently. Partition of oil and gas rights being an available and recognized remedy, we now pass to a consideration of the sufficiency of the answer in this case to invoke the relief. The motion for judgment on the pleadings challenged the sufficiency of the answer before the trial court, and presumably the answer was held insufficient.

¶9 Reference to the answer discloses that in stating the ground upon which the partition of oil and gas rights was sought, the defendant set up the fact that undivided interests were owned by different parties, naming them. He then asserted that "it would be a manifest injury to him" to partition the surface without also granting a division of royalty. No facts which would cause the "manifest injury" were pleaded, save and except the diversity of

ownership. Was it essential that the defendant also plead facts showing other peculiar additional circumstances such as a loss in the value of the property, mismanagement, or irreconcilable differences as to disposition or control of the property?

¶10 In *Clark v. Mercer Oil Co.*, supra, it is stated as a rule of pleading that such additional allegations are necessary when partition is not available under the statute. The rule is subject to grave doubt. It was adopted from the Kansas case of *Beardsley et al. v. Kansas Natural Gas Co.*, 96 P. 859, wherein it was announced without supporting authority. The theory of the Kansas court was that the right to partition property under the statute was absolute, whereas the right to partition in equity was not. The absolute nature of the right to partition had been previously recognized by the Kansas court in *Kinkead v. Maxwell et al.*, 75 Kan. 50, 88 P. 523. This case was cited in the *Beardsley* Case as establishing the absolute nature of the right under the statute. But in the *Beardsley* Case the important fact was overlooked that the absolute nature of the right was not recognized in the *Kinkead* Case in consideration of the wording of the statute or the nature of the remedy. It was, on the contrary, based upon the generally recognized rule independent of the statute, and the principal supporting authority was an Illinois equity case of *Martin v. Martin* (Ill.) 48 N.E. 924, 62 A. S. R. 411 (in which the general rule was recognized, but the existence of exceptions noted). See, also, *Hill v. Reno*, 112 Ill. 154, 54 Am. Rep. 222. Thus the Kansas court said, in effect, the right is absolute under the statute because it is absolute in equity; then later, that the right of partition, though absolute under the statute, is not absolute in equity. Upon consideration of the asserted difference in the right, a different rule as to the facts necessary to be pleaded was adopted, and particular application of the rule was made to personal property. In *Clark v. Mercer Oil Co.*, supra, we said the rule should be applied to oil and gas leases, regardless of their classification as personal or real property. In bringing the rule to this state, we overlooked a prior contrary declaration by this court that the right to partition personal property in equity independent of the statute is generally absolute. *Julian et al. v. Yeoman*, 25 Okla. 448, 106 P. 956.

¶11 Independent of the *Beardsley* Case from Kansas and our own *Clark v. Mercer Oil Co.* Case, it is generally recognized, both under statutes regulating partition and equity independent of statute (in the absence of legislation requiring particular averments), that the right to partition property is absolute and a pleading seeking partition is sufficient as a matter of law if it states facts from which the court can see that the parties are cotenants. 20 R. C. L. 760, par. 42; 47 C. J. 288; *Pomeroy's Equity Jurisprudence*, vol. 5, par. 2130; 47 C. J. 408; 20 R. C. L. 742, par. 8. See, also, the Illinois cases cited, supra, and authorities therein reviewed.

¶12 In the case of *Joseph C. Willard v. Henry K. Willard*, 145 U.S. 116, 36 L.Ed. 644, it was held by the Supreme Court of the United States:

"In a court having general jurisdiction in equity to grant partition, as in a court of law, a tenant in common, whose title in an undivided share of the land is clear, is entitled to partition, as a matter of right, so that he may hold and enjoy his property in severalty. * * *

"This statute, while it authorizes the court to compel a partition by division or by sale, at its discretion, as the facts appearing at the hearing may require, does not affect the general rule, governing every court of law or equity having jurisdiction to grant partition, that partition is of right, and not to be defeated by the mere unwillingness of one party to have each enjoy his own in severalty."

¶13 And with reference to the pleading, the court said:

"Any allegation of special reasons for partition, or for having it made in one way or in the other, would have been unusual and superfluous."

¶14 It is apparent from the foregoing authorities that the rule of pleading announced in *Clark v. Mercer Oil Co.* cannot be justified on the theory that the right of partition is any less absolute in equity independent of the statutes than it is under the statutes regulating partition. Should the rule be justified, then, upon the theory that the nature of the property with which we are dealing extinguishes or qualifies the absolute character of the right?

¶15 Usually the fact that partition will result in hardship to one or more cotenants constitutes no basis for a denial of the right. Similarly the character of the property is generally insufficient to defeat the remedy. *Pomeroy's Equity Jurisprudence* (2d Ed.) par. 2130, p. 4791. However, these rules are not entirely without exception and we are not

so rigidly tied to the precedent of the past that we cannot adapt ourselves to changing circumstances and modern commercial needs. We shall, therefore, consider the effects of partition upon the class of property with which we are dealing.

¶16 Our statutes relating to partition were adopted from Kansas. They deal only with real estate and interests therein. Section 749, O. S. 1931, et seq. Under them partition in kind is favored over partition by sale and division of the proceeds. It is only when the relief first mentioned cannot be granted without manifest injury that the alternative relief is authorized. Equity, independent of the statute, generally favors partition in kind, though its power to order a sale is generally recognized if partition by division is impracticable. *Julian et al. v. Yeoman*, supra; 20 R. C. L. 773, par. 49; *Pomeroy's Equity Jurisprudence* (2d Ed.) par. 2144, p. 4821. Some authorities and courts permit only partition through sale and question or deny the power to partition in kind oil and gas rights (20 R. C. L. 775), except in connection with a partition of the surface. *Morley v. Smith*, supra; *Stern v. Great Sou. Land Co.*, supra. But the better reasoning supports the view that partition in kind may be made when there has been no development on or near the property and there is no other reason to believe that one portion of the land involved will produce more oil than another. In other words, purely "wildcat" and unprospected territory should be subject to division by metes and bounds. *Mills-Willingham Law of Oil & Gas*, p. 272; 47 C. J. 501; *Henderson v. Chesley*, supra. Our assertion in *Coker v. Vierson* supra, that this court had often held oil rights to be incapable of partition in kind was unfortunate. We had never so held. That case is modified to correspond to the view herein expressed. Obviously partition in kind of an entire fee operates to partition in kind the included royalty interest. No logical reason can be advanced why the same relief should not be available to royalty owners in undeveloped and unprospected territory.

¶17 Obviously, in many cases, development, exploration, or geological prospecting will have approached or involved the premises from which it may appear that some portion of the tract is more valuable for oil purposes than the remainder. In such cases partition in kind is impracticable and partition, if allowable, can only be accomplished by sale. *Hall v. Douglas*, supra.

¶18 At this point, it is well to recognize that much of the royalty in this state has been divided into small fractional interests and that many of those interests are now owned by persons of limited financial means. It is at once apparent that the right to coercive judicial partition through sale and division of the proceeds may, if wholly unqualified, become a weapon of oppression and fraud in the hands of the financially fortunate. Thus, upon the approach of development, the right to partition might be used as a means of foreclosing through sale the interest of the royalty owner of limited means. Greatly enhanced value might place the property beyond his ability to elect to purchase or bid. In the absence of disagreement between the parties rendering the co-ownership of the property impracticable, the courts should not be impotent to prevent themselves from becoming an instrument of fraud and oppression under the circumstances suggested. They must, therefore, be recognized to be vested with sufficient discretion in awarding or denying relief to avoid the evil herein anticipated. Of course, inability of a cotenant to purchase should not constitute a defense under ordinary circumstances, that is, in the absence of approaching development or rapidly increasing values.

¶19 In adopting this view we realize the treacherous nature of the ground upon which we tread and forewarn litigants that a denial of the remedy of partition can only be justified in the most extreme cases, and then only when an intolerable situation with reference to control and use of the property does not exist.

¶20 Our reasoning upon this point leads us to another pertinent inquiry. If the partition of oil and gas royalty falls under our statutes regulating partition, is the power of the court sufficiently broad to recognize the discretion to deny relief?

¶21 Our partition statutes apply to real estate and interests therein. Section 749, O. S. 1931, et seq. Although we have held that a producing oil and gas lease, such as was involved in *Clark v. Mercer Oil Co.*, supra, does not constitute an interest in real estate within the meaning of the judgment lien statute (*First Nat. Bank of Healdton v. Dunlap*, 122 Okla. 288, 254 P. 729, 52 A. L. R. 128), we have, on the other hand, decided that oil "royalty" constitutes such an interest in land as to be classified as lands and tenements within the meaning of those terms as used in prescribing the method of sale upon execution (*Cuff v. Koslosky*, 165 Okla. 135, 25 P.2d 290). In *Coker v. Vierson*, supra, we applied the real estate partition statutes to a proceeding involving this class of property.

¶22 There is nothing in the statute which declares the right to be absolute or unqualified. Generally, it is, but this, as we have previously seen, is true by reason of the generally applicable principles of law independent of the

statute. It follows that exceptions or qualifications of the general rule are not inconsistent with the statute and may be recognized in actions under the statute.

¶23 The remedies and rights prescribed by the statute are cumulative, not exclusive, even when the case falls within the statute. *Sawin et al. v. Osborn et al.*, 87 Kan. 828, 126 P. 1074, Ann. Cas. 1914A, 647; *Moore v. Willey*, 77 Ark. 317, 91 S.W. 184, 113 A. S. R. 151. The remedy is in its nature equitable, even where statutes have been enacted dealing with the subject. *Chandler v. Richardson*, 65 Kan. 152, 69 P. 168 (opinion by Pollock, J.); *Bancroft's Code Prac. and Remedies*, p. 6813.

¶24 There being no statutory inhibition against the denial of relief, the power of the court is sufficiently broad to prevent the use of the remedy as an instrument of oppression.

¶25 Do these views then justify the questionable rule of pleading announced in the *Mercer Case*? We think not. Presumably a complaining party invokes a remedy for a justifiable end. Fraud or oppression in the use of the remedy is not to be presumed. If the action is to be defeated upon that ground, the matter is one of defense to be pleaded and proved as such. The rule of pleading as announced in *Clark v. Mercer Oil Co.* supra, is overruled.

¶26 It follows that the answer of the defendant, which is in the nature of a cross-petition seeking partition of oil rights, is sufficient as a matter of law and a motion for judgment on the pleadings holding it insufficient should not have been sustained.

