

D R A F T

FOR APPROVAL

# UNIFORM PARTITION OF HEIRS PROPERTY ACT

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NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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MEETING IN ITS ONE-HUNDRED-AND-NINETEENTH YEAR  
CHICAGO, ILLINOIS  
JULY 9 - JULY 16, 2010

# UNIFORM PARTITION OF HEIRS PROPERTY ACT

*WITH PREFATORY NOTE AND COMMENTS*

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By

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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# UNIFORM PARTITION OF HEIRS PROPERTY ACT

## PREFATORY NOTE

### Introduction and Summary

The Uniform Partition of Heirs Property Act is an act of limited scope addressing a widespread, well-documented problem of the deprivation of property rights and loss of wealth that many low to middle-income owners of family real property have experienced over the past several decades. These poorer Americans find themselves subject to highly unstable ownership which stands in sharp contrast to the type of secure property rights wealthier families by and large enjoy. Further, the loss of real property-related wealth these low to middle-income families have experienced has been particularly devastating to these families given the fact that real property constitutes by far the single greatest asset that these property owners typically own unlike the much more diversified asset portfolios that wealthier families typically enjoy.

The law has made the tenancy in common, a common ownership structure under which two or more cotenants own undivided interests in particular property, the default ownership structure for two or more family members who inherit real property. But certain key features of tenancy in common ownership under the default rules create serious problems for those who seek to maintain ownership of their property for themselves and their descendants, or at least the wealth represented by such real estate holdings.

- Any tenant in common may sell his or her interest or convey it by gift during his or her lifetime without the consent of his or her fellow cotenant, making it easy for non-family members -- including real estate speculators in a number of instances -- to acquire interests in family real estate. At a tenant in common's death, his or her interest in the tenancy in common property may be transferred under a will, or if the will is not probated in time or if there is no will, under the laws of intestacy.
- A significant feature of tenancy-in-common ownership -- a feature that this Act does not disturb -- is the universal right of any cotenant to file a lawsuit petitioning a court to partition the property, even if that cotenant only recently acquired its interest in property that the other cotenants and their ancestors had owned for a long time and even if that interest is very small (*e.g.*, a 5 percent or even smaller interest).
- In resolving a partition action, the two principal remedies that a court may order are partition in kind of the property into separate sub-parcels, with each sub-parcel proportionate in value to each cotenant's fractional interest or partition by sale, in which case the property is forcibly sold in its entirety with the proceeds of the sale distributed among the cotenants, again in proportion to their relative interest in the property. In the overwhelming majority of states, statutes governing partition mandate that partition in kind is the much preferred remedy because a forced sale of one's property has always been viewed as an extraordinary remedy that

undermines fundamental property rights.

- Despite the general statutory preference for partition in kind, courts in a large number of states typically resolve partition actions by ordering partition by sale which usually results in forcing property owners off of their land without their consent. This occurs even in cases in which the property could easily have been divided in kind or when an overwhelming majority of the cotenants or interest holders had opposed partition by sale or even in some cases when the only remedy any cotenant petitioned the court to order was partition in kind and not partition by sale.
- An actual preference for a partition by sale in many states has arisen in part because courts often only consider the theoretical beneficial economic effect of ordering a partition in kind as opposed to a partition sale. The many courts that utilize this approach do not place much value on upholding basic property rights and do not take account of the non-economic value that many owners place upon their property. These non-economic values can be substantial as families often value their family real property for its ancestral and even historical significance and its capacity to provide shelter that in some cases may prevent homelessness.
- Further, courts typically order the property sold at an auction utilizing forced sale procedures that are notorious for yielding sales prices well below market value. A sale under these forced sale conditions normally economically harms the tenants in common by depriving them of the market value of their property but give the buyer an unjustified windfall because the property is acquired at a significant discount from its market value and often for fire sale prices. The forced sale conditions under which partition sales occur virtually guarantees that wealth will not be maximized for tenants in common even though judges frequently order partition sales because they claim that a partition sale will be wealth maximizing for the cotenants.
- To make matters worse, in many states, cotenants who unsuccessfully resist a request for a court-ordered partition by sale are then required to pay a portion of the attorney's fees and costs incurred by the cotenant who petitioned the court for a partition by sale, forcing them in effect to pay for the deprivation of their property rights and their resulting loss of wealth. These fees and costs are in addition to the attorney's fees they must pay the attorney they hired in their unsuccessful effort to resist the sale and maintain ownership of their property.
- Given these rules and practices that many courts utilize in partition actions, there have been a number of unscrupulous real estate speculators who have purchased very small interests in family-owned tenancy in common property with the sole purpose of seeking a court-ordered partition by sale. Often these speculators have been the winning bidder in the subsequent sale of the property even though their winning bid constituted just a fraction of the property's market value.

For these reasons, estate planners and real estate lawyers believe that tenancy-in-common ownership under the default rules represents one of the most unstable forms of real property ownership. To address the dangers of this form of ownership, these professionals routinely

advise their wealthy and legally-savvy clients to enter into privately negotiated tenancy in common agreements with their fellow cotenants or work with their other cotenants to reorganize their ownership under a different ownership structure altogether such as a limited liability company.<sup>1</sup> However, a substantial percentage of tenancy in common property owners are not able to afford the services of these professionals or do not understand the legal benefits of hiring such professionals because they do not understand the inherent risks of owning property under the default rules of the tenancy in common.

Accordingly, this Act seeks to remedy the serious problems of the deprivation of property rights and loss of wealth resulting from the default use of tenancy-in-common ownership and the rules governing the tenancy in common by providing a further set of coherent, default rules reforming the worst substantive and procedural abuses that have arisen in connection with the partition of tenancy-in-common property. Specifically, this Act imports many of the property preservation and wealth protection mechanisms already commonly used by wealthy and legally-sophisticated family real property owners as well as protections courts in other countries now afford cotenants in partition actions as a result of recent reforms, and establishes those mechanisms as the default rules for partition of real property held in a tenancy in common for two or more generations. This Act does not apply to any real property which is the subject of a written tenancy-in-common agreement which contains a provision governing the partition of the property (all such agreements typically contain such a provision) or which is owned in under any other form of ownership (*e.g.*, a joint tenancy, limited liability company, partnership, limited partnership, trust or corporation) other than the tenancy in common.

### **Widespread Issue Among Low to Moderate-Income Property Owners**

There is a subset of tenancy in common property owners who are particularly vulnerable to losing their property and significant wealth as a result of a court-ordered partition sale. Scholars and practitioners who have worked with poor and minority property owners have observed that a particularly high percentage of these owners tend to own their real property under the default rules governing tenancy-in-common ownership and not under a private agreement among the cotenants governing the ownership of the property. This phenomenon is explained in large part by the fact that many low to middle-income property owners transfer their real property by intestate succession instead of by will which is consistent with studies that have documented low will-making rates among Americans of more modest means.

The more that property is transferred from one generation to the next by intestate succession, the more likely it is for an increasingly large number of tenants in common to acquire an interest in the property, resulting in increasingly unstable ownership given that each cotenant possesses an unfettered right to request a partition by sale of the entire property irrespective of the wishes of the other cotenants. Given the prevalence of this pattern of property transfer, real property transferred from one generation to the next and held in a tenancy in common is referred to colloquially in many communities from those in the Southeast to those in Appalachia to those

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<sup>1</sup> See Thomas W. Mitchell, Stephen Malpezzi, & Richard K. Green, *Forced Sale Risk: Class, Race, and The "Double Discount"*, 37 FLA. ST. U. L. REV. (forthcoming 2010).

in Indian Country as heirs property. Families who own tenancy in common property within these communities refer to their family property as “heirs property” whether members of these families acquired their interests by intestate succession, by will, or by gift. Given the widespread usage of the term heirs property within these communities, this Act utilizes the term heirs property and defines it under Section 2 consistent with how these communities understand the term and does not restrict the term to property acquired by intestacy as usage of the term heirs may suggest in some technical sense.

