

DRAFT
FOR DISCUSSION ONLY

UNIFORM PARTITION OF INHERITED PROPERTY ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For March 26 – 27, 2010 Committee Meeting

With Prefatory Note and Comments

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ON UNIFORM STATE LAWS

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March 11, 2010

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PROPERTY ACT**

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UNIFORM PARTITION OF INHERITED PROPERTY ACT

PREFATORY NOTE

The Uniform Partition of Heirs Property Act is an act of limited scope which addresses some of the well-documented problems that many low to middle-income property owners have experienced in seeking to maintain ownership of their tenancy in common property or at least the economic value of their ownership interest upon a court's resolution of a partition action. There are certain key features of tenancy in common ownership that can create problems for those who seek to maintain ownership of their property for themselves or for their descendants who may acquire an interest in the property. Under a tenancy in common, unlike under the rules governing a tenancy by the entirety, any tenant in common may sell their interest or convey it by gift during their lifetime. Unlike a joint tenant's interest in a joint tenancy, at a tenant in common's death, their 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 tenant in common to file a lawsuit in which that cotenant requests a court to partition the property.

In a typical partition action, a cotenant who seeks to end their participation in a tenancy in common requests a court to order either (i) a partition in kind of the property into separate sub-parcels, with each sub-parcel proportionate in value to each cotenant's fractional interest or (ii) a partition by sale, in which case the property is sold in its entirety with the proceeds of the sale distributed among the cotenants, again in proportion to their relative interest in the property. Any cotenant, no matter how small their individual fractional interest – even if the interest represents less than a 1 percent interest -- may request that a court order the property to be sold even if a majority of the other cotenants oppose such a request for a court-ordered sale. For this reason, 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 that the law recognizes. Therefore, these professionals often recommend that their clients who own tenancy in common property under the default rules either 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

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 a court-ordered partition sale. To this end, 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. These property owners also tend to own few assets besides the real property that they own. Given the relatively low will-making rates among those in the United States who lack substantial wealth, many low to middle-income property owners have transferred their property by intestate succession instead of by will.

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. (forthcoming 2010).

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 tenants in common to acquire an interest in the property. Given the prevalence of this pattern of property transfer, real property that is transferred from one generation to the next and which is held in a tenancy in common at least in the current generation of owners is referred to colloquially in many communities from those in the Southeast to those in Appalachia to those in Indian Country as heirs property. These property owners refer to their tenancy in common property as “heirs property” whether they acquired their interests by intestate succession or by will. Given the widespread usage of the term heirs property within these communities, this act utilizes the term heirs property and defines it under Section 2. As the number of tenants in common increases in a tenancy in common governed under the default rules, the more unstable the ownership of a particular parcel of property becomes given the fact that it only takes one cotenant to request a partition sale of the entire property.

Many if not most of these heirs property owners have little 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 to many tenancy in common property owners as well as to those who do not own tenancy in common property. For example, many of these owners believe that their property ownership is secure because they believe that their property may only be sold against their will if a majority or more of their other cotenants agree to seek a sale of the property. 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. In contrast, there have been many well-documented cases in which an outsider 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 they acquired their interest to order a forced partition by sale of the property despite the fact that the family opposed the request for a partition by sale and despite the fact that the family has been in possession of the property for decades.

Partition Sales and Land Loss 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 16 and 19 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 with 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 Different newspapers 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); 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); 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*,

news services have published several articles documenting the manner in which particular African-American families have lost land that had been in their families for generations after an outsider had 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. Of all the media attention this issue has garnered, an article written by two Associated Press investigative reporters as part of their award winning three-part series on African-American land loss entitled *Torn From the Land* has garnered the most attention.³ As a result of this legal scholarship and media attention, the American Bar Association's Section on Real Property, Trust and Estate Law established its Property Preservation Task Force several years ago. This task force has been working to identify possible solutions to the forced sales of tenancy in common property that has negatively impacted African-American property owners as well as other poor and minority property owners who tend to have modest amounts of wealth and a limited understanding of partition law.⁴

Although the issue of the substantial loss of African-American land loss due to partition sales has received more national attention than the issue of land loss in other communities that has resulted from partition sales, it is important to recognize that property loss through forced partition sales has impacted other communities as well, especially other low-income and low-wealth communities that have had little understanding of the default rules governing partition of tenancy in common property. For example, Mexican-Americans lost hundreds of thousands of acres of land as a result of partition sales of their community-owned property that occurred in the aftermath of the Mexican-American War as a result of the manner in which many land claims were settled by federal officials under the terms of the Treaty of Guadalupe Hidalgo. In most instances, the land was sold for a price that was far below the market value of the land. For example, the more than 27,000 acres of communal land within a grant of land called the Las Trampas Grant that was located in New Mexico was sold under a partition sale at an auction for \$17,000 in 1903 at approximately sixty cents an acre.⁵ Approximately ten years later, the United States acquired the property in exchange for providing its new owner with \$75,000 worth of timber rights in property located elsewhere in New Mexico. Part of the reason that the community-owned land that Mexicans had owned prior to the Mexican-American War sold for a fraction of its value at partition sales after the conclusion of the war is attributable to the fact that the community members who lived on the land grants were land rich but cash poor and therefore had no ability to make a competitive bid for the entire property at the partition auction.⁶

and Community Through Partition Sales of Tenancies in Common, 95 NW. U. L. REV. 505 (2001); John G. Casagrande Jr., Note, *Acquiring Property Through Forced Partitioning Sales: Abuses and Remedies*, 27 B.C. L. REV. 755 (1986).