¶27 It may be inferred from the pleadings in this case, though not specifically stated therein, that Wolfe, who owns one-half of both surface and royalty, did not consent to mineral conveyances made by his cotenant. This, however, does not make his right to partition either more or less unqualified than hereinbefore stated. The right of one of several cotenants to separately convey or lease his interest without the consent of his cotenants is recognized in this jurisdiction. Such a conveyance or lease is not void as to nonconsenting cotenants. *Earp v. Mid-Continent Petroleum Corporation*, 167 Okla. 86, 27 P.2d 855; *Moody v. Wagner*, 167 Okla. 99, 23 P.2d 633; *Lusk v. Carter Oil Co.*, 172 Okla. 508, 53 P.2d 856; *Hembree v. Magnolia Pet. Co.*, 176 Okla. 524, 56 P.2d 851.

¶28 The fact that a conveyance by one cotenant may have some effect on a partition brought by the nonconsenting cotenant does not destroy the validity or effect of the conveyance, nor give the nonconsenting cotenant a greater or more absolute right of partition than the existing status of the estate warrants. *Kerfoot v. Greenlee et al.*, 87 Okla. 69, 209 P. 444. There may be some doubt concerning these questions in other jurisdictions. *Young v. Young et al.* (Mo.) 270 S.W. 653, 39 A. L. R. 734, and note.

¶29 The question then arises: Was it proper for Wolfe, the owner of a one-half interest in both surface and oil rights, to insist that the oil rights be partitioned in the same action with the surface? The question requires an affirmative answer. His undivided interest in the land extended to both surface and royalty. The right to partition, subject to the qualifications hereinbefore mentioned, extends to both estates, whether they are severed or combined. We perceive no sound reason why the relief to which he is entitled in connection with his combined estate should not be determined in the same action. Permitting this to be done dispenses with the necessity of two separate proceedings. It does not prevent a denial of the relief as to royalty in proper cases. In cases where partition in kind is appropriate and allowable as to both estates, the joint consideration of the estates will enable the court to cause the surface rights of such person to correspond as nearly as possible with his royalty interest, a consideration which should have a governing influence with the court in connection with that class of relief. See *Morley v. Smith*, supra.

¶30 Our decision upon this question does not disturb the principle of *Coker et al. v. Vierson*, supra, that in granting relief the trial court may take cognizance of the two classes of interest in the land, and if sale be proper, sell the same separately. We are not passing upon the question of whether royalty owners are essential parties, except in cases where, as in this case, one of the parties who seeks partition, either as plaintiff or defendant, owns both surface and royalty in a corresponding amount and has not participated in a severance of the two estates. Thus we do not decide that surface rights cannot be partitioned separate and apart from the royalty in proper cases. Our decision is confined to the point that one who owns an undivided interest in the entire fee and who has not consented to a severance of the oil rights from the surface is entitled to insist that the partition proceedings be made sufficiently comprehensive to determine his rights to partition in both classes of property.

¶31 In deciding the issues of this appeal concerning partition and since there must be further proceedings in the

lower court, we have felt the need of making our discussion sufficiently comprehensive to guide the trial court in its final disposition of the matter.

¶32 While this action was pending in the trial court a receiver was appointed by interlocutory order on application of the plaintiff. In a reply brief herein filed defendant complains of such appointment, asserting that it was made without notice or showing sufficient to justify the appointment without notice. Apparently no attempt was made before the trial court to cause the order appointing the receiver to be vacated. An examination of the petition in error discloses that no complaint was made concerning the interlocutory order when the case was lodged in this court. This phase of the case is not properly before us for review.

¶33 The judgment of the trial court is reversed, with directions to proceed in a manner not inconsistent with this opinion.

¶34 BAYLESS, V. C. J., and WELCH, PHELPS, and CORN, JJ., concur. OSBORN, C. J., and GIBSON and HURST, JJ., dissent. RILEY, J., absent.

Citationizer® Summary of Documents Citing This Document

Cite Name	Level
Oklahoma Court of Civil Appeals Cases	
Cite Name	Level
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Cite Name	Level
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Citationizer: Table of Authority

Cite	Name	Level
None Found.		



[Home](#) | [Courts](#) | [Court Dockets](#) | [Legal Research](#) | [Calendar](#) | [Help](#)
[Previous Case](#) | [Top Of Index](#) | [This Point in Index](#) | [Citationize](#) | [Next Case](#) | [Print Only](#)

Oklahoma Supreme Court Cases

WILSON v. HARTMAN

1976 OK 10

545 P.2d 742

Decided: 01/27/1976

Supreme Court of Oklahoma

Cite as: 1976 OK 10, 545 P.2d 742

VIOLA WILSON, APPELLANT,
 v.
 L.B. HARTMAN, APPELLEE.

Appeal from the District Court of Love County; Thomas E. Shaw, Jr., Associate District Judge.

¶10 An appeal from a judgment of the district court denying plaintiff's request for partition of property jointly owned by her and her ex-husband that was not disposed of by the decree of divorce. Reversed.

Michael A. Cawley, of Fischl, Culp, McMillin, Kern & Cawley, Ardmore, for appellant.

W. Lawrence Eakin, Jr., of Milor, Eakin & Burns, Marietta, for appellee.

DOOLIN, Justice.

[545 P.2d 743]

¶11 This appeal involves the question of whether property held in joint tenancy by a husband and wife retains its character of joint ownership after a divorce decree is entered if such decree does not specifically dispose of the property and there has been no contract of property settlement incorporated into said divorce decree. We hold that it does.

¶12 Viola Hartman Wilson, plaintiff, and L.B. Hartman, defendant were married in 1948. During their nineteen years of marriage they operated a farm together, raising cattle and peanuts. In May of 1965, they acquired joint tenancy warranty deeds to two tracts of land, one of which included portions of the minerals, the other, surface rights only. One of these tracts was entirely paid for prior to the acquisition of the other, but was used as additional collateral for the purchase of the second. Deeds to both tracts created a joint tenancy with right of survivorship and both parties executed the mortgage. It is the ownership of these two tracts of land that is the subject of this law suit.

¶13 In April of 1967, the couple obtained a decree of divorce. They consulted an attorney together and although the wife signed the short verified petition, she [545 P.2d 744] claims she never appeared in court or saw the decree until she received a copy in the mail after the judgment had been entered. Neither the petition nor the decree made any mention of the jointly held tracts of land. Neither party appealed from the divorce decree and the judgment is final. Wife has since remarried.

¶14 Upon the advice of the judge granting the divorce, the husband attempted to prevail upon his ex-wife to execute a quit claim deed in his favor as to her interest in the property. She refused. In March 1971, four years after the divorce decree, the parties exercised their jointly held rights of ownership by executing a general warranty deed to one acre of the property in favor of their son. In the interim the wife executed an oil and gas lease and later an assignment of the income from it to the F.H.A. The husband has paid the taxes, the mortgage

NO oral Contract shown;

Right to partition
is absolute -

Can partition surface
& lease minerals
together

payments, made improvements and has had exclusive use and benefit of the property, retaining the profits for himself.

¶5 In November of 1973, plaintiff wife commenced the present action asking for partition of the surface of the land and further that the mineral interest owned by the parties not be partitioned but rather the joint tenancy terminated and parties be decreed to hold such interest as tenants in common.

¶6 Defendant husband in his answer admitted the joint tenancy but claimed the divorce proceedings vested all ownership of the property in him and prayed that partition should be denied and the title in and to said real property be adjudged to be his solely owned property. Plaintiff's motions for summary judgment and later for a directed verdict were denied and the court issued judgment in favor of the defendant husband. Plaintiff appeals to this Court.

¶7 It is not contested that the two tracts of land, 300 acres in all, were held in joint tenancy prior to the divorce and record title remains as such. Plaintiff claims that since the divorce proceedings made no provision as to the division of the property, it is still jointly held by defendant and herself and she has an absolute right to partition.

¶8 Defendant alleges an oral agreement between the parties that he was to receive the property and further that his subsequent acts take the agreement outside the requirements of the Statute of Frauds, citing *Waters v. Stevens*, 198 Okl. 162, 176 P.2d 808 (1947), which holds specific performance may be used to enforce an oral contract for conveyance of land, where the moving party has fully performed his side of the contract. In that case, as here, husband and wife held the property in question as joint tenants prior to the divorce. However, in *Waters* the husband and wife had appeared before a notary stating they were dividing their property. At the same time they signed a written agreement declaring separate ownership of certain property and stating the location of two tracts of real estate. The husband performed his part of the agreement to divide the property by executing and delivering deeds to his wife but his wife did not reciprocate. The Court held the husband had the right in equity to require compliance with the agreement and to compel a conveyance by his ex-wife.

¶9 Plaintiff denies the existence of an agreement and distinguishes *Waters* in that, unlike the wife there, she at no time agreed that her husband was to have sole ownership of the property. She at all times claimed ownership of the property and is ready, willing and able to pay her share of the taxes and mortgage.

¶10 There is no indication that any type of division of the property or the assumption of the indebtedness was ever discussed at the meeting with the attorney prior to the divorce. Defendant bases his claim of an oral property agreement on this statement in the divorce petition:

"Plaintiff further alleges and states that the parties hereto have agreed on property settlement and support and plaintiff [545 P.2d 745] does not ask the court for judgment in connection with the property and support."

He feels that this together with the finding in the decree "that all material acts alleged in plaintiff's petition are true" indicates that a property settlement was agreed upon. Defendant at trial attempted to prove the existence of an oral contract for the division of the property by testimony as to various conversations. In one conversation plaintiff told her son, "All I want is out, I don't want nothing but to leave." Another time defendant asked her what she wanted and in response to her question, "What do we have?" he replied, "Nothing." Her statement was "Well, it's pretty hard to divide nothing."

¶11 An oral contract to devise or as in our case to convey real estate is suspect and evidence to establish it must be weighed in a careful manner. "He who claims under such an alleged oral agreement must show a clear and mutual understanding and a positive agreement of both parties to the terms of the contract, and if the language employed by the parties leaves their intention in doubt, or if there is uncertainty in regard to what was intended, a court of equity will not undertake to decree specific performance." (Emphasis supplied). *York v. York*, 270 P.2d 656, 658 (Okl. 1953).

¶12 Plaintiff is unequivocal in her denial of the existence of any agreement or of any intention on her part to relinquish her interest. When she left the home she took only her personal belongings and \$500.00 in cash. It is unbelievable, as well as unproved, that she would intend this to be the total property settlement after nineteen years of marriage. Evidence of an oral property settlement is totally lacking. When evidence of an alleged oral

agreement is not so sufficiently clear, cogent and forcible as to leave no reasonable doubt as to its terms and character, a decree of specific performance is unwarranted. *Majors v. Majors*, 263 P.2d 1012 (Okla. 1953).

