Memorandum

TO: Drafting Committee on Uniform Tenancy in Common Partition Act

FROM: Thomas W. Mitchell[*]

DATE: November 6, 2007

RE: Overview of Project; Issues for First Meeting

This memorandum provides background information about the project to draft a Uniform Tenancy in Common Partition Act. In addition, the memorandum identifies and discusses many of the major issues our Drafting Committee will need to address. As our deliberations proceed, there may be other issues that surface that we will need to address as well.

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Introductory Comment

The research that I have conducted thus far for the Drafting Committee on a Uniform Tenancy in Common Partition Act has spanned not only the fifty states in the United States, but also a number of other jurisdictions as will be described herein. Some of the research on a few discrete issues is still ongoing, therefore at times in this memorandum I have attempted to summarize aspects of the law of partition as it relates to tenancy in common ownership based upon the research I have completed to date. As my research proceeds, I will provide the committee with any updated findings that would be relevant to our drafting project that would build upon any tentative findings include in this memorandum. Furthermore, given the large number of domestic and foreign jurisdictions that I have drawn upon in preparing this issues memorandum, there may be issues with respect to certain terminology that is used in statutes or case law across many jurisdictions that may have the appearance of having some uniform definitional meaning that in fact does not have such a uniform meaning upon closer examination. I take full responsibility for any mistaken assumptions that have been made about uniform meaning in this context, as well as for any other mistakes made in this memorandum. Of course, if my further research or our deliberations uncover any such mistakes, I will update this memorandum to incorporate any such corrections.

Background

In the United States, the tenancy in common is the most widespread form of concurrent estates in land.-[1] Although this form of ownership like many other aspects of American real property law was transported to the United States from England, England effectively abolished the tenancy in common form of ownership in its classic form in 1925 by passing the Law of Property Act 1925 that bifurcated concurrent ownership into two classes of owners: a small class of owners who hold the legal ownership with certain rights pertaining to the management and disposition of the property and a second group of beneficial owners who may continue to own their equitable interest under a tenancy in common.[2] In England, as discussed in note 2, further changes were made to law of concurrent ownership under the Trusts of Land and Appointment of Trustees Act 1996 (TOLOTA).

The rules on exit from a tenancy in common developed in two stages in many of the early states in the United States, mirroring the two-stage development of the rights to exit from a

[1] Roger A**.** Cunningham et al., The Law of Property 5.2, at 188 (2d ed. 1993).

[2] Under the Law of Property Act 1925, property that is concurrently owned was required to be owned under a trust for sale that bifurcated legal ownership from equitable ownership. Legal ownership was restricted to four people who were only permitted to own the legal interest under a joint tenancy that cannot be converted into a tenancy in common. Under the 1925 land act which was applied retroactively, it was presumed that the legal owners who held the property under a trust for sale were to sell the property because property was considered mostly to be held as an investment. The proceeds of the sale were to be distributed to the equitable owners who were still permitted to own their equitable interest under a tenancy in common. In 1996, England and Wales adopted the Trust of Land and Appointment of Trustees Act (TOLATA). TLATA replaced the trust for sale under which there was a presumption that the trustees should sell the land with a trust for land. In addition, TOLATA democratized common ownership by requiring the legal trustees to consult actively with the equitable owners before making a decision about the disposition of the commonly owned property. Courts now are required to consider cases brought under TOLATA on a case by case basis and should only order a sale if it is justified in a particular case taking into account a number of economic and non-economic factors.

tenancy in common in England prior to the passage of the Law of Property Act 1925.[3] First, the early states enacted laws permitting partition by physical division and then later these states enacted statutes granting courts the right to order a partition sale of tenancy in common property. At the time states enacted statutes permitting courts to order partition sales, the partition sale remedy was viewed as an extraordinary remedy that would only be ordered under emergency conditions. A clear majority of states have maintained the statutory preference for a partition in kind; however, over the past several decades many state court judges have ordered partition sales quite liberally.[4]

A tenancy in common may be created by volition in the United States; however, property ownership under this form often results from intestate succession as opposed to any estate or business planning. Property owned under a tenancy in common that has experienced a significant increase over time with respect to the number of co-tenants as a result of the property passing by intestate succession is commonly referred to as fractionated heirs' property or simply as heirs' property. Given that will-making rates for low and moderate income Americans is far below fifty percent, a large percentage of tenancy in common property owned under the default rules is owned by low and moderate income Americans who are "cash poor, but land rich."

When a group of property owners with resources to hire legal counsel decide to organize their real property ownership under a tenancy in common, their business and estate lawyers often draft tenancy in common agreements. These agreements explicitly allocate the rights and responsibilities each of the co-tenants possesses, including the terms governing exit from the common ownership group that often include provisions that prevent the tenants in common from seeking to partition the property for a period of time that can be substantial thus increasing the likelihood of the continuity of the common ownership into the future.[5] Such an allocation of rights and responsibilities together with rules governing exit from the ownership group do not exit with respect to tenancy in common property governed under the default rules, the regime that this drafting committee will be addressing.

In comparison to most other forms of concurrent ownership of personal or real property, the tenancy in common under the default rules governing this ownership form, is an exceedingly unstable form of ownership and the ability to maintain continuity of ownership over time can be a real challenge. Instability arises in part from the default rule that permits any tenant in common, irrespective of the size of their percentage ownership interest, to file a partition action in which they request the court to order a partition sale even if they have not consulted with their fellow co-tenants. The property can also be ordered sold even if the petitioning absentee

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[3] In England, tenants in common were first given the right to partition by physical division by the Partition Acts, 1539 and 1540. It was not until passage of the Partition Act, 1868 that tenants in common in England were afforded the right to seek a partition sale. *See, e.g.*, Penfield v. Jarvis, 399 A.2d 1280, 1283 (Conn. 1978)(indicating that Connecticut extended an act in 1844 that permitted a court to order a partition sale).

[4] *See, e.g.*, Ragland v. Walker, 387 So.2d 184 (Ala. 1980) (noting that in partition actions, "[e]xcept in the rarest of circumstances . . . the usual end result of such proceedings is the passing of title to a stranger."). This is the practice in Alabama even though Alabama is one of many states that still maintain a statutory preference for a partition in kind.

[5] *See* Powell on Real Property § 50.07[1](Matthew Bender & Co. Inc. Rel.91-6/00). Courts often uphold these restraints on alienation as long as they are not absolute restraints preventing co-tenants from seeking partition at any time in the future. *See* 37 A.L.R.3d 962 (2007).

petitioning co-tenant is an absentee owner who owns merely, for example, a one percent interest that was recently acquired and the non-petitioning co-tenants who undertake to resist a court-ordered partition sale are "on the land" co-tenants whose family has owned the property for many generations.

As the number of co-tenants increases and the fee is split into smaller and smaller interests, the more unstable the ownership becomes because each additional tenant in common may seek a partition sale or may become a target of a speculator who seeks to purchase an interest in order to seek a partition sale. Further as the ownership group becomes less cohesive with some interest holders living or working on or near the property and others located in places very distant from the property, the likelihood increases that any one owner will make a decision about the property without taking into account the preferences of his or her fellow co-tenants even if all of the ownership interests are owned by one family. For example, studies have shown that most African Americans who own an interest in heirs' property located in the South live outside this region.

The current default rules on partition of tenancy in common property can be somewhat counterintuitive and are very misunderstood by many of those who own property under this ownership form. One study has shown, for example, that seventy-five percent of those acquiring property by intestacy believe that tenancy in common property may only be sold if all of the tenants in common agree to such a sale. Therefore, there are often large information asymmetries between those who seek to purchase the interests of an individual tenant in common with an eye on seeking a partition sale and those who sell the interest who assume that the property will be maintained as a unit well into the future.

There are certain common features of partition law (in the context of tenancy in common ownership) in states across the country that have not been very controversial and have not been the subject of any calls for reform over the past fifty years. This memorandum will not discuss these aspects of current partition law in any depth. For example, an overwhelming number of states permit courts to use their equitable powers to both sell part of the property and to partition in kind the rest of the property. There does not appear to be any good reason to modify a court's equitable powers to remove the flexibility that this mixed partition remedy provides. Further, most states permit courts to order one co-tenant to pay another co-tenant owelty payments in a division in kind that results in a co-tenant acquiring title to property that is worth more than that co-tenant's pro rata share of the property. Although a few courts in a few states have indicated a reluctance to use owely payments, this remedy is still widely available and there does not appear to be any good reason to eliminate a court's ability to order such payments.

