

D R A F T  
FOR DISCUSSION ONLY

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

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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For March 14-15, 2008 Drafting Committee Meeting

*Without Prefatory Notes and With Comments*

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1                   **PARTITION OF TENANCY-IN-COMMON REAL PROPERTY ACT**

2  
3                                   **ARTICLE 1**

4  
5                                   **PART 1**

6                                   **DEFINITIONS AND OTHER GENERAL PROVISIONS**

7  
8                   **SECTION 1-101. SHORT TITLE.** This [Act] may be cited as the Partition of  
9 Tenancy-In-Common Real Property Act.

10                   **SECTION 1-102. DEFINITIONS.** In this section:

11                   (a) HEIRS’ PROPERTY:

12                   *Reporter’s Note: We only received one response from those who proposed limiting the act to*  
13 *some category of property called “Heirs’ Property” or “Heirship Property.” I disagree with the*  
14 *proposed definition because I think it is significantly under inclusive of the range of property*  
15 *owners who have been negatively impacted by the default rules on partition. This definition*  
16 *would define “Heirship Property” as property that has the following attributes:*

- 17                   • *Property that has passed by intestate succession with one possible extension to*  
18 *include property that has passed from an original intestate heir to the current owner*  
19 *by one or more gifts or testamentary transfers*
- 20                   • *The land is agricultural or residential property with inherited business property*  
21 *excluded with the possible exception that family farms be included if there is a cap*  
22 *placed upon the value of the real property that would be covered by the Act.*

23                   *We will have to revisit this issue of defining a subcategory of tenancy in common property and*  
24 *see if we can agree upon some parameters that will satisfy a significant number of people on the*  
25 *drafting committee.*

26  
27                   (b) NEWSPAPER OF GENERAL CIRCULATION: A “newspaper of general

28 circulation” means a publication that:

29                                   (1) is published in newspaper format;

30                                   (2) is distributed at least once a week for at least 50 weeks each year within the

31 judicial district, excluding a period when publication is interrupted by a labor dispute or by a

32 natural disaster or other casualty that the publisher cannot control; and has a total paid circulation

1 or paid distribution of at least 500 copies, or 10 percent of the total population of the judicial  
2 district, whichever is less; in this subparagraph, "judicial district" means the judicial district  
3 where the place of sale is located;

4 (3) holds a second class mailing permit from the United States Postal Service;

5 (4) is not published primarily to distribute advertising; and

6 (5) is not intended primarily for a particular professional or occupational group.

7 (c) PRIVATE SALE: A private sale means a sale that is limited to the parties and under  
8 which the property is sold to the highest bidder amongst the parties participating in the sale.

9 (d) PUBLIC SALE: A public sale means a sale not confined to the parties that is  
10 conducted under fair market value conditions and in which the property is listed by a licensed  
11 real estate broker or is listed as "for sale by owner" at a price that is no lower than the court-  
12 approved appraised price for a period not to exceed six months or the average market time then  
13 prevailing for real property in the relevant market whichever is longer.

14 **Comment**

15 Section 1-102(b): See Alaska Stat. § 09.35.140 (2008)

16

17 **PART 2**

18 **NOTICE AND KNOWLEDGE**

19

20 **SECTION 1-103. UNKNOWN OR UNLOCATABLE PARTIES; SERVICE BY**

21 **PUBLICATION.** In a partition proceeding, any person having a claim, interest or concern so as  
22 to be a necessary or proper party, who the plaintiff, after exercising due diligence, is unable to  
23 locate or is unable to identify by name thereby remaining unknown, may be made party to the  
24 action, provided:

1 (a) No plaintiff shall be permitted to use, and no court shall authorize, service by  
2 publication for the purpose of notifying parties in interest who do not reside within the State but  
3 whose whereabouts are known or are capable of being known by a plaintiff exercising due  
4 diligence.

5 (b) In order for a court to order that a defendant be served by publication, the plaintiff  
6 must specifically allege in an affidavit the facts showing what due diligence the plaintiff  
7 exercised in attempting to locate unknown or unlocatable owners. The affidavit required by this  
8 paragraph shall set forth facts based upon the personal knowledge of the affiant concerning the  
9 methods, means, and attempts made to locate and to effect personal service on the unknown or  
10 unlocatable defendants, including the efforts made to utilize, review, or otherwise draw upon  
11 sources of information readily available to the plaintiff.

