

State of Alabama



Alabama Law Institute

Alabama Uniform Partition of Heirs Property Act

November 2013

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Preface

The Alabama Law Institute presents to the Bench and Bar of Alabama, for consideration and constructive criticism the following proposed act.

The Uniform Partition of Heirs Property Act attempts to address a problem faced by many middle to low-income families who own real property: dispossession of their land through a forced sale. For many of these families, real estate is their single most valuable asset.

In summary, the Uniform Partition of Heirs Property Act preserves the right of a co-tenant to sell his interest in inherited real estate, while ensuring that the other co-tenants will have the necessary due process to prevent a forced sale: notice, appraisal, and right of first refusal. If the other co-tenants do not exercise their right to purchase property from the seller, the court must order a partition-in-kind if feasible, and if not, a commercially reasonable sale for fair market value.

This act would supplement Chapter 6 of Title 35 of the Code of Alabama which would continue to apply to partition of all property not deemed to be heir property.

The committee was chaired by Bill Gamble and aided by Bob McCurley who served as reporter.

Othni J. Lathram
Director

November 2013

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ALABAMA UNIFORM PARTITION OF HEIRS

PROPERTY ACT

SECTION 1. SHORT TITLE. This act may be cited as the Alabama Uniform Partition of Heirs Property Act.

Alabama Comment

None.

Uniform Comment

None.

SECTION 2. DEFINITIONS. In this act:

(1) "Ascendant" means an individual who precedes another individual in lineage, in the direct line of ascent from the other individual.

(2) "Collateral" means an individual who could inherit from, or whose estate could descend to, the related individual ~~is related to another individual~~ under the law of intestate succession of Alabama ~~this state~~ but who is not the other individual's ascendant or descendant.

(3) "Descendant" means an individual who follows another individual in lineage, in the direct line of descent from the other individual.

(4) "Determination of value" means a court order determining the fair market value of heirs property under Section 6 or 10 or adopting the valuation of the property agreed to by all cotenants.

(5) "Heirs property" means real property held in tenancy in common which satisfies all of the following requirements as of the filing of a partition action:

(A) there is no agreement in a record binding all the cotenants which governs the partition of the property;

(B) one or more of the cotenants acquired title from a relative, whether living or deceased; and

(C) Any of the following applies:

(i) 20 percent or more of the interests are held by cotenants who are relatives;

(ii) 20 percent or more of the interests

are held by an individual who acquired title from a relative, whether living or deceased; or

(iii) 20 percent or more of the cotenants are relatives.

(6) "Partition by sale" means a court-ordered sale of the entire heirs property, whether by auction, sealed bids, or open-market sale conducted under Section 10.

(7) "Partition in kind" means the division of heirs property into physically distinct and separately titled parcels.

(8) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(9) "Relative" means an ascendant, descendant, or collateral or an individual otherwise related to another individual by blood, marriage, adoption, or law of this state other than this ~~act~~ Act.

Alabama Comment

This Section is identical to Section 2 of the Uniform Partition of Heirs Property Act (the Uniform Act) except as follows:

In Subsection (2) “Collateral” was changed to clarify that the individual must be an individual who is eligible to inherit from a relative.

Uniform Comment

1. Section 2(1): In common usage, an ancestor is defined as “one from whom a person lineally descended.” *Wills v. Le Munyon*, 107 A. 159, 161 (N.J. Ch. 1919). However, statutes of descent often narrow the term to “any one from whom an estate is inherited.” *Id.* Thus, use of the term ancestor could be interpreted to exclude property acquired from a living person. In contrast, ascendant encompasses anyone who precedes an individual in lineage such as an individual’s parents or grandparents, whether living or deceased. The term ascendant is used in a number of statutes encompassing many different subject matter areas. See, e.g., ARK. CODE ANN. § 28-9-202 (2009); CONN. GEN. STAT. § 45a-755 (2010); IOWA CODE § 428A.2 (2010); FLA. STAT. § 732.403 (2009); LA. CIV. CODE ANN. art. 1301 (2009); MISS. CODE ANN. § 93-13-253; P.R. LAWS ANN. TIT. 31 § 2413 (209); TEX. ESTATES CODE ANN. § 676 (Vernon 2009).

2. Sections 2(1)-2(3): The specific classes of people who may be considered ascendants, descendants, or collaterals shall be defined under state law.

3. Section 2(5): Heirs property is defined in this Act to

include only a subset of tenancy-in-common property. At minimum, for tenancy-in-common property to be considered heirs property, title must be acquired by at least one of the cotenants in an intergenerational transfer from a relative of that cotenant who was either that cotenant's ascendant, descendant, or collateral at the time title was transferred. Further, the Act does not apply to tenancy-in-common property in which all of the cotenants are subject to a binding agreement that governs the partition of the property, including binding agreements that run to successors and assigns. Tenancy-in-common property that is acquired by investors in part to qualify for federal like-kind exchange treatment under Section 1031 of the Internal Revenue Code and that is subject to an agreement governing the partition of the property is excluded from this Act. Furthermore the Act does not apply to "first generation" tenancy-in-common property established under the default rules and still owned exclusively by the original cotenants even if there is no agreement in a record among the cotenants governing the partition of the property. "First generation" tenancy-in-common property, however, may be converted into heirs property if a cotenant with an interest in such "first generation" tenancy-in-common property transfers all or a part of his or her interest to a relative provided that the other criteria for classifying property as heirs property are satisfied.

