

DRAFT
FOR DISCUSSION ONLY

UNIFORM PARTITION OF INHERITED PROPERTY ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

May 2009 Interim Draft

Without Prefatory Note and With Comments

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ON UNIFORM STATE LAWS

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May 1, 2009

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UNIFORM PARTITION OF INHERITED PROPERTY ACT

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1 **UNIFORM PARTITION OF INHERITED 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 Uniform Partition of
9 Inherited Property Act.

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

11 (a) “Heirs’ property” means real property that is held in a tenancy in common that
12 satisfies the requirements of Section 1-103.

13 (b) “Partition in kind” means the division of real property which is owned by two or more
14 persons as co-owners into physically distinct and separately titled parcels.

15 (c) “Partition by sale” means a court-ordered sale of the whole or any part of the
16 property.

17 (d) “Private partition sale” means a partition by sale that is limited to the parties and
18 under which the property is sold to the highest bidder amongst the parties participating in the
19 sale.

20 (e) “Public partition sale” means a partition by sale which is not limited to the parties and
21 in which the property is listed for sale on the open market by a licensed real estate broker.

22 **Comment**

23 Section 1-102(b): *See* Black's Law Dictionary (8th ed. 2004); ; Channer v. Cumming, 699
24 N.W.2d 831, 837 (Neb. 2005).

25
26 Section 1-102(c): *See* M.G.L.A. 241 § 31.

1
2 Section 1-102(e): *See, e.g.,* *McCorison v. Warner*, 859 A.2d 609, 614 (Conn. Super. Ct.
3 2004) (In *McCorison*, the court referred to a public partition sale as defined in this act as a
4 “private sale”). Under a public partition sale, the property should be offered for sale under
5 conditions that are commercially reasonable under the circumstances in order to increase the
6 likelihood that the property may sell for a price that may approach the fair market value of the
7 property. In contrast, one should expect that property sold at a public auction should sell for its
8 forced sale value which is often below the property’s fair market value.
9

10 **SECTION 1-103. APPLICABILITY.**

11 (a) This Act applies to an action to partition real property held in tenancy in common
12 only if:

13 (1) the real property at the time the proceeding is commenced is or is alleged by
14 any party to be heirs’ property which is defined as tenancy-in-common property that meets the
15 following criteria:

16 (a) no written agreement among all the cotenants governs the ownership of
17 the property; and

18 (b) one or more of the cotenants acquired their title from an ancestor who
19 owned an interest in the property; and

20 (c) any of the following is true:

21 (1) 20% of the cotenants are related by blood, marriage, or
22 adoption;

23 (2) 20% or more of the interests are held by an individual who
24 acquired their title from an ancestor; or

25 (3) 20% or more of the interests are held by cotenants who are
26 related by blood, marriage, or adoption.

27 (b) Before a party may obtain an order for a remedy in an action for partition of tenancy-

1 in-common property, the court shall determine whether the property is heirs' property.

2 **Comment**

3 Section 1-103(a)(1)(a): If tenants in common acquire their interests through a deed or a
4 will that does not establish the manner in which the property shall be governed or managed, the
5 deed or will alone shall not be construed to be a written agreement among the parties that
6 governs the ownership of the property within the meaning of Section 1-103(b).
7

8 **PART 2**

9 **NOTICE AND KNOWLEDGE**

10
11 **SECTION 1-104. UNKNOWN OR UNLOCATABLE PARTIES; SERVICE BY**

12 **PUBLICATION.** Nothing herein contained limits or affects the right to serve any process in
13 any other manner now or hereafter provided by law or rule of court. Further, in addition to any
14 existing rule or rules regarding service by publication, a plaintiff in a partition action governed
15 by this Act must comply with the provisions of this section before service by publication will be
16 authorized.