Issues for the Drafting Committee

This issues memorandum identifies a range of partition reform matters that our drafting committee may consider. In addition, there may be other issues that emerge during our deliberations. The matters addressed in this memorandum include both those identified by the American Bar Association through the Property Preservation Task Force of the Real Property and Trusts and Estates Law Section (formerly the Real Property, Probate and Trust Law Section) and those identified by me based upon my review of partition law provisions in each of the states

in the United States and in jurisdictions outside of the fifty states of the United States. These other jurisdictions include Indian Country in the United States, Australia, Canada, England, Ireland, Scotland, and Wales.

This memorandum will address the following matters: (1) pre-partition rights of the non-petitioning parties; (2) equitable balancing factors a court should consider in a partition action; (3) awarding attorney's fees in a contested partition action; (4) wealth and equity protection provisions in the partition sale context; (5) legal ethics as it relates to the eligibility to be an appointed commissioner or referee and (6) requiring a waiting period for strangers to title.

In discussing these various matters, I will provide an overview of the majority approach from amongst the fifty states and will discuss any minority approaches. I will also broaden the analysis by discussing approaches to particular issues in the jurisdictions mentioned above that are located outside of the fifty states in the United States. To the extent possible, I will also provide excerpts of relevant statutes or cases, although all of the statutes from the fifty states, the American Indian Probate Reform Act, and many of the international statutes or acts are included in the appendix. Most of the cases identified in the various appended tables, including most of the cases from other countries, are also included in the appendix.

I. Pre-Partition Rights of Non-Petitioning Co-Tenants

Once a co-tenant(s) has petitioned the court to order a sale of property owned under a tenancy in common, the question arises whether the non-petitioning tenants in common should be afforded the right to buyout the interests of the petitioning parties for the fair market value of those interests. It appears that twelve states provide the non-petitioning co-tenants with some opportunity to buyout the interests of the co-tenant who petitions the court for a partition sale prior to either a court-ordered public or private sale of the entire property. These states tend to have very different approaches from one another as it pertains to the buyout remedy. Some only afford the buyout remedy to the non-petitioning co-tenants, but others allow any of the co-tenants irrespective of how they are aligned in the partition litigation to buyout their co-owners in a process that resembles a closed auction of sorts with a minimum sales (or reserve) price – typically based upon a fair market value appraisal -- set by the court or court-appointed commissioners. Other states have still different approaches.

A. Majority Approach:

Arizona: *McReady v. McReady*, 810 P.2d 624, 626 (Ariz. Ct. App. 1991) (partition statute makes no provision for buyout remedy and a court can't create this option on its own).

B. Alternative Approaches in Certain States:

1. Buyout Provisions Available to Non-Petitioning Co-Owners Only

a) Georgia: GA. CODE. ANN. § 44-6-166.1(d) (2007). Non-petitioning co-tenants given up to 90 days after appraisal conducted to purchase their pro rata share of the petitioner's share unless other non-petitioning parties

authorize other non-petitioning party or parties to buyout some or all of his or her proportionate share.

b) Louisiana: LA. REV. STAT. ANN. § 9:1113 (2007). Non-petitioning co-tenants permitted to buyout to the extent of their pro rata share the interests of petitioning co-tenant(s) who own interests that constitute 15 percent or less in the aggregate of the property. Unlike Georgia, if a non-petitioning co-tenant does not exercise their buyout rights, their right to buyout is forfeited in favor of other non-petitioning co-tenants who can then buyout an additional percentage of the petitioning co-tenants share up to the amount of their pro rata share of the shares of the non-petitioning co-tenants who relinquished their buyout option.

c) Oregon: OR. REV. STAT. § 105.210 (2005). When and how partition prevented.
If the court finds that the property can neither be partitioned nor sold without great prejudice to the owners, the court may receive evidence as to the value of the respective interests, fix the value thereof, and make an order permitting an owner to borrow money upon the property with which to pay off the interest, as so fixed, of another owner. Subject to subsection (2) of this section, an owner whose interest in the property is to be satisfied shall be fully discharged by proof of payment filed with the court of the amount fixed by the court as the value of that owner's interest. A discharged owner shall have no further interest in or claim upon the property.

Under this statute, it must be determined that partition in kind and a public sale will result in great prejudice. The petitioning party may not use the buyout remedy. *Maupin v. Opie*, 964 P.2d 1117, 1124 (Or. Ct. App. 1998).

d) South Carolina: S.C. CODE ANN. § 15-61-25 (2006). Right of first refusal of joint tenant or tenant in common to purchase property prior to partition; procedure.
(A) For the purposes of this section, "joint tenants and tenants in common" include heirs or devisees. Upon the filing of a petition for partition of real property owned by joint tenants or tenants in common, the court shall provide for the non-petitioning joint tenants or tenants in common who are interested in purchasing the property to notify the court of that interest no later than ten days prior to the date set for the trial of the case. The non-petitioning joint tenants or tenants in common shall be allowed to purchase the interests in the property as provided in this section whether default has been entered against them or not.

(B) In the circumstances described in subsection (A) of this section, and in the event the parties cannot reach agreement as to the price, the value of

the interest or interests to be sold shall be determined by one or more competent real estate appraisers, as the court shall approve, appointed for that purpose by the court. The appraisers appointed pursuant to this section shall make their report in writing to the court within thirty days after their appointment. The costs of the appraisers appointed pursuant to this section shall be taxed as a part of the cost of court to those seeking to purchase the interests of the joint tenants or tenants in common petitioning to sell their interest in the property described in the petition for partition.

(C) In the event that the petitioning joint tenants or tenants in common object to the value of the interests as determined by the appointed appraisers, those joint tenants or tenants in common shall have ten days from the date of filing of the report to file written notice of objection to the report and request a hearing before the court on the value. An evidentiary hearing limited to the proposed valuation of the interests of the petitioning joint tenants or tenants in common shall be conducted, and an order as to the valuation of the interests of the petitioning joint tenants or tenants in common shall be issued.

(D) After the valuation of the interest in property is completed as provided in subsection (B) or (C) of this section, the non-petitioning joint tenants or tenants in common seeking to purchase the interests of those filing the petition shall have forty-five days to pay into the court the price set as the value of those interests to be purchased. Upon the payment and approval of it by the court, the court shall execute and deliver or cause to be executed and delivered the proper instruments transferring title to the purchasers.

2. Buyout Provisions Available to Petitioning and Non-Petitioning Parties

a) Alabama: ALA. CODE § 35-6-100 (2007). Allowance of purchase; notice requirements.
Upon the filing of any petition for a sale for division of any property, real or personal, held by joint owners or tenants in common, the court shall provide for the purchase of the interests of the joint owners or tenants in common filing for the petition or any others named therein who agree to the sale by the other joint owners or tenants in common or any one of them. Provided that the joint owners or tenants in common interested in purchasing such interests shall notify the court of same not later than 10 days prior to the date set for trial of the case and shall be allowed to purchase whether default has been entered against them or not.

Jolly v. Knopf, 463 So.2d 150, 153 (Ala. 1985): Declared statute unconstitutional on equal protection grounds to the extent that only the non-petitioning co-tenants given buyout remedy. *Jolly* did not strike the statute, but accorded same buyout right to petitioning party or parties

provided that any private sale between the petitioning and non-petitioning co-tenants is consensual. The court in Jolly stated: "[T]he trial court is directed to allow each of the seven co-owners of the land a right to purchase the interests of the others at such price as the others are willing to sell and the buyer is willing to pay." *Id.* at 154.

b) Connecticut: Conn. Gen. Stat. § 52-500 (2007). In a partition action, court may decide to order equitable distribution of the interests of one or more persons who own the property if they own a minimal interest. Such equitable distribution may be ordered irrespective of whether the minimal interest is owned by the petitioning party or by non-petitioning co-tenants.

c) Kansas: Kan. Stat. Ann. § 60-1003(c)(4) (2006). "Where the property is not subject to partition in kind, any one or more of the parties may elect within a time so fixed by the judge to take the property or any separate tract at the appraised value, but if none of the parties elect to so take the property, or two or more elect to so take, in opposition to each other, the judge shall order the sheriff to sell it in the manner provided for sale of property on execution."

d) Maine:
Libby v. Lorrain, 430 A.2d 37, 39 (Me. 1981): The Supreme Court of Maine stated that trial courts are authorized to invoke buyout remedy in favor of one co-tenant(s) and did not restrict this to buyout by co-tenants having larger share.

