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Uniform Partition of Heirs Property Act

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UNIFORM PARTITION OF HEIRS PROPERTY ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-NINETEENTH YEAR
IN CHICAGO, ILLINOIS
JULY 9-16, 2010

WITH PREFATORY NOTE AND COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

October 19, 2010

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UNIFORM PARTITION OF HEIRS PROPERTY ACT

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UNIFORM PARTITION OF HEIRS PROPERTY ACT

PREFATORY NOTE

Introduction and Summary

The Uniform Partition of Heirs Property Act is an act of limited scope which addresses a widespread, well-documented problem faced by many low to middle-income families across the country who have been dispossessed of their real property and much of their real property-related wealth over the past several decades as a result of court-ordered partition sales of tenancy-in-common properties. The highly unstable ownership these families experience stands in sharp contrast to the secure property rights wealthier families typically enjoy. Further, the loss of real property-related wealth these low to middle-income families have experienced has been particularly devastating to these families given the fact that real property constitutes by far the single greatest asset that these property owners typically own, unlike the much more diversified asset portfolios that wealthier families normally possess. In addition, the Act may be very helpful to a surprising number of wealthier families who own tenancy-in-common property under the default rules and who also experience great problems with this ownership form.

The law has made the tenancy in common, a common ownership structure under which two or more cotenants own undivided interests in particular property, the default ownership structure for two or more family members who inherit real property. In addition, the law presumes that two or more people who acquire undivided interests in real property by conveyance or devise take ownership to the property as tenants in common and not as joint tenants unless the intention to create a joint tenancy is very clear. But certain key features of tenancy-in-common ownership under the default rules create serious problems for those who seek to maintain ownership of their property for themselves and their relatives, or at least the wealth represented by such real estate holdings.

- Any tenant in common may sell his or her interest or convey it by gift during his or her lifetime without the consent of his or her fellow cotenants, making it easy for non-family members – including real estate speculators in a number of instances – to acquire interests in family real property. At a tenant in common's death, his or her interest in the tenancy in common property may be transferred under a will, or if the will is not probated in time or if there is no will, under the laws of intestacy.
- A significant feature of tenancy-in-common ownership – a feature that this Act does not disturb – is the universal right of any cotenant to file a lawsuit petitioning a court to partition the property, even if that cotenant only recently acquired its interest in property that the other cotenants had owned within their family for a long time and even if that interest is very small (e.g., a five percent or even smaller interest).
- In resolving a partition action, the two principal remedies that a court may order are partition in kind of the property into separate subparcels, with each subparcel proportionate in value to each cotenant's fractional interest or partition by sale, in

which case the property is forcibly sold in its entirety with the proceeds of the sale distributed among the cotenants, again in proportion to their relative interests in the property. In the overwhelming majority of states, statutes governing partition mandate that partition in kind is the much preferred remedy because a forced sale of a person's property has always been viewed as an extraordinary remedy which undermines fundamental property rights.

- Despite the overwhelming statutory preference for partition in kind, courts in a large number of states typically resolve partition actions by ordering partition by sale which usually results in forcing property owners off their land without their consent. This occurs even in cases in which the property could easily have been divided in kind or an overwhelming majority of the cotenants had opposed partition by sale or even in some cases when the only remedy any cotenant petitioned the court to order was partition in kind and not partition by sale.
- A de facto preference for a partition by sale in many states has arisen in part because courts often only consider the theoretical beneficial economic effect of ordering a partition by sale as opposed to a partition in kind. The many courts that utilize this approach do not place much value on upholding basic property rights and do not take account of the noneconomic value which many owners place upon their property. These noneconomic values can be substantial as families often value their family real property for its ancestral and even historical significance or its capacity to provide shelter that in some cases may prevent homelessness.
- Further, courts typically order the property sold at an auction utilizing forced sale procedures that are notorious for yielding sales prices well below market value. A sale under these forced sale conditions normally harms the tenants in common economically by depriving them of the market value of their property but gives the buyer an unjustified windfall because the buyer acquires the property at a significant discount from its market value and often for fire sale prices. The forced sale conditions under which partition sales occur virtually guarantee that wealth will not be maximized for the tenants in common even though judges frequently order partition sales because they claim that a partition sale will be wealth maximizing for the cotenants.
- To make matters worse, in many states cotenants who unsuccessfully resist a request for a court-ordered partition by sale are then required to pay a portion of the attorney's fees and costs incurred by the cotenant who petitioned the court for a partition by sale, forcing them in effect to pay for the deprivation of their property rights and their resulting loss of wealth. These fees and costs are in addition to the attorney's fees they must pay the attorney they hired in their unsuccessful effort to resist the sale and maintain ownership of their property.
- Given these rules and practices which many courts utilize in partition actions, it is often the case that an unscrupulous real estate speculator purchases a very small interest in family-owned tenancy-in-common property with the sole purpose of seeking a court-ordered partition by sale. Often such a speculator submits the winning bid in the subsequent auction sale of the property even though the winning bid represents just a fraction of the property's market value.

For these reasons, estate planners and real estate lawyers believe that tenancy-in-common ownership under the default rules represents one of the most unstable forms of real property ownership. To address the dangers of this form of ownership, these professionals routinely advise their wealthy and legally savvy clients to enter into privately negotiated tenancy-in-common agreements with their fellow cotenants or work with their other cotenants to reorganize their ownership under a different ownership structure altogether such as a limited liability company.¹ However, a substantial percentage of tenancy-in-common property owners are not able to afford the services of these professionals or are not aware of the legal benefits of hiring such professionals because they do not understand the inherent risks of owning property under the default rules of the tenancy in common.

Accordingly, this Act seeks to remedy the serious problems many of those who own family real property have faced in keeping their property and their wealth as a result of the application of the default rules governing tenancy-in-common property by providing a further set of coherent, default rules reforming the worst substantive and procedural abuses that have arisen in connection with the partition of tenancy-in-common property. Specifically, this Act imports certain core property preservation and wealth protection mechanisms already commonly used by wealthy and legally sophisticated family real property owners as well as protections legislatures and courts in other countries now afford cotenants in partition actions as a result of modern reforms, and establishes those mechanisms as the default rules for the partition of real property owned by families under a tenancy in common. On the other hand, this Act does not seek to make wholesale changes to the law of partition. For example, this Act does not apply to any real property which is the subject of a written tenancy-in-common agreement which contains a provision governing the partition of the property (all such agreements typically contain such a provision) or which is owned under any other form of ownership (*e.g.*, a joint tenancy, a limited liability company, a partnership, a limited partnership, a trust or a corporation) other than the tenancy in common.

Tenancy-In-Common Property Owners of Modest Means Are Particularly At Risk

There is a subset of tenancy-in-common property owners who are particularly vulnerable to losing their property and significant wealth as a result of court-ordered partition sales. Scholars and practitioners who have worked with poor and minority property owners have observed that a particularly high percentage of these owners tend to own their real property under the default rules governing tenancy-in-common ownership and not under a private agreement among the cotenants governing the ownership of the property. This phenomenon is explained in large part by the fact that many low to middle-income property owners transfer their real property by intestate succession instead of by will, which is consistent with studies that have documented low will-making rates among Americans of more modest economic means.