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

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

25 (b) An affidavit in support of a motion to serve by publication in an action affecting
26 heirs' property shall set forth facts based upon the personal knowledge of the affiant concerning

1 the methods, means, and attempts made to locate and to effect personal service on the
2 defendants, including the efforts made to utilize, review, or otherwise draw upon sources of
3 information readily available to the plaintiff.

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

6 (1) A plaintiff, within 10 days after the court orders publication in an action for
7 partition subject to this subsection, shall affix a conspicuous sign on the real property subject to
8 partition stating that the action has been commenced and identifying the name of the plaintiff, the
9 known defendants, and the court in which the action is pending.

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

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

1 such party. The description of the property shall include the street address or other common
2 designation for the property, the legal description, the acreage of the property, and a description
3 of all of the improvements on the property.]

4 **Comment**

5
6 The enhanced notice by publication requirements are not meant to limit or affect the
7 rights to serve process in any other lawful way. *See, e.g.*, HAW. REV. STAT. § 634-23(5) (2009).
8

9 A number of state statutes require the plaintiff to exercise due diligence to locate or
10 identify parties who may have a claim, interest, or concern with respect to certain litigation
11 before the court will authorize service by publication. *See, e.g.*, Ala. Code. §§ 35-6-25 & 35-6-
12 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.
13 Codified Laws § 15-9-7.
14

15 Although the enhanced notice requirements in this section are designed to increase the
16 likelihood that a defendant who the plaintiff is unable to locate or is unable to identify by name
17 thereby remaining unknown to the plaintiff is provided with notice of the partition action, no
18 lender or the holder of a lien shall have any of their rights compromised under this Act.
19

20 Section 1-104(b): The requirement that the plaintiff document the due diligence taken in
21 attempting to locate unlocatable or unknown parties is found in a number of statutes. *See,*
22 *e.g.*, ALA. CODE §§ 35-6-25 & 35-6-44 (“the facts showing just what diligence the petitioner has
23 exercised must be specifically alleged in the bill”); GA. CODE ANN. § 9-11-4(f)(1)(A); HAW.
24 REV. STAT. § 634-23(2); and S.D. CODIFIED LAWS § 15-9-7.
25

26 Section 1-104(b): “Sources of readily available information” includes information that
27 may be contained in governmental offices, may be located on governmental or non-
28 governmental internet sites, may be possessed by persons likely to know the defendant, or may
29 otherwise be readily available to the plaintiff.
30

31 Section 1-104(c)(1): *See* CAL. C.C.P. CODE § 872.320(a)
32

33 Section 1-104(c)(2): *See, e.g.*, ARK. CODE ANN. § 16-59-101 (2008); CAL. C.C. P. CODE
34 § 405.20; CAL. C.C.P. CODE § 872.320(b); COLO. REV. STAT. § 38-35-110; CONN. GEN. STAT. §
35 52-325 (requiring lis pendens “to be recorded in the office of the town clerk of each town in
36 which the property is situated”)
37

38 Section 1-104(c)(3): *See* ALA. CODE § 35-6-25; GA. CODE ANN. § 9-11-4(f)(1)(A); LA
39 CODE CIV. PROC. ANN. ART. 4624; OHIO REV. CODE ANN. § 2329.23.
40

1 **ARTICLE 2**

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

3
4 **SECTION 2-201. MANNER OF PARTITION.**

5 (a) In a partition action, a court may order a partition in kind or a partition by sale
6 provided that the remedy that the court may ultimately order was requested by one of the parties.
7 A partition in kind, rather than a partition by sale, is the preferred method of dividing heirs'
8 property.

9 (b) Any party may request the court to consider a partition by sale of part of the property
10 and partition in kind of the remainder provided that such a request is made before the court
11 considers whether partition in kind of the whole property can be made without great prejudice to
12 all of the owners under Section 2-202. If the court determines that a sale and division of the
13 proceeds for part of the property and a partition in kind of the remainder would be more
14 equitable than either a partition in kind or a partition by sale of the whole property, the court may
15 order that such part be sold and the remainder divided.