Palanza v. Lufkin, 2002 Me. Super. Lexis 36 *4-5 (Me. Super. 2002): The court stated that a "buy-out or sale of the Property pursuant to the court's power of equitable partition is the most appropriate remedy." In this case, the court ordered that the plaintiff be given the option to buyout defendant's 50 percent interest in the property.

e) Massachusetts: MASS. GEN. LAWS ch. 241, § 14 (2007).
If either part of the land can't be divided without "great inconvenience to the owners", or part of land of greater value than share of any party, or whole parcel can't be divided without "such inconvenience," court can set off part or whole parcel to one party if that party pays other owners to make set-aside "just and equal."

f) Minnesota: MINN. STAT. § 558.12 (2007).
When the premises consist of a mill or other tenement which cannot be divided without damage to the owners, or when any specified part is of greater value than either party's share, and cannot be divided without damage to the owners, the whole premises or the part so incapable of division may be set off to any party who will accept it, that party paying to one or more of the others such sums of money as the referees award to

make the partition just and equal; or the referees may assign the exclusive occupancy and enjoyment of the whole or of such part to each of the parties alternately for specified times, in proportion to their respective interests.

g) Rhode Island: R.I. GEN. LAWS § 34-15-16 (2007). Order of sale.
In an action for partition, the superior court may, in its discretion, upon motion of any party to the action, order the whole premises sought to be divided, or any particular lot, portion, or tract thereof or the interest of the plaintiff or plaintiffs or of the defendant or defendants in the whole premises, or in any particular lot, portion, or tract thereof, to be sold, either at public auction or by private contract, under the direction of the court, by the commissioner or commissioners appointed to divide or sell the same; provided, that if the sale is made by private contract, it shall not be made for less than the sum fixed by the court in its decree authorizing the sale by private contract.

Bissonnette v. Ventura, 2004 R.I. Super. LEXIS 202, *11-*12.
Under § G.L. 34-15-16, this Court hereby divides "the interest of the plaintiff," which in effect allows the Court to divide, or "partition," the parties' ownership interests rather than the property itself. This Court exercises its equity jurisdiction to grant the most appropriate relief on these facts, and here, a private sale of Bissonnette's interest to Ventura will provide appropriate relief. *Giulietti*, 784 A.2d at 933-37. Thus, the sale will be a private sale, or "buy out," of Bissonnette's ownership interest to Ventura. *Id.*; G.L. 1956 § 34-15-16.

h) Vermont: VT. STAT. ANN. tit. 12, § 5174 (2007).
Assignment or sale of estate--Assignment to party.
When it appears that the real estate, or a portion thereof, cannot be divided without great inconvenience to the parties interested, the court may order it assigned to one of the parties, provided he pays to the other party such sum of money, at such times and in such manner as the commissioners judge equitable.

Wilk v. Wilk, 795 A.2d 1191, 1193 (Vt. 2001): Holding that buyout remedy is available to either party irrespective of the size of their ownership interest. Further, the court held that though partition in kind is the preferred remedy in a partition action, in cases in which a partition in kind would be impracticable, that the buyout remedy is then preferred over a partition sale. The court considered this remedy to be better suited to assisting rural landowners maintain their family farms against outsiders who'd like to purchase their land for development, especially given the increasing value of farmland. The court favored the buyout remedy even though it recognized that in some cases the price a co-tenant would have to pay to buyout their fellow co-tenants – an equitable price set by court

appointed commissioners -- might be less than someone would be willing to pay at a public auction.

C. American Indian Probate Reform Act of 2004 (AIPRA): 25 USCS §§ 2201 et seq.

In breaking with decades of federal Indian policy, AIPRA provides that a certain well-defined subset of Indian land held in trust by the federal government may be subject to a partition sale to the extent that the property involved satisfies the statutory definition of "highly fractionated Indian land."[6] Under AIPRA, the owner of the largest undivided interest in the parcel that is subject to a partition sale has a right of first refusal to match the highest acceptable bid obtained at the partition sale provided that such owner's undivided interest represents at least 20 percent of the total undivided ownership of the property in question. Provided that the largest owner satisfies AIPRA's substantive and procedural requirements, this owner may obtain title to the property if he or she tenders the amount of the purchase price within 30 days of the conclusion of the partition sale. In addition to this owner, the tribe with jurisdiction over the property in question also has a right to match the highest bid and acquire the parcel. As between such a tribe and an individual who satisfies the right of first refusal provisions, AIPRA gives preference to the individual owner.

D. International Examples

1. Canada: At least seven of the ten provinces in Canada have some sort of buyout remedy and at least five of these provinces only make this remedy available to the non-petitioning common owner(s). I'll just include a couple of examples.

a) Alberta: R.S.A. 2000, c. L-7, s. 15:
15(1) A co-owner may apply to the Court by originating notice for an order terminating the co-ownership of the interest in land in which the co-owner is a co-owner.
(2) On hearing an application under subsection (1), the Court shall make an order directing
(A) a physical division of all or part of the land between the co-owners,
(B) the sale of all or part of the interest of land and the distribution of the proceeds of the sale between the co-owners, or
(C) *the sale of all or part of the interest of one or more of the co-owners' interests in land to one or more of the other co-owners who are willing to purchase the interest*.

[6] 25 U.S.C. § 2201(6) defines highly fractionated Indian land as follows:
"parcel of highly fractionated Indian land" means a parcel of land that the Secretary, pursuant to authority under a provision of this Act, determines to have, as evidenced by the Secretary's records at the time of the determination--
(A) 50 or more but less than 100 co-owners of undivided trust or restricted interests, and no 1 of such co-owners holds a total undivided trust or restricted interest in the parcel that is greater than 10 percent of the entire undivided ownership of the parcel; or
(B) 100 or more co-owners of undivided trust or restricted interests.

b) British Columbia: R.S.B.C. 1996, c. 347, s. 8.
The court can not order the sale if the party affected offers to buyout the party asking for the partition sale. The court determines the division of the property and the price.

c) Prince Edward Island: R.S.P.E.I. 2003, C. R-3, s. 39. (1) (c):
In a petition for partition where an order for partition might be made, then if any party interested in the property to which the suit relates requests the court to direct a sale of the property and a distribution of the proceeds, instead of a division of the property between or among the parties interested, the court may, unless the other parties interested in the property or some of them undertake to purchase the share of the party requesting a sale, direct a sale of the property and give all necessary directions; and where the undertaking is given, the court may order a valuation of the share of the party requesting a sale, and may give all necessary directions.

d) Quebec: R.S.Q. 1991, c. 64, s. 1033.
Those seeking exit from concurrent ownership may be bought out in kind or by payment of money. For an in kind buyout, the remaining owners may allot the parcel in a manner that is "least prejudicial to their rights."

2. England and Wales: Under the Trusts of Land and Appointment of Trustees Act 1996, in deciding cases brought under Section 14 of TOLATA, a court may consider one beneficial owner's interest in buying out the other beneficial owner(s). *See Norton v Hudson*, 2005 EWHC 2934 (QB).

3. Ireland: Partition sales in Ireland are still governed under the Partition Act, 1868. Partition sales will be ordered under Sections Three and Four of the Act if it appears that such a sale is more beneficial to the owners than a partition in kind or if the owners who own fifty percent of more of the property request a sale. However, the law is different with respect to property that could just as beneficially be divided in kind to the extent that owners who own fifty percent or more of the interests do not request a partition sale. Under Section 5 of the 1868 Act,[7] the court may order a partition sale "unless the other parties interested in the property, or some of them, undertake to purchase the shares of the party requesting sale." This language, however, has been interpreted to mean that the non-petitioning common owners have the right to offer to buyout the petitioning common owner, but that the petitioning common owner is not obligated to accept

[7] Section 5 of the 1868 Act reads as follows:
"In a suit for partition, where if this Act had not been passed a decree for partition might have been made, then if any party interested in the property to which the suit relates, requests the Court to direct a sale of the property and a redistribution of the proceeds, instead of a division of the property between or among the parties interested, the Court may, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property, and give all necessary or proper consequential directions, and in case of such undertaking being given, the Court may order a valuation of the share of the party requesting a sale, in such manner as the Court thinks fit, and may give all necessary or proper consequential directions."

the buyout offer. However, if the petitioning co-tenant does not accept the buyout offer, such co-tenant will not be granted their request for a partition sale, but will be entitled to have the property partitioned in kind. HEATHER CONWAY, CO-OWNERSHIP OF LAND: PARTITION ACTIONS AND REMEDIES 94-5 (2000).

4. Scotland: Buyout remedy approved in *Scrimgeour v. Scrimgeour*, 1988 SLT 590, 593-94 (OH 1988). The court stated: "No court in Scotland has ever ruled out the remedy, which used to be the principal remedy, whereby the court itself would supervise a transaction in which the co-owners would, in effect, bid against each other for the right to own the whole property. Counsel submitted that it was competent for a co-owner to offer to purchase his fellow owner's pro indiviso share at the market price and that the court in an action of this kind could sanction such a remedy."