Many if not most of these heirs property owners have little or no understanding of the legal rules governing partition of tenancy in common property as studies have revealed, due to the fact that many of the rules are counterintuitive. For example, many of these owners believe that their property ownership is secure because they pay property taxes, they live on the land, and they make productive use of the land. They also believe that their property may only be sold against their will if a majority or more of their other cotenants agree which gives some of these families with a large number of members with an interest in the property false confidence that their ownership is particularly secure.

They think it is inconceivable that one cotenant with a very small ownership interest can force a sale against the wishes of all other cotenants. Unfortunately, the first time that many of these owners are informed about the actual legal rules governing partition is after a partition action has been filed, and often after critical, early court rulings have been made against them. In contrast, there have been many well-documented cases in which an outside speculator who acquired a very small interest in a parcel of heirs property that had been owned by a family for decades has been able to convince a court soon after the speculator acquired its interest to order a partition by sale of the property despite the fact that the family opposed the request for a partition by sale and despite the family’s longstanding ownership. In short, the law of partition and of partition sales often functions to give those cotenants who petition a court to force a sale upon their fellow cotenants an eminent domain-like power of condemnation. Unlike eminent domain, however, under a partition sale, fair market value compensation need not be paid to those who end up losing ownership of their property at the conclusion of the forced sale.

### **Partition Sales and Land Loss in Certain Select Communities:**

African-Americans have experienced tremendous land loss over the course of the past century. For example, although African-Americans acquired between 16 and 19 million acres of agricultural land between the end of the Civil War and 1920, African-Americans retain ownership of approximately just seven million acres of agricultural land today. Scholars and advocates who have analyzed patterns of landownership within the African-American community agree that partition sales of heirs property have been one of the leading causes of involuntary land loss within the African-American community. A considerable body of legal scholarship has highlighted the fact that partition sales have been a leading cause of African-American land loss.<sup>2</sup> Different newspapers and news services have published several articles

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<sup>2</sup> See, e.g., THE EMERGENCY LAND FUND, INC., THE IMPACT OF HEIR PROPERTY ON BLACK RURAL LAND TENURE IN THE SOUTHEASTERN REGION OF THE UNITED STATES (1980). See also Phylliss Craig-Taylor, *Through a Colored*

documenting the manner in which particular African-American families have lost land that had been in their families for generations after an outsider had acquired a small interest from a family member and then in short order was able to convince a court to order the property sold at a partition sale. The Associated Press's 2001 award winning series on African-American land loss entitled *Torn From the Land* brought national attention to the manner in which partition sales have stripped African-American families of large amounts of land and wealth.<sup>3</sup>

As a result of this legal scholarship and media attention, the American Bar Association's Section on Real Property, Trust and Estate Law established its Property Preservation Task Force several years ago. Along with the public interest law firms and community-based organizations which have been working on heirs property issues for decades, the A.B.A.'s task force has been working to decrease the incidence of forced sales of heirs property that has so negatively impacted African-American and other poor and minority property owners.<sup>4</sup> Nevertheless, the various organizations that have been working on addressing heirs property issues will continue to wage an uphill battle until the law governing the partition of heirs property is reformed to make it more just and to make tenancy-in-common ownership more stable.

Although the issue of the substantial loss of African-American land due to partition sales has received more national attention than the issue of land loss in other communities that has resulted from partition sales, it is important to recognize that forced partition sales have negatively impacted other communities as well, especially other low-income and low-wealth communities that have had little understanding of the default rules governing partition of tenancy in common property. For example, Mexican-Americans lost hundreds of thousands of acres of land as a result of partition sales of their community-owned property in the aftermath of the Mexican-American War when many land claims were settled by questionable means by federal officials under the Treaty of Guadalupe Hidalgo. In most instances, the land was sold for a price that was far below the market value of the land.<sup>5</sup> This occurred in part because, like heirs property owners today, the members of the community who had rights to the land prior to the partition sales were not able to bid effectively at the auctions because they were land rich but

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*Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 WASH U. L.Q. 737 (2000); Chris Kelley, *Stemming the Loss of Black Owned Farmland Through Partition Action -- A Partial Solution*, 1985 ARK. L. NOTES 35; Harold A. McDougall, *Black Landowners Beware: A Proposal for Statutory Reform*, 9 N.Y.U. REV. L. & SOC. CHANGE 127 (1979-1980); Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505 (2001); Faith Rivers, *Inequity in Equity: The Tragedy of Tenancy in Common for Heirs' Property Owners Facing Partition in Equity*, 17 TEMP. POL. & CIV. RTS. L. REV. 1, 58 (2007).

<sup>3</sup> See, e.g., Todd Lewan & Dolores Barclay, *Quirk in Law Strips Blacks of Land*, TENNESSEAN, Dec. 11, 2001, at 8A.

<sup>4</sup> To date, the Property Preservation Task Force has made available to the public some materials that can be helpful to those who want to stabilize their ownership of tenancy in common property. These materials include a sample tenancy in common agreement and a document addressing the ways in which limited liability companies can be used to avoid land loss. See Section of Real Property, Trust and Estate Law: Property Preservation Task Force, <http://www.abanet.org/dch/committee.cfm?com=RP018700> (last visited March 10, 2010).

<sup>5</sup> WILLIAM DEBUYS, ENCHANTMENT AND EXPLOITATION: THE LIFE AND HARD TIMES OF A NEW MEXICO MOUNTAIN RANGE 178, 180, 184, 190 (1985).

cash poor.<sup>6</sup>

Property owners in other communities also have been impacted. For example, in parts of Appalachia, heirs property has been hypothesized to be correlated with, and a cause of, the persistence of poverty.<sup>7</sup> Case studies suggest that heirs property owners in Appalachia are often concerned that one of their fellow cotenants might sell their interest to a wealthy buyer who will request a court to order the property partitioned by sale and then will purchase the property at the auction.<sup>8</sup> Some American Indians have also had their property sold against their will at partition sales. Today, much of the land that American Indians own consists of heirs property. Legislative reforms geared at addressing these heirs property issues in Indian Country have largely failed. The latest reform effort, the American Indian Probate Reform Act of 2004 has yet to be fully tested.<sup>9</sup> One of the more controversial aspects of AIPRA from the perspective of many Native Americans involves statutory rules that enable the Interior Department to conduct forced sales of small fractional interests in commonly owned Indian trust or restricted land without the consent of the co-owners.<sup>10</sup>

Heirs property ownership has presented vexing problems to property owners in cities such as New Orleans. In New Orleans, many poor property owners were not able to draw upon governmental programs such as the “Road Home” program administered by the Department of Housing and Urban Development that were established in the wake of Hurricane Katrina to provide financial assistance to property owners who had been harmed. A significant percent of these poor property owners owned heirs property which created merchantable title problems that needed to be resolved before the property owners could qualify for the governmental programs. These problems could not be resolved without hiring attorneys whom most of these property owners could not afford in contrast to the surprisingly large number of wealthy heirs property owners who were able to hire attorneys to resolve their title problems. As in rural areas, partition sales have also resulted in the deprivation of property rights and the loss of wealth in urban areas undergoing economic improvement.

### **Partition Sales and Loss of Wealth**

Those who own tenancy in common property under the default rules are not only at risk of losing their real property at a forced partition sale, but also are in danger of losing a significant portion of their wealth. In many states, a court will order a partition by sale under an

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6 David Benavides & Ryan Golten, *Righting the Record: A Response to the GAO's 2004 Report Treaty of Guadalupe Hidalgo: Findings and Possible Options Regarding Longstanding Land Grant Claims in New Mexico* 48 Nat. Resources J. 857, 886 (2008).