16 (c) In considering the practicality of a partition in kind in a case in which there are
17 multiple defendants, a court must honor any request that the defendants as a whole, or any
18 smaller group of defendants make to have their individual interests considered by the court to be
19 one aggregated group interest due to the fact that these defendants would prefer to remain tenants
20 in common if the court were to order a partition in kind.

21 **Comment**

22 Section 2-201(c): *See, e.g.*, Cal. Code Civ. Proc. § 872.830; N.C. Gen. Stat. § 46-16; W.
23 Va. Code § 37-4-3.
24

1 **SECTION 2-202. FACTORS GUIDING CHOICE OF PARTITION REMEDY.**

2 (a) If a party requests that the property be partitioned by sale and establishes by a
3 preponderance of the evidence to the satisfaction of the court, that the real property or any part of
4 it is so situated that partition in kind cannot be made without great prejudice to the owners,
5 taking into account the totality of the circumstances, the court may order a sale thereof. The
6 court may only order a partition by sale if a party requests that the property be partitioned by
7 sale. If a party does request a partition by sale, without limiting the economic or non-economic
8 factors that the court may consider, the court shall consider the following factors:

9 (1) whether the property is able to be divided between the party or parties seeking
10 a partition by sale and those seeking to maintain ownership of part of the property taking into
11 account any expressed intention of the defendants to retain their ownership of the property as
12 tenants in common;

13 (2) the practicality of dividing the property in kind;

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

18 (4) evidence of longstanding ownership by any individual cotenant as
19 supplemented by the period of time that any person or persons who such a cotenant is or was
20 related to by related by blood, marriage, or adoption and who was in the chain of title owned an
21 interest in the property;

22 (5) any cotenant's particular sentimental links with or attachment to the property,
23 including any attachments arising out of the fact that the property has ancestral or other unique or

1 special value to one or more of the cotenants;

2 (6) the use being made of the property by any of the tenants in common and the
3 degree to which this tenant in common would be harmed if he or she could not continue to use
4 the property for these purposes;

5 (7) the degree to which the cotenants have contributed their pro rata share of the
6 property taxes, insurance, and other carrying charges associated with maintaining ownership of
7 the real property as well as the degree to which the parties have contributed to the physical
8 improvement or the upkeep of the property; and

9 (8) any other economic or non-economic factors.

10 (b) In considering the factors set forth in Section 2-202(a)(1-8), a court should not
11 consider any single factor to be dispositive, standing alone, but should instead weigh the totality
12 of all relevant factors and circumstances.

13 **Comment**

14 Section 2-202(a) - Language in this section only permits a partition by sale to be ordered
15 if a party actually petitions the court for a partition by sale. In many cases, tenants in common
16 who have sought a partition in kind when it appeared to them that a partition in kind could be
17 easily ordered, were surprised that a court using an “economics only” analysis ended up ordering
18 a partition by sale which they did not seek and did not want as this was the worst option in their
19 opinion.

20
21 Section 2-202(a)(2): In certain cases in which a partition in kind alone may be
22 impracticable, a court should consider the practicality of a partition in kind by taking into
23 account the fact that owelty may be an appropriate supplemental remedy.

24
25 Section 2-202(a)(3): *See* N.C. Gen. Stat. § 46-22(b). Property that is sold at public
26 auctions under forced sale conditions, like the conditions that prevail in a partition by sale, often
27 sells at a steep discount from the actual value of the property which in turn results in the property
28 owner losing wealth, sometimes substantial wealth. There are several empirical studies that
29 demonstrate that property sells at a severe discount from fair market value prices when the
30 property is sold under the type of forced sale conditions under which property is often sold under
31 a partition by sale. *See, e.g.,* Marcus T. Allen, *Discounts in Real Estate Auction Prices:
32 Evidence from South Florida*, 69 APPRAISAL J. 38, 42 (2001) (finding discount between 13.3%
33 and 21.5%). Further, courts in many other areas of the law have distinguished between forced