The more that property is transferred from one generation to the next by intestate succession, the more likely it is for an increasingly large number of people to acquire an interest in the property, resulting in increasingly unstable ownership given that each cotenant possesses

¹ See Thomas W. Mitchell, Stephen Malpezzi, & Richard K. Green, *Forced Sale Risk: Class, Race, and The "Double Discount,"* 37 FLA. ST. U. L. REV. 589, 616 (2010).

an unfettered right to request a partition by sale of the entire property irrespective of the wishes of the other cotenants. Given the prevalence of this pattern of property transfer, real property transferred from one generation to the next and held in a tenancy in common is referred to colloquially in many communities from those in the Southeast to those in Appalachia to those in Indian Country as “heirs property” or “heirs’ property.” Families who own tenancy-in-common property within these communities refer to their family real property holdings as heirs property whether some or all of the members of these families acquired their interests by intestate succession, by will, or by gift. Consistent with the widespread usage of the term within these communities, this Act utilizes the term “heirs property” and defines it under Section 2 consistent with how many communities throughout the country understand the term; therefore, the definition of heirs property is not limited to property in which one or more cotenants acquire their interests by intestacy as usage of the term “heirs” may suggest in some technical sense.

Many if not most of these heirs property owners have little or no understanding of the legal rules governing partition of tenancy-in-common property as studies have revealed, due to the fact that many of the rules are counterintuitive. For example, many of these owners believe that their property ownership is secure because they pay property taxes, they live on the land, and they make productive use of the land. They also believe that their property may only be sold against their will if a majority or more of their cotenants agree, which gives some of these families with a large number of members with an interest in the property false confidence that their ownership is extremely secure.

These families think it is inconceivable that one cotenant with a very small ownership interest can force a sale against the wishes of all other cotenants. Unfortunately, the first time that many of these owners are informed about the actual legal rules governing partition is after a partition action has been filed, and often after critical, early court rulings have been made against them. In contrast, there have been many well-documented cases in which an outside speculator who acquired a very small interest in a parcel of heirs property that had been owned by a family for decades has been able to convince a court soon after the speculator acquired its interest to order a partition by sale of the property despite the fact that the family opposed the request for a partition by sale and despite the family’s longstanding ownership. In short, the law of partition often functions to give those cotenants who petition a court to force a sale upon their fellow cotenants an eminent domain-like power of condemnation. Unlike eminent domain, however, under a partition by sale, those who end up losing ownership of their property at the conclusion of the forced sale are not entitled to be paid fair market value compensation or any minimum level of compensation for that matter for having their property rights extinguished.

Partition Sales and Other Heirs Property Problems in Certain Select Communities

African-Americans have experienced tremendous land loss over the course of the past century. For example, although African-Americans acquired between sixteen and nineteen million acres of agricultural land between the end of the Civil War and 1920, African-Americans retain ownership of approximately just seven million acres of agricultural land today. Scholars and advocates who have analyzed patterns of landownership within the African-American community agree that partition sales of heirs property have been one of the leading causes of

involuntary land loss within the African-American community. A considerable body of legal scholarship has highlighted the fact that partition sales have been a leading cause of African-American land loss.² Many newspapers have published articles documenting the manner in which particular African-American families have lost land that had been in their families for generations after an outsider acquired a small interest from a family member and then in short order was able to convince a court to order the property sold at a partition sale. The Associated Press's 2001 award-winning series on African-American land loss, *Torn from the Land*, brought national attention to the manner in which partition sales have stripped African-American families of large amounts of land and wealth.³

As a result of this legal scholarship and media attention, several years ago the American Bar Association's Section on Real Property, Trust and Estate Law established its Property Preservation Task Force. Along with the public interest and civil rights law firms and the community development and community-based organizations that have been working on heirs property issues for decades, the A.B.A.'s task force has been working to decrease the incidence of forced sales of heirs property that has so negatively impacted African-American and other poor and minority property owners.⁴ Nevertheless, the organizations that have been working tirelessly with families who wish to maintain their heirs property holdings or at least the wealth associated with such real estate holdings will continue to face nearly insurmountable obstacles in providing meaningful assistance to significant numbers of those with heirs property problems until the default rules governing the partition of tenancy-in-common ownership are reformed to make the law of partition more just and more sensible.

Although the issue of the substantial loss of African-American land due to partition sales has received more national attention than the land loss in other communities resulting from partition sales, it is important to recognize that forced partition sales have negatively impacted other communities as well, especially other low-income and low-wealth communities. For example, Mexican-Americans lost hundreds of thousands of acres of land in New Mexico and

2 See, e.g., THE EMERGENCY LAND FUND, INC., *THE IMPACT OF HEIR PROPERTY ON BLACK RURAL LAND TENURE IN THE SOUTHEASTERN REGION OF THE UNITED STATES* (1980). See also Phylliss Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 WASH U. L.Q. 737 (2000); Chris Kelley, *Stemming the Loss of Black Owned Farmland Through Partition Action: A Partial Solution*, 1985 ARK. L. NOTES 35; Harold A. McDougall, *Black Landowners Beware: A Proposal for Statutory Reform*, 9 N.Y.U. REV. L. & SOC. CHANGE 127 (1979-1980); Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505 (2001); Faith Rivers, *Inequity in Equity: The Tragedy of Tenancy in Common for Heirs' Property Owners Facing Partition in Equity*, 17 TEMP. POL. & CIV. RTS. L. REV. 1, 58 (2007).

3 See, e.g., Todd Lewan & Dolores Barclay, *Quirk in Law Strips Blacks of Land*, TENNESSEAN, Dec. 11, 2001, at 8A.

4 To date, the Property Preservation Task Force has made available to the public some materials that can be helpful to those who want to stabilize their ownership of tenancy-in-common property. These materials include a sample tenancy-in-common agreement and a document addressing some of the ways in which limited liability companies can be used to prevent land loss. See *Section of Real Property, Trust and Estate Law: Property Preservation Task Force*, AMERICAN BAR ASSOCIATION, <http://www.abanet.org/dch/committee.cfm?com=RP018700> (last modified May 11, 2010).

other states after a significant amount of their community-owned property was improperly classified as tenancy-in-common property and was then ordered sold under partition sales in the aftermath of the Mexican-American War. In most instances, the land was sold for a price that was far below the market value of the land.⁵ This occurred in part because, like heirs property owners today, the members of the community who had rights to the land prior to the partition sales were not able to bid effectively at the partition sale auctions because they were land rich but cash poor.⁶

Property owners in other communities have been negatively impacted as well. For example, in parts of Appalachia, heirs property has been hypothesized to be correlated with, and a cause of, the persistence of poverty.⁷ Case studies suggest that heirs property owners in Appalachia are often concerned that one of their fellow cotenants might sell his or her interest to a wealthy buyer who will request a court to order the property partitioned by sale and then will purchase the property at the auction.⁸ Some American Indians also have had their family property sold against their will at partition sales.

Heirs property ownership has presented vexing problems to property owners in cities such as New Orleans. In New Orleans, many poor property owners were not able to draw upon governmental programs such as the “Road Home” program administered by the Department of Housing and Urban Development which were established in the wake of Hurricane Katrina to provide financial assistance to property owners who had been harmed. A significant percentage of these poor property owners owned heirs property, which created merchantable title problems which needed to be resolved before the property owners could qualify for the governmental programs. These problems typically could not be resolved without hiring attorneys whom most of these property owners could not afford in contrast to the surprisingly large number of wealthy heirs property owners who were brought to light in the aftermath of Katrina who were able to hire attorneys to resolve their title problems. As in rural areas, partition sales have also resulted in the deprivation of property rights and the loss of wealth in urban areas undergoing gentrification.

As the post-Katrina New Orleans experience demonstrates, a surprising number of property owners who are not poor or minority also experience significant problems with heirs property ownership. In Maine, for example, heirs property is commonly referred to as “heir-locked property.” Those who own such property in Maine experience many of the same

5 WILLIAM DEBUYS, ENCHANTMENT AND EXPLOITATION: THE LIFE AND HARD TIMES OF A NEW MEXICO MOUNTAIN RANGE 178, 180, 184, 190 (1985).