7 B. James Deaton, *Intestate Succession and Heir Property: Implications for Future Research on the Persistence of Poverty in Central Appalachia*, 41 JOURNAL OF ECONOMIC ISSUES 927 (2007).

8 B. James Deaton, Jamie Baxter, & Carolyn S. Bratt, *Examining the Consequences and Character of “Heir Property”*, 68 ECOLOGICAL ECONOMICS 2344, 2350 (2009).

9 25 U.S.C. §§ 2201-2221 (2008).

10 Douglas Nash & Cecelia Burke, *Passing Title to Tribal Lands: Existing Federal and Emerging Tribal Probate Codes*, THE ADVOCATE (Idaho), May 2007, at 26.

“economics-only” test in which the court considers the hypothetical fair market value of the property in its entirety as compared to the fair market value of the sub-parcels that would result from a partition in kind. If the court finds that the fair market value of the property as a whole is greater than the aggregated fair market value of the sub-parcels, the court will order a partition by sale. Under this approach, the tenants in common theoretically should receive an economic benefit from the partition by sale.

In fact, most tenants in common are economically harmed when a court orders a partition by sale. First, the courts usually order the property sold at auctions in which the property is sold utilizing the procedures used for forced sales such as a sale under execution. These forced sales are notorious for selling property well below the fair market value of the property which is ironic because judges often order the partition sale in the first instance because they claim that the cotenants will receive an economic benefit based upon an assumption that the sale will yield a fair market value price. When auction sales are challenged for yielding low sales prices, courts rarely overturn such sales as most courts utilize a “shock the conscience” standard to evaluate the sale. Under this standard, sales have been confirmed even though the property sold for twenty percent or less of the market value of the property even though the court ordered a partition sale in the first instance because it indicated that a partition sale would likely provide the cotenants with an economic benefit.

Next, a number of fees and costs must first be paid to others before the remaining proceeds of a sale are distributed to the tenants in common. These fees often include costs incurred in selling the property including the fees of court-appointed commissioners or referees (often 5 percent or more of the sales price), surveyor fees, and attorneys’ fees which usually constitute 10 percent of the sales price in the many states that permit such an attorney’s fee award in a partition action. At the time a court orders a partition by sale under an economics-only test, these fees and costs are not taken into account although they can in fact be quite substantial and undermine any hypothetical economic benefit a cotenant would receive from a partition sale.

Poorer families who own heirs property often lose significant wealth when their property is sold at a partition sale. This occurs because these heirs property owners are not able to bid competitively at the auction because they are unable to secure any financing to make an effective bid and because they are cash poor. Banks and other lending institutions will not accept a partial interest in a tenancy in common as collateral to secure a loan and most of these heirs property owners cannot otherwise obtain financing because they often have few other assets to offer as collateral to secure a loan. Given that partition sales often attract few bidders, an auction of heirs property that is conducted without any bids made by cotenants who are members of a family is likely to yield a particularly low sales price.

Partition sales that result in an involuntary loss of property rights as well as in a potential loss of wealth may be very disadvantageous, and even devastating to one or more of the cotenants and their descendants, depending on the facts of the particular case. The purpose of this Act is to ameliorate, to the extent feasible, the adverse consequences of a partition action when there are some cotenants who, for various reasons, desire to retain possession of some or

all of the land, and other cotenants who would like the property to be sold. At the same time, the Act recognizes the legitimate rights of each cotenant to secure his, her, or its relative share of the current market value of the property and to seek to consolidate ownership of the property. The Act makes every effort to accomplish these goals.



1 (i) 20 percent or more of the interests are held by cotenants who are  
2 related by blood, marriage, or adoption;

3 (ii) 20 percent or more of the interests are held by an individual who  
4 acquired title from an ascendant, a descendant, or a collateral whether living or deceased; or

5 (iii) 20 percent or more of the cotenants are related by blood, marriage, or  
6 adoption.

7 (6) “Partition by sale” means a court-ordered sale of the entire heirs property, whether by  
8 auction or open-market sale conducted in the manner described in Section 10.

9 (7) “Partition in kind” means the division of heirs property into physically distinct and  
10 separately titled parcels.

11 (8) “Record” means information that is inscribed on a tangible medium or that is stored  
12 in an electronic or other medium and is retrievable in perceivable form.

### 13 **Comment**

14 1. Section 2(1): Common usage defines ancestor as “one from whom a person lineally  
15 descended.” *Wills v. Le Munyon*, 107 A. 159, 161 (N.J. Ch. 1919). However, statutes of descent  
16 often narrow the term to “any one from whom an estate is inherited.” *Id.* Thus, use of the term  
17 ancestor could be interpreted to exclude property acquired from a living person. In contrast,  
18 ascendant encompasses anyone who precedes an individual in lineage such as an individual’s  
19 parents or grandparents, whether living or deceased. The term ascendant is used in a number of  
20 statutes encompassing many different subject matter areas. *See, e.g.*, ARK. CODE ANN. § 28-9-  
21 202 (2009); CONN. GEN. STAT. § 45a-755 (2010); IOWA CODE § 428A.2 (2010); FLA. STAT. §  
22 732.403 (2009); LA. CIV. CODE ANN. art. 1301 (2009); MISS. CODE ANN. § 93-13-253; P.R.  
23 LAWS ANN. TIT. 31 § 2413 (209); TEX. ESTATES CODE ANN. § 676 (Vernon 2009).

24  
25 2. Section 2(2): Collaterals include an individual’s sisters, brothers, aunts, uncles,  
26 nieces, and nephews. *See, e.g., In re Estate of Thiemann*, 992 S.W.2d 255, 256 n.3 (Mo. Ct.  
27 App. 1999).

28  
29 3. Section 2(3): Descendants include, for example, an individual’s children and  
30 grandchildren.  
31

1           4. Sections 2(1)-2(3): The specific classes of people who may be considered ascendants,  
2 descendants, or collaterals shall be defined under state law.

3  
4           5. Section 2(5): Heirs property is defined in this act to include only a subset of tenancy  
5 in common property. At minimum, for tenancy in common property to be considered heirs  
6 property, title must be acquired by at least one of the cotenants in an intergenerational transfer  
7 from a family member of that cotenant who was either that cotenant’s ascendant, descendant, or  
8 collateral at the time title was transferred. Further, the act does not apply to tenancy in common  
9 property in which all of the cotenants are subject to a binding agreement, including binding  
10 agreements that run to successors and assigns, that governs the partition of the property. Tenancy  
11 in common property that is acquired by investors in part to qualify for federal like-kind exchange  
12 treatment under Section 1031 of the Internal Revenue Code and that is subject to an agreement  
13 governing the partition of the property is excluded from this act. Furthermore the act does not  
14 apply to “first generation” tenancy in common property established under the default rules and  
15 still owned by the original cotenants even if there is no agreement in a record among the  
16 cotenants governing the partition of the property.

17  
18           6. Section 2(5)(A): If tenants in common acquire their interests through a deed or a will  
19 that does not govern the manner in which the tenancy in common property may be partitioned,  
20 the deed or will alone shall not be construed to be an agreement in a record among all the tenants  
21 in common that governs the partition of the property within the meaning of Section 2(4)(A).

