

DRAFT  
FOR DISCUSSION ONLY

**UNIFORM PARTITION OF TENANCY-IN-COMMON**  
**REAL-INHERITED**  
**PROPERTY ACT**

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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~~For November 21-22, 2008 Drafting Committee Meeting~~  
May 2009 Interim Draft

*Without Prefatory Note and With Comments*

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By  
NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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May 1, 2009

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REAL-INHERITED  
PROPERTY ACT**

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| UNIFORM PARTITION OF ~~TENANCY-IN-COMMON REAL~~INHERITED PROPERTY  
ACT

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1 UNIFORM PARTITION OF ~~TENANCY-IN-COMMON REAL~~INHERITED PROPERTY

2 ACT

4 ARTICLE 1

6 PART 1

7 DEFINITIONS AND OTHER GENERAL PROVISIONS

8 SECTION 1-101. SHORT TITLE. This [act] may be cited as the Uniform Partition of  
9 ~~Tenancy In Common Real~~Inherited Property Act.

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

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

14 \_\_\_\_\_ (b) “Partition in kind” means the ~~aet~~division of ~~physically dividing~~ real property held  
15 jointly or in common which is owned by two or more persons ~~into~~ as co-owners into physically  
16 distinct and separately ~~owned interests~~ titled parcels.

17 (bc) “Partition by sale” means ~~that the~~ court ~~may order~~ ordered sale of the whole or any  
18 part of the property ~~which cannot be divided advantageously to be sold, upon such terms and~~  
19 conditions and as the court may order. \_\_\_\_\_.

20 (ed) “Private partition sale” means a partition by sale that is limited to the parties and  
21 under which the property is sold to the highest bidder amongst the parties participating in the  
22 sale.

23 (de) “Public partition sale” means a partition by sale which is not ~~confined~~limited to the  
24 parties ~~that is conducted under fair market value conditions~~ and in which the property is listed for

Comment [twm1]: I think we might have to exclude the “private partition sale” as a sales option as a result of the manner in which the buyout section has been redrafted. Maintaining such a private partition sale option might unduly extend the period during which the property remains unsold after the court orders a partition sale because if the private partition sale fails for some reason, the court would have to order that the property be sold using another procedure.

1 ~~sale on the open market~~ by a licensed real estate broker ~~at a price that is no lower than the court-~~  
2 ~~approved appraised price for a period not to exceed six months or the average marketing time~~  
3 ~~then prevailing for real property in the relevant market whichever is longer.~~

#### 4 **Comment**

5 Section 1-102(ab): ~~See *McCorison v. Warner*, 859 A.2d 609, 614 (Conn. Super. Ct. 2004) (Black's~~  
6 ~~Law Dictionary (8th ed. 2004); *Channer v. Cumming*, 699 N.W.2d 831, 837 (Neb. 2005);~~  
7 ~~Black's Law Dictionary (8th ed. 2004)).~~

8  
9 Section 1-102(bc): See M.G.L.A. 241 § 31.

10  
11 ~~Section 1-102(e): See, e.g., *McCorison v. Warner*, 859 A.2d 609, 614 (Conn. Super. Ct.~~  
12 ~~2004) (In *McCorison*, the court referred to a public partition sale as defined in this act as a~~  
13 ~~“private sale”). Under a public partition sale, the property should be offered for sale under~~  
14 ~~conditions that are commercially reasonable under the circumstances in order to increase the~~  
15 ~~likelihood that the property may sell for a price that may approach the fair market value of the~~  
16 ~~property. In contrast, one should expect that property sold at a public auction should sell for its~~  
17 ~~forced sale value which is often below the property’s fair market value.~~

#### 18 19 **SECTION 1-103. APPLICABILITY.**

20 (a) This Act applies to ~~an action to partition real property held in~~ tenancy-in-common  
21 ~~property~~ only if:

22 ~~(1) the real property at the time the proceeding is commenced is or is alleged by~~  
23 ~~any party to be heirs’ property which is defined as tenancy-in-common property that meets the~~  
24 ~~following criteria:~~

25 ~~(a) no written agreement among all the cotenants governs the ownership of~~  
26 ~~the property; and~~

27 ~~(2) a substantial number of the cotenants [\_\_\_\_ percent or more of the interests are~~  
28 ~~held by cotenants who] are related by blood, marriage, or adoption; and~~

29 ~~(3) (b) one or more of the cotenants acquired their title from an~~  
30 ~~ancestor who owned an interest in the property; and~~

1 (c) any of the following is true:

2 (1) 20% of the cotenants are related by blood, marriage, or

3 adoption;

4 (2) 20% or more of the interests are held by an individual who

5 acquired their title from an ancestor; or

6 (3) 20% or more of the interests are held by cotenants who are

7 related by blood, marriage, or adoption.

8 (b) ~~This [act] supplements existing law governing~~Before a party may obtain an order for  
9 a remedy in an action for partition of tenancy-in-common property. ~~The principles of law and~~  
10 equity, including the law of real, the court shall determine whether the property is heirs'  
11 property, civil procedure, and probate supplement the provisions of this [act], except to the  
12 extent inconsistent with this [act]

13 **Comment**

14 Section 1-103(a)(1)(a): If tenants in common acquire their interests through a deed or a  
15 will that does not establish the manner in which ~~ease this [act]~~the property shall be governed or  
16 managed, the deed or will alone shall not be construed to be a written agreement among the  
17 parties that governs the ownership of the property within the meaning of Section 1-103(b).  
18

19 **PART 2**

20 **NOTICE AND KNOWLEDGE**

21 **SECTION 1-104. UNKNOWN OR UNLOCATABLE PARTIES; SERVICE BY**

22 **PUBLICATION.** Nothing herein contained limits or affects the right to serve any process in  
23 any other manner now or hereafter provided by law or rule of court. Further, in addition to any  
24 existing rule or rules regarding service by publication, a plaintiff in a partition action governed  
25 by this Act must comply with the provisions of this section before service by publication will be  
26

1 authorized.