6 David Benavides & Ryan Golten, *Righting the Record: A Response to the GAO's 2004 Report Treaty of Guadalupe Hidalgo: Findings and Possible Options Regarding Longstanding Land Grant Claims in New Mexico*, 48 NAT. RESOURCES J. 857, 886 (2008).

7 B. James Deaton, *Intestate Succession and Heir Property: Implications for Future Research on the Persistence of Poverty in Central Appalachia*, 41 J. OF ECON. ISSUES 927 (2007).

8 B. James Deaton, Jamie Baxter, & Carolyn S. Bratt, *Examining the Consequences and Character of “Heir Property,”* 68 ECOLOGICAL ECON. 2344, 2350 (2009).

problems that those who own heirs property elsewhere experience, including problems with unstable ownership. This has occurred in part because many properties that were not considered economically valuable in Maine fifty or sixty years ago increasingly lie in the path of development and because the ownership of many of these properties has become more fragmented with the passage of time as many interests in such property have been transferred by intestacy. Those who own heirs property in Maine also are often unable to manage their property in a rational way because some passive or uncooperative cotenants either do not contribute their share of the expenses needed to maintain ownership of the property or refuse to give their needed consent to plans that their more active fellow cotenants formulate to improve the management, stability, and utilization of the property. As is the case all across the country, many of those who own heirs property in Maine who are committed to maintaining ownership of the property within their families find themselves locked into a dysfunctional common ownership arrangement because there are no legal mechanisms to consolidate title to such property among family members who have been active and responsible owners.

Tenants in Common Often Lose Significant Wealth as a Result of Partition Sales

Those who own tenancy-in-common property under the default rules are not only at risk of losing their real property at a forced partition sale, but also are in danger of losing a significant portion of their wealth. In many states, a court will order a partition by sale under an “economics-only” test in which the court considers the hypothetical fair market value of the property in its entirety as compared to the fair market value of the subparcels that would result from a partition in kind. If the court finds that the fair market value of the property as a whole is greater than the aggregated fair market value of the subparcels, the court will order a partition by sale. Under this approach, the tenants in common theoretically should receive an economic benefit from the partition by sale.

In fact, most tenants in common are economically harmed when a court orders a partition by sale. First, the courts usually order the property sold at auctions in which the property is sold utilizing the procedures used for forced sales such as a sale under execution. These forced sales are notorious for selling property well below its fair market value which is ironic because judges often order the partition sale in the first instance because they claim that the cotenants will receive an economic benefit based upon an assumption that the sale will yield a fair market value price. When auction sales are challenged for yielding low sales prices, courts rarely overturn such sales as most courts utilize a “shock the conscience” standard to evaluate the sale. Under this standard, sales have been confirmed even though the property sold for twenty percent or less of its market value even though the court ordered a partition sale in the first instance because it indicated that a partition sale would likely provide the cotenants with an economic benefit.

Next, a number of fees and costs must first be paid to others before the remaining proceeds of a sale are distributed to the tenants in common. These fees often include costs incurred in selling the property including the fees of court-appointed commissioners or referees (often five percent or more of the sales price), surveyor fees, and attorney’s fees which usually constitute ten percent of the sales price in the many states that permit such an attorney’s fee award in a partition action. At the time a court orders a partition by sale under an economics-

only test, these fees and costs are not taken into account although they can in fact be quite substantial and undermine any hypothetical economic benefit a cotenant would receive from a partition sale.

Poorer families who own heirs property are particularly at risk of having their property sold for a low sales price at partition sales. This phenomenon can be explained by the fact that these heirs property owners are not able to bid competitively at the partition sale auction because they are unable to secure any financing to make an effective bid and because they are cash poor. Banks and other lending institutions will not accept a partial interest in tenancy-in-common property as collateral to secure a loan and most of these heirs property owners cannot otherwise obtain financing because they often have few other assets to offer as collateral to secure a loan. Given that partition sales in general often attract few bidders, an auction of heirs property in which family members of limited economic means are unable to make any competitive bids is likely to yield a particularly low sales price as the winning bidder often needs only to submit a lowball bid in order to acquire the property as few if any other competitive bids are typically made in such cases.

Partition sales that result in an involuntary loss of property rights and in the loss of wealth may be very harmful, and even devastating to one or more of the cotenants and their relatives, depending on the facts of the particular case. The purpose of this Act is to ameliorate, to the extent feasible, the adverse consequences of a partition action when there are some cotenants who wish, for various reasons, to retain possession of some or all of the land, and other cotenants who would like the property to be sold. At the same time, the Act recognizes the legitimate rights of each cotenant to secure his, her, or its relative share of the current market value of the property and to seek to consolidate ownership of the property. Overall, the Act seeks to improve the law of partition with respect to cases involving family-owned tenancy-in-common property by ensuring that each cotenant in a partition action is treated in a fair and equitable manner.

UNIFORM PARTITION OF HEIRS PROPERTY ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Partition of Heirs Property Act.

Legislative Note: Consider including this Act as a part of the state's existing partition statute.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Ascendant" means an individual who precedes another individual in lineage, in the direct line of ascent from the other individual.

(2) "Collateral" means an individual who is related to another individual under the law of intestate succession of this state but who is not the other individual's ascendant or descendant.

(3) "Descendant" means an individual who follows another individual in lineage, in the direct line of descent from the other individual.

(4) "Determination of value" means a court order determining the fair market value of heirs property under Section 6 or 10 or adopting the valuation of the property agreed to by all cotenants.

(5) "Heirs property" means real property held in tenancy in common which satisfies all of the following requirements as of the filing of a partition action:

(A) there is no agreement in a record binding all the cotenants which governs the partition of the property;

(B) one or more of the cotenants acquired title from a relative, whether living or deceased; and

(C) Any of the following applies:

(i) 20 percent or more of the interests are held by cotenants who are

relatives;

(ii) 20 percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased; or

(iii) 20 percent or more of the cotenants are relatives.

(6) “Partition by sale” means a court-ordered sale of the entire heirs property, whether by auction, sealed bids, or open-market sale conducted under Section 10.

(7) “Partition in kind” means the division of heirs property into physically distinct and separately titled parcels.

(8) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(9) “Relative” means an ascendant, descendant, or collateral or an individual otherwise related to another individual by blood, marriage, adoption, or law of this state other than this [act].

Comment

1. Section 2(1): In common usage, an ancestor is defined as “one from whom a person lineally descended.” *Wills v. Le Munyon*, 107 A. 159, 161 (N.J. Ch. 1919). However, statutes of descent often narrow the term to “any one from whom an estate is inherited.” *Id.* Thus, use of the term ancestor could be interpreted to exclude property acquired from a living person. In contrast, ascendant encompasses anyone who precedes an individual in lineage such as an individual’s parents or grandparents, whether living or deceased. The term ascendant is used in a number of statutes encompassing many different subject matter areas. *See, e.g.*, ARK. CODE ANN. § 28-9-202 (2009); CONN. GEN. STAT. § 45a-755 (2010); IOWA CODE § 428A.2 (2010); FLA. STAT. § 732.403 (2009); LA. CIV. CODE ANN. art. 1301 (2009); MISS. CODE ANN. § 93-13-253; P.R. LAWS ANN. TIT. 31 § 2413 (209); TEX. ESTATES CODE ANN. § 676 (Vernon 2009).

2. Sections 2(1)-2(3): The specific classes of people who may be considered ascendants, descendants, or collaterals shall be defined under state law.

