

# REFORMING PROPERTY LAW TO ADDRESS DEVASTATING LAND LOSS

*Thomas W. Mitchell\**

## ABSTRACT

*Tenancy-in-common ownership represents the most widespread form of common ownership of real property in the United States. Such ownership under the default rules also represents the most unstable ownership of real property in this country. Thousands of tenancy-in-common property owners, including members of many poor and minority families, have lost their commonly-owned property due to court-ordered, forced partition sales as well as much of their real estate wealth associated with such ownership as a result of such sales.*

*This Article reviews and analyzes the Uniform Partition of Heirs Property Act (UPHPA), a uniform act that represents the most significant reform to partition law in modern times. I served as the Reporter, the person charged with principal responsibility for drafting a uniform act promulgated by the National Conference of Commissioners on Uniform State Laws, for the UPHPA. The Article summarizes those aspects of partition law that have resulted in thousands of property owners losing millions of acres of property and the real estate wealth associated with such property. The Article also provides an analysis of key sections of the UPHPA, and this analysis makes clear that the UPHPA represents a very comprehensive and innovative reform to what heretofore had long been perceived to be the intractable problem of tenancy-in-common land loss. To this end, the Council of State Governments selected the UPHPA as one of thirty-five newly enacted statutes or uniform acts for inclusion in its 2013 Suggested State Legislation publication (from hundreds of submissions by state officials from across the country) to encourage states to consider it as a model. The UPHPA has been enacted into law in four states, it was introduced for consideration in four other jurisdictions in 2014, and a number of states are on the cusp of introducing it for consideration in 2015.*

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## INTRODUCTION

On July 15, 2010, at its 119th Annual Meeting held in Chicago, Illinois, the National Conference of Commissioners on Uniform State Laws (NCCUSL), also known as the Uniform Law Commission (ULC), voted to approve the Uniform Partition of Heirs Property Act (UPHPA).<sup>1</sup> The

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\* Professor, University of Wisconsin Law School. I would like to thank professors Bernadette Atuahene, J. Peter Byrne, Scott Cummings, Nestor Davidson, Rashmi Dial-Chand, Wilson Freyermuth, Lynn LoPucki, Shelley Saxer, Joseph Singer, and Dale Whitman, who each provided very helpful comments on drafts of this Article. I would also like to thank John Blimling, Monica Mark, and Richard Davis for providing excellent research assistance as I developed this Article.

It is especially fitting that my Article is being published in the *Alabama Law Review* for a few reasons. First, a few past and current faculty members at the University of Alabama School of Law have played important roles in contributing to the development of the Uniform Partition of Heirs Property Act or in its enactment into law in Alabama in 2014. Robert McCurley, a former longtime serving member of the University of Alabama School of Law faculty played a critical role in serving very capably as the chair of the Uniform Law Commission's drafting committee for the Act and he then served as the Reporter for the Alabama Law Institute's committee that presented the Alabama Uniform Partition of Heirs Property Act to the Alabama judiciary and the Alabama State Bar. Professor William Henning has served as an Alabama commissioner for the Uniform Law Commission for a number of years and he helped advocate for the Act at important junctures in its development. Professor Fredrick Vars served on the Alabama Law Institute's advisory committee for the Alabama Uniform Partition of Heirs Property Act. Second, in addition to these people, certain Alabama attorneys were particularly active observers in the drafting of the Act and/or have played especially active roles in the efforts to enact the Act into law both in Alabama and in states throughout the country. These attorneys are Craig H. Baab, Carolyn Gaines-Varner, and John Pollock. Third, the publication of this Article in the *Alabama Law Review* symbolizes how much recent progress has been made in the decades-long and mostly uphill struggle to reform partition law, including within Alabama, especially taking into account

drafting committee for the UHPA, which included many leading attorneys with expertise in real property matters, litigation, and legislative affairs, spent more than three years drafting the Act.<sup>2</sup> In addition to the members of the drafting committee, the two American Bar Association (ABA) advisors and a number of observers participated robustly and effectively in drafting the Act.<sup>3</sup> On February 14, 2011, at its Midyear Meeting in Atlanta,

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that it was widely considered especially unlikely that Alabama would enact significant partition reform into law up until just a year or two ago.

More generally, as the Reporter for the Act, I would like to thank all the people and organizations that played a key role in developing the Uniform Partition of Heirs Property Act, in helping to get it enacted into law, and otherwise in championing it one way or another. I will more fully acknowledge many of these people and organizations in a book about the Uniform Partition of Heirs Property Act that I am editing, which will be published by the American Bar Association in 2015. Still, at this time, I would like to thank the Uniform Law Commission for making the Act possible and for all the substantial work it has done and is doing to enact it into law in states throughout the country. I also would like to thank the American Bar Association's Section of Real Property, Trust and Estate Law and Section of State and Local Government Law, the co-sponsors of this forthcoming book, for all of the generous, consistent, and truly invaluable support these two sections have provided to those of us who participated in the drafting of the Act, to those who have been working hard to get it enacted into law, and, more generally, to those who own heirs property.

1. See UNIF. PARTITION OF HEIRS PROP. ACT (2010), [hereinafter UHPA], available at [http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/uphpa\\_final\\_10.pdf](http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/uphpa_final_10.pdf).

Each of the ULC's forty-nine "state commissions" present during the roll call of the states voted to approve and adopt the Uniform Partition of Heirs Property Act as a uniform act and to recommend it for enactment in the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and the United States Virgin Islands, which are the jurisdictions from which the ULC draws its commissioners. E-mail from Kristina Shidlauski, Publications Manager, Uniform Law Commission, to Thomas W. Mitchell, Professor of Law, Univ. of Wis. Law Sch. (July 15, 2010, 16:52 CST) (on file with author). The four delegations that did not vote on any uniform acts (including the UHPA) at NCCUSL's 2010 Annual Meeting were Michigan, Mississippi, New Hampshire, and New Jersey. E-mail from Kristina Shidlauski, Publications Manager, Uniform Law Commission, to Thomas W. Mitchell, Professor of Law, Univ. of Wis. Law Sch. (July 18, 2010, 11:27 CST) (on file with author).

2. The drafting committee consisted of Robert L. McCurley, Chair; William R. Breetz; George H. Buxton; Ellen Dyke; Lani L. Ewart; Peter F. Langrock; Carl H. Lisman; Marian P. Opala; Rodney W. Satterwhite; Nathaniel Sterling; M. Gay Taylor-Jones; and Thomas W. Mitchell, Reporter.

3. Phyliss Craig-Taylor, now dean at North Carolina Central University School of Law, and Steven J. Eagle, a law professor at George Mason University School of Law, served as American Bar Association Advisors. The observers included a number of representatives from the Heirs' Property Retention Coalition (HPRC), a coalition of public interest, civil rights, and community-based organizations that was formed specifically to participate in the drafting of the Act. Individuals who represented different organizations in the coalition who participated particularly actively in the drafting process included Craig H. Baab from Alabama Applesseed Center for Law & Justice, Inc., Carolyn Gaines-Varner from Legal Services Alabama, and John Pollock from the Public Justice Center. John also was the founder and remains the coordinator of the Heirs' Property Retention Coalition. Greg D. Peterson, initially from DLA Piper and then from Tarlow, Breed, Hart & Rodgers, was an observer who served as pro bono counsel for HPRC. Other active observers included Faith Rivers-James from Elon University School of Law and Gregory M. Stein from the American College of Real Estate Lawyers and the University of Tennessee College of Law. Finally, there were other observers, including representatives from the American Association of Realtors and the American Bankers Association, who did not participate actively in the drafting of the Act.

Georgia, the American Bar Association (ABA) approved the UHPA as appropriate legislation for states to consider enacting into law.<sup>4</sup>

The Act primarily seeks to address the problem many families who own tenancy-in-common property under the default rules have experienced with respect to maintaining their real property, or at least the real estate wealth associated with such property, after one or more cotenants seek to exit the common-ownership arrangement by filing a lawsuit known as a partition action. Though many of the families who own tenancy-in-common property who have been most at risk of losing their property and real estate wealth as a result of partition actions are African-American, a large number of families outside of the African-American community have also faced severe problems with partition actions. As compared to the legal rules governing exit from many other common-ownership forms, including forms under which people commonly own real property, tenancy-in-common ownership under the default rules represents a particularly unstable form of ownership.<sup>5</sup> This fact is significant given that tenancy-in-common ownership is the most prevalent form of common ownership of real property in the United States.

Such instability arises from the fact that, under the default rules, cotenants possess a nearly unqualified right to file a partition action and to request that a court resolve the partition action by ordering that the property be sold at a forced partition sale.<sup>6</sup> Many speculators—whether individuals or businesses—over an extended period of time, have acquired very small interests in family-owned, tenancy-in-common properties and have shortly thereafter filed partition actions requesting courts to order the entire properties forcibly sold.<sup>7</sup> Courts in jurisdictions throughout the country often resolve partition actions by ordering a forced partition sale of the property despite the fact that a clear majority of jurisdictions maintain a statutory preference for a remedy referred to as a partition in kind. When a court orders partition in kind, the property is divided into separately titled parcels, which the court then allocates among the former cotenants, which means that the cotenants retain important property rights at the conclusion of the partition action.<sup>8</sup>

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4. Before working vigorously to enact into law any uniform act it promulgates, the Uniform Law Commission submits uniform acts it has promulgated to the American Bar Association for its approval. WALTER P. ARMSTRONG, JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 91 (1991); James C. Dezendorf, *The Ninth Session of the Hague Conference on Private International Law*, 47 A.B.A. J. 909, 911 (1961).

5. Thomas W. Mitchell, Stephen Malpezzi & Richard K. Green, *Forced Sale Risk: Class, Race, and the "Double Discount,"* 37 FLA. ST. U. L. REV. 589, 616 (2009).

6. *Id.* at 610.