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 helpful materials that can be helpful to those who want to stabilize their ownership of tenancy in common property, including a sample tenancy in common agreement and a document addressing the ways in which limited liability companies can be used to avoid land loss. See Section of Real Property, Trust and Estate Law: Property Preservation Task Force, <http://www.abanet.org/dch/committee.cfm?com=RP018700> (last visited March 10, 2010).

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).

Property owners from other communities have been impacted or fear the impact of forced partition sales 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 cotenants are often concerned that one of their fellow cotenants might sell their 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 have also had their property sold against their will at partition sales. Today, much of the land that American Indians own consists of heirs property. Legislative reform efforts geared at addressing these heirs property issues in Indian Country have largely failed. The latest reform effort, the American Indian Probate Reform Act of 2004 has yet to be fully tested.⁹ One of the more controversial aspects of AIPRA from the perspective of many Native Americans involves statutory rules that enable the Interior Department to conduct forced sales during probate of small fractional interests in commonly owned Indian trust or restricted land without the consent of the heirs or co-owners.¹⁰

Partition Sales and Loss of Wealth

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, the court will order a partition by sale under an “economics-only” test in which the court considers the fair market value of the property in its entirety as compared to the fair market value of the sub-parcels that would result from a partition in kind. If the fair market value of the property as a whole is greater than the aggregated fair market value of the sub-parcels, 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, a substantial percentage of tenants in common are economically harmed when a court orders a partition by sale. First, 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 include costs incurred in selling the property including in many cases the fees of court-appointed commissioners or referees (often 5 percent or more of the sales price), surveyor fees, and attorneys’ fees which usually constitute 10 percent of the sales price in the many states that permit such an attorneys’ fee award in a partition action. In addition to these fees and costs, the economic analysis that courts conduct under the “economics-only” test tends to be flawed in many cases given that property is not ordered sold under conditions that are likely to produce a price that approximates the fair market value of the property. Instead, the overwhelming majority of courts order the property sold under the procedures used for forced sales such as a sale under execution. These forced sales are notorious

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

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

9 25 U.S.C. §§ 2201-2221 (2008).

10 Douglas Nash & Cecelia Burke, *Passing Title to Tribal Lands: Existing Federal and Emerging Tribal Probate Codes*, THE ADVOCATE (Idaho), May 2007, at 26.

for selling property well below the fair market value of the property. In fact, empirical studies conducted by real estate economists have demonstrated that many forced sales typically yield sales prices that are twenty percent or more below the fair market value of the property.

In many instances, families who own heirs property experience an even greater loss of wealth upon a partition by sale. This occurs because these heirs property owners are not able to bid competitively at the auction because they are unable to secure any financing to make an effective bid due to the fact that banks and other lending institutions will not accept an interest in a tenancy in common as collateral to secure a loan. Given that many of these families own few other assets besides the interest they have in their heirs property and given that they are cash poor, they are unable to make any competitive bid at the auction which often results in a very low sales price.

Partition sales that result in an involuntary loss of property rights as well as in a potential loss of wealth may be very disadvantageous to one or more of the cotenants, 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, for various reasons, desire 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 their relative share of the current market value of the Property and the Act makes every effort to accomplish that goal.

How the Act Works [to be completed when the Act is completed].

1 **NOTE TO LEGISLATIVE DRAFTSMAN:** This Act is likely to be an additional
2 chapter, subchapter or subpart of the State’s existing partition statute.

3
4 **UNIFORM PARTITION OF INHERITED PROPERTY ACT**

5
6 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Partition of
7
8 Inherited Property Act.

9
10 **SECTION 2. DEFINITIONS.** In this [act]:

11
12 (1) “Determination of Value” means an order of a court, under section 6(d) [or 6(e)],
13 determining the fair market value of the heirs property.

14 (2) “Heirs property” means real property held in tenancy in common that satisfies all of
15 the following requirements:

16 (A) There is no agreement in a record among all the cotenants that governs the
17 rights and obligations of the cotenants with respect to the ownership of the property.

18 (B) One or more of the cotenants acquired title from a biological or an adoptive
19 ascendant [living or deceased ancestor]; and

Comment [m1]: See Comment 4 below

20 (C) Either of the following is true:

21 (i) 20 percent or more of the interests are held by cotenants that are
22 related by blood, marriage, or adoption;

23 (ii) 20 percent or more of the interests are held by an individual who
24 acquired title from an ascendant; or

25 (ii) 20 percent or more of the cotenants are related by blood, marriage, or
26 adoption.

27 (3) “Open-market sale” means a partition by sale in which the heirs property is listed and
28 offered for sale on the open market in a commercially reasonable manner by a disinterested real

1 estate broker.

2 (4) "Partition by sale" means a court-ordered sale of the whole of the heirs property,
3 whether by public sale or by open-market sale.

4 (5) "Partition in kind" means the division of heirs property into physically distinct and
5 separately titled parcels.

6 (6) "Public sale" means [a public auction or other][a] sale conducted in the manner
7 authorized by [insert reference to either the general partition statute or to the state mortgage
8 foreclosure statute].

