IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

[redacted] Plaintiff, Cross-Defendant And Respondent	Court of Appeal No.H023859
v.	
[redacted] Defendant, Cross-Complaint And Appellant.	Superior Court No. M41721

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT

OF MONTEREY COUNTY

Honorable MICHAEL S. FIELDS, Judge

RESPONDENT'S BRIEF

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vi.	)	[redacted]
	)	
[redacted]	)	
	)	Superior Court
Defendant, Cross-Complaint	)	[redacted]
And Appellant.	)	
	)	

RESPONDENT'S BRIEF

INTRODUCTION

The defendant and appellant, [redacted] [hereinafter [redacted] or "appellant"], reneged on her agreement to marry the plaintiff and respondent, [redacted] [hereinafter [redacted] or "respondent"], and breached her agreement to pay one-half the purchase price and one-half of the expenses of maintaining the real property in Salinas that she and [redacted] purchased as joint tenants. While living with [redacted] at the Salinas property, she began working only part-time and negotiated with him to pay him a monthly stipend of $500 plus all food and utilities. She did not follow through on this agreement. She left [redacted] and his young son and established residence elsewhere. She contributed nothing to the mortgage

payments, upkeep of the property, or living expenses for the household after leaving [redacted]

Although she was not married to [redacted] took to calling herself [redacted] on occasion and incurred debts under that name which [redacted] had to pay off for her. After several months of living on her own, she proposed to [redacted] that she move back into the house and that they share expenses. The wiser from his previous experience, [redacted] refused this offer and initiated proceedings to have [redacted] removed from the title to the property. [redacted] then declared bankruptcy.

Following the termination of the bankruptcy proceedings, [redacted] acting as her own attorney filed a cross-complaint against [redacted] for palimony in a Marvin type proceeding. With current counsel, she abandoned the Marvin proceeding and initiated a cross-complaint for partition of the property and claimed entitlement to one-half of the value of the Salinas property. [redacted] stipulated to partition by way of appraisal should the court elect partition as the remedy, and stipulated to a current appraised value of the property at $385,000. However, at trial [redacted] tried to renege on this stipulation as well and said she would not agree to stipulation by appraisal. The court honored the stipulation for partition by way of appraisal, but found the equities compelling on the side of the respondent and awarded [redacted] an interest in the property equivalent to her contribution to the property, i.e., 1.8 percent reflecting the total value of the stipends she had given to [redacted]

On appeal, [redacted] claims she is entitled to one-half the value of the property by virtue of the fact that the title was in joint tenancy. She cites no authority for this proposition, and in fact, long-standing case authority gives the trial court discretion to make an equitable division of

interests when title is taken in joint tenancy. She also claims that the trial court had no authority to order a partition by appraisal rather than a sale of the property even though she had stipulated to a partition by appraisal. She argues that the trial court did not follow the proper procedure for a partition by appraisal because the court combined the interlocutory and final judgments in one judgment. She now claims that the proper procedure was a partition by sale which would have required [redacted] and his young son to vacate the property that he alone has financed since he took occupancy.

The trial judge treated [redacted] charitably when he determined in this action in equity that [redacted] had a concurrent interest equivalent to the stipend she had paid to [redacted] Although she contributed nothing to the purchase price, she still received an equitable interest. [redacted]'s argument that the court erred in proceeding by way of partition by appraisal with a sale of her interest to [redacted] is meritless because she stipulated to this procedure before trial. Further, the parties contracted orally at the time of purchase of the property that each would have the right to acquire the other's interest in the property. Lastly, the trial court did not err in combining the interlocutory and final judgments rather than issuing two judgments. The judgment rendered resolved all issues between the parties. Nowhere in the filings in the trial court or in this court has [redacted] alleged and proven that she had entitlements which were thwarted because the trial court rendered one judgment instead of two.

STATEMENT OF THE CASE

On November 2, 1998, plaintiff and respondent filed a complaint to quiet title to the real property commonly known as [redacted]

[redacted] (C.T. 1-5.)[1] On or about January 6, 1999, defendant, acting in propria persona, filed an "Answer" and a "Cross Complaint for Partition of Real Property and Petition for Declaratory Relief" which alleged two causes of action: (1) that she owned an "undivided one-half interest" in the property and that "[p]artition by sale of the property is more equitable than division in kind of the property," and (2) a palimony claim that the parties agreed to live as husband and wife, co-own real property, and that [redacted] would provide the financial support for the family while [redacted] would take care of the children. (Augmented Transcript, Exh. "A" p. 3.)

On July 20, 1999, the Honorable Robert O'Farrell issued an order setting aside the filing of [redacted] Answer and Cross-Complaint for failure to pay the filing fees. (See Augmentation.) Thereafter, on September 2, 1999, respondent again served her with a summons and complaint. (R.T. 1/19/01 at p. 267.) Less than a week later on September 8, 1999, defendant [redacted] filed a petition in bankruptcy. (C.T. 39; R.T. 587-588.) On September 17, 1999, the clerk noted that the quiet title action was stayed pending discharge of bankruptcy. (C.T. 7.) On January 26, 2000, a hearing was held before Judge O'Farrell on the request for default. Respondent testified as a witness. (See R.T. (1/26/00) at pp. 1-5.) Judge O'Farrell determined that the bankruptcy was no longer in effect and had been discharged on November 29, 1999, and granted respondent's request for a default judgment. (C.T. 8; R.T. (1/19/01) at pp. 257-258.) On March 24, 2000, the judgment for quiet title was filed with the superior court.

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[1]. The conventional designations "C.T." and "R.T." will be used for the Clerk's and Reporter's Transcripts, respectively.

(C.T. 9-11.)

Approximately one year after the default judgment was granted by the court, [redacted] obtained attorney Roy Gunter, III as her counsel and filed a motion to set aside the default. (C.T. 39.) On January 19, 2001, Judge Silver entered an order setting aside the default because [redacted] was purportedly misadvised by her bankruptcy attorney. (R.T. (1/16/01) at pp. 270-271; C.T. 22.)

On February 1, 2001, [redacted] filed a "cross-complaint for partition of real property by sale." (C.T. 16-21.) On March 6, 2001, [redacted] filed an amended answer to the cross-complaint alleging affirmative defenses of forfeiture by breach of oral purchase contract and rescission by conduct. (C.T. 25-26.)

On September 13, 2001, [redacted] filed a "Trial Management Report and Brief" which contained the following stipulation:

"The parties have stipulated as follows:

A. The present appraised value of the residence and the rental values during the monthly periods from November 1998 through the present are those determined by Appraiser [redacted]

B. The entire down payment of $16,054.40 was paid by [redacted] and should be allowed as a credit; and

C. In the event the Court shall decide that [redacted] has a concurrent interest in the subject property, ***the parties agree to partition by appraisal pursuant to the terms as will be set forth in an agreement to be filed with the Court at Trial.***"

(C.T. 34 [*Emphasis added*].)