¶13 Defendant's reliance on his subsequent acts to enforce the alleged oral contract also fails. These acts could not create the agreement. Before such acts might grant relief from compliance with the Statute of Frauds, there must have been some agreement or contract to enforce. Having determined that no oral contract for property settlement existed, we find it unnecessary to consider whether defendant's acts since the divorce decree were adequate to make an oral agreement enforceable.

¶14 Absent a provision in the decree, whether divorce in and of itself effects the character of property held in joint tenancy by husband and wife, has not been decided in Oklahoma. Jurisdictions generally hold that it remains in joint tenancy or rests in the spouses equally as tenants in common. See *Collier v. Collier*, 73 Ariz. 405, 242 P.2d 537 (1952), *Witzel v. Witzel*, 386 P.2d 103 (Wyo. 1963), 27A C.J.S. Divorce § 180(3) (1959) and cases cited therein.

¶15 Since the divorce decree itself in no way divided the property and we find no contract of property settlement existed, it was improper for the trial court to vest sole ownership in defendant. Whether the estate changed from one of joint tenancy to that of tenancy in common is not material and we do not decide it at this time.

¶16 A joint owner's right to partition is absolute. *Keel v. Keel*, 475 P.2d 393 (Okla. 1970). Defendant does not hold adversely to plaintiff, she has the required right to possession, and is entitled to partition. See *DeMik v. Cargill*, 485 P.2d 229 (Okla. 1971), *Chouteau v. Chouteau*, 49 Okl. 105, 152 P. 373 (1915).

¶17 Plaintiff desires partition of the surface without disturbing the oil and gas interest other than declaring it to be held jointly by the parties as tenants in common. This is proper under Oklahoma law. See *Erwin v. Hines*, 190 Okl. 99, 545 P.2d 746 121 P.2d 612 (1942), *Wolfe v. Stanford*, 179 Okl. 27, 64 P.2d 335 (1937).

¶18 Reversed and remanded to the trial court with instructions to partition land in question in accordance with 12 O.S. 1971 § 1501 et seq.

¶19 All the Justices concur.

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Cite Name	Level
Oklahoma Court of Civil Appeals Cases	
Cite	Name
<u>2000 OK CIV APP 144, 16 P.3d 482, 72 OBJ 185.</u>	<u>FRANTZ v. FRANTZ</u>
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<u>1985 OK CIV APP 16, 699 P.2d 1108, 56 OBJ 993.</u>	<u>Pitman v. Pitman</u>
Oklahoma Supreme Court Cases	
Cite	Name
<u>1984 OK 54, 684 P.2d 1191.</u>	<u>Prickett v. Moore</u>

Citationizer: Table of Authority

Cite Name	Level
Oklahoma Supreme Court Cases	
Cite	Name
<u>1947 OK 4, 176 P.2d 808, 188 Okla. 162.</u>	<u>WATERS v. STEVENS</u>
<u>1937 OK 21, 64 P.2d 335, 179 Okla. 27.</u>	<u>WOLFE v. STANFORD</u>
<u>1953 OK 139, 283 P.2d 1012.</u>	<u>MAJORS v. MAJORS</u>
<u>1953 OK 338, 270 P.2d 868.</u>	<u>YORK v. YORK</u>

<u>1970 OK 164, 475 P.2d 393.</u>	<u>KEEL v. KEEL</u>	Cited
<u>1971 OK 61, 485 P.2d 229.</u>	<u>DEMIK v. CARGILL</u>	Cited
<u>1942 OK 17, 121 P.2d 812, 190 Okla. 88.</u>	<u>ERWIN v. HINES</u>	Cited
Title 12, Civil Procedure		
<u>Cite</u>	<u>Name</u>	<u>Level</u>
<u>12 O.S. 1501.</u>	<u>Renumbered as 52 O.S. 5 569 by Laws 1985, c. 120, § 2, emerg. eff. May 31, 1985</u>	Cited
Wyoming Supreme Court Cases		
<u>Cite</u>	<u>Name</u>	<u>Level</u>
<u>1963 WY 53, 386 P.2d 103.</u>	<u>Witzel v. Witzel</u>	Cited



Home	Courts	Court Dockets	Legal Research	Calendar	Help
Previous Case	Top Of Index	This Point in Index	Citationize	Next Case	Print Only

Oklahoma Court of Civil Appeals Cases

DEWRELL v. LAWRENCE

2002 OK CIV APP 105

58 P.3d 223

Case Number: 96261

Decided: 09/27/2002

Mandate Issued: 10/25/2002

DIVISION I

THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA, DIVISION I

Cite as: 2002 OK CIV APP 105, 58 P.3d 223

J. LADON DEWRELL and CAROL A. DEWRELL, husband and wife, Plaintiffs/Appellees

v.

KATHLEEN R. LAWRENCE, Defendant/Appellant

APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY, OKLAHOMA

HONORABLE WILLIAM C. HETHERINGTON, JR., JUDGE

REVERSED AND REMANDED

Ted W. Haxel, Purcell, Oklahoma, for Plaintiffs/Appellees

Tommy L. Sims, Lawton, Oklahoma, for Defendant/Appellant

OPINION

Carl B. Jones, Judge:

¶1 This action was brought by J. Ladon Dewrell and Carol A. Dewrell (Dewrells), Appellees, for partition of 45 acres of land owned in undivided interests one-half by the Dewrells and one-half by Kathleen R. Lawrence (Lawrence), Appellant. The Dewrells and Lawrence are unrelated business partners who jointly purchased significantly improved property north of Lexington, Oklahoma (Ranch) and certain personal property located thereon. The Dewrells paid \$225,000.00 cash for their undivided one-half interest. Lawrence contributed \$100,000.00 of her own cash and borrowed the remaining \$125,000.00 from the Dewrells under a promissory note and mortgage.

¶2 The Ranch has approximately 743 feet of frontage on Highway 77 and is improved with a small house, a large main barn and office, a climate controlled "show barn" used for high value show horses, a hay barn, a training track, outer and inner fencing, pipe and cable working pens and arenas. Lawrence resides on the Ranch and operates a horse breeding and showing business thereon. The Dewrells are Florida residents and do not intend to live in Oklahoma.

¶3 Lawrence agreed to the partition. The trial court appointed three commissioners and instructed them "to make partition of the property among the parties according to their respective interests, if such partition can be made without manifest injury." The trial court further instructed "[i]f partition cannot be made, the [c]ommissioners shall make a valuation and appraisal of the property." The commissioners reported that partition in kind could not be made according to the parties respective interests without manifest injury to the parties and they appraised the property.

*Court must
Consider
distribution
in unequal parcels
of property*

¶4 Lawrence filed her exception to the commissioners' report urging the land can be partitioned in kind, and if not so partitioned, Lawrence would suffer "grave manifest injury." Lawrence suggested the trial court resubmit the matter to the commissioners with instructions to partition the Ranch into various tracts of uneven sizes and values so the court may allot a parcel to Lawrence thereby providing her with a place to live and maintain her livelihood. The Dewrells requested the trial court to approve the commissioners' report and order the property sold "on the courthouse steps."

¶5 The cause was tried with both parties presenting witnesses and documentary evidence. Lawrence testified she desired 10-acres with 343 feet of frontage and the show barn and she suggested the remaining 35-acres and improvements thereon be allotted to the Dewrells. Lawrence desired that the trial court make the necessary adjustments, under the doctrine of owelty, to balance the monetary value of the property allocated to each party.

¶6 Mr. Dewrell testified the Ranch is a beautiful showplace and every acre is needed to facilitate the use and utility of the improvements on the Ranch. He testified he would not recover his investment from the 35-acres because this tract was located in the flood plain and had only approximately 400 feet of frontage. Mr. Dewrell testified he wanted the property sold so that the parties can equally profit or suffer their proportionate loss on the Ranch.

¶7 All three commissioners testified that based on their instructions to partition according to the parties respective one-half interests and the character, location, frontage and improvements of the ranch, it could not be partitioned in kind without manifest injury. Commissioner Fred Nolen testified the commissioners considered it inequitable to divide the ranch into one-half interests of unequal value. However, he also testified that had the commissioners been provided with different instructions permitting the division of the ranch into unequal allotments, then their opinion might have been different. On cross-examination, Commissioner Nolen agreed that to divide the ranch into a 10-acre and a 35-acre allotment would diminish the whole tract. But, on re-direct, Commissioner Nolen contradicted his earlier testimony by confirming he could not state with certainty, and without a lot of work and re-appraisal, that partitioning the ranch in unequal allotments would have a diminishment on the value of the ranch. Commissioner Ron Wilhite testified he was in accord with Commissioner Nolen. On cross examination, commissioner George Musgrave testified the commissioners decided the ranch could not be divided because of "complications," such as barns, houses and fences. On re-direct, commissioner Musgrave was asked if he had different instructions to divide the ranch in unequal allotments, was possible to do so without the parties suffering a dollar loss? He replied, "anything's possible."

¶8 Upon conclusion of trial, the trial court found the Ranch was overbuilt with tremendous improvements and any attempt to equalize the partition value by cutting out a piece of the Ranch would diminish the value of the whole property. The trial court also openly questioned whether it was legally possible to instruct the commissioners to specifically appraise to partition in kind without the parties agreeing to it and prior to the commissioners rendering an initial report and opinion that the property can be partitioned in kind. The trial court announced it must place great factual deference on the opinion of the commissioners that the ranch could not be partitioned in kind. The trial court denied Lawrence's exception, approved the commissioners' report and ordered the land sold. Lawrence filed a motion for new trial which was denied and this appeal ensued.

¶9 We begin with an analysis of the applicable law. Partition proceedings are governed by 12 O.S. 2001 §1501 et seq. The right to partition is absolute and the proceeding is one of equitable cognizance; therefore, equitable principals apply. *Chesmore v. Chesmore*, 1971 OK 49, ¶6, 484 P.2d 516, 518. "The prevailing rule is that as between partition in kind or a sale of the land and division of the proceeds, the courts and statutes favor a partition in kind, if it can be accomplished without manifest injury to the parties." *Diehl v. Hieronymus*, 1967 OK 79, ¶10, 426 P.2d 368, 370-371.

¶10 Lawrence raised five propositions of error. We find proposition III to be dispositive, therefore, we will not address the other allegations of error. Lawrence urges the trial court erred when it determined that after the commissioners' initial report had been submitted, and absent the parties' agreement, it did not have the authority to resubmit the matter to the commissioners with instructions to determine if the ranch could be partitioned in unequal tracts.

¶11 The Dewrells' concede the trial court openly questioned its authority to resubmit the matter to the commissioners with new instructions to partition the Ranch into separate tracts absent an agreement of the parties and/or a finding by the commissioners or the trial court that the Ranch could be partitioned in kind. However, they contend the trial court was aware of its authority to resubmit the matters to the commissioners,

after exception is filed, if the trial court determined a partition in kind was supported by the evidence. They urge the trial court properly determined partition in kind was not supported by the evidence; therefore, it had no reason to resubmit the matter to the commissioners.

