

D R A F T
FOR DISCUSSION ONLY

**PARTITION OF TENANCY-IN-COMMON
REAL PROPERTY ACT**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For November 21-22, 2008 Drafting Committee Meeting

Without Prefatory Note and With Comments

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ON UNIFORM STATE LAWS

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**DRAFTING COMMITTEE ON PARTITION OF TENANCY-IN-COMMON REAL
PROPERTY ACT**

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Act consists of the following individuals:

ROBERT L. MCCURLEY, JR., Alabama Law Institute, P.O. Box 861425, Tuscaloosa, AL
35486, *Chair*

GEORGE H. BUXTON, III, 31 East Tennessee Ave., Oak Ridge, TN 37830

ELLEN F. DYKE, 2125 Cabots Point Lane, Reston, VA 20191

LANI LIU EWART, 1099 Alakea St., Suite 1800, Honolulu, HI 96813

CARL H. LISMAN, 84 Pine St., P.O. Box 728, Burlington, VT 05402

MARIAN P. OPALA, State Capitol, Room 238, Oklahoma City, OK 73105

RODNEY W. SATTERWHITE, P.O. Box 1540, Midland, TX 79702

NATHANIEL STERLING, 4180 Oak Hill Ave., Palo Alto, CA 94306

M. GAY TAYLOR – JONES, 18 N. Foxhill Rd., North Salt Lake, UT 84054

THOMAS W. MITCHELL, University of Wisconsin Law School, 975 Bascom Mall, Madison,
WI 53706, *Reporter*

EX OFFICIO

MARTHA LEE WALTERS, Oregon Supreme Court, 1163 State St., Salem, OR 97301-2563,
President

WILLIAM R. BREETZ, JR., Connecticut Urban Legal Initiative, 35 Elizabeth St., Rm K-202,
Hartford, CT 06105, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

PHYLISS CRAIG-TAYLOR, 1211 E. Moorehead St., Charlotte, NC 28204, *ABA Advisor*

STEVEN J. EAGLE, George Mason University School of Law, 3301 Fairfax Dr., Arlington, VA
22201-4426, *ABA Section Advisor*

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.nccusl.org

UNIFORM PARTITION OF TENANCY-IN-COMMON REAL PROPERTY ACT

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1 **UNIFORM PARTITION OF TENANCY-IN-COMMON REAL PROPERTY ACT**

2
3 **ARTICLE 1**

4
5 **PART 1**

6 **DEFINITIONS AND OTHER GENERAL PROVISIONS**

7
8 **SECTION 1-101. SHORT TITLE.** This [act] may be cited as the Partition of Tenancy-
9 In-Common Real Property Act.

10 **SECTION 1-102. DEFINITIONS.** In this [act]:

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

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

16 (c) “Private sale” means a sale that is limited to the parties and under which the property
17 is sold to the highest bidder amongst the parties participating in the sale.

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

23 **Comment**

24 Section 1-102(a): See *McCorison v. Warner*, 859 A.2d 609, 614 (Conn.Super. 2004);
25 *Channer v. Cumming*, 699 N.W.2d 831, 837 (Neb. 2005); *Black's Law Dictionary* (8th ed.

1 2004)

2

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

4

5 **SECTION 1-103. APPLICABILITY.**

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

7 (1) no written agreement among all the cotenants governs the ownership of the

8 property;

9 (2) a substantial number of the cotenants [___ percent or more of the interests are

10 held by cotenants who] are related by blood, marriage, or adoption; and

11 (3) one or more of the cotenants acquired their title from an ancestor who owned

12 an interest in the property.

13 (b) This [act] supplements existing law governing partition of tenancy-in-common

14 property. The principles of law and equity, including the law of real property, civil procedure,

15 and probate supplement the provisions of this [act], except to the extent inconsistent with this

16 [act] in which case this [act] governs.

