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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ARTICLE 1

PART 1

DEFINITIONS AND OTHER GENERAL PROVISIONS

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

SECTION 1-102. DEFINITIONS. In this section:

(a) **HEIRS’ PROPERTY** “Partition in kind” means the act of physically dividing real property held jointly or in common by two or more persons into separately owned interests.

(b) “Partition by sale” means that the court may order the whole or any part of the property which cannot be divided advantageously to be sold, upon such terms and conditions and as the court may order.

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

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

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

(b) **NEWSPAPER OF GENERAL CIRCULATION:** A “newspaper of general circulation” means a publication that:
(1) is published in newspaper format;

(2) is distributed at least once a week for at least 50 weeks each year within the judicial district, excluding a period when publication is interrupted by a labor dispute or by a natural disaster or other casualty that the publisher cannot control; and has a total paid circulation or paid distribution of at least 500 copies, or 10 percent of the total population of the judicial district, whichever is less; in this subparagraph, "judicial district" means the judicial district where the place of sale is located;

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

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

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

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

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

Comment


SECTION 1-103. APPLICABILITY.

(a) This Act applies to tenancy-in-common property only if:
no written agreement among all the cotenants governs the ownership of the
property;

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

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

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

PART 2

NOTICE AND KNOWLEDGE

SECTION 1-1043. UNKNOWN OR UNLOCATABLE PARTIES; SERVICE BY
PUBLICATION. Nothing herein contained limits or affects the right to serve any process in
any other manner now or hereafter provided by law or rule of court. Further, in addition to any
existing rule or rules regarding service by publication, a plaintiff in a partition action governed
by this Act must comply with the provisions of this section before service by publication will be
authorized.

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

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

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

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

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

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

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

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

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

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

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

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

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

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


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

Section 1-104(c)(3): See Ala. Code § 35-6-25; Ga. Code Ann., § 9-11-4(f)(1)(A); LSA-C.C.P. Art. 4624; OH R.C. § 2329.23; Alaska Stat. § 09.35.140 with respect to the language addressing newspaper of general circulation that is published nearest to the place of sale.

Question: If there is to be a statement of the root of title, would that be the root of title as defined by state marketable title acts or some other period?

Section 1-103(c)(4): HRS § 634-23 (5)
ARTICLE 2

PARTITION IN KIND AND PARTITION BY SALE

SECTION 2-201. ACTION FOR PARTITION BY DIVISION AUTHORIZED–WHO MAY BRING. When two or more persons are interested, as tenants in common, in real property in which one or more of them have an estate of inheritance or for life or years, an action may be brought by one or more of such persons against the others for a partition by division thereof according to the respective rights and interests of the parties interested therein, or for a sale of such property, or a part thereof, if it appears that a partition by division cannot be had without great prejudice to the parties.

Comment

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

SECTION 2-2012. PARTITION BY SALE FACTORS.

(a) If a party requests that the property be partitioned by sale and it is alleged in the complaint and established by a preponderance of the evidence to the satisfaction of the court, that the real property or any part of it is so situated that the partition in kind cannot be made without great prejudice to all of the owners, taking into account the totality of the circumstances, the court may order a sale thereof. The court may only order a partition by sale if a party requests that the property be partitioned by sale. If a party does request partition by sale, without limiting the economic or non-economic factors that the court may consider in deciding whether a partition in kind of all of the property or some of the property as provided for in Section 2-202 can be made without great prejudice to the owners, the court shall consider the following factors:
whether the property is able to be divided between the party or parties seeking a partition by sale, division in kind, and those seeking to remain tenants in common as well as the practicality of dividing the property in kind;

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

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

any cotenant’s particular sentimental links with or attachment to the property, including any attachments arising out of the fact that the property has ancestral, historical or other unique or special value to one or more of the co-owners;

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

the degree to which the parties have contributed their pro rata share of the property taxes, insurance, and other carrying charges associated with maintaining ownership of the real property as well as the degree to which the parties have contributed to the physical improvement or upkeep of the property, including any upkeep
related to protecting the interests of the cotenants against any person who has no legal claim to
the property but who attempts to use the property without the consent of the cotenants.

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

Comment

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

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

Courts in Texas, for example, have indicated that property should be sold at its fair market value at a partition sale. Grimm v. Beck, 237 S.W.2d 1017, 1018 (Tex. App. Ct. 1951). Many courts have held that a partition by sale should only be awarded if such a sale would be significantly more beneficial to the cotenants in economic terms than a partition in kind. Texas courts have further indicated that a partition sale should only be ordered if it is more economically beneficial to the owners than a partition in kind. See Jacobs v. Mada, 2007 TX App. Ct. Briefs 832438, Aug. 8, 2007 at **21-22. In Jacobs, the court stated: “Moreover, the purpose of partitioning real estate by sale rather than in kind, the preferred method, is to restore the maximum value of the separate property to its owners.” There are several empirical studies that demonstrate that if property is sold under the type of forced sale conditions under which
property is often sold under a partition sale it will typically sell at a severe discount from fair market value prices. Further, courts in many other areas of the law have distinguished between forced sale value and fair market value. Therefore, one must consider the specific type of sales conditions under which property would be sold at a partition sale in order to evaluate whether or not the winning bid is likely to be at fair market value and whether the current owners would end up better off economically from a partition sale as opposed to a division in kind.