The court trial was held on September 18, 2001 before Judge Michael S. Fields. Trial lasted one day. The parties were the only witnesses to testify. Both sides rested and the court continued the matter to

another date in order to review the file, research points of law, and hear arguments of counsel. (C.T. 51-52; R.T. 598.)

On September 26, 2001, the parties presented their final statements. Thereafter the court entered the following order:

> "Defendant's motion previously made to dismiss as to quiet title is granted. Court orders that there be partician [sic] by way of appraisal upon payment of $7,000.00 by Plaintiff to Defendant which is 1.8% of the appraised value. Defendant is ordered to sign off on any claim to title. Title will therefore be with the Plaintiff upon payment of the $7,000.00 to Defendant. [¶] Attorney Dorset is to prepare the order." C.T. 53.)

On September 26, 2001, following entry of the judgment, [redacted] filed an untimely request for a statement of decision. (C.T. 54.) On October 4, 2001, the court denied this request pursuant to Code of Civil Procedure section 632. (C.T. 58.)

On October 5, 2001, [redacted] sent a proposed judgment to [redacted] (C.T. 72.) On October 15, 2001, the court judgment was filed. [redacted] filed objections to the proposed judgment on October 16, 2001. (C.T. 63-70.) These were denied by the court on October 26, 2001. (C.T. 81.) [redacted] notice of appeal was filed on December 4, 2001. (C.T. 82.)

STATEMENT OF THE FACTS

Respondent, [redacted] is a 46-year-old firefighter for the [redacted] and has been so employed for 25 years. He is a high school graduate, but took only a few college courses. (R.T. 505-506.)

[redacted] met appellant [redacted] in 1993. She was a therapist at the Community Hospital of the Monterey Peninsula. They dated for a couple of years and then got engaged in January 1996. (R.T. 507-

508.) They did not live together. (R.T. 513.) They decided to purchase the aforementioned [redacted] residence together in April 1996. The home was to be a family home where they would live together as husband and wife and raise [redacted] young son from a previous marriage. (R.T. 508-509.) [redacted] entered into an oral agreement that they would buy the property together and contribute equally (50/50) to the purchase and cost of the property. [redacted] would borrow the down payment from his retirement account and [redacted] would pay him back. (R.T. 513-514, 516, 551, 562, 566, 573.) They would each be responsible for their own debts. (R.T. 527.) If there was no marriage, then either party had the right to buy out the other person's interest in the property. (R.T. 549.)[2]

They signed a "reservation instrument" in which the subdivider agreed to reserve the property. [redacted] were each to put down a deposit of $500 to reserve the property. [redacted] wrote out a check but then withdrew the check forcing [redacted] to put down the entire $1,000.00. (R.T. 514; Plaintiff's Exhibit 1.) [redacted] told [redacted] that she did not have the money. [redacted] never did receive this $500.00 from her. (R.T. 514.)

On or about April 29, 1996, [redacted] signed a real

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[2]. In her original cross-complaint Ford states that McCabe and she had agreed that ownership would be equal in real and personal property even though their contributions were not equal. She alleged in a palimony cause of action that McCabe "would provide the financial support and income necessary for [Ford] and the child to live." (Augmentation, Exh. "A".) Ford's recollection was different at trial. She testified that they never discussed what would happen with the home if their relationship ended. (R.T. 576.)

estate purchase contract indicating that the property would vest in them as joint tenants. (Plaintiff's Exhibit 3.) The purchase price of the property was $210,890.00. (R.T. 532; Plaintiff's Exh. 3.)

Interest on the home loan was fixed at eight and one-half percent. They were required to pay mortgage insurance as part of the loan agreement.[3] Property taxes, homeowners' insurance and mortgage insurance were impounded. [redacted] put down $16,054.40 toward the purchase and closing costs. (C.T. 34; R.T. 519-521.) The closing date was September 9, 1996. (R.T. 522.)

[redacted] allowed [redacted] name on the title though she had contributed nothing toward the purchase of the property because they were going to be married. (R.T. 522.) They took title as joint tenants because the realtor explained to them that "that's the way married people do who have title to homes. . . ." (R.T. 510.) They knew that this meant they were co-owners with rights of survivorship. (R.T. 547-548.) Appellant did not take this to mean that they were 50/50 owners. She testified as follows: "I don't think we actually said 50/50. The home would be ours." (R.T. 573.) They held themselves out as married on a buyer's profile for the residence. (R.T. 511; Plaintiff's Exh. 7.)

[redacted] moved into the property on September 10, 1996. (R.T. 507.) The mortgage and mortgage insurance payment was $1670.34 a month. Homeowner's insurance was $38.33 a month. Real

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[3]. [redacted] signature did not appear anywhere on the loan application. (R.T. 597, Defendant's Exh. "H.") [redacted] was sure however that she had filled out a loan application. (R.T. 597.) They listed their incomes on the reservation instrument as $42,000 ([redacted]) and $26,000 ([redacted]). (R.T. 546-547.)

property taxes were $183.55 per month, and homeowner's dues $69.42 a month. (C.T. 31; R.T. 538-539.) During one month, as an example, [redacted] paid $1944.15 for the mortgage, taxes and insurance on the property. (R.T. 539.) [redacted] got into a car accident as they were moving into the property. The accident did not require her to be hospitalized. Nonetheless, following the accident, Ford claimed she was unable to work full time. In an effort to accommodate her alleged inability to work full time, [redacted] and [redacted] agreed that until [redacted] was able to work full-time she would contribute $500.00 toward the mortgage, buy the food, and pay all of the utilities. [redacted] would pay the balance of the mortgage. (C.T. 40; R.T. 523-524, 555-557; Augmented Transcript, Exh. "C," Memo of Points and Authorities, p. 4.)

[redacted] did not intend to make a gift to [redacted] for a one-half interest in the property. He expected [redacted] to pay her share and to reimburse him for the down payment. (R.T. 561.) He would not have purchased the property if he knew they would not marry. (R.T. 562.)

[redacted] paid $500.00 per month on a sporadic basis for seven months for a total of $3,500. She did not pay all of the utilities as promised for the seven months that she lived with [redacted]. (C.T. 40; R.T. 523-526, 568.) At the time of trial, [redacted] had paid more than $121,000.00 toward the residence. (R.T. 542.)