¶12 Our standard of review in a partition action is whether the trial court's decision is either against the clear weight of the evidence, or is contrary to law. *Cain v. Christie*, 1997 OK CIV APP 7, ¶14, 937 P.2d 119, 122. After reviewing the evidence in the record, we find the trial court erred when it failed to exercise its authority and consider re-submitting this matter to the commissioners under new instructions to allot unequal portions of the Ranch to the parties and invoke the doctrine of owelty. *Id.* at ¶13.

¶13 Title 12 O.S. 2001 §1507 specifically authorizes that "[f]or good and sufficient reasons appearing to the court, the commissioners may be directed to allot particular portions to any one of the parties." In such event, the doctrine of owelty is available to the trial court in the exercise of its equitable powers, and the party who sought owelty is entitled to a judicial consideration of her application for same. *Chesmore*, 1971 OK 49 at ¶8, 484 P.2d at 519. The Oklahoma Supreme Court explained:

[I]n making divisions along natural and practical lines the allotments cannot always be made of equal area or value, and, when an allotment is made to a party which is in excess of his share, the court may require him to pay such excess, which is called owelty, to the other co-tenants. It would seem more equitable, in a proper case, to require the payment or receipt of a reasonable sum of money than to require lands to be sold as a whole, where a proportionately small sum is required to equalize the shares. The object of partition is a division of the property; a sale of the lands is justified only when partition in kind, with or without owelty, is impractical.

Chesmore at ¶6, 484 P.2d at 518-519 (citations omitted).

¶14 The trial court was concerned that it could not resubmit this matter for appraisal of unequal allotments unless the parties agreed. *Chesmore* explains the trial court's error:

The general rule of equity requiring the payment of owelty does not give defendants an absolute right to receive a share of the land set off to them in kind and pay owelty to equalize the shares awarded to plaintiffs. The rule does give the court the power to consider the application of owelty, without regard to an agreement between the parties that he may do so. Owelty, like a division of the lands in kind, is within the broad equitable powers of the court in partition proceedings. The court will not be denied the exercise of its equitable powers in partition proceedings by the failure of all parties to agree that its inherent power may be so exercised.

Id. at ¶7, 484 P.2d at 519 (citations omitted).

¶15 The commissioners should have been instructed by the trial court to consider whether an allotment of a particular portion of the ranch to Lawrence along with owelty could be accomplished without manifest injury to the parties. The trial court still has the discretion to determine Lawrence's desired 10-acre allotment along with owelty is not practicable or equitable. Accordingly, we reverse and remand to the trial court for further proceedings consistent with this opinion.

¶16 We are asked to award the Dewrells their appeal-related attorney fees pursuant to Rule 1.14(b), Oklahoma Supreme Court Rules, 12 O.S. 2001, Ch. 15, App.; 12 O.S. 2001 §696.4(c) and 12 O.S. 2001 §1515. "Whenever there is statutory authority to award attorney fees in the trial of a matter, additional fees may be allowed (to the prevailing party) for legal services rendered in the appellate court." *Sisney v. Smalley*, 1984 OK 70, ¶20, 890 P.2d 1048, 1051 (parenthesis in original).

¶17 We note §1515 provides:

The court making partition shall tax the costs, attorney's fees and expenses which may accrue in the action, and apportion the same among the parties, according to their respective interests, and may award execution therefore, as in other cases.

¶18 Assuming arguendo §1515 mandated an award of appeal-related attorney fees to a prevailing party in a

partition action, the Dewrells would not be considered "prevailing parties" in this appeal. The Dewrell's request for appeal-related attorney fees is denied.

¶19 REVERSED AND REMANDED; MOTION FOR APPEAL-RELATED ATTORNEY FEES DENIED.

¶20 JOPLIN, V.C.J., and BUETTNER, J., concur.

Citationizer® Summary of Documents Citing This Document

Cite Name Level

None Found.

Citationizer: Table of Authority

Cite Name	Level
Oklahoma Court of Civil Appeals Cases	
Cite	Name
<u>1997 OK CIV APP 7, 937 P.2d 119, 68 OBJ 1198.</u>	<u>CAIN v. CHRISTE</u>
	Discussed
Oklahoma Supreme Court Cases	
Cite	Name
<u>1997 OK 79, 426 P.2d 368.</u>	<u>DIEHL v. HIERONYMUS</u>
<u>1971 OK 49, 484 P.2d 516.</u>	<u>CHESMORE v. CHESMORE</u>
<u>1971 OK 50, 484 P.2d 519.</u>	<u>GARRAGO OIL CO. v. MID-CONTINENT CASUALTY CO.</u>
<u>1984 OK 70, 690 P.2d 1048.</u>	<u>Slaney v. Smalley</u>
	Discussed
Title 12, Civil Procedure	
Cite	Name
<u>12 O.S. 695.4.</u>	<u>Provision for Costs, Attorney Fees, and Interest</u>
<u>12 O.S. 1501.</u>	<u>Renumbered as 52 O.S. 6 369 by Laws 1985, c. 120, § 2, emerg. eff. May 31, 1985</u>
	Cited
<u>12 O.S. 1997.</u>	<u>Commissioner to Allot Portions</u>
<u>12 O.S. 1515.</u>	<u>Costs, Attorney's Fees and Expenses</u>
	Cited

D. ATTORNEY GENERAL OPINIONS

OSC Found Document: Question Submitted by: The Honorable Maxine Kincheloe, Okla... Page 1 of 3

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Oklahoma Attorney General's Opinions

Must owners
of surface
and minerals
sell both,
if demanded - Yes

Question Submitted by: The Honorable Maxine Kincheloe, Oklahoma House of Representatives
1982 OK AG 126
Decided: 06/29/1982
Oklahoma Attorney General

Cite as: 1982 OK AG 126, ____

¶0 The Attorney General is in receipt of your request for an official opinion wherein you ask, in effect, the following questions:

1. Under Oklahoma partition law, must all the co-owners of real property sell their undivided mineral rights along with the surface rights if one of the co-owners wants to sell his surface and mineral interests?
2. Must the initial or amended petition reflect that the other co-owners do not want to sell their undivided mineral rights along with the surface rights?
3. Can the Court give good title to the successful bidder at the partition sale without transferring the title by a mineral deed?

¶1 Oklahoma law recognizes the right of a co-owner to partition his property. Partition proceedings terminate the joint ownership of property and the relations of the parties. *Cox v. Lasley*, 639 P.2d 1219 (Okla. 1982), *Wolfe v. Stanford*, 179 Okl. 27, 64 P.2d 335 (1937). "A joint owner's right to partition is absolute." *Wilson v. Hartman*, 595 P.2d 742 (Okla. 1976). "The general rule is that all property capable of being held in co-tenancy is subject to partition by judicial proceedings, the partition being either *in kind or by appraisal or sale*." (Emphasis added) *Cox v. Lasley*, at 1221. Additionally, the Oklahoma Supreme Court has long held:

"Generally speaking, the law favors the partition of property held by cotenants in recognition of the principle that property rights are more valuable and the use and enjoyment of property is best promoted when individuals own the same in such a way that they are entitled to exclusive use and enjoyment. Thus courts are adverse to any rule which compels unwilling persons to use their property in common." *Wolfe v. Stanford*, at 336. [Citation omitted].

¶2 Lastly, the Court recently stated:

"The fact that none of the defendants consented to the conveyance of a fractional interest in the minerals to the plaintiff in the case before us does not affect plaintiff's right to partition. The right of one of several co-tenants to separately convey or lease his interest without the consent of his co-tenants is recognized in this jurisdiction. The fact that a conveyance by one co-tenant may have some effect upon a partition brought by or against the nonconsenting co-tenant does not destroy the validity or effect of the conveyance, nor give the nonconsenting co-tenant a greater or lesser right of partition than the existing status of the estate warrants." *Cox v. Lasley*, at 1221. [Citation omitted].

¶3 The partition statute, 12 O.S. 1501 (1981) et seq., provides the methodology to partition the property. After an order for partition has been entered by the court, the court appoints three (3) commissioners to make the partition. Under 12 O.S. 1505 and 12 O.S. 1506 (1981), the commissioners partition the property according to the parties' respective interests, if it can be accomplished without manifest injury to them. "But if such partition cannot be made, the commissioner shall make a valuation and appraisal of the property." 12 O.S. 1509(A) (1981). If the property cannot be partitioned and it has been valued and appraised, one or more of the parties can elect to take the property at the appraised value. 12 O.S. 1512 (1981).

¶4 The Legislature has addressed the circumstances when the partitioned property has to be sold:

"If none of the parties elect to take the property at the valuation, or if several of the parties elect to take the same at the valuation, in opposition to each other, the court shall make an order directing the sheriff of the county to sell the same, in the same manner as in sales of real estate on execution; but no sale shall be made at less than two-thirds (2/3) of the valuation placed upon the property by the commissioners." 12 O.S. 1513 (1981). (Emphasis added)

¶5 The question of what is the appropriate method to partition a given estate is a matter for the commissioners to decide. In *Collier v. Collier*, 184 Okl. 38, 84 P.2d 603 (1938), the Oklahoma Supreme Court described this duty:

"Whether the whole interests in said land could be partitioned and set apart in kind to each of the interested parties according to their respective interests, without manifest injury, is in the first instance a matter for the Commissioners. The court may refuse and decline to adopt their report in the premises, and discharge them and appoint others, but cannot substitute his judgment in such matter for the judgment of Commissioners provided by law for just such purpose." 84 P.2d at 606.

¶6 A party objecting to the commissioners' decision can except the report. 12 O.S. 1509(B)(C) (1981). The court can set aside the report for good cause, appoint new commissioners or refer the matter back to the original commissioners. 12 O.S. 1510 (1981).

¶7 Thus, a co-owner desiring to sell his surface and mineral interests can obtain partition to sell those interests. The partition can be in kind, by sale or appraisal. If the parties do not elect to take at the valuation or if several parties elect to take at the valuation, the court shall order the property to be sold, forcing the co-owner's real estate and mineral interests to be sold.

¶8 Petitions to initiate partition proceedings are governed by both statute and equitable principles. Title 12 O.S. 1501 (1981) states:

"When the object of the action is to effect a partition of real property, the petition must describe the property and the respective interests of the owners thereof, if known."

¶9 If there are unknown owners or shares, the Legislature further provided:

"If the number of shares or interests is known, but the owners thereof are unknown, or if there are, or are supposed to be, any interests which are unknown, contingent or doubtful, these facts must be set forth in the petition with reasonable certainty." 12 O.S. 1502 (1981).