1 sale value and fair market value. Therefore, one must consider the specific type of sales
2 conditions under which property would be sold at a partition by sale in order to evaluate whether
3 or not the winning bid would approximate the property's fair market value and whether the
4 current owners would end up better off economically from a partition by sale as opposed to a
5 partition in kind. *See generally*, Thomas W. Mitchell, Stephen Malpezzi, & Richard K. Green,
6 *Forced Sale Risk: Class, Race, and the "Double Discount"*, 37 FLA. ST. U. L. REV. ___
7 (forthcoming 2010).

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

14
15 Section 2-202(a)(4): *See Delfino v. Vealencis*, 436 A.2d 27, 33 (Conn. 1980); *Eli v. Eli*,
16 557 N.W.2d 405, 409-411 (S.D. 1997); and *Ark Land. Co. v. Harper*, 599 S.E.2d. 754, 761-62
17 (W. Va. 2004).

18
19 Section 2-202(5): *See Ark Land. Co. v. Harper*, 599 S.E.2d. 754, 761-62 (W. Va. 2004);
20 *Overstreet v. Overstreet*, 692 So. 2d 88, 91 (1997); and Property (Co-ownership) Act 2005, Part
21 IV, § 229(2)(c), Victoria, Australia.

22
23 Section 2-202(6): *See Delfino v. Vealencis*, 436 A.2d 27, 33 (Conn. 1980); Property (Co-
24 ownership) Act 2005, Part IV, § 229(2)(c), Victoria, Australia.

25
26 **SECTION 2-203. SALE OF PART OR WHOLE OF PROPERTY; APPRAISAL.**

27 (a) If the court finds that a partition in kind of the real property cannot be made of the
28 whole or a part of the property without great prejudice to the property owners, the court shall
29 appoint a disinterested appraiser to perform an appraisal of the property to be sold. The
30 appraiser must be currently state-licensed or state-certified to appraise the type of property that is
31 to be sold at the partition by sale. In addition, the appraiser must perform all of his or her duties
32 and must practice in accordance with the Uniform Standards of Professional Appraisal Practice.
33 After taking an oath administered by the judge, a magistrate, or the clerk of the court to appraise
34 the property at its fair market value, the property must be appraised based upon its highest and
35 best use assuming sole or unitary ownership of the fee simple estate but with deductions made

1 for the amount of all liens and encumbrances against such real estate. Upon its completion, the
2 appraiser shall file his or her appraisal with the court.

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

14 **Comment**

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

18
19 Should we include time limits for the appointment of the appraiser and the filing of the
20 report?

21
22 Section 2-203(b): Language from 52 Okl. St. § 318.5.
23

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

25 (a) The court in its discretion or on the motion of any interested party may appoint three
26 or more disinterested persons to be commissioners to divide or sell the property as ordered by the
27 court. If the court decides to appoint commissioners, the clerk of the court shall forthwith notify

1 the commissioners of their appointment, and shall deliver to one of them a certified copy of the
2 judgment of partition.

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

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

9 (1) Any officer of the court in which the partition action is being litigated,
10 including any judge, magistrate, or clerk of the court.

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

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

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

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

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

22 (e) The commissioners shall be sworn by the judge, a magistrate, or the clerk of the court,
23 to do justice among the tenants in common in respect to such partition action, according to their

1 best skill and ability.

2 **Comment**

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

5
6 Section 2-205(a): Cal. Code Civ. Proc. § 873.010.

7
8 Section 2-205(c): Cal. Code Civ. Proc. § 873.050. The first four requirements are from
9 Section 873.050 with the addition of the language barring “any relative of any owner within the
10 third degree.”

11
12 Section 2-205(e): *See* N.C. Gen. Stat. § 46-8.

