

MEMORANDUM

TO: HEIRS PROPERTY DRAFTING COMMITTEE and OBSERVERS
FROM: THOMAS MITCHELL and BILL BREETZ
DATE: JUNE 29, 2010

RE: OUTLINE FOR COMMITTEE DISCUSSION IN CHICAGO

This outline is intended as a partial guide to the Drafting Committee's discussion at its scheduled Friday meeting in Chicago on July 9.

INTRODUCTION / SET-UP We think there are 3 policy issues embedded in the current draft of Section 7 as that draft will be presented to the Floor on July 10. Section 7 of the Floor Draft accommodates all 3 policy goals described below by providing a statutory buy-out for all 3 interests: the predator developer, the non-appearing cotenants who were named as parties in the partition action, and the volunteer selling family members seeking to exit.

For reasons explained below, we believe the Committee should withdraw existing Section 7 and replace it with the attached revision of Section 7. We have conferred with the group of observers who have participated in the Committee's deliberations and they unanimously support this recommendation.

Also attached is a possible new section that addresses a portion of the gap left between current Section 7 and the proposed new section. Bill drafted this section and it has been discussed with the observers. Unlike the observers' unanimous support of Section 7, the observers are divided in their reaction to this proposal.

ISSUES / POSSIBLE SOLUTIONS The 3 policy goals are these:

FIRST - Our observers feel strongly that the greatest risk to 'heirs property' is the possibility that a developer/speculator may acquire a minority co-tenancy interest and take advantage of traditional partition statutes to force a sale of the entire property, contrary to the express interests of other ancestral co-tenants. The mandatory buyout in Section 7 directly addresses that risk and that policy is preserved in the proposed new Section 7.

SECOND The original draft of Section 7 sought to consolidate when possible the interests of inactive and disinterested family members among the active and interested family members - the 'inactive cousins'- who may have simply disappeared and fail either to contribute their share of costs of upkeep or to participate in the needed collective management of the property. As a consequence, the active family members are often forced to bear a disproportionate share of the costs of maintaining the property [taxes, insurance, repairs, etc] and are simultaneously unable to lease, mortgage or even sell the property. In Maine, there is even a colloquial term used to describe this property; 'heir-locked property.' A statutory procedure for clearing title would be preferable to the other means that could - less directly perhaps - achieve that outcome. The possible new section addresses this policy issue.

THIRD We are told that there are often family members – the “volunteer sellers” - who would welcome the opportunity to voluntarily divest themselves of their interests in favor either of other family members or third parties. While nothing in current law prevents such a transaction, the Drafting Committee was told that many such potential sellers are reticent to engage openly in negotiations with other family members to achieve that result, and a statutory device to facilitate those sales would be a useful device. As explained below, we propose not to address this policy issue in either of the drafts presented here.

While those 3 goals seemed desirable to the entire Drafting Committee in New Orleans, the text of Section 7 in the Floor Draft proved overly complex and confusing, to the reader, to those preparing commentary and explanations in preparation for the floor discussion and, hopefully, enactment discussions in the states, and, we thought, almost certainly to the court and the parties as they sought to apply it in practice. We were concerned that the Floor might be similarly confused and that such a draft might generate negative reaction to the entire Act.

PROPOSED SECTION 7 The attached draft – prepared with the collaboration of Greg Peterson, Thomas and Bill - seeks to simplify the outcome in Section 7. Our principal device to accomplish that result is to delete reference to the interests both of the ‘quiet cousins’ and of the volunteer co-tenants who may wish to offer their units for sale.

The Committee will note the brackets in the draft around the words ‘on motion’. While the Committee voted to approve that phrase in New Orleans, we both believe that, upon reflection, this requirement may be difficult to implement since the parties will have no knowledge of the failure of the Round 1 buyout in the absence of notice from the court. For that reason, we propose to delete those words, but leave them in brackets because of the Committee’s prior decision.

POSSIBLE NEW SECTION This draft offers an alternative means of potentially buying out the interests held by those cotenants who are served – perhaps by publication - but do not ‘appear’ in the partition action. It does so simply by allowing the court the option to fashion a suitable remedy if any party requests it, but making clear that any such remedy would be later in time than the buy-out of the cotenant that seeks sale in a partition action. Bill and some of the observers feel that the text as drafted, which also provides that defaulted cotenants will be compensated based on the court’s determination of value, is useful because it will assist in clearing title. There is not unanimity among the observers in this regard. At the same time, this section ignores the possible interests of those cotenants who would like to voluntarily sell their interests; it does so both for the sake of simplicity and because such market transactions may freely occur in the absence of any statutory treatment.

As an alternative to a new section, some of the observers feel that the Comment to Section 7 (or a Legislative Note) could make the same points, but at the risk that some enactors may not see or read those.