¶10 The Oklahoma Supreme Court has stated that the party seeking partition, both under the statute or in equity, needs only to state facts from which the court can determine the parties are co-tenants. *Colonial Royalties v. Hinds*, 202 Okl. 660, 216 P.2d 958 (1948); *Wolfe v. Stanford*, *supra*.

¶11 Thus, it is unnecessary for the party seeking partition to plead that the other co-owners do not desire to sell their property.

¶12 The Legislature addressed the question of whether a deed must be delivered to the successful purchaser at a partition sale.

"The sheriff shall make return of his proceedings to the court, and if the sale made by him shall be approved by the court, the sheriff shall execute a deed to the purchaser, upon the payment of the purchase money, or securing the same to be paid, in such manner as the court shall direct." 12 O.S. 1514 (1971).

¶13 This statute does not allow any discretion in passing the title by any other means after a partition sale. Thus, the successful purchaser at a partition sale must receive a deed.

¶14 It is therefore, the official opinion of the Attorney General that:

1. Under Oklahoma partition law co-owners may be compelled to sell either their mineral and real estate interests or both estates as a result of one co-owner's partitioning of his estate.
2. The party filing a petition for partition needs only describe the real property to be partitioned and the

respective interests of the owners if known.

3. A deed must be delivered to the successful purchaser of real property at a partition sale pursuant to 12 O.S. 1514 (1981).

JAN ERIC CARTWRIGHT
ATTORNEY GENERAL OF OKLAHOMA
GREGORY E. GORE
ASSISTANT ATTORNEY GENERAL

Citationizer[®] Summary of Documents Citing This Document

Cite Name Level

None Found.

Citationizer: Table of Authority

Cite Name	Level
Title 12, Civil Procedure	
Cite	Name
12 O.S. 1501.	Renumbered as 52 O.S. § 559 by Laws 1985, c. 120, § 2, emerg. eff. May 31, 1985
12 O.S. 1502.	Contents of Reasonable Certainty in Petition
12 O.S. 1505.	Court Shall Make Order Specifying Interests of Respective Parties
12 O.S. 1506.	Appointment of Commissioners to Make Partition
12 O.S. 1508.	Duty of Commissioners - Report - Notice of Time Limit for Filing Exception or Election
12 O.S. 1510.	Filing of Exceptions to Report - Setting Aside of Report
12 O.S. 1512.	Purchase at Appraised Value
12 O.S. 1513.	Order for Sheriff to Sell Property
12 O.S. 1514.	Return of Proceedings - Sheriff to Execute Deed
	Level
	Discussed
	Cited
	Cited
	Cited
	Discussed
	Cited
	Cited
	Cited
	Discussed

E. FORMS

§ 5.160

J. PARTITION OF CO-TENANCY PROPERTY*

§ 5.160 Introduction

Where real property is owned by two or more persons as co-tenants (i.e., either as tenants in common or as joint tenants), one or more of the owners can compel either (1) the division “in kind” of the land itself into distinct “divided” parcels to be held by each owner separately or (2), if that is not feasible, the sale of the entire tract to one of the owners, at the appraised value, or (3) at a public sale, with a proportional split of the net sale proceeds among the owners.¹ A joint owner’s right to partition is absolute.²

Such process is supervised by the local district court which confirms the amount of each party’s respective interest in the land, and then appoints three commissioners to determine whether a distribution “in kind” can be made, or that an appraisal with a sale is needed to avoid “manifest injury” to any party.³

The public policy preference is to separate the property “in kind”. The use of the concept of “owelty” assists in carrying out such distribution “in kind” by having the commissioners define unequal but functional parcels and then attribute values to each parcel. Any difference in value between the tracts being received would be adjusted by the payment of money by the person receiving the more valuable parcel. Such owelty process can be ordered by the court, who is always acting in equity in a partition action, even if not all parties consent to such process. The court will apparently consider whether the property will sell for a higher total amount if sold altogether or in multiple parcels, as part of its attempt to avoid manifest injury.⁴ In the *Dewrell* case, one party insisted on a division in kind, even if in unequal parcels, in order to allow her to continue to operate her horse ranch on her particular tract. In appropriate circumstances, such as in the *Dewrell* case, the court may direct the commissioners to allocate particular portions of the land to a specific party.⁵

It should be noted that, by statute and according to an Oklahoma Attorney General’s Opinion, where a co-tenant owns both surface and mineral interests in a parcel, such owner can force a

*By Kraettli Q. Epperson

10, 545 P.2d 742 (Okla. 1976).

[Section 5.160]

³12 Okla. Stat. Ann. §§ 1501.1 et seq.

¹Cox v. Lasley, 1981 OK 111, 639 P.2d 1219 (Okla. 1981); Wolfe v. Stanford, 1937 OK 21, 179 Okla. 27, 64 P.2d 335 (1937).

⁴Dewrell v. Lawrence, 2002 OK CIV APP 105, 58 P.3d 223 (Div. 1 2002).

²Wilson v. Hartman, 1976 OK

⁵12 Okla. Stat. Ann. § 1507.

partition of an interest in either the surface or the mineral estate, or both. However, where the minerals are already owned separately from the surface, a partition of the minerals between co-owners is not allowed absent an allegation in the petition, and absent proof at time of trial, that (1) one of the co-owners is frustrating the development of such minerals, and (2) a pooling order from the Corporation Commission will not achieve the desired result.⁶

If the Commissioners' Report shows the property to be worth less than \$5,000.00, an abbreviated sale process is provided by statute.⁷

The Court must award costs, attorneys fees and expenses, and apportion them among the parties according to their interests in the land, and award execution for such amounts, if not promptly paid.⁸

§ 5.161 Petition

The Petition must describe the property and the respective interests of the owners thereof, if known.¹ Where the name of the owner is unknown or the amount of a party's interest is unknown, as much information as is available must be set forth in the Petition.² In addition, in any Petition involving the partition of a mineral estate, the Petition must specify and the plaintiff must establish at trial, by a preponderance of the evidence that, as noted above, (1) one of the co-owners is frustrating the development of such minerals, and (2) a pooling order from the Corporation Commission will not achieve the desired result.³

While it is not required by statute, in order to ensure that any title that is derived from a Partition sale is free from liens, holders of a specific or general lien on the land may be named as parties.⁴ If the land is sold or conveyed through a Partition action without joining and paying, or otherwise paying, such lienholders, the liens continue to encumber the property in the hands of the new owners.

As a court of equity, the Partition Court has full power to make any reasonable order to make a just and equitable partition and to secure the parties' interests.⁵

Any answer by a party may state the amount and nature of

⁶12 Okla. Stat. Ann. § 1501.1(B);
1982 OK AG 126.

⁷12 Okla. Stat. Ann. § 1517.

⁸12 Okla. Stat. Ann. § 1515.

[Section 5.161]

¹12 Okla. Stat. Ann. § 1501.1.

²12 Okla. Stat. Ann. § 1502.

³12 Okla. Stat. Ann. § 1501.1(B).

⁴12 Okla. Stat. Ann. § 1503.

⁵12 Okla. Stat. Ann. § 1516.

§ 5.161

their interest, and may deny the interest of the plaintiff or other defendants.⁶

§ 5.162 **Petition form**

The state statutes do not provide a required or suggested form for a “Petition” for a partition action. The following is a suggested form for such a “Petition”:

IN THE DISTRICT COURT OF (OKLAHOMA) COUNTY
STATE OF OKLAHOMA

<u>(PLAINTIFF’S NAME),</u>)	
)	
Plaintiff,)	
)	
vs.)	Case No. CJ-20__-__
)	
<u>(DEFENDANTS’ NAME(S))</u>)	
)	
Defendant(s).)	

PETITION TO PARTITION REAL PROPERTY

COMES NOW the Plaintiff, (PLAINTIFF’S NAME) and for his/her cause of action against the Defendant, (DEFENDANTS’ NAME(S)), alleges and states:

1. That the Plaintiff and Defendant are the sole owners as tenants in common of, and each of them is exercising control and asserting possession in and to, the following-described real property situated in (OKLAHOMA) County, State of Oklahoma, to-wit:

(LEGAL DESCRIPTION) (the “Subject Property”),

2. That the Subject Property is owned and held in undivided shares and proportions as follows:

(a) (PLAINTIFF’S NAME): an undivided (one-half (½)) fee simple interest, tenancy in common; and

(b) (DEFENDANT’S NAME): an undivided (one-half (½)) fee simple interest, tenancy in common.

3. That no other person has any interest or lien in, to, or upon the Subject Property, and that the Plaintiff believes that the Subject Property is not capable of being divided in kind in partition.

WHEREFORE, Plaintiff prays (1) that a date, time, and loca-

⁶12 Okla. Stat. Ann. § 1504.

tion certain be appointed for hearing this petition, (2) that notice to the Defendant, and to other interested parties, of the hearing be given, (3) that upon hearing this petition, the Court order and decree (a) that the interest of the Plaintiff and Defendant, and other parties, be determined to be as herein set forth, (b) that partition of the Subject Property be made according to such interests, (c) that the Court appoint three (3) commissioners (i) to determine whether the Subject Property can be divided in kind between the parties without doing manifest injury (using owelty if necessary), and, if such division is possible to describe the parcels and any necessary owelty, and (ii) if such division is not possible, then to appraise the Subject Property, (4) that the Court order such division in kind by ordering a sheriff's deed, including any necessary adjustment due to owelty, or, if such division in kind is not possible, to offer the land to the owners at the appraised value, and, if none, or if several, of such owners want to acquire the whole of the Subject Property at such price, then to order a sale, (5) that the Court provide such other order and relief as may be proper, and (6) that the costs, attorney's fees and expenses which may accrue in this action be apportioned among the parties according to their respective interest in the land and paid from the proceeds of sale, if the land is sold and, if the land is not sold, but is partitioned in kind, that a lien for a proportional share of such costs, attorneys fees and expenses be imposed on each of the party's respective interests in the Subject Property, in favor of the other party, and be made subject to immediate foreclosure, if such amounts are not paid promptly, as if such lien were a mortgage lien thereon. In addition, the court is requested to provide additional or different relief, as it deems appropriate.

Respectfully submitted,

(NAME OF ATTORNEY)

OBA#_____

Attorney at Law

(ADDRESS)

(PHONE NUMBER)

Attorney For Plaintiff,

(NAME OF PLAINTIFF)

ATTORNEY'S LIEN CLAIMED

(Verification is not required by statute)

VERIFICATION

§ 5.162

STATE OF OKLAHOMA)
) ss.
COUNTY OF *[name of county]*)

(PLAINTIFF'S NAME) being first duly sworn, states and deposes:

1. I am of legal age;
2. I am the plaintiff in the foregoing Petition;
3. I have read the foregoing Petition, and can state, from my personal knowledge and information, that the contents thereof are true and correct. If called upon to testify in open court, I would testify in conformity herewith.