E. Issues for our Drafting Committee

1. Should our uniform law include a pre-partition buyout provision that would be a remedy made available after a partition action is filed but before any decision is made by the court on the merits?

2. If so, should the pre-partition buyout remedy be limited to the non-petitioning parties or should it be available to all parties thereby sanctioning a "closed auction" between the parties?

3. Whether or not the pre-partition buyout remedy if included in our uniform law is made available to all parties or is restricted to the non-petitioning parties, how should the buyout provision be structured?

a) To this end, should individual parties be restricted to purchasing interests of the party or parties to be bought out in an amount that reflects their pro rata share of the undivided ownership or should these parties be able to purchase a larger share to the extent that others eligible to exercise the buyout remedy choose not to exercise their buyout rights?

b) Further, how many days prior to the date set for the trial of the partition action do parties eligible to utilize the buyout remedy have to notify the court of their intent to exercise the buyout remedy?

c) How should the appraisal of the interests that may be bought out be conducted?

d) How many days after the value of the property is established does the party or parties seeking to utilize the buyout remedy have to pay into the court the value of the shares to be bought out?

4. If the pre-partition buyout remedy is made available to all parties, how should the "closed auction" between the parties should be conducted?

5. Along the lines of the right of first refusal provision provided for by AIPRA, should the drafting committee consider including a right of first refusal provision that would allow some discrete subgroup of the cotenants who did not submit the highest bid at the partition sale to match the highest offer within a certain number of days after the conclusion of the partition sale?

II. Equitable Balancing Factors a Court Should Consider in a Partition Action

The partition sale remedy was not permitted in England until 1868 and many of the early states in the United States for quite some time because such a liquidation sale was viewed as undermining core, fundamental property rights of common owners, many of whom did not view their property ownership in purely economic terms. Upon enacting partition sale statutes, the courts in England and the United States interpreted these statutes as permitting a partition sale only under emergency conditions given that a forced sale was still considered to be a remedy that would undermine important property rights. One court in Connecticut in the late 1800s summed up the then prevailing view by stating the following: "[A] sale of one's property without his consent is an extreme exercise of power warranted only in clear cases." *Ford v. Kirk*, 41 Conn. 9, 12 (1874). Over time, many state courts in the United States increasingly have come to view real property as a fungible commodity and have effectively reversed the statutory presumption in favor of a division in kind – still on the books in most states -- by ordering partition sales quite liberally.

In determining whether a partition in kind can be made without "great prejudice to the parties" or without treating the common owners unfairly or inequitably (or some alternative formulation of the test for determining whether a partition in kind is appropriate), a substantial number of state courts utilize a purely economic test. Under this pervasive economics test, the courts consider whether a partition in kind would result in subdivided properties with an aggregate fair market value that is less than the fair market value of the property in its undivided state. To the extent that there appear to be economies of scale that would result in the entire property having a fair market value that is greater than the aggregate value of the plots subject to division in kind, these courts will order a sale.

The economics-only analysis that many courts use discounts non-economic values such as the importance that longstanding ownership may have to a family or a group in terms of the cultural, heritage or historic value of the property to that group or family. These concerns are taken into account in considering partition in the context of certain Native American trust land subject to partition and even in the context of eminent domain in certain states that have enacted post-*Kelo v. City of New London*, 545 U.S. 469 (2005), statutes. For example, in Missouri, property that is taken by eminent domain that fulfills the definition of a "homestead taking" must be compensated at the rate of one hundred and twenty-five percent of market value and a condemnation that involves a taking that "prevents the owner from utilizing property in substantially the same manner as it was currently being utilized on the day of the taking and involving property owned within the same family for fifty or more years" must be compensated

for both the fair market value of the property and the "heritage value" of the property defined as fifty percent of the property's fair market value.[8]

Despite the majority approach that considers economic value only, there are at least twelve states that are willing to consider non-economic factors as well. Some of these states weigh non-economic factors in some substantial manner. Others will take non-economic factors into account, but consider them to be subordinate to the economic efficiency test.

A. Majority Approach:

Alaska: Alaska Stat. §§ 09.45.290, 09.45.330 (2007). Partition sale may be ordered if petitioner proves to court that partition can't happen without "great prejudice to the parties." Under this statute, prejudice is measured in purely economic terms, i.e. where the aggregate value of the partitioned parcels would be of materially less economic value than the value of the whole. *Ashley v. Baker*, 867 P.2d 792, 796 (Alaska 1994).

B. Alternative Approaches:

Courts in at least fourteen states have indicated that in addition to weighing economic factors when deciding whether to order a partition in kind or a partition sale, that non-economic factors may be considered. These states include the following: Colorado, Connecticut, Florida, Massachusetts, Mississippi, Nevada, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Utah, Virginia, and West Virginia. Although the non-economic factors may be outcome determinative in all of these states, four or five of these states indicate that the non-economic factors may be accorded as much, if not more importance than the economic efficiency factor standing alone.

1. Non-Economic Factors Weighed, But Assigned Less Value: Selected Examples

North Dakota: Court can consider sentimental attachment, but non-economic factors are subordinate to financial value. *Schnell v. Schnell*, 346 N.W.2d 713, 716-17 (N.D. 1984). In *Schnell*, the court held that sentimental attachment to land by one co-owner was sufficient to prevent a partition sale that the other co-owner sought.

Oregon: Noting that "sentimental reasons, especially an owner's desire to preserve a home, may also be considered, but that they are necessarily subordinate to the pecuniary interests of the parties." *Fike v. Sharer*, 571 P.2d 1252, 1254 (Or. 1977).

[8] *See, e.g.* §§ 523.001, 523.039 R.S.Mo. In Indiana, in an eminent domain proceeding those who own agricultural land may be compensated at the rate of one hundred and twenty-five percent of fair market value and those who have property taken that they occupied as a residence may be compensated at the rate of one hundred and fifty percent of fair market value. Burns Ind. Code Ann. § 32-24-4.5-8.

2. Non-Economic Factors Given Great Weight

Connecticut: "It is the interests of all of the tenants in common that the court must consider; and not merely the economic gain of one tenant, or a group of tenants. The trial court failed to give due consideration to the fact that one of the tenants in common has been in actual and exclusive possession of a portion of the property for a substantial period of time; that the tenant has made her home on the property; and that she derives her livelihood from the operation of a business on this portion of the property, as her family before her has for many years. A partition by sale would force the defendant to surrender her home and, perhaps, would jeopardize her livelihood. It is under just such circumstances, which include the demonstrated practicability of a physical division of the property, that the wisdom of the law's preference for partition in kind is evident." *Delfino v. Vealencis***,** 436 A.2d 27, 33 (Conn. 1980)(citation omitted).

South Dakota: "[M]onetary considerations, while admittedly significant, do not rise to the level of excluding all other appropriate considerations. SDCL 21-45-1 and 21-45-28 speak of 'great prejudice', not 'great financial prejudice'. . . . We believe this to be especially so when the land in question has descended from generation to generation. While it is true that the Eli brothers' expert testified that if partitioned, the separate parcels would sell for $ 50 to $ 100 less per acre, this fact alone is not dispositive. One's land possesses more than mere economic utility; it 'means the full range of the benefit the parties may be expected to derive from their ownership of their respective shares.' Such value must be weighed for its effect upon all parties involved, not just those advocating a sale. . . . To this extent, the previous monetary definition of 'great prejudice' as found in *Johnson, supra,* is modified to include consideration of the totality of the circumstances. *Eli v. Eli,* 557 N.W.2d 405, 409-411 (S.D. 1997)(citations omitted).

West Virginia: "[W]e now make clear and hold that, in a partition proceeding in which a party opposes the sale of property, the economic value of the property is not the exclusive test for deciding whether to partition in kind or by sale. Evidence of long-standing ownership, coupled with sentimental or emotional interests in the property, may also be considered in deciding whether the interests of the party opposing the sale will be prejudiced by the property's sale. This latter factor should ordinarily control when it is shown that the property can be partitioned in kind, though it may entail some economic inconvenience to the party seeking a sale.
In the instant case, the Caudill heirs were not concerned with the monetary value of the property. Their exclusive interest was grounded in the long-standing family ownership of the property and their emotional desire to keep their ancestral family home within the family. It is quite clear that this emotional interest would be prejudiced through a sale of the property." *Ark Land. Co. v. Harper*, 599 S.E.2d. 754, 761-62 (W. Va. 2004).