7. Todd Lewan & Dolores Barclay, *Quirk in the Law Strips Blacks of Land*, TENNESSEAN, Dec. 11, 2001, at 8A.

8. Mitchell, Malpezzi & Green, *supra* note 5, at 610.

Not only do court-ordered partition sales undermine property rights for many low- to moderate-income property owners, but also many, if not most, partition sales end up stripping such property owners of much of their wealth that had been associated with the common property they had owned that was ordered sold. Ironically, many courts that resolve partition actions by ordering partition sales claim that such forced sales serve the economic interest of all of the cotenants.<sup>9</sup> These courts wrongly assume in many, if not most, cases that all the cotenants will derive more economic value from a forced sale of the entire property than from an in-kind division of the property based upon the premise that the property as a whole has economies of scale that buyers would value.

The UPHPA represents the most comprehensive and significant innovation in modern times to the current state law of partition, at least insofar as that law applies to partition actions involving family-owned, tenancy-in-common property, which is referred to as “heirs property” under the Act.<sup>10</sup> The Act establishes a hierarchy of remedies that both reinforces the property rights of certain tenancy-in-common property owners who traditionally have been most at risk of losing their property at a forced partition sale and significantly improves the ability of these tenancy-in-common property owners to maintain their real-estate-based wealth should a court order such a forced partition sale.<sup>11</sup> Though many of the UPHPA’s provisions represent some significant reform to partition law for most jurisdictions, three specific provisions stand out. First, the UPHPA provides cotenants who did not request the court to order a forced sale of commonly-owned property with the opportunity to buy out the interests of any cotenant that did request the court to order a forced sale of the property. Second, unlike the general partition law in almost every state in which there is an ostensible preference for partition in kind, the Act adds real substance to the preference for a physical division of the property as the preferred remedy as opposed to a forced sale of the property. Third, the Act seeks to ensure that the wealth-maximization goal, which many courts invoke as a justification for ordering a forced partition sale, can be much better realized by the substantial reforms the Act makes to the sales process most states use for partition sales.

In drafting the UPHPA, the drafting committee drew upon many different sources of law. For example, the drafting committee considered a wide range of both substantive and procedural state laws as well as some of the private ordering strategies that people who own real property jointly with others and who are wealthy or legally savvy often utilize, in part to

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9. *Id.* at 613.

10. *See infra* Part V.A for definition of “heirs property.”

11. *See* UPHPA, *supra* note 1, §§ 7-10, at 15-29.

make their ownership more secure.<sup>12</sup> Further, the UHPHA is one of the few purely domestic uniform acts that the Uniform Law Commission has promulgated that draws upon laws from other countries, if only in a somewhat limited way.<sup>13</sup> To be specific, the UHPHA's drafting committee drew upon some of the private law from other countries governing common ownership of real property, including some aspects of partition law from Australia, Canada, and Scotland, among other countries.

Since the ABA approved the UHPHA in 2011, the Act has garnered some significant support. From hundreds of newly enacted statutes or model statutes submitted by state officials for consideration, the Council of State Governments selected the UHPHA as one of thirty-five legislative acts that it featured in its Suggested State Legislation publication for 2013 based upon its view, among other considerations, that the UHPHA constitutes a very innovative and comprehensive act that addresses a complex issue of regional or national significance.<sup>14</sup> It has also been endorsed by a number of state, regional, and national organizations.<sup>15</sup> Alabama, Georgia, Montana, and Nevada have enacted the UHPHA into law, and it was also introduced for consideration in 2014 by legislatures in Connecticut, the District of Columbia, Hawaii, and South Carolina.<sup>16</sup> These early enactments and introductions are notable given that NCCUSL historically has had mixed success with respect to convincing states to enact its real property acts.<sup>17</sup>

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12. See, e.g., UHPHA, *supra* note 1, § 4 cmt. 1; *id.* § 9 cmt. 1; *id.* at Prefatory Note, at 3.

13. Eric Stein, *Uses, Misuses—and Nonuses of Comparative Law*, 72 NW. U. L. REV. 198, 212 (1977) (noting that outside of uniform acts that involve subject matter that inherently implicates the laws of other countries such as the enforcement of foreign judgments or reciprocal enforcement of child support orders, the Uniform Law Commission's drafting committees have drawn upon laws outside of the United States only in an episodic way). At the same time, in the past fifteen to twenty years, NCCUSL has become increasingly involved in international and transnational legal matters. For example, it has formed a strong relationship with the United States Department of State, has established a Committee on International Legal Developments, and has created, along with the American Bar Association, a Joint Editorial Board for International Law. Merle H. Weiner, *Codification, Cooperation, and Concern for Children: The Internationalization of Family Law in the United States over the Last Fifty Years*, 42 FAM. L.Q. 619, 657 (2008).

14. See 72 COUNCIL OF STATE GOV'TS, SUGGESTED STATE LEGISLATION 5, 9 (2013).

15. See *Partition of Heirs Property Act*, UNIFORM LAW COMM'N, <http://www.uniformlaws.org/Act.aspx?title=Partition%20of%20Heirs%20Property%20Act> (last visited Sept. 12, 2014).

16. See *id.*

17. Some of the Uniform Law Commission's real property acts have been enacted into law in a substantial number of states. These include the Uniform Real Property Electronic Recording Act, the Uniform Environmental Covenants Act, the Uniform Conservation Easement Act, and the Uniform Residential Landlord and Tenant Act. In contrast, some others have not been adopted by any states over a significant period of time. These include the Uniform Land Transactions Act, the Uniform Land Security Interest Act, and the Uniform Nonjudicial Foreclosure Act. Of course, a number of the Uniform Law Commission's real property acts fall between these extremes as these acts have been adopted in at least some minority of states. For example, the Uniform Assignment of Rents Act has been enacted into law in five states since it was promulgated in 2005.

Part I of this Article provides an overview of tenancy-in-common ownership. This Part also demonstrates how courts have been very flawed in assuming that partition sales are wealth maximizing in the light of the below market value or even fire sale prices that partition sales often yield and in consideration of the transaction costs associated with such forced partition sales. Part II establishes the fact that low- to moderate-income tenancy-in-common owners have experienced and continue to experience particular problems with tenancy-in-common ownership in general and with partition actions more specifically. Part III provides some history of the mostly unsuccessful efforts to reform partition law in the forty to fifty years preceding the promulgation of the UHPA as well as some background on how the ULC decided to form a drafting committee in an effort to reform partition law. Part IV of this Article provides an analysis of key sections and provisions of the UHPA, demonstrating how innovative and comprehensive the UHPA is in terms of addressing some of the longstanding problems many property owners have had with partition actions. The Article concludes by providing some information on one important reform idea that did not survive the drafting process and by indicating what type of initiatives or reforms could build upon the UHPA's success in making tenancy-in-common ownership more viable for a much larger number of property owners across the United States.

## I. OVERVIEW OF TENANCY-IN-COMMON OWNERSHIP

### A. *General Characteristics*

The tenancy in common is a form of common ownership of property that appears to have first arisen in England in the fourteenth century.<sup>18</sup> England, however, effectively abolished the tenancy-in-common form of ownership in its classic legal form in 1925 after the English Parliament enacted the Law of Property Act 1925.<sup>19</sup> As in the United States, many other countries with legal systems rooted in the English common law recognize the tenancy-in-common form of ownership.<sup>20</sup> A tenant in common owns an undivided, fractional interest in a parcel of property and may use and possess the entire property,<sup>21</sup> provided he does not oust a

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18. WILLIAM B. STOEBCUK & DALE A. WHITMAN, *THE LAW OF PROPERTY*, § 5.2, at 176 (3d ed. 2000).

19. C. J. Meyers, *The Effect of the Rule Against Perpetuities on Perpetual Non-Participating Royalty and Kindred Interests*, 32 *TEX. L. REV.* 369, 402 n.103 (1954).

20. Australia, for example, recognizes the tenancy-in-common form of ownership. *See, e.g., Sacks v Klein* [2011] VSC 451 (Unreported, Supreme Court of Victoria, 13 Sept. 2011) (Austl.).

21. JOHN G. SPRANKLING & RAYMOND R. COLETTA, *PROPERTY: A CONTEMPORARY APPROACH* 380 (1st ed. 2009).



fellow cotenant who also seeks to use and possess the property.<sup>22</sup> A cotenant may transfer his interest by conveyance, will, or intestacy.<sup>23</sup>

In the United States, the tenancy in common is the most common concurrent ownership form with respect to the ownership of real property<sup>24</sup> for several reasons. First, a conveyance or devise of real property to two or more people creates a tenancy in common and not a joint tenancy unless the conveyance or will expressly declares an intention to create a joint tenancy,<sup>25</sup> or unless the conveyance or devise is to a husband and a wife in a jurisdiction that still recognizes the tenancy by the entirety (provided that there is no intention in these circumstances to create a tenancy in common or a joint tenancy).<sup>26</sup> Second, the tenancy in common is the default ownership structure the law assigns to two or more people who qualify as heirs who inherit an intestate decedent's real property under intestacy laws in states throughout the country.<sup>27</sup> In addition to these rules, which may in fact create tenancy-in-common ownership in some circumstances in which it was not specifically intended, many people also agree to structure their real property ownership under a tenancy in common.

## B. Partition Actions

### 1. Background and Scope of a Cotenant's Right to Seek Partition

Under a tenancy in common, there is unity of possession, which means that each cotenant is entitled to possess the entire property subject to the identical possessory rights each other cotenant has as well, unless some private agreement among the cotenants provides otherwise.<sup>28</sup> If the unity of possession in a tenancy in common is destroyed, the tenancy terminates. Destruction of the unity of possession can happen in several ways.<sup>29</sup> A tenancy in common automatically ends if all of the common owners convey

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22. STOEBUCK & WHITMAN, *supra* note 18, § 5.8, at 203–04.

23. SPRANKLING & COLETTA, *supra* note 21, at 380.

24. STOEBUCK & WHITMAN, *supra* note 18, § 5.2, at 176; RICHARD R. POWELL & PATRICK J. ROHAN, *POWELL ON REAL PROPERTY* 594 (1968).

25. STOEBUCK & WHITMAN, *supra* note 18, § 5.2, at 178. *See, e.g.*, *Riggs v. Snell*, 352 P.2d 1056, 1057 (Kan. 1960) (noting that to overcome the presumption of a tenancy in common, “the language used in a grant or devise must make it *clear* that a joint tenancy was intended to be created”).