9 (7) "Real estate broker" means a broker who negotiates contracts of sale and other
10 agreements between buyers and sellers of real property and who is licensed in the states where
11 they conduct business.

12 (8) "Record", used as a noun, means information that is inscribed on a tangible medium
13 or that is stored in an electronic or other medium and is retrievable in perceivable form.

14 **Comment**

15 1. Section 2(2) Heirs property is defined in this act to include only a subset of tenancy in
16 common property. Specifically the act applies only to certain tenancy in common properties
17 which are not governed by any agreement in a record among the cotenants provided that one or
18 more of the cotenants acquired their ownership interest from an older relative. In contrast, heirs
19 property is defined in the act in such a way that the act does not apply to tenancy in common
20 property governed by an agreement among the owners whether or not the agreement addresses
21 the manner in which the tenancy in common property may be partitioned. Furthermore the act
22 does not apply to "first generation" tenancy in common property that the cotenants elect to
23 establish under the default rules even if there is no agreement in a record among the cotenants
24 governing the ownership of the property to the extent that none of the cotenants acquired their
25 interest from an older relative.

26
27 2. Joint tenancy property is not covered by this act. In order for any real property that
28 was initially owned by two or more individuals as joint tenancy property to be covered by this
29 act, one or more of the joint tenants must sever the joint tenancy in accordance with the
30 requirements of state law. Once a joint tenancy is severed, this act may apply if the property is
31 determined to be heirs property under this act even if two or more individuals who had formerly

1 been joint tenants prior to severance of the joint tenancy and who did not take any action to sever
2 the joint tenancy remain joint tenants with one another after severance with respect to a
3 particular interest in the tenancy in common. *See* 7-51 RICHARD R. POWELL, POWELL ON REAL
4 PROPERTY § 51.04(1)(a) (Michael Allen Wolf ed., 2009). *See also* Carmack v. Place, 535 P.2d
5 197 (Co. 1975).

6
7 3. Section 2(2)(A): If tenants in common acquire their interests through a deed or a will
8 that does not establish the duties and responsibilities of the tenants in common with respect to
9 the ownership of the property, the deed or will alone shall not be construed to be an agreement in
10 a record among all the tenants in common that governs the ownership of the property within the
11 meaning of Section 2(b)(1).

12
13 4. Section 2(2)(B): Common usage defines ancestor as “one from whom a person
14 lineally descended.” *Wills v. Le Munyon*, 107 A. 159, 161 (N.J. Ch. 1919). However, statutes of
15 descent narrow the term to “any one from whom an estate is inherited.” *Id.* Thus, use of the term
16 ancestor would exclude property acquired from a living person. In contrast, ascendant
17 encompasses anyone who precedes a person in lineage, for example a parent or grandparent.
18 BLACK’S LAW DICTIONARY 129 (9th ed. 2009). The term ascendant is used in a number of
19 statutes encompassing many different subject matter areas. *See, e.g.*, ARK. CODE ANN. § 28-9-
20 202 (2009); CONN. GEN. STAT. § 45a-755 (2010); IOWA CODE § 428A.2 (2010); FLA. STAT. §
21 732.403 (2009); LA. CIV. CODE ANN. art. 1301 (2009); MISS. CODE ANN. § 93-13-253; P.R.
22 LAWS ANN. TIT. 31 § 2413 (209); TEX. ESTATES CODE ANN. § 676 (Vernon 2009). Due to the
23 fact that ascendants can be living or dead, the term does not need modifying language. *Cf.*, In re
24 Estate of Thiemann, 992 S.W.2d 255, 256-257 (Mo. Ct. App. 1999).

25
26 5. Section 2(3): Under an open-market sale, the buyer and seller negotiate at arm’s
27 length and the sales price is not influenced by any particular exigency of either the buyer or the
28 seller. *See Dennis v. County of Santa Clara*, 263 Cal. Rptr. 887, 892 (Cal. Ct. App. 1989). In
29 Minnesota, for example, a court may order real property that is to be sold under an order to
30 partition by sale to be sold by open-market sale or private sale as this type of sale is referred to in
31 Minnesota and in other states. *See* MINN. STAT. § 588.17 (2009) (providing that a court may
32 order property subject to a partition by sale to be sold at a private sale instead of at a public
33 auction). *See also* *Wilson v. Skogerboe*, 414 N.W.2d 521 (Minn. Ct. App. (1987) (court-
34 appointed referee sold property under a private sale after showing the property to numerous
35 prospective buyers).

36
37 6. Section 2(8): The definition of “record” is identical to the definition of “record” in
38 Section 1-103(29) of the Uniform Common Interest Ownership Act (2008). Information that
39 constitutes a “record” under this Act need not be recorded.

40 41 42 **SECTION 3. APPLICABILITY.**

43
44 (a) Heirs property may be partitioned only as provided in this [act] unless all of the

1 parties agree to utilize some other procedure [method] to partition the property. This [act]
2 supplements the provisions of [insert reference to general partition statute] and, if an action is
3 governed by this [act], replaces provisions of the [insert reference to general partition statute]
4 that are inconsistent with this [act].

5 (b) As soon as practical after commencement of an action pursuant to [insert reference
6 to general partition statute], the court shall determine whether the property is heirs property. [In
7 an action to partition real property under [insert reference to general partition statute] the court
8 shall determine whether the property is heirs property under this [act]. If the court determines
9 that the property is heirs property, the property must be partitioned under this [act].