2 In a partition proceeding, any person having a claim to or interest in the property so as to  
3 be a necessary or proper party, who the plaintiff, after exercising due diligence, is unable to  
4 locate or is unable to identify by name thereby remaining unknown, may be made party to the  
5 action, provided:

6 (a) No plaintiff shall be permitted to use, and no court shall authorize, service by  
7 publication for the purpose of notifying ~~parties in interest~~defendants whose whereabouts are  
8 known or are capable of being known by a plaintiff exercising due diligence, irrespective of  
9 whether these interested parties reside in state or reside out of state.

10 ~~(b) In order for a court to order that a defendant be served by publication, the plaintiff~~  
11 ~~must specifically allege in an affidavit the facts showing what due diligence the plaintiff~~  
12 ~~exercised in attempting to locate unlocatable or unknown owners. The affidavit required by this~~  
13 ~~paragraph~~ (b) An affidavit in support of a motion to serve by publication in an action  
14 affecting heirs' property shall set forth facts based upon the personal knowledge of the affiant  
15 concerning the methods, means, and attempts made to locate and to effect personal service on the  
16 ~~unlocatable or unknown~~ defendants, including the efforts made to utilize, review, or otherwise  
17 draw upon sources of information readily available to the plaintiff.

18 (c) In addition to other requirements provided elsewhere, where the court orders service  
19 by publication, such order shall be subject to the following conditions:

20 (1) ~~The~~A plaintiff ~~shall post, not later than ten (, within 10) days after the date the~~  
21 ~~order is made, a copy of the summons and complaint in court orders publication in an action for~~  
22 ~~partition subject to this subsection, shall affix~~ a conspicuous ~~plac~~sign on the real property ~~that is~~  
23 ~~the subject of~~subject to partition stating that the action has been commenced and identifying the

**Comment [T2]:** Carl suggested that we strike the intro part of 1-104 up to (a). There was no consensus on this suggestion. Please weigh in with your thoughts on this suggestion.

1 | ~~name of the plaintiff, the action-known defendants, and this summons and complaint shall remain~~  
2 | ~~posted on the subject property throughout court in which the remaining duration of the partition~~  
3 | ~~action; is pending.~~

**Comment [T3]:** We agreed in Portland to strike the language requiring the posting of the complaint for the duration of the partition action. Now that we've changed the requirement to a requirement that a conspicuous sign be posted should we have some durational requirement?

4 | (2) The plaintiff shall record, if not already recorded, a notice of the pendency of  
5 | the action in the office of the recorder of deeds in the county or counties in which the real  
6 | property or any portion thereof is situated [in the place designated by state law for the filing of a  
7 | lis pendens]. The notice shall contain the name of the court where such action is pending, the  
8 | names of all the ~~parties to such~~ persons named in the action at the time of such recording, and a  
9 | description of the real property affected by the action.

10 | ~~(3)~~ (3) The publication shall be addressed to any persons who is necessary to be  
11 | made a party defendant who the plaintiff is unable to locate in his or her name followed by the  
12 | words: "and his heirs or devisees, if deceased." The publication shall also contain the name and  
13 | address of the court, the docket number of the proceeding, the names of the parties, the character  
14 | of the action, the name and contact information for the principal attorney for the plaintiff  
15 | including the address and telephone number for this attorney, a description of the property, a  
16 | notice directed and addressed to the party to be thus served, commanding him or her to appear  
17 | and answer as in ordinary cases, and the date on or after which default may be entered against  
18 | such party. The description of the property shall include the street address or other common  
19 | designation for the property, the legal description, the acreage of the property, and a description  
20 | of all of the number of buildings improvements on the property.]

**Comment [T4]:** Martha suggested that we include in the Act the consequences that would flow from failing to comply with the notice requirements (such as the effect on people who claim to be bona fide purchasers for value). Do you agree that we need to include such language in this Act? If so, what should be the consequences? In the foreclosure context, for example, in the absence of a statute to the contrary, the failure to mail a statutorily required notice to a mortgagor renders the foreclosure sale void in many jurisdictions.

21 | **Comment**

22 |  
23 | The enhanced notice by publication requirements are not meant to limit or affect the  
24 | rights to serve process in any other lawful way. ~~HRS. See, e.g., HAW. REV. STAT. § 634-23(5)~~  
25 | (2009).  
26 |

1 A number of state statutes require the plaintiff to exercise due diligence to locate or  
2 identify parties who may have a claim, interest, or concern with respect to certain litigation  
3 before the court will authorize service by publication. *See, e.g.*, Ala. Code. §§ 35-6-25 & 35-6-  
4 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.  
5 Codified Laws § 15-9-7.

6  
7 ~~As a general rule, the holder of a mortgage or other lien upon the undivided interest of a~~  
8 ~~cotenant is not, in the absence of a statute stating otherwise, a necessary party to a suit for~~  
9 ~~partition, since the lien is transferred to the interests in severalty allocated to the cotenants;~~  
10 ~~however, such holder of a mortgage or other lien upon the undivided interest of a cotenant is a~~  
11 ~~proper party provided that the mortgage or lien existed at the commencement of such~~  
12 ~~proceedings. See 59A Am. Jur. 2d Partition § 95.~~

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

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

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

29  
30 Section 1-104(c)(1): *See* CAL. C.C.P. CODE-~~Civ. Proc.~~ § 872.320(a)

31  
32 Section 1-104(c)(2): *See, e.g.*, ~~A.C.A.~~ARK. CODE ANN. § 16-59-101 (2008); CAL. C.C.P.  
33 ~~CODE-Civ Proc~~ § 405.20; CAL. C.C.P. CODE-~~Civ. Proc.~~ § 872.320(b); ~~C.R.S.~~COLO. REV. STAT. §  
34 38-35-110; CONN. GEN. STAT. § 52-325 (requiring lis pendens “to be recorded in the office of the  
35 town clerk of each town in which the property is situated”)

36  
37 Section 1-104(c)(3): *See* ALA. CODE § 35-6-25; GA. CODE ANN-; § 9-11-4(f)(1)(A);  
38 ~~LSA-C.C.P.~~LA CODE CIV. PROC. ANN. ART. 4624; ~~OH R.~~OHIO REV. CODE ANN. § 2329.23.  
39 ~~Question: If there is to be a statement of the root of title, would that be the root of title as defined~~  
40 ~~by state marketable title acts or some other period?~~

1 ARTICLE 2

2 PARTITION IN KIND AND PARTITION BY SALE

3  
4 SECTION 2-201. MANNER OF PARTITION BY SALE.