3. Section 2(5): Heirs property is defined in this Act to include only a subset of tenancy-in-common property. At minimum, for tenancy-in-common property to be considered heirs property, title must be acquired by at least one of the cotenants in an intergenerational transfer

from a relative of that cotenant who was either that cotenant's ascendant, descendant, or collateral at the time title was transferred. Further, the Act does not apply to tenancy-in-common property in which all of the cotenants are subject to a binding agreement that governs the partition of the property, including binding agreements that run to successors and assigns. Tenancy-in-common property that is acquired by investors in part to qualify for federal like-kind exchange treatment under Section 1031 of the Internal Revenue Code and that is subject to an agreement governing the partition of the property is excluded from this Act. Furthermore the Act does not apply to "first generation" tenancy-in-common property established under the default rules and still owned exclusively by the original cotenants even if there is no agreement in a record among the cotenants governing the partition of the property. "First generation" tenancy-in-common property, however, may be converted into heirs property if a cotenant with an interest in such "first generation" tenancy-in-common property transfers all or a part of his or her interest to a relative provided that the other criteria for classifying property as heirs property are satisfied.

Joint tenancy property is not covered by this Act. In order for any real property that was initially owned by two or more individuals as joint tenancy property to be covered by this Act, one or more of the joint tenants must sever the joint tenancy in accordance with the requirements of state law. Once a joint tenancy is severed, this Act may apply if the property is determined to be heirs property at the time of the filing of a partition action even if two or more individuals who had formerly been joint tenants prior to severance of the joint tenancy remain joint tenants with each other after severance with respect to a particular interest in the tenancy in common. *See* 7-51 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 51.04(1)(a) (Michael Allen Wolf ed., 2009). *See also* *Carmack v. Place*, 535 P.2d 197 (Co. 1975).

4. Section 2(5)(A): If tenants in common acquire their interests through a deed or a will that does not govern the manner in which the tenancy-in-common property may be partitioned, the deed or will alone shall not be construed to be an agreement in a record among all the tenants in common which governs the partition of the property within the meaning of Section 2(5)(A).

5. Section 2(8): Information that constitutes a "record" under this Act need not be recorded.

6. Section 2(9): A relative as that term is defined under this Act does not include a person who is related to another person only by affinity. The definition of relative does encompass individuals who are determined to be relatives under state law even if, for example, it has not been established that these individuals are genetically related. For example, under the Uniform Parentage Act, a man may be determined to be the father of a child even if paternity has not been established by genetic testing.

7. Section 2(9): In a partition action, a state court may apply the state's choice of law rules to determine whether two or more cotenants may be determined to be relatives. Under its choice of law analysis, the court could determine that two or more cotenants are relatives based upon application of the substantive law of another state because the law that applies under a state's choice of law rules would constitute "other law of this state" under Section (2)(9).

SECTION 3. APPLICABILITY; RELATION TO OTHER LAW.

(a) This [act] applies to partition actions filed on or after [the effective date of this [act]].

(b) In an action to partition real property under [insert reference to general partition statute] the court shall determine whether the property is heirs property. If the court determines that the property is heirs property, the property must be partitioned under this [act] unless all of the cotenants otherwise agree in a record.

(c) This [act] supplements [insert reference to general partition statute] and, if an action is governed by this [act], replaces provisions of [insert reference to general partition statute] that are inconsistent with this [act].

Comment

1. Section 3(b): A final order of a court in a partition action filed on or after the date this Act becomes effective is subject to challenge if the court failed to determine whether the real property in question is heirs property as that term is defined under this Act.

2. Section 3(b): In a partition action, after a court has determined that the property in question is heirs property, all of the cotenants may agree to partition the property utilizing an agreed upon method or procedure that is different from the procedures required by this Act provided that the agreement is contained in a record.

SECTION 4. SERVICE; NOTICE BY POSTING.

(a) This [act] does not limit or affect the method by which service of a [complaint] in a partition action may be made.

(b) If the plaintiff in a partition action seeks [an order of] notice by publication and the court determines that the property may be heirs property, the plaintiff, not later than 10 days after the court's determination, shall post [and maintain while the action is pending] a conspicuous sign on the property that is the subject of the action. The sign must state that the action has commenced and identify the name and address of the court and the common designation by

which the property is known. The court may require the plaintiff to publish on the sign the name of the plaintiff and the known defendants.

Comment

1. Section 4(b): In some instances, some states require by statute that a sign or notice be posted in a conspicuous place on real property that may be subject to a forced sale. *See, e.g.*, ARIZ. REV. STAT. ANN. § 42-18266 (2010) (in connection with property that is subject to foreclosure for delinquent taxes, requiring in certain circumstances the placing of a sign in a conspicuous place on the property describing the property, indicating that the property is subject to foreclosure, and giving notice about the manner in which the owner may redeem the tax lien); CAL. CIV. CODE § 2924f (West 2010) (in most nonjudicial foreclosures by power of sale, requiring that a copy of the notice of sale be posted in a conspicuous place on the real property in question and that the notice of sale contain relevant information about the power of sale foreclosure action).

SECTION 5. [COMMISSIONERS]. If the court appoints [commissioners] pursuant to [insert reference to general partition statute], each [commissioner], in addition to the requirements and disqualifications applicable to [commissioners] in [insert reference to general partition statute], must be disinterested and impartial and not a party to or a participant in the action.

Legislative Note: Nearly every state uses the term “commissioner.” However, there are some exceptions. For example, California uses the term “referee” and Georgia uses the term “partitioner.”

SECTION 6. DETERMINATION OF VALUE.

(a) Except as otherwise provided in subsections (b) and (c), if the court determines that the property that is the subject of a partition action is heirs property, the court shall determine the fair market value of the property by ordering an appraisal pursuant to subsection (d).

(b) If all cotenants have agreed to the value of the property or to another method of valuation, the court shall adopt that value or the value produced by the agreed method of

valuation.

(c) If the court determines that the evidentiary value of an appraisal is outweighed by the cost of the appraisal, the court, after an evidentiary hearing, shall determine the fair market value of the property and send notice to the parties of the value.

(d) If the court orders an appraisal, the court shall appoint a disinterested real estate appraiser licensed in this state to determine the fair market value of the property assuming sole ownership of the fee simple estate. On completion of the appraisal, the appraiser shall file a sworn or verified appraisal with the court.

(e) If an appraisal is conducted pursuant to subsection (d), not later than 10 days after the appraisal is filed, the court shall send notice to each party with a known address, stating:

(1) the appraised fair market value of the property;

(2) that the appraisal is available at the clerk's office; and

(3) that a party may file with the court an objection to the appraisal not later than 30 days after the notice is sent, stating the grounds for the objection.

(f) If an appraisal is filed with the court pursuant to subsection (d), the court shall conduct a hearing to determine the fair market value of the property not sooner than 30 days after a copy of the notice of the appraisal is sent to each party under subsection (e), whether or not an objection to the appraisal is filed under subsection (e)(3). In addition to the court-ordered appraisal, the court may consider any other evidence of value offered by a party.

(g) After a hearing under subsection (f), but before considering the merits of the partition action, the court shall determine the fair market value of the property and send notice to the parties of the value.

Comment

1. Section 6(a): Some states require that any property that may be subject to partition by sale shall first be appraised before a court decides whether to order partition in kind or partition by sale. *See, e.g.*, N.M. STAT. § 42-5-7 (2009). Other states require that nearly all real property that is to be sold under an order or a judgment of a court must be appraised before the property is sold. *See, e.g.*, KY. REV. STAT. ANN. § 426.520 (West 2010).

2. Section 6(b): The court may not adopt a monetary value for the property that only some of the cotenants but not others have agreed upon or a valuation derived from an alternative method of valuation that only some of the cotenants have agreed upon even if the only cotenants that have not agreed to the value of the property or to another method of valuation are cotenants that are unknown, unlocatable, or otherwise remain unascertained.