[redacted] broke up with [redacted] and moved out of the house in June 1997. (R.T. 523-526, 564.) She moved into a condominium in Salinas. (R.T. 592.) It was her decision to break off the engagement with [redacted] and she voluntarily moved out of the house. (R.T. 525.) She paid nothing to [redacted] after moving out of the house. (R.T. 525, 540, 568-569.) [redacted] has paid all mortgage payments since the property was

purchased. (R.T. 538-539.)

After [redacted] moved out, [redacted] requested that [redacted] write a letter for her to [redacted]'s landlord to the effect that [redacted] had no obligation to pay anything toward the Salinas property as she could not afford to pay both obligations. [redacted] did so. (R.T. 526.) [redacted] was working as a lab tech for community hospital at the time of their separation. (R.T. 564.)

[redacted] rented a condo in Salinas after moving out. (R.T. 592.) [redacted] testified that in the period from January to March 1998, she asked [redacted] to move back into the Salinas house because she was having financial difficulties. (R.T. 564.) She stated that [redacted] told her "no." (R.T. 593.) She never sent a letter to [redacted] requesting that she be allowed back on the premises. (R.T. 597.)

[redacted] had the property appraised on May 3, 1999, so that he could refinance the property to reduce his mortgage payment. It turned out that the appraised value of $205,000 was below the purchase price. The reason for this was that the development was not completed and a new house could be bought for the same price that he had paid. (R.T. 532-534, 579; Plaintiff's Exh. 5.) This appraisal influenced [redacted]'s opinion concerning the fair market value of the property at that time. (R.T. 534.) [redacted], through their counsel, later stipulated that the appraised value of the property at the time of trial was $385,000 based upon an appraisal by [redacted]. (R.T. 535, 559; Defendant's Exh. "K.")

When they purchased the Salinas property, [redacted] filled out an application for a joint Bank of America Visa Card which was to be used only for improvements to the property. [redacted] told [redacted] he did not want another credit card debt. Notwithstanding this warning, [redacted] had maxed out the credit on the card at $2,500.00. Some of these charges were

incurred after they broke up. None of these expenditures were incurred for the property.[4] [redacted] told [redacted] she would have to pay off the debt. She said that she had, but it turned out that she had not. [redacted] was forced to pay off the debt for her. (R.T. 517-518, 549.)

On occasions [redacted] held herself out as Mrs. [redacted]. (R.T. 563.) She used the names [redacted] and [redacted] in her petition for bankruptcy. (R.T. 594.) She never returned the engagement ring that [redacted] purchased for her. (R.T. 526-527.) At trial, she claimed she no longer had it. (R.T. 565.)

[redacted] testified that she believed she was entitled to one-half the value of the Salinas property. (R.T. 589, 595.) She felt she had no obligation to pay anything on the mortgage because she had moved out and had to take care of herself. (R.T. 595-597.)

[redacted] has endured financial hardship as the result of [redacted]'s decision to make him solely responsible financially for the Salinas residence. [redacted] has had to forego buying things for his son. He has been unable to refinance the property to reduce the interest rate because [redacted] name is still on the title. (R.T. 528-531.)

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4. [redacted] claimed that the amount she put on the card was $975.20, and that she believed these charges were for the home, but she could not state what they were used for. She also believed that the credit card debt was discharged in her bankruptcy. (R.T. 575.)

ARGUMENT

I.

THE TRIAL COURT HAD THE AUTHORITY TO ORDER AN EQUITABLE DIVISION OF THE CONCURRENT INTERESTS OF THE PARTIES ACCORDING TO THEIR RESPECTIVE CONTRIBUTIONS TO THE PROPERTY.

Appellant contends that the trial court had no power to make an equitable division of the parties' concurrent interests in the subject real property. Appellant claims that she is entitled to a fifty (50%) interest in the property as a joint tenant even though the amount she actually contributed was $3,500. (Appellant's Opening Brief [hereinafter "AOB" at p. 16.) Appellant ignores long-standing case law and treatise authority that a partition action is an action in equity and that the trial court has the power to divide interests of the parties in an equitable manner. Appellant's argument also ignores the fact that the parties by oral agreement and by their conduct displayed that it was their intention to hold title in true joint tenancy only in the event two condition precedents were fulfilled: (1) the parties were married; and (2) they made equal contributions to the purchase and upkeep of the property. These conditions were never fulfilled, and consequently, the parties held title as tenants in common with their interests to correspond to their respective contributions to the property.

A. Standard of review

Where the evidence is conflicting in an action to partition realty, the trial court has considerable latitude in determining the interests of the parties. (O'Bryant v. Bosserman (1949) 94 Cal.App.2d 353, 356.) A finding concerning the nature of a title or interest in real property, "just as in the case of other finding of the trial court, is binding upon the appellate

court if it is supported by substantial evidence or by reasonable inferences therefrom." (Turknette v. Turknette (1950) 100 Cal.App.2d 271, 278.)

Substantial evidence is not synonymous with "any" evidence. The evidence supporting the judgment must be credible, reasonable in nature, and of solid value. (Estate of Teed (1952) 112 Cal.App.2d 638, 644.) However, the testimony of a single witness, even that of respondent, can provide the requisite substantial evidence, regardless of the amount of evidence to the contrary. (Marriage of Mix (1975) 14 Cal.3d 604, 614.) In applying the substantial evidence test, the "'appellate court ordinarily *looks only at the evidence supporting the successful party, and disregards the contrary showing.*'" (Nestle v. City of Santa Monica (1972) 6 Cal.3d 920, 925 quoting 6 Witkin, Cal. Procedure (1971) § 249, p. 4241 [*italics* in original].) It accepts respondent's evidence as true, resolves all conflicts in the evidence in respondent's favor, and draws all favorable inferences that may reasonably be drawn. (Hasson v. Ford Motor Co. (1977) 19 Cal.3d 530, 544.)

B. The parties actual intentions were to own the property as tenants in common rather than in joint tenancy unless they were married and contributed equally to the purchase of the property.

