

D R A F T
FOR DISCUSSION ONLY

UNIFORM PARTITION OF HEIRS PROPERTY ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For March 26 – 27, 2010 Committee Meeting

Strike and Score Version

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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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March 2, 2010

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

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5 **UNIFORM PARTITION OF HEIRS PROPERTY ACT**

6
7 **SECTION 1. SHORT TITLE.**

8 This [act] may be cited as the Uniform Partition of Heirs Property Act.

9 **SECTION 2. DEFINITIONS.**

10 In this [act]:

11 (1) “Determination of Value” means ~~an~~the order of ~~athe~~ court, ~~required by~~under section
12 6(d) [or 6(e)], determining the ~~real property’s~~ fair market value ~~of the~~ heirs ~~property~~.

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

15 (A) ~~T~~here is no agreement in a record among all the cotenants that governs the
16 rights and obligations of the cotenants with respect to the ownership of the property, ~~and~~

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

Comment [m1]: See Comment 4 below

19 (C) ~~E~~ither ~~any~~ of the following is true:

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

22 (ii) 20 percent or more of the interests are held by an one or more
23 individuals who acquired title from an ascendant~~estor~~; or

24 (ii) 0 percent or more of the cotenants are related by blood, marriage, or
25 adoption.

1 (3) "Open-market sale" means a partition by sale ~~which is not limited to the cotenants~~
2 ~~and~~ in which the heirs property is listed and offered for sale on the open market in a
3 commercially reasonable manner by a disinterested licensed real estate broker.

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

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

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

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

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

16 **Comment**

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

28 2. Joint tenancy property is not covered by this act. In order for any real property
29 that was initially owned by two or more individuals as joint tenancy property to be covered by
30 this act, one or more of the joint tenants must sever the joint tenancy in accordance with the

1 requirements of state law. Once a joint tenancy is severed, this act may apply if the property is
2 determined to be heirs property under this act even if two or more individuals who had formerly
3 been joint tenants prior to severance of the joint tenancy and who did not take any action to sever
4 the joint tenancy remain joint tenants with one another after severance with respect to a
5 particular interest in the tenancy in common. *See* 7-51 RICHARD R. POWELL, POWELL ON REAL
6 PROPERTY § 51.04(1)(a) (Michael Allen Wolf ed., 2009). *See also* Carmack v. Place, 535 P.2d
7 197 (Co. 1975).

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

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

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

38
39 6. Section 2(8): The definition of “record” is identical to the definition of “record”
40 in Section 1-103(29) of the Uniform Common Interest Ownership Act (2008). Information that
41 constitutes a “record” under this Act need not be recorded.
42
43
44

1 **SECTION 5. COMMISSIONERS.** If the court appoints commissioners pursuant
2 [insert reference to general partition statute], each commissioner must, in addition to the
3 requirements and disqualifications applicable to commissioners in [insert reference to general
4 partition statute] be disinterested and impartial and neither a party nor a participant in the action.

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

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.

6 (a) ~~Promptly after~~If the court determines that the ~~real~~ property which is the subject of the
7 partition action is heirs property, the court also promptly shall determine ~~the~~its fair market value
8 of the property by appraisal pursuant to subsection (b), unless:

9 (1) all of the cotenants have agreed to the ~~[value of the property]~~ [price at which
10 the property is to be offered for sale], or

11 (2) the court determines that the cost of the appraisal will exceed its evidentiary
12 value to the court [in which case the court shall determine the fair market value of the heirs
13 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.