13

1 **ARTICLE 3**

2 **BUYOUT PROVISIONS**

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

6 **INEQUITABLE.** If the court finds that all or a portion of the real property may not be
7 partitioned in kind without great prejudice to all of the owners under Section 2-202, the court
8 shall, prior to ordering a public partition sale or a public auction of such property, provide the
9 cotenant or cotenants who had not petitioned the court for a partition by sale with the opportunity
10 to buyout the entire interest of the party or parties who had petitioned the court for a partition by
11 sale. The court shall inform any cotenant who appears in person before the court without
12 counsel about the availability of this buyout remedy.

13 (a) A party who had not petitioned the court for a partition by sale may inform the court
14 that their interest should be made available for purchase under this section within 15 days after
15 the court determines the value of the property to be sold pursuant to Section 2-203. If all of the
16 parties to the action who had not petitioned the court for a partition by sale of the property
17 inform the court that their interest should be made available for purchase under this section, the
18 court shall order the property sold pursuant to Section 4-401.

19 (b) A party who had not petitioned the court for a partition by sale and who does not
20 inform the court that their interest should be made available for purchase as provided for under
21 subsection (b), shall notify the court of their intention to exercise the buyout option no sooner
22 than 15 days and no later than 30 days after the court has determined the value of the property to
23 be sold pursuant to Section 2-203. A party who had not petitioned the court for a partition by
24 sale may purchase an interest in the property as provided in this section even if a default

1 judgment has been entered against that party. If more than one party who had not petitioned the
2 court for a partition by sale wishes to exercise their right to buyout interests under this section,
3 each of these cotenants shall be entitled to purchase a portion of the interest that is available to be
4 bought out at a level that is equal to the cotenant's existing percentage ownership divided by the
5 total percentage ownership of all cotenants participating in the buyout.

6 (c) No sooner than 30 days and no later than 75 days after the appraised price for the
7 property to be sold is established, each party who has exercised the buyout option shall pay into
8 the court the price set as the value of the interest they are purchasing. Upon full payment of the
9 purchase price for the entire interest that is subject to the buyout provisions of this section, the
10 court shall order that the proper instruments transferring title in the interest be executed and
11 delivered to the purchasing cotenant or cotenants. If none of the cotenants who exercised the
12 buyout option pays their percentage of the price set as the value of the entire interest to be bought
13 out within 75 days after the appraised price for the property to be sold is established, the court
14 shall order a sale of the property pursuant to Section 4-401.

15 (d) If one or more but not all of the cotenants who exercised the buyout option under
16 subsection (b) fail to pay their percentage of the price established as the value of the interest by
17 the deadline specified in subsection (c), the remaining cotenants who exercised the buyout option
18 may purchase a portion of the defaulting cotenant's interest by paying the price of the share or
19 shares into the court within 10 days after the expiration of the deadline provided in subsection (c)
20 of this section. The portion that each of the remaining cotenants may purchase shall be equal to
21 the cotenant's original percentage ownership divided by the total percentage ownership of all
22 cotenants interested in purchasing the defaulting cotenant's interest. If the remaining cotenants
23 who exercised the buyout option do not cure the default by paying the full price of the interest to

1 be bought out into the court within 10 days after the expiration of the deadline provided in
2 subsection (c) of this section, the court shall order property sold pursuant to Section 4-401.

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 **ARTICLE 4**

2 **SALES PROCEDURE**

3
4 **SECTION 4-401. PUBLIC PARTITION SALES OR PUBLIC AUCTIONS.**

5 (a) If a court orders a sale of all or part of the real property or of the whole, the court shall
6 order that the property be sold at a public partition sale unless the court finds that a sale at a
7 public auction would likely be more just, fair, economically advantageous to all the parties under
8 the circumstances. If the court orders a public partition sale and the parties agree on the identity
9 of a licensed real estate broker to list the property, the court shall appoint that real estate broker
10 to conduct the sale. If the parties cannot agree upon the appointment of a licensed real estate
11 broker within ten (10) days of the court's public partition sale order, the court shall appoint a
12 disinterested, licensed real estate broker to conduct the public partition sale and establish a
13 reasonable commission for this broker. The licensed real estate broker who is appointed by the
14 court shall list the property for sale at a price that is no lower than the court-approved appraised
15 price and subject to any other terms and conditions that are established by the court.