C. International Examples

1. England and Wales: Section 15 of the Trusts of Land and Appointment of Trustees Act 1996 states:

15.—(1) The matters to which the court is to have regard in determining an application for an order under section 14 include—
(a) the intentions of the person or persons (if any) who created the trust,
(b) the purposes for which the property subject to the trust is held,
(c) the welfare of any minor occupies or might reasonably be expected to occupy any land subject to the trust as his home, and
(d) the interests of any secured creditor of any beneficiary.

A leading treatise from Great Britain makes clear that the foregoing criteria are not exhaustive. This treatise states:

The specification of relevant criteria in section 15(1) is not exhaustive. In any particular case it is open to the court to have regard to other factors which legitimately bear upon the sale of the trust property. The court is required to respond humanely to a wide variety of competing needs presented by the beneficial owners under a trust of land. It is clear, for instance, that the court may, in its discretion, withhold a sale of the family home where a co-owner who wishes to retain the home is out of work. It may, on the other hand, be just and equitable to release the cash shares of the equitable co-owners where the trust property comprises an excessively large house which is plainly unsuitable for sole occupation by the beneficial co-owner resisting sale. Likewise, it may be highly relevant that a refusal to order sale will severely prejudice the value of a beneficiary's equitable share or otherwise keep this share locked up in the land for an unduly lengthy or indefinite period. Sometimes the balance of the parties' respective accommodation requirement may, almost as a matter of responsible housing policy, point towards the solution of the problem. In *Bernhard v. Josephs* Kerr LJ observed that 'above all, in these times of housing shortage, a sale has the disadvantage that the property ceases to be available as a home for either of the parties.' The fact that a court-ordered sale throws an increased strain upon already hard-pressed social housing stock may be a ground which influences the court to decline to order the sale of co-owned homes.
KEVIN GRAY & SUSAN FRANCIS GRAY, ELEMENTS OF LAND LAW 1139 (4th ed. 2005).

2. Ireland: In Ireland, the courts only take into account economic factors in deciding whether to order a partition in kind or a partition sale. A leading Irish treatise on partition actions involving co-owned land states the following: "Sale must be more beneficial than partition for all the persons interested in the property. In determining this issue the court should apply an objective standard.

The term ‘beneficial’ as used in this context means beneficial in a pecuniary sense – the court should look towards the financial result. Thus, if the costs associated with partition are greater than those associated with sale because of the number of persons interested in the property, sale would be more beneficial than partition under s 3. Likewise, the court may order sale where the resulting purchase money would be greater than the property’s current rental income, or where a sale of the entire property would fetch a higher price than separate sales of the divided shares following partition. . . . However, the fact that sale will detrimentally affect a business conducted on the property by one of the co-owners may not deter the court from making such an order. Questions of sentiment that arise, for example, on the proposed sale of family property are also irrelevant in this context.” HEATHER CONWAY, CO-OWNERSHIP OF LAND: PARTITION ACTIONS AND REMEDIES 79 (2000).

3. Victoria, Australia:

228. What can VCAT [the Victorian Civil and Administrative Tribunal] order?

(1) In any proceeding under this Division, VCAT may make any order it thinks fit to ensure that a just and fair sale or division of land or goods occurs.

(2) Without limiting VCAT's powers, it may order—

(a) the sale of the land or goods and the division of the proceeds of sale among the co-owners; or

(b) the physical division of the land or goods among the co-owners; or

(c) that a combination of the matters specified in paragraphs (a) and (b) occurs.

229. Sale and division of proceeds to be preferred

(1) If VCAT determines that an order should be made for the sale and division of land which is, or goods which are, the subject of an application under this Division, VCAT must make an order under section 228(2)(a) unless VCAT considers that it would be more just and fair to make an order under section 228(2)(b) or (c).

(2) Without limiting any matter which VCAT may consider, in determining whether an order under section 228(2)(b) or (c) would be more just and fair, VCAT must take into account the following—

(a) the use being made of the land or goods, including any use of the land or goods for residential or business purposes;

(b) whether the land is, or goods are, able to be divided and the practicality of dividing the land or goods;

(c) any particular links with or attachment to the land or goods, including whether the land or the goods are unique or have a special value to one or more of the co-owners.

D. Issues for our Drafting Committee

1. Should our uniform law include a provision that would require, under a "totality of the circumstances" approach, courts to weigh a broad range of economic and non-economic factors in deciding whether to order a partition in kind or a partition sale?

2. If so, should we include examples of some of the economic and non-economic factors that a court should weigh such as longstanding ownership, importance of the property as shelter, evidence of sentimental attachment, cultural or historical significance of the property, and the link between continued ownership and the ability of a co-tenant to earn a livelihood or to continue to operate a particular business?

III. Awarding Attorney's Fees in a Contested Partition Action

Under the American Rule on attorney's fees, the prevailing party in litigation is not entitled to an attorney's fee award unless a particular common law rule, statute, or contractual term provides for an exception to the normal rule that each party bears the expenses of their own attorney's fees. In contrast to the English Rule on attorney's fees under which the losing party must pay for some or all of the prevailing party's attorney's fees, the American Rule is grounded upon the belief that litigants should not be penalized for merely defending or prosecuting a lawsuit and a fear that poor litigants would be deterred from seeking to vindicate their rights in court if they were forced to pay some or all of the prevailing party's attorney's fees if they were to lose their case in court.

Under the "common-benefit" and common fund theories permitting the recovery of attorney's fees as an exception to the American Rule, attorneys' fees may be awarded to the successful plaintiff to prevent unjust enrichment on the part of others who have benefited from the plaintiff's litigation without paying any of the attorney's fees that the plaintiff incurred. Under the common fund exception, the plaintiff's litigation creates or traces a common fund, the economic benefit of which is shared by all the members of a certain class. The "common benefit" exception is an extension of the "common fund" exception and involves cases in which the plaintiff's action confers something other than a direct monetary benefit upon others who did not contribute to paying for the attorney's fees incurred in vindicating the non-monetary rights.

Based largely upon the notion that a party who successfully petitions a court for a partition sale has conferred a benefit upon the group of tenants in common as a whole, a number of states provide that the petitioner's attorney's fees should be allocated amongst all of the co-tenants -- irrespective of whether these non-petitioning co-tenants contested the partition sale request -- and paid out from the proceeds of the sale before the sale proceeds are distributed to the co-owners. In such a contested action, application of the common benefit rule rests upon the notion that the only benefits that are relevant are the supposed economic benefits of a partition sale and that it is irrelevant whether the co-tenant(s) who .resisted the petition for a partition sale wanted such an economic benefit even if such a benefit proved to be available.

At this stage of my review of the partition law in the fifty states, it appears that there are approximately twenty-five jurisdictions that either permit or require attorney's fees to be paid from the proceeds of the sale even in case that were contested. Of these jurisdictions, it appears that approximately ten of these jurisdictions require that the attorney's fees be paid from the proceeds of the sale. The other states in this group indicate that the attorney's fees may be paid from the proceeds of the sale. In addition, at least five or six of the states permit the attorney's fees incurred by the non-petitioning cotenant(s) to be paid from the proceeds of the sale to the extent that these fees are ultimately deemed to have been expended for the common benefit of all of the parties. The most common approach in allocating attorney's fees in these states is to allocate the fees to each of the co-tenants in proportion to their individual ownership share.

There appear to be at least fourteen states that do not permit attorney's fees to be paid from the proceeds of the partition sale. Some of these states make no provision for the payment of attorney's fees from the proceeds of a partition sale even if the partition action was uncontested. At least ten states permit attorney's fees to be paid from the proceeds of a partition sale in uncontested partition actions but disallow such payment of attorney's fees in contested partition actions.

A. States that Require Attorney's Fees to be Paid from the Proceeds of a Partition Sale.

The states that require attorney's fees to be paid from the distribution of the sales proceeds include Arkansas, Iowa, Missouri, Ohio, and Oregon. *See* "Summary of All State Partition Sale Statutes" in Appendix.

B. States that Permit Attorney's Fees to be Paid from the Proceeds of Sale.

The states that permit attorney's fees to be paid from the distribution of the sales proceeds include California, Hawaii, Illinois Michigan, Montana, and South Carolina. *See* "Summary of All State Partition Sale Statutes" in Appendix.

C. States that Allow Attorney's Fees to be Paid from the Proceeds of a Partition Sale Only in Cases in which the Partition Action was uncontested.

States that do not allow attorney's fees to be paid from the proceeds of a partition sale include Indiana, Louisiana, Minnesota, Mississippi, Nebraska, Pennsylvania, Washington, West Virginia, and Wisconsin. *See* "Summary of All State Partition Sale Statutes" in Appendix.

D. States that Do Not Allow Attorney's Fees to be Paid from the Proceeds of a Partition Sale Whether or Not the Partition Action was contested.

