

DRAFT
FOR DISCUSSION ONLY

PARTITION OF TENANCY-IN-COMMON REAL PROPERTY ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For November 21-22, 2008 Drafting Committee Meeting

Without Prefatory Note and With Comments

Changes Shown in Strike and Score

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PROPERTY ACT**

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1 ~~_____ (1) is published in newspaper format;~~
2 ~~_____ (2) is distributed at least once a week for at least 50 weeks each year within the~~
3 ~~judicial district, excluding a period when publication is interrupted by a labor dispute or by a~~
4 ~~natural disaster or other casualty that the publisher cannot control; and has a total paid circulation~~
5 ~~or paid distribution of at least 500 copies, or 10 percent of the total population of the judicial~~
6 ~~district, whichever is less; in this subparagraph, "judicial district" means the judicial district~~
7 ~~where the place of sale is located;~~
8 ~~_____ (3) holds a second class mailing permit from the United States Postal Service;~~
9 ~~_____ (4) is not published primarily to distribute advertising; and~~
10 ~~_____ (5) is not intended primarily for a particular professional or occupational group.~~

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

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

18 **Comment**

19 Section 1-102(~~ab~~): See McCorison v. Warner, 859 A.2d 609, 614 (Conn.Super. 2004);
20 .Channer v. Cumming, 699 N.W.2d 831, 837 (Neb. 2005); Black's Law Dictionary (8th ed.
21 2004)Alaska Stat. § 09.35.140 (2008)

22 Section 1-102(b): See M.G.L.A. 241 § 31.
23

24 **SECTION 1-103. APPLICABILITY.**

25 (a) This Act applies to tenancy-in-common property only if:

1 (1) no written agreement among all the cotenants governs the ownership of the
2 property;

3 (2) a substantial number of the cotenants [___ percent or more of the interests are
4 held by cotenants who] are related by blood, marriage, or adoption; and

5 (3) one or more of the cotenants acquired their title from an ancestor who owned
6 an interest in the property.

7 (b) This [act] supplements existing law governing partition of tenancy-in-common
8 property. The principles of law and equity, including the law of real property, civil procedure,
9 and probate supplement the provisions of this [act], except to the extent inconsistent with this
10 [act] in which case this [act] governs.

11
12
13 **PART 2**

14 **NOTICE AND KNOWLEDGE**

15 **SECTION 1-10~~4~~3. UNKNOWN OR UNLOCATABLE PARTIES; SERVICE BY**
16 **PUBLICATION.** Nothing herein contained limits or affects the right to serve any process in
17 any other manner now or hereafter provided by law or rule of court. Further, in addition to any
18 existing rule or rules regarding service by publication, a plaintiff in a partition action governed
19 by this Act must comply with the provisions of this section before service by publication will be
20 authorized.

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

1 party to the action, provided:

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

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

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

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

19 (2) The plaintiff shall record, if not already recorded, a notice of the pendency of
20 the action in the office of the recorder of deeds in the county or counties in which the real
21 property or any portion thereof is situated [in the place designated by state law for the filing of a
22 lis pendens]. The notice shall contain the name of the court where such action is pending, the
23 names of all the parties to such action at the time of such recording, and a description of the real

1 property affected by the action.

2 (3) The publication shall be addressed to any persons who is necessary to be made
3 a party defendant who the plaintiff is unable to locate in his or her name followed by the words:
4 “and his heirs or devisees, if deceased.” The publication shall also contain the name and address
5 of the court, the docket number of the proceeding, the names of the parties, the character of the
6 action, the name and contact information for the principal attorney for the plaintiff including the
7 address and telephone number for this attorney, a description of the property, a notice directed
8 and addressed to the party to be thus served, commanding him or her to appear and answer as in
9 ordinary cases, and the date on or after which default may be entered against such party.