22  
23           7. Joint tenancy property is not covered by this act. In order for any real property that  
24 was initially owned by two or more individuals as joint tenancy property to be covered by this  
25 act, one or more of the joint tenants must sever the joint tenancy in accordance with the  
26 requirements of state law. Once a joint tenancy is severed, this act may apply if the property is  
27 determined to be heirs property under this act even if two or more individuals who had formerly  
28 been joint tenants prior to severance of the joint tenancy and who did not take any action to sever  
29 the joint tenancy remain joint tenants with one another after severance with respect to a particular  
30 interest in the tenancy in common. *See* 7-51 RICHARD R. POWELL, POWELL ON REAL PROPERTY §  
31 51.04(1)(a) (Michael Allen Wolf ed., 2009). *See also* Carmack v. Place, 535 P.2d 197 (Co.  
32 1975).

33  
34           8. Section 2(8): Information that constitutes a “record” under this Act need not be  
35 recorded.

36  
37           **SECTION 3. APPLICABILITY.**

38  
39           (a) In an action to partition real property under [insert reference to general partition  
40 statute] the court shall determine whether the property is heirs property. If the court determines  
41 that the property is heirs property, the property must be partitioned under this [act] unless all of

1 the cotenants otherwise agree in a record.

2 (b) This [act] supplements [insert reference to general partition statute] and, if an action  
3 is governed by this [act], replaces provisions of [insert reference to general partition statute] that  
4 are inconsistent with this [act].

5 **Comment**

6 1. Section 3(a): After this act becomes applicable to a partition action which has been  
7 filed, a final order of a court partitioning any real property held under a tenancy in common is  
8 subject to challenge if the court did not determine whether the real property in question is heirs  
9 property as defined under this [act].

10  
11 2. Section 3(a): After a court has determined that the property in question in a partition  
12 action is heirs property, all of the cotenants may agree to partition the property utilizing an agreed  
13 upon method or procedure that is different from the procedures required by this act provided that  
14 the agreement is contained in a record.

15

16 **SECTION 4. NOTICE BY POSTING.**

17 (a) This [act] does not limit or affect the method by which service of a complaint in a  
18 partition action may be made.

19 (b) If the plaintiff seeks an order of notice by publication and the court determines that  
20 the property may be heirs property, the plaintiff, not later than 10 days after the court determines  
21 that the property may be heirs property, shall post [and maintain while the action is pending] a  
22 conspicuous sign on the property that is the subject of the action. The sign must state that the  
23 action has commenced and identify the name and address of the court and the common  
24 designation by which the property is known. The court may require the plaintiff to publish the  
25 name of the plaintiff and the known defendants on the sign.

26 **Comment**

27 1. Section 4(b): Under certain circumstances, some state statutes require that a sign or

1 notice be posted in a conspicuous place on real property that may be subject to a forced sale. *See,*  
2 *e.g.,* ARIZ. REV. STAT. ANN. § 42-18266 (2010) (requiring the placing of a sign under certain  
3 circumstances in a conspicuous place on property that is subject to foreclosure for delinquent  
4 taxes describing the property, indicating that the property is subject to foreclosure, and giving  
5 notice about the manner in which the owner may redeem the tax lien) ; CAL. CIV. CODE § 2924f  
6 (West 2010) (requiring under most circumstances in nonjudicial foreclosures by power of sale  
7 that a copy of the notice of sale containing relevant information about the power of sale action be  
8 posted in a conspicuous place on the real property in question).  
9

10           **SECTION 5. [COMMISSIONERS].** If the court appoints [commissioners] pursuant to  
11 [insert reference to general partition statute], each [commissioner] must, in addition to the  
12 requirements and disqualifications applicable to [commissioners] in [insert reference to general  
13 partition statute], be disinterested, impartial, and neither a party to nor a participant in the action.

14 ***Legislative Note:** The term commissioner is used by nearly every state. However, there are*  
15 *some exceptions. For example, California uses the term referee and Georgia uses the term*  
16 *partitioner.*  
17

18           **SECTION 6. DETERMINATION OF VALUE.**

19           (a) Except as otherwise provided in subsections (b) and (c), if the court determines that  
20 the property that is the subject of the partition action is heirs property, the court shall determine  
21 the fair market value of the property by ordering an appraisal pursuant to subsection (d).

22           (b) If all cotenants have agreed to the value of the property, the court shall adopt that  
23 value.

24           (c) If the court determines that the evidentiary value of the appraisal is outweighed by the  
25 cost of the appraisal, the court, after an evidentiary hearing, shall determine the fair market value  
26 of the property and notify the parties of the value.

27           (d) If the court orders an appraisal, the court shall appoint a disinterested real estate  
28 appraiser licensed in this state to determine the fair market value of the property assuming sole

1 ownership of the fee simple estate. On completion of the appraisal, the appraiser shall file a  
2 sworn or verified appraisal with the court.

3 (e) If an appraisal is conducted pursuant to subsection (d), not later than 10 days after the  
4 appraisal is filed, the clerk of the court shall send notice to each party with a known address,  
5 stating:

6 (1) the appraised fair market value of the property;

7 (2) that the appraisal is available at the clerk's office; and

8 (3) that a party may object to the appraisal not later than 30 days after the notice  
9 is sent, stating the grounds for the objection.

10 (f) If an appraisal is filed with the court pursuant to subsection (d), the court shall  
11 conduct a hearing to determine the fair market value of the property no sooner than 30 days after  
12 a copy of the notice of appraisal is sent to each party under subsection (e), whether or not an  
13 objection to the appraisal is filed under subsection (e)(3). In addition to the court-ordered  
14 appraisal, the court may consider any other evidence of value that is offered by a party.

15 (g) After the hearing under subsection (f), but before considering the merits of the  
16 partition action, the court shall determine the fair market value of the property and notify the  
17 parties of the value.

### 18 **Comment**

19  
20 1. Section 6(a): Some states require that any property that may be subject to partition by  
21 sale shall first be appraised before a court decides whether to order partition in kind or partition  
22 by sale. *See, e.g.*, N.M. STAT. § 42-5-7 (2009). Other states require that nearly all real property  
23 that is to be sold under an order or a judgment of a court must be appraised before the property is  
24 sold. *See, e.g.*, KY. REV. STAT. ANN. § 426.520 (West 2010).

25  
26 2. Section 6(b): The court may not adopt a monetary value for the property that only  
27 some of the cotenants but not others have agreed upon even if the only cotenants that have not

1 agreed to the value of the property are cotenants that are unknown, unlocatable, or otherwise  
2 remain unascertained.

3  
4 2. Section 6(d): Some states require that property that is to be sold by partition by sale be  
5 appraised by one or more disinterested persons under certain circumstances. *See, e.g.*, MINN.  
6 STAT. § 558.17 (2009) (providing that the court order property subject to partition by sale to be  
7 appraised by two or more disinterested persons before the property is sold if the court orders the  
8 property sold at a private sale instead of at a public auction). Other states require a person a court  
9 may appoint to appraise real property under certain statutes to be state-certified and in good  
10 standing with the state appraisal authorities. *See, e.g.*, OKLA. STAT. tit. 52, § 318.5 (2009).

11  
12 3. Section 6(d): State statutes and case law typically refer to one person’s exclusive  
13 ownership of property as “sole ownership.” *See, e.g.*, CAL. CIV. CODE § 681 (2010) (The  
14 ownership of property by a single person is designated as a sole or several ownership); FLA.  
15 STAT. § 711.502 (2009) (“Only individuals whose registration of a security shows sole ownership  
16 by one individual . . . may obtain registration in beneficiary form”); MONT. CODE ANN. 70-1-305  
17 (2009); S.D. CODIFIED LAWS § 43-2-10 (2009) (“The ownership of property by a single person is  
18 designated as a sole or several ownership.”). *See also In re Robertson*, 203 F.3d 855, 860 (5th  
19 Cir. 2000) (when partitioning former community property, the assets are divided between the  
20 former spouses and “the assets of which each former spouse acquires sole ownership is  
21 reclassified by law as the separate, exclusive property of that former spouse.”).