17

18

PART 2

19

NOTICE AND KNOWLEDGE

20

21 **SECTION 1-104. UNKNOWN OR UNLOCATABLE PARTIES; SERVICE BY**

22 **PUBLICATION.** Nothing herein contained limits or affects the right to serve any process in

23 any other manner now or hereafter provided by law or rule of court. Further, in addition to any

24 existing rule or rules regarding service by publication, a plaintiff in a partition action governed

25 by this Act must comply with the provisions of this section before service by publication will be

1 authorized.

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

6 (a) No plaintiff shall be permitted to use, and no court shall authorize, service by
7 publication for the purpose of notifying parties in interest whose whereabouts are known or are
8 capable of being known by a plaintiff exercising due diligence, irrespective of whether these
9 interested parties reside in state or reside out of state.

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

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

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

23 (2) The plaintiff shall record, if not already recorded, a notice of the pendency of

1 the action in the office of the recorder of deeds in the county or counties in which the real
2 property or any portion thereof is situated [in the place designated by state law for the filing of a
3 lis pendens]. The notice shall contain the name of the court where such action is pending, the
4 names of all the parties to such action at the time of such recording, and a description of the real
5 property affected by the action.

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

17 **Comment**

18
19 The enhanced notice by publication requirements are not meant to limit or affect the
20 rights to serve process in any other way. HRS § 634-23 (5)

21
22 A number of state statutes require the plaintiff to exercise due diligence to locate or
23 identify parties who may have a claim, interest, or concern with respect to certain litigation
24 before the court will authorize service by publication. *See, e.g.*, Ala. Code. §§ 35-6-25 & 35-6-
25 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.
26 Codified Laws § 15-9-7.

27
28 As a general rule, the holder of a mortgage or other lien upon the undivided interest of a
29 cotenant is not, in the absence of a statute stating otherwise, a necessary party to a suit for
30 partition, since the lien is transferred to the interests in severalty allocated to the cotenants;

1 however, such holder of a mortgage or other lien upon the undivided interest of a cotenant is a
2 proper party provided that the mortgage or lien existed at the commencement of such
3 proceedings. *See* 59A Am. Jur. 2d Partition § 95.
4

5 Section 1-104(b) - The requirement that the plaintiff document the due diligence taken in
6 attempting to locate unlocatable or unknown parties is found in a number of statutes. *See, e.g.,*
7 Ala. Code. §§ 35-6-25 & 35-6-44 (“the facts showing just what diligence the petitioner has
8 exercised must be specifically alleged in the bill”); Ga. Code Ann. § 9-11-4(f)(1)(A); Haw. Rev.
9 Stat. § 634-23(2); and S.D. Codified Laws § 15-9-7.
10

11 Section 1-104(b) - “Sources of readily available information” includes information that
12 may be contained in governmental offices, may be located on governmental or non-
13 governmental internet sites, may be possessed by persons likely to know the defendant, or may
14 otherwise be readily available to the plaintiff.
15

16 Section 1-104(c)(1): *See* Cal. Code. Civ. Proc. § 872.320(a)
17

18 Section 1-104(c)(2): *See, e.g.,* A.C.A. § 16-59-101 (2008); Cal Code Civ Proc § 405.20;
19 Cal. Code. Civ. Proc. § 872.320(b); C.R.S. 38-35-110; Conn. Gen. Stat. § 52-325 (requiring lis
20 pendens “to be recorded in the office of the town clerk of each town in which the property is
21 situated”)
22

23 Section 1-104(c)(3): *See* Ala. Code § 35-6-25; Ga. Code Ann., § 9-11-4(f)(1)(A); LSA-
24 C.C.P. Art. 4624; OH R.C. § 2329.23. Question: If there is to be a statement of the root of title,
25 would that be the root of title as defined by state marketable title acts or some other period?
26

