

D R A F T

FOR DISCUSSION ONLY

**UNIFORM PARTITION OF INHERITED
PROPERTY ACT**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-EIGHTEENTH YEAR
SANTA FE, NEW MEXICO
JULY 9 - JULY 16, 2009

**UNIFORM PARTITION OF INHERITED
PROPERTY ACT**

WITHOUT PREFATORY NOTE AND WITH COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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June 4, 2009

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UNIFORM PARTITION OF INHERITED PROPERTY ACT

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1 **UNIFORM PARTITION OF INHERITED PROPERTY ACT**

2
3 **ARTICLE 1**

4
5 **PART 1**

6 **DEFINITIONS AND OTHER GENERAL PROVISIONS**

7
8 **SECTION 1-101. SHORT TITLE.** This [act] may be cited as the Uniform Partition of
9 Inherited Property Act.

10 **SECTION 1-102. DEFINITIONS.** In this [act]:

11 (a) “Heirs’ property” means real property that is held in a tenancy in common that
12 satisfies the requirements of Section 1-103.

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

15 (c) “Partition by sale” means a court-ordered sale of the whole or any part of heirs’
16 property.

17 (d) “Private partition sale” means a partition by sale which is not limited to the parties
18 and in which the real property is listed for sale on the open market by a licensed real estate
19 broker.

20 **Comment**

21 Section 1-102(b): *See* Black's Law Dictionary (8th ed. 2004); *Channer v. Cumming*, 699
22 N.W.2d 831, 837 (Neb. 2005).

23
24 Section 1-102(c): *See* MASS GEN. LAWS ANN. ch. 241 § 31.

25
26 Section 1-102(d): *See, e.g.,* *McCorison v. Warner*, 859 A.2d 609, 614 (Conn. Super. Ct.
27 2004) (In *McCorison*, the court referred to a private partition sale as defined in this act as a
28 “private sale”). Under a private partition sale, the real property should be offered for sale under

1 conditions that are commercially reasonable under the circumstances in order to increase the
2 likelihood that the property may sell for a price that may approach the fair market value of the
3 property. In contrast, one should expect that real property that is sold at a public auction to sell
4 for its forced sale value which is often below the property's fair market value.
5

6 **SECTION 1-103. APPLICABILITY.**

7 (a) This Act applies to an action to partition real property held in tenancy in common
8 only if the real property at the time the proceeding is commenced is or is alleged by any party to
9 be heirs' property which is defined as tenancy-in-common property that meets the following
10 criteria:

11 (1) no written agreement among all the cotenants governs the ownership of the
12 property; and

13 (2) one or more of the cotenants acquired title from an ancestor who owned an
14 interest in the property; and

15 (3) any of the following is true:

16 (a) 20% or more of the cotenants are related by blood, marriage, or
17 adoption;

18 (b) 20% or more of the interests are held by one or more individuals who
19 acquired title from an ancestor; or

20 (c) 20% or more of the interests are held by cotenants who are related by
21 blood, marriage, or adoption.

22 (b) Before a party may obtain an order for a remedy in an action for partition of real
23 property that is tenancy-in-common property, the court shall determine whether the property is
24 heirs' property.

25 **Comment**

1 Section 1-103(a)(1): If tenants in common acquire their interests through a deed or a will
2 that does not establish the manner in which the real property shall be governed or managed, the
3 deed or will alone shall not be construed to be a written agreement among the parties that
4 governs the ownership of the property within the meaning of Section 1-103(a)(1).
5

6 **PART 2**

7 **NOTICE AND KNOWLEDGE**

8 **SECTION 1-104. UNKNOWN OR UNLOCATABLE PARTIES; SERVICE BY**
9 **PUBLICATION.**

10
11 (a) This Act does not limit or affect the right to serve any process in any manner allowed
12 by law or rule of court. However, in addition to any existing rule regarding service by
13 publication, a plaintiff in a partition action governed by this Act must comply with the provisions
14 of this section before service by publication will be authorized.

15 (b) In a proceeding to partition heirs' property, no plaintiff shall be permitted to use, and
16 no court shall authorize, service by publication for the purpose of notifying persons whose
17 whereabouts are known or are capable of being known by a plaintiff exercising due diligence,
18 whether or not those persons reside within this State.