16 (b) If the property does not sell for at least the appraised price within the time period the
17 court establishes for a public partition sale, the court upon further hearing may either approve the
18 highest outstanding offer, if any, or revalue the property and order that the property continued to
19 be listed for a further defined period, or order that the property be sold at a public auction.

20 (c) If the court orders that all or any part of the real property is to be sold at a public
21 auction, the court shall set the terms and conditions of the sale. The auction must be conducted
22 in the manner prescribed by law for auctions of real property in other partition proceedings in
23 this state.

1 (d) If the purchaser is a party who owns an interest in the property or holds a lien on the
2 property, and thereby is entitled to a share of the proceeds of the sale, such a purchaser shall
3 receive a credit against the purchase price in an amount equal to the value of their interest or lien.
4 Parties or lienholders who qualify for this credit may aggregate their credits if they are joint
5 purchasers.

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 4-401(d): *See, e.g.*, OR. REV. STAT. § 105.365; S.D. CODIFIED LAWS § 21-45-34
22 (2009); UTAH CODE ANN. § 78-39-35 (2009); and WASH. REV. CODE § 7.52.390 (2009).
23

24 **SECTION 4-402. PERSONS INELIGIBLE TO PURCHASE AT A PUBLIC** 25 **PARTITION SALE.**

26 (a) The judge, any commissioner, any appraiser, or any real estate broker, as well as any
27 agent for any of these individuals who participates in the partition proceedings may not directly
28 or indirectly purchase property in a public partition sale.

29 (b) A sale contrary to subsection (a) shall not be confirmed under Section 4-403(c).
30 Notwithstanding confirmation under Section 4-403(c), a person harmed by a violation of
31 subsection (a) shall be entitled to damages.

1 **Comment**

2 Cal. Code Civ. Proc. § 873.690
3

4 **SECTION 4-403. REPORT OF A PUBLIC PARTITION SALE OR A BUYOUT.**

5 (a) Within 15 days after any sale under this Act, the person authorized to sell the
6 property, shall file a report with the court and provide the report to all parties.

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

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

10 (2) The name of the purchaser.

11 (3) The sales price.

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

13 (5) Any amounts payable to lienholders.

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

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

17 (c) Within 30 days of the filing of the report of sale, the court shall hold a hearing on
18 whether to confirm the sale. The court shall not confirm a sale to a person listed in Section 4-
19 402(a).

20 **Comment**

21 Cal. Code Civ. Proc. § 873.710

22 Section 4-403(b)(7): Other material facts may include any recommendations with respect
23 to land use planning and development that would enable those who purchase property at public
24 partition sales to use the property that is purchased for more economically productive purposes.
25 Such planning and development may include building or opening public or private highways,
26 roads, and streets, as well as granting public or private easements.
27

1 **ARTICLE 5**

2 **ATTORNEY'S FEES**

3
4 **SECTION 5-501. AWARD OF ATTORNEYS' FEES.** The court shall not award
5 attorney's fees to any party in a partition action involving heirs' property.

6 **Comment**

7
8 *See, e.g.,* McReady v. McReady, 810 P.2d 624, 627 (Ariz. Ct. App. 1991); Lee v.
9 Palumbo, 2001 Conn. Super. LEXIS 2534 at *1 (Conn. Sup. Ct. 2001); Fleming v. Lundy, 156
10 A.D.2d 965 (N.Y. App. Div. 1989); and Ragan v. Ragan, 119 S.E. 882, 884 (N.C. 1923).