Joint tenancy property is not covered by this Act. In order for any real property that was initially owned by two or more individuals as joint tenancy property to be covered by this Act, one or more of the joint tenants must sever the joint tenancy in accordance with the requirements of state law. Once a joint tenancy is severed, this Act may apply if the property is determined to be heirs property at the time of the filing of a partition action even if two or more

individuals who had formerly been joint tenants prior to severance of the joint tenancy remain joint tenants with each other after severance with respect to a particular interest in the tenancy in common. See 7-51 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 51.04(1)(a) (Michael Allen Wolf ed., 2009). See also *Carmack v. Place*, 535 P.2d 197 (Co. 1975).

4. Section 2(5)(A): If tenants in common acquire their interests through a deed or a will that does not govern the manner in which the tenancy-in-common property may be partitioned, the deed or will alone shall not be construed to be an agreement in a record among all the tenants in common which governs the partition of the property within the meaning of Section 2(5)(A).

5. Section 2(8): Information that constitutes a “record” under this Act need not be recorded.

6. Section 2(9): A relative as that term is defined under this Act does not include a person who is related to another person only by affinity. The definition of relative does encompass individuals who are determined to be relatives under state law even if, for example, it has not been established that these individuals are genetically related. For example, under the Uniform Parentage Act, a man may be determined to be the father of a child even if paternity has not been established by genetic testing.

7. Section 2(9): In a partition action, a state court may apply the state’s choice of law rules to determine whether two or more cotenants may be determined to be relatives. Under its choice of law analysis, the court could determine that two or more cotenants are relatives based upon application of the substantive law of another state because

the law that applies under a state's choice of law rules would constitute "other law of this state" under Section (2)(9).

SECTION 3. APPLICABILITY; RELATION TO OTHER LAW.

(a) This act applies to partition actions filed on or after the effective date of this act.

(b) In an action to partition real property under Chapter 6 of Title 35 Code of Alabama the court shall determine whether the property is heirs property. If the court determines that the property is heirs property, the property must be partitioned under this act unless all of the cotenants otherwise agree in a record.

(c) This {act} supplements Chapter 6 of Title 35 Code of Alabama and, if an action is governed by this {act}, replaces provisions of Chapter 6 of Title 35 Code of Alabama that are inconsistent with this act.

(d) This Act does not supplant or otherwise change the provisions for fees as a part of the cost under Alabama

Code Section 34-3-60

Alabama Comment

Subsections (a), (b), and (c) are identical to Section 3 of the Uniform Act except for the additions in Subsections (b) & (c) that reference Chapter 6 of Title 35 Code of Alabama (Alabama's general Partition Act). Pursuant to subsection (c), this act supplements Chapter 6 of Title 35. However, under subsection (b), if the property to be partitioned under Chapter 6 of Title 35 is heir property, this act controls. In contrast, since this act is supplemental to Chapter 6 of Title 35, Article 4A would be applicable in non-heir property cases.

Subsection (d) was added since the Uniform Act did not address attorney's fees or costs. The Act does not change the current law on attorneys' fees or cost now found in the general Partition Act.

Uniform Comment

1. Section 3(b): A final order of a court in a partition action filed on or after the date this Act becomes effective is subject to challenge if the court failed to determine whether the real property in question is heirs property as that term is defined under this Act.

2. Section 3(b): In a partition action, after a court has determined that the property in question is heirs property, all of the cotenants may agree to partition the property utilizing an agreed upon method or procedure that is different from the procedures required by this Act provided that the agreement is contained in a record.

SECTION 4. SERVICE; NOTICE BY POSTING.

(a) ~~This [act] does not limit or affect the method by which service of a [complaint] in a partition action may be made.~~ Service of process shall be in accordance with sections 35-6-20 and 35-6-25 of the Code of Alabama.

(b) ~~If the plaintiff in a partition action seeks [an order of] notice~~ When service of process is obtained by publication and the court determines that the property may be heirs property, the plaintiff, not later than 10 days after the court's determination, shall post ~~[and maintain while the action is pending]~~ conspicuous and durable sign of at least 11 x 17 inches in size on the property that is the subject of the action. The sign must state that the action has commenced and identify the name and address of the court and the common designation by which the property is known. The court may require the plaintiff to publish on the sign the name of the plaintiff and the known defendants.

Alabama Comment

This Section is substantially different from the Uniform Act. Subsection (a) requires the service of process to follow the current service of process law in partition actions.

Subsection (b) provides that when service is obtained by publication, in addition to publication, there must be a “durable” sign 11x17 inches in size placed on the property.

Uniform Comment

1. Section 4(b): In some instances, some states require by statute that a sign or notice be posted in a conspicuous place on real property that may be subject to a forced sale. *See, e.g.,* ARIZ. REV. STAT. ANN. § 42-18266 (2010) (in connection with property that is subject to foreclosure for delinquent taxes, requiring in certain circumstances the placing of a sign in a conspicuous place on the property describing the property, indicating that the property is subject to foreclosure, and giving notice about the manner in which the owner may redeem the tax lien); CAL. CIV. CODE § 2924f (West 2010) (in most nonjudicial foreclosures by power of sale, requiring that a copy of the notice of sale be posted in a conspicuous place on the real property in question and that the notice of sale contain relevant information about the power of sale foreclosure action).

SECTION 5. COMMISSIONERS. If the court

appoints commissioners pursuant to Alabama Code Sections 36-6-45 and 36-6-62 each commissioner, in addition to the requirements and disqualifications applicable to commissioners in Alabama Code Sections 35-6-45, 36-6-46 and 36-6-62, must be disinterested and impartial and not a party to or a participant in the action.

Alabama Comment

This Section is identical to Section 5 of the Uniform Act except for the addition of the references to the Alabama Code sections under the general partition law.

Uniform Comment

Legislative Note: Nearly every state uses the term "commissioner." However, there are some exceptions. For example, California uses the term "referee" and Georgia uses the term "partitioner."