5 (a) In a partition action, a court may order a partition in kind or a partition by sale  
6 provided that the remedy that the court may ultimately order was requested by one of the parties.  
7 A partition in kind, rather than a partition by sale, is the preferred method of dividing heirs'  
8 property.

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

16 (c) In considering the practicality of a partition in kind in a case in which there are  
17 multiple defendants, a court must honor any request that the defendants as a whole, or any  
18 smaller group of defendants make to have their individual interests considered by the court to be  
19 one aggregated group interest due to the fact that these defendants would prefer to remain tenants  
20 in common if the court were to order a partition in kind.

21 Comment

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

Comment [T5]: What happens if no one requests a partition sale and the court determines that a partition in kind which had been requested by one of the parties is determined to be unfeasible? Dismiss the case and require the petitioner(s) to pay for the costs of the litigation?

1 | **SECTION 2-202. FACTORS: GUIDING CHOICE OF PARTITION REMEDY.**

2 | (a) If a party requests that the property be partitioned by sale and establishes by a  
3 | preponderance of the evidence to the satisfaction of the court, that the real property or any part of  
4 | it is so situated that partition in kind cannot be made without great prejudice to ~~all of~~ the owners,  
5 | taking into account the totality of the circumstances, the court may order a sale thereof. The  
6 | court may only order a partition by sale if a party requests that the property be partitioned by  
7 | sale. If a party does request a partition by sale, without limiting the economic or non-economic  
8 | factors that the court may consider ~~in deciding whether a partition in kind of all of the property~~  
9 | ~~or some of the property as provided for in Section 2-202 can be made without great prejudice to~~  
10 | ~~the owners~~, the court shall consider the following factors:

11 | (1) whether the property is able to be divided between the party or parties seeking  
12 | a partition by sale and those seeking to ~~remain tenants in common as well as the practicality of~~  
13 | ~~dividing the property in kind~~ maintain ownership of part of the property taking into account any  
14 | expressed intention of the defendants to retain their ownership of the property as tenants in  
15 | common;

16 | ~~\_\_\_\_\_~~ (2) the practicality of dividing the property in kind;

17 | ~~\_\_\_\_\_~~ (3) whether a partition in kind would apportion the property in such a way that the  
18 | ~~actual~~ value of the parcels resulting from the division, in the aggregate, would be materially less  
19 | than the ~~actual~~-value of the property if it was sold as a whole based upon a valuation that takes  
20 | into account the type of sale conditions under which the court-ordered sale would occur-;

21 | ~~(34)~~ evidence of longstanding ownership by any individual cotenant as  
22 | supplemented by the period of time that any person or persons ~~that~~who such a cotenant is or was  
23 | related to by related by blood, marriage, or adoption and who was in the chain of title owned an

1 interest in the property;

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

5 | (56) the use being made of the property by any of the tenants in common and the  
6 degree to which this tenant in common would be harmed if he or she could not continue to use  
7 the property for these purposes, ~~especially as it pertains to residential, business, or agricultural~~  
8 ~~uses; and;~~

9 | (67) the degree to which the ~~parties~~cotenants have contributed their pro rata share  
10 of the property taxes, insurance, and other carrying charges associated with maintaining  
11 ownership of the real property as well as the degree to which the parties have contributed to the  
12 physical improvement or the upkeep, ~~of the property, including any upkeep related to protecting~~  
13 ~~the interests of the cotenants against any person who has no legal claim to the property but who~~  
14 ~~attempts to use the property without the consent of the cotenants.~~ of the property; and  
15 (8) any other economic or non-economic factors.

16 | (b) In considering the factors set forth in Section 2-~~201202~~202(a)(1-~~6~~) ~~as well as any other~~  
17 ~~economic or non-economic factor that the court may consider to be relevant,~~8, a court should  
18 not consider any single factor to be dispositive, standing alone, but should instead weigh the  
19 totality of ~~the~~all relevant factors and circumstances.

20 **Comment**

21 | Section 2-~~201202~~202(a) - Language in this section only permits a partition by sale to be  
22 ordered if a party actually petitions the court for a partition by sale. In many cases, tenants in  
23 common who have sought a partition in kind when it appeared to them that a partition in kind  
24 could be easily ordered, were surprised that a court using an “economics only” analysis ended up  
25 ordering a partition by sale which they did not seek and did not want as this was the worst option  
26 in their opinion.

1  
2 ~~Section 2-201(a)(2): See N.C. Gen. Stat. § 46-22(b). In certain cases in which a~~  
3 ~~partition in kind alone may be impracticable, a court should consider the practicality of a~~  
4 ~~partition in kind by taking into account the fact that owelty may be an appropriate supplemental~~  
5 ~~remedy.~~