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

22 (c) If an appraisal is conducted pursuant to subsection (b), not later than ~~Within~~ 10 days
23 after the appraisal ~~report~~ is filed, the clerk of the court shall send/deliver to each party

1 (1) a copy of the appraisal ~~report~~, and

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

4 (d) ~~If After the appraisal report is an appraisal is~~ filed with the court pursuant to
5 subsection (b), the court shall conduct a hearing to determine the fair market value of the
6 property not sooner than 30 days after a copy of the appraisal is delivered to each party, whether
7 or not an objection to the appraisal is has been filed by the expiration of the period for stating an
8 objection. ~~In addition to the court-ordered appraisal, the court may consider A party may offer~~
9 ~~any other valuation another of the property appraisal that is offered as evidence by any~~
10 ~~party prepared by a [licensed] appraiser~~. After the hearing, but before considering the merits of
11 the partition action, the court shall ~~issue a(i)~~ determina~~tion of~~ the property's fair market value,
12 and (ii) notify the [parties] [cotenants] both of that value and of the procedures for possible
13 cotenant buyouts in Section 9 of this [act].

14 (e) [How will a court determine the fair market value of the heirs property if the court
15 does not order an appraisal?]

16 Comment

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

22
23 2. Section 6(b): Some states require that property that is to be sold by partition by
24 sale be appraised by one or more disinterested persons under certain circumstances. *See, e.g.*,
25 MINN. STAT. § 558.17 (2009) (providing that the court order property subject to partition by sale
26 to be appraised by two or more disinterested persons before the property is sold if the court
27 orders the property sold at a private sale instead of at a public auction). Other states require the
28 person who is to appraise real property under certain statutes to be state-certified and in good
29 standing with the state appraisal authorities. *See, e.g.*, OKLA. STAT. tit. 52, § 318.5 (2009).

1 3. Section 6(b): State statutes and case law typically refer to one person’s ownership
2 of property as “sole ownership.” *See, e.g.*, CAL. CIV. CODE § 681 (2010) (The ownership of
3 property by a single person is designated as a sole or several ownership); FLA. STAT. § 711.502
4 (2009) (“Only individuals whose registration of a security shows sole ownership by one
5 individual . . . may obtain registration in beneficiary form”); MONT. CODE ANN. 70-1-305
6 (2009); S.D. CODIFIED LAWS § 43-2-10 (2009) (“The ownership of property by a single person is
7 designated as a sole or several ownership.”). *See also In re Robertson*, 203 F.3d 855, 860 (5th
8 Cir. 2000) (when partitioning former community property, the assets are divided between the
9 former spouses and “the assets of which each former spouse acquires sole ownership is
10 reclassified by law as the separate, exclusive property of that former spouse.”).

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

27
28
29 **SECTION 7. PARTITION ALTERNATIVES.**

30 (a) Following the court’s notice of its determination of the value of the property and of
31 the procedures for possible cotenant buyouts in Section 9, eligible cotenants may purchase, in the
32 manner described in Section 9, all of the available interests of any cotenants ~~the parties~~ who
33 either (i) requested partition by sale or (ii) offer their interests for sale in the manner described in
34 Section 9(a).

35 (b) Otherwise, whether the requested relief in a partition action is for partition in kind or
36 partition by sale, if all the cotenants’ interests that become available for purchase as described in
37 Section 7(a) are not purchased by other cotenants pursuant to Section 9, the court must order

1 | partition ~~of the whole property in kind~~ unless the court finds, pursuant to Section 8, that a
2 | partition in kind will result in [great] [substantial] prejudice to [substantially] all the cotenants.

3 | In considering whether to the practicality of a partition in kind, the court shall approve any
4 | request by two or more parties to have their individual interests ~~considered as one~~ aggregated-
5 | group interest.

6 | (c) If partition in kind of the whole of the property is not ordered pursuant to ~~either~~
7 | subsection (b), the court shall order partition by sale, pursuant to Section 10 or, if no cotenant
8 | requested partition by sale, the court shall dismiss the action.