26. STOEBUCK & WHITMAN, *supra* note 18, § 5.5, at 193.

27. 86 C.J.S. *Tenancy in Common* § 11 (2012). Real property can be transferred by intestate succession when a person dies without a will and leaves heirs or when a will is not probated in a timely way. JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, & ESTATES* 72–73 (6th ed. 2000).

28. Evelyn Alicia Lewis, *Struggling with Quicksand: The Ins and Outs of Cotenant Possession Value Liability and a Call for Default Rule Reform*, 1994 WIS. L. REV. 331, 339 (1994); Frank W. Hammett, *Tenancy in Common — Remedy of Cotenant Against Cotenant*, 33 MARQ. L. REV. 257, 257 (1950).

29. 20 AM. JUR. 2D *Cotenancy and Joint Ownership* § 40 (2012).

their interests in the common property, voluntarily or involuntarily, to a third person or if one cotenant acquires the interest or interests of all of the other cotenants.<sup>30</sup> Second, adverse possession will terminate a tenancy in common.<sup>31</sup> Third, a tenancy in common will end if the cotenants voluntarily agree to partition the property into two or more separately titled estates or if a court orders partition of the property.<sup>32</sup>

In terms of the scope of a cotenant's right to seek judicial partition, a cotenant possesses a near universal right to file a partition action because restrictions on the ability of a cotenant to file a partition action normally constitute an unlawful restraint on alienation.<sup>33</sup> A cotenant's right to file a partition action does not depend upon the magnitude of her ownership interest or the length of time she has owned her interest. Even a cotenant who has only recently acquired a very small fractional interest—even a 1 percent or less undivided interest—in tenancy-in-common property that members of a family (or some other group for that matter) have owned for generations, may file a partition action in most circumstances,<sup>34</sup> without consulting with his or her fellow cotenants.

In some circumstances, cotenants often expressly or impliedly agree that none of the cotenants shall have an unrestricted right to file a partition action, and in other instances a person who creates tenancy-in-common ownership among others by devise or by conveyance, for example, expressly restricts the right of any of the cotenants to partition the property.<sup>35</sup> Courts generally uphold these types of agreements or

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30. 4 ILLINOIS REAL PROPERTY § 29:8 (2012).

31. *Id.* Adverse possession can terminate tenancy-in-common ownership in at least three ways depending upon in which jurisdiction such a claim may arise. First, someone who is a complete stranger to title can adversely possess property owned by a group of cotenants under a claim of right if she can prove all of the elements of adverse possession against the cotenants as a whole. *Cf. Rhodes v. Cahill*, 802 S.W.2d 643, 644–47 (Tex. 1990) (finding the adverse possessor had not sufficiently proven the elements of adverse possession to take title to property owned by numerous heirs to the original title holder). Second, in a large number of states, a conveyance by one cotenant to a stranger to title, by an instrument that purports to transfer the entire parcel in severalty to the grantee and not just the cotenant's undivided interest, will enable the grantee to claim adverse possession under color of title if subsequent to the conveyance the grantee fulfills all of the elements for adverse possession under color of title. 3 AM. JUR. 2D *Adverse Possession* § 204 (2014). Third, if a cotenant in sole possession of tenancy-in-common property ousts or commits some act that can be deemed the equivalent of an ouster with respect to all of his fellow cotenants, such a cotenant can adversely possess property against his fellow cotenants in many jurisdictions thereby overcoming the presumption that such a cotenant's sole possession of the property is not adverse to the interests of his fellow cotenants. *See generally* W.W. Allen, Annotation, *Adverse Possession Between Cotenants*, 82 A.L.R.2D 5 § 13 (1962).

32. 4 ILLINOIS REAL PROPERTY, *supra* note 30.

33. STOEBCUK & WHITMAN, *supra* note 18, § 5.11, at 216; *see also* POWELL & ROHAN, *supra* note 24, at 607; HERBERT T. TIFFANY & BASIL JONES, 2 TIFFANY REAL PROPERTY § 474 (3d ed. 2014).

34. *See* 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, 510 (2001) [hereinafter Mitchell, *Reconstruction*].

35. TIFFANY & JONES, *supra* note 33, § 474.

restrictions that limit the ability of a cotenant to file a partition action, provided that the restriction only constitutes a partial restraint on alienation that remains in effect for a “reasonable time.”<sup>36</sup> For example, many investors acquire fractional interests in tenancy-in-common property in order to qualify for the like-kind exchange provision of § 1031 of the Internal Revenue Code, a provision that permits investors to defer taxes on the exchange of real property.<sup>37</sup> In acquiring such fractional interests, the investors are nearly always subject to agreements that restrict their right to seek to partition the property. The IRS has ruled that these restrictions are lawful provided they “are required by a lender and . . . are consistent with customary commercial lending practices.”<sup>38</sup>

## 2. *Methods a Court May Use to Partition Tenancy-In-Common Property*

Legal commentators and courts often focus on just two of the remedies that a court can order in resolving a partition action. These remedies, partition in kind and partition by sale, certainly are the predominant remedies courts consider in partition cases. Nevertheless, a review of the law in states throughout the country reveals a surprising range of remedies, including some that have received little attention from legal scholars, that courts can order in partition actions. One might expect that this range of possible remedies would enable these courts to resolve partition actions in very equitable ways tailored to the specific circumstances of individual cases.

Despite the theoretical availability in most jurisdictions of remedies that fall somewhere between the binary options of just partition in kind or just partition by sale,<sup>39</sup> in recent decades, courts have tended to underutilize some of these intermediate remedies. This development has resulted in fewer courts ordering partition in kind and many more courts ordering partition by sale.<sup>40</sup> Though there is no research that provides a definitive

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36. Wade R. Habeed, *Contractual Provisions as Affecting Right to Judicial Partition*, 37 A.L.R.3d 962, § 8a (1971); see also TIFFANY & JONES, *supra* note 33.

37. See generally 26 U.S.C. § 1031 (2008).

38. Rev. Proc. 6-6, 2002–22 I.R.B. 733.

39. There is some legal precedent for the proposition that courts of equity have some very limited discretion to refuse to partition property in any way but only “in extreme cases or where manifest injustice, fraud or oppression will result if partition is granted.” See, e.g., *Condrey v. Condrey*, 92 So. 2d 423, 427 (Fla. 1957); see also *Newman v. Chase*, 359 A.2d 474, 479 (N.J. 1976).

40. 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); John G. Casagrande, Jr., Note, *Acquiring Property Through Forced Partitioning Sales: Abuses and Remedies*, 27 B.C. L. REV. 755, 778 (1986). Some courts have simply stated that most courts in partition actions are unable to partition property in an equitable way which explains why courts typically end up ordering partition sales. See, e.g., *Ragland v. Walker*, 387 So. 2d 184, 185 (Ala. 1980) (“Except in the

explanation for the reasons courts have decreased their use of intermediate remedies in partition actions, certain well-respected commentators have suggested that courts have ordered partition by sale with greater frequency over the past several decades in substantial part because it is simply a much easier remedy for a court to order.<sup>41</sup> Others have suggested that as courts have increasingly considered real property to be a fungible commodity, courts in partition actions have become less concerned about protecting the non-economic values that many cotenants in such actions seek to preserve by requesting courts to order partition in kind.<sup>42</sup>

The following paragraphs describe some of the remedies available to all or at least some state courts in partition actions, irrespective of whether courts actually use these remedies to any considerable degree.

*a. Partition in Kind or Partition by Sale*

A clear majority of states maintain a statutory preference for a partition in kind. In these states, partition statutes indicate that a court may order a partition sale only if partition in kind would result in “great prejudice” or “manifest prejudice” or “substantial injury” (or some other similar formulation of an injury requirement) to the cotenants as a whole.<sup>43</sup> No matter how any given state formulates the injury requirement, hardly any state legislatures have developed any specific criteria that a court must consider before ordering a partition by sale.

Instead, even in jurisdictions with a statutory preference for partition in kind, courts have increasingly undermined the statutory preference for partition in kind by ordering partition sales in cases in which the property was easily divisible. To this end, many of these courts have ordered a partition sale after applying a very narrow, economics-only test.<sup>44</sup> In applying it, courts give little, if any, weight to claims made by cotenants who seek a division in kind that the property holds substantial

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rarest of circumstances which permit judicial equitable partition, the usual end result of such proceedings is the passing of title to a stranger.”).

41. See Lewan & Barclay, *supra* note 7.

42. Mitchell, *Reconstruction*, *supra* note 34, at 510.

43. It should be noted that in many if not most jurisdictions, courts may order a mixed remedy, under which they divide part of the property in kind and order the remainder sold. See, e.g., CAL. CIV. PROC. CODE § 872.830 (West 1980); NEB. REV. STAT. § 25-21, 103 (1995). However, in a limited number of other states, a court may only order either partition in kind or partition by sale of the whole property. See, e.g., *Fernandes v. Rodriguez*, 761 A.2d 1283, 1289 (Conn. 2000).

44. See, e.g., *Ashley v. Baker*, 867 P.2d 792, 796 (Alaska 1994) (noting that “[t]he consensus view is that ‘great prejudice’ refers to economic harm”) (quoting ALASKA STAT. § 09.45.290 (2012)). Though these economics-only tests have mostly been developed by state judges, some state partition statutes also mandate that primarily economic considerations should be used to determine whether partition in kind would result in great prejudice or substantial injury to the cotenants. See, e.g., N.C. GEN. STAT. § 46-22 (2013).

noneconomic value for them.<sup>45</sup> Under the economics-only test, a court will order a sale if the hypothetical fair market value of the entire property is significantly more than the aggregated fair market value of separately titled parcels which would arise from a partition in kind.<sup>46</sup>

*b. Owelty*

In many jurisdictions, in cases in which courts cannot practicably divide the property in such a way as to give each cotenant his fair share, courts have ordered owelty payments,<sup>47</sup> which require a cotenant who receives more than his pro rata share of the property to pay a cotenant who receives less than his pro rata share monetary compensation so that the partition is just.<sup>48</sup> Though courts may order owelty primarily in partition actions, the concept that cash should be paid to balance an otherwise unequal exchange is common in various areas of business law. In the commercial law area, including cases involving real estate transfers, courts may order equalizing payments known as boot.<sup>49</sup>

*c. The Buyout Remedy*

Third, in approximately fourteen states, a court can grant one or more of the parties the opportunity to buy out, at a price determined by the court in most instances, some or all of the ownership interest of another cotenant.<sup>50</sup> Though often alluded to as a buyout remedy, this remedy is also referred to as partition by allotment in a few jurisdictions.<sup>51</sup> The states that provide for buyouts view such buyouts as more consistent with the preference for partition in kind than with partition by sale of the entire property at public auction, even though one or more cotenants may have their interests liquidated against their will.<sup>52</sup> These states also believe that certain cotenants may have superior equitable claims to maintaining ownership of the property as a whole.<sup>53</sup> The scope of the buyout remedy,

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45. See Phyllis Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 WASH. U. L. Q. 737, 764 (2000).