6  
7 ~~Section 2-202(a)(3): See N.C. Gen. Stat. § 46-22(b). Property that is sold at public~~  
8 ~~auctions under forced sale conditions, like the conditions that prevail in a partition by sale, often~~  
9 ~~sells at a steep discount from the actual value of the property which in turn results in the property~~  
10 ~~owner losing wealth, sometimes substantial wealth. There are several empirical studies that~~  
11 ~~demonstrate that property sells at a severe discount from fair market value prices when the~~  
12 ~~property is sold under the type of forced sale conditions under which property is often sold under~~  
13 ~~a partition by sale. See, e.g., Marcus T. Allen, *Discounts in Real Estate Auction Prices: Evidence from South Florida*, 69 APPRAISAL J. 38, 42 (2001) (finding discount between 13.3%~~  
14 ~~and 21.5%). Further, courts in many other areas of the law have distinguished between forced~~  
15 ~~sale value and fair market value. Therefore, one must consider the specific type of sales~~  
16 ~~conditions under which property would be sold at a partition by sale in order to evaluate whether~~  
17 ~~or not the winning bid would approximate the property's fair market value and whether the~~  
18 ~~current owners would end up better off economically from a partition by sale as opposed to a~~  
19 ~~partition in kind. See generally, Thomas W. Mitchell, Stephen Malpezzi, & Richard K. Green,~~  
20 ~~*Forced Sale Risk: Class, Race, and the "Double Discount"*, 37 FLA. ST. U. L. REV.~~  
21 ~~(forthcoming 2010).~~

22  
23  
24 Many courts have held that a partition by sale should only be awarded if such a sale  
25 would be significantly more beneficial to the cotenants in economic terms than a partition in  
26 kind. See *Jacobs v. Mada*, 2007 TX App. Ct. Briefs 832438, Aug. 8, 2007 at \*\*21-22. In *Jacobs*,  
27 the court stated: "Moreover, the purpose of partitioning real estate by sale rather than in kind,  
28 the preferred method, is to restore the maximum value of the separate property to its owners."

29  
30 Section 2-202(a)(34): See *Delfino v. Vealencis*, 436 A.2d 27, 33 (Conn. 1980); *Eli v. Eli*,  
31 557 N.W.2d 405, 409-411 (S.D. 1997); and *Ark Land. Co. v. Harper*, 599 S.E.2d. 754, 761-62  
32 (W. Va. 2004).

33  
34 Section 2-202(d5): See *Ark Land. Co. v. Harper*, 599 S.E.2d. 754, 761-62 (W. Va. 2004);  
35 *Overstreet v. Overstreet*, 692 So. 2d 88, 91 (1997); and Property (Co-ownership) Act 2005, Part  
36 IV, § 229(2)(c), Victoria, Australia.

37  
38 Section 2-202(e6): See *Delfino v. Vealencis*, 436 A.2d 27, 33 (Conn. 1980); Property  
39 (Co-ownership) Act 2005, Part IV, § 229(2)(c), Victoria, Australia.

40  
41 ~~SECTION 2-202. PARTIAL PARTITION IN KIND AND SALE. Any party may~~  
42 ~~request the court to consider partition by sale of part of the property and partition in kind of the~~  
43 ~~remainder provided that such a request is made before the court considers whether partition in~~

1 ~~kind of the whole property can be made without great prejudice to all of the owners under~~  
2 ~~Section 2-201. If the court finds, after weighing certain economic and non-economic factors~~  
3 ~~including those mandated by Section 2-201(a)(1-6), that sale and division of proceeds for part of~~  
4 ~~the property would be more equitable than a partition in kind or a partition by sale of the whole~~  
5 ~~property, the court may order that such part be sold and the remainder divided.~~

6 **Comment**

7 ~~See, e.g., Cal. Code Civ. Proc. § 872.830; N.C. Gen. Stat. § 46-16; W. Va. Code § 37-4-3.~~  
8

9 ~~SECTION 2-203. SALE OF PART OR WHOLE OF PROPERTY; APPRAISAL.~~

10 (a) ~~Should~~If the court ~~be of the opinion~~finds that a partition in kind of the real property  
11 cannot be made of the whole or a part of the property without great prejudice to the property  
12 owners ~~of the same~~, the court shall appoint a disinterested appraiser to perform an appraisal of  
13 the property to be sold. The appraiser ~~who is appointed~~ must be currently state-licensed or state-  
14 certified to appraise the type of property that is to be sold at the partition by sale. In addition, the  
15 appraiser must perform all of his or her duties and must practice in accordance with the Uniform  
16 Standards of Professional Appraisal Practice. After taking an oath administered by the judge, a  
17 magistrate, or the clerk of the court to appraise the property at its fair market value, the property  
18 must be appraised based upon its highest and best use assuming sole or unitary ownership of the  
19 fee simple estate but with deductions made for the amount of all liens and encumbrances against  
20 such real estate. Upon its completion, the appraiser shall file his or her appraisal with the court.

21 (b) Within ten (10) days after the report of the appraiser is filed, the clerk of the court  
22 shall forward to each party or the party's attorney ~~of record, each party, and interested party~~ of  
23 record, a copy of the report of the appraiser and a notice stating the time limits for filing an  
24 exception provided that any party must be given at least thirty (30) days from the receipt of the

1 appraisal report to file such an exception. Any party ~~to the action who shall have been adjudged~~  
2 ~~by the court to have an interest in the real estate appraised,~~ may contest ~~said the~~ appraisal ~~by~~  
3 ~~filing an affidavit setting forth wherein said appraisal is incorrect and.~~ Any party may also file  
4 ~~with the court~~ an appraisal paid for by ~~themselves~~that party, provided such appraisal is  
5 conducted by an appraiser who possesses the requisite qualifications set forth under this section  
6 for a court-appointed appraiser. An evidentiary hearing limited to the proposed valuation of the  
7 property shall be conducted. In determining the value of the real estate, the court may use its  
8 discretion in deciding upon how much weight to give to any appraisal that was filed with the  
9 court and may also exercise its discretion to order a new appraisal that it will consider before the  
10 court determines the property's value.

#### 11 **Comment**

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

15  
16 Should we include time limits for the appointment of the appraiser and the filing of the  
17 report?

18  
19 Section 2-203(b): Language from 52 Okl. St. § 318.5.  
20

#### 21 **SECTION 2-204. APPOINTMENT OF COMMISSIONERS.**

22 (a) The court in its discretion or on the motion of any interested party may appoint three  
23 or more disinterested persons to be commissioners to divide or sell the property as ordered by the  
24 court. If the court decides to appoint commissioners, the clerk of the court shall forthwith notify  
25 the commissioners of their appointment, and shall deliver to one of them a certified copy of the  
26 judgment of partition.