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

14 (1) The plaintiff shall post, not later than ten (10) days after the date the order is  
15 made, a copy of the summons and complaint in a conspicuous place on the real property that is  
16 the subject of the action and this summons and complaint shall remain posted on the subject  
17 property throughout the remaining duration of the partition action;

18 (2) The plaintiff shall record, if not already recorded, a notice of the pendency of  
19 the action.

20 (3) Publishing notice in a newspaper of general circulation that is published  
21 nearest to the court in which the partition action was filed [nearest to the county in which the real  
22 property is located] for the number of times and within the timeframe required for the sale of real  
23 property upon execution. Said notice shall contain the street address or other common

1 designation for the property, the number of acres, a legal description of the property, a  
2 description of any improvements, the title of the court, the title of the case, the names of the first  
3 named plaintiff and the first named defendant, the number of the case, the names of the parties to  
4 be served by publication, a command that the defendant appear and answer as in ordinary cases,  
5 and the date on or after which default may be entered against such party.

6 (4) Nothing herein contained limits or affects the right to serve any process in any  
7 other manner now or hereafter provided by law or rule of court.

8 **Comment**  
9

10 A number of state statutes require the plaintiff to exercise due diligence to locate or  
11 identify parties who may have a claim, interest, or concern with respect to certain litigation  
12 before the court will authorize service by publication. *See, e.g.*, Ala. Code. §§ 35-6-25 & 35-6-  
13 44; Ga. Code Ann. § 9-11-4(f)(1)(A); Haw. Rev. Stat. § 634-23(2); N.C. Gen. § 46-3.1; and S.D.  
14 Codified Laws § 15-9-7.

15  
16 The requirement that the plaintiff document the due diligence taken in attempting to  
17 locate unlocatable or unknown parties is found in a number of statutes. *See, e.g.*, Ala. Code. §§  
18 35-6-25 & 35-6-44 (“the facts showing just what diligence the petitioner has exercised must be  
19 specifically alleged in the bill”); Ga. Code Ann. § 9-11-4(f)(1)(A); Haw. Rev. Stat. § 634-23(2);  
20 and S.D. Codified Laws § 15-9-7.

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

26  
27 Section 1-103(c)(1): *See* Cal. Code. Civ. Proc. § 872.320(a)

28  
29 Section 1-103(c)(2): *See* Cal. Code. Civ. Proc. § 872.320(b)

30  
31 Section 1-103(c)(3): Alaska Stat. § 09.35.140 with respect to the language addressing  
32 newspaper of general circulation that is published nearest to the place of sale.

33  
34 Section 1-103(c)(4): HRS § 634-23 (5)  
35

36

1 **ARTICLE 2**

2 **PARTITION BY DIVISION AND PARTITION SALE**

3  
4 **SECTION 2-201. ACTION FOR PARTITION BY DIVISION AUTHORIZED –**

5 **WHO MAY BRING.** When two or more persons are interested, as tenants in common, in real  
6 property in which one or more of them have an estate of inheritance or for life or years, an action  
7 may be brought by one or more of such persons against the others for a partition by division  
8 thereof according to the respective rights and interests of the parties interested therein, or for a  
9 sale of such property, or a part thereof, if it appears that a partition by division cannot be had  
10 without great prejudice to the parties.

11 **Comment**

12 Alaska Stat. § 09.45.260 (2007); Minn. Stat. § 558.01.  
13

14 **SECTION 2-202. PARTITION SALE.** If it is alleged in the complaint and established

15 by a preponderance of the evidence to the satisfaction of the court, that the real property or any  
16 part of it is so situated that the partition cannot be made without great prejudice to all of the  
17 owners, taking into account the totality of the circumstances, the court may order a sale thereof.

18 Without limiting the economic or non-economic factors that the court may consider in  
19 determining whether a partition can be made without great prejudice to the owners, the court  
20 shall consider the following factors:

21 (a) whether the property is able to be divided between the party or parties seeking a  
22 division in kind and those seeking to remain tenants in common as well as the practicality of  
23 dividing the property;

24 (b) whether a partition by division would apportion the property in such a way that the



1 fair market value of the parcels resulting from the division, in the aggregate, would be materially  
2 less than the value of the property if it was sold as a whole based upon a valuation that takes into  
3 account the type of sale conditions under which the court-ordered sale would occur.