Comment [m2]: Proposed Applicability section per the Committee on Style. The Committee on Style proposes this language because it finds the existing Section 3 to be inconsistent.

10 **Comment**

11 A final order of a court partitioning any real property held under a tenancy in common is
12 subject to challenge if the court failed to determine whether the real property in question is heirs
13 property under this [act].
14

15 **SECTION 4. NOTICE BY POSTING.** This [act] does not limit or affect the method
16 by which service of [the complaint][process by publication or otherwise] may be made, but a
17 plaintiff in an action governed by this [act] also shall, not later than 10 days after [filing the
18 complaint][service of process by publication or otherwise], erect [and maintain] while the action
19 is pending, a conspicuous sign on the property that is the subject of the action, stating that the
20 action has been commenced and identifying the names of the plaintiffs, the known defendants,
21 and [the name and address of the court][in which the action is pending].
22

Comment [T3]: We do need to work out what consequences, if any, flow from failing to maintain the sign on the property if we maintain the requirement that the sign remain posted throughout the duration of the action. Alternatively, we may have to consider modifying the language in this section.

23 **SECTION 5. COMMISSIONERS.** If the court appoints commissioners pursuant
24 [insert reference to general partition statute], each commissioner must, in addition to the
25 requirements and disqualifications applicable to commissioners in [insert reference to general

1 partition statute] be disinterested and impartial and neither a party nor a participant in the action.

2 **SECTION 6. DETERMINATION OF FAIR MARKET VALUE.**

3
4 (a) If the court determines that the property which is the subject of the partition action is
5 heirs property, the court also promptly shall determine the fair market value of the property by
6 appraisal pursuant to subsection (b), unless:

Comment [T4]: The valuation determination will not establish the value of any particular sub parcel that could be sold if the court considers ordering a partition in kind of part of the property and a partition by sale of the remainder. Due to this fact and to the fact that courts rarely order partition in kind of part of the property and partition by sale of the remaining portion, we decided against making the mixed remedy available under this act..

7 (1) all of the cotenants have agreed to the price at which the property is to be
8 offered for sale, or

9 (2) the court determines that the cost of the appraisal will exceed its evidentiary
10 value to the court [in which case the court shall determine the fair market value of the heirs
11 property pursuant to subsection (fill in the blank)].

Comment [m5]: We need to address how the court will make a determination of value if no appraisal is ordered by the court.

12 (b) If the court orders an appraisal, the court shall appoint a disinterested state-certified
13 real estate appraiser in good standing with [insert the name of the state regulatory board,
14 department, or agency that certifies appraisers], to determine the property's fair market value
15 assuming sole ownership of the fee simple estate, adjusted by the value of any [covenants,] liens
16 and [other] encumbrances against the property. Upon completion of the appraisal, the appraiser
17 shall file a sworn or verified appraisal with the court, stating that the appraisal was prepared in
18 accordance with the requirements of this subsection and other applicable law.

19 (c) If an appraisal is conducted pursuant to subsection (b), not later than 10 days after the
20 appraisal is filed, the clerk of the court shall send to each party:

21 (1) a copy of the appraisal, and

22 (2) notice that a party may object to the appraisal not later than 30 days after the
23 notice was sent, stating the grounds for the objection.

24 (d) If an appraisal is filed with the court pursuant to subsection (b), the court shall

1 conduct a hearing to determine the fair market value of the property not sooner than 30 days
2 after a copy of the appraisal is delivered to each party, whether or not an objection to the
3 appraisal is filed by the expiration of the period for stating an objection. In addition to the court-
4 ordered appraisal, the court may consider any other valuation of the property that is offered as
5 evidence by any party. After the hearing, but before considering the merits of the partition
6 action, the court shall (i) determine the property’s fair market value, and (ii) notify the [parties]
7 [cotenants] both of that value and of the procedures for possible cotenant buyouts in Section 9 of
8 this [act].
9 (e) [How will a court determine the fair market value of the heirs property if the court
10 does not order an appraisal?]

11 **Comment**

- 12
13 1. Section 6(a): Some states require that any property that may be subject to partition by
14 sale shall first be appraised before a court decides whether to order partition in kind or partition
15 by sale. See, e.g., N.M. Stat. § 42-5-7 (2009). Other states require that real property that is to be
16 sold under an order or a judgment of a court first must be appraised in most instances by certain
17 disinterested persons. See, e.g., Ky. Rev. Stat. Ann. § 426.520 (2010)
18
19 2. Section 6(b): Some states require that property that is to be sold by partition by sale be
20 appraised by one or more disinterested persons under certain circumstances. See, e.g., MINN.
21 STAT. § 558.17 (2009) (providing that the court order property subject to partition by sale to be
22 appraised by two or more disinterested persons before the property is sold if the court orders the
23 property sold at a private sale instead of at a public auction). Other states require the person who
24 is to appraise real property under certain statutes to be state-certified and in good standing with
25 the state appraisal authorities. See, e.g., OKLA. STAT. tit. 52, § 318.5 (2009).
26
27 3. Section 6(b): State statutes and case law typically refer to one person’s ownership of
28 property as “sole ownership.” See, e.g., CAL. CIV. CODE § 681 (2010) (The ownership of
29 property by a single person is designated as a sole or several ownership); FLA. STAT. § 711.502
30 (2009) (“Only individuals whose registration of a security shows sole ownership by one
31 individual . . . may obtain registration in beneficiary form”); MONT. CODE ANN. 70-1-305
32 (2009); S.D. CODIFIED LAWS § 43-2-10 (2009) (“The ownership of property by a single person is
33 designated as a sole or several ownership.”). See also *In re Robertson*, 203 F.3d 855, 860 (5th
34 Cir. 2000) (when partitioning former community property, the assets are divided between the
35 former spouses and “the assets of which each former spouse acquires sole ownership is

1 reclassified by law as the separate, exclusive property of that former spouse.”).