"Except in a case of conveyance to married persons, when a deed conveys property to the grantees as 'joint tenants' there is a rebuttable presumption that it is, in fact, held in joint tenancy. This presumption . . . can be rebutted by evidence establishing a common understanding or agreement of all parties that the ownership of the property was to be other than joint tenancy." (Miller & Starr, Current Law of Cal. Real Estate (2d ed. 1989) § 12:18, pp. 139-140 [hereinafter "Miller & Starr"]; Estate of

Hoefflin (1959) 176 Cal.App.2d 619, 628; see also Costello v. Poole (1963) 217 Cal.App.2d 556, 559.) The presumption of joint tenancy "can be overcome by evidence of a written or oral agreement between the parties that the respective interests of the parties will be different from as indicated by the record title." (Miller & Starr, supra, § 12:38, p. 174; In re Marriage of Leversee (1984) 156 Cal.App.3d 891, 895.) "In California, . . . the intent of the parties is the most significant factor in agreements altering possessory rights between joint tenants. . . ." (Miller & Starr, supra, § 12:23, pp. 144-145.)[5]

Here, it is apparent from the evidence that the parties never intended to take title in joint tenancy with the right of survivorship unless they were married and contributed equally to the purchase of the property. The property was purchased in contemplation of marriage. The parties referred to themselves as "married" in the buyer's profile for the residence. (R.T. 512-513.) Respondent testified that he was "positive" they had an oral agreement that each would contribute equally to the purchase price and share equally in the property debt. (R.T. 513-516, 527, 551.) In accordance with this expectation, appellant tendered one-half of the $1,000 down payment on the reservation instrument only to later withdraw the check for insufficient funds. (R.T. 514.) Respondent tendered the entire down payment for the property. (R.T. 519-522.) He expected appellant to pay him back. (R.T. 514, 561.) He did not intend to make a gift to appellant of a one-half interest in the property. (R.T. 561.) Respondent

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[5]. With a limited exception inapplicable here, the statue of frauds does not apply to transmutations of property by oral agreements. (In re Marriage of Neal (1984) 153 Cal.App.3d 117, 124. fn. 12.)

allowed appellant's name on the title though he had paid the purchase price because they were going to be married. (R.T. 522.) Respondent would not have purchased the property if he had known they would not marry. (R.T. 562.) Thus, when appellant failed to contribute her 50% share and refused to marry respondent, the conditions precedent to her owning a 50% share of the property were never realized.

It also appears from the evidence that appellant never expected an equal share in the property simply because her name was on the title. When asked whether they would "own the home 50/50", appellant responded, "We agreed that the home would be ours. I don't think we actually said 50/50. The home would be ours." (R.T. 573.) If there was an agreement that the home would be owned in unequal interests according to their respective contributions, then the home was owned as tenants in common rather than joint tenancy. "A joint interest is one owned by two or more persons in equal shares. . . ." (Civ. Code, § 683.) Thus, the fact that the parties contemplated unequal shares according to their relative contributions to the property is indicative that they did not intend to own the property as joint tenants.

The parties took title as joint tenants because that was what the realtor told them to do. (R.T. 547-548.)[6] The discrepancy in the form of ownership between the grant deed (title in joint tenancy) and deed of trust (title as tenants in common) indicates that the parties did not pay much attention to the form of ownership, and that what was important to the

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[6]. "A husband and wife may hold property as joint tenants or tenants in common, or as community property." (Fam. Code, § 750.)

parties was their contemplation of marriage and agreement to contribute equally to the purchase price and upkeep of the property. (Pltf's Exh. 1; Deft's Exh. J; R.T. 504, 584.)

Accordingly, although the title was taken in joint tenancy, the parties agreed orally and by their conduct manifested their intention that the property would be held as tenants in common unless they were married and contributed equally to the purchase price and property debt. (R.T. 561.) These condition precedents to true joint tenancy ownership were never fulfilled.

C. The court had the power to divide the interests of the parties equitably in proportion to the amounts contributed.

"A partition action is an action in equity in which the cotenants seek to sever their ownership." (Miller & Starr, supra, § 12:14, p. 124.) In determining the nature of the title and expectations of the parties, a trial judge is not bound by the form of the deed alone. Property may be found to be other than that indicated by the deed when there is an oral or written agreement as to the ownership of the property, or where such understanding may be inferred from the conduct and declarations of the parties. (Thomasset v. Thomasset (1953) 122 Cal.App.2d 116, 133.) "[I]n a suit for partition all parties' interests in the property may be put in issue regardless of the record title (Code Civ. Proc., § 872.610; [citations]), and the court may consider the fact that parties have contributed different amounts to the purchase price in determining whether a true joint tenancy was intended [citation]. If a tenancy in common rather than a joint tenancy is found, the court may either order reimbursment (see *Demetris v. Demetris* [1954] 125 Cal.App.2d 440, 445 . . .) or determine the ownership interests

in the property in proportion to the amounts contributed (see *Kershman v. Kershman* [1961] 192 Cal.App.2d 23, 26-27 . . .)." (Milian v. De Leon (1986) 181 Cal.App.3d 1185, 1195-1196.)[7]

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[7]. Appellant argues that the cases which hold that a partition action is an action in equity and that the court can make an equitable division of the interests have been superceded by statute. Appellant states that "[a]lthough there is pre-1976 case authority that a partition of real property is an equitable proceeding (e.g., see Lent v. H.C. Morris Co. (1938) 25 Cal.App.2d 305, 307-308), there is no case which has held that this unfettered equitable review continued after Title 10.5 of the Code of Civil Procedure was enacted in 1976." (AOB at p. 15.) On the contrary, the Legislature itself codified existing case law into the 1976 partition statute. In Richmond v. Dofflemyer (1980) 105 Cal.App.3d 745, the court stated that "[a]s indicated in the comments of the California Law Commission, the primary purpose of the commission and of the Legislature was to codify existing law unless it was felt that there was some reason for making a change." (Id., at p. 753.) There was no reason for making a change in the nature of the partition proceedings. Published case law and the leading commentators on California Real Property Law in recent publications refer to a partition action as an action in equity and that the parties interests may be equitably divided. (See, e.g., 5 Miller & Starr, § 12:14, pp. 124, 132; Milian v. De Leon, supra, 181 Cal.App.3d 1185, 1195-1196.) In fact, "[a] partition judgment may be attacked directly in equity in cases where the court had no jurisdiction." (48 Cal.Jur.3d, Partition, § 100, p. 350.)

Further, section 872.610 of the Code of Civil Procedure provides that "[t]he interests of the parties, plaintiff as well as defendant, may be put in issue, tried, and determined in the action." Code of Civil Procedure section 872.140 provides that "[t]he court may, in all cases, order allowance, accounting, contribution, or other compensatory adjustment among the parties according to the principles of

In Cosler v. Norwood (1950) 97 Cal.App.2d 665, the plaintiff and defendant purchased a duplex for $27,000, the title being taken in the names of the parties as joint tenants with the understanding that each should pay half of the purchase price. Plaintiff paid one-fourth and the defendant paid three-fourths of the purchase price. They resided in the residence together until plaintiff moved out and filed an action for an accounting. The trial court decreed that plaintiff owned a one-fourth interest and the defendant owned a three-fourths interest in the property. This order was upheld on appeal. In upholding the ruling of the trial court the Court of Appeal stated:

> "There is no merit in plaintiff's contention that since the title to the real property was taken in the names of the parties as joint tenants defendant is estopped to claim that she has more than one-half interest in the property. Plaintiff by seeking a partition and an accounting put in issue the interest of each of the parties to the real property in question. Therefore the deed of joint tenancy was only one item of evidence to be considered by the court in connection with other probative facts produced by plaintiff and defendant."
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> (Id., at p. 666.)