4 (c) evidence of longstanding ownership by any individual cotenant as supplemented by  
5 the period of time that any ancestor or ancestors of such an existing cotenant owned an interest in  
6 the property;

7 (d) any cotenant's particular sentimental links with or attachment to the property,  
8 including any attachments arising out of the fact that the property has historical or other unique  
9 or special value to one or more of the co-owners;

10 (e) the use being made of the property by any of the tenants in common and the degree to  
11 which this tenant in common would be harmed if he or she could not continue to use the property  
12 for these purposes, especially as it pertains to residential or business uses; and

13 (f) the degree to which the parties have contributed their pro rata share of the property  
14 taxes, insurance, and other carrying charges associated with maintaining ownership of the real  
15 property as well as the degree to which the parties have contributed to the physical upkeep or  
16 improvement of the property.

17 **Comment**

18 This language only permits a partition sale to be ordered if a party actually petitions for a  
19 partition sale. In many cases, those who have owned real property who have sought a partition  
20 by division when it appeared to them that a partition by division could be easily ordered, were  
21 surprised that a court using an "economics only" analysis ended up ordering a partition sale  
22 which they did not seek and did not want as this was the worst option in their opinion.

23  
24 Section 2-202(b): *See* N.C. Gen. Stat. § 46-22(b).

25  
26 Courts in Texas, for example, have indicated that property should be sold at its fair  
27 market value at a partition sale. *Grimm v. Beck*, 237 S.W.2d 1017, 1018 (Tex. App. Ct. 1951).  
28 Texas courts have further indicated that a partition sale should only be ordered if it is more  
29 economically beneficial to the owners than a partition in kind. *Jacobs v. Mada*, 2007 TX App.

1 Ct. Briefs 832438, Aug. 8, 2007 at \*\*21-22. In *Jacobs*, the court stated: “Moreover, the purpose  
2 of partitioning real estate by sale rather than in kind, the preferred method, is to restore the  
3 maximum value of the separate property to its owners.” There are several empirical studies that  
4 demonstrate that if property is sold under the type of forced sale conditions under which property  
5 is often sold under a partition sale it will typically sell at a severe discount from fair market value  
6 prices. Further, courts in many other areas of the law have distinguished between forced sale  
7 value and fair market value. Therefore, one must consider the specific type of sales conditions  
8 under which property would be sold at a partition sale in order to evaluate whether or not the  
9 winning bid is likely to be at fair market value and whether the current owners would end up  
10 better off economically from a partition sale as opposed to a division in kind.

11  
12 Section 2-202(c): *See* *Delfino v. Vealencis*, 436 A.2d 27, 33 (Conn. 1980); *Eli v. Eli*, 557  
13 N.W.2d 405, 409-411 (S.D. 1997); and *Ark Land. Co. v. Harper*, 599 S.E.2d. 754, 761-62 (W.  
14 Va. 2004).

15  
16 Section 2-202(d): *See* *Ark Land. Co. v. Harper*, 599 S.E.2d. 754, 761-62 (W. Va. 2004);  
17 *Overstreet v. Overstreet*, 692 So. 2d 88, 91 (1997); and *Property (Co-ownership) Act 2005, Part*  
18 *IV, § 229(2)(c)*, Victoria, Australia.

19  
20 Section 2-202(e): *See* *Delfino v. Vealencis*, 436 A.2d 27, 33 (Conn. 1980); *Property (Co-*  
21 *ownership) Act 2005, Part IV, § 229(2)(c)*, Victoria, Australia.  
22

23 **SECTION 2-203. PARTIAL DIVISION AND SALE.** If, in making a determination  
24 whether partition by division of the whole property can be made without great prejudice to all of  
25 the owners under Section 2-202, the court finds, after weighing economic and non-economic  
26 factors including those mandated by Section 2-202, that sale and division of proceeds for part of  
27 the property would be more equitable than division of the whole property, the court may order  
28 that such part be sold and the remainder divided.

29 **Comment**

30 *See, e.g.,* Cal. Code Civ. Proc. § 872.830; N.C. Gen. Stat. § 46-16; W. Va. Code § 37-4-3.  
31

32 **SECTION 2-204. SALE OF PART OR WHOLE OF PROPERTY; APPRAISAL.**

33 (a) Should the court be of the opinion that a partition of the real property by division  
34 thereof cannot be made of the whole or a part of the property without great prejudice to the

1 owners of the same, the court shall appoint a disinterested appraiser to perform an appraisal of  
2 the property to be sold. The appraiser who is appointed must be state-licensed or state-certified  
3 to appraise the type of property that is to be sold at the partition sale [or designated a Member of  
4 the Appraisal Institute (MAI) and otherwise qualified to appraise the type of property that is to  
5 be sold at the partition sale]. After taking an oath to appraise the property at its fair market  
6 value, the property must be appraised based upon its highest and best use assuming sole or  
7 unitary ownership of the fee simple estate but with deductions made for the amount of all liens  
8 and encumbrances against such real estate. Upon its completion, the appraisal shall be filed with  
9 the court.