19 (c) No plaintiff shall be permitted to use service by publication in any case in which such
20 service is not prohibited under subsection (b) unless the court orders service by publication. An
21 affidavit in support of a motion to serve by publication in a partition action affecting heirs'
22 property shall set forth facts based upon the personal knowledge of the affiant concerning the
23 methods, means, and attempts made to locate and to effect personal service on the defendants,
24 including the efforts made to discover, review, or otherwise use sources of information readily
25 available to the plaintiff.

26 (d) Any order of service by publication shall be subject to the following conditions:

1 The enhanced notice by publication requirements are not meant to limit or affect the
2 rights to serve process in any other lawful way. *See, e.g.*, HAW. REV. STAT. § 634-23(5) (2009).

3
4 A number of state statutes require the plaintiff to exercise due diligence to locate or
5 identify parties who may have a claim, interest, or concern with respect to certain litigation
6 before the court will authorize service by publication. *See, e.g.*, Ala. Code. §§ 35-6-25 & 35-6-
7 44; Ga. Code Ann. § 9-11-4(f)(1)(A); Haw. Rev. Stat. § 634-23(2); N.C. Gen. § 46-3.1; and S.D.
8 Codified Laws § 15-9-7.

9
10 Although the enhanced notice requirements in this section are designed to increase the
11 likelihood that a defendant who the plaintiff is unable to locate or is unable to identify by name
12 thereby remaining unknown to the plaintiff is provided with notice of the partition action, no
13 lender or the holder of a lien shall have any of its rights compromised under this Act.

14
15 Section 1-104(c): The requirement that the plaintiff document the due diligence taken in
16 attempting to locate unlocatable or unknown parties is found in a number of statutes. *See,*
17 *e.g.*, ALA. CODE §§ 35-6-25 & 35-6-44 (“the facts showing just what diligence the petitioner has
18 exercised must be specifically alleged in the bill”); GA. CODE ANN. § 9-11-4(f)(1)(A); HAW.
19 REV. STAT. § 634-23(2); and S.D. CODIFIED LAWS § 15-9-7.

20
21 Section 1-104(c): “Sources of readily available information” includes information that
22 may be contained in governmental offices, may be located on governmental or non-
23 governmental internet sites, may be possessed by persons likely to know the defendant, or may
24 otherwise be readily available to the plaintiff.

25
26 Section 1-104(d)(1): *See* CAL. C.C.P. CODE § 872.320(a)

27
28 Section 1-104(d)(2): *See, e.g.*, ARK. CODE ANN. § 16-59-101 (2008); CAL. C.C. P. CODE
29 § 405.20; CAL. C.C.P. CODE § 872.320(b); COLO. REV. STAT. § 38-35-110; CONN. GEN. STAT. §
30 52-325 (requiring *lis pendens* “to be recorded in the office of the town clerk of each town in
31 which the property is situated”)

32
33 Section 1-104(d)(3): *See* ALA. CODE § 35-6-25; GA. CODE ANN. § 9-11-4(f)(1)(A); LA
34 CODE CIV. PROC. ANN. ART. 4624; OHIO REV. CODE ANN. § 2329.23.

1 **ARTICLE 2**

2 **PARTITION IN KIND AND PARTITION BY SALE**

3
4 **SECTION 2-201. MANNER OF PARTITION.**

5 (a) Heirs' property may be partitioned only as provided in this Act. A court may order
6 partition in kind or partition by sale of heirs' property only if one or more parties requests the
7 court to order one of these particular remedies. If a party petitions the court for a partition in
8 kind only and no other party requests the court to order a partition by sale, the court shall dismiss
9 the case if the court ultimately determines that a partition in kind cannot be made without great
10 prejudice to the parties.

11 (b) A partition in kind, rather than a partition by sale, is the preferred method of dividing
12 heirs' property.

13 (c) Any party may request the court to order a partition by sale of part of the property and
14 partition in kind of the remainder provided that such a request is made before the court decides
15 whether partition in kind of the whole property can be made without great prejudice to the
16 owners under Section 2-202. If the court determines that a sale and division of the proceeds for
17 part of the property and a partition in kind of the remainder would be more equitable than either
18 a partition in kind or a partition by sale of the whole property, the court may order that such part
19 be sold and the remainder divided.