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

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

17 | Comment

18 | 1. Section 7(d): In many states, a court may order a partition in kind of part of the
19 | property and a partition by sale of the remainder. *See, e.g.,* CAL. CIV. PRO. § 872.830 (West
20 | 2010); NEB. REV. STAT. § 25-21,103 (2009). However, in other states a court may only order
21 | either a partition in kind or a partition by sale of the whole property. *See, e.g.,* *Fernandes v.*
22 | *Rodriguez*, 761 A.2d 1283, 1289 (Conn. 2000).

23 | 2. Section 7(e): This subsection provides for the remedy of “owelty” which is an
24 | equitable remedy. *See, e.g.,* CODE OF ALA. § 35-6-24 (2010); CAL. CIV. PRO. § 873.250 (West
25 | 2009). Courts order owelty payments when it is not reasonable to physically divide an estate
26 | into equal shares, but the difference can be compensated by monetary payments. *Dewrell v.*
27 | *Lawrence*, 58 P.3d 223, 227 (Okla. Civ. App. 2002). In recent decades, courts have tended to
28 | underutilize the remedy of owelty which has resulted in property being sold by partition by sale
29 | in many instances in which partition in kind could have been ordered. *See, e.g.,* *John G.*

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 Casagrande Jr., Note, *Acquiring Property through Partitioning Sales: Abuses and Remedies*, 27
2 B.C. L. REV. 755, 778 (1986); Faith Rivers, *Inequity in Equity: The Tragedy of Tenancy in*
3 *Common for Heirs Property Owners Facing Partition in Equity*, 17 TEMP. POL. & CIV. RTS. L.
4 REV. 1, 76 (2007) (noting that heirs property owners could obtain fair and equitable divisions of
5 property if courts stopped taking the easy option by ordering partitions sales and utilized tools
6 such as owelty payments).
7
8

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

10 (a) In ~~considering~~determining whether a partition in kind would result in
11 [great][substantial] prejudice to [substantially] all of the cotenants, the court shall consider the
12 following:

13 (1) whether the property practicably may be divided ~~among~~between the parties-
14 ~~seeking a partition by sale and those seeking to maintain ownership of part of the property;~~

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

19 (3) evidence of ~~the length of longstanding~~the length of ownership or possession of the
20 property by ~~any~~any cotenant ~~and any period of time during which any person who was either a~~
21 ~~predecessor in title or a predecessor in possession to a cotenant and who is or was such cotenant~~
22 ~~is or was~~ related by blood, marriage, or adoption ~~to that any such cotenant was a predecessor in~~
23 ~~title to the property who owned an interest in the property;~~

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

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

4 (6) the degree to which the cotenants ~~have~~ contributed their pro rata share of the
5 property taxes, insurance, and other ~~carrying~~ charges ~~or expenses~~ associated with maintaining
6 ownership of the property;

7 (7) the degree to which the ~~cotenants parties~~ have contributed to ~~or failed to~~
8 ~~contribute to~~ the physical improvement, maintenance, ~~or the~~ upkeep of the property; and

9 (8) any other relevant factors.

10 (b) In considering the factors ~~set forth~~ in subsection (a), the court ~~may shall~~ not consider
11 any single factor to be dispositive, ~~standing alone~~, but shall instead weigh the totality of all
12 relevant factors and circumstances.