3. Section 6(b): The cotenants may agree that the property should be valued utilizing a less expensive method of valuation than an appraisal in situations, for example, in which the cotenants lack the expertise to value the property themselves. For example, the cotenants may agree to authorize two real estate brokers each to submit a broker's opinion of value and further may agree that the two valuation opinions should be averaged to determine the value of the property.

4. Section 6(d): Under certain circumstances, some states require that property that is to be sold by partition by sale be appraised by one or more disinterested persons. *See, e.g.*, MINN. STAT. § 558.17 (2009) (providing that property subject to partition by sale shall be appraised by two or more disinterested persons before the property is sold if the court orders the property sold at a private sale instead of at a public auction). In some instances, states require that certain court-appointed real estate appraisers must be state-certified and in good standing with the state appraisal authorities. *See, e.g.*, OKLA. STAT. tit. 52, § 318.5 (2009).

5. Section 6(d): State statutes and case law typically refer to one person's exclusive ownership of property as "sole ownership." *See, e.g.*, CAL. CIV. CODE § 681 (2010) (designating the ownership of property by a single person as a sole or several ownership); FLA. STAT. § 711.502 (2009) ("Only individuals whose registration of a security shows sole ownership by one individual . . . may obtain registration in beneficiary form"); MONT. CODE ANN. 70-1-305 (2009); S.D. CODIFIED LAWS § 43-2-10 (2009) ("The ownership of property by a single person is designated as a sole or several ownership."). *See also In re Robertson*, 203 F.3d 855, 860 (5th Cir. 2000) ("[T]he assets of which each former spouse acquires sole ownership is reclassified by law as the separate, exclusive property of that former spouse.").

SECTION 7. COTENANT BUYOUT.

(a) If any cotenant requested partition by sale, after the determination of value under Section 6, the court shall send notice to the parties that any cotenant except a cotenant that

requested partition by sale may buy all the interests of the cotenants that requested partition by sale.

(b) Not later than 45 days after the notice is sent under subsection (a), any cotenant except a cotenant that requested partition by sale may give notice to the court that it elects to buy all the interests of the cotenants that requested partition by sale.

(c) The purchase price for each of the interests of a cotenant that requested partition by sale is the value of the entire parcel determined under Section 6 multiplied by the cotenant's fractional ownership of the entire parcel.

(d) After expiration of the period in subsection (b), the following rules apply:

(1) If only one cotenant elects to buy all the interests of the cotenants that requested partition by sale, the court shall notify all the parties of that fact.

(2) If more than one cotenant elects to buy all the interests of the cotenants that requested partition by sale, the court shall allocate the right to buy those interests among the electing cotenants based on each electing cotenant's existing fractional ownership of the entire parcel divided by the total existing fractional ownership of all cotenants electing to buy and send notice to all the parties of that fact and of the price to be paid by each electing cotenant.

(3) If no cotenant elects to buy all the interests of the cotenants that requested partition by sale, the court shall send notice to all the parties of that fact and resolve the partition action under Section 8(a) and (b).

(e) If the court sends notice to the parties under subsection (d)(1) or (2), the court shall set a date, not sooner than 60 days after the date the notice was sent, by which electing cotenants must pay their apportioned price into the court. After this date, the following rules apply:

(1) If all electing cotenants timely pay their apportioned price into court, the court

shall issue an order reallocating all the interests of the cotenants and disburse the amounts held by the court to the persons entitled to them.

(2) If no electing cotenant timely pays its apportioned price, the court shall resolve the partition action under Section 8(a) and (b) as if the interests of the cotenants that requested partition by sale were not purchased.

(3) If one or more but not all of the electing cotenants fail to pay their apportioned price on time, the court [, on motion,] shall give notice to the electing cotenants that paid their apportioned price of the interest remaining and the price for all that interest.

(f) Not later than 20 days after the court gives notice pursuant to subsection (e)(3), any cotenant that paid may elect to purchase all of the remaining interest by paying the entire price into the court. After the 20-day period, the following rules apply:

(1) If only one cotenant pays the entire price for the remaining interest, the court shall issue an order reallocating the remaining interest to that cotenant. The court shall issue promptly an order reallocating the interests of all of the cotenants and disburse the amounts held by it to the persons entitled to them.

(2) If no cotenant pays the entire price for the remaining interest, the court shall resolve the partition action under Section 8(a) and (b) as if the interests of the cotenants that requested partition by sale were not purchased.

(3) If more than one cotenant pays the entire price for the remaining interest, the court shall reapportion the remaining interest among those paying cotenants, based on each paying cotenant's original fractional ownership of the entire parcel divided by the total original fractional ownership of all cotenants that paid the entire price for the remaining interest. The court shall issue promptly an order reallocating all of the cotenants' interests, disburse the

amounts held by it to the persons entitled to them, and promptly refund any excess payment held by the court.

(g) Not later than 45 days after the court sends notice to the parties pursuant to subsection (a), any cotenant entitled to buy an interest under this section may request the court to authorize the sale as part of the pending action of the interests of cotenants named as defendants and served with the complaint but that did not appear in the action.

(h) If the court receives a timely request under subsection (g), the court, after hearing, may deny the request or authorize the requested additional sale on such terms as the court determines are fair and reasonable, subject to the following limitations:

(1) a sale authorized under this subsection may occur only after the purchase prices for all interests subject to sale under subsections (a) through (f) have been paid into court and those interests have been reallocated among the cotenants as provided in those subsections; and

(2) the purchase price for the interest of a nonappearing cotenant is based on the court's determination of value under Section 6.

Comment

1. This Act includes a mechanism for the buyout of interests as the first preferred alternative to partition by sale to promote judicial economy, to encourage consolidation of ownership, and to accomplish the larger goal of establishing a default, statutory approach to partition of inherited property which mirrors the best practices used for family property owned by those who are wealthy and legally savvy. Private tenancy-in-common agreements, whether for family property or commercial property, virtually always provide that a cotenant that wishes to exit ownership must first offer his or her interest for sale to other cotenants.

Conducting the interest buyout process first may achieve sufficient consolidation of interests or alignment of interests among remaining cotenants that buyout eliminates the need for either partition in kind or partition by sale, and the relatively greater associated time, costs and complexities of the two latter remedies.

2. Although this section is one of the longer sections of the Act, it is streamlined compared to most, if not all, buyout provisions in written private agreements such as limited liability company operating agreements and tenancy-in-common agreements, and compared to buyout statutes in those states which have them. This streamlined buyout mechanism is consistent with the default rule nature of the overall Act.

Most of the detail of the section arises from the need to describe the procedural steps and mathematical proportions applicable at various stages in the buyout process, and to guide courts, that may not be familiar with buyout contracts or their corporate cousins, subscription agreements, including the possible outcomes of each step in a buyout and the next judicial action to assure an orderly process completed efficiently. Again, implementation of a buyout procedure in a given case is likely to be by far the fastest and simplest remedy to implement, both in comparison with partition in kind and partition by sale. Even allowing for motion practice, the expectation is that the mandatory buyout provisions of this Act could be and typically should be completed within a maximum of four to six months after the court establishes the value of the underlying real property (which must be done in any case under the Act).

3. Only those cotenants that seek partition by sale are mandatorily subject to the buyout. A cotenant who seeks partition by sale has already determined that he or she is willing to be divested of any interest in the real property owned in common in exchange for being paid money for any such divested interest. This is not necessarily true of cotenants that seek partition in kind or cotenants that are respondents in the partition proceeding. A principal historical justification for the remedy of a forced sale in many contexts has been to allow owners no longer desiring to participate in ownership to exit. A buyout mechanism such as the one in this section accomplishes this purpose without divesting owners who affirmatively indicate their preference for continuing ownership.