20 (d) In considering the practicality of a partition in kind, the court must honor any request
21 by two or more parties to have their individual interests considered as one aggregated group
22 interest because these parties would prefer to remain tenants in common if the court were to
23 order a partition in kind.

1 **Comment**

2 Section 2-201(a): Language in this section only permits a partition by sale to be ordered
3 if a party actually petitions the court for a partition by sale. In many cases, tenants in common
4 who have sought a partition in kind when it appeared to them that a partition in kind could be
5 easily ordered, were surprised that a court using an “economics only” analysis ended up ordering
6 a partition by sale which they did not seek and did not want as this was the worst option in their
7 opinion.

8
9 Section 2-201(c): *See, e.g.*, Cal. Code Civ. Proc. § 872.830; N.C. Gen. Stat. § 46-16; W.
10 Va. Code § 37-4-3.

11
12 **SECTION 2-202. FACTORS GUIDING CHOICE OF PARTITION REMEDY.**

13 (a) The court may order partition by sale only if a party requests such relief and
14 establishes by a preponderance of the evidence that the real property or any part of it is so
15 situated that partition in kind cannot be made without great prejudice to the owners, taking into
16 account the totality of the circumstances.

17 (b) In evaluating a request for partition by sale, the court shall consider the following
18 factors:

19 (1) whether the property practicably may be divided between the party or parties
20 seeking a partition by sale and those seeking to maintain ownership of part of the property;

21 (2) whether a partition in kind would apportion the property in such a way that the
22 fair market value of the parcels resulting from the division, in the aggregate, would be materially
23 less than the value of the property if it was sold based upon a valuation that takes into account
24 the type of sale conditions under which the court-ordered sale would occur;

25 (3) evidence of longstanding ownership of the property by any cotenant as
26 supplemented by the period of time that any person or persons who such a cotenant is or was
27 related to by blood, marriage, or adoption and who was a predecessor in the chain of title owned
28 an interest in the property;

1 (4) any cotenant’s particular sentimental links with or attachment to the property,
2 including any attachments arising out of the fact that the property has ancestral or other unique or
3 special value to one or more of the cotenants;

4 (5) the use being made of the property by any cotenant and the degree to which
5 that cotenant would be harmed if he or she could not continue to use the property for these
6 purposes;

7 (6) the degree to which the cotenants have contributed their pro rata share of the
8 property taxes, insurance, and other carrying charges associated with maintaining ownership of
9 the property;

10 (7) the degree to which the parties have contributed to the physical improvement
11 or the upkeep of the property; and

12 (8) any other relevant economic or non-economic factors.

13 (c) In considering the factors set forth in Section 2-202(b)(1-8), a court should not
14 consider any single factor to be dispositive, standing alone, but should instead weigh the totality
15 of all relevant factors and circumstances.

16 **Comment**

17 Section 2-202(a)(1): In certain cases in which a partition in kind alone may be
18 impracticable, a court should consider the practicality of a partition in kind by taking into
19 account the fact that owelty may be an appropriate supplemental remedy.

20
21 Section 2-202(a)(2): *See* N.C. Gen. Stat. § 46-22(b). Real property that is sold at public
22 auctions under forced sale processes such as those normally utilized in a partition by sale of real
23 property, often is sold at a steep discount from the actual value of the property. In these
24 instances, property owners often lose wealth, sometimes a substantial amount of wealth. There
25 are several empirical studies that demonstrate that property sells at a severe discount from fair
26 market value prices when the property is sold under the type of forced sale conditions under
27 which property is often sold under a partition by sale. *See, e.g.,* Marcus T. Allen, *Discounts in*
28 *Real Estate Auction Prices: Evidence from South Florida*, 69 APPRAISAL J. 38, 42 (2001)
29 (finding discount between 13.3% and 21.5%). Further, courts in many other areas of the law
30 have distinguished between forced sale value and fair market value. Therefore, one must

1 consider the specific type of sales conditions under which real property would be sold at a
2 partition by sale in order to evaluate whether or not the winning bid would approximate the
3 property's fair market value and whether the current owners would end up better off
4 economically from a partition by sale as opposed to a partition in kind. *See generally*, Thomas
5 W. Mitchell, Stephen Malpezzi, & Richard K. Green, *Forced Sale Risk: Class, Race, and the*
6 *"Double Discount"*, 37 FLA. ST. U. L. REV. __ (forthcoming 2010).