46. See *Ashley*, 867 P.2d at 796.

47. See, e.g., *Chesmore v. Chesmore*, 484 P.2d 516, 519 (Okla. 1971).

48. *Keenan v. Wade*, 182 P.3d 1099, 1101 n.1 (Alaska 2008).

49. See, e.g., *Schmidt v. Colonial Terrace Assocs.*, 656 P.2d 807, 809 (Mont. 1982).

50. This remedy is distinguished from the equitable remedy of owelty in almost every jurisdiction by the fact that in ordering a buyout, a court may grant one cotenant the opportunity to buy out all of another cotenant's interest or all of the interests of all of the other cotenants. See, e.g., *Onderdonk v. Onderdonk*, 307 A.2d 710, 712–13 (Md. 1973); see also 68 C.J.S. *Partition* § 142 (2014).

51. See, e.g., S.C. CODE ANN. § 15-61-50 (2005 & Supp. 2013); S.C. R. CIV. P. 71(f)(4); see also *Zimmerman v. Marsh*, 618 S.E.2d 898, 900 (S.C. 2005).

52. Cf. *Rissolo v. Betts Island Oyster Farms, LLC*, 979 A.2d 534, 538–40 (Conn. App. Ct. 2009).

53. *Id.*

including which cotenants may be given the opportunity to utilize this remedy, can differ substantially among the jurisdictions that recognize this remedy.

*1. States Limiting Buyout Remedy to Nonpetitioning Cotenants*

Georgia,<sup>54</sup> Louisiana,<sup>55</sup> and South Carolina<sup>56</sup> are states that restrict the buyout remedy by statute to parties that are not deemed to be parties that petitioned a court to partition commonly-owned property, irrespective of whether the petitioning cotenant requested partition in kind or partition by sale.<sup>57</sup> There are, however, significant differences among these three state statutes. For example, unlike Louisiana and South Carolina, Georgia permits a party that had petitioned a court for partition to “withdraw as petitioner in the partition action and become a party in interest and any party in interest . . . [to] become a petitioner in the action.”<sup>58</sup> In Georgia, a party that withdraws as a petitioner and thereby becomes a nonpetitioning party or a party in interest is then eligible to buy out the interest of any remaining petitioner. Therefore, this provision of the Georgia statute in effect transforms what may appear to be a potentially compulsory buyout into a voluntary buyout.

Moreover, the Georgia and Louisiana statutes referred to above have significant limitations that considerably narrow the circumstances under which parties that did not petition the court for partition may be able to buy out the interest of a petitioning cotenant. Both states only permit the buyout remedy to be used in partition actions in which courts have determined that partition in kind is not feasible.<sup>59</sup> In Georgia, a nonpetitioning cotenant who is referred to as a party in interest may only pay “in proportion to that party’s share of the total shares of property of all parties in interest, unless one party in interest authorizes another party in interest to pay some or all of his proportionate share of the shares available for sale.”<sup>60</sup> As a result of this provision, the buyout remedy may fail if just one nonpetitioning cotenant does not pay his or her share of the purchase price into the court and also does not authorize another nonpetitioning cotenant to pay his or

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54. GA. CODE ANN. § 44-6-166.1 (2010 & Supp. 2014).

55. LA. REV. STAT. ANN. § 9:1113 (2008 & Supp. 2014).

56. S.C. CODE ANN. § 15-61-25 (2005 & Supp. 2013).

57. Before Oregon revised its buyout statute in 2001, Oregon also had restricted the buyout remedy to owners “objecting to the partition or sale.” See *Maupin v. Opie*, 964 P.2d 1117, 1124 (Or. Ct. App. 1998) (quoting OR. REV. STAT. § 105.210 (1997) (amended 2001)).

58. GA. CODE ANN. § 44-6-166.1(d).

59. *Id.* § 44-6-166.1(b); LA. REV. STAT. ANN. § 9:1113(A).

60. GA. CODE ANN. § 44-6-166.1(e)(2).

her share of the purchase price.<sup>61</sup> In Louisiana, only the interest or interests of a co-owner or co-owners that (a) petitioned the court to partition the property and (b) own either “an aggregate interest of fifteen percent or less of the immovable property or an aggregate interest of twenty percent or less of the immovable property if there was past ownership of the whole by a common ascendant” are subject to being bought out by the nonpetitioning co-owners, provided that the court determines the property is not susceptible to partition in kind.<sup>62</sup>

South Carolina provides the most robust buyout rights to tenants in common that had not petitioned a court for partition at any time. In South Carolina, these nonpetitioning cotenants are afforded the right to buy out the interests of any cotenant that petitioned a court for partition, and the statute does not make this buyout right contingent upon the determination of a court that the property is not susceptible to division in kind.<sup>63</sup> Unlike the Georgia statute, the South Carolina statute does not specify whether and under what conditions a nonpetitioning cotenant may acquire more than his pro rata share of the nonpetitioning cotenants’ interests that are subject to being bought out. In South Carolina, it appears that the consequences of a failed buyout may be high because the statute indicates that in such a circumstance “the court shall proceed according to its traditional practices in partition sales” even though the statute does not require a court to have determined that the property could not have been partitioned in kind before nonpetitioning cotenants are given the opportunity to buy out interests of petitioning cotenants.<sup>64</sup> However, it is hard to predict how a South Carolina court would rule with respect to the consequences of a failed buyout under this relatively new statute as there still are no reported decisions in South Carolina on this statute.

2. *States That Grant Courts Discretion to Give Petitioning or Nonpetitioning Parties the Chance to Buy Out Other Cotenants*

Unlike the small number of states that permit those cotenants that did not petition a court to partition some parcel of real property the opportunity as a matter of right to buy out a petitioning cotenant, a larger number of states give courts the discretion to decide whether to grant any cotenant in a partition action an opportunity to buy out a fellow cotenant even if the

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61. *Id.* § 44-6-166.1(e)(1)–(2).

62. LA. REV. STAT. ANN. § 9:1113(A).

63. S.C. CODE ANN. § 15-61-25(A) (2005 & Supp. 2013).

64. *Id.* § 15-61-25(E).

cotenant to be bought out would not otherwise consent to such a sale.<sup>65</sup> The states that permit courts to grant any cotenant in a partition action the opportunity to buy out another cotenant do so in a few different ways. Some state statutes explicitly give courts the discretion to allot the entire property to one cotenant provided that this cotenant pay to the other cotenant or cotenants a sum of money established by the court to make the partition just.<sup>66</sup> In one state, an owelty statute has been interpreted to permit courts in that state to award the entire property to one of the cotenants, provided that such a cotenant pay the other cotenant a court-determined sum of money.<sup>67</sup> Further, there are at least two states in which courts that had no express statutory authority to make such an order have ordered properties allotted to one cotenant provided that the cotenant afforded the buyout remedy purchase the other cotenant's interest for an amount that would make the partition fair.<sup>68</sup>

### 3. *Alabama Affords Both Petitioning and Nonpetitioning Parties the Opportunity to Buy Out Other Cotenants*

Alabama has a statute that was enacted into law in 1979 that provides that cotenants in a partition action that petition a court for partition by sale may have their interests bought out by the nonpetitioning cotenants.<sup>69</sup>

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65. See, e.g., CONN. GEN. STAT. ANN. § 52-500 (West 2013 & Supp. 2014); MASS. GEN. LAWS ANN. ch. 241, § 14 (2004 & Supp. 2014).

66. See, e.g., CONN. GEN. STAT. ANN. § 52-500 (noting a court may grant some common owners the opportunity to purchase the interests of other common owners who "have only a minimal interest"); MASS. GEN. LAWS ANN. ch. 241, § 14; MINN. STAT. ANN. § 558.12 (West 2010); OR. REV. STAT. § 105.210 (2011); R.I. GEN. LAWS § 34-15-16 (2011); S.C. CODE ANN. § 15-61-50 (2013); VT. STAT. ANN. tit. 12, § 5174 (2002 & Supp. 2013); VA. CODE ANN. § 8.01-83 (2007); W. VA. CODE ANN. § 37-4-3 (LexisNexis 2001 & Supp. 2014); *Bissonnette v. Ventura*, No. Civ.A. PC 02-3437, 2004 WL 2821652, at \*4 (R.I. Super. Ct. Nov. 22, 2004).

67. See *Libby v. Lorrain*, 430 A.2d 37, 39 (Me. 1981).

68. See *Reitmeier v. Kalinoski*, 631 F. Supp. 565, 578 (D.N.J. 1986); *Henry Talmadge & Co. v. Seaboard Air Line Ry. Co.*, 152 S.E. 243, 246 (Ga. 1930). In California, at least one court has ordered a buyout under which the court gave two of the parties the initial chance to buy out the other party under what the court indicated would be a private sale. See *Odening v. Evans*, No. B168869, 2006 WL 711071, at \*3 (Cal. Ct. App. Mar. 22, 2006). In ordering this remedy it is unclear if the court relied upon a particular statute or if it believed it had general equitable power to do so. Though there is a California statute that gives a court discretion in a partition action to order a private sale as opposed to a public auction, the statute does not define private sale to include giving one party the opportunity to buy out another party without the consent of that other party. See CAL. CIV. PROC. CODE § 873.520 (West 1980).