## 22 23 **SECTION 7. COTENANT BUYOUT.**

24 (a) Following the determination of value under Section 6, the court shall notify the  
25 parties of the procedures set forth in this section for cotenant buyout.

26 (b) The interest of any cotenant that requested partition by sale is available for purchase  
27 by other cotenants.

28 (c) Not later than 15 days after the court gives notice pursuant to subsection (a), any  
29 cotenant that did not request partition by sale may give notice to the court of its desire to make  
30 the cotenant’s entire interest available for purchase under this section. If the interests of all  
31 cotenants that did not request partition by sale are made available for purchase under this  
32 subsection, the court shall order the property sold pursuant to section 10.

33 (d) On motion of any cotenant that did not request partition by sale that is made not later

1 than 30 days after the court gives notice pursuant to subsection (a), the following interests shall  
2 also be available for purchase, but only all of the interests as a single unit:

3 (1) the interest of any cotenant that timely offers its interests for sale under  
4 subsection (c); and

5 (2) the interest of any cotenant that is the subject of default [entry][judgment].

6 (e) Not later than 45 days after expiration of the period in subsection (d), any cotenant  
7 whose interest is not available for purchase pursuant to subsections (b) or (c) may give notice to  
8 the court that it elects to purchase the available interests. The purchase price for each available  
9 interest is the value determined under Section 6 multiplied by the fractional interest to be  
10 purchased. Each electing cotenant may buy the portion of the available interests equal to that  
11 electing cotenant's existing percentage ownership divided by the total percentage ownership of  
12 all cotenants electing to buy.

13 (f) After the expiration of the period in subsection (e), the court shall:

14 (1) determine the interest that each electing cotenant is entitled to buy and the  
15 purchase price; or

16 (2) if no cotenant elects to buy, the court shall proceed under Section 8(a) and (b).

17 (g) If the order is issued pursuant to subsection (f)(1), the court shall set a date, not  
18 sooner than 60 days from the determination, by which electing cotenants shall pay the purchase  
19 price into the court. After this date:

20 (1) If all electing cotenants pay, the court shall issue an order reallocating all of  
21 the cotenants' interests and disburse the amounts held by it to the persons entitled thereto.

22 (2) If no electing cotenant pays, the court shall proceed under Section 8(a) and (b)

1 as if the available interests were not purchased.

2 (3) If one or more but not all of the electing cotenants do not pay, the court, on  
3 motion, shall issue an order that determines the percentage interests remaining and the purchase  
4 price.

5 (h) After the court issues an order under subsection (g)(3), the following rules apply:

6 (1) Not later than 20 days after the date of the order, each of the electing  
7 cotenants that paid may elect to purchase all of the remaining available interests by paying the  
8 price into the court.

9 (2) If more than one cotenant pays the price for all the remaining available  
10 interests, each buys the part of the remaining available interests that is equal to that cotenant's  
11 original percentage ownership divided by the total original percentage interest of all cotenants  
12 that paid the price pursuant to this subsection, and the court shall issue an order reallocating all of  
13 the cotenants' interests, disburse the amounts held by it to the persons entitled thereto, and  
14 promptly refund any excess payment held by it.

15 (3) If no cotenant pays the price for the remaining available interests, the court  
16 shall determine whether the funds paid into court are sufficient to purchase the entire interests of  
17 all cotenants that petitioned for sale.

18 (4) If the funds are sufficient, the court shall allocate the entire interests of all  
19 cotenants that petitioned for sale among the paying cotenants, disburse the amounts held by it to  
20 the persons entitled thereto, and promptly refund any excess payment held by it.

21 (5) If the funds are not sufficient, the court shall proceed under Section 8(a) and  
22 (b) as if all the available interests of cotenants had not been purchased.

1  
2 **Comment**  
3

4 1. This Act includes a buyout of interests mechanism as the first preferred alternative to  
5 partition by sale for reasons of judicial economy (i.e. because it may allow the court to avoid both  
6 partition in kind as well as partition by sale, and the relatively greater associated time and costs  
7 of the two latter remedies), to encourage consolidation of ownership, and to accomplish the  
8 larger goal of establishing a default, statutory approach to partition of inherited property that  
9 mirrors the best practices used for family property owned by the wealthy and legally-aware.  
10 Private tenancy-in-common agreements, whether for family property or commercial property,  
11 virtually always provide that a cotenant that wishes to exit ownership must first offer his interest  
12 for sale to other cotenants.  
13

14 2. Although this section is one of the longer sections of the Act, it is streamlined  
15 compared to most, if not all, buyout provisions in written private agreements such as limited  
16 liability company operating agreements, and tenancy-in-common agreements, and compared to  
17 buyout statutes in those states which have them. This streamlined buyout mechanism is  
18 consistent with the default rule nature of the overall Act.  
19

20 Most of the detail of the section arises from the need to describe the procedural steps, and  
21 different mathematical proportions, applicable at various stages in the buyout process, to ensure  
22 uniform implementation and to guide courts, which may not be familiar with buyout contracts or  
23 their corporate cousins, subscription agreements. Overall, however, implementation of a buyout  
24 procedure in a given case is likely to be by far the fastest and simplest remedy to implement, both  
25 in comparison with partition in kind and partition by sale. Even allowing for motion practice, the  
26 expectation is that the buyout provisions of this Act could be and typically should be completed  
27 within a *maximum* of four to six months after the court establishes the value of the underlying  
28 real property (which must be done in any case under the Act).  
29

30 3. Only those cotenants that seek partition by sale are mandatorily subject to the buyout.  
31 A cotenant who seeks partition by sale has already determined that he or she wishes to be  
32 divested of any portion of the real property owned in common. This is not necessarily true of  
33 cotenants that seek partition in kind or cotenants that are respondents in the partition proceeding.  
34 A principal historical justification for the remedy of a forced sale in many contexts has been to  
35 allow owners no longer desiring to participate in ownership to exit. A buyout mechanism such as  
36 the one in this section accomplishes this purpose without divesting owners who affirmatively  
37 indicate their preference for continuing ownership.  
38

39 4. The section contemplates that, upon prompt motion, cotenants who did *not* seek  
40 partition by sale also may be *allowed to offer* their interests for sale and that the interests of  
41 defaulting cotenants *may be* mandatorily subject to the buyout. This provision is intended to  
42 foster consolidation of interests, while at the same time allowing the court to determine whether  
43 expanding the pool of interests to be purchased is appropriate or practical under the  
44 circumstances. And, while it is always true that cotenants could buy and sell interests outside of

1 a court proceeding, the statutory buyout provision has the benefit of using an appraised, court-set  
2 valuation, and a clear process with short timeframes.

3  
4 5. The buyout section in the Act contemplates that the price for interests made available  
5 for purchase (mandatorily or with leave of court) will be the simple result of multiplying the  
6 court-determined value of the entire real property (usually appraised value, but sometimes a  
7 value agreed on by all parties) by the partial interest made available for purchase (whether  
8 expressed as a fraction or as a percentage).

9  
10 So, for example, if John Smith, who owns a 10% cotenant interest in Greenacre, which is  
11 heirs property, brings an action for partition by sale, and the appraised value of Greenacre  
12 accepted by the court is \$100,000, then John Smith's cotenancy interest will be priced at \$10,000  
13 for statutory buyout purposes, and each of the other cotenants will have the right to purchase a  
14 pro rata share of Smith's cotenancy interest for a pro rata share of the \$10,000 price.

15  
16 Note that this likely overvalues the Smith interest under classic concepts of valuation  
17 (because the \$10,000 price disregards the discount for Smith owning only a 10%, minority  
18 interest, and disregards the further discount typically applied by valuers to interests in tenancy  
19 in common property because of its inherently unstable characteristics). The drafters concluded,  
20 however, that the simplicity of the math and the quid pro quo of somewhat enhanced value  
21 compensated for making Smith's interest mandatorily subject to the buyout by statute.