States that do not allow attorney's fees to be paid from the proceeds of a partition sale include Arizona, Connecticut, New York, and North Carolina. *See* "Summary of All State Partition Sale Statutes" in Appendix.

E. Issues for our Drafting Committee

1. In contested partition actions, should attorney's fees that either the petitioning or the non-petitioning parties incur be allowed to be charged against the proceeds of a partition sale under the common fund or common benefit theory?

2. If no attorney's fees may be charged against the proceeds of a partition sale in a contested action, what is required of the non-petitioning parties in order for the court to deem the action to be a contested action?

IV. Wealth and Equity Protection Provisions in the Partition Sale Context

A. Appraisal:

There are no uniform standards to govern the appraisal of property that may be subject to a partition sale. In California, for example, the court may in its discretion appoint a referee to sell the property. If such a referee is appointed, the referee may hire an appraiser -- with court approval -- amongst other professional service providers. CAL. CODE CIV. PROC. § 873.110 (2007). In Georgia, the court appoints three qualified persons to make the appraisal and then averages the three appraisals in order to establish the appraised price. GA. CODE ANN. § 44-6-166.1(c) (2007). In Wyoming, if the three court-appointed commissioners determine that a partition in kind can not be made without manifest injury to the property's value, they are required to report that fact to the court along with the "just valuation of the estate." WYO. STAT. ANN. § 1-32-109 (2007). The statute does not spell out how the valuation is to be determined by the commissioners.

In addition to the issues with respect to (1) whether appraisals are required, (2) who selects the appraiser(s); and (3) the weight a court should give any appraisal, there appear to be issues with the methodology that any appraisers appointed by a court or a referee or commissioner should utilize. Although it appears to be the widespread practice that the property should be valued at its fair market value, some practitioners have claimed that in some states that the appraisers have valued the property in a manner that discounts the value of the property due to its fractional ownership structure. Given that the successful bidder at a partition sale acquires sole ownership of the property in almost every instance, such a fractionalized discount valuation – if such a technique is currently used in any jurisdiction -- does not appear to be warranted. Finally, in some states that have enacted eminent domain statutes in the past couple of years, appraisers are required to be state licensed or state-certified and the appraisals or a summary of the appraisal with financial data that establishes how the appraiser calculated the fair market value of the property must be provided to the owner before any final negotiations to establish the sales price.

1. American Indian Probate Reform Act of 2005: Appraisal Provisions. Under AIPRA, the Secretary of the Interior is required to have an appraisal of the fair market value of the property subject to a partition sale under AIPRA. Once the appraisal is completed, the Secretary is required to attempt to provide written notice to all of the owners who own an undivided interest in the property of the

results of the appraisal and of the owner's right to object to the appraisal. After reviewing any comments that are submitted about the appraisal from any owners who object to the appraisal, the Secretary of the Interior is empowered under AIPRA to order a new appraisal. Even after the Secretary ultimately approves an appraisal, the property owners have the right to pursue an administrative appeal of the confirmation of the appraisal. *See* 25 U.S.C. § 2204(c)(2)(E-H)(2007).

2. Issues for our Drafting Committee

a) Should the drafting committee consider a provision that requires a court to order that one or more appraisals be conducted by a disinterested appraiser?

b) If a court-ordered appraisal would be required, should the appraiser be required to be state-licensed or state-certified?

c) Should appraisals ordered to be done by the court be required to be provided to the co-tenants before any efforts are undertaken to sell the property under a court-ordered partition sale?

d) Should the co-tenants be able to object to the appraisal or to submit an appraisal they paid for on their own to be considered by the court?

e) If more than one appraisal is conducted, how should the court weigh each appraisal? Should they be averaged as is the practice in Georgia or should courts retain discretion to place whatever weight they choose upon any appraisal?

f) Should the drafting committee clarify whether or not the property may be appraised in a manner that takes into account its fractionalized status?

B. Public Auction or Private Sale

As highlighted hereinbefore, in deciding whether to order a partition in kind or a partition sale, courts often only utilize an economics analysis in which the aggregate value of the physically partitioned parcels is compared with the value of the property as a whole. To the extent that the fair market value of the property as a whole is worth more than the fair market value of the partitioned parcels, courts often order a partition sale believing that the sale best promotes the interests of all of the cotenants. In ordering such a sale, few courts have taken into account whether the conditions under which the property is sold satisfy the economic preconditions for a fair market value sale as these have been detailed by a number of legal and economics scholars. In fact, the manner in which tenancy in common property is sold at public auctions fails to satisfy a number of the preconditions for a fair market value sale, including the condition that the property be exposed to the market for an adequate period of time. Empirical studies by a number of real estate economists confirm that property ordered forcibly sold at

public auctions most often sells for a substantial "liquidating discount" from the fair market value, often twenty to thirty percent below market value.[9]

1. Iowa is representative of states that use public auctions only.

a) Idaho: Idaho Code § 6-524 (2007). Conduct of sale -- Contents of notice
All sales of real property made by referees under this chapter must be made at public auction to the highest bidder, upon notice published in the manner required for the sale of real property on execution. The notice must state the terms of sale, and if the property or any part of it is to be subject to a prior estate, charge or lien, that must be stated in the notice.

2. Provision for Private Sales in minority of states

There appear to be at least eleven states that provide that property to be sold under a partition sale order be sold at either a public auction or by means of a private sale. These states include Alabama, California, Connecticut, Florida, Indiana, Iowa, Massachusetts, Minnesota, Nevada, New Mexico, and Texas. The California and Texas statutory provisions are highlighted below as representative examples.

a) California: Cal. Civ. Proc. § 873.520 (2007). Determination of public or private sale.
The property shall be sold at public auction or private sale as the court determines will be more beneficial to the parties. For the purpose of making this determination, the court may refer the matter to the referee and take into account the referee's report.

b) Texas: Tex. R. Civ. P. 770 (2007). Property Incapable of Division.
Should the court be of the opinion that a fair and equitable division of the real estate, or any part thereof, cannot be made, it shall order a sale of so much as is incapable of partition, which sale shall be for cash, or upon such other terms as the court may direct, and shall be made as under execution or by private or public sale through a receiver, if the court so order, and the proceeds thereof shall be returned into court and be partitioned among the persons entitled thereto, according to their respective interests.

[9] *See, e.g.,* William G. Hardin, III & Marvin L. Wolverton, 12 *Journal of Real Estate Research* 101,102 (1996) (finding a 22% forced sale discount); Fred A. Forgey, Ronald C. Rutherford, and Michael L. VanBuskirk, *Effect of Foreclosure Status on Residential Selling Price*, 9 Journal of Real Estate Economics 313, 314 (1994) (finding a 23% forced sale discount); and James D. Shilling, John D. Benjamin, and C.F. Sirmans, *Estimating Net Realizable Value for Distressed Real Estate,* 5 The Journal of Real Estate Research 129, 130 (1990) (finding a 24% forced sale discount).

3. International Examples

a) **Canada:** As of the date of this memorandum, it has been determined that at least seven of the ten provinces in Canada permit a court to order that property to be sold under a court-ordered partition sale may be sold at a private sale normally conducted by a licensed real estate agent. A review of the Canadian case law to date indicates that the private sale option appears to be preferred to the public auction alternative.

One court in the province of Ontario, for example, ordered a partition sale by a real estate agent "to ensure a sale at the highest possible price" unless the respondent paid the market value for the property within 30 days of the court. Brière v. Saint-Pierre, [2007] O.J. No. 2926, 2007 ON.C. LEXIS 3015 *5. A court in Saskatchewan Court exercised its discretion to direct a private sale at a fixed price with the property listed by real estate agents to be followed by a court-ordered public sale if no private sale can be accomplished in a set period of time. Giesbrecht v.Giesbrecht, [1976] 6 W.W.R. 272, 26 R.F.L. 375. In using the private sale option, Canadian courts regularly establish the listing price and other terms of sale.

b) **England and Wales:** Under the Trusts of Land and Appointments of Trustees act, those parties who constitute the legal trustees have a duty to sell the trust land for the best price that is reasonable obtainable. *See infra* p. 29. In fulfilling this responsibility, the common practice appears to be to sell the property by means of a private sale.

c) **Ireland**: A leading Irish treatise states the following with respect to the manner in which property may be sold pursuant to a court-ordered partition sale: "The court may permit the person having conduct of the sale to sell the land in any manner he thinks fit. Alternatively, it might order the land to be sold in a particular manner whether by tender, private treaty or public auction. The court may direct a valuation of the property with a view to fixing a reserve price. Where a third party such as a creditor seeks an order for sale in lieu of partition, sale of the property on the open market may be the only way to ensure that he gets full value for his interest."
HEATHER CONWAY, CO-OWNERSHIP OF LAND: PARTITION ACTIONS AND REMEDIES 342 (2000).