SECTION 6. DETERMINATION OF VALUE.

(a) Except as otherwise provided in subsections (b) and (c), if the court determines that the property that is the subject of a partition action is heirs property, the court shall

determine the fair market value of the property by ordering an appraisal pursuant to subsection (d).

(b) If all cotenants have agreed to the value of the property or to another method of valuation, the court shall adopt that value or the value produced by the agreed method of valuation.

(c) If the court determines that the evidentiary value of an appraisal is outweighed by the cost of the appraisal, the court, after an evidentiary hearing, shall determine the fair market value of the property and send notice to the parties of the value.

(d) If the court orders an appraisal, the court shall appoint a disinterested real estate appraiser licensed in this state to determine the fair market value of the property assuming sole ownership of the fee simple estate. On completion of the appraisal, the appraiser shall file a sworn or verified appraisal with the court.

(e) If an appraisal is conducted pursuant to

subsection (d), not later than 10 days after the appraisal is filed, the court shall send notice to each party with a known address, stating:

(1) the appraised fair market value of the property;

(2) that the appraisal is available at the clerk's office; and

(3) that a party may file with the court an objection to the appraisal not later than 30 days after the notice is sent, stating the grounds for the objection.

(f) If an appraisal is filed with the court pursuant to subsection (d), the court shall conduct a hearing to determine the fair market value of the property not sooner than 30 days after a copy of the notice of the appraisal is sent to each party under subsection (e), whether or not an objection to the appraisal is filed under subsection (e)(3). In addition to the court-ordered appraisal, the court may consider any other evidence of value offered by a party.

(g) After a hearing under subsection (f), but before considering the merits of the partition action, the court shall determine the fair market value of the property and send notice to the parties of the value.

Alabama Comment

Alabama made no changes to Section 6 of the Uniform Act.

Uniform Comment

1. Section 6(a): Some states require that any property that may be subject to partition by sale shall first be appraised before a court decides whether to order partition in kind or partition by sale. *See, e.g.*, N.M. STAT. § 42-5-7 (2009). Other states require that nearly all real property that is to be sold under an order or a judgment of a court must be appraised before the property is sold. *See, e.g.*, KY. REV. STAT. ANN. § 426.520 (West 2010).

2. Section 6(b): The court may not adopt a monetary value for the property that only some of the cotenants but not others have agreed upon or a valuation derived from an alternative method of valuation that only some of the cotenants have agreed upon even if the only cotenants that have not agreed to the value of the property or to another method of valuation are cotenants that are unknown, unlocatable, or otherwise remain unascertained.

3. Section 6(b): The cotenants may agree that the property should be valued utilizing a less expensive method of valuation than an appraisal in situations, for example, in which the cotenants lack the expertise to value the property themselves. For example, the cotenants may agree to authorize two real estate brokers each to submit a broker's opinion of value and further may agree that the two valuation opinions should be averaged to determine the value of the property.

4. Section 6(d): Under certain circumstances, some states require that property that is to be sold by partition by sale be appraised by one or more disinterested persons. *See, e.g.*, MINN. STAT. § 558.17 (2009) (providing that property subject to partition by sale shall be appraised by two or more disinterested persons before the property is sold if the court orders the property sold at a private sale instead of at a public auction). In some instances, states require that certain court-appointed real estate appraisers must be state-certified and in good standing with the state appraisal authorities. *See, e.g.*, OKLA. STAT. tit. 52, § 318.5 (2009).

5. Section 6(d): State statutes and case law typically refer to one person's exclusive ownership of property as "sole ownership." *See, e.g.*, CAL. CIV. CODE § 681 (2010) (designating the ownership of property by a single person as a sole or several ownership); FLA. STAT. § 711.502 (2009) ("Only individuals whose registration of a security shows sole ownership by one individual . . . may obtain registration in beneficiary form"); MONT. CODE ANN. 70-1-305 (2009); S.D. CODIFIED LAWS § 43-2-10 (2009) ("The ownership of property by a single person is designated as a sole or several ownership."). *See also In re Robertson*, 203 F.3d 855, 860 (5th Cir. 2000) ("[T]he assets of which each former spouse

acquires sole ownership is reclassified by law as the separate, exclusive property of that former spouse.”).

SECTION 7. COTENANT BUYOUT.

(a) In each petitioner’s initial pleading in a partition action, the petitioner shall state whether the petitioner requests partition by sale. If the petitioner fails to so state, the petitioner shall be deemed to have not requested partition by sale.

(b) In each cotenant’s initial responsive pleading, the cotenant shall state whether the cotenant requests partition by sale.

(1) If a cotenant files a responsive pleading but fails to so state, the cotenant shall be deemed to have not requested partition by sale.

(2) If a guardian ad litem is appointed to represent one or more cotenants, including but not limited to unknown, unlocatable, and legally incapacitated cotenants, such guardian ad litem can but is not required to state

whether or not such cotenant requests partition by sale, and such guardian ad litem shall have no liability for making or failing to make such election. If a guardian ad litem files a responsive pleading but fails to so state, such cotenant shall be deemed to have not requested partition by sale.

(c) If a cotenant is named as a defendant and served with the complaint but does not appear in the action, the cotenant shall be deemed to have not requested partition by sale, unless the court approves a request to authorize the sale of the cotenant's interest as set forth in subsections (1) through (3) of this subsection.

~~(g)~~ (1) Not later than ~~45~~ 14 days after the court sends notice to the parties pursuant to subsection ~~(a)~~ (e) or subsection (f)(1), any cotenant entitled to buy an interest under this section may request the court to authorize the sale ~~as part of the pending action pursuant to this Section~~ of the interests of cotenants named as defendants and served with the complaint but ~~that did not appear~~ not appearing in the

action.

