

Uniform Partition of Heirs Property Act: Executive Summary and Overview of How the Act Works

This Act is likely to be an additional chapter, subchapter or subpart of a state's existing partition statute. It is an act of limited scope that is designed to alleviate serious problems the default rules governing the partition of tenancy-in-common property have created for owners of family-owned, tenancy in common property who want to maintain ownership of their real property or at least the wealth that is associated with that property upon a court-ordered sale of the property. In many communities throughout the United States, particularly in lower-income communities, such property is commonly known as heirs property irrespective of whether interests in the property were acquired by deed, by will, or by intestacy.

The tenancy in common is a form of ownership under which the common owners, like shareholders of a corporation, own an *undivided interest* in the whole of the property. There are two main problems with the manner in which courts have decided partition actions. First, though under the law of most states, a partition in kind of the property is stated to be the much preferred remedy, many courts and some legislatures have developed rules that effectively undercut this preference. This has arisen because many courts utilize an economics-only test that mandates that tenancy-in-common be sold at a forced partition sale if the *hypothetical* market value of the property is more than the value of the sub-parcels that would result from a physical division of the property. Under this test, no value is assigned to the non-economic values a cotenant places upon his or her property, including the property's heritage or historic value. Second, though courts routinely order a partition by sale in circumstances when a division in kind could practically have been done, the courts almost always order a sale under forced sale conditions such as a sale upon execution that are notorious for selling property for a low price, thereby stripping wealth from the cotenants and providing the buyer with an unjustified economic windfall.

It is well known among estate planners, real estate lawyers, business lawyers and planners, and others that the default rules of partition make tenancy in common property one of the most unstable forms of common ownership of assets under the law because any one cotenant no matter how small his or her interest may request a court to order a forced sale of the *whole property* even if all of the other cotenants oppose such a sale. Therefore, these professionals routinely advise their clients who tend to be relatively wealthy and legally sophisticated, in comparison to those who own heirs property, to enter into agreements that contract around the default rules of tenancy in common ownership or to reorganize their ownership under a different ownership structure altogether that has default rules that better promote stability and continuity of ownership. Further, there is an international trend in which legislatures, law commissions, and courts in countries such as England, Wales, Scotland, and Canada have recognized that the default rules governing the

ownership of commonly owned real property, including the default rules governing partition of tenancy in common property, should be reformed to better protect the property rights and wealth of the common owners upon one of the common owners exit from the common ownership group.

As defined by this Act, “heirs property” is real property owned under the tenancy in common form of ownership that is *not subject* to a written agreement governing the partition of the property and that has the following attributes:

- one or more of the cotenants acquired title from a family member whether living or deceased;
- A significant percentage of the cotenants in terms of numbers or of interests held are related to each other or at least one of the cotenants who owns a substantial percentage of the undivided interests acquired title from a family member.

By definition, this Act is *not* applicable to property subject to a written tenancy-in-common agreement among all of the cotenants or to property owned under any ownership form except a tenancy in common.

This Act is designed to establish as the default rules for partition of heirs property some of the key provisions ensuring stable ownership and protecting wealth found in common ownership arrangements among wealthier and more legally sophisticated common owners. This Act implements these key protections by establishing a *hierarchy of remedies* in proceedings for the partition of heirs property. In order, the legally-preferred remedies under this Act are as follows:

- (1) a right of buyout of tenancy-in-common interests by those cotenants who did not petition the court for a forced sale of the property;
- (2) partition in kind of the property;
- (3) sale of the property by open-market sale (i.e., sale under commercially reasonable conditions designed to sell the property for its fair market value by listing and marketing the property through a licensed real estate broker); and
- (4) sale of the property by auction or similar mechanism, if the prior three remedies are not possible.

Finally, the Act improves the notice to owners of the pending action, sets forth a test for determining when property should be divided or sold that supports the stated preference for a partition in kind, and strengthens conflict of interest provisions governing the selection of commissioners or similar persons who often advise a court on the manner in which property should be partitioned.

How the Uniform Partition of Heirs Property Act Works:

- Plaintiff files petition in court seeking partition of tenancy-in-common property.
- If petitioner seeks permission to use notice by publication, court makes determination whether property may be heirs property, and if so, requires petitioner to post conspicuous sign on property within 10 days of this determination. (Sec. 4(b)). At later stage, irrespective of whether notice by publication is requested or authorized, court makes determination of whether the property is *heirs property* (as defined in Sec. 2(5)) in order to determine whether to apply all of the provisions of the Act to that partition proceeding. (Sec. 3(a)).
- Under Sec. 6, Court makes determination of value for purposes of valuing interests under any buyout of a cotenant's interest (under Sec. 7) or for establishing the offer price for the property if it is ordered sold under an open-market sale (under Sec. 10).
- Court notifies parties of buyout procedures and then provides opportunity for cotenants that did not petition the court for a partition by sale to buyout interests that may be available for purchase (Sec. 7).
- If buyout was not conducted or did not resolve all claims (either because buyout was successful but some cotenant remains that still seeks partition in kind or because buyout failed), court weighs ordering partition in kind versus partition by sale (Sec. 8(a) and (b)).
- If only remaining requests are for partition in kind, or if partition in kind will not cause [great] [manifest] prejudice to cotenants as a group, court must order division-in-kind. (Sec. 8(a))
- If court instead orders a sale, sale shall be open-market sale, unless auction is both economically advantageous and in bests interests of cotenants as a group (Sec 10(a)).
- If court orders open-market sale:
 - Parties have 10 days to agree on real estate broker; otherwise, court appoints disinterested licensed broker. (Sec 10(b)).
 - If offer for determined value, broker has 7 days to report it to court and sale may be completed under state law. (Sec 10(c)).
 - If no offer for determined value, court can a) approve highest outstanding order; b) redetermine value and order property to continue to be marketed; or c) order auction. (Sec. 10(d)).
 - If court orders auction sale, sale conducted under existing law or as the court directs. (Sec. 10(e)).