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To the NCCUSL Drafting Committee on Partition of Tenancy-in-Common Real Property Act:

I write to you today for two purposes: 1) to introduce the Heirs' Property Retention Coalition (HPRC), a coalition of advocacy groups, legal services practitioners, and academics that supports the proposal submitted to NCCUSL by the Property Preservation Task Force (PPTF) of the Real Property Trusts and Estates Section of the American Bar Association for a Uniform Partition Act; and 2) to suggest some additions to that proposal. As attorneys and advocates who have struggled with the inequities inherent in the current partition statutory schemes, we are excited by the opportunity to address the serious and widespread problem of land loss via forced partition sales in a comprehensive and uniform manner, and are grateful for NCCUSL's interest in and commitment to this important work. We, and the communities we represent, stand fully behind the proposal already submitted as well as the suggestions below.

About the Coalition

Origins and Purpose

During the summer of 2006, HPRC was formed to include lawyers, advocates, and academics heavily involved in partition litigation, reform, and/or scholarly study. The purpose of the coalition was originally to strategize ways to address the significant deficiencies in the state partition statutes, deficiencies that accelerate the rate of involuntary dispossession of heirs' property owners. The coalition members bring significant legal, practical, and historical knowledge to this important reform task.

In addition to performing research on the status of partition law across the country and co-developing the statutory reform proposal with the PPTF, we are: 1) gathering data on the nature of partition cases handled by practitioners across the south; 2) streamlining the intake process used by legal services and advocacy groups for heirs' property cases so as to facilitate data gathering; 3) collaborating on community outreach strategies that will help alert property owners to the inherent dangers of heirs' property ownership; and 4)

pursuing the creation of a one-stop resource center in North Carolina for heirs' property owners.

Composition of Coalition

The coalition is composed of the following organizations:

- Alabama & Georgia Appleseed Centers on Law & Justice, Inc.
- Center for Heirs Preservation Property, Charleston, SC
- Center for Minority Land and Community Security, Tuskegee, AL
- Central Alabama Fair Housing Center, Montgomery, AL
- Federation of Southern Cooperatives, Land Assistance Fund, GA, AL, SC, and MS
- Gateway Development, Hilton Head, SC
- Georgia Legal Services Program
- Indian Land Tenure Foundation, Little Canada, MN
- Land Loss Prevention Project, Durham, NC
- Lawyers Committee for Civil Rights Under Law, Washington, D.C.
- Legal Services of Alabama
- New Orleans Legal Assistance Corporation
- Pro Bono Project of New Orleans
- Southern Coalition for Social Justice, Durham, NC
- University of North Carolina's Center for Civil Rights, Chapel Hill, NC

Additional Changes Recommended for Uniform Partition Proposal

HPRC fully supports the proposal put forward by the American Bar Association. Upon further review of existing state statutory law and the current proposal, HPRC has determined that a few additions to the proposal are needed to help ensure equity in the handling of partition cases. Each proposed change provides a rationale and the suggested language to include in boldface text. The suggested language is intended to be integrated into the existing PPTF proposal.

1. Add Additional Factors for the Court to Consider in Weighing Division Versus Sale

The proposal before NCCUSL requires the court to consider noneconomic factors (such as sentimental attachment) in deciding whether to divide or sell the property. This is a wise addition, given that land holds much value to families beyond mere monetary value. Indeed, heirs' property has often been in the owners' families for multiple generations and represents the family's historic homestead. Below are additional suggestions that attempt to balance the equities and ensure that the court gives proper consideration to all necessary factors.

In determining whether the subject property should be divided or sold, the court shall consider whether a partition sale would promote the interests of all the owners. In addition to considerations of the value of each owner's share after division, the court shall consider: longstanding involvement with or

sentimental/emotional attachment to the property; use of the property for one's livelihood; noneconomic uses to which the property has been put; ~~and the existence of a homestead on the property. whether any owner will lose their homestead and lack viable alternative living arrangements; whether the historic value of the parcel and/or its improvements will be negatively impacted by division or sale; the degree to which owners have served as caretakers of the property, and any other factor that the court determines to be relevant to an equitable resolution.~~ **No single factor, including economic valuation, shall be determinative in the court's evaluation of the totality of the circumstances.**

2. Give the Court Flexible Equitable Power

It is important that courts are granted power to handle partition matters flexibly and on a case-by-case basis, that they have the power to deny partition altogether in extraordinary cases, and that they are empowered to sell and/or divide portions of the property if such handling would be more equitable (which is something a large number of state statutes already allow). This equitable power is already allowed in some states.

If, in making a determination whether sale or division is appropriate, the court finds that sale and division of proceeds for part of the property would be more equitable than division of the whole property, the court may order that such part be sold and the remainder divided. The court shall also have the power to deny altogether the petition for partition in extraordinary cases or where partition would result in a manifest injustice.

3. Require That All Appointed Commissioners are Disinterested

Not all states currently require that commissioners appointed to handle divisions or sales be disinterested. This is problematic, as a commissioner who has a vested interest (such as a tie to one of the parties or a desire to purchase the subject property) may handle the case in an inequitable manner.

No commissioner appointed to handle either partition in kind or sale by partition, nor any person for the benefit of them, can be interested in the action. Any division or sale made by such an interested commissioner is void.