Likewise, in Kershman v. Kershman, supra, 192 Cal.App.2d

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equity." Section 873.960 provides with respect to partitions by appraisal that the court may approve a report of a referee respecting the appraised value and the interests of the parties if "no facts appear which would make such transfer [of title] inequitable. . . ." Thus the partition statutes and case law are in accord that the court may utilize equitable principles in apportioning the interests of the parties and determining the method of partition in a partition action.

23, the plaintiff and defendant were married in 1950, and purchased a parcel of real property by joint tenancy deed in 1955. Citing Cosler and Thomassett, the Court of Appeal rejected the defendant's contention that the trial court had no power to do other than order an equal division of the proceeds of the sale of the property held in joint tenancy. (Id., at p. 26.) At trial, plaintiff testified that she would put in her $8000, he his $1000, and he would assume the mortgage of $7000. This was to equalize their payments on the property. The Court of Appeal noted that "[t]his testimony amply supports the implied finding that the plaintiff and defendant had agreed that their interests were not be equal *until* defendant had paid his share, and that their interests were to represent at any given point of time the contemporaneous proportion of their respective contributions in relation to the total." (Id., at p. 27 [original emphasis].)

The Thomasset, Cosler, and Kershman cases clearly support the actual and implied findings of the trial court that appellant was not entitled to an equal interest in the property until she married respondent and paid her share. Additionally, a reasonable inference can be derived from the evidence that even though [redacted] agreed with respondent to pay one-half of the purchase price and upkeep of the property (R.T. 561-562), she never had an intention to keep this promise. Consistent with the plan that they would share in the purchase price of the property, [redacted] tendered a check for $500 or one-half of the deposit on the reservation agreement; however, she later withdrew it claiming she did not have the funds. (R.T. 513-514.) [redacted]'s intention to contribute as little as she possibly could to the property is evidenced by her allegations in her original cross-complaint. In her original cross-complaint, [redacted] averred that it was her intention to have respondent "provide the financial support and income necessary for the

Cross-Complainant and the child to live." (See Augmentation, Exh. A, p. 3.) At trial, [redacted] denied that there was an agreement to share equally in the cost of the property. (R.T. 573.) Although she led respondent to believe she would share in the expenses of the property equally, she had no intention of doing so. On these facts, there was sufficient evidence for a finding by the court that appellant acquired her one-half share as a joint tenant with fraudulent intent and that such contract could be rescinded. (Civ. Code, § 1572, 1689, subd. (b)(1); C.T. 25; see Santoro v. Carbone (1972) 22 Cal.App.3d 721, 726-727.)

D. The interest awarded appellant by the trial court was more than she was entitled to receive.

Although tenancy in common raises a presumption of equal ownership, the court is "authorized to order an equitable compensatory adjustment to compensate the parties for their respective use of separate funds to purchase and improve the residence." (In re Marriage of Rico (1992) 10 Cal.App.4th 706, 710.) "[T]he proper measure of reimbursement for each party is the fair value of his or her separate property interest. . . . [¶] By calculating the percentage of the purchase price represented by the contributions for purchase and improvements, the court determine[s] the extent of the parties' unequal separate interests in the residence." (Ibid.)

Appellant contributed nothing toward the purchase price of the property or improvements to the property. The remainder of her contribution ($500 per month for seven months plus some utilities) was essentially equal to or less than her personal living expenses for shelter. Given that appellant paid nothing toward the purchase price or improvements, she had no ownership interest in the property and was entitled to reimbursement only for her contributions toward the mortgage.

(R.T. 542.) [8]

The Kershman court determined that since the parties respective ownership interests were to be determined by their relative contributions, the following example would be used to determine their interests:

> "A and B purchase a home for $20,000. A pays $16,000 and B pays $4000, or 20%, and it is agreed that their respective ownership interests are to be determined by the amounts of their contributions. Two years later they sell the house for $25,000. B receives 20% of the total proceeds, or 20% of $20,000 plus 20% of $5,000, the increment attributable to appreciation."
>
> (Id., at p. 29.)

Here, respondent contributed $121,000 toward the property and appellant $3,500. The principal balance on the mortgage at the time of trial was $191,573.23. (R.T. 536.) The property was purchased for $210,890. (R.T. 532.) The appreciation in value was $174,110 ($385,000 - $210,890.) Thus, at the time of trial the equity in the property was $193,426.77.

The ratio of appellant's $3,500 contribution to respondent's

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[8]. Appellant argues in support of this valuation which would have resulted in her receiving only the value of her contributions to the mortgage. She states that "[s]ince mortgages, insurance, real property taxes, and association dues are clearly for the 'common benefit,' these amounts are 'costs of partition,' which expenditures, by either party, should not have been utilized by the Trial Court to determine percentage of ownership of the subject real property." (AOB at p. 18.) Thus, according to appellant, her contribution to the mortgage should have played no part in the court's valuation of her interest.

$121,000 contribution is 2.8% of the total contributions made to the property. The 2.8% multiplied by the equity ($193,426.770) amounts to $5,416. (See Demetris v. Demetris, supra, 125 Cal.App.2d 440, 446 [net proceeds are calculated after deduction of the property debt].) The only method by which respondent can imagine the court derived a figure of 1.8% (or $7,000) for plaintiff was by dividing her contribution of $3,500 by the equity, and then multiplying the resultant 1.8% by the appraised value of $385,000 to obtain a figure of roughly $6,930 which the court rounded up to $7,000.

Accordingly, the court's valuation of the parties' respective interests in the property was more favorable to appellant than the facts and the law required. Appellant's claim that the court erred in failing to award her a 50% interest is groundless.

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING A PARTITION BY WAY OF APPRAISAL.

Appellant argues that the court had no authority to order a partition by appraisal because the parties never entered into a written agreement filed with the trial court setting out the terms of the agreement as specified in Code of Civil Procedure section 873.920. (AOB pp. 12-15.) On the contrary, no written agreement was necessary to effectuate the parties oral agreement upon the purchase of the property that one party could buy out the other's interest in the property if their relationship ended. Further, there was a written agreement filed with the court evidencing the parties agreement to a partition by appraisal if the court determined that the parties held concurrent interests in the property, the terms and conditions of

which would be determined during trial. Those terms and conditions were determined during trial. Appellant has waived the right to a partition by any method other than partition by appraisal. Further, given her stance at trial objecting to a partition by appraisal which she had earlier agreed to, it would have been fruitless for the trial judge to wait for the parties to execute a written agreement when the terms were undisputed and appellant had reneged on her agreement to proceed by partition by appraisal. Lastly, it would be inequitable to permit appellant to renege on her agreement that partition proceed by appraisal and to force a sale of respondent's home so that appellant can obtain her $7000 proceeds from the sale. Such an action would serve no other purpose than to have this court be a party to appellant's retribution against respondent.