7
8 Many courts have held that a partition by sale should only be awarded if such a sale
9 would be significantly more beneficial to the cotenants in economic terms than a partition in
10 kind. *See Jacobs v. Mada*, 2007 TX App. Ct. Briefs 832438, Aug. 8, 2007at **21-22. In *Jacobs*,
11 the court stated: "Moreover, the purpose of partitioning real estate by sale rather than in kind,
12 the preferred method, is to restore the maximum value of the separate property to its owners."

13
14 Section 2-202(a)(3): *See Delfino v. Vealencis*, 436 A.2d 27, 33 (Conn. 1980); *Eli v. Eli*,
15 557 N.W.2d 405, 409-411 (S.D. 1997); and *Ark Land. Co. v. Harper*, 599 S.E.2d. 754, 761-62
16 (W. Va. 2004).

17
18 Section 2-202(4): *See Ark Land. Co. v. Harper*, 599 S.E.2d. 754, 761-62 (W. Va. 2004);
19 *Overstreet v. Overstreet*, 692 So. 2d 88, 91 (Miss. 1997); and Property (Co-ownership) Act
20 2005, Part IV, § 229(2)(c), Victoria, Australia.

21
22 Section 2-202(5): *See Delfino v. Vealencis*, 436 A.2d 27, 33 (Conn. 1980); Property (Co-
23 ownership) Act 2005, Part IV, § 229(2)(c), Victoria, Australia.

24
25 **SECTION 2-203. SALE OF PART OR WHOLE OF PROPERTY;**
26 **ESTABLISHING THE PROPERTY'S VALUE.**

27 (a) If the court orders partition by sale of all or part of heirs' property, the court shall
28 appoint a disinterested appraiser to perform an appraisal of the property to be sold. The
29 appraiser must be currently state-licensed or state-certified to appraise the type of real property
30 that is to be sold and must perform all of his or her work and duties in accordance with the
31 Uniform Standards of Professional Appraisal Practice. The property must be appraised at its fair
32 market value based upon its highest and best use assuming sole or unitary ownership of the fee
33 simple estate but with deductions made for the amount of all liens and encumbrances against the
34 property. Upon completion of the appraisal, the appraiser shall file a sworn or verified appraisal
35 with the court, stating that the appraisal was prepared in accordance with the requirements of this

1 subsection.

2 (b) Within ten (10) days after the appraiser files a report of the appraisal with the court,
3 the clerk of the court shall forward to each party and each party's attorney of record, a copy of
4 the report and a notice stating that any party may contest the appraisal by a specified date by
5 filing a written exception thereto, stating the grounds for such exception. Parties shall have at
6 least thirty (30) days from the receipt of the report to file an exception. Any party may also file
7 an appraisal paid for by that party, provided such appraisal is conducted by an appraiser who
8 possesses the requisite qualifications required under this section for a court-appointed appraiser.

9 (c) The court shall conduct an evidentiary hearing limited to the proposed valuation of the
10 property. In determining the fair market value of the real property, the court may use its
11 discretion in deciding upon how much weight to give to any appraisal that was filed with the
12 court and may also exercise its discretion to order a new appraisal.

13 **Comment**

14 Parts of this section are drawn from N.M. Stat. § 42-5-7. Disinterested appraiser
15 language drawn from Ill. § 735 ILCS 5/17-106; Minn. Stat. § 588.17; West Virginia § 37-4-3.;
16 Tenn. Code. Ann. § 29-17-1004.