~~(h)~~ (2) If the court receives a timely request under subsection ~~(g)~~ (c)(1), the court, after a hearing, may deny the request or may authorize the requested ~~additional~~ sale of the interests of any or all cotenants named as defendants and served with the complaint who did not appear in the action.

~~on such terms as the court determines are fair and reasonable, subject to the following limitations:~~

~~————— (1) a sale authorized under this subsection may occur only after the purchase prices for all interests subject to sale under subsections (a) through (f) have been paid into court and those interests have been reallocated among the cotenants as provided in those subsections; and~~

~~————— (2) the purchase price for the interest of a nonappearing cotenant is based on the court's determination of value under Section 6.~~

(3) If the court approves the request made

pursuant to subsection (c)(1) with respect to any cotenant who was named as a defendant and served with the complaint but did not appear in the action, such cotenant shall be deemed to have requested partition by sale for purposes of this Section, and shall be treated for all purposes hereunder as having requested partition by sale.

(d) If no cotenant, including the petitioner, has requested partition by sale, the court shall determine whether the property can be partitioned in kind pursuant to Sections 8(a), (c), and (d), and Section 9. If the court determines the property cannot be partitioned in kind, the court shall dismiss the action without prejudice.

(~~a~~)(e) If any cotenant, including the petitioner, has requested partition by sale, after the determination of value under Section 6, the court shall send notice to the parties that any cotenant except a cotenant that requested partition by sale may buy all the interests of the cotenants that requested partition by sale.

~~(b)(1)~~ Not later than ~~45~~30 days after the notice is sent ~~under subsection (a)~~, any cotenant except a cotenant that requested partition by sale may give notice to the court that it elects to buy all the interests of the cotenants that requested partition by sale.

~~(e)(2)~~ The purchase price for ~~each of~~ the interests of a cotenant that requested partition by sale ~~is~~ shall be the value of the entire parcel determined under Section 6 multiplied by the cotenant's fractional ownership of the entire parcel.

~~(d)(3)~~ After expiration of the period in subsection ~~(b)(e)(1)~~, if the following rules apply: ~~(1)~~ If only one cotenant elects to buy all the interests of the cotenants that requested partition by sale, the court shall notify all the parties of that fact and of the price to be paid by the electing cotenant calculated pursuant to subsection (e)(2). ~~—(2)~~ If more than one cotenant elects to buy all the interests of the cotenants that requested partition by sale, the court shall

allocate the right to buy those interests among the electing cotenants based on each electing cotenant's existing fractional ownership of the entire parcel divided by the total existing fractional ownership of all cotenants electing to buy and send notice to all the parties of that fact and of the price to be paid by each electing cotenant calculated pursuant to subsection (e)(2).

~~(e)(4) The the court sends notice to the parties under subsection (d)(1) or (2), the court shall set a date, not sooner than 60 days after the date the notice was sent end of the applicable notice period in subsection (e)(1), by which electing cotenants must pay their apportioned price into the court. After this date, the following rules apply:~~

~~(4) (A) If all electing cotenants timely pay their apportioned price into court, the court shall issue an order reallocating all the interests of the cotenants and disburse the amounts held by the court to the persons entitled to them, and the court shall thereafter enter such~~

other orders as may be appropriate and dismiss the action without prejudice.

~~(3)~~(B) If one or more but not all of the electing cotenants fail to pay their apportioned price on time, the court~~[, on motion,]~~ shall give notice to the electing cotenants that paid their apportioned price of the ~~interest~~ remaining interests of the cotenants that requested partition by sale and the total price for all that those interests.

~~(2)~~(C) If no electing cotenant timely pays its apportioned price, the court shall proceed according to subsection (f) as if the interests of the cotenants that requested partition by sale were not purchased pursuant to this subsection.

~~(f)~~(5) Not later than 20 days after the court gives notice pursuant to subsection ~~(e)~~(3)(e)(4)(B), any cotenant that paid may elect to purchase all of the remaining interests of the cotenants that requested partition by sale by paying the entire price into the court. ~~After the 20-day~~

~~period, the following rules apply:~~

~~(1)-(A)~~ If only one cotenant timely pays the entire price for the remaining interests of the cotenants that requested partition by sale, the court shall issue an order reallocating the remaining interests of the cotenants that requested partition by sale to that cotenant. The court shall issue promptly an order reallocating the interests of all of the cotenants and disburse the amounts held by it to the persons entitled to them.

~~(3)-(B)~~ If more than one cotenant timely pay the entire price for the remaining interests of the cotenants that requested partition by sale, the court shall reapportion the remaining interests of the cotenants that requested partition by sale among those paying cotenants, based on each paying cotenant's original fractional ownership of the entire parcel divided by the total original fractional ownership of all cotenants that paid the entire price for the remaining interests of the cotenants that

requested partition by sale. The court shall issue promptly an order reallocating all of the cotenants' interests, disburse the amounts held by it to the persons entitled to them, and promptly refund any excess payment held by the court.

~~(2)-(C)~~ If no cotenant pays the entire price for the remaining interests of the cotenants that requested partition by sale, the court shall proceed according to subsection (f) as if the interests of the cotenants that requested partition by sale were not purchased pursuant to subsection (f).

~~(3)-(f)~~ If no cotenant elects pursuant to subsection (e) to buy all the interests of the cotenants that requested partition by sale, the court shall ~~send notice to all the parties of that fact and resolve the partition action under Section 8(a) and (b).~~ proceed as follows:

(1) The court shall send notice to the parties that no cotenant elected pursuant to subsection (e) to buy all the interests of the cotenants that requested partition by sale

and that any cotenant that requested partition by sale may buy all the interests of the other cotenants that requested partition by sale.