13 Comment

14 1. Under this section, a court in a partition case must consider the totality of the
15 circumstances, including a number of economic and non-economic factors, in deciding whether
16 to order partition in kind or partition by sale. In partition cases, a number of courts have utilized
17 such a totality of the circumstances approach in deciding whether to order partition in kind or
18 partition by sale. *See, e.g.,* Delfino v. Vealencis, 436 A.2d 27, 33 (Conn. 1980) (“It is the
19 interests of all of the tenants in common that the court must consider; and not merely the
20 economic gain of one tenant, or a group of tenants.); Schnell v. Schnell, 346 N.W.2d 713, 716
21 (N.D. 1984) (holding that economic and non-economic factors, including sentimental value,
22 should be weighed by a court in a partition action); Eli v. Eli, 557 N.W.2d 405, 409-411 (S.D.
23 1997) (citations omitted) (in explicitly adopting a totality of the circumstances test, the Supreme
24 Court of South Dakota stated that “[o]ne’s land possesses more than mere economic utility; it
25 ‘means the full range of the benefit the parties may be expected to derive from their ownership of
26 their respective shares.’ Such value must be weighed for its effect upon all parties involved, not
27 just those advocating a sale.”); Ark Land Co. v. Harper, 599 S.E.2d 754, 761 (W. Va. 2004)
28 (holding that “in a partition proceeding in which a party opposes the sale of property, the
29 economic value of the property is not the exclusive test for deciding whether to partition in kind
30 or by sale. Evidence of longstanding ownership, coupled with sentimental or emotional interests
31 in the property, may also be considered in deciding whether the interests of the party opposing
32 the sale will be prejudiced by the property’s sale.”).

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

15
16 3. Section 8(a)(3) permits consideration of longstanding possession of the property
17 by any cotenant or any predecessor in possession who is or was related to that cotenant. Adverse
18 possession, for example, raises this issue. Adverse possession statutes require possession over
19 the course of multiple years before a person may actually take title to the property. *See, e.g.*, 735
20 ILL. COMP. STAT. 5/13-101 (2009) (requiring twenty years of adverse possession); WIS. STAT. §§
21 893.25, 893.26 (2008) (requiring twenty years or ten years if color of title). Thus, because many
22 states allow tacking of possession, it is possible that a cotenant may have acquired possession of
23 the property from an ascendant that had been in possession of the property for many years
24 despite the fact that the statute of limitations for adverse possession had not run thereby
25 preventing the ascendant in prior possession from obtaining valid title to the property.

26
27 4. Section 8(4): For many families or communities, real property ownership has
28 important ancestral or historical meaning. *See, e.g.*, *Chuck v. Gomes*, 532 P.2d 657, 662 (Haw.
29 1975) (Richardson, C.J., dissenting):

30
31 “[T]here are interests other than financial expediency which I recognize as essential
32 to our Hawaiian way of life. Foremost is the individual's right to retain ancestral land
33 in order to perpetuate the concept of the family homestead. Such right is derived from
34 our proud cultural heritage. . . . [W]e must not lose sight of the cultural traditions
35 which attach fundamental importance to keeping ancestral land in a particular family
36 line.”

37
38 *See also* Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black*
39 *Landownership, Political Independence, and Community Through Partition Sales of Tenancies*
40 *in Common*, 95 NW. U. L. REV. 505, 523-526 (2001).

41
42 **SECTION 9. ~~PROCEDURES FOR~~ COTENANT BUYOUT.**

43 (a) Within 15 days after the court notifies the [parties] [cotenants] pursuant to Section

1 6(d) [and/or 6(e)] of its determination of value and of the procedures for possible cotenant
2 buyouts described in this section, any cotenant other than a cotenant ~~thatwho~~ requested partition
3 by sale is eligible to give notice to the court [and to the other (parties)(cotenants)] that the eligible
4 cotenant's entire interest is available for purchase under this section. If all eligible cotenants
5 offer their interests as available for purchase by giving proper notice, the court shall order the
6 property sold pursuant to Section 10.

7 (b) Within 15 days after the deadline by which any eligible cotenant may offer its interest
8 for purchase, any cotenant ~~thatwho~~ did not request partition by sale and did not offer its entire
9 interest for purchase as described in subsection (a) may notify the court that it has elected to
10 purchase the available interests of other cotenants described in Section 7(a). An eligible
11 cotenant may elect to purchase another cotenant's interest as provided in this section even if a
12 default judgment has been entered against that cotenant. The purchase price for all interests
13 available under section 7(a) shall be equal to the fractional interest to be purchased multiplied by
14 the fair market value of the real property that is the subject of the partition action as determined
15 by the court pursuant to Section 6. If more than one eligible cotenant elects to purchase interests
16 under this section, each electing cotenant shall be entitled to purchase a portion of the aggregate
17 interests that are available for purchase equal to the electing cotenant's existing percentage
18 ownership divided by the total percentage ownership of all cotenants electing to purchase.