10 ~~Publishing notice in a newspaper of general circulation that is published nearest to the court in~~
11 ~~which the partition action was filed [nearest to the county in which the real property is located]~~
12 ~~for the number of times and within the timeframe required for the sale of real property upon~~
13 ~~execution. Said notice The shall description of contain the property shall include the street~~
14 ~~address or other common designation for the property, the legal description, the acreage of the~~
15 ~~property, and the number of buildings on the property, the number of acres, a legal description~~
16 ~~of the property, a description of any improvements, the title of the court, the title of the case, the~~
17 ~~names of the first named plaintiff and the first named defendant, the number of the case, the~~
18 ~~names of the parties to be served by publication, a command that the defendant appear and~~
19 ~~answer as in ordinary cases, and the date on or after which default may be entered against such~~
20 ~~party.~~

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

23 **Comment**
24

1 The enhanced notice by publication requirements are not meant to limit or affect the
2 rights to serve process in any other way. HRS § 634-23 (5)
3

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

10 As a general rule, the holder of a mortgage or other lien upon the undivided interest of a
11 cotenant is not, in the absence of a statute stating otherwise, a necessary party to a suit for
12 partition, since the lien is transferred to the interests in severalty allocated to the cotenants;
13 however, such holder of a mortgage or other lien upon the undivided interest of a cotenant is a
14 proper party provided that the mortgage or lien existed at the commencement of such
15 proceedings. See 59A Am. Jur. 2d Partition § 95.
16

17 Section 1-104(b) The requirement that the plaintiff document the due diligence taken in
18 attempting to locate unlocatable or unknown parties is found in a number of statutes. *See, e.g.*,
19 Ala. Code. §§ 35-6-25 & 35-6-44 (“the facts showing just what diligence the petitioner has
20 exercised must be specifically alleged in the bill”); Ga. Code Ann. § 9-11-4(f)(1)(A); Haw. Rev.
21 Stat. § 634-23(2); and S.D. Codified Laws § 15-9-7.
22

23 Section 1-104(b) “Sources of readily available information” includes information that may
24 be contained in governmental offices, may be located on governmental or non-governmental
25 internet sites-on the internet, may be possessed by persons likely to know the defendant, or may
26 otherwise be readily available to the plaintiff.
27

28 Section 1-104~~3~~(c)(1): *See* Cal. Code. Civ. Proc. § 872.320(a)
29

30 Section 1-104~~3~~(c)(2): *See, e.g., A.C.A. § 16-59-101 (2008); Cal Code Civ Proc § 405.20;* Cal.
31 Code. Civ. Proc. § 872.320(b); C.R.S. 38-35-110; Conn. Gen. Stat. § 52-325 (requiring lis
32 pendens “to be recorded in the office of the town clerk of each town in which the property is
33 situated”)
34

35 Section 1-104~~3~~(—c)(3): *See* Ala. Code § 35-6-25; Ga. Code Ann., § 9-11-4(f)(1)(A); LSA-
36 C.C.P. Art. 4624; OH R.C. § 2329.23 .Alaska Stat. § 09.35.140 with respect to the language
37 addressing newspaper of general circulation that is published nearest to the place of sale.
38 Question: If there is to be a statement of the root of title, would that be the root of title as defined
39 by state marketable title acts or some other period?
40

41 Section 1-103(e)(4): HRS § 634-23 (5)
42
43

1 ARTICLE 2

2 PARTITION ~~IN KIND~~BY DIVISION AND PARTITION BY SALE

3
4 ~~SECTION 2-201. ACTION FOR PARTITION BY DIVISION AUTHORIZED—~~

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

11 Comment

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

14 SECTION 2-201~~2~~. PARTITION BY SALE FACTORS.

15 ~~(a) If a party requests that the property be partitioned by sale and it is alleged in the~~
16 ~~complaint and~~ established by a preponderance of the evidence to the satisfaction of the court,
17 that the real property or any part of it is so situated that ~~the~~ partition in kind cannot be made
18 without great prejudice to all of the owners, taking into account the totality of the circumstances,
19 the court may order a sale thereof. The court may only order a partition by sale if a party
20 requests that the property be partitioned by sale. If a party does request partition by sale,
21 wWithout limiting the economic or non-economic factors that the court may consider in
22 deciding~~termining~~ whether a partition in kind of all of the property or some of the property as
23 provided for in Section 2-202 can be made without great prejudice to the owners, the court shall
24 consider the following factors:

