



## Central Alabama Fair Housing Center

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Thomas Mitchell, NCCUSL Reporter  
University of Wisconsin  
975 Bascom Mall  
Madison, WI 53706

February 22, 2008

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

Dear Professor Mitchell:

We write to you today as NCCUSL Observers as well as members of the Heirs' Property Retention Coalition (HPRC), a network of over 15 national, regional, and state organizations focused on heirs' property issues. This letter articulates our position on two issues that arose during the November 2007 NCCUSL drafting session in Chicago.

1) Scope of Partition Proposal

We believe that the Drafting Committee's stated purpose, namely "to draft a uniform act that will address the issue of tenancy-in-common land ownership .... [by drafting] a new law to protect vulnerable landowners ..." clearly and simply outlines the task at hand. The letter from NCCUSL's Joint Editorial Board ("JEB") to the Scope Committee, which refers to the "breadth of the proposal", was not addressing the range of affected properties, but rather the depth of the substantive suggestions.

In this vein, the proposal currently before the Drafting Committee that was submitted by the ABA is indeed not a "wholesale modification of tenancy in common ownership and the law of partition", as the JEB letter warns against; instead, it leaves the fundamental rules of tenancy-in-common ownership unchanged and only effects a series of small adjustments to various stages of the partition process. As the JEB letter indicates, the current proposal, which does not claim in any way to define heirs' property or so narrow

its reach, “is much more narrowly focused and has the support of the JEB-URPA.” Moreover, the JEB letter indicates that the report prepared by the American Bar Association’s Property Preservation Task Force (PPTF) supporting the current proposal was “the result of a thoughtful process of more than 2 years of study – with participation by leadership of the ABA Real Property, Probate and Trust Law Section as well as legal academics who have studied and written extensively about the problem of tenancy-in-common land loss. ...”

With this in mind, we believe that any attempt to narrow the proposal’s reach to some artificial class of property (i.e., “non-commercial property”, “property passed intestate” or “property with a certain number of owners”) is neither envisioned nor practical, for the following reasons:

- Any attempt to narrow the proposal in this fashion will undeniably cause some properties intended to be covered to be inadvertently excluded from its reach;
- Such a narrowing is unprecedented in the law and unworkable in practice, and will likely lead to such consternation and disapproval from states examining it for adoption that they will reject the uniform law in its entirety as a result;
- Such a narrowing attempts to protect a practice (commercial transactions relying on the default rules) that is rarely used and should not be protected by the proposal, on the grounds that it is a disapproved business practice. In fact, commercial attorneys have informed us that engaging in commercial land transactions involving tenancies in common without having a business agreement in place among the tenants in common is such a bad business practice that the IRS recognizes it as such by discounting the value of such property. Moreover, commercial attorneys have informed us that 1031 like-kind exchanges involving tenancy-in-common structures typically now include a written agreement among the tenants-in-common and that such agreements ordinarily a) contemplate a complete ban on the right to partition to be set forth in the mortgage loan documents for such transactions, and b) provide for both mandatory rights of first offer and second offer as a precondition to sales of tenant-in-common interests to persons outside the group and mandatory rights of first refusal and second refusal as a precondition to exercise of the right to partition;
- The letter from the ABA’s PPTF to Shannon Skinner of NCCUSL, which introduced the current proposal and referred to carve outs for some commercial properties, did not envision a wholesale elimination of all such properties from the proposal’s reach, but instead a carve-out for properties *for which a TIC agreement is in place*. The partition proposal has always been intended to effect a change in the default rules and not limit the ability of parties to contract around such default rules.

## 2) Structuring of Buyout Provision

We recommend that the buyout option only be provided to the nonpetitioners, rather than being left to the discretion of the court to award to either side. As stated in the Drafting

Committee's mandate, this proposal is intended "...to protect vulnerable landowners", which is best accomplished by limiting the buyout right to nonpetitioners. One HPRC member with substantial on-the-ground experience with partition actions is the Federation Of Southern Cooperatives / Land Assistance Fund (FSC), which has provided outreach education and legal assistance to African-American landowners for over forty years. FSC performed a thorough search of its records as well as interviewed current/former staff and volunteers. This analysis revealed that of all the heirs' property cases handled directly by FSC or by outside attorneys referred by FSC, no case involved a situation either where family members interested in keeping the land in the family petitioned the court to have the land sold at auction or where a petitioner asked the court for permission to exercise the buyout option. The petitioner in the overwhelming majority of FSC's cases owned a very small interest, and in many (if not most) cases was not a family member. Even in some cases where the petitioner was a family member, he/she often acted at the behest of an outsider.

FSC's results, along with the experience of other community-based organizations, leads HPRC to believe that the purpose of the uniform legislation would be better served if the buyout option is made available only to the nonpetitioners. If this option is given to the petitioner as well, it would be much easier for speculators who already exercise much more influence on the court system and local appraisers to ultimately purchase land far below its true value, which would result in the heirs both being dispossessed and receiving less for their share of the land.

We appreciate your hard work as Reporter and the enthusiasm and commitment of NCCUSL as a whole, and look forward to continuing to work with the Drafting Committee as the proposal progresses.

Sincerely,

John Pollock, NCCUSL Observer, Central Alabama Fair Housing Center  
Anita Earls, NCCUSL Observer, Southern Center for Social Justice  
Craig H. Baab, NCCUSL Observer, Alabama Appleseed Center for Law & Justice  
Dawn Battiste, NCCUSL Observer, Land Loss Prevention Project  
Carolyn Gaines-Varner, NCCUSL Observer, Alabama Legal Services  
Jerry Pennick, NCCUSL Observer, Federation of Southern Cooperatives  
David Tipson, NCCUSL Observer, Lawyers Committee for Civil Rights  
Audrey Wiggins, NCCUSL Observer, Lawyers Committee for Civil Rights

Non-Observer Sign-Ons:

Diane Standaert, UNC Center for Civil Rights  
Jennie Stephens, Center for Heirs' Property Preservation  
Skipper StipeMaas, Georgia Legal Services Program  
Robert Zabawa, Center for Minority Land & Community Security  
Deke Clayborn, National Bar Association