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

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

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

15 (f) If one or more but not all of the ~~cotenants who~~cotenants that elected to purchase the
16 available interests described in section 7(a) fails to timely pay into the court the entire purchase
17 price for the interests it offered to purchase, the court shall within 10 days, notify each ~~cotenant~~
18 ~~who~~cotenants that timely elected to purchase and paid its purchase price of that failure and of the
19 aggregate percentages of interests remaining available for purchase and the corresponding
20 purchase price. Thereafter, each of the ~~cotenants who~~cotenants that qualified for notice under
21 this subsection may, within the next 20 days, or any extended time granted for good cause by the
22 court, purchase all of the remaining available interests by paying into the court the corresponding
23 purchase price. If more than one of those qualified cotenants seeks to purchase all the remaining

1 interests, each such qualified cotenant shall be permitted to buy a portion of the remaining
2 available interests equal to that qualifying cotenant's original percentage ownership divided by
3 the total original percentage interest of all qualifying cotenants, and the court shall promptly
4 refund any excess payments at closing.

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

9 ~~(a) — Before the court may consider the request of any cotenant to partition in kind or~~
10 ~~partition by sale the whole of the property, it shall provide any cotenants who had not requested~~
11 ~~partition by sale the opportunity to purchase the entire interest of any cotenant who either~~
12 ~~requested partition by sale or timely gave notice that its interest is available for purchase under~~
13 ~~this section. A cotenant who did not request partition by sale may give notice to the court within~~
14 ~~15 days after the court's determination of the real property's value pursuant to Section 6(d) for~~
15 ~~Section 6(e)] that the cotenant's entire interest is available for purchase under this section. If~~
16 ~~every cotenant who had not requested partition by sale gives notice that its entire interest is~~
17 ~~available for purchase under this section, the court shall order the property sold pursuant to~~
18 ~~Section 10. The purchase price for interests under this section shall be equal to the fractional~~
19 ~~interest to be purchased multiplied by the fair market value of the real property that is the subject~~
20 ~~of the partition action.~~

21 ~~(b) — Any cotenant who did not request partition by sale or did not give notice that its~~
22 ~~entire interest is available for purchase may notify the court of its intention to exercise the~~
23 ~~purchase right under this section, in any case no later than 30 days after the court's determination~~

1 ~~of the real property's value. Such a cotenant may purchase another cotenant's interest as~~
2 ~~provided in this section even if a default judgment has been entered against that cotenant. If~~
3 ~~more than one cotenant elects to exercise the right to purchase interests under this section, each~~
4 ~~of those cotenants shall be entitled to purchase the portion of the aggregate interests that are~~
5 ~~available for purchase equal to its existing percentage ownership divided by the total percentage~~
6 ~~ownership of all cotenants electing to purchase. The court shall notify each electing cotenant of~~
7 ~~the interests it is entitled to purchase and the associated purchase price no later than 45 days after~~
8 ~~the court has determined the fair market value of the real property. If none of the eligible~~
9 ~~cotenants timely exercises its purchase right, the court shall proceed to consider whether it~~
10 ~~should order a partition in kind or a partition by sale of the property pursuant to Section 7(b) (c):~~
11 ~~(c) No later than 45 days after the court has notified a cotenant, pursuant to subsection~~
12 ~~(b), of the percentage of the interests it is entitled to purchase and the corresponding purchase~~
13 ~~price, such cotenant shall pay into the court 50% of the price set as the value for its percentage of~~
14 ~~the interests to be purchased, unless for good cause shown the court extends the time in which a~~
15 ~~cotenant may pay into the court the initial 50% of the purchase price. Upon payment into court~~
16 ~~of the initial 50% of the purchase price by all cotenants participating in the purchase, the court~~
17 ~~shall schedule a prompt time for closing, at which time the remaining 50% of the purchase price~~
18 ~~will be due and payable into court. At closing the court shall issue an order reallocating all of~~
19 ~~the cotenants' interests in the property to reflect the buyout. If none of the cotenants who~~
20 ~~exercised the purchase right timely pays into the court its percentage of the purchase price for the~~
21 ~~interests being purchased as provided in this subsection, the court shall proceed as if none of the~~
22 ~~eligible cotenants had exercised the purchase right pursuant to subsection (b):~~
23 ~~(d) If one or more but not all of the cotenants who exercised the purchase right under~~