17
18 Section 2-203(a)-(b): Language from 52 Okl. St. § 318.5.
19

20 **SECTION 2-204. COMMISSIONERS.**

21 (a) If the court appoints commissioners, these commissioners must be disinterested and in
22 any case may not be any of the following:

23 (1) any officer of the court in which the partition action is being litigated,
24 including any judge, magistrate, or clerk of the court;

25 (2) a former or present partner or employee of the judge;

26 (3) a relative within the third degree of the judge or the judge's spouse or the

1 spouse of such a relative;

2 (4) an owner of any interest in the real property subject to partition together with
3 any relative of any such owner within the third degree and any spouse of such a relative; or

4 (5) any person who participates in the partition action on behalf of any party
5 whether as legal counsel, expert witness, or otherwise.

6 (b) The court may appoint as commissioners under this title any person or persons to
7 whose appointment all parties have consented, except those persons prohibited from serving as
8 commissioners pursuant to subsection (a)(1)-(5) of this section. In the case of a minor party or a
9 party for whom a conservator of the estate has been appointed, the guardian or conservator of the
10 estate of the party may so consent.

11 (c) The commissioners shall be sworn by the judge, a magistrate, or the clerk of the court,
12 to do justice among the tenants in common in respect to such partition action, according to their
13 best skill and ability.

14 **Comment**

15 All states do not utilize the terminology of “commissioners.” For example, California
16 utilizes the term “referee.” *See, e.g.*, Cal. Code Civ. Proc. § 873.010

17
18 Section 2-204(a): *See* Cal. Code Civ. Proc. § 873.050.
19

1 **ARTICLE 3**

2 **BUYOUT PROVISIONS**

3
4 **SECTION 3-301. BUYOUT WHEN PARTITION IN KIND DEEMED**

5 **INEQUITABLE.** If the court finds that all or a portion of the real property may not be
6 partitioned in kind without great prejudice to the owners under Section 2-202, the court shall,
7 prior to ordering a private partition sale or a public auction of such property, provide the cotenant
8 or cotenants who had not petitioned the court for a partition by sale with the opportunity to
9 buyout the entire interest of the party or parties who had petitioned the court for a partition by
10 sale. The court shall inform any cotenant who appears in person before the court without
11 counsel about the availability of this buyout remedy.

12 (a) A party who had not petitioned the court for a partition by sale may inform the court
13 that his or her interest should be made available for purchase under this section within 15 days
14 after the court determines the fair market value of the real property to be sold pursuant to Section
15 2-203. If all of the parties to the action who had not petitioned the court for a partition by sale of
16 the property inform the court that their interests should be made available for purchase under this
17 section, the court shall order the property sold pursuant to Section 4-401.

18 (b) A party who had not petitioned the court for a partition by sale and who does not
19 inform the court that his or her interest should be made available for purchase as provided for
20 under subsection (b), shall notify the court of his or her intention to exercise the buyout option no
21 sooner than 15 days and no later than 30 days after the court has determined the fair market value
22 of the real property to be sold pursuant to Section 2-203. A party who had not petitioned the
23 court for a partition by sale may purchase an interest in the real property as provided in this

1 section even if a default judgment has been entered against that party. If more than one party
2 who had not petitioned the court for a partition by sale wishes to exercise their right to buyout
3 interests under this section, each of these parties who is a cotenant shall be entitled to purchase a
4 portion of the interest that is available to be bought out at a level that is equal to the cotenant's
5 existing percentage ownership divided by the total percentage ownership of all cotenants
6 participating in the buyout.

7 (c) No sooner than 30 days and no later than 75 days after the court has established the
8 value of the real property pursuant to Section 2-203, each party who has exercised the buyout
9 option shall pay into the court the price set as the fair market value of the interest it is
10 purchasing. Upon full payment of the purchase price for the entire interest that is subject to the
11 buyout provisions of this section, the court shall order that the proper instruments transferring
12 title in the interest be executed and delivered to the purchasing cotenant or cotenants. If none of
13 the cotenants who exercised the buyout option pays its percentage of the price set as the fair
14 market value of the entire interest to be bought out within 75 days after the court has established
15 the value of the real property, the court shall order a sale of the property pursuant to Section 4-
16 401.