22  
23 6. In overview, the buyout section of this Act contemplates that the court will:

- 24
- 25 • establish the value of the entire real property;
  - 26 • allow cotenants other than the petitioner for sale 45 days to express interest in purchasing  
27 the interests available for purchase (so the court can then determine pro rata shares and  
28 prices for each purchaser, using simple mathematical formulas);
  - 29 • give the purchasers who timely expressed interest in buying an additional, brief period to  
30 be determined by the court (at least 60 days, but preferably not much longer, due to the  
31 fact that property values are a function of market conditions over time) in which to pay  
32 the purchase price into court;
  - 33 • if there is a failure of some purchasers to timely post money, the court will conduct a  
34 quick, 20-day, "savings" round in which any purchaser who timely posted money can  
35 buy the entire interest of all purchasers who failed timely to post money (and if more than  
36 one purchaser "saves" the buyout by posting such entire amount, then the cost and  
37 interest in question is split pro rata among those purchasers who act to save the buyout);  
38 and
  - 39 • close the buyout, by paying the purchase price to the former cotenant who has been  
40 bought out, and issuing an order stating the new cotenancy interests among the remaining  
41 cotenants.
- 42

43 If the buyout fails for any reason or if there is any cotenant remaining at the conclusion of the  
44 buyout that has requested partition in kind, the Act contemplates that the court will then proceed

1 to partition in kind or partition by sale (in that order).  
2

3 7. If cotenants who did not seek partition by sale wish to sell their interests, they may  
4 notify the court of their desire to sell. On motion, these interests as well as the interest of any  
5 defaulting cotenant may be made available for sale as a unit. Such allowance, however, is  
6 subject to sufficient purchase money coming forward from buying cotenants to purchase both the  
7 petitioner for sale's interest and the other interests made available on motion. The buyout section  
8 instructs the court to favor completing a sale of the interest(s) of the petitioner(s) that are  
9 mandatorily subject to sale above a failure of the buyout due to inadequate purchase money  
10 payments by buyers for any other interests that are made available for purchase on motion of a  
11 cotenant.  
12

13 8. The pro rata share any given cotenant may purchase is equal to his original share in the  
14 tenancy in common property divided by the total share of all those cotenants that elected to buy.  
15 And the price to be paid by any given purchaser is that same fraction or percentage multiplied by  
16 the total value of the interest to be purchased.  
17

18 So, continuing with the example begun in paragraph 5, above, assume Betty Smith Jones  
19 who owned 10% of Greenacre, George Smith who owned 20% of Greenacre, and Harriet Long  
20 who owned 15% of Greenacre, were the only cotenants of John Smith who timely notified the  
21 court of their desire to purchase John Smith's 10% interest in Greenacre. The total percentage  
22 interest in Greenacre of all potential purchasers who timely gave notice of desire to buy is thus  
23 45%. The owners of the other 45% cotenancy interests in Greenacre either did not wish to  
24 purchase or did not timely respond and so become ineligible to participate in the buyout of John  
25 Smith.  
26

27 In this example Betty has a right to purchase  $10/45^{\text{th}}$  of John Smith's interest, George has  
28 the right to purchase  $20/45^{\text{th}}$  of John Smith's interest and Harriet has the right to purchase  
29  $15/45^{\text{th}}$  of John Smith's interest. The court would determine these percentages and notify each  
30 of Betty, George and Harriet of the interests they could purchase, and the related purchase price  
31 each of them would have to pay. Since John Smith's 10% interest in Greenacre was statutorily  
32 valued at \$10,000 in the example, the price to Betty is  $\$10,000 \times (10/45)$ , or \$2,222.22, the price  
33 to George is  $\$10,000 \times (20/45)$ , or \$4,444.45, and the price to Harriet is  $\$10,000 \times (15/45)$ , or  
34 \$3,333.33. Obviously minor amounts of rounding will be required in some cases, as above,  
35 where the price to be paid by George is rounded up by one penny so that John Smith can receive  
36 the full \$10,000 for his 10% interest.  
37

38 Now further assume that the court orders that all purchasers pay their respective purchase  
39 price into court 90 days after the court order is docketed, and that Betty and George timely pay  
40 their \$2,222.22 and \$4,444.45 into court, but that Harriet fails to do so. Under the buyout section  
41 of the Act, the court will then notify each of Betty and George that  $15/45^{\text{th}}$  (i.e., one-third) of  
42 John Smith's 10% interest is still available for purchase and that either Betty or George may  
43 purchase the entire such interest for \$3,333.33 by paying that further sum into court within 20  
44 days (absent which the buyout will fail and the court will proceed to determine whether partition

1 in kind is possible or whether only partition by sale is appropriate).

2  
3 Assume that each of Betty and George timely post \$3,333.33 with the court in the  
4 “savings” round (i.e., a further total of \$6,666.66, in addition to the aggregate \$6,666.67 already  
5 posted by Betty and George in the initial round). Under these circumstances, the court will allow  
6 each of Betty and George to purchase a further pro rata share (meaning pro rata as between them)  
7 of Harriet’s 15/45<sup>ths</sup> portion of John Smith’s 10% interest. In the case of Betty she may purchase  
8 a 10/30<sup>ths</sup> share of the portion Harriet failed timely to buy (Betty’s original percentage interest in  
9 Greenacre divided by the total original percentage interests of the two cotenants who timely  
10 posted money in the first buyout round and the “savings” round, Betty’s original interest of 10%  
11 plus George’s 20% interest). George, similarly, may purchase a further 20/30<sup>ths</sup> share. Betty will  
12 ultimately pay \$1,111.11 and George will ultimately pay \$2,222.22; the remaining amounts  
13 posted by each of them in the savings round will be returned to them (\$2,222.22 will be returned  
14 to Betty and \$1,111.11 will be returned to George).

15  
16 The court then issues an order in which it reallocates John Smith’s original 10% interest  
17 in Greenacre to Betty (10/45 plus [10/30 x 15/45]) and George (20/45 plus [20/30 x 15/45]), pays  
18 to John Smith the \$10,000 for his bought-out interest, and leaves the percentage interests of  
19 Harriet and the other cotenants who did not participate in the buyout unchanged. To complete  
20 the example, as a result of the order the interests of the remaining cotenants (who are satisfied to  
21 remain cotenants) are: 45% various cotenants who did not participate in the buyout and whose  
22 interests are unchanged by the buyout, 15% Harriet who attempted to participate in the buyout  
23 but could not come up with the money, and whose interest so remains unchanged by the buyout,  
24 13.333% Betty and 26.667% George.

25  
26 **SECTION 8. PARTITION ALTERNATIVES.**

27 (a) If all the interests of all cotenants that petitioned for sale that become available for  
28 purchase pursuant to Section 7 are not purchased by other cotenants or if after conclusion of the  
29 buyout under Section 7 there is any cotenant remaining that has requested partition in kind, the  
30 court shall order partition in kind unless the court finds, after consideration of the factors listed in  
31 Section 9, that partition in kind will result in [great] [manifest] prejudice to the cotenants as a  
32 group. In considering whether to order partition in kind, the court shall approve a request by two  
33 or more parties to have their individual interests aggregated.

34 (b) If the court does not order partition in kind, the court shall order partition by sale

1 pursuant to Section 10 or, if no cotenant requested partition by sale, the court shall dismiss the  
2 action.

3 (c) If the court orders partition in kind, the court may also require that one or more  
4 cotenants pay one or more other cotenants amounts so that the payments, taken together with the  
5 value of the in-kind distributions to the cotenants, will make the partition in kind just and equal.