27 (b) The court in its discretion may appoint commissioners for a partition in kind and

**Comment [T6]:** My notes on the discussion from this section do not reveal much consensus on any proposed changes. Bill Breetz, for example, indicated that he had no proposed changes. Carl wanted a default rule that no commissioners be appointed unless all parties requested the appointment of commissioners. Greg was worried that if courts are not given discretion to appoint commissioners they might just "take the easy route" and order a partition by sale even if a partition by kind could/should have been ordered. John worried that making it more difficult to appoint commissioners might generate opposition to the Act from the type of people who are normally appointed to be commissioners.

Therefore, I am not really sure what to do with this section and therefore have not made any changes. Please weigh in with your thoughts on this section. We probably should have a conference call to talk about the draft before I submit the draft to NCCUSL for the annual meeting. We can talk about a number of items at that time, including this section.

1 commissioners for partition by sale if either of these remedies is ordered, or the court may  
2 appoint the same commissioners for a partition in kind and a partition by sale if both remedies  
3 are ordered by the court.

4 (c) If the court appoints commissioners, these commissioners must be disinterested and in  
5 any case may not be any of the following:

6 (1) ~~A clerk~~ Any officer of the court in which the partition action is being litigated,  
7 including any judge, magistrate, or deputy clerk of the court.

8 (2) A former or present partner or employee of the judge.

9 (3) A relative within the third degree of the judge or the judge's spouse or the  
10 spouse of such a relative.

11 (4) An owner of any interest in the property that is the subject of the action  
12 together with any relative of any owner within the third degree.

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

15 (d) The court may appoint as commissioners under this title any person or persons to  
16 whose appointment all parties have consented. In the case of a minor party or a party for whom  
17 a conservator of the estate has been appointed, the guardian or conservator of the estate of the  
18 party may so consent.

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

#### 22 **Comment**

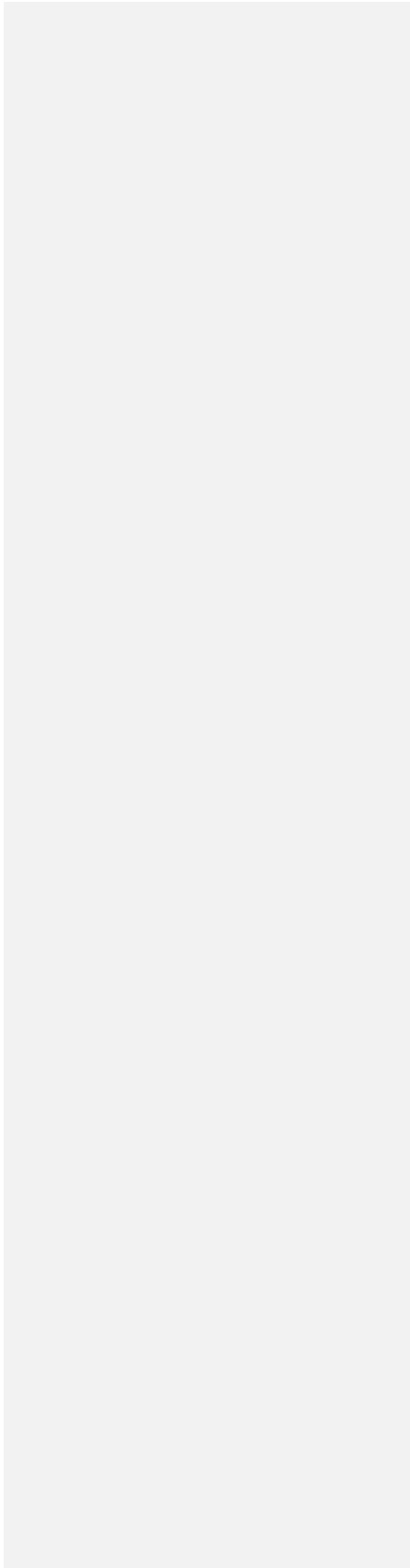
23 The drafting committee should decide whether to make appointment of commissioners  
24 mandatory or discretionary. The states are split on this matter.

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9

Section 2-205(a): Cal. Code Civ. Proc. § 873.010.

Section 2-205(c): Cal. Code Civ. Proc. § 873.050. The first four requirements are from Section 873.050 with the addition of the language barring “any relative of any owner within the third degree.”

Section 2-205(e): *See* N.C. Gen. Stat. § 46-8.





1 inform the court that their interest should be made available for purchase as provided for under  
2 subsection (b), shall notify the court of their intention to exercise the buyout option no sooner  
3 than 15 days and no later than 30 days after the court has determined the value of the property to  
4 be sold pursuant to Section 2-203. A party who had not petitioned the court for a partition by  
5 sale may purchase an interest in the property as provided in this section even if a default  
6 judgment has been entered against that party. If more than one party who had not petitioned the  
7 court for a partition by sale wishes to exercise their right to buyout interests under this section,  
8 each other, the court shall give of these parties cotenants shall be entitled to purchase a portion of  
9 the interest that is available to be bought out at least forty five (45) days to a level that is equal to  
10 the cotenant's existing percentage ownership divided by the total percentage ownership of all  
11 cotenants participating in the buyout.

12 (c) No sooner than 30 days and no later than 75 days after the appraised price for the  
13 property to be sold is established, each party who has exercised the buyout option shall pay into  
14 the court the amount by which the fair market value of the property as determined by the court  
15 under Section 2-203 exceeds this party's or these parties' entitlement to a portion of the proceeds  
16 of the sale. If the parties who are given the opportunity to purchase the property to be sold under  
17 the price set as the value of the interest they are purchasing. Upon full payment of the purchase  
18 price for the entire interest that is subject to the buyout provisions of this section, the court shall  
19 order that the proper instruments transferring title in the interest be executed and delivered to the  
20 purchasing cotenant or cotenants. If none of the cotenants who exercised the buyout option pays  
21 their percentage of the price set as the value of the entire interest to be bought out within 75 days  
22 after the appraised price for the property to be sold is established, the court shall order a sale of  
23 the property pursuant to Section 4-401.