A. The choice of the method of partition is vested in the discretion of the trial court.

"There are three methods by which to accomplish a partition: there can be a physical division of the property, a sale of the property and a division of the proceeds, or a partition by appraisal whereby one cotenant acquires the interests of the other cotenants based on a court ordered and supervised appraisal." (Miller & Starr, supra, § 12:14, pp. 123-124.) "By agreement of the parties, when their interests are not disputed, the partition can be accomplished by appraisal whereby one party purchases from another upon the agreed terms and conditions under court supervision." (Id., § 12:14, at p. 129.)

If the court finds that the plaintiff is entitled to partition, it makes an interlocutory judgment determining the interests of the parties and ordering partition. The judgment may, but need not, determine the manner of partition. (4 Witkin, Sum. of Cal. Law (9th ed. 1987) Real Property, §

297, p. 491; see also Code Civ. Proc., § 872.720, subd. (a); Miller & Starr, Current Law of Cal. Real Estate (2d ed. 1989) § 12:14, p. 125.) Here, the judgment did determine the manner of partition, i.e., partition by appraisal.

B. The parties implied agreement to sell their respective interests to one another required the partition to proceed by appraisal.

"An action for partition is an equitable proceeding [citation]. Although partition is a matter of right when a cotenant desires it [citation], it is subject to the requirement of fairness and the right may be waived by contract, either expressly *or by implication.*" (Penasquitos, Inc. v. Holladay (1972) 27 Cal.App.3d 356, 358 [*italics* added].) Further, "[w]here the effect of a cotenancy partition is to substantially impair contractually acquired joint rights, an agreement not to partition is implicit in the agreement. This is so because the contractual obligations are manifestly inconsistent with partition [citation]." (Id., at p. 359.)

Here, respondent testified that it was agreed that if the marriage did not occur the property would be divided. It was also implied that one party could buy out the other in the event of a break up. (R.T. 548-549.) A partition by sale or division of the property would be manifestly inconsistent with the agreement that one party could buy out the other. Accordingly, the parties contractual agreement modified appellant's right to partition in that she could only seek a partition by appraisal.

C. Appellant has waived the right to a partition by any method other than partition by appraisal.

"Partition can be waived impliedly in the absence of an express agreement between the cotenants. 'The situations in which the right of partition is so waived are varied in application.'" (Miller & Starr, supra,

§ 12:17, p. 136.) "In addition to the limitation on the right of partition derived from the express or implied waiver by agreement, the courts have imposed an even wider and more general limitation. This limitation subjects the right of partition to the 'requirement of fairness.'" (Id., § 12:17, p. 137; see also Penasquitos, Inc. v. Holladay, supra, 27 Cal.App.3d 356, 359.)

In this case, appellant informed the court that the parties had "stipulated" that "[i]n the event the Court shall decide that [redacted] has a concurrent interest in the subject property, the parties agree to partition by appraisal pursuant to the terms as will be set forth in an agreement to be filed with the Court at Trial." (C.T. 34.) This agreement would have informed respondent's presentation of evidence, and the evidence the court permitted the parties to present. In fact, the court interrupted respondent when evidence of respondent's loan payments was presented by respondent's counsel and requested a meeting off the record whereupon the parties returned and stipulated that respondent had made all the loan payments. (R.T. 539-541.) Thereafter, respondent introduced no evidence of the dollar amounts for contributions in the nature of mortgage payments, taxes, insurance, association dues, and improvements to which respondent would have been entitled to reimbursement in the event of partition by sale. (Kershman v. Kershman, supra, 192 Cal.App.2d at p. 28.) The fact that the court did not allow evidence of these compensatory adjustments after this off-the-record conference is compelling evidence that the court and parties were disposed to partition by appraisal. If this were not the case, then the court would not have disposed of the parties contentions by one judgment, but instead would have entered an interlocutory decree adjudging the parties respective interests and a partition by sale, and then ordered an accounting

of the parties' entitlement to compensatory adjustments prior to entering a final judgment.

D. **The parties' agreement filed with the court and subsequent stipulations on the record substantially complied with the provisions of Code of Civil Procedure sections 873.910 and 873.920.**

Code of Civil Procedure section 873.910 provides that "[w]hen the interests of all parties are undisputed *or have been adjudicated,* the parties may agree upon a partition pursuant to this chapter." (Emphasis added.)

In this case, the agreement filed with the court closely follows the language of section 873.910. The agreement specified that if the court determined there were concurrent interests in the property, i.e., the court adjudicated the parties' interests, then the parties agreed to partition by appraisal pursuant to terms set forth in an agreement to be filed with the court "*at trial.*" (C.T. 34 [Emphasis added].)

Code of Civil Procedure section 873.920 specifies that the written agreement shall include: (a) a description of the property, (b) the names of the parties and their interests, (c) the names of the parties who are willing to acquire the interests, (d) the name of a referee to whose appointment the parties consent, (e) the date the interests are to be appraised, and (f) other terms mutually agreed upon.

Appellant's trial brief contains the names of the parties (C.T. 30), a description of the property (C.T. 30), the agreement for the court to adjudicate the parties' interests (C.T. 34), respondent's intent to acquire the property through quiet title or other legal means (C.T. 32.), the fact that "[b]y stipulation of the parties, appraiser [redacted] was retained to

appraise the present value of the residence . . . "(C.T. 31), and the parties' agreement that respondent had made all payments on the property from June 1, 1997 until the present. (C.T. 31.)[9]

The only missing term was the appointment of a referee, and the appointment of a referee was unnecessary given the fact that the parties had stipulated that the court would determine the interests of the parties and stipulated that the appraisal by [redacted] would constitute the present value of the property. (C.T. 34.) Code of Civil Procedure section 873.940 provides that the "court shall appoint one referee . . . to appraise the property and the interests involved. The referee shall report the valuations and other findings to the court in writing filed with the clerk." However, appointment of a referee is required "only where it is determined that a referee is necessary or would be desirable or helpful and that is should not be so strictly construed as to require the expense and time-consuming services of a referee where the court has adequate evidence before it to render its decision." (Richmond v. Dofflemyer, supra, 105 Cal.App.3d 745, 755.) Here, there was no purpose to appointment of a referee and to do so would have been a needless expense.