(2) Not later than 30 days after the notice is sent under subsection (f)(1), any cotenant that requested partition by sale may give notice to the court that it elects to buy all the interests of the other cotenants that requested partition by sale.

(3) Notwithstanding the cotenant's prior request for partition by sale, any cotenant making an election to buy pursuant to this paragraph shall be deemed, for purposes of this subsection (f), to have not requested partition by sale.

(4) The purchase price for the interest of a cotenant that requested partition by sale shall be the value of the entire parcel determined under Section 6 multiplied by the cotenant's fractional ownership of the entire parcel.

(5) If only one cotenant elects to buy all the

interests of the other cotenants that requested partition by sale, the court shall notify all the parties of that fact and of the price to be paid by the electing cotenant calculated pursuant to subsection (f)(4). If more than one cotenant elects to buy all the interests of the other cotenants that requested partition by sale, the court shall allocate the right to buy those interests among the electing cotenants based on each electing cotenant's existing fractional ownership of the entire parcel divided by the total existing fractional ownership of all cotenants electing to buy and send notice to all the parties of that fact and of the price to be paid by each electing cotenant calculated pursuant to subsection (f)(4).

~~(e)(6) The court sends notice to the parties under subsection (d)(1) or (2), the court shall set a date, not sooner than 60 days after the date the notice was sent~~ end of the applicable notice period in subsection (f)(1), by which electing cotenants must pay their apportioned price into the court. After this date, the following rules apply:

~~(1)~~ (A) If all electing cotenants timely pay their apportioned price into court, the court shall issue an order reallocating all the interests of the cotenants and disburse the amounts held by the court to the persons entitled to them, and the court shall thereafter enter such other orders as may be appropriate and dismiss the action without prejudice.

~~(3)~~ (B) If one or more but not all of the electing cotenants fail to pay their apportioned price on time, the court~~[, on motion,]~~ shall give notice to the electing cotenants that paid their apportioned price of the ~~interest~~ remaining interests of the cotenants that requested partition by sale and the total price for ~~all that~~ those interests.

~~(2)~~ (C) If no electing cotenant timely pays its apportioned price, the court shall resolve the partition action under Sections 8 through 11 ~~8(a) and (b)~~ as if the interests of the cotenants that requested partition by sale were not purchased.

~~(f)-(7)~~ Not later than 20 days after the court gives notice pursuant to subsection ~~(e)(3)(f)(6)(B)~~, any cotenant that paid may elect to purchase all of the remaining interests of the cotenants that requested partition by sale by paying the entire price into the court. ~~After the 20-day period, the following rules apply:~~

~~(1)-(A)~~ If only one cotenant timely pays the entire price for the remaining interests of the cotenants that requested partition by sale, the court shall issue an order reallocating the remaining interests of the cotenants that requested partition by sale to that cotenant. The court shall issue promptly an order reallocating the interests of all of the cotenants and disburse the amounts held by it to the persons entitled to them.

~~(3)-(B)~~ If more than one cotenant timely pay the entire price for the remaining interests of the cotenants that requested partition by sale, the court shall reapportion the remaining interests of the cotenants that

requested partition by sale among those paying cotenants, based on each paying cotenant's original fractional ownership of the entire parcel divided by the total original fractional ownership of all cotenants that paid the entire price for the remaining interests of the cotenants that requested partition by sale. The court shall issue promptly an order reallocating all of the cotenants' interests, disburse the amounts held by it to the persons entitled to them, and promptly refund any excess payment held by the court.

~~(2)-(C)~~ If no electing cotenant pays the entire price for the remaining interests of the cotenants that requested partition by sale, the court shall resolve the partition action under Sections 8 through 11 ~~8(a) and (b)~~ as if the interests of the cotenants that requested partition by sale were not purchased.

(8) If no cotenant elects to buy all the interests of the other cotenants that requested partition by sale, the court shall send notice to all the parties of that fact and

resolve the partition action under Sections 8 through 11.

Alabama Comment

This Section is extensively revised from the original Section 7 of the Uniform Partition of Heirs Property Act regarding Cotenant Buyout. As revised, the Section provides for the following procedure:

1. Petitioner and each cotenant would have to state in their initial pleadings whether or not they request partition by sale. If nobody requests partition by sale, the court would determine whether the property could be partitioned in kind. If not, the action would be dismissed without prejudice.
2. If any cotenant (including the petitioner) requests partition by sale, cotenants who did not request partition by sale would have the right to buy out the interests of cotenants who did request partition by sale.
 - a. The price would be based on the fractional interest of each cotenant requesting sale multiplied by the value determined by the court under Section 6.
 - b. If more than one cotenant wanted to buy the interests of the cotenants requesting sale, each buying cotenant would be able to buy a share of the selling cotenants' interests based on the buyers' respective fractional interests.

- c. If one or more cotenants bought out all the interests of the cotenants requesting sale, the action would end, and the property would not be partitioned.
- 3. If none of the cotenants who did not request partition by sale bought all the interests of the cotenants requesting sale, then cotenants who did request partition by sale would have the right to buy out the interests of other cotenants who do request partition by sale.
 - a. The price would be based on the fractional interest of each cotenant requesting sale multiplied by the value determined by the court under Section 6.
 - b. If more than one cotenant wanted to buy the interests of the cotenants requesting sale, each buying cotenant would be able to buy a share of the selling cotenants' interests based on the buyers' respective fractional interests.
 - c. If one or more cotenants bought out all the interests of the cotenants requesting sale, the action would end, and the property would not be partitioned.
 - d. If nobody bought all the interests of the cotenants requesting sale, the court would then determine whether partition in kind is possible, and if not the

property would be sold.