1 (d) If one or more but not all of the cotenants who exercised the buyout option under  
2 subsection (b) fail to pay their percentage of the price established as the value of the interest by  
3 the deadline specified in subsection (c), the remaining cotenants who exercised the buyout option  
4 may purchase a portion of the defaulting cotenant's interest by paying the price of the share or  
5 shares into the court within the time fixed by the court the purchase price for the property as set  
6 in accordance with this section, the property will then be sold at a public sale or at public auction  
7 as the court determines 10 days after the expiration of the deadline provided in subsection (c) of  
8 this section. The portion that each of the remaining cotenants may purchase shall be equal to the  
9 cotenant's original percentage ownership divided by the total percentage ownership of all  
10 cotenants interested in purchasing the defaulting cotenant's interest. If the remaining cotenants  
11 who exercised the buyout option do not cure the default by paying the full price of the interest to  
12 be bought out into the court within 10 days after the expiration of the deadline provided in  
13 subsection (c) of this section, the court shall order property sold pursuant to Section 4-401.

14 ~~—— (b) If two or more parties, in opposition to each other, inform the court of their desire to~~  
15 ~~purchase the property within the time fixed by the court, the court shall exercise its discretion to~~  
16 ~~decide whether to award one or more of the parties the opportunity to purchase the property as~~  
17 ~~provided in this section to the exclusion of the party or parties in opposition to this party or these~~  
18 ~~parties. Without limiting the factors that the court may consider, the court shall consider the~~  
19 ~~factors set forth in Section 2-201(a)(3)-(6), as well as the degree to which the parties own~~  
20 ~~significantly unequal shares in the property. If the court determines that one or more parties not~~  
21 ~~in opposition to each other should be given the opportunity to purchase the property to be sold~~  
22 ~~under the provisions of this section, the court shall give this party or these parties at least forty-~~  
23 ~~five (45) days to pay into the court the amount by which the fair market value of the property as~~

1 ~~determined by the court under Section 2-203 exceeds this party's or these parties' entitlement to~~  
2 ~~a portion of the proceeds of the sale. If such a party or parties fail to pay into the court the~~  
3 ~~purchase price within the time fixed by the court, the court shall use its discretion to decide~~  
4 ~~whether to allow any other party who had expressed an interest in purchasing the property an~~  
5 ~~opportunity to purchase the property.~~

6 ~~—— (c) If under subsection (b) the court determines that the equities do not favor giving one~~  
7 ~~or more parties the opportunity to purchase the property to the exclusion of any other party or~~  
8 ~~parties who have expressed an interest in purchasing the property, upon motion of any party, the~~  
9 ~~court shall order a private sale that will be limited to all of the parties. Such a private sale~~  
10 ~~between the parties shall be conducted upon the terms established by the court provided that the~~  
11 ~~court shall establish a reserve price that is no lower than the court approved appraisal price for~~  
12 ~~the property.~~

13 ~~—— (d) Within 15 days after any private sale that occurs under this section, whomever the~~  
14 ~~court vested with power to sell the property at the private sale shall report the sale to the court for~~  
15 ~~confirmation and approval. The court may reject the sale and order a resale of the property for~~  
16 ~~good cause shown.~~

17 ~~—— (e) If there is no party that is given the right to purchase the property under this section~~  
18 ~~that pays into the court the purchase price within the time fixed by the court or if a private sale~~  
19 ~~does not take place under subsection (c) then the property shall be sold under the procedures set~~  
20 ~~forth in Article 4 of this Act.~~

21 **Comment**

22 *See* Kansas Stat. Ann. § 60-1103(c)(4) for requirement that the court first determine that  
23 partition in kind cannot be made without great prejudice.

24  
25 Section 3-301(b): *See* Wilk v. Wilk, 173 Vt. 343 (Vt. 2002).

26

1 ARTICLE 4

2 SALES ~~PROCESS~~PROCEDURE

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

5 (a) If a court orders a sale ~~under this part whether of aof all or~~ part of the real property or  
6 of the whole, the court ~~should~~shall order that the property be sold at a public partition sale  
7 unless the court ~~sets forth reasons that establish~~finds that a sale at a public auction would likely  
8 be more just, fair, ~~and commercially reasonable economically advantageous to all the parties~~  
9 under the circumstances. ~~Should~~If the court ~~order~~orders a public partition sale and the parties  
10 ~~reach agreement upon~~agree on the identity of a licensed real estate broker to list the property, the  
11 court shall appoint ~~this~~that real estate broker to conduct the sale ~~of the property~~. If the parties  
12 cannot ~~reach agreement with respect to~~agree upon the appointment of a licensed real estate  
13 broker within ten (10) days of the court's public ~~partition~~by sale order, the court shall appoint a  
14 disinterested, licensed real estate broker to conduct the ~~sale after consulting with the parties~~.  
15 ~~Upon appointing the public partition sale and establish a reasonable commission for this broker~~.  
16 The licensed real estate broker, ~~who is appointed by~~ the court shall ~~establish~~list the property for  
17 sale at a ~~commercially reasonable real estate brokerage commission that the real estate broker~~  
18 ~~shall be entitled to be paid from the proceeds of the sale of the property~~price that is no lower than  
19 the court-approved appraised price and subject to any other terms and conditions that are  
20 established by the court.

21 (b) ~~If~~ the property does not sell for at least the appraised ~~value~~price within the time  
22 period ~~provided~~the court establishes for a public partition sale, the court upon further hearing  
23 may either ~~revalue the property and~~ approve the highest outstanding offer, if any, ~~that equals or~~

**Comment [T8]:** My concern with this provision is that property often does not sell for the listing price, especially in a down market. It seems to me that the appointed broker should be given some flexibility to accept a commercially reasonable offer subject to court approval (any maybe subject to the approval of a majority of the interest holders). So how about some language giving the broker authority to approve a commercially reasonable offer or an offer that represent something like – at minimum -- 90% of the listing price?