2
3 4. Section 6(b): As utilized in this Section, encumbrance is defined to include, among
4 other property interests, a covenant running with the land, an easement, and a reservation of a
5 right-of-way. *See* 20 AM. JUR. 2D COVENANTS, CONDITIONS, AND RESTRICTIONS § 95 (2010)
6 (easements and covenants running with the land are encumbrances within the meaning of a
7 covenant against encumbrances). *See also*, *Blissett v. Riley*, 667 So. 2d 1335, 1337 (Ala. 1995)
8 (quoting *Colonial Capital Corp. v. Smith*, 367 So. 2d 490, 491-92 (Ala. Civ. App. 1979)) (a
9 covenant restricting the size and materials of structures built on the property is an encumbrance
10 because it is an “outstanding right[] or interest [in] the estate conveyed that will diminish the
11 value, but which [is] consistent with the passage of the fee.”); *Fraser v. Bentel*, 119 P. 509, 511
12 (Cal. 1911) (a covenant running with the land and restricting the use of the property is an
13 encumbrance); *Evans v. Faught*, 42 Cal. Rptr. 133, 137 (Cal. Ct. App. 1965) (listing several
14 types of encumbrances including covenants, easements, and reservations of right-of-way). *Cf.*
15 *Brewer v. Peatross*, 595 P.2d 866, 868 (Utah 1979) (“An encumbrance may be said to be any
16 right that a third person holds in land which constitutes a burden or limitation upon the rights of
17 the fee title holder”).
18

19 20 **SECTION 7. PARTITION ALTERNATIVES.**

21
22 (a) Following the court’s notice of its determination of the value of the property and of
23 the procedures for possible cotenant buyouts in Section 9, eligible cotenants may purchase, in the
24 manner described in Section 9, all of the available interests of any cotenants who either (i)
25 requested partition by sale or (ii) offer their interests for sale in the manner described in Section
26 9(a).

27 (b) Otherwise, whether the requested relief in a partition action is for partition in kind or
28 partition by sale, if all the cotenants’ interests that become available for purchase as described in
29 Section 7(a) are not purchased by other cotenants pursuant to Section 9, the court must order
30 partition in kind unless the court finds, pursuant to Section 8, that partition in kind will result in
31 [great] [substantial] prejudice to [substantially] all the cotenants. In considering whether to
32 partition in kind, the court shall approve a request by two or more parties to have their individual
33 interests aggregated.

Comment [m6]: Remember that a number of commissioners at the annual meeting asked what a great prejudice or a substantial prejudice standard meant? We are picking up on the most common standard that state courts have used but are setting forth a new test to define the elements a court must consider. Should we do more to define the great/substantial prejudice standard?

1 (c) If partition in kind is not ordered pursuant to subsection (b), the court shall order
2 partition by sale, pursuant to Section 10 or, if no cotenant requested partition by sale, the court
3 shall dismiss the action.

4 (d) Under this [act] a court may order the whole property partitioned in kind or
5 partitioned by sale but it may not order partition in kind of part of the property and partition by
6 sale of the remainder.

7 [(e) In ordering partition in kind, the court may also, on motion and after hearing, require
8 that one or more cotenants pay one or more other cotenants such sums as may be necessary in
9 order that the payments, taken together with the value of the in-kind distributions to the
10 cotenants, will make the value of each cotenant's interest after partition substantially
11 proportionate to the cotenant's undivided interest in the heirs property before partition.]

12 **Comment**

13 1. Section 7(d): In many states, a court may order a partition in kind of part of the
14 property and a partition by sale of the remainder. *See, e.g.*, CAL. CIV. PRO. § 872.830 (West
15 2010); NEB. REV. STAT. § 25-21,103 (2009). However, in other states a court may only order
16 either a partition in kind or a partition by sale of the whole property. *See, e.g.*, *Fernandes v.*
17 *Rodriguez*, 761 A.2d 1283, 1289 (Conn. 2000).

18
19 2. Section 7(e): This subsection provides for the remedy of “owelty” which is an
20 equitable remedy. *See, e.g.*, CODE OF ALA. § 35-6-24 (2010); CAL. CIV. PRO. § 873.250 (West
21 2009). Courts order owelty payments when it is not reasonable to physically divide an estate
22 into equal shares, but the difference can be compensated by monetary payments. *Dewrell v.*
23 *Lawrence*, 58 P.3d 223, 227 (Okla. Civ. App. 2002). In recent decades, courts have tended to
24 underutilize the remedy of owelty which has resulted in property being sold by partition by sale
25 in many instances in which partition in kind could have been ordered. *See, e.g.*, John G.
26 Casagrande Jr., Note, *Acquiring Property through Partitioning Sales: Abuses and Remedies*, 27
27 B.C. L. REV. 755, 778 (1986); Faith Rivers, *Inequity in Equity: The Tragedy of Tenancy in*
28 *Common for Heirs' Property Owners Facing Partition in Equity*, 17 TEMP. POL. & CIV. RTS. L.
29 REV. 1, 76 (2007) (noting that heirs property owners could obtain fair and equitable divisions of
30 property if courts stopped taking the easy option by ordering partitions sales and utilized tools
31 such as owelty payments).