1 **ARTICLE 2**

2 **PARTITION IN KIND AND PARTITION BY SALE**

3
4 **SECTION 2-201. PARTITION BY SALE FACTORS.**

5 (a) If a party requests that the property be partitioned by sale and establishes by a
6 preponderance of the evidence to the satisfaction of the court, that the real property or any part of
7 it is so situated that partition in kind cannot be made without great prejudice to all of the owners,
8 taking into account the totality of the circumstances, the court may order a sale thereof. The
9 court may only order a partition by sale if a party requests that the property be partitioned by
10 sale. If a party does request partition by sale, without limiting the economic or non-economic
11 factors that the court may consider in deciding whether a partition in kind of all of the property
12 or some of the property as provided for in Section 2-202 can be made without great prejudice to
13 the owners, the court shall consider the following factors:

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

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

21 (3) evidence of longstanding ownership by any individual cotenant as
22 supplemented by the period of time that any person or persons that such a cotenant is or was
23 related to by related by blood, marriage, or adoption who was in the chain of title owned an

1 interest in the property;

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

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

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

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

19 **Comment**

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

26
27 Section 2-201(a)(2): *See* N.C. Gen. Stat. § 46-22(b). Property that is sold at public

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

14
15 Many courts have held that a partition by sale should only be awarded if such a sale
16 would be significantly more beneficial to the cotenants in economic terms than a partition in
17 kind. *See Jacobs v. Mada*, 2007 TX App. Ct. Briefs 832438, Aug. 8, 2007at **21-22. In *Jacobs*,
18 the court stated: “Moreover, the purpose of partitioning real estate by sale rather than in kind,
19 the preferred method, is to restore the maximum value of the separate property to its owners.”

20
21 Section 2-202(a)(3): *See Delfino v. Vealencis*, 436 A.2d 27, 33 (Conn. 1980); *Eli v. Eli*,
22 557 N.W.2d 405, 409-411 (S.D. 1997); and *Ark Land. Co. v. Harper*, 599 S.E.2d. 754, 761-62
23 (W. Va. 2004).

24
25 Section 2-202(d): *See Ark Land. Co. v. Harper*, 599 S.E.2d. 754, 761-62 (W. Va. 2004);
26 *Overstreet v. Overstreet*, 692 So. 2d 88, 91 (1997); and Property (Co-ownership) Act 2005, Part
27 IV, § 229(2)(c), Victoria, Australia.

28
29 Section 2-202(e): *See Delfino v. Vealencis*, 436 A.2d 27, 33 (Conn. 1980); Property (Co-
30 ownership) Act 2005, Part IV, § 229(2)(c), Victoria, Australia.

31
32 **SECTION 2-202. PARTIAL PARTITION IN KIND AND SALE.** Any party may
33 request the court to consider partition by sale of part of the property and partition in kind of the
34 remainder provided that such a request is made before the court considers whether partition in
35 kind of the whole property can be made without great prejudice to all of the owners under
36 Section 2-201. If the court finds, after weighing certain economic and non-economic factors
37 including those mandated by Section 2-201(a)(1-6), that sale and division of proceeds for part of
38 the property would be more equitable than a partition in kind or a partition by sale of the whole

1 property, the court may order that such part be sold and the remainder divided.

2 **Comment**

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

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

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

17 (b) Within ten (10) days after the report of the appraiser is filed, the clerk of the court
18 shall forward to each attorney of record, each party, and interested party of record, a copy of the
19 report of the appraiser and a notice stating the time limits for filing an exception provided that
20 any party must be given at least thirty (30) days from the receipt of the appraisal report to file
21 such an exception. Any party to the action who shall have been adjudged by the court to have an
22 interest in the real estate appraised, may contest said appraisal by filing an affidavit setting forth
23 wherein said appraisal is incorrect and may also file with the court an appraisal paid for by
24 themselves, provided such appraisal is conducted by an appraiser who possesses the requisite

1 qualifications set forth under this section for a court-appointed appraiser. An evidentiary hearing
2 limited to the proposed valuation of the property shall be conducted. In determining the value of
3 the real estate, the court may use its discretion in deciding upon how much weight to give to any
4 appraisal that was filed with the court and may also exercise its discretion to order a new
5 appraisal that it will consider before the court determines the property's value.