1 ~~exceeds the revaluation price,~~ or revalue the property and order that the property continued to be  
2 listed for a further defined period ~~not to exceed three months,~~ or order that the property be sold at  
3 a public auction ~~within sixty (60) days of the hearing.~~

4 (c) If the court orders that all or any part of the real property ~~or the whole~~ is to be sold at  
5 a public auction, the court shall set the terms and conditions of the sale. The ~~court shall~~  
6 set auction must be conducted in the manner prescribed by law for auctions of real property in  
7 other partition proceedings in this state.

8 (d) ~~If the purchaser is a reserve price that may not be less than eighty five (85) percent of~~  
9 ~~the court approved appraised value of party who owns an interest in the property or holds a lien~~  
10 ~~on the property that is to be sold. If it appears to the court that the property subject to partition~~  
11 ~~by sale will not sell for eighty five percent of the, and thereby is entitled to a share of the~~  
12 ~~proceeds of the sale, such a purchaser shall receive a credit against the purchase price in an~~  
13 ~~amount of the valuation thereof, the court upon further hearing may either revalue the property~~  
14 ~~and approve the highest outstanding offer, equal to the value of their interest or lien. Parties or~~  
15 ~~lienholders who qualify for this credit may aggregate their credits if any, that equals or exceeds~~  
16 ~~eighty five percent of the revaluation price or order a new public auction.~~  
17 they are joint purchasers.

#### 18 **Comment**

19 This preference for public sales draws upon the strong international trend as seen in  
20 countries such as England, Wales, Scotland, and Canada where law commissions, courts and  
21 legislatures have recognized that public sales are superior to public auctions with respect to  
22 preserving property owner's wealth in situations where courts have ordered forced sales. These  
23 countries have recognized that public auctions do not vindicate the policy goal of making sure  
24 that any economies of scale derived from selling the property as a whole actually benefit the  
25 present co-owners as opposed to a purchaser who can purchase the property for a below market  
26 value price at a "fire sale."

27 Section 4-401(a): *See* § 735 ILCS 5/17-105. *See also* Buck v. Grube, 833 N.E.2d 110  
28

1 (Ind. App. 2005)

2 Section 4-401(b): *See* § 735 ILCS 5/17-105.

3  
4  
5 Section 4-401(d): *See, e.g.,* OR. REV. STAT. § 105.365; S.D. CODIFIED LAWS § 21-45-34  
6 (2009); UTAH CODE ANN. § 78-39-35 (2009); and WASH. REV. CODE § 7.52.390 (2009).  
7

8 **SECTION 4-402. PERSONS INELIGIBLE TO PURCHASE AT A PUBLIC**  
9 **PARTITION SALE.**

10 (a) The ~~following persons shall not purchase property sold in the proceeding directly or~~  
11 ~~indirectly:~~

12 ~~\_\_\_\_\_ (1) The commissioners and judge, any court appointed commissioner, any~~  
13 ~~appraiser, or any real estate broker, as well as any agent for any of these individuals who~~  
14 ~~participates in the partition proceedings:~~

15 ~~\_\_\_\_\_ (2) Any officer of the court in which the may not directly or indirectly purchase~~  
16 ~~property in a public partition action was litigated, including any judge, magistrate, or clerk of the~~  
17 ~~court.~~

18 ~~\_\_\_\_\_ (3) The legal representatives of any party.~~

19 ~~\_\_\_\_\_ (4) A guardian or conservator of a party, unless for the benefit of the ward or~~  
20 ~~conservatee.~~

21 ~~\_\_\_\_\_ (5) Any other person who owes a fiduciary duty to a party directly or indirectly,~~  
22 ~~unless for the benefit of the beneficiary for whom they have duties of good faith, trust,~~  
23 ~~confidence, and candor sale.~~

24 (b) ~~All sales contrary to this section are voidable except that a sale to a bona fide~~  
25 ~~purchaser following~~ A sale contrary to ~~this section~~ subsection (a) shall not be ~~disturbed~~ confirmed  
26 under Section 4-403(c). Notwithstanding confirmation under Section 4-403(c), a person harmed

**Comment [T9]:** Question. My notes indicate that a decision was made to limit this provision to public partition sales. I can understand that in a public auction, the more robust the bidding is the higher the sales price one can expect. However, in many jurisdictions there is a concern about rigged auctions. Wouldn't this section be helpful to address that concern? Of course, there is a balance that must be struck as allowing these people to bid in non-rigged auctions is helpful. I just wanted to clarify for records the reason this decision was made.

1 | by a violation of subsection (a) shall be entitled to damages.

2 | **Comment**

3 | Cal. Code Civ. Proc. § 873.690

5 | **SECTION 4-403. REPORT OF A PUBLIC PARTITION SALE OR A BUYOUT.**

6 | (a) Within 15 days after any sale ~~that occurs~~ under this ~~section, whenever~~ Act, the ~~court~~  
7 | ~~vested with power~~ person authorized to sell the property, ~~including any commissioner, any~~  
8 | ~~licensed real estate broker, or any sheriff,~~ shall file a report with the court and ~~shall~~ provide the  
9 | report to all parties.

10 | (b) The report shall contain, in addition to such other information as may be appropriate,  
11 | all of the following information:

12 | (1) A description of the property sold to each purchaser.

13 | (2) The name of the purchaser.

14 | (3) The sales price.

15 | (4) The terms and conditions of the sale and the security, if any, taken.

16 | (5) Any amounts payable to lienholders.

17 | (6) A statement as to contractual or other arrangements or conditions as to agents'  
18 | commissions.

19 | ~~\_\_\_\_\_ (7) Any determination and recommendation as to opening and closing public and~~  
20 | ~~private ways, roads, streets, and easements.~~

21 | ~~\_\_\_\_\_ (8) \_\_\_\_\_ (7) Other material facts relevant to the sale and the confirmation~~  
22 | proceeding.