FURTHER AFFIANT SAITH NOT.

(PLAINTIFF'S NAME)

Subscribed and sworn to before me, a Notary Public on this _____ day of _____, 20____, by (PLAINTIFF'S NAME).

My Commission Expires: _____

My Commission Number is: _____

Notary Public
(SEAL)

§ 5.163 **Order for hearing form**

While the state statutes do not specifically require a written order (as opposed to a verbal order) setting the petition for hearing, the preparation and use of such an order reduces the chance of misunderstanding and error among the court and the parties. No specific period of time is set forth in the Partition statutes for the advance notice of the Hearing to order partition. Therefore, the court should specify the date for the hearing and also specify how far in advance the defendant must receive such notice. If you follow the general statutes concerning civil service of process, they require that an Answer be filed within twenty (20) days, with the possibility of an automatic 20-day extension.¹

The state statutes do not provide a required or suggested form

[Section 5.163]

¹12 Okla. Stat. Ann. § 2012.

for an “Order” for a hearing on the petition.² The following is a suggested form for such an “Order”:

IN THE DISTRICT COURT OF (OKLAHOMA) COUNTY
STATE OF OKLAHOMA

<u>(PLAINTIFF’S NAME)</u> ,)	
)	
Plaintiff,)	
)	
vs.)	Case No. CJ-20____-
)	
<u>(DEFENDANTS’ NAME(S))</u>)	
)	
Defendant(s).)	

**ORDER FIXING TIME FOR HEARING PETITION FOR
PARTITION**

Whereas, Plaintiff (PLAINTIFF’S NAME), as a person interested in the real property (described below), has filed herein a petition praying for partition and the appointment of commissioners to make partition of the real property, described as follows:

(LEGAL DESCRIPTION) (the “Subject Property”).

It is therefore ordered by the court that this petition be heard in the district court at the county courthouse of (OKLAHOMA) County, Oklahoma County, in the city of (CITY), the County Seat, State of Oklahoma, in courtroom _____ of the undersigned judge on the _____ day of _____, 20____, at _____ o’clock _____m.

It is further ordered that notice of said hearing be given to the defendant herein, (DEFENDANT’S NAME), at least _____ days before the hearing.

Dated this _____ day of _____, 20_____.

Judge

²12 Okla. Stat. Ann. §§ 1505, 1506.

§ 5.163

Approved by:

(ATTORNEY'S NAME),
OBA# _____
(ATTORNEY'S ADDRESS)
(ATTORNEY'S TELEPHONE
NUMBER)
Attorney For Plaintiff,
(PLAINTIFF'S NAME)

§ 5.164 Notice of Hearing petition for partition form

The state statutes do not provide a required or suggested form for a "Notice Of Hearing". The following is a suggested form for such a "Notice":

IN THE DISTRICT COURT OF (OKLAHOMA) COUNTY
STATE OF OKLAHOMA

(PLAINTIFF'S NAME),)
)
Plaintiff,)
)
vs.) Case No. CJ-20__-____
)
(DEFENDANTS' NAME(S)))
)
Defendant(s).)

NOTICE OF HEARING PETITION FOR PARTITION

To Defendant:

(DEFENDANT'S NAME)
(DEFENDANT'S ADDRESS)

You are hereby notified that Plaintiff (PLAINTIFF'S NAME) has filed in this court a petition for partition of the real property, described as follows:

(LEGAL DESCRIPTION) (the "Subject Property"), said petition praying for partition and the appointment of commissioners to make partition of all that Subject Property; that the _____ day of _____, 20____, at _____ o'clock _____m., in the courtroom of Judge _____, in the (OKLA-

HOMA) County district court, room _____, in the court house of said (OKLAHOMA) County, State of Oklahoma, is appointed as the time and place of the hearing of said petition, when and where all persons interested may appear and contest the same.

Dated this _____ day of _____, 20____.

Respectfully submitted,

(NAME OF ATTORNEY)

OBA#_____

Attorney at Law

(ADDRESS)

(PHONE NUMBER)

Attorney For Plaintiff,

(NAME OF PLAINTIFF)

§ 5.165 Order for Partition form

The state statutes do not provide a required or suggested form for an “Order for Partition”.¹ The court should include in the Order a reasonable deadline for the commissioners to report back to the court. The following is a suggested form for such an “Order”:

IN THE DISTRICT COURT OF (OKLAHOMA) COUNTY STATE OF OKLAHOMA

(PLAINTIFF’S NAME),)

Plaintiff,)

vs.)

Case No. CJ-20__-____

(DEFENDANTS’ NAME(S)))

Defendant(s).)

ORDER FOR PARTITION

Now on this _____ day of _____, 20____, this cause came on for hearing on the petition of (PLAINTIFF’S NAME), for the partition of certain real property (described below), said Plaintiff

[Section 5.165]

1506.

¹12 Okla. Stat. Ann. §§ 1505,

§ 5.165

appearing by (PLAINTIFF'S ATTORNEY'S NAME), his/her attorney; said Defendant (DEFENDANT'S NAME), appearing by his/her attorney, (ATTORNEY'S NAME); said petition for partition having been filed on the _____ day of _____, 20____; and the court having inspected the pleadings and exhibits, and having heard evidence and the arguments of counsel, and being fully advised in the premises, it is FOUND, ADJUDGED AND DECREED by the court that the Plaintiff (PLAINTIFF'S NAME), and the Defendant (DEFENDANT'S NAME), together own all of the fee simple interest in the subject real property and are each owners of an undivided (ONE-HALF (½) FEE SIMPLE) interest therein, as tenants in common, in the following described real property, situated in (OKLAHOMA) County, Oklahoma, to-wit:

(LEGAL DESCRIPTION) (the "Subject Property").

It is therefore considered and adjudged by the court, that the shares of the aforesaid parties, and their respective interests in the Subject Property, as set forth above, be and the same are hereby confirmed; and it is further ordered, adjudged and decreed that partition of said Subject Property be made accordingly; that (COMMISSIONER#1 NAME), (COMMISSIONER#2 NAME), and (COMMISSIONER#3 NAME) are hereby appointed commissioners, and upon taking the oath prescribed by law, shall proceed to make said partition, preferably in kind, if possible without doing manifest injury to the parties, and, if necessary to such partition in kind, to use owelty, and to report the same to this court on or before the _____ day of _____, 20____, at the hour of _____ o'clock ____m.

DISTRICT JUDGE

Approved by:

(NAME OF ATTORNEY)

OBA#_____

Attorney at Law

(ADDRESS)

(PHONE NUMBER)

Attorney For Plaintiff,

(NAME OF PLAINTIFF)

§ 5.166 Commissioners' Oath form

Before the commissioners enter upon their duties, they must take and subscribe an oath providing that they will perform their

duties faithfully and impartially, and to the best of their abilities.¹ There are no statutory eligibility requirements set forth for the commissioners, but the use of licensed appraisers is prudent.

The state statutes do not provide a required or suggested form for a “Commissioner’s Oath” for a partition action. The following is a suggested form for such an “Oath”:

IN THE DISTRICT COURT OF (OKLAHOMA) COUNTY
STATE OF OKLAHOMA

<u>(PLAINTIFF’S NAME),</u>)	
)	
Plaintiff,)	
)	
vs.)	Case No. CJ-20____-____
)	
<u>(DEFENDANTS’ NAME(S))</u>)	
)	
Defendant(s).)	

OATH

We, the undersigned, (COMMISSIONER #1 NAME), (COMMISSIONER #2 NAME) and (COMMISSIONER #3 NAME), the commissioners appointed by the court in the above entitled cause, being duly sworn upon our oath say that we will perform our duties as such commissioners faithfully and impartially, to the best of our ability.

Witness our hands this _____ day of _____, 20_____.

(COMMISSIONER #1 NAME)

(COMMISSIONER #2 NAME)

(COMMISSIONER #3 NAME)

Subscribed and sworn to before me this _____ day of _____, 20_____.

[Section 5.166]

¹12 Okla. Stat. Ann. § 1508.

§ 5.166

Notary Public

[12 Okla. Stat. Ann. § 1508 (SEAL)]

My Commission Expires: _____

My Commission Number is: _____

§ 5.167 Report of commissioners form

The commissioners shall make partition (i.e., divide the land into separate parcels) according to the parties' respective proportional shares, if such division can be done without doing "manifest injury" to the parties. The suggested division, and any adjustment in equalizing the value received by each party (using owelty) must be reported to the court. If such division in kind cannot be done in a reasonable fashion, then that fact must be reported to the court, and the commissioners will also conduct an appraisal of the property. These conclusions, along with any appraisal, are all submitted to the court as part of their report.¹

The state statutes do not provide a required or suggested form for a "Commissioner's Report" for a partition action. The following is a suggested form for such a "Report":

IN THE DISTRICT COURT OF (OKLAHOMA) COUNTY
STATE OF OKLAHOMA

<u>(PLAINTIFF'S NAME),</u>)	
)	
Plaintiff,)	
)	
vs.)	Case No. CJ-20__-__
)	
<u>(DEFENDANTS' NAME(S))</u>)	
)	
Defendant(s).)	

REPORT OF COMMISSIONERS

We, the undersigned, (COMMISSIONER #1 NAME), (COMMISSIONER #2 NAME) and (COMMISSIONER #3 NAME), the

[Section 5.167]

¹12 Okla. Stat. Ann. § 1509.

commissioners appointed by the court in the above entitled proceedings on the _____ day of _____, 20____, to make partition between the Plaintiff (PLAINTIFF'S NAME) and the Defendant (DEFENDANT'S NAME), of that certain real property situated in (OKLAHOMA) County, Oklahoma, to-wit:

(LEGAL DESCRIPTION) (the "Subject Property"), do hereby certify and report to the Court that, before entering upon our duties as such Commissioners, we took and subscribed the oath directed by statute; that we then proceeded to view, inspect, and examine the above-described premises for the purpose of making partition thereof as ordered and directed by the Court.

We found that partition of said property can be made among the said parties according to their respective interests as determined and ordered by said order of the Court herein without manifest injury to said parties, and we have accordingly partitioned the said above-described property as follows, to-wit:

TO:

1. (PLAINTIFF'S NAME): (LEGAL DESCRIPTION);

And

2. (DEFENDANT'S NAME): (LEGAL DESCRIPTION).