6 (d) If the court orders partition in kind, the court shall allocate to the cotenants that are  
7 unknown, unlocatable, or are the subject of a default [entry][judgment], if their interests were not  
8 bought out pursuant to Section 7, a part of the property representing the combined interests of  
9 these cotenants as determined by the court [and this part of the property shall remain undivided].

#### 10 **Comment**

11 1. In many states, a court may order a partition in kind of part of the property and a  
12 partition by sale of the remainder. *See, e.g.*, CAL. CIV. PROC. § 872.830 (West 2010); NEB. REV.  
13 STAT. § 25-21,103 (2009). However, in a limited number of other states a court may only order  
14 either a partition in kind or a partition by sale of the whole property. *See, e.g.*, *Fernandes v.*  
15 *Rodriguez*, 761 A.2d 1283, 1289 (Conn. 2000). This act neither prescribes nor prohibits a  
16 partition in kind of part of the heirs property and partition by sale of the remainder. For example,  
17 there may be circumstances in which cotenants receiving part of the property in kind would  
18 receive substantially less than their pro rata share of the economic value of the whole property  
19 without a cash payment from the sale of the part of the property to be sold and might wish the  
20 court to retain jurisdiction for purposes of completing the partition by sale of the remaining  
21 portion of the property (rather than employing “owelty,” discussed in the next comment). It is in  
22 circumstances such as the last-mentioned case that the court should consider exercising its  
23 equitable discretion to implement a mixed remedy and to fashion such appropriate procedures as  
24 justice may require, drawing on the procedures and principles of this act. If a court decides to  
25 order such a mixed remedy, the court may consider whether, in such a process, there should or  
26 should not be a further right to buy out interests before ordering a partition by sale of part of the  
27 property.

28  
29 2. Section 8(c): This subsection provides for the remedy of “owelty” which is an  
30 equitable remedy. *See, e.g.*, CODE OF ALA. § 35-6-24 (2010); CAL. CIV. PRO. § 873.250 (West  
31 2009). Courts order owelty payments when it is not practical to physically divide an estate into  
32 equal shares, but the difference can be compensated by monetary payments. *Dewrell v.*  
33 *Lawrence*, 58 P.3d 223, 227 (Okla. Civ. App. 2002). In recent decades, courts have tended to  
34 underutilize the remedy of owelty which has resulted in property being sold by partition by sale

1 in many instances in which partition in kind could have been ordered. *See, e.g.,* Faith Rivers,  
2 *Inequity in Equity: The Tragedy of Tenancy in Common for Heirs' Property Owners Facing*  
3 *Partition in Equity*, 17 TEMP. POL. & CIV. RTS. L. REV. 1, 76 (2007) (noting that heirs property  
4 owners could obtain fair and equitable divisions of property if courts stopped taking the easy  
5 option by ordering partitions sales and utilized tools such as owelty payments). *See also* John G.  
6 Casagrande Jr., Note, *Acquiring Property through Partitioning Sales: Abuses and Remedies*, 27  
7 B.C. L. REV. 755, 778 (1986).

8  
9 3. Section 8(d): Several states have provisions whereby a court may order a partition in  
10 kind and designate a part of the property for cotenants who remain unknown or unlocatable at the  
11 conclusion of the action. *See, e.g.,* ALASKA STAT. § 09.45.290 (2010); ARK. CODE ANN. § 18-60-  
12 414 (2010); CAL. CIV. PROC. § 873.270 (West 2010); HAW. REV. STAT. § 668-9 (2010); MICH.  
13 COMP. LAWS § 3.402 (2010); N.D. CENT. CODE 32-16-12 (2010); OR. REV. STAT. § 105.245  
14 (2010); S.D. CODIFIED LAWS § 21-45-15 (2010); UTAH CODE ANN. § 78B-6-1212 (2010); WASH.  
15 REV. CODE § 7.52.080 (2010).

## 17 SECTION 9. CONSIDERATIONS FOR PARTITION IN KIND.

18  
19 (a) In determining whether partition in kind would result in [great][manifest] prejudice to  
20 the cotenants as a group, the court shall consider the following:

21 (1) whether the heirs property practicably may be divided among the cotenants;

22 (2) whether partition in kind would apportion the property in such a way that the  
23 fair market value in the aggregate of the parcels resulting from the division would be materially  
24 less than the value of the property if it were sold as a whole, taking into account the condition  
25 under which the court-ordered sale would likely occur;

26 (3) evidence of the collective duration of ownership or possession of the property  
27 by a cotenant and one or more predecessors in title or predecessors in possession to that cotenant  
28 who are or were related by blood, marriage, or adoption to that cotenant or to each other;

29 (4) a cotenant's sentimental attachment to the property, including any attachment  
30 arising because the property has ancestral or other unique or special value to the cotenant;

31 (5) the use being made of the property by a cotenant and the degree to which the

1 cotenant would be harmed if the cotenant could not continue the same use of the property;

2 (6) the degree to which the cotenants have contributed their pro rata share of the  
3 property taxes, insurance, and other expenses associated with maintaining ownership of the  
4 property or have contributed to the physical improvement, maintenance, or upkeep of the  
5 property; and

6 (7) any other relevant factor.

7 (b) The court may not consider any one factor in subsection (a) to be dispositive, but  
8 shall instead weigh the totality of all relevant factors and circumstances.

### 9 **Comment**

10 1. Under this section, a court in a partition case must consider the totality of the  
11 circumstances, including a number of economic and non-economic factors, in deciding whether  
12 to order partition in kind or partition by sale. In partition cases, a number of courts have utilized  
13 such a totality of the circumstances approach in deciding whether to order partition in kind or  
14 partition by sale. *See, e.g.,* Delfino v. Vealencis, 436 A.2d 27, 33 (Conn. 1980) (“It is the  
15 interests of all of the tenants in common that the court must consider; and not merely the  
16 economic gain of one tenant, or a group of tenants.”); Schnell v. Schnell, 346 N.W.2d 713, 716  
17 (N.D. 1984) (holding that economic and non-economic factors, including sentimental value,  
18 should be weighed by a court in a partition action); Eli v. Eli, 557 N.W.2d 405, 409-411 (S.D.  
19 1997) (citations omitted) (in explicitly adopting a totality of the circumstances test, the Supreme  
20 Court of South Dakota stated that “[o]ne’s land possesses more than mere economic utility; it  
21 ‘means the full range of the benefit the parties may be expected to derive from their ownership of  
22 their respective shares.’ Such value must be weighed for its effect upon all parties involved, not  
23 just those advocating a sale.”); Ark Land Co. v. Harper, 599 S.E.2d. 754, 761 (W. Va. 2004)  
24 (holding that “in a partition proceeding in which a party opposes the sale of property, the  
25 economic value of the property is not the exclusive test for deciding whether to partition in kind  
26 or by sale. Evidence of longstanding ownership, coupled with sentimental or emotional interests  
27 in the property, may also be considered in deciding whether the interests of the party opposing  
28 the sale will be prejudiced by the property’s sale.”).

29  
30 2. Section 9(a)(2): Under this subparagraph, among other possible considerations of the  
31 condition under which the property may be sold, the court must assess whether the cotenants  
32 would receive a greater economic benefit from a sale of the whole property due to possible  
33 economies of scale that would result from selling the whole property that could not be captured  
34 from partition in kind of the property. In conducting this assessment, a court must take into  
35 consideration the type of sales condition under which any court-ordered sale would occur as

1 property that is sold at a forced sale such as a sale upon execution or a foreclosure sale typically  
2 results in property being sold at prices that are substantially below the fair market value of the  
3 property. Such a resulting discount from the fair market value of the property due to the forced  
4 sale conditions may render partition in kind to be as or more economically beneficial to the  
5 cotenants than partition by sale of the whole property even in instances in which economies of  
6 scale could be realized if the whole property were to be sold instead under fair market value  
7 conditions. *See generally*, Thomas W. Mitchell, Stephen Malpezzi, & Richard K. Green, *Forced*  
8 *Sale Risk: Class, Race, and The “Double Discount”*, 37 FLA. ST. U. L. REV. (forthcoming 2010).