1 ~~subsection (b) fails to timely pay into the court the purchase price for the interests it is~~
2 ~~purchasing, whether the initial 50% or the second 50% at closing, the court shall within 10 days,~~
3 ~~notify each cotenant who timely exercised the purchase right and paid its purchase price of that~~
4 ~~failure and of the aggregate percentages of interests remaining available for purchase and the~~
5 ~~corresponding purchase price. Thereafter, each of the remaining cotenants who timely exercised~~
6 ~~the purchase right and paid into the court the purchase price, may, within the next 20 days,~~
7 ~~unless for good cause shown the court extends the time, purchase all of the remaining interests~~
8 ~~not purchased by the defaulting cotenants by paying into the court the corresponding purchase~~
9 ~~price. If more than one cotenant seeks to purchase these remaining interests, each such cotenant~~
10 ~~shall be permitted to buy a fraction of the remaining interests equal to that cotenant's original~~
11 ~~percentage ownership divided by the total original percentage interest of all cotenants who~~
12 ~~actually paid in the purchase price for the remaining interests, and the court shall promptly~~
13 ~~refund any excess payments at closing.~~

14 ~~(e) If none of the remaining cotenants who timely exercised the purchase right and paid~~
15 ~~the purchase price into the court timely pays the full purchase price for all of the remaining~~
16 ~~interests of the defaulting cotenants, the court shall proceed as if none of the eligible cotenants~~
17 ~~had exercised the purchase right pursuant to subsection (b).~~

18
19 **SECTION 9. PROCEDURES FOR CO-TENANT BUY-OUT.**

20 ~~(a) — Before the court may order partition in kind or partition by sale of the whole of~~
21 ~~the property, it shall provide any cotenants who had not requested partition by sale the~~
22 ~~opportunity to purchase the entire interest of any cotenant who requested partition by sale or who~~
23 ~~timely gave notice that their interest is available for purchase under this section. A party who~~
24 ~~did not request partition by sale of the whole of the property may give notice to the court within~~

1 ~~15 days after the court's determination of value that the party's interest is available for purchase~~
2 ~~under this section. A party who did not request partition by sale may give notice to the court~~
3 ~~within 15 days after the court's determination of value that the party's interest is available for~~
4 ~~purchase under this section. If every party [who had not requested partition by sale of the whole~~
5 ~~of the property] gives notice that his or her interest is available for purchase under this section,~~
6 ~~the court shall order the whole property sold pursuant to Section 10.~~

7 (b) ~~Any party who did had not requested partition by sale of the whole of the property or~~
8 ~~did [and does not give notice that his or her interest is available for purchase] may notify the~~
9 ~~court no later than 30 days after the court's determination of value of his or her intention to~~
10 ~~exercise the purchase right under this section. Such a A cotenant [who had not requested~~
11 ~~partition by sale] may purchase another party's interest as provided in this section even if a~~
12 ~~default judgment has been entered against that cotenant. If more than one party elects to~~
13 ~~exercise the right to purchase interests under this section, each of those parties shall be entitled to~~
14 ~~purchase a portion of the aggregate interests that are available for purchase in proportion to his~~
15 ~~or her existing percentage ownership divided by the total percentage ownership of all cotenants~~
16 ~~electing to participate in the purchase. The court shall notify each electing cotenant of the~~
17 ~~interests it is entitled to purchase and the associated purchase price no later than 45 days after the~~
18 ~~court has determined the fair market value of the real property.~~