6 **Comment**

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

10
11 Should we include time limits for the appointment of the appraiser and the filing of the
12 report?

13
14 Section 2-203(b): Language from 52 Okl. St. § 318.5.
15

16 **SECTION 2-204. APPOINTMENT OF COMMISSIONERS.**

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

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

26 (c) If the court appoints commissioners, these commissioners must be disinterested and in
27 any case may not be any of the following:

- 1 (1) A clerk or deputy clerk of the court.
- 2 (2) A former or present partner or employee of the judge.
- 3 (3) A relative within the third degree of the judge or the judge's spouse or the
- 4 spouse of such a relative.
- 5 (4) An owner of any interest in the property that is the subject of the action
- 6 together with any relative of any owner within the third degree.
- 7 (5) Any person who participates in the partition action on behalf of any party
- 8 whether as legal counsel, expert witness, or otherwise.

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

13 (e) The commissioners shall be sworn by the judge, a magistrate, or the clerk of the court,
14 to do justice among the tenants in common in respect to such partition action, according to their
15 best skill and ability.

16 **Comment**

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

19
20 Section 2-205(a): Cal. Code Civ. Proc. § 873.010.

21
22 Section 2-205(c): Cal. Code Civ. Proc. § 873.050. The first four requirements are from
23 Section 873.050 with the addition of the language barring “any relative of any owner within the
24 third degree.”

25
26 Section 2-205(e): *See* N.C. Gen. Stat. § 46-8.
27

1 **ARTICLE 3**

2 **BUYOUT PROVISIONS**

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

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

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

20 (b) If two or more parties, in opposition to each other, inform the court of their desire to
21 purchase the property within the time fixed by the court, the court shall exercise its discretion to
22 decide whether to award one or more of the parties the opportunity to purchase the property as
23 provided in this section to the exclusion of the party or parties in opposition to this party or these
24 parties. Without limiting the factors that the court may consider, the court shall consider the

1 factors set forth in Section 2-201(a)(3)-(6), as well as the degree to which the parties own
2 significantly unequal shares in the property. If the court determines that one or more parties not
3 in opposition to each other should be given the opportunity to purchase the property to be sold
4 under the provisions of this section, the court shall give this party or these parties at least forty-
5 five (45) days to pay into the court the amount by which the fair market value of the property as
6 determined by the court under Section 2-203 exceeds this party's or these parties' entitlement to
7 a portion of the proceeds of the sale. If such a party or parties fail to pay into the court the
8 purchase price within the time fixed by the court, the court shall use its discretion to decide
9 whether to allow any other party who had expressed an interest in purchasing the property an
10 opportunity to purchase the property.

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

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

22 (e) If there is no party that is given the right to purchase the property under this section
23 that pays into the court the purchase price within the time fixed by the court or if a private sale

1 does not take place under subsection (c) then the property shall be sold under the procedures set
2 forth in Article 4 of this Act.

3 **Comment**

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

6
7 Section 3-301(b): *See* Wilk v. Wilk, 173 Vt. 343 (Vt. 2002).
8

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

6 **Comment**

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

15
16 Section 4-401(a): *See* § 735 ILCS 5/17-105. *See also* Buck v. Grube, 833 N.E.2d 110
17 (Ind. App. 2005)

18
19 Section 4-401(b): *See* § 735 ILCS 5/17-105.
20

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

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

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

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

28 (3) The legal representatives of any party.

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

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

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

6 **Comment**

7 Cal. Code Civ. Proc. § 873.690
8

9 **SECTION 4-403. REPORT OF SALE.**

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

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

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

16 (2) The name of the purchaser.