32
33

1 **SECTION 8. CONSIDERATIONS FOR PARTITION IN KIND.**

2
3 (a) In determining whether partition in kind would result in [great][substantial] prejudice
4 to [substantially] all of the cotenants, the court shall consider the following:

5 (1) whether the property practicably may be divided among the parties;

6 (2) whether partition in kind would apportion the property in such a way that the
7 fair market value of the parcels resulting from the division, in the aggregate, would be materially
8 less than the value of the property if it were sold based upon a valuation that takes into account
9 the condition under which the court-ordered sale would occur;

10 (3) evidence of the length of ownership or possession of the property by a
11 cotenant or a person who was either a predecessor in title or a predecessor in possession to a
12 cotenant and who is or was related by blood, marriage, or adoption to that cotenant;

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

16 (5) the use being made of the property by a cotenant and the degree to which the
17 cotenant would be harmed if the cotenant could not continue the same use of the property;

18 (6) the degree to which the cotenants contributed their pro rata share of the
19 property taxes, insurance, and other charges or expenses associated with maintaining ownership
20 of the property;

21 (7) the degree to which the cotenants have contributed to the physical
22 improvement, maintenance, or upkeep of the property; and

23 (8) any other relevant factor.

24 (b) In considering the factors in subsection (a), the court may not consider any single

1 factor to be dispositive, but shall instead weigh the totality of all relevant factors and
2 circumstances.

3 **Comment**

4 1. Under this section, a court in a partition case must consider the totality of the
5 circumstances, including a number of economic and non-economic factors, in deciding whether
6 to order partition in kind or partition by sale. In partition cases, a number of courts have utilized
7 such a totality of the circumstances approach in deciding whether to order partition in kind or
8 partition by sale. *See, e.g.,* Delfino v. Vealencis, 436 A.2d 27, 33 (Conn. 1980) (“It is the
9 interests of all of the tenants in common that the court must consider; and not merely the
10 economic gain of one tenant, or a group of tenants.); Schnell v. Schnell, 346 N.W.2d 713, 716
11 (N.D. 1984) (holding that economic and non-economic factors, including sentimental value,
12 should be weighed by a court in a partition action); Eli v. Eli, 557 N.W.2d 405, 409-411 (S.D.
13 1997) (citations omitted) (in explicitly adopting a totality of the circumstances test, the Supreme
14 Court of South Dakota stated that “[o]ne’s land possesses more than mere economic utility; it
15 ‘means the full range of the benefit the parties may be expected to derive from their ownership of
16 their respective shares.’ Such value must be weighed for its effect upon all parties involved, not
17 just those advocating a sale.”); Ark Land Co. v. Harper, 599 S.E.2d. 754, 761 (W. Va. 2004)
18 (holding that “in a partition proceeding in which a party opposes the sale of property, the
19 economic value of the property is not the exclusive test for deciding whether to partition in kind
20 or by sale. Evidence of longstanding ownership, coupled with sentimental or emotional interests
21 in the property, may also be considered in deciding whether the interests of the party opposing
22 the sale will be prejudiced by the property’s sale.”).

23
24 2. Section 8(a)(2) requires the court to conduct an economic analysis to determine
25 whether the cotenants would receive a greater economic benefit from a sale of the whole
26 property due to possible economies of scale that would result from selling the whole property
27 that could not be captured from partition in kind of the property. In conducting this economic
28 analysis, a court must take into consideration the type of sales conditions under which any court-
29 ordered sale would occur as property that is sold at a forced sale such as a sale upon execution or
30 a foreclosure sale typically results in property being sold at prices that are twenty percent or
31 more below the fair market value of the property. Such a resulting discount from the fair market
32 value of the property due to the forced sale conditions may render partition in kind to be as or
33 more economically beneficial to the cotenants than partition by sale of the whole property
34 despite the fact that economies of scale could be realized if the property were to sold instead
35 under fair market value conditions. *See generally,* Thomas W. Mitchell, Stephen Malpezzi, &
36 Richard K. Green, *Forced Sale Risk: Class, Race, and The “Double Discount”*, 37 FLA. ST. U. L.
37 REV. (forthcoming 2010).