9  
10 3. Section 9(a)(3): Under this subparagraph, the court shall consider, among other  
11 considerations, longstanding possession of the property by any cotenant or certain predecessors  
12 in possession to that cotenant. Adverse possession, for example, raises this issue. Adverse  
13 possession statutes require possession over the course of a number of years before a person may  
14 actually take title to the property. *See, e.g.*, 735 ILL. COMP. STAT. 5/13-101 (2009) (requiring  
15 twenty years of adverse possession); WIS. STAT. §§ 893.25, 893.26 (2008) (requiring twenty  
16 years or ten years if color of title). Thus, because many states allow tacking of possession, it is  
17 possible that a cotenant may have acquired possession of the property from an ascendant who had  
18 been in possession of the property for many years despite the fact that the statute of limitations  
19 for adverse possession had not run thereby preventing the ascendant in prior possession from  
20 obtaining valid title to the property.

21  
22 4. Section 9(a)(4): For many families or communities, real property ownership has  
23 important ancestral or historical meaning. *See, e.g.*, *Chuck v. Gomes*, 532 P.2d 657, 662 (Haw.  
24 1975) (Richardson, C.J., dissenting):

25  
26 “[T]here are interests other than financial expediency which I recognize as essential to  
27 our Hawaiian way of life. Foremost is the individual's right to retain ancestral land in  
28 order to perpetuate the concept of the family homestead. Such right is derived from our  
29 proud cultural heritage. . . . [W]e must not lose sight of the cultural traditions which  
30 attach fundamental importance to keeping ancestral land in a particular family line.”

31  
32 *See also* Phyliss Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition,*  
33 *Family Land Loss, and Rule Setting*, 78 WASH U. L.Q. 737, 766-768, 772-774 (2000); Thomas  
34 W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership,*  
35 *Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95  
36 NW. U. L. REV. 505, 523-526 (2001).

## 37 38 **SECTION 10. OPEN-MARKET SALE OR AUCTION.**

39  
40 (a) If the court orders a sale of heirs property, the sale must be an open-market sale

41 unless the court finds that an auction would be more economically advantageous and in the best

1 interest of the cotenants as a group.

2 (b) If the court orders an open-market sale and the parties, not later than 10 days after the  
3 entry of the order, agree on a real estate broker licensed in this state to offer the property for sale,  
4 the court shall appoint that broker and establish a reasonable commission. If the parties do not  
5 agree on a broker, the court shall appoint a disinterested real estate broker licensed in this state to  
6 offer the property for sale and shall establish a reasonable commission. The broker shall offer  
7 the property for sale in a commercially reasonable manner at a price no lower than the  
8 determination of value and on the terms and conditions established by the court.

9 (c) If the broker appointed under subsection (b) obtains within a reasonable time an offer  
10 to purchase the property for at least the determination of value, the broker shall comply with the  
11 reporting requirements set forth in Section 11 and the sale may then be completed in accordance  
12 with state law.

13 (d) If the broker appointed under subsection (b) does not obtain within a reasonable time  
14 an offer to purchase the property for at least the determination of value, the court, after hearing,  
15 may:

16 (1) approve the highest outstanding offer, if any;

17 (2) redetermine the value of the property and order that the property continue to  
18 be offered for an additional period of time; or

19 (3) order that the property be sold at an auction.

20 (e) If the court orders an auction, the court shall set terms and conditions of the sale. The  
21 auction must be conducted under [insert reference to general partition statute or, if there is none,  
22 insert reference to foreclosure sale].

1 (f) If a purchaser is entitled to a share of the proceeds of the sale, the purchaser must  
2 receive a credit against the price in an amount equal to the purchaser's share of the proceeds.

### 3 **Comment**

4 1. Section 10(a): Under an open-market sale, the buyer and seller negotiate at arm's  
5 length and the sales price is not influenced by any particular exigency of either the buyer or the  
6 seller. *See Dennis v. County of Santa Clara*, 263 Cal. Rptr. 887, 892 (Cal. Ct. App. 1989). In  
7 some states, a court may order real property that is to be sold under an order to partition by sale  
8 to be sold by open-market sale or private sale as this type of sale is referred to in Minnesota and  
9 in other states. *See, e.g.*, MINN. STAT. § 588.17 (2009); N.M. STAT. § 42-5-7 (2009). *See also*  
10 *Wilson v. Skogerboe*, 414 N.W.2d 521 (Minn. Ct. App. (1987) (court-appointed referee sold  
11 property under a private sale after showing the property to numerous prospective buyers).  
12

13 Courts that have utilized an open-market sale to sell property ordered sold under a  
14 partition by sale have claimed that an open-market sale would yield a better sales price than the  
15 sales prices that could be expected if the property were sold at a public auction. *See, e.g.*, *Orgain*  
16 *v. Butler*, 496 S.E.2d 433, 435 (Va. 1998) (reversing chancellor's order that property be sold at a  
17 public auction given commissioner's report that recommended that property be sold on the open  
18 market by a real estate broker because such an open-market sale would yield the best price  
19 obtainable).  
20

21 2. The preference for open-market sales draws upon an international trend in which law  
22 commissions and courts in countries such as Scotland have recognized that forced sales such as  
23 partition sales should be conducted by open-market sale instead of by public auction in order to  
24 better preserve the wealth of a real property owner who is subject to a forced sale.  
25

26 3. Section 10(b): Courts in partition actions that have ordered property sold at an open-  
27 market sale have often required the property to be marketed by a real estate broker under  
28 commercially reasonable conditions. *See, e.g.*, *McCorison v. Warner*, 859 A.2d 609, 614 (Conn.  
29 Super. Ct. 2004) (In *McCorison*, the court referred to an open-market sale as defined in this act  
30 as a private sale and ordered that the property be listed by a real estate broker for up to two years  
31 provided that at least twenty-five percent (25%) of the parties agreed to continue to have the  
32 property listed by a broker after the first year if the property had not been sold by that time).  
33

## 34 **SECTION 11. REPORT OF OPEN-MARKET SALE.**

35 (a) Unless required to do so within a shorter time by [insert reference to general partition  
36 statute], a broker appointed under Section 10(b) to offer heirs property for open-market sale shall  
37 file a report not later than seven days after receiving an offer to purchase the property for at least

1 the value as determined under Section 6 or 10.

2 (b) The report required by subsection (a) must contain the following information:

3 (1) a description of the property to be sold to each buyer;

4 (2) the name of each buyer;

5 (3) the proposed purchase price;

6 (4) the terms and conditions of the proposed sale, including the terms of any  
7 owner financing;

8 (5) the amounts to be paid to lienholders;

9 (6) a statement of contractual or other arrangements or conditions of the broker's  
10 commission; and

11 (7) other material facts relevant to the sale.  
12

13 **SECTION 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In  
14 applying and construing this uniform act, consideration must be given to the need to promote  
15 uniformity of the law with respect to its subject matter among states that enact it.

16 **SECTION 13. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**  
17 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, and supersedes the federal  
18 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq.,  
19 but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or  
20 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15  
21 U.S.C. Section 7003(b).

22 **SECTION 14. TRANSITIONAL PROVISION.** This [act] applies to partition actions  
23 filed on or after the effective date.

1           **SECTION 15. EFFECTIVE DATE.** This [act] takes effect . . . .