

THE PARTITION

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Abstract: *The partition is the judicial action by which the timeshare is terminated by transforming the rights to abstract quota of the property from succession into individual **property** rights over assets in the shared partition by their effective allotment to the heirs of the defunct.*

It can be petitioned at any time by all co-owners except for the case when there is an agreement of temporary suspension of the right to petition for partition among them (no. 663-664).

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The definitive or property partition is different from the usage or provisional partition which refers only to the possession and use of succession assets during the timeshare, each co-owner individually using the assets, having the right to use the income they produce without the obligation to answer to the other co-owners. Unlike the definitive partition that produces retroactive effects from the beginning of the succession, the provisional partition produces effects only starting with the date it was carried out voluntarily or judicially.

The partition can be total, in respect to the entirety of the succession and of all co-owners, but it can also be spatial, either regarding some assets or one or both co-owners, the rest remaining in indivisibility.

THE FORMS OF PARTITION

The partition can be voluntary or judicial.

1. The voluntary partition

According to the provisions of art. 730 line 1 Civil Code, the voluntary partition can be carried out when all co-owners agree and are legally competent.

This partition can be done in writing (by authentic document or private signature) and consensual (verbal), in which situation, in order to be successfully invoked, it must be approved under the conditions of the common law (art. 1191 and Civil Code). However, the verbal partition must be unquestionable, since it cannot be inferred from equivocal state of affairs.

The voluntary partition can be made extra-judicially and also by a transaction done through an expedient decision in front of the trial court, even if there are minors or interdicted persons among the co-owners when there is the preliminary consent of the juvenile court and of the legal guardian if necessary (art. 6734 line 2 Rules of Civil Procedure). The voluntary partition

made without respecting the legal norms regarding minors' protection is not null, but only dissoluble (affected by relative invalidity), and can be ratified when the minor comes of age.

Moreover, the voluntary partition can be made during the notary succession procedure (art. 81 line 3 of Law no. 3601995). The voluntary partition can be partial, the trial court ensuing a decision for the remaining assets upon which there are dissensions.

The co-owners are free to share the inheritance as they deem fit (in kind, by giving it to one of them, by selling it at an auction and dividing the sum of money, etc.).

If a voluntary partition was made among the co-owners, none of them can petition for another partition at a later time.

2. The judicial partition

The judicial partition takes place when: the co-owners do not agree to a voluntary partition; there are co-owners who cannot be present at the partition; and there are cases when among the co-owners there are minors or interdicted persons, and the tutelary authority didn't agree to a voluntary partition (art.730 line 2 Civil Code and art. 6734 line 2 Rules of Civil Procedure).

A. Persons who can demand the partition

Co-owners. The first people entitled to petition for the partition are the co-owners. Nobody can be forced to remain in indivisibility, which is why any of the co-owners can petition for the partition.

The heir title is impassible. Legal heirs, residuary legatees, or residuary institutions can petition for the partition as well. In case of conveyance of their succession rights according to the provisions of art.1399 Civil Code, the transferees can also petition for the partition. Those who cannot claim the partition are the heirs who have no rights over the indivisible succession like private legatees or contract institutions, anomalous heirs, all of these receiving certain assets from the defunct individually.

Personal creditors of the co-owners can act diagonally. According to the provisions of art. 1825 Civil Code, the personal creditors of heirs cannot go after the indivisible part of the debtor from succession immovables before the partition of the entire assets is terminated. In this case, it is traditionally admitted that these creditors do not exert this right in their own name but for the co-owner-debtor, diagonally (art. 974 Civil Code). That is why, as the co-owner cannot petition for the partition of one or another succession assets, the creditor or the one acting diagonally in his/her name, and not in their own name, cannot go after the indivisible part of an immovable, but only petition for the partition of the entire succession.

Since the co-owners' creditors do not act in their own name, but diagonally (for the co-owner), they cannot petition for the partition only in case

the debtor could have done that, and not when there is a valid agreement for temporary maintenance of the indivisibility.

B. The necessary capacity to participate in a partition

Even though the partition produces declaratory effects, and not translative effects, the action is not ordinary since by it a significant transformation of the ownership rights is made, the indivisible rights over the partition being substituted by individual rights over certain assets. The participation in the partition requires the legal competence of all co-owners, plaintiffs and defendants alike.