69. ALA. CODE § 35-6-100 (1991 & Supp. 2014). This statutory section reads as follows:

Upon the filing of any petition for a sale for division of any property, real or personal, held by joint owners or tenants in common, the court shall provide for the purchase of the interests of the joint owners or tenants in common filing for the petition or any others named therein who agree to the sale by the other joint owners or tenants in common or any one of them. Provided that the joint owners or tenants in common interested in purchasing such interests shall notify the court of same not later than 10 days prior to the date set for trial of



Though the statute survived some earlier constitutional challenges, the Alabama Supreme Court determined in *Jolly v. Knopf* that the statute violated state and federal equal protection constitutional provisions to the extent that it afforded the buyout remedy exclusively to defendants in partition actions in which plaintiffs petition a court for partition by sale and prevented plaintiffs in such actions from seeking to buy out the defendants.<sup>70</sup> As a result of the *Jolly* case, in cases in Alabama in which a plaintiff petitions the court for partition by sale, the plaintiffs and defendants may now invoke the buyout remedy.<sup>71</sup> If both a plaintiff and a defendant invoke the buyout remedy and fulfill the other relevant statutory obligations, then the court will afford these cotenants the opportunity to purchase the property through a private sales procedure in which the parties are given the opportunity to acquire the property by bidding against one another.<sup>72</sup>

The *Jolly* decision is very curious in some significant ways. It should be noted that in *Jolly*, the Alabama Supreme Court first held that the buyout statute was constitutional with respect to giving defendants, but not plaintiffs, buyout rights.<sup>73</sup> However, six months after issuing its first opinion, after a rehearing *ex mero motu* for which the court offered no reason for conducting, the Alabama Supreme Court withdrew its first opinion.<sup>74</sup> The court in the second *Jolly* opinion held that the buyout statute violated Alabama and federal constitutional equal protection provisions by providing defendants in partition actions with the opportunity to buy out the interests of plaintiffs that petition for partition by sale but not permitting plaintiffs petitioning for partition by sale with the opportunity to buy out defendants.<sup>75</sup>

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the case and shall be allowed to purchase whether default has been entered against them or not.

As the Alabama Supreme Court has noted, this statute is “not a model of draftsmanship” as it contains technical inaccuracies and grammatical and other deficiencies which render its meaning somewhat unclear. *See Ragland v. Walker*, 387 So. 2d 184, 185 (Ala. 1980).

70. *See Jolly v. Knopf*, 463 So. 2d 150, 153 (Ala. 1985).

71. *See, e.g., Cupps v. Pruitt*, 694 So. 2d 1346, 1353 (Ala. Civ. App. 1996); *Few v. Few*, 681 So. 2d 142, 144 (Ala. Civ. App. 1995).

72. *See, e.g., Cupps*, 694 So. 2d at 1353; *Few*, 681 So. 2d at 144. The Alabama buyout statute does indicate that only those interests of joint owners or tenants in common “who agree to the sale” may be purchased. *See ALA. CODE* § 35-6-100 (1991 & Supp. 2014). However, courts in Alabama have indicated that in cases in which both a cotenant that petitioned a court for partition by sale and a nonpetitioning cotenant invoke the buyout right that the invocation of the buyout right, at least with respect to the second party that invokes the right, constitutes consent to a private sale. *See Cupps*, 694 So. 2d at 1353.

73. *Jolly v. Knopf*, 454 So. 2d 919 (Ala. 1984), *withdrawn by* 463 So. 2d 150 (Ala. 1985).

74. *Jolly*, 463 So. 2d at 151.

75. *Id.* at 153–54.

The *Jolly* decision was poorly decided for at least two reasons. First, in 1999, the Alabama Supreme Court held that Alabama's constitution does not contain any equal protection clause or equal protection provisions at all.<sup>76</sup> This decision completely undercuts the part of the *Jolly* court's holding that indicated that the statute at issue in that case violated state constitutional equal protection provisions.<sup>77</sup>

Second, under the rational basis review standard that the *Jolly* court acknowledged was the proper standard of review in that case, it was quite a stretch for the *Jolly* court to hold that in passing the statute at issue in *Jolly*, the Alabama legislature took action that was not rationally related to any legitimate state interest. In *Jolly*, the court indicated that the purpose of the statute was "to afford protection to co-owners against other co-owners seeking an involuntary sale of the co-owned land for pro-rata distribution of the proceeds of sale."<sup>78</sup> Normally, it would not be even a close call for a court to hold that protecting the property rights of those that own property in common with others against a forced sale of their property by their co-owners represents a legitimate state interest. It also seems beyond question that the statute at issue in *Jolly* was rationally related to that state interest.

Nevertheless, the court in *Jolly* did not address at all whether the legislative purpose represented a legitimate state interest or whether the statute was rationally related to that legislative purpose. Instead of any such analysis, the court merely held in a very conclusory manner that the statute violated state and federal equal protection constitutional provisions by providing defendants an opportunity to buy out plaintiffs that petition a court for partition by sale while not giving plaintiffs that petition a court for partition by sale similar rights to buy out nonpetitioning defendants. Given the significant problems with the court's legal analysis in *Jolly*, it is not surprising that no courts from any other states with buyout statutes that give nonpetitioning parties in partition actions greater buyout rights than petitioning parties have determined that their buyout statutes violate any constitutional equal protection provisions, whether state or federal.

### *C. Irremediable Economic Harm Often Results From a Partition Sale*

#### *1. Forced Sale Prices Well Below Market Value*

Despite the ostensible judicial concern for maximizing wealth in cases in which courts use primarily economic rationales to justify the ordering of a partition sale, or the apparent belief of many judges in other partition

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76. See *Ex Parte Melof*, 735 So. 2d 1172, 1186 (Ala. 1999).

77. See *id.*

78. *Jolly*, 463 So. 2d at 153.

cases that properties sold under partition sales usually fetch a fair price, many cotenants suffer serious economic harm as a result of partition sales. These results should not be surprising given that partition sales simply represent a type of forced sale and fair market value has been described as “the very *antithesis* of forced-sale value.”<sup>79</sup> Under forced sales such as partition sales, the sellers are compelled to sell, unlike those who sell property under fair market value conditions, which means that these sellers are not willing sellers.<sup>80</sup>

Second, like prospective buyers at other forced sales, prospective buyers at partition sales often lack much information about the properties subject to being sold.<sup>81</sup> Many potential bidders are unable to find out anything about a specific parcel of property that is scheduled to be sold under a partition sale, even the basic fact of when the property is scheduled to be sold, because most state statutes require that those who conduct partition sales use the same procedures, or at least some of the key procedures, that those who conduct other court-ordered, forced sales, such as sales under execution, use.<sup>82</sup> For example, in North Carolina, the notification standards for sales under execution, which are very minimal, also apply to partition sales. In addition to posting notice of the sale in an area designated by the clerk of the superior court for such public notices, which is often the courthouse, the standards mandate publication of notice of the sale in a newspaper “once a week for at least two successive weeks . . . [provided that] [t]he period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than seven days.”<sup>83</sup>

This type of notice, however, “is calculated not to attract bidders but to satisfy formal requirements.”<sup>84</sup> Descriptions that fail to give the reader sufficient information to know whether he is interested in the property, including newspaper notices in which properties are only described using a

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79. BFP v. Resolution Trust Corp., 511 U.S. 531, 537 (1994).

80. See Mitchell, Malpezzi & Green, *supra* note 5, at 602.

81. *Id.* at 602–03.

82. *Id.* at 603. See, e.g., ALA. CODE § 35-6-62 (1991) (“[T]he sale shall be conducted, the purchase money collected, conveyance of the title made and all proceedings subsequent to the sale conducted in every respect as is done when property in the hands of an executor or administrator is to be distributed.”); N.C. GEN. STAT. § 46-28 (2013) (stating that with limited exceptions, procedures to be used for a partition sale are the same as are provided in Article 29A of Chapter 1 of the General Statutes, which govern execution sales); WIS. STAT. ANN. § 842.18 (West 2007) (stating that notice of partition sales to be given using the same requirements as for sales on execution).

83. N.C. GEN. STAT. § 1-339.17.

84. Lynn M. LoPucki, *A General Theory of the Dynamics of the State Remedies/Bankruptcy System*, 1982 WIS. L. REV. 311, 317 (1982).

legal description, are therefore still legally sufficient.<sup>85</sup> As a result of these types of notice procedures, many potential bidders do not participate in partition sales because they never find out about such sales in the first place. Others who do participate usually end up making below market value bids in part because they often have little quality information about properties subject to a partition sale.<sup>86</sup>

At least two other features of the forced sale procedures that are used for most partition sales make it very unlikely that a partition sale will yield a fair market value price. First, the fact that a property subject to a partition sale is exposed to the market for a period of time that falls far short of the typical period of time properties on the open market are exposed to the market substantially increases the chances that the property will end up being sold for less than its market value.<sup>87</sup> Second, prospective buyers at most partition sales are not able to finance the purchase of the properties in the way that those who purchase property under fair market value conditions typically can finance real estate acquisitions. To this end, in most states, the high bidder at a partition sale only can acquire the property by making an immediate cash payment to the person charged with managing the sale.<sup>88</sup> Such a requirement is obviously quite different from how prospective buyers seeking to purchase property on the open market can make bids, which often are contingent upon their securing financing within thirty to sixty days.<sup>89</sup> Given this cash payment requirement, significantly fewer prospective buyers seek to purchase property at a typical partition sale as compared to the number of people who seek to purchase property that is offered for sale on the open market.

In sum, as is well known, forced sales such as foreclosure sales and sales upon execution of real and personal property often yield prices well below fair market value because the procedures used in these sales are not designed to yield market value prices.<sup>90</sup> In many instances, these sale procedures yield fire sale prices.<sup>91</sup> These same forced sale procedures are used by most states for partition sales. As a result, many, if not most, partition sales are in fact wealth-depleting, notwithstanding the wealth-maximizing rationale many courts have used to order partition sales in the first instance.