1 (1a) whether the property is able to be divided between the party or parties
2 seeking a ~~partition by sale~~division in kind and those seeking to remain tenants in common as
3 well as the practicality of dividing the property in kind;

4 (2b) whether a partition ~~in kind~~by division would apportion the property in such a
5 way that the ~~actual fair market~~ value of the parcels resulting from the division, in the aggregate,
6 would be materially less than the actual value of the property if it was sold as a whole based
7 upon a valuation that takes into account the type of sale conditions under which the court-
8 ordered sale would occur.

9 (3e) evidence of longstanding ownership by any individual cotenant as
10 supplemented by the period of time that any person or persons that such a cotenant is or was
11 related to by related by blood, marriage, or adoption who was in the chain of title ancestor or
12 ancestors of such an existing cotenant owned an interest in the property;

13 (4d) any cotenant's particular sentimental links with or attachment to the property,
14 including any attachments arising out of the fact that the property has ~~ancestral~~historical or other
15 unique or special value to one or more of the co-owners;

16 (5e) the use being made of the property by any of the tenants in common and the
17 degree to which this tenant in common would be harmed if he or she could not continue to use
18 the property for these purposes, especially as it pertains to residential, ~~or~~ business, or agricultural
19 uses; and

20 (6f) the degree to which the parties have contributed their pro rata share of the
21 property taxes, insurance, and other carrying charges associated with maintaining ownership of
22 the real property as well as the degree to which the parties have contributed to the physical
23 improvement or physical the upkeep ~~or, improvement of of~~ the property, including any upkeep

1 related to protecting the interests of the cotenants against any person who has no legal claim to
2 the property but who attempts to use the property without the consent of the cotenants.

3 (b) In considering the factors set forth in Section 2-201(a)(1-6) as well as any other
4 economic or non-economic factor that the court may consider to be relevant, a court should not
5 consider any single factor to be dispositive, standing alone, but should instead weigh the totality
6 of the circumstances.

7 **Comment**

8 Section 2-201(a) This language in this section only permits a partition by sale to be
9 ordered if a party actually petitions the court for a partition-by sale. In many cases, tenants in
10 common those who have owned real property who have sought a partition in kind~~by division~~
11 when it appeared to them that a partition in kind~~by division~~ could be easily ordered, were
12 surprised that a court using an “economics only” analysis ended up ordering a partition by sale
13 which they did not seek and did not want as this was the worst option in their opinion.

14
15 Section 2-201~~2~~(a)(2): See N.C. Gen. Stat. § 46-22(b). Property that is sold at public
16 auctions under forced sale conditions, like the conditions that prevail in a partition by sale, often
17 sells at a steep discount from the actual value of the property which in turn results in the property
18 owner losing wealth, sometimes substantial wealth. There are several empirical studies that
19 demonstrate that property sells at a severe discount from fair market value prices when the
20 property is sold under the type of forced sale conditions under which property is often sold under
21 a partition by sale. See, e.g., Marcus T. Allen, Discounts in Real Estate Auction Prices:
22 Evidence from South Florida, 69 APPRAISAL J. 38, 42 (2001) (finding discount between 13.3%
23 and 21.5%). Further, courts in many other areas of the law have distinguished between forced
24 sale value and fair market value. Therefore, one must consider the specific type of sales
25 conditions under which property would be sold at a partition by sale in order to evaluate whether
26 or not the winning bid would approximate the property’s fair market value and whether the
27 current owners would end up better off economically from a partition by sale as opposed to a
28 partition in kind.