Hence, while the legally competent majors can participate in the partition (in their own name or through a trustee), minors under 14 years old and the interdicted persons participate through legal representative (parents or tutors), and the persons with limited legal competence (minors between 14 and 18 years of age) participate together with their legal guardians (parents or tutors).

C. The partition procedure

a) The partition claim

According to the provisions of art. 6732 Rules of Civil Procedure, the partition claim must include the persons entitled to the succession, the heir title of each of them, the assets to be divided, their assessment, where they are and who owns them or administers them.

If there are three or more co-owners, the partition can also be made partially, only to one or some of the co-owners, the rest remaining in indivisibility at their own request. The partial partition is inadmissible when all the co-owners require the termination of the indivisibility.

b) The admittance of the partition claim

When the object of the partition is an inheritance that does not pose particular problems with the assessment of the succession assets and with their allotment, the trial court will firstly give a decision that establishes the assets to be divided, the persons entitled to receive them, the quotas for each heir, the claims the heirs have from each other, and the inheritance passive. Afterwards, it will allot the assets and the eventual sums of money to create a balance among the former co-owners (art. 6735 Rules of Civil Procedure).

c) Preliminary admittance of the partition claim

If the inheritance cannot be directly divided by the court since there is a need for the evaluation of the assets, the court will first proceed to drawing up a document that stipulates the assets to be divided, the persons entitled to receive them, the quotas for each heir, the claims the heirs have from each other, and the inheritance passive. An expert will be designated to evaluate the assets and propose the allotments to be attributed to the co-owners (art. 6736 Rules of Civil Procedure).

Equality in rights of the co-owners and the equity of the partition impose the establishment of the circulation value of indivisible assets at the date of division, but taking into consideration their state at the moment the succession was started; the decrease or increase of value must be supported by all co-owners according to their share of the inheritance.

The evaluation is done according to specific criteria for each category of assets. Thus, the lands evaluation will be done according to: class, fertility, economic importance, destination, climate of the area, nature and properties of the soil, distance from urban localities and communication means, eventual degradation process, etc. As far as constructions are concerned, they will be evaluated according to the nature of the materials they are made of, the comfort degree, location, year of construction, prices in the area, access ways, etc.

In the case of the assets bought with a loan, the partition will include the ownership right over the assets at the circulation value at the date of the partition, and not only at the advance and instalments paid until that moment, the remaining credit being transferred to the inheritance passive.

d) **The partition. Attribution of the succession assets**

The principle of attributing succession assets in kind. The allotments formed by the expert – corresponding to the quota value attributed to each co-owner – will be attributed in kind by the court, taking into consideration the provisions of art. 741 line 1 Civil Code according to which „when forming allotments and parties, the same amount of movable assets, immovable assets, rights or debts of the same nature and value must be attributed”. Thus, without the agreement of the co-owners, the attribution of succession assets to one (some) of the co-owners and only the counter value in money to the others is illegal so long as the attribution in kind is possible.

Nonetheless, in order to avoid the decrease of the economic value of the succession assets (especially immovables), „the division beyond measure” of inheritances and the „division of exploitations” (art. 741 line 2 Civil Code) will be avoided, which means that eventually the componence of the allotments is a question of estimation de facto, and not de jure.

For the formation and attribution of allotments, the court will take into consideration the agreement of the parties, and in its default such criteria as: the size of the quota that comes to each party; the nature of the assets; the residence and job of the parties; the fact that some of the co-owners have brought improvements to the succession assets with the others’ agreement, etc. (art. 6739 Rules of Civil Procedure). None of these criteria can be prevail over the others, thus their correlation is imposed.

The eventual difference in value among allotments (some co-owners receiving allotments that surpass the value of the quota they have from the inheritance) will be compensated by the payment of some sums of money in favour of the co-owners whose allotments have a lower value than their quota

(art. 742 Civil Code and art. 6735 line 2 Rules of Civil Procedure). The payment obligation of the established sum of money for several co-owners is divisible and not solidary, each having to pay their share and not the whole.

Failure to pay the money on time cannot entail the resolution of the partition (this is not a sale), the other co-owners having no other option but to force execute the debtor's assets.

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