d) **Scotland:** Prior to 1972, Scotland had adhered to the practice that property sold pursuant to a partition sale was to be sold by a public auction or public roup as this is referred to in Scotland. The preference for the public roup was considered in 1966 in the Report on Conveyancing Legislation and Practice, commonly called the Halliday Report. The Halliday Report stated, *inter alia*, that "[t]he number of sales effected by public exposure has much diminished in modern practice, since a sale can

often be effected on more advantageous terms by private negotiation and the requirement of public exposure is inconvenient in the sale of certain kinds of property such as individual flats in tenements." In a 1972 partition case called *Campbell v. Murray*, 1972 SC 310, the Scottish high court decided that the public roup was no longer the best way to sell property ordered sold in a partition action in order to achieve the goal of obtaining the best sales price. The *Campbell* court stated: "[W]hatever the merits of sale by public roup once were, sale by this method is now seen to be less likely than sale by private bargain, after an adequate test of the relevant market, to lead to sale at the best price which can reasonably be obtained." Not only may a private sale now be used to sell property ordered sold under a partition sale in Scotland, but also the private sale is practically the exclusive method used in Scotland for selling property that a court orders sold in a partition action because such a sale is viewed as being more likely to fetch a higher sales price as the court in *Campbell* made clear.

4. Issues for our Drafting Committee

a) Should the drafting committee include language in the uniform law permitting property sold pursuant to a court-ordered partition sale to be sold under a private sale?

b) If the drafting committee develops language permitting private sales, should there be language that provides any specific directions on the manner in which the private sale should be conducted?

C. Minimum Sales Prices: The vast majority of states provide no requirement that property that is sold pursuant to a court-ordered partition sale be sold for some established minimum sales price, although a large number of states provide that a court may in its discretion set a minimum sales price. At least nine states do provide for a minimum sales price.

1. States with Minimum Sales Price Provisions: Illinois, Indiana, Kansas, Minnesota, New Mexico, Ohio, Oklahoma, Texas, and Wyoming have provisions requiring property sold under a court-ordered partition sale to be sold for some minimum sales price. In all of the foregoing states with a minimum sales price provision that only provide for a public sale of the property subject to a partition sale order, the property that is ordered sold may not be sold for less than two-thirds of its appraised value. In Indiana and New Mexico, the property may not be sold for less than two-thirds of its appraised value if it is sold at a public sale and may not be sold for less that its fully appraised value if it is sold at a private sale. In Texas, whether or not property ordered sold pursuant to a partition sale is sold at a public sale or a private sale it must be sold for no less than its fully appraised value.

2. American Indian Probate Reform Act of 2005: AIPRA allows the Secretary of the Interior to conduct a partition sale of highly fractionated Indian trust property as defined in the statute, at a public auction or by sealed bid, "for not less than the final appraised fair market value to the highest bidder" from a discrete group of statutorily defined eligible bidders. 25 U.S.C. § 2204(c)(2)(I)(i). If there is no "bid that equals or exceeds the final appraised value, the Secretary may either –
(I) purchase the parcel of land for its appraised fair market value on behalf of the Indian tribe with jurisdiction over the land, subject to the lien and procedures provided under section 214(b) (*25 U.S.C. 2213(b)*); or
(II) terminate the partition process." 25 U.S.C. § 2204(c)(2)(K) (i).

3. International Examples:

a) **Canada:** In many of the Canadian provinces, the courts often establish a minimum sales price in cases in which property is ordered sold under a partition sale by means of a private sale. The most common practice appears to be for courts to require the licensed real estate agent to list the property in question at the full appraised fair market value price.

b) Victoria, Australia: Under the Property (Co-Ownership) Act 2005, the Victorian statutory provisions that address partition, in relevant part, state the following:
232. Other matters in VCAT orders
In any proceeding under this Division, VCAT may order—
(c) in the case of a private sale, that the sale be at fair market price as determined by an independent valuer;
(d) in the case of an auction, that the reserve price is the reserve price set by VCAT.

4. Issues for our Drafting Committee

a) Should the drafting committee mandate that property sold pursuant to a court-ordered partition sale be sold for any minimum sales price?

b) If a minimum sales price provision should be included in the uniform law, what should be the minimum sales price?

c) If the drafting committee decides to include language requiring a minimum sales price, should any distinction be made between minimum sales prices required at a public auction and minimum sales prices required if the property is sold at a private sale?

d) If the drafting committee decides to include language requiring a minimum sales price, should the committee also develop language to

account for the contingency that the property does not attract bids at or above the minimum sales price?

D. Purchase on Credit: Certain states permit the highest bidder to pay a portion of the winning bid within a short period after the sale and the balance over a longer period of time. Florida and Utah are two such states that permit purchases on credit.

1. Florida: Fla. Stat. § 64.071(2) (2007). Sale where nondivisible.
Conditions of Sale. --For good cause the court may order the sale made on reasonable credit for part or all of the purchase money, but at least one-third of the purchase money shall be paid down unless all parties consent to credit otherwise. The purchase money not paid down shall be secured by a mortgage on the land and such other security as the court directs.

2. Utah: Utah Code. Ann. § 78-39-25 (2007). Sales on credit -- Order for: The court must, in the order of sale, direct the terms of credit which may be allowed for the purchase money of any portion of the premises of which it may direct a sale on credit, and for that portion of which the purchase money is required, by the provisions hereinafter contained, to be invested for the benefit of unknown owners, minors or parties out of the state.

In contrast to the purchase on credit provisions mentioned above, in a November 15, 2006 letter to the Joint Editorial Board for Uniform Real Property Acts, David Dietrich who is the Co-Chair of the Property Preservation Task Force of the American Bar Association's Real Property and Trusts and Estates Law Section stated:

"[T]he PPTF has learned that courts are frequently requiring the successful purchaser to pay into the court the entire value of the property, even the portion that represents the purchaser's own interest. For cash-poor purchasers, this represents a significant deterrent, and it is nonsensical given that the portion of money representing the purchaser's existing interest will simply be returned to them later."[10]

3. Issues for our Drafting Committee

a) Should the drafting committee develop any language permitting property to be purchased to be purchased on credit?

b) Should the drafting committee develop language that addresses whether or not the winning bidder at a partition sale must pay into the court the full amount of the winning bid or the amount of the winning bid less that bidder's ownership interest, if any?t

[10] Letter from David J. Dietrich, Co-Chair, Property Preservation Task Force, to Shannon Skinner, Esq., Preston Gates Ellis LLP, (November 15, 2006), at 8.

E. **Post-Sale Challenges or Remedies to Sales Based on Claim of Unreasonably Low Sales Price**

There are no uniform standards that guide a court's discretion is setting aside a sale based upon allegations that the sales price is unacceptably low. Some jurisdictions only permit a sale to be set aside if there is evidence of fraud or if the sale was conducted in a procedurally flawed manner. Other jurisdictions may set a sale aside if the sales price is deemed inadequate in some manner. However, states in this latter category do not apply any commonly agreed upon standards for assessing what may constitute an unacceptably low price as some of the examples highlighted below make clear.

1. Example of jurisdiction that requires fraud or a procedurally flawed sale. In a case in which the property in question was sold for $500 at a public auction to one of the tenants in common under a court-ordered partition sale despite the fact that there was evidence that the property had a fair market value of $10,500, the grossly inadequate sales price standing alone was not sufficient to set aside the sale. In addition to a grossly inadequate sales price there need to be at least slight evidence of fraud or some irregularity in the manner in which the sale was conducted to allow a court to set aside the sale. Gross v. Gross, 350 S.W.2d 470, 471-72. (Ky. 1961).