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85. Mitchell, Malpezzi & Green, *supra* note 5, at 604–05 (highlighting an Alaska case in which more than 500 acres of property were sold on execution after the property was advertised a few times in the *Anchorage Daily Times* in an advertisement that included just the legal description for the property).

86. *See id.* at 602–03.

87. *Id.* at 604.

88. *Id.* at 606.

89. *Id.*

90. *Id.* at 602.

91. *Id.* at 612.

Very few states have addressed the lack of fit between the wealth-maximizing justifications for ordering partition sales and the actual forced sale procedures used for partition sales. Under the law in most states, tenants in common who are not in a financial position to make a competitive auction bid have almost no ability to prevent their property from being sold at a partition sale for a forced sale or a fire sale price. To this end, only a small minority of states mandate by statute that property sold at a partition sale yield any minimum sales price.

In many states, property ordered sold under a partition sale may be sold only at a public auction.<sup>92</sup> In a very small number of these states, the property must sell for some minimum price. All these states require that the cotenants receive at least two-thirds of the property's appraised price.<sup>93</sup> In contrast, the statutory minimum sales price requirement in a very small number of states only applies to private sales, a sales procedure very few states permit to be used for partition sales.<sup>94</sup> In these states, which all also permit property ordered sold under a partition sale to be sold at a public auction, the property must sell for at least its court-appraised value if it was offered for sale at a private sale. In New Mexico, however, the minimum sales price applies to almost every partition sale, whether by private sale or public auction, though the minimum sales price differs depending upon the type of sale.<sup>95</sup> If a New Mexico court orders a public sale, a property in almost all instances must sell for at least two-thirds of its appraised value, but a property cannot sell for less than its fully appraised value if a New

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92. *E.g.*, OHIO REV. CODE ANN. § 5307.11 (West 1995 & Supp. 2014); WYO. STAT. ANN. § 1-32-111 (2013).

93. *E.g.*, 735 ILL. COMP. STAT. ANN. 5/17-105 (West 2011 & Supp. 2014); KAN. STAT. ANN. § 60-1003 (2005 & Supp. 2013); OHIO REV. CODE ANN. § 5307.12; OKLA. STAT. tit. 12, § 1513 (West 2010 & Supp. 2014); WYO. STAT. ANN. §§ 1-32-111 & 112.

94. *See, e.g.*, MINN. STAT. ANN. § 558.17 (West 2010); R.I. GEN. LAWS § 34-15-16 (2011); PA. R. CIV. P. 1567. Such private sales are authorized in almost every instance by statute. However, at least in Connecticut and Wisconsin, such sales have been authorized in partition actions by courts though there was no express statutory authority to order such private sales. *See* *Giulietti v. Giulietti*, 784 A.2d 905, 936 (Conn. App. Ct. 2001); *Heyse v. Heyse*, 176 N.W.2d 316, 321 (Wis. 1970). In the context of partition actions, the term private sale can mean something different in different cases or in different jurisdictions. In some instances, it can mean a buyout by one of the parties on terms determined by a court. *See* *Odening v. Evans*, No. B168869, 2006 WL 711071, at \*3 (Cal. Ct. App. Mar. 22, 2006). In other instances, it may mean a sale in which bidding is confined to the parties in the partition action. *See, e.g.*, 42 PA. R. CIV. P. 1566 ("If any party rejects the proposed allotment of the purparts or if no objection is made to a sale under Rule 1563, the property shall be offered for private sale by open bidding confined to the parties to be held upon not less than twenty days' notice."). In other cases, it may mean a sale to a specific prospective buyer on terms established by a court, including to a buyer who is not a cotenant or even a party in the partition action. *See* *Buell v. Rubin*, No. 310497, 2005 WL 2995494, at \*1-2 (Mass. Land Ct. Nov. 9, 2005). Further, it can mean that the property will be listed for sale by the parties, a broker, or someone else so that the property may be offered for sale on the open market. *See* *Heyse*, 176 N.W.2d at 321.

95. *See* N.M. STAT. ANN. § 42-5-7 (LexisNexis 1978).

Mexico court orders a private sale.<sup>96</sup> Finally, in Texas, real property sold under a partition sale is required to be sold for its fair market value irrespective of how the property is sold.<sup>97</sup>

## 2. *Courts Rarely Set Aside Partition Sales Based Upon Low Price Alone*

In the overwhelming number of states that have no statutory requirement that partition sales yield some minimum price, a cotenant rarely will be able to convince a court to set aside a partition sale solely based upon a claim that the sales price was inadequate.<sup>98</sup> This is the case no matter how grossly inadequate the sales price may have been,<sup>99</sup> including in cases in which a partition sale yields a price that is \$100,000 or more below the property's market value or otherwise a price that represents just a fraction of the property's market value. For example, an appellate court in Kentucky confirmed a judicial sale of jointly-owned property despite the fact that the property sold for less than 5 percent of its value based upon uncontested evidence of its value.<sup>100</sup>

Nevertheless, courts throughout the country will consider setting aside a partition sale if, in addition to the inadequacy of the sales price, there are other circumstances that existed, such as mistake, fraud, other misconduct, or irregularity by the purchaser or some other person connected with the partition sale that may have caused the inadequate sales price.<sup>101</sup> In these circumstances, the greater the discrepancy between the sales price and the market value of the property, the slighter the need for some other circumstance to have existed that negatively impacted the sales price.<sup>102</sup> However, there is no widespread agreement among courts from different jurisdictions on the conditions that must be present for a court to set aside a partition sale when there is a claim that the sales price was severely inadequate but there is no direct evidence that any other circumstance negatively impacted the sales price. Courts in some jurisdictions may set

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96. *Id.* In New Mexico, however, the minimum sales price requirement does not apply to properties valued at less than \$10,000 if the property is sold at a public auction. *Id.*

97. *Grimm v. Beck*, 237 S.W.2d 1017, 1018 (Tex. Civ. App. 1951).

98. *See, e.g., Sulkowski v. Sulkowski*, 561 So. 2d 416, 418 (Fla. Dist. Ct. App. 1990); *Necaise v. Ladner*, 910 So. 2d 699, 702 (Miss. Ct. App. 2005).

99. *See Sulkowski*, 561 So. 2d at 418.

100. *See Gross v. Gross*, 350 S.W.2d 470, 471–72 (Ky. Ct. App. 1961); *cf. Suchan v. Suchan*, 741 P.2d 1289, 1297 (Idaho 1986) (confirming an execution sale in which property with a market value of \$300,090 sold for an effective purchase price of \$71,000, which represented 24 percent of the property's market value).

101. *Necaise*, 910 So. 2d at 702; 59A AM. JUR. 2D *Partition* § 143 (2003); 12 FLA. JUR. 2D *Cotenancy and Partition* § 125 (2014).

102. *See, e.g., Apex Fin. Corp. v. Brown*, 7 S.W.3d 820, 829 (Tex. App. 1999).

aside a partition sale if the disparity between the sales price and the market value of the property is so great as to shock the conscience of the court, thereby creating a presumption of fraud.<sup>103</sup> In jurisdictions applying this rule, the sales price that may shock a court is not susceptible to any mathematical formula but instead may depend upon a number of different factors, including the value of the property, the harm that may result from confirming the sale, etc.<sup>104</sup>

Courts in a very small number of jurisdictions will consider setting aside a partition sale based upon a claim that the sales price is inadequate if confirming the sale would result in substantial injustice even if there is no fraud (actual or presumed) or other direct or indirect evidence of unfair circumstances that impacted the judicial sale.<sup>105</sup> However, courts in these jurisdictions only will set aside a partition sale in cases in which there is no evidence of unfair circumstances if the sales price is deemed to be grossly inadequate, which is a much higher standard than courts use in considering whether to set aside a partition sale when some unfair circumstance exists that contributes to the sales price being inadequate to some extent.<sup>106</sup> Nevertheless, very few of these courts will set aside a partition sale if the sales price is at least 20 percent of the property's market value.<sup>107</sup>

### 3. *Attorney's Fees Awarded to Party Who Petitioned Court for Sale*

Not only do nearly all partition sales yield sales prices that often are well below the fair market value of the properties sold, but also an overwhelming majority of states permit courts to make an attorney's fee

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103. See, e.g., *Sangamon Assocs., Ltd. v. Carpenter 1985 Family P'ship, Ltd.*, 165 S.W.3d 141, 144 (Mo. 2005).

104. *Looper v. Madison Guar. Sav. & Loan Ass'n*, 729 S.W.2d 156, 157 (Ark. 1987).

105. See, e.g., *Walsch v. Deanovich*, 168 N.W.2d 213, 215 (Wis. 1969).

106. See *Armstrong v. Csurrilla*, 817 P.2d 1221, 1234 (N.M. 1991). *But see* CAL. CIV. PROC. CODE § 873.730(c)(2-3) (West 1980) (In California, a partition sale may be vacated if "[t]he sale[s] price is disproportionate to the value of the property" or if "[i]t appears that a new sale will yield a sum that exceeds the sale price by at least 10 percent on the first ten thousand dollars (\$10,000) and 5 percent on the amount in excess thereof, determined after a reasonable allowance for the expenses of a new sale."); *Varnell v. Lee*, 14 N.W.2d 708, 712 (Iowa 1944) (stating that in Iowa, a court considering whether to confirm a partition sale considers whether the sales price was the highest price that reasonably could be obtained and not just whether the sales price was grossly inadequate).

107. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 8.3 cmt. b (1997) ("Gross inadequacy" cannot be precisely defined in terms of a specific percentage of fair market value. Generally, however, a court is warranted in invalidating a sale where the price is less than 20 percent of fair market value and, absent other foreclosure defects, is usually not warranted in invalidating a sale that yields in excess of that amount."). *Cf. Koay v. Koay*, 359 S.E.2d 113, 116 (W. Va. 1987) ("A partition sale is a forced sale, and for that reason courts have been hesitant to find that a bid substantially below an appraised value or an arm's length transaction value is so grossly inadequate to shock the conscience. Bids often amounting to only 50% or less of the appraised or arm's length value have been upheld.").

award in a partition action.<sup>108</sup> Attorney's fee awards in these cases most often are awarded under the "common benefit" doctrine, which is an exception to the American rule on attorney's fees under which each party normally is responsible for paying his own attorney's fees.<sup>109</sup> Under this doctrine, parties may have to pay a portion of another party's attorney's fees if the attorney for the other party provided legal services in the litigation that the court deems inured to the benefit of those to be charged as well as to the party who employed the attorney.<sup>110</sup> Of the states that permit attorney's fees to be awarded in a partition action, a majority permits an attorney's fee award to be made to any party; however, some states that permit attorney's fees to be awarded in partition actions only permit (or even require) an attorney's fee award to be made to the plaintiff or the plaintiff's attorney.<sup>111</sup>

Although courts in the states that allow attorney's fees primarily consider whether to award attorney's fees under the common benefit doctrine, there is considerable disagreement among the states as to what legal services may be deemed to have been done for the common benefit.<sup>112</sup>

108. See ALA. CODE § 34-3-60 (2010); ALASKA STAT. § 09.45.620 (2012); ARK. CODE ANN. § 18-60-419 (2003 & Supp. 2013); CAL. CIV. PROC. CODE §§ 874.010 (West 1980); COLO. REV. STAT. ANN. § 38-28-109 (West 2007); FLA. STAT. ANN. § 64.081 (West 2012 & Supp. 2014); HAW. REV. STAT. ANN. § 668-17 (LexisNexis 2011); IDAHO CODE ANN. § 6-545 (2010); 735 ILL. COMP. STAT. ANN. 5/17-125 (West 2011 & Supp. 2014); KAN. STAT. ANN. § 60-1003 (2005 & Supp. 2013); LA. CODE CIV. PROC. ANN. art. 4613 (1998) (allowing attorney fees only in uncontested partition actions); ME. REV. STAT. ANN. tit. 14, § 6508 (2003); MASS. GEN. LAWS ANN. ch. 241, § 22 (2004 & Supp. 2014); MISS. CODE ANN. § 11-21-31 (2004 & Supp. 2013); MONT. CODE ANN. § 70-29-218 (2013); NEB. REV. STAT. § 25-21.108 (1995 & Supp. 2004); NEV. REV. STAT. ANN. § 39.480 (West, Westlaw through 2014); N.M. STAT. ANN. § 42-5-8 (LexisNexis 1978 & Supp. 2012); N.D. CENT. CODE § 32-16-45 (2010); OHIO REV. CODE ANN. § 5307.25 (West 1995 & Supp. 2014); OKLA. STAT. ANN. tit. 12, § 1515 (West 2010 & Supp. 2014); OR. REV. STAT. § 105.405 (2011); S.C. CODE ANN. § 15-61-110 (2005 & Supp. 2013); S.D. CODIFIED LAWS § 21-45-24 (1987); TENN. CODE ANN. § 29-27-121 (2012); UTAH CODE ANN. § 78B-6-1243 (LexisNexis 2012); VA. CODE ANN. § 8.01-92 (2007); WASH. REV. CODE ANN. § 7.52.480 (West 2007); WIS. STAT. ANN. § 842.21 (West 2007); WYO. STAT. ANN. § 1-32-122 (2013); IOWA R. CIV. P. 1.1225; MO. SUP. CT. R. 96.30; PA. R. CIV. P. 1574; O'Connor v. Bielski, 701 S.E.2d 856, 858 (Ga. 2010) (indicating that a court may award attorney's fees in certain partition actions); Faulkner v. Terrell, 287 S.W.2d 409, 414 (Ky. Ct. App. 1956) (allowing narrow exceptions for attorney's fees in partition actions); Haynes v. Cameron, 295 N.W. 372, 373 (Mich. 1940); Kuller v. Kuller, 109 N.W.2d 561, 564 (Minn. 1961); McMullin v. Doughty, 55 A. 115, 117 (N.J. Ch. 1903) (outlining a very narrow allowance for attorney's fees in particularly complicated partition cases); Keener v. Korn, 264 S.E.2d 829, 833 (N.C. Ct. App. 1980); Francis v. Francis, 102 A.2d 872, 873 (R.I. 1954); Woods v. McLain, 166 S.E. 279, 280 (W. Va. 1932) (allowing attorney's fees in partition actions when one party is unrepresented).

109. Moore v. Ballard, 914 A.2d 487, 489-90 (R.I. 2007); D.E. Evins, Annotation, *Allowance and Apportionment of Counsel Fees in Partition Action or Suit*, 94 A.L.R.2d 575, § 7 (1964).

110. See Moore, 914 A.2d at 490; Evins, *supra* note 109.

111. See, e.g., ARK. CODE ANN. § 18-60-419 (allowing a reasonable fee to the attorney bringing the suit); MISS. CODE ANN. § 11-21-31 ("In all cases of the partition or sale of property for division of proceeds, the court may allow a reasonable attorney's fee to the attorney or the plaintiff . . ."); MO. SUP. CT. R. 96.30 (indicating that "[t]he court shall allow a reasonable fee to the attorney instituting the action in partition").

112. Evins, *supra* note 109.



In some states that permit courts to award attorney's fees in partition actions, courts cannot award fees if the partition action is an adversarial proceeding, including in cases in which one of the parties contests another party's petition for a partition sale.<sup>113</sup> However, in other jurisdictions, courts may award attorney's fees even in adversarial partition actions in which one or more parties contested another party's request for the court to order partition by sale.<sup>114</sup> In these cases, a party who hires an attorney in an effort to resist a court-ordered sale runs the risk of having to pay his or her own attorney as well as a portion of the fees of the attorney for the party who petitioned the court to order the property sold, if the court does in fact end up ordering the property sold.<sup>115</sup>

Irrespective of what the formal law may be, advocates for tenancy-in-common owners who have contested requests for partition sale have long claimed that courts primarily make attorney's fee awards, and often substantial such awards, to the cotenants that have successfully petitioned courts to order partition sales. These advocates believe that attorney's fee awards in such instances are unjust because the actions almost never provide any benefits to their clients but often harm their clients in important ways. Many of the cotenants these attorneys represent not only end up losing their property at a judicial sale that often yields a fire sale price, but also, they are then required to pay part of the legal fees of the cotenants who successfully sought the forced sale.<sup>116</sup>

In some cases, an attorney's fee award can be relatively small, but in others, it can be very substantial. As a technical matter, sometimes courts award attorney's fees in partition actions by using the so-called lodestar approach, which is the reasonable amount of time the attorney spent working on parts of a case that qualify for an award of attorney's fees multiplied by a reasonable hourly rate.<sup>117</sup> In many other cases, however, courts award attorney's fees in partition cases in which the property is ordered sold based upon a fixed percentage of the sales price. In terms of

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113. See, e.g., *Reagan v. Rivers*, 345 S.W.2d 601, 602 (Ark. 1961) ("In adversary suits there is no ground for taxing the fees of the solicitor of one of the parties against the other parties . . . ." (quoting *Lewis v. Crawford*, 1 S.W.2d 26, 26 (Ark. 1928) (internal quotations omitted))); *Le Blanc v. Le Blanc*, 80 So. 2d 715, 720 (La. Ct. App. 1955) (requiring the parties bringing forth the "contentions" to pay their own fees).

114. *Lewan & Barclay*, *supra* note 7. In one case highlighted by the Associated Press, the attorney for a small number of cotenants who were deemed to have petitioned the court in 1996 for the sale of 300 acres of property that had been owned by the Sanders family, an African-American family, for eighty-three years was awarded approximately 20 percent of the \$505,000 sales price. The court made this award despite the fact that the majority of the named plaintiffs had indicated that they had not authorized the attorney to file the partition action and despite the fact that several of the cotenants hired another attorney in an effort to contest the request for a partition by sale. *Id.*

115. *Id.*

116. See *id.*

117. See, e.g., *Howe v. Tarvezian*, 894 N.E.2d 1173, 1175–76 (Mass. App. Ct. 2008).

the latter approach, courts often order that attorney's fees be paid in an amount representing 5 percent,<sup>118</sup> 10 percent,<sup>119</sup> or 15 percent of the property's sales price.<sup>120</sup> There even have been many cases in which courts have ordered attorney's fees that constituted 20 percent<sup>121</sup> or even 25 percent of the property's sale price.<sup>122</sup>

In general, permitting attorney's fees to be awarded in a contested partition action often represents a highly questionable application of the common benefit doctrine. In many cases, the benefit that is purportedly conferred on a party held responsible for paying a portion of his adversary's attorney's fees in a partition action may not be considered by such a party (or by almost any reasonable person) to represent any benefit to him or her at all. In other instances, it may be a benefit that at best may be framed as being roughly equal to some harm the cotenant suffered as a result of the legal work done by opposing counsel in the partition action.<sup>123</sup> It is particularly inappropriate that courts have made attorney's fee awards under the common benefit doctrine, as many courts have done, in partition actions on behalf of the party that petitioned the court for a partition sale when the partition sale caused cotenants who contested the request for a partition sale economic harm, often severe economic harm. In such cases, there simply is no sound basis for a court to award any attorney's fees under the common benefit doctrine.

#### 4. *Fees Paid to Commissioners, Surveyors, and Others*

In partition actions, courts commonly appoint one or more people known as commissioners or referees, depending upon the jurisdiction.<sup>124</sup>

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118. Brooks v. Kunz, 637 S.W.2d 135, 142 (Mo. Ct. App. 1982).

119. Anderson v. Lee, 621 So. 2d 1305, 1306-07 (Ala. 1993).

120. Benton v. King, 934 So. 2d 1062, 1069 (Ala. Civ. App. 2005).

121. Lewan & Barclay, *supra* note 7.

122. E-mail from Carolyn Gaines-Varner, Reg'l Dir., Legal Services Alabama, to Thomas W. Mitchell, Professor of Law, Univ. of Wis. Law Sch. (Sept. 12, 2013, 09:49 CDT) (on file with author).