10 (b) Within ten (10) days after the report of the appraisers is filed, the clerk of the court  
11 shall forward to each attorney of record, each party, and interested party of record, a copy of the  
12 report of the appraisers and a notice stating the time limits for filing an exception provided that  
13 any party must be given at least thirty (30) days from the receipt of the appraisal report to file  
14 such an exception. Any party to the action who shall have been adjudged by the court to have an  
15 interest in the real estate appraised, may contest said appraisal by filing an affidavit setting forth  
16 wherein said appraisal is incorrect and may also file with the court an appraisal paid for by  
17 themselves, provided such appraisal is conducted by an appraiser who possesses the requisite  
18 qualifications set forth under this section for a court-appointed appraiser. An evidentiary hearing  
19 limited to the proposed valuation of the property shall be conducted. In determining the value of  
20 the real estate, the court may use its discretion in deciding upon how much weight to give to any  
21 appraisal that was filed with the court and may also exercise its discretion to order a new  
22 appraisal that it will consider before the court determine the property's value.

1 **Comment**

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

6 Section 2-204(a): The alternative that makes a someone a Member of the Appraisal  
7 Institute a qualified appraiser has been provided as an option for those states that may not have a  
8 licensing or certification system in place for appraisers.  
9

10 Should we include time limits for the appointment of the appraiser and the filing of the  
11 report?  
12

13 Section 2-204(b): Language from 52 Okl. St. § 318.5.  
14

15 **SECTION 2-205. APPOINTMENT OF COMMISSIONERS.**

16 (a) The court [in its discretion or on the motion of any interested party may] [shall]  
17 appoint three or more disinterested persons commissioners to divide or sell the property as  
18 ordered by the court. The clerk of the court shall forthwith notify the commissioners of their  
19 appointment, and shall deliver to one of them a certified copy of the judgment of partition.

20 (b) The court in its discretion may appoint commissioners for a partition by division and  
21 commissioners for sale if both of these remedies are ordered, or the court may appoint the same  
22 commissioners for a sale and division if both remedies are ordered by the court.

23 (c) None of the following persons shall be appointed a commissioner under this title:

24 (1) A clerk or deputy clerk of the court.

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

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

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

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

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

7 (e) The commissioners shall be sworn by a magistrate, the sheriff or any deputy sheriff of  
8 the county, or any other person authorized to administer oaths, to do justice among the tenants in  
9 common in respect to such partition action, according to their best skill and ability.

10 **Comment**

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

13  
14 Section 2-205(a): Cal. Code Civ. Proc. § 873.010.

15  
16 Section 2-205(c): Cal. Code Civ. Proc. § 873.050. The first four requirements are from  
17 Section 873.050 with the addition of the language barring “any relative of any owner within the  
18 third degree.”

19  
20 Section 2-205(e): *See* N.C. Gen. Stat. § 46-8.

21

1 **ARTICLE 3**

2 **BUYOUT**

3  
4 **SECTION 3-301. BUYOUT.** Where the court has determined that the real property, or  
5 any portion of it, may not be partitioned by division without great prejudice to all of the owners  
6 under Section 2-202, any one or more of the parties may inform the court within a time so fixed  
7 by the court of their desire to purchase the property or the separate portion of it that could not be  
8 partitioned by division without great prejudice to all of the owners.

9 (a) If any one or more of the parties inform the court of their desire to purchase the  
10 property within the time fixed by the court, and there are no parties in opposition to each other,  
11 the court shall give these parties at least forty-five (45) days to pay into the court the fair market  
12 value of the property as determined by the court under Section 2-204. If a party who is given the  
13 opportunity to purchase the property to be sold under the provisions of this section fails to pay  
14 into the court the fair market value of the property within the time fixed by the court, the  
15 property will then be sold at a public sale or at public auction as the court determines.