4. The buyout section gives a court, upon prompt motion, the discretion to conduct or not to conduct a second buyout process for the interests of cotenants who are respondents (a.k.a. defendants) in the action but do not file an appearance. In any case the first, mandatory buyout process for cotenants seeking partition by sale must be completed (and must result in a buyout) before the second, discretionary buyout process can begin. This ensures the best chance to consolidate interests in those cotenants who wish to continue to own a parcel of property together, by limiting the amount of money the purchasing cotenants need (just enough to purchase the interests of those who wish to partition the property by sale). Because banks and other institutional lenders virtually never lend on cotenancy interests, purchasers will need to use personal savings or other family capital to fund a buyout. In many cases, however, the interests (and value of interests) of those seeking partition by sale is relatively small and, if shared among several purchasing cotenants, will be within the means of many low to middle-income cotenants.

The section allows, in subsections (g) and (h), for the potential, discretionary buyout of cotenants who fail to appear in the action. This provision is intended to foster consolidation of interests among active cotenants (which makes any division in kind that may ultimately be needed easier for a court to accomplish), and to provide a fund of money based on a court-approved appraisal of land value, rather than a divided portion of land of potentially less certain

value, for the benefit of those cotenants who cannot be located or who fail to appear and participate in the action. Courts should consider, however, that many small interest holders sometimes do not believe the court really has the power to take away their interests or sell property and that others believe that resisting any request for a partition by sale is futile notwithstanding the merits of any particular case. Other cotenants do not appear because they do not have the money to hire counsel or the persistence or capacity to read and respond to pleadings. Therefore, a court should exercise discretion in deciding when to treat non-appearance in an action as an indication of a cotenant's limited resources, true indifference, or free riding on other cotenants. Nonetheless, in the relatively common event where there are dozens or even scores of inactive or unlocatable cotenants, the discretionary buyout may be a valuable tool to consolidate ownership among active, engaged cotenants while still preserving property value for other cotenants.

Although it is always true that cotenants could buy and sell interests outside of a court proceeding, the statutory buyout provision has the benefit of (a) using an appraised, court-set valuation, and (b) outlining a clear process with short timeframes. It thus eliminates two discussion points on which negotiations among cotenants often founder. The framework of the statutory buyout provision also creates a model which cotenants can use (and to which courts can direct the attention of litigants) to structure their own, private deals to value and sell interests in land among themselves without court involvement or as a supplement to judicial process.

5. The buyout section in the Act contemplates that the price for interests available for purchase (mandatorily or with leave of court) will be the simple result of multiplying the court-determined value of the entire real property (usually appraised value, but sometimes a value agreed on by all parties) by the partial interest available for purchase (whether expressed as a fraction or as a percentage).

So, for example, if John Smith owns a 10% cotenant interest in Greenacre, which is heirs property, he brings an action for partition by sale, and the appraised value of Greenacre accepted by the court is \$100,000, then John Smith's cotenancy interest will be priced at \$10,000 for statutory buyout purposes, and each of the other cotenants will have the right to purchase a pro rata share of John Smith's cotenancy interest for a pro rata share of the \$10,000 price.

It is important to note that this likely overvalues John Smith's interest under classic concepts of valuation (because the \$10,000 price disregards the discount for Smith owning only a 10%, minority interest, and disregards the further discount typically applied by valuers to interests in tenancy in common property due to its inherently unstable characteristics). The drafters concluded, however, that the simplicity of the math and the quid pro quo of somewhat enhanced value compensated for making Smith's interest mandatorily subject to the buyout by statute once he sought partition by sale.

6. In overview, the buyout section of this Act contemplates that the court will:
- establish the value of the entire real property;

- allow cotenants other than the petitioner for sale 45 days to express interest in purchasing the interests available for purchase (so the court can then determine pro rata shares and prices for each purchaser, using a simple mathematical ratio);
- give the purchasers who timely expressed interest in buying an additional, brief period to be determined by the court (at least 60 days, but preferably not much longer, due to the fact that property values are a function of market conditions over time) in which to pay the purchase price into court;
- if there is a failure of some purchasers to pay their apportioned price on time, the court will conduct a quick, 20-day, "savings" round in which any purchaser who timely paid can buy the entire remaining interest for which purchase money was not timely paid (and if more than one purchaser "saves" the buyout by paying such entire amount, then the cost and interest in question is split pro rata among those purchasers who act to save the buyout); and
- close the buyout, by paying the purchase price to the former cotenant who has been bought out, and issuing an order stating the new cotenancy interests among the remaining cotenants.

If the buyout fails for any reason or if there is any cotenant remaining at the conclusion of the buyout that has requested partition in kind, the Act contemplates that the court will then proceed to a partition in kind or a partition by sale (with a clear preference for a partition in kind).

7. The pro rata share any given cotenant may purchase is equal to his original share in the tenancy-in-common property divided by the total share of all those cotenants that elected to buy. In addition, the price to be paid by any given purchaser is that same fraction or percentage multiplied by the total value of the interest to be purchased.

So, continuing with the example begun in paragraph 5, above, we have John Smith, a 10% cotenant of Greenacre, who has filed a petition for partition by sale. John Smith's cotenancy interest is mandatorily subject to buyout by the cotenants who did not request partition by sale. The court determines the value of Greenacre pursuant to the Act and notifies the parties that John Smith's 10% interest is available to be bought out by his cotenants (the example assumes no other cotenant has sought partition by sale).

Next, assume Betty Smith Jones who owned 25% of Greenacre, George Smith who owned 20% of Greenacre, and Harriet Long who owned 15% of Greenacre, were the only cotenants of John Smith who timely notify the court of their election to purchase John Smith's 10% interest in Greenacre. The total percentage interest in Greenacre of all potential purchasers who timely gave notice of desire to buy is thus 60%. The owners of the other 30% cotenancy interests in Greenacre either did not wish to purchase or did not timely respond to the buyout notice and so become ineligible to participate in the buyout of John Smith's 10% interest.

In this example, Betty has a right to purchase 25/60ths of John Smith's interest, George has the right to purchase 20/60ths of John Smith's interest, and Harriet has the right to purchase 15/60ths of John Smith's interest. The court would determine these percentages and notify Betty, George, and Harriet of the interests they could purchase, and the related purchase price each of

them would have to pay. Since John Smith's 10% interest in Greenacre was statutorily valued at \$10,000 in the example in paragraph 5, the price to Betty is $\$10,000 \times (25/60)$, or \$4,166.67. The price to George is $\$10,000 \times (20/60)$, or \$3,333.33. The price to Harriet is $\$10,000 \times (15/60)$, or \$2,500. Obviously minor amounts of rounding will be required in some cases, as above with George and Betty.

Now further assume that the court orders that all purchasers pay their respective purchase price into court within 90 days after the court's determination of purchasers' interests and purchase prices is docketed, and that Betty and George timely pay their respective \$4,166.67 and \$3,333.33 into court, but that Harriet fails to do so. Under the buyout section of the Act, the court will then notify Betty and George that 15/60ths (i.e., one-quarter) of John Smith's 10% interest is still available for purchase and that either Betty or George may purchase the entire such interest for \$2,500 by paying that further sum into court within 20 days (absent which the buyout will fail and the court will proceed to determine whether partition in kind is possible or whether only partition by sale is appropriate).