23 | (c) Within 30 days of the filing of the report of sale, the court shall hold a hearing on  
24 | whether to confirm ~~or to set aside~~ the sale. The court shall not confirm a sale to a person listed in

1 | Section 4-402(a).

2 | **Comment**

3 | Cal. Code Civ. Proc. § 873.710

4 |  
5 | ~~SECTION 4-404. PURCHASE BY ENCUMBRANCER OR PARTY ENTITLED~~  
6 | ~~TO SHARE. When a party entitled to a share of the property, or an encumbrancer entitled to~~  
7 | ~~have the lien of the encumbrancer paid out of the sale, becomes a purchaser, the commissioners~~  
8 | ~~may take a receipt for so much of the proceeds of the sale as belongs to the party or the~~  
9 | ~~encumbrancer.~~

10 | **Comment**

11 | ~~Modeled after Oregon Rev. Stat. § 105.365. Other states such as South Dakota, Utah and~~  
12 | ~~Washington have nearly identical statutes.~~

13 | Section 4-403(b)(7): Other material facts may include any recommendations with respect  
14 | to land use planning and development that would enable those who purchase property at public  
15 | partition sales to use the property that is purchased for more economically productive purposes.  
16 | Such planning and development may include building or opening public or private highways,  
17 | roads, and streets, as well as granting public or private easements.  
18 |

1 **ARTICLE 5**

2 **ATTORNEY'S FEES**

3  
4 ~~SECTION 5-501. AWARD OF ATTORNEYS' FEES. The reasonable attorney fees~~  
5 ~~of any party to an action for partition of real property owned under a tenancy in common may be~~  
6 ~~awarded in the court's equitable discretion if these fees were incurred for the common benefit of~~  
7 ~~all of the tenants in common. The reasonableness of an attorney fee award cannot be based in~~  
8 ~~any way on an arbitrary percentage of the value, and the court shall require evidence to be~~  
9 ~~presented of the reasonableness of the fees sought prior to awarding any such fees and the~~  
10 ~~manner in which these fees were incurred for the common benefit of all of the parties. No~~  
11 ~~portion of any attorney's fees may be assessed against any party who contests the partition~~  
12 ~~proceeding whether by appearing by court appointed or privately retained counsel or by~~  
13 ~~appearing pro se.~~

14 SECTION 5-501. AWARD OF ATTORNEYS' FEES. The court shall not award  
15 attorney's fees to any party in a partition action involving heirs' property.

16 **Comment**

17 ~~Section 5-501(e): Common benefit language picked from N.D. Stat. § 32-16-45.~~

18  
19 ~~The last sentence is largely drawn from La. C.C.P. Art. 4613 with the additional~~  
20 ~~provision that a contested action includes an action in which a party is represented pro se. Other~~  
21 ~~state courts have held that an attorney's fee award is improper in a contested action irrespective~~  
22 ~~of the fact that the plain language of the partition statute might seem to provide for fee shifting~~  
23 ~~that would require the defendants to pay a share of the plaintiff's attorney's fees. Osborne v.~~  
24 ~~Eslinger, 58 N.E. 439, 444 (Ind. 1900) ("Where parties appear by counsel, and contest a petition~~  
25 ~~for partition, they should not be required to pay the fees of the attorneys of their adversary.");~~  
26 ~~Dailey v. Houston, 151 So. 2d 919, 927 (Miss. 1963) "This statute . . . was intended primarily to~~  
27 ~~give a fee to the solicitor who conducts the suit without resistance. Where there is a real~~  
28 ~~controversy, and it is proper for defendants to be represented by counsel of their own choosing,~~  
29 ~~the fee permitted by section 975, to be taxed as a common charge upon all of the interests, should~~  
30 ~~not be allowed. This is especially so where, as here, a defendant is successful in part, by~~  
31 ~~preserving some of his claims, through his own initiative and the efforts of his own counsel.";~~

1 ~~Cary v. Armbrust, 70 N.W.2d 427, 431 (Neb. 1955) (“In *Oliver v. Lansing*, 57 Neb. 352, 77 N.W.~~  
2 ~~802, the following rule was laid down by this court on the question of taxability of attorney's fees~~  
3 ~~for plaintiff's attorney in partition cases: “The plaintiff's attorney's fees are not taxable as costs in~~  
4 ~~an action for partition where the proceedings are adversary.”; *Novy v. Novy*, 188 A. 328, 330~~  
5 ~~(Pa. 1936) (“The act makes reasonable counsel fees part of the costs in these proceedings, and~~  
6 ~~the courts have followed the practice of allowing them since its passage. The fees contemplated~~  
7 ~~were only such as would compensate counsel in a reasonable amount for services rendered in the~~  
8 ~~actual partition and for the common benefit of the parties in interest. When, however, partition is~~  
9 ~~contested in good faith, or when the services rendered are adverse to the other parties, the~~  
10 ~~petitioner cannot recover as costs counsel fees earned by his attorney in litigating his right to~~  
11 ~~partition.”); *Port v. Elson*, 321 N.W.2d 363 (Wis. Ct. App. 1982) (“It has been widely recognized~~  
12 ~~that if a partition proceeding is adversary in character, the proceeding is not for the common~~  
13 ~~benefit of all the parties, and therefore the payment of attorney's fees from the proceeds of the~~  
14 ~~sale should not be allowed.”).~~  
15 ~~See, e.g., *McReady v. McReady*, 810 P.2d 624, 627 (Ariz. Ct. App. 1991); *Lee v.*~~  
16 ~~*Palumbo*, 2001 Conn. Super. LEXIS 2534 at \*1 (Conn. Sup. Ct. 2001); *Fleming v. Lundy*, 156~~  
17 ~~*A.D.2d* 965 (N.Y. App. Div. 1989); and *Ragan v. Ragan*, 119 S.E. 882, 884 (N.C. 1923).~~