Although the parties disagreed as to a valuation date (respondent asking for the amount established by expert appraisal around

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[9]. According to appellant, the parties submitted evidence of an expert appraisal which "went into evidence by stipulation" at the time of trial. (See Memorandum of Points and Authorities in Opposition to Motion for Production of Additional Evidence on Appeal, at pp. 3, 6.) Respondent requests that this court take judicial notice of this document in its file in this case pursuant to sections 452 and 459 of the Evidence Code.

the time that appellant moved out of the residence ($205,000), and appellant for the $385,000.00 current value as determined by appraiser [redacted]), this disagreement did not affect the validity of the agreement for partition by appraisal. The parties agreed that only one expert opinion could be offered as to the *valuation at the time of trial* and that was the appraisal by [redacted] which the court utilized in its judgment. (See fn. 9, supra; R.T. 532, 559-560.) Thus, if the court selected respondent's valuation date, the appellant would have been entitled to nothing because the appraised value of $205,000 was less than the purchase price of $210,890 and there would have been no equity in the property. Only if the court selected appellant's valuation based on the [redacted] appraisal was appellant entitled to anything, and if the court did select appellant's valuation, then both the appellant's interest in the property and the valuation date were undisputed. Thus, all of the necessary terms set forth in Code of Civil Procedure section 873.920 were agreed to by the parties either in writing or orally by stipulation at the time of trial.

Appellant argues that the parties stipulated that there was to be an accounting after the court judgment if the court determined that respondent was not entitled to quiet title of the property. (AOB at pp. 8-9, 18-19.) Appellant states that "[t]he parties had entered into a Stipulation in regard to such accounting, which Stipulation had been accepted by the Trial Court." Contrary to the statements in Appellant's Opening Brief, the court never agreed that an accounting was necessary to determine the parties respective interests in the property. The court believed the matter was not open to debate based upon the evidence presented. "THE COURT: I don't think there will be any dispute. The documents are in the hands of the bank, I assume. Is there anything more than Homeowners Association and taxes,

all items that have been paid? So if we need the exact amount, we can ascertain that." (R.T. 541.) The parties made it clear that an accounting was available to the court if necessary to resolve the legal issues in the case. However, no accounting was necessary.

III.

THE TRIAL COURT DID NOT ERR IN ISSUING A SINGLE JUDGMENT RATHER THAN TWO JUDGMENTS IN THIS CASE.

Appellant contends that the court erred in failing to follow the statutory procedure of first entering an interlocutory judgment determining the ownership interests of the parties in the real property, and later a final judgment. (AOB at p. 2.) On the contrary, the court followed the statutory procedure in entering an interlocutory judgment, and there was no need for any further post-judgment orders as the court finally disposed of the parties' contentions in a single judgment.

"There is only *one final judgment*, the last or ultimate judgment which determines the rights of the parties. . . ." (7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 7, p. 544.) The finality of the judgment can only be weighed in terms of the situation as it existed when the judgment was entered, rather than by the determination of events after the judgment. (Id., at p. 545.) The theory behind the final judgment rule "is that piecemeal disposition and multiple appeals in a single action would be oppresive and costly, and that a review of intermediate rulings should await the final disposition of the case." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 58, p. 113.)

In an action for partition, an interlocutory judgment determining the rights and interests of the parties, the manner of partition,

and directing that a partition be made is an appealable judgment. (Code Civ. Proc., § 904.1, subd. (a)(9).) As to the matters determined in the interlocutory judgment, the interlocutory judgment is final and only matters arising after entry of the interlocutory judgment may be reviewed in the final judgment. (48 Cal.Jur.3d, Partition, §§ 63,102, p. 305, 351 & fn. 13.) Thus, the court's interlocutory judgment determining the interests of the parties, the method of partition by appraisal, and directing a partition was a final judgment as to those issues. The court did not have to await the parties later filing of a more complete written agreement for partition by appraisal before giving effect to that agreement in the judgment entered by the court.

Further, there is no rule of law that says a court may not combine the interlocutory and final judgments where it is practical to do so. In fact, "'[i]t is a principle of chancery that a court of equity will if possible dispose of all issues between the litigants in one judgment in order to preclude further litigation.'" (In re Marriage of Gagne (1990) 225 Cal.App.3d 277, 288.) There was no reason for the court to enter separate judgments and occasion further delay in the resolution of this case given that all issues necessary for the court's judgment had been determined at trial. The court had determined the parties respective interests, the fact that there would be a partition, and the manner of partition, i.e., by appraisal according to the parties agreement. As there was no sale or division of the property, the court did not have to appoint a referee. (Richmond v. Dofflemyer, supra, 105 Cal.App.3d 745, 755.) The court permitted evidence of offsets during the trial and appellant could not come up with anything concrete. She said only that some expenditures on the joint visa card may have been for the benefit of the property. (R.T. 575.) Thus, at the

time the interlocutory (and final) judgment was entered, all of the conditions for the transfer of appellant's interest to respondent had been fulfilled. As there was no showing of costs or compensatory adjustments by appellant for the common benefit, there was no need to determine these amounts after an interlocutory judgment had been entered.

Additionally, Code of Civil Procedure section 873.980 provides that with respect to partitions by appraisal the "provisions of this chapter are cumulative and if, for default or other cause, interests are not transferred and acquired pursuant to this chapter, the parties may pursue their other rights of partition. . . ." Although appellant agreed to partition by appraisal by a written agreement filed at trial and the parties stipulated that respondent had made all the payments on the property from June of 1997 onward, appellant nonetheless later testified that she had no intent of agreeing to partition by appraisal. (R.T. 590.) Thus, to forestall future litigation that would undermine the judgment, the court had no choice but to finally dispose of the litigation in one judgment. The court's award of a 1.8% interest to appellant was based upon his understanding that appellant would sell her interest to respondent. The court could have sustained respondent's quiet title action and ordered reimbursement to appellant of her $3,500. The court was not obligated to render its judgment nugatory by waiting for the parties to execute a writing containing the terms of an agreement already before the court.

Further, any error in combining the interlocutory and final judgments was not prejudicial to appellant. In appellant's post-trial motions to the trial court, appellant did not submit any evidence that she merited any compensatory adjustments to her 1.8% interest. Simply stated, she failed to prove entitlement to any compensatory adjustments. (Cf.

Regaldo v. Regaldo (1962) 198 Cal.App.2d 549, 552-553 [failure to allow cotenant reimbursement in connection with partition sale for insurance premiums, interest and repairs was not error where tenant failed to prove these items].) The only other allowable cost would be attorneys fees if incurred for the common benefit of all parties to the action. The award of such fees is discretionary. The trial court could have found that Ms. [redacted] efforts to take one-half the value of the estate was unmeritorious and not for the common good, and that "a less time consuming and more meritorious path of resolution was available." (Forrest v. Elam (1979) 88 Cal.App.3d 164, 173-174, fn. 3.)