4. Cotenants who appear but fail to state whether they request partition by sale are deemed to not request partition by sale.
5. Cotenants who are served but do not timely respond are deemed to not request partition by sale. However, another cotenant could request that the court authorize the sale of the non-appearing cotenants. If approved with respect to any non-appearing cotenants, such cotenants would be deemed to have requested partition by sale.
6. With respect to cotenants for whom a guardian ad litem is appointed, including unknown, unlocatable, and legally incapacitated cotenants, the GAL can but is not required to state whether or not such cotenant requests partition by sale, and the GAL would have no liability for making or failing to make an election. If a GAL files a response but fails to so state, the cotenant is deemed to have not requested partition by sale.

SECTION 8. PARTITION ALTERNATIVES.

- (a) If all the interests of all cotenants that requested partition by sale are not purchased by other cotenants pursuant to Section 7, or if after conclusion of the buyout

under Section 7, a cotenant remains that has requested partition in kind, the court shall order partition in kind unless the court, after consideration of the factors listed in Section 9, finds that partition in kind will result in great ~~manifest~~ prejudice to the cotenants ~~as a group~~. In considering whether to order partition in kind, the court shall approve a request by two or more parties to have their individual interests aggregated.

(b) If the court does not order partition in kind under subsection (a), the court shall order partition by sale pursuant to Section 10 or, if no cotenant requested partition by sale, the court shall dismiss the action.

(c) If the court orders partition in kind pursuant to subsection (a), the court may require that one or more cotenants pay one or more other cotenants amounts so that the payments, taken together with the value of the in-kind distributions to the cotenants, will make the partition in kind just and proportionate in value to the fractional interests

held.

(d) If the court orders partition in kind, the court shall allocate to the cotenants that are unknown, unlocatable, or the subject of a default ~~entry~~ judgment, if their interests were not bought out pursuant to Section 7, a part of the property or value of the property representing the combined interests of these cotenants as determined by the court ~~and this part of the property shall remain undivided.~~

Alabama Comment

This Section is identical to Section 8 of the Uniform Act except as follows:

1. In Subsection (a) “great” prejudice was chosen instead of “manifest” and “as a group” was deleted in the first sentence; and

2. In Subsection (d) “default” judgment was chosen over “entry”. Also, Alabama added after “a part of the property” the alternative “or value of the property” and at the end of the sentence deleted “and this part of the property shall remain undivided.”

Uniform Comment

1. In many states, a court may order a partition in kind of part of the property and a partition by sale of the

remainder. *See, e.g.*, CAL. CIV. PROC. CODE § 872.830 (West 2010); NEB. REV. STAT. § 25-21,103 (2009). However, in a limited number of other states a court may only order either a partition in kind or a partition by sale of the whole property. *See, e.g.*, *Fernandes v. Rodriguez*, 761 A.2d 1283, 1289 (Conn. 2000). This Act neither prescribes nor prohibits a partition in kind of part of the heirs property and partition by sale of the remainder. For example, there may be circumstances in which cotenants receiving part of the property in kind would receive substantially less than their pro rata share of the economic value of the whole property without a cash payment from the sale of the part of the property to be sold and might wish the court to retain jurisdiction for purposes of completing the partition by sale of the remaining portion of the property (rather than employing “owelty,” discussed in the next comment). It is in circumstances such as the last-mentioned case that the court should consider exercising its equitable discretion to implement a mixed remedy and to fashion such appropriate procedures as justice may require. These procedures should draw upon the procedures and the property and wealth preservation principles of this Act, including the hierarchy of sales procedures that apply to the manner in which a partition by sale should be conducted under this Act. If a court decides to order such a mixed remedy, the court may consider whether, in such a process, there should or should not be a further right to buy out interests before ordering a partition by sale of part of the property.

2. Section 8(c): This subsection provides for the remedy of “owelty” which is an equitable remedy. *See, e.g.*, CODE OF ALA. § 35-6-24 (2010); CAL. CIV. PROC. CODE § 873.250 (West 2009). Courts have the equitable power to order owelty payments when it is impractical to divide an estate in a just manner but monetary payments can be

ordered to adjust for any variance in the value of the parcels from the interests in the property held by the respective cotenants. *Dewrell v. Lawrence*, 58 P.3d 223, 227 (Okla. Civ. App. 2002). In recent decades, courts have tended to underutilize the remedy of owelty which has resulted in more courts ordering partition by sale in instances in which partition in kind could have been ordered with an appropriate accompanying owelty order. *See, e.g., Faith Rivers, Inequity in Equity: The Tragedy of Tenancy in Common for Heirs' Property Owners Facing Partition in Equity*, 17 TEMP. POL. & CIV. RTS. L. REV. 1, 76 (2007) (noting that heirs property owners could obtain fair and equitable divisions of property if courts stopped taking the easy option by ordering partition sales and utilized tools such as owelty payments). *See also* John G. Casagrande Jr., Note, *Acquiring Property Through Partitioning Sales: Abuses and Remedies*, 27 B.C. L. REV. 755, 778 (1986). A court in a partition action involving heirs property that may be practicably divided among the cotenants in a manner that preserves the fair value of each cotenant's ownership interest may not order owelty merely because a cotenant is willing to pay for a parcel that is more valuable than the fair economic value of that cotenant's ownership interest.

