

**To:** Tenancy in Common Ownership Default Rules Drafting Committee

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This memo serves as a preliminary issues memo to begin our Committee's discussion on the topic of tenancy in common (TIC) ownership default rules. The memo is just a starting point for the discussions necessary to begin drafting an Act and do not encompass the entirety of the issues that will be raised throughout this process.

In contemplating the overall structure of an Act, the preliminary vision is as follows:

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| Section 1. | Short Title   |
| Section 2. | Definitions   |
| Section 3. | Scope   |
| Section 4. | Actions of Co-Tenants <sup>1</sup>                                      |
| Section 5. | Liability of Co-Tenants <sup>2</sup>                                    |
| Section 6. | Interaction of Act with Uniform Partition of Heirs Property Act (UPHPA) |
| Section 7. | Enactment   |

This structure is not set in stone and may be changed in its entirety, but it is an overarching structure the Committee can use to commence discussion.

The bulk of the discussion for our first meeting, and the bulk of the issues for our Committee to decide, rests around what is labeled "Section 4. Actions of Co-Tenants." The goal for our meeting on Friday, September 17 is to have a robust discussion on this issue. As part of that discussion, it would be helpful to hear examples of issues that have caused strife for co-tenants, such as stories of one co-tenant or a small group of co-tenants preventing an action from being taken when the majority of the co-tenants desired the action. Such information can help inform the Committee as to the types of everyday issues in which the current unanimity rule is causing a roadblock for co-tenants. Inherent in the discussion of the types of actions co-tenants can take without unanimous consent is a discussion on what is labeled "Section 6. Interaction with the UHPA."

On Saturday, September 18, our goal is to shift our discussion to what is labeled "Section 5. Liability of Co-Tenants" and "Section 3. Scope." Once the Committee has discussed the types of actions co-tenants can take without unanimous consent, the issue of liability for co-tenants if they violate the rules and the scope of the Act's application naturally arise.

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<sup>1</sup> Depending on the Committee's discussion, this section may be expanded into multiple parts that vary based on percentages required for an action or on the types of actions co-tenants engage in.

<sup>2</sup> Depending on the Committee's discussion, this section may be expanded into multiple parts that vary based on the type of liability imposed or on some other factor such as the good or bad faith of the co-tenant.

All of the issues we hope to discuss in our first Committee meeting are described in more detail below.

### **ISSUE I: ACTIONS A LESS-THAN-UNANIMOUS VOTE SHOULD APPLY TO & WHAT LESS-THAN-UNANIMOUS PERCENTAGE OF TENANTS IN COMMON SHOULD BE REQUIRED?**

The central issue that drove the Study Committee to its recommendation was the current unanimity rule for TIC property. Without an agreement to the contrary, unanimity is required for nearly all decisions involving TIC property such as whether to use the property as rental property or a primary residence for one tenant in common, whether to use the property as timberland, whether to mortgage the property in its entirety, whether to maintain the property as farmland, whether to build a house on the property, whether to make improvements to the property, and a host of other issues that routinely arise between tenants in common. By requiring unanimity, tenants in common—and particularly those with greater numbers of tenants in common—frequently either (1) remain stuck with maintaining the status quo of their property and thus unable to capitalize on potential investments that could be made on the property or (2) are forced to partition.

The UHPA creates more fair procedures for such a partition process for owners of heirs property, but for other co-tenants—and even for many owners of heirs property—the ultimate desire may not be to partition, but instead have the entirety of the co-tenants remain joint owners of the property. This may be particularly true when the TIC property is owned by family members who desire to both develop and capitalize on TIC property while also maintaining family harmony and avoid partition procedures.

The goal of the Study Committee, then, was to have our Committee develop a default managerial rule for TIC property that allowed for less-than-unanimous decision-making would assist in some situations. In drafting a less-than-unanimous rule, there are two central questions for the Committee to consider:

- (1) What types of actions should co-tenants be able to make in a less-than-unanimous manner?
- (2) For the actions where a less-than-unanimous vote is required, what percentage of the co-tenants should have to agree?

In thinking of the types of actions co-tenants should be able to make with less than unanimous consent, the Committee can begin by considering some specific examples of actions that co-tenants might want to take. For example, should co-tenants be able to change the property from TIC property into, for example, an LLC with a less-than-unanimous vote? Should co-tenants be able to build an office, house, or other improvement on the property with a less-than-unanimous vote? Should co-tenants be able to remove timber, oil, or other resources from the property with a less-than-unanimous vote?<sup>3</sup> Should co-tenants, to the extent a lender agrees, be able to mortgage the property with a less-than-unanimous vote? These examples are by no means an exclusive list of

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<sup>3</sup> It is worth noting that there is precedent for less-than-unanimous decision-making between tenants in common in the area of mineral law and timber law. *See, e.g.*, § 765 ILCS 520/0.01 *et seq.*; W. VA. CODE § 37B-1-1 *et seq.*; MCL 319.101 *et seq.*; LA. REV. STAT. § 31:164 *et seq.*

the types of actions co-tenants might want to take but are currently prohibited from doing under the unanimity rule, but they are exemplary of the types of actions the Committee must consider. Hearing from Committee members and Observers their own experiences of dealing with TIC property would enlighten the Committee's conversation about specific instances where the unanimity rule has blocked a desired action.