16 (b) If two or more parties, in opposition to each other, inform the court of their desire to  
17 purchase the property within the time fixed by the court, the court shall exercise its discretion to  
18 decide whether to award one of the parties the opportunity to purchase the property as provided  
19 in this section. Without limiting the factors that the court may consider, the court shall consider  
20 the factors set forth in Section 2-202(c)-(f), as well as the degree to which the parties own  
21 significantly unequal shares in the property. If a party who is given the opportunity to purchase  
22 the property to be sold under the provisions of this section fails to pay into the court the fair  
23 market value of the property within the time fixed by the court, the court shall use its discretion

1 to decide whether to allow any other party who had expressed an interest in purchasing the  
2 property an opportunity to purchase the property.

3 (c) If under subsection (b) the court determines that the equities do not favor giving one  
4 party the opportunity to purchase the property to the exclusion of any other party who has  
5 expressed an interest, the court shall have the discretion to order a private sale that will be  
6 limited to the parties. Such a private sale between the parties shall be conducted upon the terms  
7 established by the court provided that the court shall establish a reserve price that is no lower  
8 than the court-approved appraisal price for the property.

9 (d) If there is no party that is given the right to purchase the property under this section  
10 that pays into the court the purchase price within the time fixed by the court or if a private sale  
11 does not take place under subsection (c) either because the court chooses not to exercise its  
12 discretion to order a private sale or because no party chooses to participate in any such court-  
13 ordered private sale then the property shall be sold under the procedures set forth in Article 4 of  
14 this Act.

15 **Comment**

16 *See* Kansas Stat. Ann. § 60-1103(c)(4) for requirement that the court first determine that  
17 partition by division cannot be made without great prejudice.

18  
19 Section 3-301(b): *See* Wilk v. Wilk, 173 Vt. 343 (Vt. 2002).

20  
21 Should the court have discretion to deny the buyout right altogether in cases in which two  
22 or more parties in opposition to each other express an interest in exercising the buyout right or  
23 should the courts be required to conduct a private sale if two or more parties express an interest  
24 in purchasing the property?  
25

1 **ARTICLE 4**

2 **SALES PROCESS**

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

5 (a) If a court orders a sale under this part whether of a part of the real property or of the  
6 whole, the court should order that the property be sold at a public sale unless the court sets forth  
7 reasons that establish that a sale at a public auction would be more just, fair, and commercially  
8 reasonable under the circumstances. If the property does not sell for at least the appraised price  
9 within the time period provided for a public sale, the court upon further hearing may either  
10 revalue the property and approve the sale, or order that the property continued to be listed for a  
11 period not to exceed three months, or order that the property be sold at a public auction within  
12 sixty (60) days of the hearing.

13 (b) If the court orders that any part of the real property or the whole is to be sold at a  
14 public auction, the court shall set the terms and conditions of the sale. The court shall set a  
15 reserve price that may not be less than eighty-five (85) percent of the court-approved appraised  
16 value of the property that is to be sold. If it appears to the court that any of the premises will not  
17 sell for eighty-five percent of the amount of the valuation thereof, the court upon further hearing  
18 may either revalue the property and approve the sale or order a new sale.

19 **Comment**

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



1  
2 Section4-401(a): *See* § 735 ILCS 5/17-105.

3  
4 Section 4-401(b): *See* § 735 ILCS 5/17-105.  
5

6 **SECTION 4-402. PERSONS INELIGIBLE TO PURCHASE AT SALE.**

7 (a) The following persons shall not purchase property sold in the action directly or  
8 indirectly:

9 (1) The commissioners and any court-appointed appraiser who participates in the  
10 partition proceedings.

11 (2) The attorney of a party.

12 (3) A guardian or conservator of a party, unless for the benefit of the ward or  
13 conservatee.

14 (b) All sales contrary to this section are void except that a sale to a bona fide purchaser  
15 following a sale contrary to this section shall not be disturbed.

16 **Comment**

17 Cal. Code Civ. Proc. § 873.690  
18

19 **SECTION 4-403. COMMISSIONERS' REPORT OF SALE.**

20 (a) Upon making a sale of property, the commissioners shall report the sale to the court.

21 (b) The commissioner's report shall contain, in addition to such other information as may  
22 be appropriate, all of the following information:

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

24 (2) The name of the purchaser.

25 (3) The sales price.

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

1 (5) Any amounts payable to lienholders.

2 (6) A statement as to contractual or other arrangements or conditions as to agents'  
3 commissions.