29
30 Courts in Texas, for example, have indicated that property should be sold at its fair
31 market value at a partition sale. Grimm v. Beck, 237 S.W.2d 1017, 1018 (Tex. App. Ct. 1951).
32 Many courts have held that a partition by sale should only be awarded if such a sale would be
33 significantly more beneficial to the cotenants in economic terms than a partition in kind. Texas
34 courts have further indicated that a partition sale should only be ordered if it is more
35 economically beneficial to the owners than a partition in kind. See Jacobs v. Mada, 2007 TX
36 App. Ct. Briefs 832438, Aug. 8, 2007 at **21-22. In Jacobs, the court stated: “Moreover, the
37 purpose of partitioning real estate by sale rather than in kind, the preferred method, is to restore
38 the maximum value of the separate property to its owners.” There are several empirical studies
39 that demonstrate that if property is sold under the type of forced sale conditions under which

1 ~~property is often sold under a partition sale it will typically sell at a severe discount from fair~~
2 ~~market value prices. Further, courts in many other areas of the law have distinguished between~~
3 ~~forced sale value and fair market value. Therefore, one must consider the specific type of sales~~
4 ~~conditions under which property would be sold at a partition sale in order to evaluate whether or~~
5 ~~not the winning bid is likely to be at fair market value and whether the current owners would end~~
6 ~~up better off economically from a partition sale as opposed to a division in kind.~~
7

8 Section 2-202(ae)(3): *See* Delfino v. Vealencis, 436 A.2d 27, 33 (Conn. 1980); Eli v. Eli,
9 557 N.W.2d 405, 409-411 (S.D. 1997); and Ark Land. Co. v. Harper, 599 S.E.2d. 754, 761-62
10 (W. Va. 2004).

11
12 Section 2-202(d): *See* Ark Land. Co. v. Harper, 599 S.E.2d. 754, 761-62 (W. Va. 2004);
13 Overstreet v. Overstreet, 692 So. 2d 88, 91 (1997); and Property (Co-ownership) Act 2005, Part
14 IV, § 229(2)(c), Victoria, Australia.

15
16 Section 2-202(e): *See* Delfino v. Vealencis, 436 A.2d 27, 33 (Conn. 1980); Property (Co-
17 ownership) Act 2005, Part IV, § 229(2)(c), Victoria, Australia.
18

19 **SECTION 2-20~~2~~³. PARTIAL ~~DIVISION~~PARTITION IN KIND AND SALE. Any
20 party may request the court to consider partition by sale of part of the property and partition in
21 kind of the remainder provided that such a request is made before the court considers ~~If, in~~
22 making a determination whether partition in kind~~by division~~ of the whole property can be made
23 without great prejudice to all of the owners under Section 2-20~~1~~². 2, If the court finds, after
24 weighing certain economic and non-economic factors including those mandated by Section 2-
25 201(a)(1-6)~~2-202~~, that sale and division of proceeds for part of the property would be more
26 equitable than a partition in kind~~division of the whole property or a partition by sale of the whole~~
27 property, the court may order that such part be sold and the remainder divided.**

28 **Comment**

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

31 **SECTION 2-20~~3~~³. SALE OF PART OR WHOLE OF PROPERTY; APPRAISAL.**

32 (a) Should the court be of the opinion that a partition in kind of the real property ~~by~~

1 ~~division thereof~~ cannot be made of the whole or a part of the property without great prejudice to
2 the owners of the same, the court shall appoint a disinterested appraiser to perform an appraisal
3 of the property to be sold. The appraiser who is appointed must be currently state-licensed or
4 state-certified to appraise the type of property that is to be sold at the partition by sale. In
5 addition, the appraiser must perform all of his or her duties and must practice in accordance with
6 the Uniform Standards of Professional Appraisal Practice, must be state-licensed or state-certified
7 to appraise the type of property that is to be sold at the partition sale [or designated a Member of
8 the Appraisal Institute (MAI) and otherwise qualified to appraise the type of property that is to
9 be sold at the partition sale]. After taking an oath administered by the judge, a magistrate, or the
10 clerk of the court to appraise the property at its fair market value, the property must be appraised
11 based upon its highest and best use assuming sole or unitary ownership of the fee simple estate
12 but with deductions made for the amount of all liens and encumbrances against such real estate.
13 Upon its completion, the appraiser ~~at~~ shall ~~be filed~~ his or her appraisal with the court.