4. Require Due Diligence for Use of Notice by Publication

In many states, petitioners are allowed to notify interested parties by publication if such parties are "unknown", but there is no elaboration of this provision, and it is mostly left to court discretion. Notice by publication is very unlikely to result in heirs' property owners becoming aware of the action, and they thus may be dispossessed of their family land unknowingly. However, a few states require the petitioner to exercise due diligence to

find interested parties before resorting to notice by publication, and this is reasonable given the extremity of divestment by partition sale.

The petitioner shall only be permitted to use notice by publication after stating in an affidavit that a reasonable effort has been made to locate the owners that remain unknown and providing a description in the affidavit of the steps taken to locate the missing owner. Further, the petitioner shall send a notice to that owner's last known address.

5. Increase the Time Respondents Have To Buy Out the Petitioner

Our experience in handling partition cases suggests that the amount of time nonpetitioners are given to buy out the petitioner is inadequate for indigent owners to obtain financing to buy out the petitioner's interest, which may be substantial. We suggest an instruction to the court that it consider reasonable requests for time extensions of the trial in order to accommodate the buyout right.

(a) If the court determines pursuant to guidelines established in this Chapter that the property cannot be partitioned, the court shall permit the nonpetitioning joint tenants or tenants in common to purchase the interest of the petitioner ("the buyout option"). Any nonpetitioning owners who desire to exercise the buyout option must notify the court of that desire no later than ten (10) days prior to the date set for the trial of the case. **The court shall consider reasonable requests for postponement of the trial date in order to accommodate nonpetitioners seeking to exercise their right to buy out the petitioner.** The court shall notify any nonpetitioning owners who appear in person before the court without counsel of the buyout option. This option is provided in recognition of the need to protect the rights of continued family ownership of land against involuntary dispossession via forced sale, particularly where the petitioner has come by their interest by means other than devise or intestacy.

6. Allow Parties to Request Second Appraisal

In the current proposal being reviewed by NCCUSL, the value of the property to be sold (be it the entire parcel or merely the petitioner's share, in the case of a buyout) is measured by "one or more competent and independent real estate appraisers as the court shall approve and appoint", and if multiple appraisals are used, the court averages the values. The proposal does not, however, provide a clear right for the parties to move for the court to request a second appraisal. A second appraisal can be essential in situations where the first appraisal is not truly neutral or may simply be inaccurate.

Rather than impose an automatic second appraisal requirement in all cases (which would increase the costs of some undisputed partition actions unnecessarily), we recommend that the statute merely provide the parties the right to request a second appraisal, which the court can grant if it is satisfied that it is warranted. The experience of practitioners suggests that the parties will be significantly empowered in their motion

with a statutory right to a second appraisal. Additionally, we recommend that rather than automatically averaging the two appraisals, the court should have discretion to determine the weight that should be given to each.

The proposed new language affects two sections of the prior proposal:

Buyout Option for Partition Sale Opponents

(c) In the event that the parties cannot agree on the price of the petitioner's interest, the value of such interest shall be determined by one or more competent and independent real estate appraisers as the court shall approve and appoint. **The parties shall have the right to request a second appraisal, and if the court finds that a second appraisal is needed to ensure a fair valuation, it shall appoint a second appraiser. The cost of any appraisals ordered pursuant to this section shall be taxed as a part of the costs of court to all parties. The parties shall also have the right to submit a second appraisal to the court at the submitting party's own expense.**

The appraisers appointed pursuant to this section shall make their report in writing to the court within thirty (30) days after appointment. Should the **court receive appraisals that state** appraisers arrive at different values, the court shall **evaluate the appraisals and determine the weight to be given to each in arriving at the value of the interest at stake.** ~~average the value of the two appraisals and use such average as the value of the interest. The cost of any appraisals appointed pursuant to this section shall be taxed to all parties as a part of the costs of court to those who have exercised the buyout option.~~

Establishment of Sale Price Minimums and Purchase-on-Credit

(a) ... The value shall be determined by one or more competent and independent real estate appraisers as the court shall approve and appoint, and such appraisers shall value the property without discounting its fractionalized status, but instead shall value the parcel as if it were held by one owner with clear title. **The parties shall have the right to request a second appraisal, and if the court finds that a second appraisal is needed to ensure a fair valuation, it shall appoint a second appraiser. The cost of any appraisals ordered pursuant to this section shall be taxed as a part of the costs of court to all parties. The parties shall also have the right to submit a second appraisal to the court at the submitting party's own expense.** ~~The parties shall have the right to request a second appraisal, and if the court finds that a second appraisal is needed to ensure a fair valuation, it shall appoint a second appraiser.~~ The appraisers appointed pursuant to this section shall make their report in writing to the court within thirty (30) days after appointment. **Should the court receive appraisals that state different values, the court shall evaluate the appraisals and determine the weight to be given to each in arriving at the value of the property being sold.** ~~Should the appraisers arrive at different values, the court~~

~~shall average the value of the two appraisals and use such average as the value to be used. The cost of **any appraisals appointed pursuant to this section** shall be taxed **to all parties** as a part of the costs of court.~~

Once again, thank you for the time and effort you are devoting to this important cause, and we look forward to working closely with you in the future.

Sincerely,

John Pollock
Attorney, Central Alabama Fair Housing Center
on behalf of the Heirs Property Retention Coalition (HPRC)