Assume that Betty and George each timely post another \$2,500 with the court in the "savings" round (i.e., a further total of \$5,000, in addition to the aggregate \$7,500 already posted by Betty and George in the initial round). Under these circumstances, the court will allow Betty and George each to purchase a further pro rata share (meaning pro rata as between them) of Harriet's 15/60ths portion of John Smith's 10% interest. In the case of Betty she may purchase a 25/45ths share of the portion Harriet failed timely to buy (the numerator in the fraction is Betty's original percentage interest in Greenacre and the denominator in the fraction is the total original percentage interests of the two cotenants who timely posted money in both the first buyout round and the "savings" round, Betty's original interest of 25% plus George's original 20% interest). George, similarly, may purchase a further 20/45ths share. In this case, where Betty and George each posted the entire \$2,500 needed to "save" the buyout, Betty will ultimately pay \$1,388.89 and George will ultimately pay \$1,111.11; the remaining amounts posted by each of them in the savings round will be returned to them (\$1,111.11 will be returned to Betty and \$1,388.89 will be returned to George).

The court then issues an order in which it reallocates John Smith's original 10% interest in Greenacre as follows: 5.556% to Betty (25/60ths plus $[25/45ths \times 15/60ths]$) and 4.444% to George (20/60ths plus $[20/45ths \times 15/60ths]$), pays to John Smith the \$10,000 the court received for his bought-out interest from Betty and George, and leaves the percentage interests of Harriet (who attempted to participate in the buyout but did not come up with the cash) and the other cotenants who did not participate in the buyout unchanged. To complete the example, as a result of the order the interests of the remaining cotenants (who are satisfied to remain cotenants) are: 30% various cotenants who did not participate in the buyout and whose interests are unchanged by the buyout, 15% Harriet who attempted to participate in the buyout but could not come up with the necessary money, and whose interest therefore remains unchanged by the buyout, 30.556% Betty (her original 25% plus 5.556% formerly owned by John Smith) and 24.444% George (20% plus 4.444%).

SECTION 8. PARTITION ALTERNATIVES.

(a) If all the interests of all cotenants that requested partition by sale are not purchased by other cotenants pursuant to Section 7, or if after conclusion of the buyout under Section 7, a cotenant remains that has requested partition in kind, the court shall order partition in kind unless the court, after consideration of the factors listed in Section 9, finds that partition in kind will result in [great] [manifest] prejudice to the cotenants as a group. In considering whether to order partition in kind, the court shall approve a request by two or more parties to have their individual interests aggregated.

(b) If the court does not order partition in kind under subsection (a), the court shall order partition by sale pursuant to Section 10 or, if no cotenant requested partition by sale, the court shall dismiss the action.

(c) If the court orders partition in kind pursuant to subsection (a), the court may require that one or more cotenants pay one or more other cotenants amounts so that the payments, taken together with the value of the in-kind distributions to the cotenants, will make the partition in kind just and proportionate in value to the fractional interests held.

(d) If the court orders partition in kind, the court shall allocate to the cotenants that are unknown, unlocatable, or the subject of a default [entry][judgment], if their interests were not bought out pursuant to Section 7, a part of the property representing the combined interests of these cotenants as determined by the court [and this part of the property shall remain undivided].

Legislative Note: *In the overwhelming majority of states that have a strong statutory preference for a partition in kind as opposed to a partition by sale, most state courts within these states apply a statutory “great prejudice” or “manifest prejudice” standard in deciding whether it is appropriate in a given case to order a partition by sale instead of a partition in kind. Under this Act, there is also a strong preference for a partition in kind. In Section 8(a), select either the “great prejudice” or “manifest prejudice” standard.*

Comment

1. In many states, a court may order a partition in kind of part of the property and a partition by sale of the remainder. *See, e.g.*, CAL. CIV. PROC. CODE § 872.830 (West 2010); NEB. REV. STAT. § 25-21,103 (2009). However, in a limited number of other states a court may only order either a partition in kind or a partition by sale of the whole property. *See, e.g.*, *Fernandes v. Rodriguez*, 761 A.2d 1283, 1289 (Conn. 2000). This Act neither prescribes nor prohibits a partition in kind of part of the heirs property and partition by sale of the remainder. For example, there may be circumstances in which cotenants receiving part of the property in kind would receive substantially less than their pro rata share of the economic value of the whole property without a cash payment from the sale of the part of the property to be sold and might wish the court to retain jurisdiction for purposes of completing the partition by sale of the remaining portion of the property (rather than employing “owelty,” discussed in the next comment). It is in circumstances such as the last-mentioned case that the court should consider exercising its equitable discretion to implement a mixed remedy and to fashion such appropriate procedures as justice may require. These procedures should draw upon the procedures and the property and wealth preservation principles of this Act, including the hierarchy of sales procedures that apply to the manner in which a partition by sale should be conducted under this Act. If a court decides to order such a mixed remedy, the court may consider whether, in such a process, there should or should not be a further right to buy out interests before ordering a partition by sale of part of the property.

2. Section 8(c): This subsection provides for the remedy of “owelty” which is an equitable remedy. *See, e.g.*, CODE OF ALA. § 35-6-24 (2010); CAL. CIV. PROC. CODE § 873.250 (West 2009). Courts have the equitable power to order owelty payments when it is impractical to divide an estate in a just manner but monetary payments can be ordered to adjust for any variance in the value of the parcels from the interests in the property held by the respective cotenants. *Dewrell v. Lawrence*, 58 P.3d 223, 227 (Okla. Civ. App. 2002). In recent decades, courts have tended to underutilize the remedy of owelty which has resulted in more courts ordering partition by sale in instances in which partition in kind could have been ordered with an appropriate accompanying owelty order. *See, e.g.*, Faith Rivers, *Inequity in Equity: The Tragedy of Tenancy in Common for Heirs’ Property Owners Facing Partition in Equity*, 17 TEMP. POL. & CIV. RTS. L. REV. 1, 76 (2007) (noting that heirs property owners could obtain fair and equitable divisions of property if courts stopped taking the easy option by ordering partition sales and utilized tools such as owelty payments). *See also* John G. Casagrande Jr., Note, *Acquiring Property Through Partitioning Sales: Abuses and Remedies*, 27 B.C. L. REV. 755, 778 (1986). A court in a partition action involving heirs property that may be practicably divided among the cotenants in a manner that preserves the fair value of each cotenant’s ownership interest may not order owelty merely because a cotenant is willing to pay for a parcel that is more valuable than the fair economic value of that cotenant’s ownership interest.

3. Section 8(d): Several states have statutory provisions which permit a court to order a partition in kind and to designate a part of the property for cotenants who remain unknown or unlocatable at the conclusion of the action. *See, e.g.*, ALASKA STAT. § 09.45.290 (2010); ARK. CODE ANN. § 18-60-414 (2010); CAL. CIV. PROC. CODE § 873.270 (West 2010); HAW. REV. STAT.

§ 668-9 (2010); MICH. COMP. LAWS § 3.402 (2010); N.D. CENT. CODE § 32-16-12 (2010); OR. REV. STAT. § 105.245 (2010); S.D. CODIFIED LAWS § 21-45-15 (2010); UTAH CODE ANN. § 78B-6-1212 (2010); WASH. REV. CODE § 7.52.080 (2010).

SECTION 9. CONSIDERATIONS FOR PARTITION IN KIND.

(a) In determining under Section 8(a) whether partition in kind would result in [great][manifest] prejudice to the cotenants as a group, the court shall consider the following:

- (1) whether the heirs property practicably can be divided among the cotenants;
- (2) whether partition in kind would apportion the property in such a way that the aggregate fair market value of the parcels resulting from the division would be materially less than the value of the property if it were sold as a whole, taking into account the condition under which a court-ordered sale likely would occur;
- (3) evidence of the collective duration of ownership or possession of the property by a cotenant and one or more predecessors in title or predecessors in possession to the cotenant who are or were relatives of the cotenant or each other;
- (4) a cotenant's sentimental attachment to the property, including any attachment arising because the property has ancestral or other unique or special value to the cotenant;
- (5) the lawful use being made of the property by a cotenant and the degree to which the cotenant would be harmed if the cotenant could not continue the same use of the property;
- (6) the degree to which the cotenants have contributed their pro rata share of the property taxes, insurance, and other expenses associated with maintaining ownership of the property or have contributed to the physical improvement, maintenance, or upkeep of the property; and

(7) any other relevant factor.