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

1 the real estate, the court may use its discretion in deciding upon how much weight to give to any
2 appraisal that was filed with the court and may also exercise its discretion to order a new
3 appraisal that it will consider before the court determines the property's value.

4 **Comment**

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

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

12
13 Should we include time limits for the appointment of the appraiser and the filing of the
14 report?

15
16 Section 2-2034(b): Language from 52 Okl. St. § 318.5.
17

18 **SECTION 2-2045. APPOINTMENT OF COMMISSIONERS.**

19 (a) The court ~~in~~ its discretion or on the motion of any interested party may ~~shall~~
20 appoint three or more disinterested persons to be commissioners to divide or sell the property as
21 ordered by the court. ~~If the court decides to appoint commissioners, t~~If the court decides to appoint commissioners, the clerk of the court shall
22 forthwith notify the commissioners of their appointment, and shall deliver to one of them a
23 certified copy of the judgment of partition.

24 (b) The court in its discretion may appoint commissioners for a partition in kind~~by~~
25 ~~division~~ and commissioners for partition by sale if ~~either both~~ of these remedies is~~are~~ ordered, or
26 the court may appoint the same commissioners for a partition in kind and a partition by sale ~~and~~
27 ~~division~~ if both remedies are ordered by the court.

28 (c) If the court appoints commissioners, these commissioners must be disinterested and in
29 any case may not be any of the following: ~~None of the following persons shall be appointed a~~

1 ~~commissioner under this title:~~

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

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

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

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

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

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

14 (e) The commissioners shall be sworn by the judge, a magistrate, or the clerk of the
15 ~~court, the sheriff or any deputy sheriff of the county, or any other person authorized to administer~~
16 ~~oaths~~, to do justice among the tenants in common in respect to such partition action, according to
17 their best skill and ability.

18 **Comment**

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

21
22 Section 2-205(a): Cal. Code Civ. Proc. § 873.010.

23
24 Section 2-205(c): Cal. Code Civ. Proc. § 873.050. The first four requirements are from
25 Section 873.050 with the addition of the language barring “any relative of any owner within the
26 third degree.”

27
28 Section 2-205(e): *See* N.C. Gen. Stat. § 46-8.
29

1 ARTICLE 3

2 BUYOUT PROVISIONS

3
4
5 SECTION 3-301. BUYOUT WHEN PARTITION IN KIND DEEMED

6 INEQUITABLE. Where the court has determined that the real property, or any portion of it,
7 may not be partitioned in kind~~by division~~ without great prejudice to all of the owners under
8 Section 2-201~~2~~ or Section 2-202, any one or more of the parties may inform the court within a
9 time so fixed by the court of their desire to purchase the property or the separate portion of it that
10 could not be partitioned in kind~~by division~~ without great prejudice to all of the owners.

11 (a) If any one or more of the parties inform the court of their desire to purchase the
12 property subject to a partition by sale within the time fixed by the court, and there are no parties
13 in opposition to each other, the court shall give these parties at least forty-five (45) days to pay
14 into the court the amount by which the fair market value of the property as determined by the
15 court under Section 2-203 exceeds this party's or these parties' entitlement to a portion of the
16 proceeds of the sale. If ~~thea party- parties~~ who ~~are~~is given the opportunity to purchase the
17 property to be sold under the provisions of this section fails to pay into the court ~~the fair market~~
18 ~~value of the property~~ within the time fixed by the court the purchase price for the property as set
19 in accordance with this section, the property will then be sold at a public sale or at public auction
20 as the court determines.