IV.

APPELLANT'S REQUEST FOR STATEMENT OF DECISION WAS PROPERLY DENIED AS UNTIMELY, AND THE COURT CONSIDERED AND DENIED APPELLANT'S OBJECTIONS TO THE PROPOSED DECISION.

Appellant recognizes that her request for statement of decision was untimely. (AOB at pp. 20-21.) Nevertheless, she claims she should be relieved of this default because the court's judgment was in error.

For bench trials completed within one day or within eight hours of court time over more than one day, the request for a statement of decision must be made before submission of the matter for decision. (Code of Civ. Proc., § 632; Cal. Rules of Court, rule 825(a); Architects & Contractors Estimating Serv. v. Smith (1985) 164 Cal.App.3d 1001, 1005.) The trial was completed within one day, and no request for statement of decision was filed by appellant before the matter was submitted for decision. (R.T. (9/26/01; 10:00 a.m.) at p. 765.) Therefore, the court properly ruled that the request was untimely. (C.T. 58.)

Appellant argues that she had no idea the trial court would render a decision "far beyond an interlocutory judgment of the ownership interests of each of the parties in the subject real property," and she should not be required to request a Statement of Decision in regard to issues which should not have been considered. (AOB at pp. 20-21.) This argument is meritless. An interlocutory judgment is an appealable judgment. (Code of Civ. Proc., § 904.1, subd. (a)(9).) It may finally dispose of both the parties interests in the property and the manner of partition. (Miller & Starr, supra, § 297, p. 491; Code Civ. Proc., § 872.720, subd. (a).) The essence of appellant's appeal is that the court erred in apportioning the parties concurrent interests and in choosing the method of partition. Appellant's ignorance of the law respecting the authority of the court is nobody's fault but appellant's.

Appellant also claims that the court did not consider her objections to the proposed judgment because the court judgment was filed on October 15, 2001, ten days after service by mail of the proposed judgment, and appellant's objections were not filed until October 16, 2001. (AOB at p. 21.) Nonetheless, as appellant recognizes, the court issued a decision denying appellant's request to set aside the judgment. (C.T. 81.) Thus, the objections were considered and denied.

V.

THE TRIAL COURT DID NOT ERR IN ALLOWING THE ADMISSION OF EVIDENCE REGARDING PAYMENTS MADE BY RESPONDENT FOR MORTGAGE, PROPERTY TAXES AND INSURANCE OR RESPONDENT'S TESTIMONY CONCERNING PROPERTY VALUE.

Appellant claims that payments made by respondent for mortgage, property taxes and insurance were irrelevant in the quiet title action and in the partition action until after an interlocutory decree had been rendered by the court. (AOB p. 24.) On the contrary, the quiet title action and the cross-complaint for partition were tried in one proceeding in one day based upon the testimony of two witnesses. The court did not receive the documentary evidence of respondent's payments on the property until after appellant and respondent had each presented their cases. (R.T. 582.) The order of proof was in the discretion of the trial court and there was no abuse of discretion. (McLellan v McLellan (1972) 23 Cal.App.3d 343, 353.) Further, as mentioned above, if the amounts contributed toward mortgages, property taxes and insurance were irrelevant to the court's valuation of the parties' interests, then appellant should have taken nothing by way of her cross-complaint because she contributed nothing to the purchase price.

Appellant also complains that the court allowed respondent to testify concerning his opinion concerning the value of the property at the time when appellant moved out of the property in June of 1997. (AOB at pp. 22-23.) The basis for this objection was that valuation takes place only after the court first establishes the parties respective interests in the property by an interlocutory judgment. This contention is without merit. The parties

stipulated through their attorneys that they could testify concerning the value of the property. According to respondent, "[t]he parties expressly reserved the right to challenge the appraiser's valuation through their own testimony." (Memo of Points and Authorities in Opposition to Motion to Produce Evidence on Appeal, p. 6, ¶ 6.) Further, appellant introduced testimony concerning the value of the property through the Rowland appraisal and through questioning of respondent and cannot now be heard that it was error to do so. (R.T. 559.)

CONCLUSION

Although appellant has claimed on appeal that the court's judgment is unsupported by substantial evidence, appellant has offered no legal or factual analysis to support that claim. Appellant's central legal assertion is that a court has no power to divide interests in real property held in joint tenancy other than 50/50. An unbroken line of cases stretching several decades has held that the manner in which title is taken is only one factor in determining the interests of the parties in real property. Appellant's factual claim is that the parties never agreed to partition. However, appellant makes no reference in her opening brief to the parties stipulation to proceed by partition by appraisal which stipulation is contained in her trial brief. Appellant's contention that the parties had no agreement to a partition by appraisal is contradicted by respondent's own filings with the court, the stipulations of the parties, and the evidence of the appraisal which appellant introduced into evidence.

From the outset of this litigation, appellant has asked for more than she is legally entitled, and when she does not get what she wants, she makes up a story or misstates the law in the hope that a court of law will buy it. This appeal is but another example. The judgment of the trial court

should be affirmed.

DATED: July 23, 2002

Respectfully submitted,

[redacted]
Attorney for Respondent

CERTIFICATE OF BRIEF LENGTH
(Cal. Rules of Court, rule 14(c)(1)

I, DAVID CARICO, certify:

1. I am an attorney, duly licensed to practice law in the State of California, and am the attorney for respondent in McCabe v. Ford, Court of Appeal No. H023859.

2. Respondent's brief in McCabe v. Ford, Court of Appeal No. H023859, contains ten thousand three hundred and twenty-two (10,322) words excluding the cover page, tables, and this certificate.

3. Respondent's counsel used the computer program Corel Wordperfect Office 2000, in calculating the number of words in Respondent's Brief.

The undersigned certifies that the foregoing is true and correct and signs this certificate on July 24, 2002.

DAVID CARICO
Attorney for Respondent

Case Name: McCabe v. Ford No. H023859

I declare that:

I am employed in the County of Monterey, California. I am over the age of 18 years and not a party to the within entitled cause; my business address is 215 West Franklin Street, Suite 309, Monterey, CA 93940.

On July 25, 2002, I served the attached

Respondent's Brief

in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Monterey, California, addressed as follows:

Monterey Superior Court
for delivery to
Hon. Michael S. Fields, Judge
1200 Aguajito Road
Monterey, CA 93940

Roy Gunter III
Law Offices of Roy Gunter
580 Calle Principal, Ste 2
Monterey, CA 93940

Jim McCabe
18018 Stonehaven Drive
Salinas, CA 93908

California Supreme Court
350 McAllister Street, Rm. 1295
San Francisco, CA 94102
(five copies)

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Monterey, California, on July 25, 2002.
(Date)

David D. Carico _____ _____