4 (7) Any determination and recommendation as to opening and closing public and  
5 private ways, roads, streets, and easements.

6 (8) Other material facts relevant to the sale and the confirmation proceeding.

7 **Comment**

8 Cal. Code Civ. Proc. § 873.710  
9

10 **SECTION 4-404. MOTION TO CONFIRM OR SET ASIDE SALE.**

11 (a) A purchaser, the commissioners, or any party may move the court to confirm or set  
12 aside the sale.

13 (b) The moving party shall give not less than 10 days' notice of motion to:

14 (1) The purchaser if the purchaser is not the moving party; and

15 (2) All other parties who have appeared in the action.

16 **Comment**

17 Cal. Code Civ. Proc. § 873.720  
18

19 **SECTION 4-405. HEARING ON MOTION.**

20 (a) At the hearing, the court shall examine the report and witnesses in relation to the  
21 report.

22 (b) The court may confirm the sale notwithstanding a variance from the prescribed terms  
23 of sale if to do so will be beneficial to the parties and will not result in substantial prejudice to  
24 persons interested in the sale.

1 (c) The court may vacate the sale and direct that a new sale be made if it determines any  
2 of the following:

3 (1) The proceedings were unfair or notice of sale was not properly given. If there  
4 is no finding at the hearing of unfairness or improper notice, the sale may thereafter not be  
5 attacked on such grounds.

6 (2) If the property was sold at a public sale or public auction, the sales price is  
7 disproportionate to the value of the property.

8 (3) If with respect to a public sale or a public auction that had been conducted, it  
9 appears that a new sale will yield a sum that exceeds the sales price by at least five (5) percent,  
10 determined after a reasonable allowance for the expenses of a new sale.

11 **Comment**

12 Cal. Code Civ. Proc. § 873.730

13  
14 The California statute has language that allows a court to vacate a sale if the following  
15 condition is met: “It appears that a new sale will yield a sum that exceeds the sale price by at  
16 least 10 percent on the first ten thousand dollars (\$10,000) and 5 percent on the amount in excess  
17 thereof, determined after a reasonable allowance for the expenses of a new sale.” However, the  
18 California partition statute permits partition in the context of both real and personal property.  
19 Therefore the “10 percent on the first ten thousand dollars (\$10,000)” does not make as much  
20 sense in the context of a partition sale of real property.  
21

22 **SECTION 4-406. INCREASED OFFERS.**

23 (a) If at the hearing under Section 4-405 a responsible bidder makes a written increased  
24 offer that exceeds the sales price generated from a public sale or a private by 5 percent, the court  
25 in its discretion may do either of the following:

26 (1) Vacate the sale and direct that a new sale be made.

27 (2) Vacate the sale, accept the increased offer, and confirm the sale to the offerer.

28 (b) Except as provided in subdivision (c), the amount by which an increased offer

1 exceeds the sale price is determined on the basis of the gross amount of the increased offer  
2 including any commission on the increased offer to which an agent may be entitled.

3 (c) Where in advance of sale the court has so ordered or the parties have so agreed, if an  
4 increased offer is made by a party to the action who is not represented by an agent, the amount  
5 by which an increased offer of a nonparty exceeds the sale price is determined on the basis of the  
6 net amount of the increased offer excluding any commission on the increased offer to which an  
7 agent may be entitled.

8 **Comment**

9 Cal. Code Civ. Proc. § 873.740  
10

11 **SECTION 4-407. PURCHASE BY ENCUMBRANCER OR PARTY ENTITLED**

12 **TO SHARE.** When a party entitled to a share of the property, or an encumbrancer entitled to  
13 have the lien of the encumbrancer paid out of the sale, becomes a purchaser, the commissioners  
14 may take a receipt for so much of the proceeds of the sale as belongs to the party or the  
15 encumbrancer.

16 **Comment**

17 Modeled after Oregon Rev. Stat. § 105.365. Other states such as South Dakota, Utah and  
18 Washington have nearly identical statutes.  
19

1 **ARTICLE 5**

2 **COURT COSTS AND FEES**

3  
4 **SECTION 5-501. COURT COSTS AND FEES.**

5 (a) In the event partition by division of the cotenancy is made, the costs of partition shall  
6 be apportioned by the court among all the cotenants. The proportion of the costs assessed  
7 against each cotenant shall be a lien upon the share of the cotenancy assigned by the court to the  
8 cotenant. If partition by division of the whole or a part of the property cannot be made without  
9 great prejudice to the cotenants and a sale of entire estate or any part thereof is ordered, the court  
10 shall apportion the costs of sale among all the cotenants. The court shall deduct and withhold  
11 from the distributive share of the proceeds of the sale assigned to each cotenant the proportion of  
12 the costs assessed against each cotenant.