38
39 3. Section 8(a)(3) permits consideration of longstanding possession of the property by
40 any cotenant or any predecessor in possession who is or was related to that cotenant. Adverse
41 possession, for example, raises this issue. Adverse possession statutes require possession over
42 the course of multiple years before a person may actually take title to the property. *See, e.g.,* 735

1 ILL. COMP. STAT. 5/13-101 (2009) (requiring twenty years of adverse possession); WIS. STAT. §§
2 893.25, 893.26 (2008) (requiring twenty years or ten years if color of title). Thus, because many
3 states allow tacking of possession, it is possible that a cotenant may have acquired possession of
4 the property from an ascendant that had been in possession of the property for many years
5 despite the fact that the statute of limitations for adverse possession had not run thereby
6 preventing the ascendant in prior possession from obtaining valid title to the property.
7

8 4. Section 8(4): For many families or communities, real property ownership has
9 important ancestral or historical meaning. *See, e.g.,* Chuck v. Gomes, 532 P.2d 657, 662 (Haw.
10 1975) (Richardson, C.J., dissenting):

11
12 “[T]here are interests other than financial expediency which I recognize as essential to
13 our Hawaiian way of life. Foremost is the individual's right to retain ancestral land in
14 order to perpetuate the concept of the family homestead. Such right is derived from our
15 proud cultural heritage. . . . [W]e must not lose sight of the cultural traditions which
16 attach fundamental importance to keeping ancestral land in a particular family line.”
17

18 *See also* Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black*
19 *Landownership, Political Independence, and Community Through Partition Sales of Tenancies*
20 *in Common*, 95 NW. U. L. REV.505, 523-526 (2001).
21

22 23 **SECTION 9. COTENANT BUYOUT.**

24
25 (a) Within 15 days after the court notifies the [parties] [cotenants] pursuant to Section
26 6(d) [and/or 6(e)] of its determination of value and of the procedures for possible cotenant
27 buyouts described in this section, any cotenant other than a cotenant that requested partition by
28 sale is eligible to give notice to the court [and to the other (parties)(cotenants)] that the eligible
29 cotenant’s entire interest is available for purchase under this section. If all eligible cotenants
30 offer their interests as available for purchase by giving proper notice, the court shall order the
31 property sold pursuant to Section 10.

32 (b) Within 15 days after the deadline by which any eligible cotenant may offer its
33 interest for purchase, any cotenant that did not request partition by sale and did not offer its
34 entire interest for purchase as described in subsection (a) may notify the court that it has elected
35 to purchase the available interests of other cotenants described in Section 7(a). An eligible

1 cotenant may elect to purchase another cotenant's interest as provided in this section even if a
2 default judgment has been entered against that cotenant. The purchase price for all interests
3 available under section 7(a) shall be equal to the fractional interest to be purchased multiplied by
4 the fair market value of the real property that is the subject of the partition action as determined
5 by the court pursuant to Section 6. If more than one eligible cotenant elects to purchase interests
6 under this section, each electing cotenant shall be entitled to purchase a portion of the aggregate
7 interests that are available for purchase equal to the electing cotenant's existing percentage
8 ownership divided by the total percentage ownership of all cotenants electing to purchase.

9 (c) The court shall notify each electing cotenant of the interests it is entitled to purchase
10 and the associated purchase price within 15 days after the deadline by which an eligible cotenant
11 may elect to purchase the available interests of cotenants. If none of the eligible cotenants
12 timely exercises its purchase right, the court shall proceed to consider whether it should order
13 partition in kind or partition by sale of the property pursuant to Section 7(b) and 7(c).

14 (d) No later than 45 days after the court has notified an electing cotenant, pursuant to
15 subsection (c), of the percentage of the available interests it is entitled to purchase and the
16 corresponding purchase price, that cotenant shall pay into the court fifty percent (50%) of the
17 price set as the value for its percentage of the interests to be purchased, unless for good cause
18 shown the court extends the time in which a cotenant may pay into the court the initial fifty
19 percent (50%) of the purchase price. Upon payment into court of the initial fifty percent (50%)
20 of the purchase price by all cotenants electing to purchase the available interests, the court
21 promptly shall schedule a time for closing, at which time the remaining fifty percent (50%) of
22 the purchase price will be due and payable into court. At closing the court shall issue an order
23 reallocating all of the cotenants' interests in the property to reflect the buyout.

1 (e) If none of the cotenants that elected to purchase the available interests timely pays
2 into the court its percentage of the purchase price for the interests being purchased, the court
3 shall proceed under Section 7(b) and 7(c) as if all the available interests of cotenants had not
4 been purchased.

5 (f) If one or more but not all of the cotenants that elected to purchase the available
6 interests described in section 7(a) fails to timely pay into the court the entire purchase price for
7 the interests it offered to purchase, the court shall within 10 days, notify each cotenants that
8 timely elected to purchase and paid its purchase price of that failure and of the aggregate
9 percentages of interests remaining available for purchase and the corresponding purchase price.
10 Thereafter, each of the cotenants that qualified for notice under this subsection may, within the
11 next 20 days, or any extended time granted for good cause by the court, purchase all of the
12 remaining available interests by paying into the court the corresponding purchase price. If more
13 than one of those qualified cotenants seeks to purchase all the remaining interests, each such
14 qualified cotenant shall be permitted to buy a portion of the remaining available interests equal
15 to that qualifying cotenant's original percentage ownership divided by the total original
16 percentage interest of all qualifying cotenants, and the court shall promptly refund any excess
17 payments at closing.

18 (g) If none of the cotenants that qualified for notice under subsection (f) timely pays the
19 full purchase price for all of the remaining available interests, the court shall proceed under
20 Section 7(b) and 7(c) as if all the available interests of cotenants had not been purchased.

21 **SECTION 10. OPEN-MARKET SALE OR PUBLIC SALE.**

22 (a) If the court orders a sale of the property, the sale must be an open-market sale unless
23 the court finds that a public sale would be more economically advantageous and in the best
24

1 interest of all the cotenants.