After the Committee contemplates specific examples where the unanimity rule causes difficulties for holders of TIC property, it will then be helpful to begin thinking about whether the types of actions being considered can be grouped into categories for purposes of drafting the Act, or whether the types of actions must be enumerated expressly. This is ultimately a drafting question and the Committee is unlikely to resolve the question in our first meeting. But it is nevertheless helpful at the outset to think about how structurally the Act will be drafted and the advantages and disadvantages of each approach. If the Committee opts to have an enumerated list of activities to which a less-than-unanimous rule applies, that list will inherently be imperfect in that it will omit some activity future co-tenants wish to take that the Committee simply did not think of during the drafting process. Categorizing the actions co-tenants can take without unanimity also will cause imperfections as there may be some future activity co-tenants wish to take that the Committee did not think of during the drafting process, but had the Committee thought of the issue, the Committee would have wanted the unanimity rule to apply. There are pros and cons to each approach, and as noted, resolution is unlikely to occur immediately, but how the Committee wants to structure the Act is worth some preliminary discussion.

The Committee must next wrestle with the specific percentage required for co-tenants to take an action without unanimity. A preliminary question for the Committee on this issue is whether all actions that require less-than-unanimity should have the same percentage requirement or might some actions have different percentage requirements. One way the Committee might contemplate this question is are there some actions the Committee wants to encourage co-tenants to take such that the Committee would want to set a lower percentage requirement (such as a 51% requirement) thereby making the action easier to take? Alternatively, are there some actions the Committee wants co-tenants to exercise more caution before taking and thus the Committee might want to impose a higher percentage requirement (such as an 80% requirement)? Are there even actions the Committee thinks the minority of co-tenants should be able to take? Still yet, are there some actions that co-tenants might want to take that Committee thinks should still require unanimity?

These questions drive to the fundamental issue the Committee must consider: what are the types of actions the Committee wants a majority of the co-tenants to be able to do without having unanimous consent? Put another way, what types of actions should the minority of co-tenants not be able to stop?

## **ISSUE II: HOW SHOULD THE DEFAULT RULES ACT INTERACT WITH THE UHPA?**

When the original Study Committee was created, a discussion occurred as to whether the Act to be drafted by this Committee should be a stand-alone act or added as an amendment to the UHPA. The Study Committee unanimously recommended that the default rules Act be a stand-alone proposal for two predominant reasons. First, the Study Committee recommended that a default rules Act that created a less-than-unanimous rule apply to all TIC property and not be limited to

only heirs property. Second, given the vast number of states that have already adopted or are currently considering the UHPA, the Study Committee was cautious of causing unintentional harm to the success of the UHPA.

In making this recommendation, the Study Committee was conscious that a new Act to be drafted by this Committee should not overlap or conflict in substance with the partitioning procedures of the UHPA. When contemplating the types of actions to which a less-than-unanimous action can be taken by co-tenants, the Committee must be similarly conscious to not overlap or conflict in substance with the UHPA. To be mindful of this, the Committee in drafting the Act must contemplate two scenarios: (1) Can the Act drafted by this Committee be adopted by a State that has already adopted the UHPA? (2) Can the Act drafted by this Committee be adopted by a State that has not adopted the UHPA? The answer to both questions should be yes at the end of the drafting process for this Act.

### **ISSUE III: SHOULD THERE BE ANY LIABILITY IF CO-TENANTS VIOLATE THE NEW LESS-THAN-UNANIMOUS RULES?**

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A new regime where co-tenants can make some decisions without unanimity raises the question of whether the Act needs to legislate liability rules if co-tenants violate the rules. Turning back to some specific examples, if the Act created a rule that 80% of the co-tenants can agree to fell timber on TIC property, and then 50% of the co-tenants cut down the trees, should the Act legislate any liability for violating the rule? Similarly, if the Act allowed for 51% of the co-tenants to agree to build a structure on the property, then one co-tenant acting alone built a structure, should there be any liability for violating the rule?

If there is liability included in the uniform act, then the inherent question is what type of liability. Should the liability be in money damages or should the liability include restoring the property to its prior condition (if possible)? And, relatedly, should there be different liability rules depending on the good or bad faith of the violating co-tenant(s)?

### **ISSUE IV: SCOPE**

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With all of these issues comes the issue of scope of the act, specifically what forms of TIC property should the Act apply and to what types of property should the Act apply. The Study Committee recommended that the uniform law cover (1) all ownership forms of TIC property that are not subject to a binding agreement between the co-tenants and (2) cover only TIC interests in real estate and the proceeds thereof. Upon contemplating the aforementioned issues, the Committee should reconsider whether the scope suggested by the Study Committee is the correct scope.

The reality is that depending on the less-than-unanimous percentage(s) selected, the number of co-tenants required to have the Act become applicable will change, i.e. if it takes 80% of co-tenants to make a decision, the Act by its own terms could not apply to TIC property with fewer than 5 co-tenants, whereas if there was a 51% rule, the Act could apply to TIC property with 3 or more co-tenants. While the Committee may not want to alter the Study Committee's recommendation as to the scope of the Act, it is worth contemplating whether the less-than-unanimous percentage(s) drafted by the Committee inherently limit the Act's scope.