19 (c) ~~No later than 475 days after the court has notified a cotenant, pursuant to subsection~~
20 ~~(b), of the percentage of the interests it is entitled to purchase and the corresponding purchase~~
21 ~~price, such cotenant shall pay into the court the price set as the value for its percentage of the~~
22 ~~interests to be purchased court's determination of value, unless for good cause shown the court~~
23 ~~extends the time in which a party may pay into the court his or her portion of the purchase price.~~

1 each party who exercised the purchase right shall pay into the court by cash, certified check or
2 electronic transfer the value of the interests being purchased, calculated in each instance by
3 multiplying the court's determination of value by the percentages of ownership in the property
4 being purchased. Upon full payment of the purchase price by all of the cotenants participating in
5 the purchase, the court shall issue an order reallocating all of the cotenants' interests in the
6 property. If none of the cotenants who exercised the purchase right timely pay into the court s
7 his or her the percentage of the purchase price for value of the interests being purchased as
8 provided in this subsection, within 75 days after the court's determination of value, the court
9 shall proceed as if none of the cotenants had offered to purchase any interests pursuant to section
10 6(a).

11 (d) If one or more but not all of the cotenants who exercised the purchase right under
12 subsection (c) fail to timely pay into the court the value of the interests being purchased, the
13 court
14 shall within 10 days notify all cotenants who exercised the purchase right and paid his or her
15 percentage of the purchase price of that failure and of the percentages of interests remaining
16 available for purchase. Thereafter, each of the remaining cotenants who timely exercised the
17 purchase right and paid into the court his or her percentage of the price, may, within the next 20
18 days, unless for good cause shown the court extends the time, purchase all of the remaining
19 interests not purchased by the defaulting cotenants by paying into the court the value of all of the
20 remaining interests being purchased. If more than one cotenant seeks to purchase these
21 remaining interests, each such cotenant shall be permitted to buy a fraction of the remaining
22 interests equal to that cotenant's original percentage ownership divided by the total original
23 percentage interest of all cotenants who actually pay in the purchase price for the remaining

1 ~~interests, and the court shall promptly refund any excess payments.~~

2 (e) ~~If the remaining cotenants who timely exercised the purchase right and paid the~~
3 ~~purchase price into the court pursuant to subsection (c) do not timely pay the full price of the~~
4 ~~interests to be bought out pursuant to subsection (d), the court shall proceed as if none of the~~
5 ~~remaining interests of the cotenants described in subsection (d) had been available for purchase~~
6 ~~pursuant to section 6(a).~~

7 **SECTION 10. ~~SALE BY PUBLIC SALE OR OPEN-~~MARKET SALE OR**
8 **PUBLIC SALE.**

9 (a) If the court orders a sale of the property, the sale ~~must~~shall be an open-~~market~~ sale
10 unless the court finds that a public sale would be ~~economically~~ more economically advantageous
11 and in the best interest of all the cotenants.

12 (b) If the court orders an open-~~market~~ sale and the parties, ~~stipulate, within not later than~~
13 10 days after the ~~court's~~ order, agree on ~~the identity of a~~ real estate broker to offer the property
14 for sale, the court shall appoint that broker; ~~otherwise,~~ otherwise, the court shall appoint a disinterested
15 real estate broker to offer the property for sale and shall establish a reasonable commission. The
16 broker shall offer the property for sale at a price no lower than the ~~court's~~ determination of value
17 and on the terms and conditions established by the court.