3. Section 8(d): Several states have statutory provisions which permit a court to order a partition in kind and to designate a part of the property for cotenants who remain unknown or unlocatable at the conclusion of the action. *See, e.g.,* ALASKA STAT. § 09.45.290 (2010); ARK. CODE ANN. § 18-60-414 (2010); CAL. CIV. PROC. CODE § 873.270 (West 2010); HAW. REV. STAT. § 668-9 (2010); MICH. COMP. LAWS § 3.402 (2010); N.D. CENT. CODE § 32-16-12 (2010); OR. REV. STAT. § 105.245 (2010); S.D. CODIFIED LAWS § 21-45-15 (2010); UTAH CODE ANN. § 78B-6-1212 (2010); WASH. REV. CODE § 7.52.080

(2010).

**SECTION 9. CONSIDERATIONS FOR
PARTITION IN KIND.**

(a) In determining under Section 8(a) whether partition in kind would result in great ~~manifest~~ prejudice to the cotenants ~~as a group~~, the court shall consider the following:

(1) whether the heirs property practicably can be divided among the cotenants;

(2) whether partition in kind would apportion the property in such a way that the aggregate fair market value of the parcels resulting from the division would be materially less than the value of the property if it were sold as a whole, taking into account the condition under which a court-ordered sale likely would occur;

(3) evidence of the collective duration of ownership or possession of the property by a cotenant and

one or more predecessors in title or predecessors in possession to the cotenant who are or were relatives of the cotenant or each other;

(4) a cotenant's sentimental attachment to the property, including any attachment arising because the property has ancestral or other unique or special value to the cotenant;

(5) the lawful use being made of the property by a cotenant and the degree to which the cotenant would be harmed if the cotenant could not continue the same use of the property;

(6) the degree to which the cotenants have contributed their pro rata share of the property taxes, insurance, and other expenses associated with maintaining ownership of the property or have contributed to the physical improvement, maintenance, or upkeep of the property; and

(7) any other relevant factor.

(b) The court may not consider any one factor in subsection (a) to be dispositive without weighing the totality of all relevant factors and circumstances.

Alabama Comment

This Section is identical to Section 9 of the Uniform Act except for the changes made in Subsection (a).

In Subsection (a) “great” prejudice was chosen instead of “manifest” to be consistent with the identical change made in Section 8(a). Further, Alabama deleted “as a group”. Thus, the court may consider whether partition “in kind” would constitute “great prejudice” to a cotenant individually rather than the cotenants as a group.

Uniform Comment

1. Under this section, a court in a partition action must consider the totality of the circumstances, including a number of economic and noneconomic factors, in deciding whether to order partition in kind or partition by sale. In partition cases, a number of courts have utilized such a totality of the circumstances approach in deciding whether to order partition in kind or partition by sale. *See, e.g.,* *Delfino v. Vealencis*, 436 A.2d 27, 33 (Conn. 1980) (“It is the interests of all of the tenants in common that the court must consider; and not merely the economic gain of one tenant, or a group of tenants.”); *Schnell v. Schnell*, 346 N.W.2d 713, 716 (N.D. 1984) (holding that economic and noneconomic factors, including sentimental value, should be weighed by a

court in a partition action); *Eli v. Eli*, 557 N.W.2d 405, 409-411 (S.D. 1997) (citations omitted) (in adopting a totality of the circumstances test, the Supreme Court of South Dakota stated that “[o]ne’s land possesses more than mere economic utility; it ‘means the full range of the benefit the parties may be expected to derive from their ownership of their respective shares.’ Such value must be weighed for its effect upon all parties involved, not just those advocating a sale.”); *Ark Land Co. v. Harper*, 599 S.E.2d. 754, 761 (W. Va. 2004) (“[I]n a partition proceeding in which a party opposes the sale of property, the economic value of the property is not the exclusive test for deciding whether to partition in kind or by sale. Evidence of longstanding ownership, coupled with sentimental or emotional interests in the property, may also be considered in deciding whether the interests of the party opposing the sale will be prejudiced by the property’s sale.”).

2. Section 9(a)(2): Under this subparagraph, among other possible considerations of the condition under which the property may be sold, the court must assess whether the cotenants would receive a greater economic benefit from a sale of the whole property due to possible economies of scale that would result from selling the whole property which could not be captured from partition in kind of the property. In conducting this assessment, a court must take into consideration the type of sales condition under which any court-ordered sale would occur as property that is sold at a forced sale – such as a sale upon execution or a foreclosure sale – typically results in property being sold at prices that are substantially below the fair market value of the property. Such a resulting discount from the fair market value of the property due to the forced sale conditions may render partition in kind to be as, or more, economically beneficial to the cotenants than partition by sale of the whole property

even in instances in which economies of scale could be realized if the whole property were to be sold under fair market value conditions. *See generally*, Thomas W. Mitchell, Stephen Malpezzi, & Richard K. Green, *Forced Sale Risk: Class, Race, and The “Double Discount,”* 37 FLA. ST. U. L. REV. 589 (2010).

3. Section 9(a)(3): Under this subparagraph, the court shall consider, among other considerations, longstanding possession of the property by any cotenant or certain predecessors in possession to that cotenant. Adverse possession, for example, raises this issue. Adverse possession statutes require possession over the course of a number of years before a person may actually take title to the property. *See, e.g.*, 735 ILL. COMP. STAT. 5/13-101 (2009) (requiring twenty years of adverse possession); WIS. STAT. §§ 893.25, 893.26 (2008) (requiring twenty years or ten years if color of title). Thus, because many states allow tacking of possession, it is possible that a cotenant may have acquired possession of the property from a relative who had been in possession of the property for many years despite the fact that the statute of limitations for adverse possession had not run, thereby preventing the relative in prior possession from obtaining valid title to the property.