17 (3) The sales price.

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

19 (5) Any amounts payable to lienholders.

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

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

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

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

3 **Comment**

4 Cal. Code Civ. Proc. § 873.710

5

6 **SECTION 4-404. PURCHASE BY ENCUMBRANCER OR PARTY ENTITLED**

7 **TO SHARE.** When a party entitled to a share of the property, or an encumbrancer entitled to

8 have the lien of the encumbrancer paid out of the sale, becomes a purchaser, the commissioners

9 may take a receipt for so much of the proceeds of the sale as belongs to the party or the

10 encumbrancer.

11 **Comment**

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

14

1 **ARTICLE 5**

2 **ATTORNEY’S FEES**

3
4 **SECTION 5-501. AWARD OF ATTORNEYS’ FEES.** The reasonable attorney fees
5 of any party to an action for partition of real property owned under a tenancy in common may be
6 awarded in the court's equitable discretion if these fees were incurred for the common benefit of
7 all of the tenants in common. The reasonableness of an attorney fee award cannot be based in
8 any way on an arbitrary percentage of the value, and the court shall require evidence to be
9 presented of the reasonableness of the fees sought prior to awarding any such fees and the
10 manner in which these fees were incurred for the common benefit of all of the parties. No
11 portion of any attorney’s fees may be assessed against any party who contests the partition
12 proceeding whether by appearing by court-appointed or privately retained counsel or by
13 appearing pro se.

14 **Comment**

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

16
17 The last sentence is largely drawn from La. C.C.P. Art. 4613 with the additional
18 provision that a contested action includes an action in which a party is represented pro se. Other
19 state courts have held that an attorney’s fee award is improper in a contested action irrespective
20 of the fact that the plain language of the partition statute might seem to provide for fee shifting
21 that would require the defendants to pay a share of the plaintiff’s attorney’s fees. *Osborne v.*
22 *Eslinger*, 58 N.E. 439, 444 (Ind. 1900) (“Where parties appear by counsel, and contest a petition
23 for partition, they should not be required to pay the fees of the attorneys of their adversary.”);
24 *Dailey v. Houston*, 151 So. 2d 919, 927 (Miss. 1963) “This statute . . . was intended primarily to
25 give a fee to the solicitor who conducts the suit without resistance. Where there is a real
26 controversy, and it is proper for defendants to be represented by counsel of their own choosing,
27 the fee permitted by section 975, to be taxed as a common charge upon all of the interests, should
28 not be allowed. This is especially so where, as here, a defendant is successful in part, by
29 preserving some of his claims, through his own initiative and the efforts of his own counsel.”;
30 *Cary v. Armbrust*, 70 N.W.2d 427, 431 (Neb. 1955) (“In *Oliver v. Lansing*, 57 Neb. 352, 77 N.W.
31 802, the following rule was laid down by this court on the question of taxability of attorney's fees
32 for plaintiff's attorney in partition cases: ‘The plaintiff's attorney's fees are not taxable as costs in

1 an action for partition where the proceedings are adversary.'"; *Novy v. Novy*, 188 A. 328, 330
2 (Pa. 1936) ("The act makes reasonable counsel fees part of the costs in these proceedings, and
3 the courts have followed the practice of allowing them since its passage. The fees contemplated
4 were only such as would compensate counsel in a reasonable amount for services rendered in the
5 actual partition and for the common benefit of the parties in interest. When, however, partition is
6 contested in good faith, or when the services rendered are adverse to the other parties, the
7 petitioner cannot recover as costs counsel fees earned by his attorney in litigating his right to
8 partition."); *Port v. Elson*, 321 N.W.2d 363 (Wis. Ct. App. 1982) ("It has been widely recognized
9 that if a partition proceeding is adversary in character, the proceeding is not for the common
10 benefit of all the parties, and therefore the payment of attorney's fees from the proceeds of the
11 sale should not be allowed.").