13 (b) As used in this section "costs" includes expenses incurred by commissioners, costs of  
14 survey, costs of appraisers, expenses incurred by agents or masters appointed by the court to  
15 conduct a sale, and other costs incurred in partition by division or in sale which to the court seem  
16 just and proper.

17 (c) The reasonable attorney fees of any party to an action for partition of real property  
18 owned under a tenancy in common may be awarded in the court's equitable discretion if these  
19 fees were incurred for the common benefit of all of the tenants in common. The reasonableness  
20 of an attorney fee award cannot be based in any way on an arbitrary percentage of the value, and  
21 the court shall require evidence to be presented of the reasonableness of the fees sought prior to  
22 awarding any such fees and the manner in which these fees were incurred for the common  
23 benefit of all of the parties. No portion of any attorney's fees may be assessed against any party

1 who contests the partition proceeding whether by appearing by court-appointed or privately  
2 retained counsel or by appearing pro se.

### 3 **Comment**

4 Section 5-501(a): N.M. Stat. § 42-5-8.

5  
6 Section 5-501(b): *See* N.M. Stat. Ann. § 42-5-8(B).

7  
8 Section 5-501(c): Common benefit language picked from N.D. Stat. § 32-16-45.

9  
10 The last sentence is largely drawn from La. C.C.P. Art. 4613 with the additional  
11 provision that a contested action includes an action in which a party is represented pro se. Other  
12 states have statutes that include language that reads: “When, however, a litigation arises between  
13 some of the parties only, the court may require the expense of such litigation to be paid by the  
14 parties thereto, or any of them.” Alaska Stat. § 09.45.620; Rev. Code Wash. (ARCW) §  
15 7.52.480; 28 V.I.C. § 497 (Virgin Islands Code). Other state courts have held that an attorney’s  
16 fee award is improper in a contested action irrespective of the fact that the plain language of the  
17 partition statute might seem to provide for fee shifting that would require the defendants to pay a  
18 share of the plaintiff’s attorney’s fees. *Osborne v. Eslinger*, 58 N.E. 439, 444 (Ind. 1900)  
19 (“Where parties appear by counsel, and contest a petition for partition, they should not be  
20 required to pay the fees of the attorneys of their adversary.”); *Dailey v. Houston*, 151 So. 2d 919,  
21 927 (Miss. 1963) “This statute . . . was intended primarily to give a fee to the solicitor who  
22 conducts the suit without resistance. Where there is a real controversy, and it is proper for  
23 defendants to be represented by counsel of their own choosing, the fee permitted by section 975,  
24 to be taxed as a common charge upon all of the interests, should not be allowed. This is  
25 especially so where, as here, a defendant is successful in part, by preserving some of his claims,  
26 through his own initiative and the efforts of his own counsel.”; *Cary v. Armbrust*, 70 N.W.2d  
27 427, 431 (Neb. 1955) (“In *Oliver v. Lansing*, 57 Neb. 352, 77 N.W. 802, the following rule was  
28 laid down by this court on the question of taxability of attorney's fees for plaintiff's attorney in  
29 partition cases: ‘The plaintiff's attorney's fees are not taxable as costs in an action for partition  
30 where the proceedings are adversary.’”; *Novy v. Novy*, 188 A. 328, 330 (Pa. 1936) (“The act  
31 makes reasonable counsel fees part of the costs in these proceedings, and the courts have  
32 followed the practice of allowing them since its passage. The fees contemplated were only such  
33 as would compensate counsel in a reasonable amount for services rendered in the actual partition  
34 and for the common benefit of the parties in interest. When, however, partition is contested in  
35 good faith, or when the services rendered are adverse to the other parties, the petitioner cannot  
36 recover as costs counsel fees earned by his attorney in litigating his right to partition.”); *Port v.*  
37 *Elson*, 321 N.W.2d 363 (Wis. Ct. App. 1982) (“It has been widely recognized that if a partition  
38 proceeding is adversary in character, the proceeding is not for the common benefit of all the  
39 parties, and therefore the payment of attorney’s fees from the proceeds of the sale should not be  
40 allowed.”).