4. Section 9(a)(4): For many families or communities, real property ownership has important ancestral or historical meaning. *See, e.g.*, *Chuck v. Gomes*, 532 P.2d 657, 662 (Haw. 1975) (Richardson, C.J., dissenting):

“[T]here are interests other than financial expediency which I recognize as essential to our Hawaiian way of life. Foremost is the individual's right to retain ancestral land in order to perpetuate the concept of the family homestead. Such right is derived from our

proud cultural heritage. . . . [W]e must not lose sight of the cultural traditions which attach fundamental importance to keeping ancestral land in a particular family line.”

See also Phyliss Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 WASH U. L.Q. 737, 766-68, 772-74 (2000); Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 523-26 (2001).

5. Section 9(a)(5): If a single cotenant is using the property in an unlawful way, for example by engaging in conduct that amounts to an ouster of one or more other cotenants, the court shall not recognize such unlawful use as a factor weighing in favor of the court’s granting a request made by the cotenant in possession for a partition in kind of the property.

6. After considering the factors in this section, a court that decides to order a partition in kind may not divide the heirs property in a manner that modifies the pre-partition, fair economic value of any cotenant’s ownership interest in the property unless the court issues an appropriate owelty order pursuant to Section 8(c). This proscription is consistent with the approach that courts utilize in ordering partition in kind under general partition statutes.

SECTION 10. OPEN-MARKET SALE, SEALED

BIDS, OR AUCTION.

(a) If the court orders a sale of heirs property, the ~~sale must be an open market sale~~ court shall order that the sale be conducted by one or more of the following methods of sale: open market sale with or without a broker or brokers; ~~or a sale by sealed bids; public auction; or private sale.~~ The court shall choose a method which shall ~~unless the court finds that a sale by sealed bids or an auction would~~ be more economically advantageous and in the best interest of the cotenants as a group.

(b) If the court orders an open-market sale with or without a broker and the parties, not later than 10 days after the entry of the order, agree on a real estate broker or brokers licensed in this state to offer the property for sale, the court shall appoint the broker or brokers and establish a ~~reasonable commission~~ terms of the listing agreement. If the parties do not agree on a broker or brokers, the court shall appoint a disinterested real estate broker licensed in this state to offer the property for sale and shall establish a

reasonable ~~commission~~ term. The broker or brokers shall offer the property for sale in a commercially reasonable manner on the terms and conditions established by the court, at a price no lower than the determination of value unless the court orders otherwise for good cause shown and on the terms and conditions established by the court.

(c) If, ~~the broker appointed under subsection (b)~~ obtains within a reasonable time, in an open market sale, an offer is obtained ~~an offer~~ to purchase the property for at least the determination of value or the amount ordered by the court and within a reasonable time, not to exceed 180 days,:

(1) the broker or seller shall comply with the reporting requirements in Section 11; and

(2) the sale may be completed in accordance with state law ~~other than this [act]~~.

(d) If, in an open market sale, an offer is ~~the broker appointed under subsection (b)~~ does not obtained to purchase the property within a reasonable time, not to

~~exceed 180 days, an offer to purchase the property for at least the determination of value or the amount ordered by the court, the court, after hearing, may:~~

(1) approve the highest outstanding offer, if any;

(2) ~~redetermine the value of the property and order that the property continue to be offered for an additional time with or without redetermining the value of the property;~~ or

(3) order that the property be sold by sealed bids or at an auction.

(e) If the court orders a sale by ~~sealed bids or an auction, unless the parties otherwise agree or the court for good cause shown orders otherwise, the court shall set terms and conditions of the sale. If the court orders an auction, the auction must be conducted at the front door or main entrance to the courthouse of the county where the land or a substantial and material part thereof is located. The sale~~

shall be held at a time specified by the court between the legal hours of sale 11:00 a.m. to 4:00 p.m. on the day designated for the exercise of the auction to sell heirs property.

(f) If a purchaser is entitled to a share of the net proceeds of the sale, the purchaser is entitled to a credit against the price in an amount equal to the purchaser's share of the proceeds.

Alabama Comment

This Section is substantially different from Section 10 of the Uniform Act:

This section has been revised to clarify that when a court orders a sale ~~to~~ it can be conducted by one of several specific methods which are listed. The court can choose the method more economically advantageous to the tenants as a whole.

An open market sale may be held with or without brokers. The court may also determine the terms, the listing agreement and the length of the listing term.

Offers obtained in an open market sale must be made within 180 days unless a shorter date is set by the court.

When an offer is not made within 180 days, the court

may extend the time with or without re-evaluating the property.

Subsection (e) delineated the appropriate places and times to hold an auction at the courthouse.

Uniform Comment

None

SECTION 11. REPORT OF OPEN-MARKET SALE.

(a) ~~Unless required to do so within a shorter time by [insert reference to general partition statute],~~ In an open-market sale of heirs property, a broker or seller ~~appointed under Section 10(b) to offer heirs property for open-market sale~~ shall file a report with the court not later than seven days after receiving an offer to purchase the property for at least the determination of value determined under Section 6 or 10 ~~or the amount ordered by the court.~~

(b) The report required by subsection (a) must contain the following information:

(1) a description of the property to be sold to

each buyer;

(2) the name of each buyer;

(3) the proposed purchase price;

(4) the terms and conditions of the proposed sale, including the terms of any owner financing;

(5) the amounts to be paid to lien holders;

(6) a statement of contractual or other arrangements or conditions of the broker's commission; and

(7) other material facts relevant to the sale.

Alabama Comment

This Section is similar to Section 11 of the Uniform Act except that Subsection (a) has been redrafted to be consistent with other modifications that Alabama has made to the Uniform Act.

In an open market sale a report must be filed with the court not later than seven days after the receipt of an offer for value or the amount ordered in the court.

Uniform Comment

None.

SECTION 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 13. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This act modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 14. EFFECTIVE DATE. This act ~~takes effect~~ is effective for partition actions filed on or after

January 1, 2015.