21 (b) If two or more parties, in opposition to each other, inform the court of their desire to
22 purchase the property within the time fixed by the court, the court shall exercise its discretion to
23 decide whether to award one or more of the parties the opportunity to purchase the property as
24 provided in this section to the exclusion of the party or parties in opposition to this party or these

1 parties. Without limiting the factors that the court may consider, the court shall consider the
2 factors set forth in Section 2-201(a)(3)-(6)2(e)-(f), as well as the degree to which the parties own
3 significantly unequal shares in the property. If the court determines that one or more parties
4 not in opposition to each other should be ~~who is~~ given the opportunity to purchase the property
5 to be sold under the provisions of this section, the court shall give this party or these parties at
6 least forty-five (45) days to pay into the court the amount by which the fair market value of the
7 property as determined by the court under Section 2-203 exceeds this party's or these parties'
8 entitlement to a portion of the proceeds of the sale. If such a party or parties ~~fails~~ to pay into the
9 court the purchase price ~~the fair market value of the property~~ within the time fixed by the court,
10 the court shall use its discretion to decide whether to allow any other party who had expressed an
11 interest in purchasing the property an opportunity to purchase the property.

12 (c) If under subsection (b) the court determines that the equities do not favor giving one
13 or more parties the opportunity to purchase the property to the exclusion of any other party or
14 parties who has ~~has~~ expressed an interest in purchasing the property, upon motion of any party, the
15 court shall ~~have the discretion to~~ order a private sale that will be limited to all of the parties.
16 Such a private sale between the parties shall be conducted upon the terms established by the
17 court provided that the court shall establish a reserve price that is no lower than the court-
18 approved appraisal price for the property.

19 (d) Within 15 days after any private sale that occurs under this section, whomever the
20 court vested with power to sell the property at the private sale shall report the sale to the court for
21 confirmation and approval. The court may reject the sale and order a resale of the property for
22 good cause shown.

23 (e) If there is no party that is given the right to purchase the property under this section

1 that pays into the court the purchase price within the time fixed by the court or if a private sale
2 does not take place under subsection (c) ~~either because the court chooses not to exercise its~~
3 ~~discretion to order a private sale or because no party chooses to participate in any such court-~~
4 ~~ordered private sale~~ then the property shall be sold under the procedures set forth in Article 4 of
5 this Act.

6 **Comment**

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

9
10 Section 3-301(b): *See* Wilk v. Wilk, 173 Vt. 343 (Vt. 2002).

11
12 ~~Should the court have discretion to deny the buyout right altogether in cases in which two~~
13 ~~or more parties in opposition to each other express an interest in exercising the buyout right or~~
14 ~~should the courts be required to conduct a private sale if two or more parties express an interest~~
15 ~~in purchasing the property?~~
16

1 reserve price that may not be less than eighty-five (85) percent of the court-approved appraised
2 value of the property that is to be sold. If it appears to the court that the property subject to
3 partition by sale~~any of the premises~~ will not sell for eighty-five percent of the amount of the
4 valuation thereof, the court upon further hearing may either revalue the property and approve the
5 highest outstanding offer, if any, that equals or exceeds eighty-five percent of the revaluation
6 price~~the sale~~ or order a new public auction~~new sale~~.

7 **Comment**

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

16
17 Section 4-401(a): *See* § 735 ILCS 5/17-105. *See also Buck v. Grube, 833 N.E.2d 110*
18 *(Ind. App. 2005)*

19
20 Section 4-401(b): *See* § 735 ILCS 5/17-105.
21

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

23 (a) The following persons shall not purchase property sold in the proceeding~~action~~
24 directly or indirectly:

25 (1) The commissioners and any court-appointed appraiser or real estate broker
26 who participates in the partition proceedings.