2 (b) If the court orders an open-market sale and the parties, not later than 10 days after the
3 order, agree on a real estate broker to offer the property for sale, the court shall appoint that
4 broker; otherwise, the court shall appoint a disinterested real estate broker to offer the property
5 for sale and shall establish a reasonable commission. The broker shall offer the property for sale
6 at a price no lower than the determination of value and on the terms and conditions established
7 by the court.

8 (c) If the broker, within a reasonable period, does not obtain an offer to purchase the
9 property for at least the determination of value, the court, after hearing, may:

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

11 (2) redetermine the value of the property and order that the property continue to
12 be offered for an additional period; or

13 (3) order that the property be sold at a public sale.

14 (d) If the court orders a public sale, the court shall set the terms and conditions of the
15 sale, which also must be conducted in the manner prescribed in [insert reference to general
16 partition statute or, if there is none, insert reference to foreclosure sale].

17 (e) If a purchaser is entitled to a share of the proceeds of the sale, the purchaser must
18 receive a credit against the price in an amount equal to the purchaser's share of the proceeds.

19 **Comment**

20 1. Courts which have utilized an open-market sale to sell property ordered sold under a
21 partition by sale have determined that an open-market sale would yield a better sales price that
22 the sales prices that could be expected if the property were sold at a public auction. *See, e.g.,*
23 *Orgain v. Butler*, 496 S.E.2d 433, 435 (Va. 1998) (reversing chancellor's order that property be
24 sold at a public auction given commissioner's report that recommended that property be sold on
25 the open market by a real estate broker because such a sale would yield the best price
26 obtainable).

1 2. Section 10(b): Courts which have utilized such an open-market sale in partition
2 actions have often required the property to be marketed by a real estate broker under
3 commercially reasonable conditions. *See, e.g.,* *McCorison v. Warner*, 859 A.2d 609, 614 (Conn.
4 Super. Ct. 2004) (In *McCorison*, the court referred to an open-market sale as defined in this act
5 as a private sale and ordered that the property be listed by a real estate broker for up to two years
6 provided that at least twenty-five percent (25%) of the parties agreed to continue to have the
7 property listed by a broker after the first year if the property had not been sold by that time).

8
9
10 **SECTION 11. REPORT OF SALE.**

11 (a) Unless required to do so within a shorter period of time by [insert reference to
12 general partition statute], the person authorized to offer the property for sale shall file a report
13 not later than 15 days after receiving an offer to purchase the property for at least the
14 determination of value. The report must contain the following information:

15 (1) a description of the property to be sold to each buyer;

16 (2) the name of each buyer;

17 (3) the proposed sales price;

18 (4) the terms and conditions of the proposed sale, including the terms of any
19 owner financing;

20 (5) the amounts, if any, to be paid to lienholders;

21 (6) a statement as to contractual or other arrangements or conditions as to agents'
22 commissions; and

23 (7) other material facts relevant to the sale and the confirmation proceeding.

24 (b) Not later than 30 days after a report of sale is filed, the court shall confirm the sale if
25 made in compliance with this [act].

26 **SECTION 12. ATTORNEY'S FEES.** No portion of any attorney's fees may be
27 assessed against any party who contests the partition proceeding whether by appearing by court-
28

1 appointed or privately retained counsel or by appearing pro se. If a partition action is
2 uncontested, the court may in its equitable discretion order that reasonable attorney’s fees
3 expended by any party for the common benefit of all of the cotenants be paid by the cotenants in
4 proportion to their respective interests in the heirs property.

5 **Comment**

6 Many states provide that attorney’s fees may not be awarded in a contested partition
7 action. *See, e.g.*, La. C.C.P. Art. 4613 (2010). *See also* Osborne v. Eslinger, 58 N.E. 439, 444
8 (Ind. 1900) (“Where parties appear by counsel, and contest a petition for partition, they should
9 not be required to pay the fees of the attorneys of their adversary.”); Dailey v. Houston, 151 So.
10 2d 919, 927 (Miss. 1963) “Where there is a real controversy, and it is proper for defendants to be
11 represented by counsel of their own choosing, the fee permitted by section 975, to be taxed as a
12 common charge upon all of the interests, should not be allowed.”; Cary v. Armbrust, 70 N.W.2d
13 427, 431 (Neb. 1955); Novy v. Novy, 188 A. 328, 330 (Pa. 1936) (“The act makes reasonable
14 counsel fees part of the costs in these proceedings, and the courts have followed the practice of
15 allowing them since its passage. The fees contemplated were only such as would compensate
16 counsel in a reasonable amount for services rendered in the actual partition and for the common
17 benefit of the parties in interest. When, however, partition is contested in good faith, or when the
18 services rendered are adverse to the other parties, the petitioner cannot recover as costs counsel
19 fees earned by his attorney in litigating his right to partition.”); Port v. Elson, 321 N.W.2d 363
20 (Wis. Ct. App. 1982) (“It has been widely recognized that if a partition proceeding is adversary
21 in character, the proceeding is not for the common benefit of all the parties, and therefore the
22 payment of attorney’s fees from the proceeds of the sale should not be allowed.”).

23
24
25 **SECTION 13. TRANSITION.**

26
27 **SECTION 14. EFFECTIVE DATE.** This [act] takes effect....
28