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

Comment


SECTION 2-203. SALE OF PART OR WHOLE OF PROPERTY; APPRAISAL.

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

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

Comment

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

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

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

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

SECTION 2-2045. APPOINTMENT OF COMMISSIONERS.

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

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

(c) If the court appoints commissioners, these commissioners must be disinterested and in
any case may not be any of the following: None of the following persons shall be appointed a
commissioner under this title:

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

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

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

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

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

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

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

Comment

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


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

SECTION 3-301. BUYOUT WHEN PARTITION IN KIND DEEMED INEQUITABLE. Where the court has determined that the real property, or any portion of it, may not be partitioned by division without great prejudice to all of the owners under Section 2-201 or Section 2-202, any one or more of the parties may inform the court within a time so fixed by the court of their desire to purchase the property or the separate portion of it that could not be partitioned by division without great prejudice to all of the owners.

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

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

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

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

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

Comment

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

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

Should the court have discretion to deny the buyout right altogether in cases in which two or more parties in opposition to each other express an interest in exercising the buyout right or should the courts be required to conduct a private sale if two or more parties express an interest in purchasing the property?
ARTICLE 4

SALES PROCESS

SECTION 4-401. PUBLIC SALES OR PUBLIC AUCTIONS.

(a) If a court orders a sale under this part whether of a part of the real property or of the whole, the court should order that the property be sold at a public sale unless the court sets forth reasons that establish that a sale at a public auction would be more just, fair, and commercially reasonable under the circumstances. Should the court order a public sale and the parties reach agreement upon a licensed real estate broker to list the property, the court shall appoint this real estate broker to conduct the sale of the property. If the parties cannot reach agreement with respect to the appointment of a licensed real estate broker within ten (10) days of the court’s partition by sale order, the court shall appoint a licensed real estate broker to conduct the sale after consulting with the parties. Upon appointing the licensed real estate broker, the court shall establish a commercially reasonable real estate brokerage commission that the real estate broker shall be entitled to be paid from the proceeds of the sale of the property.

(b) If the property does not sell for at least the appraised value within the time period provided for a public sale, the court upon further hearing may either revalue the property and approve the highest outstanding offer, if any, that equals or exceeds the revaluation price, or revalue the property and order that the property continued to be listed for a period not to exceed three months, or order that the property be sold at a public auction within sixty (60) days of the hearing.

(cb) If the court orders that any part of the real property or the whole is to be sold at a public auction, the court shall set the terms and conditions of the sale. The court shall set a
reserve price that may not be less than eighty-five (85) percent of the court-approved appraised value of the property that is to be sold. If it appears to the court that the property subject to partition by sale any of the premises will not sell for eighty-five percent of the amount of the valuation thereof, the court upon further hearing may either revalue the property and approve the highest outstanding offer, if any, that equals or exceeds eighty-five percent of the revaluation price or order a new public auction new sale.

Comment

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

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

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

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

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

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

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

(3) The legal representatives' attorney of any party.

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

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

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

Comment

Cal. Code Civ. Proc. § 873.690

SECTION 4-403. COMMISSIONERS’ REPORT OF SALE.

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

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

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

(2) The name of the purchaser.

(3) The sales price.

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

(5) Any amounts payable to lienholders.

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

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

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

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

Comment

Cal. Code Civ. Proc. § 873.710

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

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

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

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

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

Comment

Cal. Code Civ. Proc. § 873.720

SECTION 4-405. HEARING ON MOTION.

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

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

(c) The court may vacate the sale and direct that a new sale be made if it determines any of the following:
The proceedings were unfair or notice of sale was not properly given. If there is no finding at the hearing of unfairness or improper notice, the sale may thereafter not be attacked on such grounds.

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

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

Comment

The California statute has language that allows a court to vacate a sale if the following condition is met: “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.” However, the California partition statute permits partition in the context of both real and personal property. Therefore the “10 percent on the first ten thousand dollars ($10,000)” does not make as much sense in the context of a partition sale of real property.

SECTION 4-406. INCREASED OFFERS.

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

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

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

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

Comment

Cal. Code Civ. Proc. § 873.740

SECTION 4-4047. PURCHASE BY ENCUMBRANCER OR PARTY ENTITLED TO SHARE. When a party entitled to a share of the property, or an encumbrancer entitled to have the lien of the encumbrancer paid out of the sale, becomes a purchaser, the commissioners may take a receipt for so much of the proceeds of the sale as belongs to the party or the encumbrancer.

Comment

Modeled after Oregon Rev. Stat. § 105.365. Other states such as South Dakota, Utah and Washington have nearly identical statutes.
ARTICLE 5

COURT COSTS AND FEES

SECTION 5-501. AWARD OF ATTORNEYS’ FEES COURT COSTS AND FEES.

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

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

(c) The reasonable attorney fees of any party to an action for partition of real property owned under a tenancy in common may be awarded in the court's equitable discretion if these fees were incurred for the common benefit of all of the tenants in common. The reasonableness of an attorney fee award cannot be based in any way on an arbitrary percentage of the value, and the court shall require evidence to be presented of the reasonableness of the fees sought prior to awarding any such fees and the manner in which these fees were incurred for the common benefit of all of the parties. No portion of any attorney’s fees may be assessed against any party
who contests the partition proceeding whether by appearing by court-appointed or privately
retained counsel or by appearing pro se.

Comment


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

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