27 (2) Any officer of the court in which the partition action was litigated, including
28 any judge, magistrate, or clerk of the court.

29 (3) The legal representatives~~attorney~~ of any party.

30 (4) A guardian or conservator of a party, unless for the benefit of the ward or

1 conservatee.

2 (5) Any other person who owes a fiduciary duty to a party directly or indirectly,
3 unless for the benefit of the beneficiary for whom they have duties of good faith, trust,
4 confidence, and candor.

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

7 **Comment**

8 Cal. Code Civ. Proc. § 873.690
9

10 **SECTION 4-403. ~~COMMISSIONERS'~~ REPORT OF SALE.**

11 (a) Within 15 days after any sale that occurs under this section, Upon making a sale of
12 property, whomever the court vested with power to sell the property, including any
13 commissioner, any licensed real estate broker, or any sheriff, the commissioners shall file a
14 report with the sale to the court and shall provide the report to all parties.

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

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

18 (2) The name of the purchaser.

19 (3) The sales price.

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

21 (5) Any amounts payable to lienholders.

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

24 (7) Any determination and recommendation as to opening and closing public and

1 private ways, roads, streets, and easements.

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

3 (c) Within 30 days of the filing of the report of sale, the court shall hold a hearing to
4 confirm or to set aside the sale.

5 **Comment**

6 Cal. Code Civ. Proc. § 873.710
7

8 ~~**SECTION 4 404. MOTION TO CONFIRM OR SET ASIDE SALE.**~~

9 ~~—— (a) A purchaser, the commissioners, or any party may move the court to confirm or set~~
10 ~~aside the sale.~~

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

12 ~~—— (1) The purchaser if the purchaser is not the moving party; and~~

13 ~~—— (2) All other parties who have appeared in the action.~~

14 **Comment**

15 ~~—— Cal. Code Civ. Proc. § 873.720~~
16

17 ~~**SECTION 4 405. HEARING ON MOTION.**~~

18 ~~—— (a) At the hearing, the court shall examine the report and witnesses in relation to the~~
19 ~~report.~~

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

23 ~~—— (c) The court may vacate the sale and direct that a new sale be made if it determines any~~
24 ~~of the following:~~

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

4 ~~—————(2) If the property was sold at a public sale or public auction, the sales price is~~
5 ~~disproportionate to the value of the property.~~

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

9 **Comment**

10 ~~—————Cal. Code Civ. Proc. § 873.730~~

11
12 ~~—————The California statute has language that allows a court to vacate a sale if the following~~
13 ~~condition is met: “It appears that a new sale will yield a sum that exceeds the sale price by at~~
14 ~~least 10 percent on the first ten thousand dollars (\$10,000) and 5 percent on the amount in excess~~
15 ~~thereof, determined after a reasonable allowance for the expenses of a new sale.” However, the~~
16 ~~California partition statute permits partition in the context of both real and personal property.~~
17 ~~Therefore the “10 percent on the first ten thousand dollars (\$10,000)” does not make as much~~
18 ~~sense in the context of a partition sale of real property.~~

19
20 **SECTION 4-406. INCREASED OFFERS.**

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

24 ~~—————(1) Vacate the sale and direct that a new sale be made.~~

25 ~~—————(2) Vacate the sale, accept the increased offer, and confirm the sale to the offerer.~~

26 ~~—————(b) Except as provided in subdivision (c), the amount by which an increased offer~~
27 ~~exceeds the sale price is determined on the basis of the gross amount of the increased offer~~
28 ~~including any commission on the increased offer to which an agent may be entitled.~~

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

6 **Comment**

7 ~~—— Cal. Code Civ. Proc. § 873.740~~

8

9 **SECTION 4-40~~4~~7. PURCHASE BY ENCUMBRANCER OR PARTY ENTITLED**

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

14 **Comment**

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

17

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

3 **Comment**

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

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

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

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