[OR]

We found that partition of the Subject Property among the parties according to their respective interests as determined and ordered by said order of the Court herein cannot be made without manifest injury to the parties, and we have accordingly made a valuation and appraisal of the above-described real property, the Subject Property, and determined the total value of the same to be in the amount of \$_____.

In witness whereof, we have hereunto subscribed our names this _____ day of _____, 20____.

(COMMISSIONER #1 NAME)

(COMMISSIONER #2 NAME)

(COMMISSIONER #3 NAME)

§ 5.168 Final decree: division in kind form

If the commissioners partition the property in their Report,

§ 5.168

and there are not exceptions to the Report filed, the court shall confirm such partition.¹

The state statutes do not provide a required or suggested form for a “Final Decree” for a partition action. The following is a suggested form for such a “Decree”:

IN THE DISTRICT COURT OF (OKLAHOMA) COUNTY
STATE OF OKLAHOMA

(PLAINTIFF’S NAME),)
)
Plaintiff,)
)
vs.) Case No. CJ-20__-____
)
(DEFENDANTS’ NAME(S)))
)
Defendant(s).)

FINAL DECREE

(in-kind)

On this _____ day of _____, 20____, this action coming on to be further heard upon the report filed herein by (COMMISSIONER#1 NAME), (COMMISSIONER#2 NAME) and (COMMISSIONER#3 NAME), the Commissioners heretofore appointed herein by the court to make partition of the real property involved in this action, said Plaintiff (PLAINTIFF’S NAME) being represented by his/her attorney, (ATTORNEY’S NAME), and the Defendant (DEFENDANT’S NAME) by his/her attorney, (ATTORNEY’S NAME);

And it appearing to the court that said Commissioners, after having first taken and subscribed the oath prescribed by law, which has been duly filed herein, and having duly inspected and examined the real property, as directed by the order of said court made herein on the _____ day of _____, 20____, to-wit:

(LEGAL DESCRIPTION) (the “Subject Property”).
as directed by the order of this Court entered on the _____ day of _____, 20____; and the Commissioners having thereafter filed herein their report finding that said premises can be

[Section 5.168]

¹12 Okla. Stat. Ann. § 1511.

partitioned without manifest injury to the owners thereof as ordered by the Court, and having partitioned the same accordingly, and no objections or exceptions having been taken to said report;

It is by the Court CONSIDERED, ORDERED AND DECREED that the said report of the Commissioners is hereby in all things ratified, confirmed and approved by the Court, and the said real property is hereby ordered partitioned among the parties hereto as follows, such partition to be and remain firm and effectual forever:

TO:

(c) (PLAINTIFF'S NAME): (LEGAL DESCRIPTION);

and

(d) (DEFENDANT'S NAME): (LEGAL DESCRIPTION).

And it is further FOUND, ORDERED, ADJUDGED AND DECREED that the costs, attorneys fees and expenses herein (including fees and expenses of Plaintiff's attorney in the sum of \$_____) totaling \$_____, are reasonable and are hereby assessed in equal proportions to the parties hereto, and, until paid in full to the Plaintiff, (ONE-HALF (1/2)) of such amounts is hereby made a lien on the interest of the Defendant in the Subject Property, subject to immediate foreclosure.

IT IS SO ORDERED, on _____.

Judge

Approved for Entry:

(NAME OF ATTORNEY)

OBA#_____

Attorney at Law

(ADDRESS)

(PHONE NUMBER)

Attorney For Plaintiff,

(NAME OF PLAINTIFF)

§ 5.169 Sheriff's deed: Taking property in kind

The state statutes do not provide a required or suggested form

for a “Sheriff’s Deed.” The following is a suggested form for such a “Sheriff’s Deed”:

WHEREAS, on the _____ day of _____, 20____, in the district court within and for (OKLAHOMA) County, State of Oklahoma, in Case Number Case No. CJ-20____-_____, styled Plaintiff (PLAINTIFF'S NAME) v. (DEFENDANT'S NAME), in an action to partition certain real property and premises as hereinafter described, it was duly adjudged and decreed that the said plaintiff and the said defendant were the sole and exclusive owners, in fee simple, as tenants in common, of:

NOW THEREFORE, I, _____ Sheriff of (OKLAHOMA) county, Oklahoma, in consideration of the premises and in pursuance of said order of said court and of the statutes in such case, have, and do hereby, granted, bargained, sold, and conveyed unto the said buyer, (PLAINTIFF'S NAME), to his/her heirs and assigns, forever, and by these presents, do grant, bargain, sell, and convey unto the said buyer, his/her heirs and assigns, forever, the said real estate and premises situate in (OKLAHOMA) County, Oklahoma, and particularly described above, together with all and singular the tenements, improvements, hereditaments, and appurtenances thereon and thereunto belonging or in any wise appertaining.

In witness whereof, I, the said sheriff as aforesaid, have hereunto set my hand and seal this _____ day of _____, 20____.

STATE OF OKLAHOMA)
) SS.
COUNTY OF [name of county])

69

acknowledged to me that he, as such sheriff, executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth.

In witness whereof I hereunto set my hand and official seal the day and year last above written.

(Notary Public)

My Commission (No. _____) Expires: _____
(SEAL)

After recording return to:

(NAME OF ATTORNEY)
OBA# _____
Attorney at Law
(ADDRESS)
(PHONE NUMBER)
Attorney For Plaintiff,
(NAME OF PLAINTIFF)

§ 5.170 Notice of time limit for filing exception to the report of commissioners or election to take property at appraisalment form

The plaintiff or his attorney must mail a copy of the Commissioner's Report to the attorney of record for all other parties, by certified mail, within ten (10) days of the filing of the Report.¹ Any exceptions to such report (e.g., challenging the valuation or other matters) must be filed within 20 days from the filing of the Report.²

The state statutes do not provide a required or suggested form for a "Notice of Time Limit." The following is a suggested form for such a "Notice":

IN THE DISTRICT COURT OF (OKLAHOMA) COUNTY
STATE OF OKLAHOMA

(PLAINTIFF'S NAME),)

[Section 5.170]

²12 Okla. Stat. Ann. § 1505.

¹12 Okla. Stat. Ann. § 1509.

§ 5.170

)	
Plaintiff,)	
)	
vs.)	Case No. CJ-20__-__
)	
<u>(DEFENDANTS' NAME(S))</u>)	
)	
Defendant(s).)	

**NOTICE OF TIME LIMIT FOR FILING EXCEPTION TO
THE REPORT OF COMMISSIONERS OR ELECTION TO
TAKE PROPERTY AT APPRAISEMENT**

The parties, and/or their attorneys of record, will take notice that the Commissioners appointed by the court in the above-styled cause have filed their report with the court clerk on the _____ day of _____, 20____, which report states that a partition cannot be made, and making an appraisement and valuation of said real property, the Subject Property; a copy of said report being attached to this notice.

The parties, and/or their attorneys of record, will further take notice that the time limit for filing an exception to the commissioner's report and an election to take the Subject Property at appraisement is not later than twenty (20) days from the date the report was filed.

Dated this _____ day of _____, 20_____.

Respectfully submitted,

(NAME OF ATTORNEY)
OBA#_____
Attorney at Law
(ADDRESS)
(PHONE NUMBER)
Attorney For Plaintiff,
(NAME OF PLAINTIFF)

§ 5.171 Affidavit of mailing notice of time limit for filing exception to the report of commissioners or election to take property at appraisalment form

An affidavit confirming the mailing of the Report is required by statute.¹

The state statutes do not provide a required or suggested form for an “Affidavit of Mailing”. The following is a suggested form for such a “Affidavit”:

IN THE DISTRICT COURT OF (OKLAHOMA) COUNTY
STATE OF OKLAHOMA

<u>(PLAINTIFF’S NAME),</u>)	
)	
Plaintiff,)	
)	
vs.)	Case No. CJ-20__-__
)	
<u>(DEFENDANTS’ NAME(S))</u>)	
)	
Defendant(s).)	

AFFIDAVIT OF MAILING

STATE OF OKLAHOMA)	
)	ss.
COUNTY OF <i>[name of county]</i>)	

(ATTORNEY’S NAME), being duly sworn, upon oath, deposes and says that:

1. I am the attorney of record for (PLAINTIFF’S NAME), a party to the above-styled proceedings;

2. On _____, said date being within ten (10) days after the Report of Commissioners in said cause was filed with the court clerk, I transmitted to the attorney of record for each party in the case, and to all parties appearing in the action *pro se*, via certified mail, return-receipt requested, a copy of the attached notice stating that the time limit for filing an exception to the Report of Commissioners, or an election to take the Subject Property at appraisalment, is not later than twenty (20) days from the date the

[Section 5.171]

¹12 Okla. Stat. Ann. § 1509.

§ 5.171

report was filed; and

3. Each copy of the notice was accompanied by a copy of the Report of Commissioners filed in the above-styled proceedings.

Further affiant sayeth not.

(ATTORNEY'S NAME),

Affiant

Subscribed and sworn to before me this _____ day of _____, 20____.

Notary Public

My Commission (No. _____) Expires: _____

§ 5.172 Election to take property at appraisalment form

If one of the parties elects to take all of the property at the appraised value, such party must file such election within twenty (20) days of the filing of the Commissioner's Report.¹

The state statutes do not provide a required or suggested form for an "Election." The following is a suggested form for such an "Election":

IN THE DISTRICT COURT OF (OKLAHOMA) COUNTY
STATE OF OKLAHOMA

(PLAINTIFF'S NAME),)

)

Plaintiff,)

)

vs.)

)

(DEFENDANTS' NAME(S)))

)

Defendant(s).)

Case No. CJ-20__-____

ELECTION TO TAKE PROPERTY AT APPRAISEMENT

[Section 5.172]

¹12 Okla. Stat. Ann. § 1512; see Rodgers v. Twedt, 2008 OK CIV APP 11, 177 P.3d 1111 (Div. 2 2007), cert.

denied, (Jan. 14, 2008) (court's discretion to extend 20-day response period expires upon passage of initial 20 days).

COMES NOW the Plaintiff (PLAINTIFF'S NAME) and shows the Court that the Commissioners heretofore appointed by this Court to make partition of the real estate involved herein (Subject Property), have duly made and filed their report showing that partition of said property cannot be made without manifest injury to the parties herein, and valuing and appraising the same at the sum of \$_____.

The said Plaintiff hereby elects and offers to take said property at said appraisal and prays that this Court may order and direct the sheriff of (OKLAHOMA) County, Oklahoma, to make, execute, and deliver to this Plaintiff a proper deed of conveyance of said property upon payment to the said Defendant (DEFENDANT'S NAME) of the sum of \$_____, same being the proportion of each of said parties of the said appraised value of the said real estate and premises (i.e., (1/2 EACH)); however, such amount is subject to a proportional reduction for costs, attorneys fees and expenses, paid by Plaintiff.