17 (d) If one or more but not all of the cotenants who exercised the buyout option under
18 subsection (b) fail to pay their percentage of the price established as the fair market value of the
19 interest by the deadline specified in subsection (c), the court shall within 10 days after such
20 deadline notify all cotenants who exercised the buyout option of that fact and of the amounts
21 which failed to be timely paid in, and each of the remaining cotenants who exercised the buyout
22 option and timely paid in its percentage of the purchase price, may purchase all or a portion of
23 the defaulting cotenant's or cotenants' interest(s) by paying the fair market value of the share or

1 shares into the court within a further 10 days after the court gives such notice provided above in
2 this subsection. The portion that each of the remaining cotenants may purchase shall be equal to
3 the cotenant's original percentage ownership divided by the total percentage ownership of all the
4 remaining cotenants interested in purchasing the defaulting cotenant's or cotenants' interest(s)
5 who pay in within such further 10 day period. If the remaining cotenants who exercised the
6 buyout option and timely paid in do not pay the full price of the interest to be bought out into the
7 court within such further 10 day period after the court gives the notice provided above in this
8 subsection, the court shall order the property sold pursuant to Section 4-401.

9

1 **ARTICLE 4**

2 **SALES PROCEDURE**

3
4 **SECTION 4-401. PRIVATE PARTITION SALES OR PUBLIC AUCTIONS.**

5 (a) If a court orders a sale of all or part of heirs' property, the court shall order that the
6 property be sold at a private partition sale unless the court finds that a public auction sale would
7 be economically more advantageous and in the best interest of all the cotenants.

8 (b) If the court orders a private partition sale and the parties agree on the identity of a
9 licensed real estate broker to sell the property within 10 days after the court's order, the court
10 shall appoint that real estate broker to sell the property. If the parties cannot so agree, the court
11 shall appoint a disinterested, licensed real estate broker to sell the property and shall establish a
12 reasonable commission for the broker. The broker shall list the real property for sale at a price
13 no lower than the court-determined value of the property as established in Section 2-203 and
14 subject to any other terms and conditions established by the court.

15 (c) If the property does not sell for at least the court-determined value of the property
16 within the time period the court establishes for a private partition sale, the court, upon further
17 hearing, may:

18 (1) approve the highest outstanding offer, if any;

19 (2) revalue the property and order that the property continue to be listed for a
20 further defined period; or

21 (3) order that the property be sold at a public auction.

22 (d) If the court orders a public auction, the court shall set the terms and conditions of the
23 sale, which also shall be conducted in the manner prescribed by law for auctions of real property

1 in other partition proceedings in this state.

2 (e) If the buyer is a person who owns an interest in the real property or holds a lien on the
3 property, and thereby is entitled to a share of the proceeds of the sale, the buyer shall receive a
4 credit against the price in an amount equal to the value of the interest or lien. Persons who
5 qualify for this credit may aggregate their credits if they are joint buyers.

6 **Comment**

7 This preference for public sales draws upon the strong international trend as seen in
8 countries such as England, Wales, Scotland, and Canada in which law commissions, courts and
9 legislatures have recognized that public sales are superior to public auctions with respect to
10 preserving a real property owner's wealth in instances in which a court has ordered a forced sale.
11 These countries have recognized that public auctions do not vindicate the policy goal of making
12 sure that any economies of scale derived from selling the property as a whole actually benefit the
13 present co-owners as opposed to a purchaser who can purchase the property at a price that is
14 below the fair market value of the property.

15
16 Section 4-401(e): *See, e.g.*, OR. REV. STAT. § 105.365; S.D. CODIFIED LAWS § 21-45-34
17 (2009); UTAH CODE ANN. § 78-39-35 (2009); and WASH. REV. CODE § 7.52.390 (2009).

18
19 **SECTION 4-402. PERSONS INELIGIBLE TO PURCHASE AT A PRIVATE**
20 **PARTITION SALE.**

21 (a) The judge, any commissioner, any appraiser, or any real estate broker, as well as any
22 agent for any of these individuals who participates in the partition proceedings may not directly
23 or indirectly buy all or any part of the property which is the subject of such private partition sale.

24 (b) A sale contrary to subsection (a) shall not be confirmed under Section 4-403(c).
25 Notwithstanding confirmation under Section 4-403(c), a person harmed by a violation of
26 subsection (a) shall be entitled to damages.

27 **Comment**

28 Section 4-402(a): *See, e.g.*, Cal. Code Civ. Proc. § 873.690
29