(b) The court may not consider any one factor in subsection (a) to be dispositive without weighing the totality of all relevant factors and circumstances.

Comment

1. Under this section, a court in a partition action must consider the totality of the circumstances, including a number of economic and noneconomic factors, in deciding whether to order partition in kind or partition by sale. In partition cases, a number of courts have utilized such a totality of the circumstances approach in deciding whether to order partition in kind or partition by sale. *See, e.g.*, *Delfino v. Vealencis*, 436 A.2d 27, 33 (Conn. 1980) (“It is the interests of all of the tenants in common that the court must consider; and not merely the economic gain of one tenant, or a group of tenants.”); *Schnell v. Schnell*, 346 N.W.2d 713, 716 (N.D. 1984) (holding that economic and noneconomic factors, including sentimental value, should be weighed by a court in a partition action); *Eli v. Eli*, 557 N.W.2d 405, 409-411 (S.D. 1997) (citations omitted) (in adopting a totality of the circumstances test, the Supreme Court of South Dakota stated that “[o]ne’s land possesses more than mere economic utility; it ‘means the full range of the benefit the parties may be expected to derive from their ownership of their respective shares.’ Such value must be weighed for its effect upon all parties involved, not just those advocating a sale.”); *Ark Land Co. v. Harper*, 599 S.E.2d. 754, 761 (W. Va. 2004) (“[I]n a partition proceeding in which a party opposes the sale of property, the economic value of the property is not the exclusive test for deciding whether to partition in kind or by sale. Evidence of longstanding ownership, coupled with sentimental or emotional interests in the property, may also be considered in deciding whether the interests of the party opposing the sale will be prejudiced by the property’s sale.”).

2. Section 9(a)(2): Under this subparagraph, among other possible considerations of the condition under which the property may be sold, the court must assess whether the cotenants would receive a greater economic benefit from a sale of the whole property due to possible economies of scale that would result from selling the whole property which could not be captured from partition in kind of the property. In conducting this assessment, a court must take into consideration the type of sales condition under which any court-ordered sale would occur as property that is sold at a forced sale – such as a sale upon execution or a foreclosure sale – typically results in property being sold at prices that are substantially below the fair market value of the property. Such a resulting discount from the fair market value of the property due to the forced sale conditions may render partition in kind to be as, or more, economically beneficial to the cotenants than partition by sale of the whole property even in instances in which economies of scale could be realized if the whole property were to be sold under fair market value conditions. *See generally*, Thomas W. Mitchell, Stephen Malpezzi, & Richard K. Green, *Forced Sale Risk: Class, Race, and The “Double Discount,”* 37 FLA. ST. U. L. REV. 589 (2010).

3. Section 9(a)(3): Under this subparagraph, the court shall consider, among other considerations, longstanding possession of the property by any cotenant or certain predecessors

in possession to that cotenant. Adverse possession, for example, raises this issue. Adverse possession statutes require possession over the course of a number of years before a person may actually take title to the property. *See, e.g.*, 735 ILL. COMP. STAT. 5/13-101 (2009) (requiring twenty years of adverse possession); WIS. STAT. §§ 893.25, 893.26 (2008) (requiring twenty years or ten years if color of title). Thus, because many states allow tacking of possession, it is possible that a cotenant may have acquired possession of the property from a relative who had been in possession of the property for many years despite the fact that the statute of limitations for adverse possession had not run, thereby preventing the relative in prior possession from obtaining valid title to the property.

4. Section 9(a)(4): For many families or communities, real property ownership has important ancestral or historical meaning. *See, e.g.*, *Chuck v. Gomes*, 532 P.2d 657, 662 (Haw. 1975) (Richardson, C.J., dissenting):

“[T]here are interests other than financial expediency which I recognize as essential to our Hawaiian way of life. Foremost is the individual's right to retain ancestral land in order to perpetuate the concept of the family homestead. Such right is derived from our proud cultural heritage. . . . [W]e must not lose sight of the cultural traditions which attach fundamental importance to keeping ancestral land in a particular family line.”

See also Phyliss Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 WASH U. L.Q. 737, 766-68, 772-74 (2000); Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 523-26 (2001).

5. Section 9(a)(5): If a single cotenant is using the property in an unlawful way, for example by engaging in conduct that amounts to an ouster of one or more other cotenants, the court shall not recognize such unlawful use as a factor weighing in favor of the court's granting a request made by the cotenant in possession for a partition in kind of the property.

6. After considering the factors in this section, a court that decides to order a partition in kind may not divide the heirs property in a manner that modifies the pre-partition, fair economic value of any cotenant's ownership interest in the property unless the court issues an appropriate orderly order pursuant to Section 8(c). This proscription is consistent with the approach that courts utilize in ordering partition in kind under general partition statutes.

SECTION 10. OPEN-MARKET SALE, SEALED BIDS, OR AUCTION.

(a) If the court orders a sale of heirs property, the sale must be an open-market sale unless the court finds that a sale by sealed bids or an auction would be more economically

advantageous and in the best interest of the cotenants as a group.

(b) If the court orders an open-market sale and the parties, not later than 10 days after the entry of the order, agree on a real estate broker licensed in this state to offer the property for sale, the court shall appoint the broker and establish a reasonable commission. If the parties do not agree on a broker, the court shall appoint a disinterested real estate broker licensed in this state to offer the property for sale and shall establish a reasonable commission. The broker shall offer the property for sale in a commercially reasonable manner at a price no lower than the determination of value and on the terms and conditions established by the court.

(c) If the broker appointed under subsection (b) obtains within a reasonable time an offer to purchase the property for at least the determination of value:

- (1) the broker shall comply with the reporting requirements in Section 11; and
- (2) the sale may be completed in accordance with state law other than this [act].

(d) If the broker appointed under subsection (b) does not obtain within a reasonable time an offer to purchase the property for at least the determination of value, the court, after hearing, may:

- (1) approve the highest outstanding offer, if any;
- (2) redetermine the value of the property and order that the property continue to be offered for an additional time; or
- (3) order that the property be sold by sealed bids or at an auction.

(e) If the court orders a sale by sealed bids or an auction, the court shall set terms and conditions of the sale. If the court orders an auction, the auction must be conducted under [insert reference to general partition statute or, if there is none, insert reference to foreclosure sale].

(f) If a purchaser is entitled to a share of the proceeds of the sale, the purchaser is entitled

to a credit against the price in an amount equal to the purchaser's share of the proceeds.

SECTION 11. REPORT OF OPEN-MARKET SALE.

(a) Unless required to do so within a shorter time by [insert reference to general partition statute], a broker appointed under Section 10(b) to offer heirs property for open-market sale shall file a report with the court not later than seven days after receiving an offer to purchase the property for at least the value determined under Section 6 or 10.

(b) The report required by subsection (a) must contain the following information:

- (1) a description of the property to be sold to each buyer;
- (2) the name of each buyer;
- (3) the proposed purchase price;
- (4) the terms and conditions of the proposed sale, including the terms of any owner financing;
- (5) the amounts to be paid to lienholders;
- (6) a statement of contractual or other arrangements or conditions of the broker's commission; and
- (7) other material facts relevant to the sale.

SECTION 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 13. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize

electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 14. EFFECTIVE DATE. This [act] takes effect