Respectfully submitted,

(NAME OF ATTORNEY)

OBA#_____

Attorney at Law

(ADDRESS)

(PHONE NUMBER)

Attorney For Plaintiff,

(NAME OF PLAINTIFF)

§ 5.173 Final decree: election to take property at appraisal form

If one of the parties elects to take all of the property at the appraisal value, the court must direct the sheriff to make a deed to that party.¹

The state statutes do not provide a required or suggested form for a "Final Decree". The following is a suggested form for such a "Final Decree":

IN THE DISTRICT COURT OF (OKLAHOMA) COUNTY
STATE OF OKLAHOMA

[Section 5.173]

¹12 Okla. Stat. Ann. § 1512.

§ 5.173

(PLAINTIFF'S NAME),)
)
Plaintiff,)
)
vs.) Case No. CJ-20____-____
)
(DEFENDANTS' NAME(S)))
)
Defendant(s).)

FINAL DECREE

(by sale)

On this _____ day of _____, 20____, this action comes on to be heard upon the report filed herein by (COMMISSIONER #1 NAME), (COMMISSIONER #2 NAME) and (COMMISSIONER #3 NAME), the Commissioners heretofore appointed to make partition of the real property involved in this action. Plaintiff (PLAINTIFF'S NAME) appeared by and through his/her attorney, (ATTORNEY'S NAME), and the Defendant (DEFENDANT'S NAME) by and through his/her attorney, (ATTORNEY'S NAME);

And it appearing to the court that said Commissioners, after having first taken and subscribed the oath prescribed by law, which has been duly filed herein, and having thereafter duly gone upon and personally inspected the real property that is the subject of this action, to-wit:

(LEGAL DESCRIPTION) (the "Subject Property").
as directed by the order of this Court entered on the _____ day of _____, 20____, and the Commissioners having thereafter filed herein their report finding that said premises cannot be partitioned without manifest injury to the owners thereof and that the said Commissioners have valued and appraised said real estate and premises at the sum of \$_____; and no objections or exceptions having been taken to said report;

It is by the Court FOUND, ORDERED, ADJUDGED and DECREED that the said report of the Commissioners is hereby in all things ratified, confirmed and approved by the Court.

And it further appearing that Plaintiff (PLAINTIFF'S NAME) has duly and timely filed herein his/her election to take said real estate and premises at the appraised value of \$_____.

It is therefore further ORDERED, ADJUDGED and DECREED that the sheriff of (OKLAHOMA) County, Oklahoma, be, and he is hereby ordered and directed to make, execute, and deliver a deed duly conveying the above-described real estate and premises

and all improvements thereon and appurtenances thereunto belonging, to the said Plaintiff (PLAINTIFF'S NAME) upon payment by Plaintiff to the Defendant (DEFENDANT'S NAME), of the sum of \$_____, being the proportion due each of the said parties of the appraised value of said real estate and premises; however, said sum being subject to the deductions noted below.

And it is further FOUND, ORDERED, ADJUDGED and DECREED that costs, attorneys fees and expenses herein (including fees and expenses of Plaintiff's attorney in the sum of \$_____) totaling \$_____ (hereinafter "Costs"), are reasonable and are assessed in equal proportions to the parties hereto, and the Plaintiff shall deduct from the amount to be paid to the Defendant for his one-half of the Subject Property, (ONE-HALF (1/2)) of such Costs (said one-half being \$_____), with any unpaid balance being an in personam judgment in favor of the Plaintiff and against the Defendant.

After deducting (ONE-HALF (1/2)) of the Costs from the amount to be paid to the Defendant by the Plaintiff, the sum of \$_____ is due to the Defendant for his interest in the Subject Property.

IT IS SO ORDERED, on _____.

Judge

Approved for Entry:

(NAME OF ATTORNEY)

OBA#_____

Attorney at Law

(ADDRESS)

(PHONE NUMBER)

Attorney For Plaintiff,

(NAME OF PLAINTIFF)

§ 5.174 Sheriff's deed: election to take property at appraisal form

The state statutes do not provide a required or suggested form for a "Sheriff's Deed." The following is a suggested form for such a "Sheriff's Deed":

SHERIFF'S DEED

WHEREAS, on the _____ day of _____, 20____, in the district court within and for (OKLAHOMA) County, State of Oklahoma, in Case Number Case No. CJ-20_____-_____,

styled Plaintiff (PLAINTIFF'S NAME) v. (DEFENDANT'S NAME), in an action to partition certain real property and premises as hereinafter described, it was duly adjudged and decreed that the said plaintiff and the said defendant were the sole and exclusive owners, in fee simple, as tenants in common, of:

NOW THEREFORE, I, _____ Sheriff of (OKLAHOMA) County, Oklahoma, in consideration of the premises and in pursuance of said order of said court and of the statutes in such case made and provided, for and in consideration of the sum of \$_____, cash in hand paid by the said buyer (PLAINTIFF'S NAME), to the said seller (DEFENDANT'S NAME), as evidenced by the receipts heretofore presented to me, have granted, bargained, sold, and conveyed unto the said buyer, (PLAINTIFF'S NAME), his/her heirs and assigns, forever, and by these presents, do grant, bargain, sell, and convey unto the said buyer, his/her heirs and assigns, forever, the said real estate and premises situate in (OKLAHOMA) County, Oklahoma, and particularly described above, together with all and singular the tenements, improvements, hereditaments, and appurtenances thereon and thereunto belonging or in any wise appertaining.

In witness whereof, I, the said sheriff as aforesaid, have hereunto set my hand and seal this _____ day of _____, 20____.

STATE OF OKLAHOMA)
) SS.
COUNTY OF [name of county])

On this _____ day of _____, 20____, before me, the undersigned, a notary public within and for said state, personally appeared _____, Sheriff of (OKLAHOMA) County, State of Oklahoma, known to me to be the identical person described in and who executed the foregoing instrument of writing, and acknowledged to me that he, as such sheriff, executed the same as his free and voluntary act and deed, for the uses and purposes

In witness whereof I hereunto set my hand and official seal the day and year last above written.

My Commission (No. _____) Expires: _____
(SEAL)

(NAME OF ATTORNEY)
OBA#_____
Attorney at Law
(ADDRESS)
(PHONE NUMBER)
Attorney For Plaintiff,
(NAME OF PLAINTIFF)

If none of the parties elect to take the property at the appraised value, or several of the parties so elect, then the court will order the land sold intact for at least two thirds of the value at a general execution sale.¹ Additional notice requirements are set forth in the partition statutes.²

The state statutes do not provide a required or suggested form for a “Final Decree.” The following is a suggested form for such a “Final Decree”:

(PLAINTIFF'S NAME),)
)
Plaintiff,)
)

²12 Okla. Stat. Ann. § 1513.

159

§ 5.175

vs.) Case No. CJ-20____-____
)
(DEFENDANTS' NAME(S)))
)
Defendant(s).)

FINAL DECREE

(by sale)

On this _____ day of _____, 20____, this action comes on to be heard upon the report filed herein by (COMMISSIONER #1 NAME), (COMMISSIONER #2 NAME) and (COMMISSIONER #3 NAME), the Commissioners heretofore appointed to make partition of the real property involved in this action. Plaintiff (PLAINTIFF'S NAME) appeared by and through his/her attorney, (ATTORNEY'S NAME), and the Defendant (DEFENDANT'S NAME) by and through his attorney, (ATTORNEY'S NAME);

And it appearing to the court that said Commissioners, after having first taken and subscribed the oath prescribed by law, which has been duly filed herein, and having thereafter duly gone upon and personally inspected the real property that is the subject of this action, to-wit:

(LEGAL DESCRIPTION) (the "Subject Property").
as directed by the order of this Court entered on the _____ day of _____, 20____, and the Commissioners having thereafter filed herein their report finding that said premises cannot be partitioned without manifest injury to the owners thereof and that the said Commissioners have valued and appraised said real estate and premises at the sum of \$_____; and no objections or exceptions having been taken to said report;

It is by the Court FOUND, ORDERED, ADJUDGED and DECREED that the said report of the Commissioners is hereby in all things ratified, confirmed and approved by the Court.

And it further appearing that none of the parties have duly and timely filed herein an election to take said real estate and premises.

It is therefore further ORDERED, ADJUDGED and DECREED that the Subject Property is to be sold at general execution, with additional notice requirements as required by the partition statutes, 12 Okla. Stat. Ann. §§ 1501.1 et seq.

IT IS SO ORDERED, on _____.

Judge

Approved for Entry:

(NAME OF ATTORNEY)

OBA#_____

Attorney at Law

(ADDRESS)

(TELEPHONE NUMBER)

Attorney For Plaintiff,

(NAME OF PLAINTIFF)

F. LIST OF PUBLISHED ARTICLES (Available On-Line) by Kraettli Q. Epperson

KRAETTLI Q. EPPERSON:
PROFESSIONAL LECTURES & PUBLICATIONS: PUBLISHED LIST
ORGANIZED BY DATE
(Last Revised January 10, 2012)

2011

248. **"The Real Estate Mortgage Follows the Promissory Note Automatically Without an Assignment: The Lesson of BAC Home Loans", 82 OBJ 2938 (December 10, 2011)**
245. **"An Introduction to the Transfer on Death Act & Changes Coming in 2011", TitleGram Newsletter (October 14, 2011)**

2010

239. **"Oklahoma's Marketable Record Title Act: An Argument for its Application to Chains of Title to Severed Minerals after *Rocket Oil and Gas Co. v. Donabar*", The Oklahoma Bar Journal (March 12, 2011)**
236. **"Update on Oklahoma Title Related Cases: For 2009-2010", The Oklahoma County Bar Association Briefcase (December, 2010)**
228. **"Do Statutory Monetary Penalties, Arising due to a Lender's Failure to File a Mortgage Release, Apply to Constructive Mortgages and Fixtures Filings?", The Oklahoma County Bar Association Briefcase, Part I: V. 42, No. 1 OCBA Briefcase 5 (January 2010), and Part II: V. 42, No. 2 OCBA Briefcase 5 (February 2010)**

2009

227. **"The Elusive Legal Malpractice Statute of Limitations for Attorney Title Opinions", The Oklahoma County Bar Association Briefcase, Part I: V. 41, No. 10 OCBA Briefcase 7 (October 2009), and Part II: V. 41, No. 12 OCBA Briefcase 7 (December 2009)**
226. **"Marital Homestead Rights Protection: Impact of *Hill v. Discover Card?*", 80 The Oklahoma Bar Journal 2408 (November 21, 2009)**
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