18 (c) If the broker, within a reasonable period, does not ~~timely procure a person willing~~
19 obtain an offer to purchase the property for at least the ~~court's~~ determination of value, the court,
20 after hearing, may:

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

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

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

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

5 (e) If ~~the~~ purchaser ~~is a cotenant or otherwise owns an interest in the property and~~
6 ~~thereby~~ is entitled to a share of the proceeds of the sale, the purchaser ~~must~~ receive a credit
7 against the price in an amount equal to the ~~purchaser's share of the proceeds~~ value of the interest.

8 **Comment**

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

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

23
24
25 **SECTION 11. REPORT OF SALE.**

26 (a) Unless required to do so within a shorter period of time by [insert reference to general
27 partition statute], the ~~broker or other~~ person authorized to ~~offer~~ have offered the property for sale
28 shall file ~~his or her~~ a report ~~not later than~~ within 15 days after receiving ~~an~~ the offer ~~to purchase~~
29 ~~the property for at least the determination of value~~ for sale. The report ~~must~~ contain the
30 following information:

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

- 1 (2) the name of each buyer;
- 2 (3) the proposed sales price;
- 3 (4) the terms and conditions of the proposed sale, including the terms of any
- 4 owner financing;
- 5 (5) the amounts, if any, to be paid to lienholders;
- 6 (6) a statement as to contractual or other arrangements or conditions as to agents’
- 7 commissions; and
- 8 (7) other material facts relevant to the sale and the confirmation proceeding.
- 9 (b) ~~Not later than~~Within 30 days ~~after a of the filing of the~~ report of sale is filed, the court
- 10 shall confirm the sale if made in compliance with this [act].

11 **SECTION 12. ~~AWARD OF ATTORNEY’S FEES.~~ No portion of any attorney’s fees**

12 may be assessed against any party who contests the partition proceeding whether by appearing

13 by court-appointed or privately retained counsel or by appearing pro se. If a partition action is

14 uncontested, the court may in its equitable discretion order that reasonable attorney’s fees

15 expended by any party for the common benefit of all of the cotenants be paid by the cotenants in

16 proportion to their respective interests in the heirs property. ~~Each party to an action under this~~

17 ~~fact] shall be responsible for payment of his or her attorney’s fees.~~

18 **Comment**

19 1. Many states provide that attorney’s fees may not be awarded in a contested

20 partition action. *See, e.g.,* La. C.C.P. Art. 4613 (2010). *See also* Osborne v. Eslinger, 58 N.E.

21 439, 444 (Ind. 1900) (“Where parties appear by counsel, and contest a petition for partition, they

22 should not be required to pay the fees of the attorneys of their adversary.”); Dailey v. Houston,

23 151 So. 2d 919, 927 (Miss. 1963) “Where there is a real controversy, and it is proper for

24 defendants to be represented by counsel of their own choosing, the fee permitted by section 975,

25 to be taxed as a common charge upon all of the interests, should not be allowed.”; Cary v.

26 Armbrust, 70 N.W.2d 427, 431 (Neb. 1955); Novy v. Novy, 188 A. 328, 330 (Pa. 1936) (“The

27 act makes reasonable counsel fees part of the costs in these proceedings, and the courts have

28 followed the practice of allowing them since its passage. The fees contemplated were only such

1 as would compensate counsel in a reasonable amount for services rendered in the actual partition
2 and for the common benefit of the parties in interest. When, however, partition is contested in
3 good faith, or when the services rendered are adverse to the other parties, the petitioner cannot
4 recover as costs counsel fees earned by his attorney in litigating his right to partition.”); Port v.
5 Elson, 321 N.W.2d 363 (Wis. Ct. App. 1982) (“It has been widely recognized that if a partition
6 proceeding is adversary in character, the proceeding is not for the common benefit of all the
7 parties, and therefore the payment of attorney’s fees from the proceeds of the sale should not be
8 allowed.”).

9
10

11 **SECTION 13. TRANSITION.**

12 s:\chl\nccus\partition\draft 122909