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an interest in the property by a large number of family members makes the family ownership particularly secure because they believe that at least a majority of the common owners must agree on any sale of the property. In many instances, as scholars, practitioners, and the media have brought to light, individuals or businesses have acquired a small interest in family-owned tenancy-in-common property and within a short time thereafter have filed partition actions requesting the court to order the entire property forcibly sold under a partition sale. Many who own family real property under the default tenancy-in-common rules are unaware that their ownership is inherently unstable until they are first exposed to the often counterintuitive rules governing partition after a partition action is filed and critical stages in the litigation have passed.

With respect to partition actions, an overwhelming majority of jurisdictions maintain a statutory preference for partition in-kind of the property (a physical division of the property into separate parcels). Many courts across the country, however, have developed an actual preference for partition by sale of the property, irrespective of language within their state's partition statute indicating that partition in-kind should be preferred. This preference for ordering a partition by sale has arisen in part because many courts across the country have developed and applied a narrow "economics only" test under which the courts will order a partition by sale if the hypothetical fair market value of the entire property is more than the aggregated fair market value of the subparcels that would result from a partition in-kind. Courts that primarily or exclusively consider economic factors in deciding whether to order partition in-kind or partition by sale give little weight to the non-economic value that a property may hold. These non-economic values can be substantial in many cases in which families have allowed certain family members to use the property as a primary residence (sometimes the family members who use the property would face homelessness if they could not reside on the property), the property

possesses strong ancestral or historical significance for a family, or the property has served for a long time as the site of a family-run business. Courts have often ordered partition sales in cases in which a family has owned the property for generations, has always timely paid all property taxes and other obligations needed to maintain ownership, or has used the land for a productive purpose.

In addition to undermining significant non-economic values, most tenants in common experience serious, even grievous economic harm, when their property is sold under partition by sale. This results because courts typically order the property sold using the same procedures as are used for forced sales such as sales under execution and foreclosure sales. Such sale procedures not only fail to be wealth maximizing, as courts that order partition sales under the "economics only" test appear to assume, but they also are notorious for selling property well below its fair market value. For example, courts have confirmed partition sales in which the properties in question sold for 20% or less of their market value. Therefore, although a partition by sale gives an individual cotenant an eminent domain-like power of condemnation without requiring a cotenant that seeks such a sale to prove that the other cotenants will benefit from the sale, there is no guarantee or even likelihood that the cotenants as a whole will receive fair market value compensation, which the Constitution requires for nearly all eminent domain proceedings. In the end, thousands of property owners who have lost their properties as a result of court-ordered partition sales have not only been stripped of their property rights but have also had a significant amount of their real property wealth stripped from them as well. This has been particularly devastating to less well off tenancy-in-common owners because of the fact that low- to moderate-income people have much less diversified asset portfolios than wealthier people, and real property ownership tends to constitute a substantial percentage of their asset holdings.

The act does not limit or prohibit the filing of a partition action and does

not replace in any comprehensive way existing partition laws, but provides narrowly focused statutory procedures and a hierarchy of remedies for use in partition actions involving heirs property only. Key highlights of the UPHPA include:

- A definition of "heirs property" limits the act to family-owned tenancy-in-common property that satisfies specific criteria, including requirements that one or more cotenants have acquired their interests from a relative (this excludes "first generation" tenancy-in-common property from the definition) and the cotenants do not have an express agreement governing the partition of the property. UPHPA's provisions require a court to determine whether property in a partition action is heirs property. If a court so determines, UPHPA will govern the action unless all the cotenants have agreed otherwise.
- To address a concern that some courts appoint people with an interest in the action to advise the court on how to partition the property, including whether to order a partition in-kind or a partition by sale, UPHPA prohibits any court-appointed commissioner (or referee or partitioner in jurisdictions that use one of these terms) from having an interest in or being a participant in the partition action.
- Under UPHPA, the court appoints a disinterested real estate appraiser to assess the fair market value of the property unless (1) all the cotenants agree on the value of the property, (2) all the cotenants agree to a different valuation method that will produce a value for the property, or (3) the court determines that the cost of the appraisal will outweigh its evidentiary value. The determination of value is used under the act's buyout provisions and in those cases in which a court orders the property partitioned by sale.
- After the court determines the

value of the property, UPHPA grants all of the cotenants that did not request partition by sale a right to buy out the interests of all cotenants that have requested partition by sale. The price is equal to the court-determined value of the property multiplied by the fractional interests of the cotenants that are bought out. If certain conditions are satisfied, the court is also given discretion to conduct a second buyout of the interests of cotenants named as defendants who were served with the complaint but who did not appear in the action. In many circumstances, this second buyout process can help to make partition in-kind of the property more feasible in those instances in which a buyout does not resolve the action and to consolidate ownership of the property to facilitate the management and to improve the utilization of the property over the long term.

- If a buyout does not resolve the action, because, for example, a cotenant remains who seeks partition in-kind after the court has concluded any buyout of interests, then the court will proceed with a partition in-kind unless great or manifest prejudice to the cotenants as a group would result. UPHPA provides a list of economic and non-economic factors that a court will consider as a whole to determine whether great or manifest prejudice would occur if partition in-kind were to be ordered. If the court does not order partition in-kind, it will order partition by sale unless none of the cotenants has requested partition by sale, in which case the court will dismiss the action.
- In cases in which a court orders heirs property sold under a partition by sale, UPHPA contains important wealth preservation protections to mitigate the economic effect of a forced sale. Drawing on recent reforms to partition law in other countries, such as Scotland, and the practice of some courts in

some states, a partition by sale, if ordered, must be an open-market sale unless a sale by sealed bid or an auction would be economically more advantageous and of greater benefit to the cotenants as a group. The parties can agree on a licensed broker, or the court can appoint one. The broker will offer the property for sale in a commercially reasonable manner and will list the property for sale at the court-determined value. If an offer at or above the court-determined value is received within a reasonable time, the broker may complete the sale according to state law after complying with UPHPA's reporting requirements. The act also provides the court with the flexibility to consider offers below the determined value of the property if the broker does

not receive an offer for at least the determined value within a reasonable time.

The UPHPA creates a reasonable and predictable framework for partition actions involving heirs property. The act does not change existing partition law for non-heirs property, including non-heirs property subject to a binding agreement among cotenants on how to handle partition. As it incorporates some of the best practices used for family property owned by those who are wealthy and legally savvy, the UPHPA will help protect the holders of millions of acres of covered family-owned, ancestral property located all across the country from being stripped of their real property and their real property wealth without adequate recourse. ■



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