2. Other states do not require those who seek to challenge the sufficiency of a sales price to produce evidence of fraud or some procedural irregularity. However, amongst these states there are no uniform standards that have been developed to guide a court's discretion in evaluating the sufficiency of a sales price. I will just provide some examples of the different standards that have been developed.

a) **Alaska**: The Alaska Supreme Court has noted that most courts will refuse to confirm a forced sale only if the sales price is grossly inadequate or is so low as to "shock the conscience of the court." Hayes v. Alaska USA Fed. Credit Union, 767 P.2d 1158, 1161 (Alaska 1989). Further, the court in *Hayes* stated that commentators have noted that most courts hold that prices above forty percent of the fair market value of a property's value are not usually deemed "grossly inadequate." *Id*. at.1162.

b) **California**: Under CAL. CODE. CIV. PROC. § 873.730(c)(2), a court may vacate a partition sale and order a new sale if the "sale price is disproportionate to the value of the property." Alternatively, a court in California may vacate a partition sale and order a new sale if the following condition is satisfied:
"It appears that a new sale will yield a sum that exceeds the sale price by at least 10 percent on the first ten thousand dollars ($10,000) and 5 percent on the amount in excess thereof, determined after a reasonable allowance

for the expenses of a new sale." CAL. CODE. CIV. PROC. § 873.730(c)(3)(2007).

c) **Hawaii**: In a case in which one of the co-tenants purchased the property in question for $500,000 at a public auction after the property was ordered sold in a partition action, the trial court decided that the sales price was "so grossly inadequate as to 'shock the conscience of the court'" due to the fact that the property had been appraised at $758,000 by the court-appointed commissioner. Sugarman v. Kapu, 85 P.3d 644, 647-48 (Haw. 2004). The court specifically indicated that the "grossly inadequate" standard did not require evidence of fraud and that gross inadequacy of the price alone may "shock the conscience" of the court. *Id*. at 652. Further, the Hawaii Supreme Court held that the trial court was well within its discretion to reopen the auction at the hearing to confirm the auction bid because there was ample evidence that new bids would be significantly higher than the highest bid received at the public auction. *Id*. at 649-51.

d) **Iowa**: Courts in Iowa do not focus upon whether a sales price is grossly inadequate when they consider whether to confirm a partition sale. The court in Varnell v. Lee, 14 N.W.2d 708, 712 (Iowa 1944) held: "It is the right of the owners of this property to obtain the highest price they can for it, and to ask the court to open or reopen biddings in order that it may be done. . . . The chief purpose of partition sales is to secure for the owners the most advantageous sale that can reasonably be obtained. Following our earlier decisions, this court, in Criswell v. Criswell, 230 Iowa 27, 31, 296 N. W. 735, 300 N.W. 533, 534, said: 'One of the primary concerns of the court in passing on judicial sales should ordinarily be to obtain the highest price that can fairly be procured.'"

e) **North Carolina**: Under N.C. GEN. STAT. § 46-28.1(a)(2)(c), a court is empowered to deny confirmation of a partition sale if the "amount bid or price offered is inadequate and inequitable and will result in irreparable damage to the owners of the real property."

f) **Oklahoma**: Oklahoma courts have granted motions to vacate a partition sale of property conducted by public auction and to reopen the bidding at a new auction. In one case, property that had been appraised at a fair market value of $1,500 was sold at the public auction for $1,200. McManus v. Hull, 376 P.2d 586 (Okla. 1962). The court in McManus stated the following:

"[T]here was sufficient evidence presented that the sale price was inadequate and also that there were additional circumstances of unfairness or irregularity. There was evidence to sustain the court's finding of rumors circulated (although not by Mr. McManus) at or prior to the sale which

tended to chill the bidding; it was undisputed that Mr. McManus and Mrs. Foster had each elected to buy the property, prior to the sale, for the appraised value of $ 1,500; and Mrs. Foster by her answer made an advance bid of $ 2,000 and offered to pay the costs of readvertisement and sale." *Id*. at 588.

3. International Examples:

a) **Canada:** To date, I have not conducted a comprehensive survey on the issue of whether a partition sale may be vacated in Canada based upon a claim of insufficient sales price. In the one province that I have conducted research on this issue to date, Alberta, courts may refuse to approve a partition sale if the highest bid is less than the fair market value of the property. R.S.A. 2000, c. L-7 sec. 16. The statute reads as follows:

> "16 Notwithstanding section 15(2) [the statutory section permitting a partition sale], if an order is made under section 15(2)(b) and the highest amount offered for the purchase of the interest in the land is less than the market value of the interest, the Court may
> (a) refuse to approve the sale, and
> (b) make any further order it considers proper."

b) **England and Wales:** In England and Wales, those who are the legal trustees of land under a trust of land are deemed to be fiduciaries with respect to the beneficial owners, including beneficial owners who hold their equitable interests in a tenancy in common. If the trustees of land sell the property, including selling the property after successfully petitioning the court under Section 14 of TOLATA over the objection of any beneficial owner, the trustee is obligated to obtain the best price that is reasonable obtainable. If such a trustee fails to obtain the best price reasonably attainable, the beneficial owners may sue the trustee for the difference between the best price that was reasonably attainable and the actual sales price. This principle is established in the case of *George v. McDonald*, (1992) 5 BPR 11659 at 11670, a case that considered a sale by trustees at an undervalued price. Though *George* is a case from New South Wales in Australia, the English courts consider it to be precedent. *See* KEVIN GRAY AND SUSAN FRANCIS GRAY, ELEMENTS OF LAND LAW 1101-1102 (2005) (leading English property law treatise citing the English rule with citation to *George*).

4. Issues for our Drafting Committee

a) Should the drafting committee develop language that establishes the standard by which a court will consider a post-sale challenge to a partition sale based upon a claim that the property was sold for an unreasonably low price?

b) Should the drafting committee develop language that specifies the manner in which any new sale may be conducted if the initial sale is invalidated based upon the court's view that the sales price was insufficient?

V. Legal ethics with respect to eligibility to be appointed commissioner or referee.

A. Most states require that the court-appointed commissioner(s) or referee(s) who assist the court in a partition action must be disinterested parties.

I will provide just two representative examples of statutes requiring any court-appointed commissioner or referee to be disinterested.

1. In California, under CAL. CODE CIV. PROC. § 873.050, "[a]n owner of any interest in the property that is the subject of the action" is disqualified to serve as a referee to assist the court in a partition action.

2. In Rhode Island, R.I. GEN. LAWS § 34-15-24 governs the appointment of commissioners in partition acts. The statute reads as follows:

In actions for partition, after judgment for partition has been entered, the superior court on motion shall appoint and commission one or more discreet, impartial, and disinterested persons to make partition pursuant to such judgment, who shall be sworn to the faithful discharge of their trust.

B. At least one state does not require commissioners to be disinterested, at least in the context of a partition sale.

Although my research on this issue is still ongoing, there is but one jurisdiction I have discovered thus far that does not require a commissioner appointed in the partition sale context to be disinterested

1. Indiana makes a distinction between commissioners appointed to sell property ordered sold pursuant to a partition sale and commissioners appointed to partition land ordered divided in kind. In the latter instance, Indiana requires the commissioners to be disinterested because they are worried that interested commissioners may act to prejudice the rights of other parties. In contrast, an Indiana appellate court has held that a commissioner appointed to sell property ordered sold pursuant to a court-ordered partition sale need not be disinterested. This court stated the following: "[T]here is not so much to gain, if anything, from an interested commissioner when selling property because, as Defendants have noted, all parties have the common objective of maximizing the sales price." *Cohen v. Meyer*, 701 N.E.2d 1253, 1256 (Ind. Ct. App. 1998).

C. Issues for Drafting Committee

1. Should the drafting committee develop language that requires any commissioner or referee that the court appoints to assist the court in any way in a partition action to be disinterested?

2. If the drafting committee does develop language requiring commissioners or referees to be disinterested, should the committee specify which class of people would be deemed to be disinterested?

VI. Requiring a Waiting Period for Strangers to Title

A. Arkansas requires "waiting period for strangers to title"

Arkansas requires a person who is deemed a "stranger to title" who acquires an undivided interest in a parcel of property that contains at least ten acres to wait three years to file a partition action after. This statute is designed to provide a disincentive to speculators who might seek to acquire an undivided interest in property with the goal of quickly forcing a sale of the property. The Arkansas statute reads as follows:

ARK. CODE ANN. § 18-60-404 (2007).
18-60-404. Restriction on right to partition for certain purchasers of land.

(a) (1) When an undivided interest in a parcel of land containing at least ten (10) acres is purchased after June 28, 1985, by a stranger to the title, the purchaser shall not have a cause of action to partition the land until the expiration of three (3) years after the date of purchase.

(2) However, any person or group of persons or entities which individually or in combination own fifty percent (50%) or more of the parcel may at any time institute a cause of action to partition the land.

(b) For purposes of this section, the term "stranger to the title" means a person who purchases an undivided interest in property and who is not related in the fourth degree of consanguinity to any other owner of such property.

B. Issues for Drafting Committee

1. Should the drafting committee develop any language delaying any cause of action to partition property for a "stranger to title"?

2. If so, should the committee set any acreage threshold that would have to be satisfied in order for the "stranger to title" provision to apply?

3. Further, if the committee develops any language that would apply to "strangers to title," what percentage of undivided interests must such a "stranger to title" possess to be excused from the statutory language delaying such person's right to pursue a partition action?