123. Moore v. Davis, No. 4377-VCG, 2011 WL 3890534, at \*2 (Del. Ch. Aug. 29, 2011). In *Moore*, the court stated the following:

Although subjectively the Respondents have an asset of less value after the sale than before, objectively what they have received is equivalent: they exchanged a one-sixth undivided ownership in the property for one-sixth of the net value of the property upon sale. Since, however, the Respondents have been deprived of one asset (an asset which, in fact, they preferred) in exchange for an asset of equal value, there has been no benefit to the class. The exchange is a wash. It would be inequitable for this Court not only to force this exchange (which it is each co-tenant's right to accomplish under the statute), but to also force the Respondents to pay for this privilege. Because I find that no common benefit has been accomplished for the co-tenants, application of the "common benefit" exception is not warranted, and each party must bear his own attorneys' fees.

124. 59A AM. JUR. 2D *Partition* § 119 (2014). Most states refer to these people as commissioners. See, e.g., Yturria v. Kimbro, 921 S.W.2d 338 (Tex. App. 1996). However, in some other states

Many assume that those eligible to be commissioners or referees possess some expertise or localized knowledge about real property matters that can be helpful to a court in a partition matter.<sup>125</sup> State laws providing for the appointment of commissioners or referees, however, do not establish detailed requirements setting forth the knowledge, let alone the expert knowledge, a commissioner or referee must possess.<sup>126</sup>

Court-appointed commissioners can assist a court in any number of ways in a partition action, including by helping the court decide whether the property should be divided in kind or sold,<sup>127</sup> by proposing how the property should be divided in kind,<sup>128</sup> or by conducting a court-ordered sale of the property.<sup>129</sup> Many jurisdictions even require courts to appoint commissioners or referees in partition actions in at least some phase of the action.<sup>130</sup> Even though commissioners or referees often play a prominent role in partition actions, legal scholarship on partition law has almost completely overlooked any issue bearing upon the role that commissioners or referees play. For example, there is no legal scholarship that addresses the criteria courts use to appoint commissioners or referees, the influence these court-appointed commissioners or referees can have on the outcome of a partition action, the extent to which commissioners or referees in some jurisdictions may have conflicts of interest, and the compensation these commissioners or referees receive for their work.

In terms of compensation, commissioners or referees in partition actions are entitled to reasonable fees.<sup>131</sup> Although in a minority of jurisdictions statutes establish the fee a commissioner or referee may

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including California, these people are referred to as referees. *See* *Richmond v. Dofflemyer*, 164 Cal. Rptr. 727 (Cal. Ct. App. 1980). In Georgia, they are referred to as partitioners. *See* GA. CODE ANN. § 44-6-163 (2010).

125. *See, e.g.*, J. H. Beuscher, *The Use of Experts by the Courts*, 54 HARV. L. REV. 1105, 1113–15 (1941) (noting that referees and commissioners, for example, appointed by courts pursuant to specialized statutes that only apply to certain well-defined and discrete types of cases including partition actions are usually presumed to be experts with respect to the issues they are charged either to evaluate or to prepare some type of report for review by the court).

126. *See, e.g.*, IDAHO CODE ANN. § 6-512 (2010); MO. SUP. CT. R. 96.12 (recognizing that commissioners who are appointed in Missouri need only be “residents of any county in which any of the land to be divided lies”).

127. MASS. GEN. LAWS ANN. ch. 241, § 12 (West 2004 & Supp. 2014); OKLA. STAT. ANN. tit. 12, § 1509 (West 2010 & Supp. 2014); *see also* P.R. LAWS ANN. tit. 32, § 2624 (2009).

128. *See, e.g.*, ALA. CODE § 35-6-45 (1991); DEL. CODE ANN. tit. 25, § 724 (2009 & Supp. 2012); OHIO REV. CODE ANN. § 5307.06 (West 1995 & Supp. 2014).

129. *See, e.g.*, MASS GEN. LAWS ANN. ch. 241, § 31. In some jurisdictions, if the court orders a mixed remedy—partition in kind of part of the property and a sale of the remainder—a court can appoint a referee to conduct the partition in kind of part of the property and a different referee to conduct the sale of the remainder. *See, e.g.*, CAL. CIV PROC. CODE § 873.020 (West 1980).

130. 59A AM. JUR. 2D *Partition* § 119.

131. 68 C.J.S. *Partition* § 141 (2014).

receive in a partition action,<sup>132</sup> in most jurisdictions, a court has the discretion to determine the amount of the fee.<sup>133</sup> In some jurisdictions, the commissioner's or referee's fees must reflect the number of days the commissioner or referee worked on the case, and in other jurisdictions, courts have more open-ended authority to set the amount of the fees.<sup>134</sup> In some cases in which courts have ordered a partition sale, courts have awarded fees for commissioners or referees in an amount representing a fixed percentage, for example 5 percent, of the purchase price.<sup>135</sup> In addition to providing commissioners or referees with a reasonable fee, courts also commonly award fees to surveyors, appraisers, auctioneers, and other people who can assist a court in a partition action,<sup>136</sup> and sometimes the referees or commissioners have the discretion to enter into contracts with these types of professionals.<sup>137</sup>

When one takes account of the forced sale price partition sales typically yield and the various fees a court may award that come out of the purchase price, including attorney's fees, commissioner's fees, and surveyor's fees, for example, it becomes apparent that many if not most partition sales do not maximize wealth for the cotenants. In far too many cases, the cotenants in fact end up stripped of a substantial amount of the real estate wealth associated with their tenancy-in-common ownership.

## II. LOW- TO MODERATE-INCOME TENANCY-IN-COMMON OWNERS FACE PARTICULAR PROBLEMS WITH PARTITION ACTIONS

### A. *Features That Make Tenancy-in-Common Ownership Among Low- to Moderate-Income Property Owners Particularly Unstable and Risky*

Though people of many different backgrounds who own tenancy-in-common property under the default rules experience a range of problems with their ownership, a subset of tenancy-in-common property owners are particularly at risk of losing their property at forced partition sales, together with a significant amount of their wealth. These people tend to own

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132. See, e.g., N.Y. C.P.L.R. §§ 8003(a)–(b) (McKinney 1981 & Supp. 2014).

133. See, e.g., MISS. CODE ANN. § 25-7-35 (2010); Meister v. Rakow, 284 P.2d 464 (Ariz. 1955).

134. Compare MO. ANN. STAT. § 528.220 (West 1953 & Supp. 2014) (providing that compensation be calculated based on number of days of employment), with CAL. CIV. PROC. CODE § 873.010(b)(3) (West 1980) (providing only that the court may “[f]ix the reasonable compensation for the services of the referee and provide for payment of the referee’s reasonable expenses.”).

135. See, e.g., Maxwell v. Stalnaker, 96 S.E.2d 907, 909 (W. Va. 1957).

136. Lawrence v. Donovan, 673 P.2d 130, 132, 134 (Mont. 1983); see also 68 C.J.S. *Partition* § 224 (2014).

137. See, e.g., CAL. CIV. PROC. CODE § 873.110 (West 1980).

undivided interests in tenancy-in-common property, under the default rules, in which many of the cotenants are low- to moderate-income individuals. Often in these situations, the tenancy in common arose in the first instance because an ancestor who was not wealthy or who was not legally sophisticated (or both) transferred his or her real property by intestacy to two or more heirs.

In many families in which intestate succession first created the tenancy in common, individual cotenants who acquired their interests by intestacy subsequently transfer their individual interests by intestate succession as well. Oftentimes, this results in an increasing number of people owning an undivided interest in the property. This pattern of property transfer has been so prevalent within certain communities that many people within these communities refer to family-owned, tenancy-in-common property as “heirs’ property” or “heirs property” or “heir property.”<sup>138</sup>

This pattern of property transfer also results in property ownership becoming increasingly unstable over time because any one of the growing number of cotenants may file a partition action and request the court to order partition by sale. What makes these property owners even more at risk of losing their property is that the properties, which were often not considered prime real estate when first acquired by an ancestor of some or all of the current cotenants, are often now in the path of development. Further, heirs property ownership often presents other serious problems for both those who own such property and for others. For example, one commentator claims that heirs property ownership in Calhoun County, Alabama, impedes the ability of heirs property owners in that county from obtaining financing to improve their property, thereby impeding their ability to build wealth. According to this commentator, this phenomenon in turn harms the public because substantial tax revenues are foregone while many of the parcels of heirs property remain severely underdeveloped.<sup>139</sup>

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138. The term is so common that some nonprofit organizations that work with low-income property owners have the term in their organizational title or, otherwise, have developed projects of one type or another which are referred to as “heir property” or “heirs’ property” projects. For example, the Center for Heirs’ Property Preservation in Charleston, South Carolina exclusively works with low-income heirs property owners. See THE CENTER FOR HEIRS’ PROPERTY PRESERVATION, <http://www.heirsproperty.org> (last visited Aug. 3, 2013). Appleseed, a leading public interest organization with a network of centers in several southern states has an “Heir Property” project as does its affiliated centers in Alabama, Georgia, Louisiana, and South Carolina. See *Heir Property*, APPLESEED, <http://www.appleseednetwork.org/what-we-do/projects/heir-property/> (last visited Aug. 3, 2013). The Heirs’ Property Retention Coalition is an umbrella organization of attorneys, advocates, and academics who are “heavily involved in litigation, legislative reform, and/or scholarly study related to heirs’ property” that was initially formed in 2006 to participate in the drafting process for the Uniform Partition of Heirs Property Act but which is now working on others heirs property initiatives. See *About HPRC*, HEIRS’ PROPERTY RETENTION COALITION, <http://www.southerncoalition.org/hprc/?q=node/6> (last visited Aug. 3, 2013).

139. See, e.g., Craig H. Baab, *Heir Property: A Constraint for Planners, An Opportunity for Communities: The Legacy of Steve Larkin*, PLAN. & ENVTL. L., Nov. 2011, at 3, 10 (“[In Calhoun

A significant percentage of families who own heirs property poorly understand many of the legal rules governing tenancy-in-common ownership, which is not surprising given that many of the rules are counterintuitive and given that these families often lack access to basic legal services.<sup>140</sup> Many believe that their ownership is secure as long as they pay their property taxes and stay current on their mortgage obligations to the extent that they have any mortgage obligations at all. Further, one study of such property owners revealed that the overwhelming majority of these owners believed that their property was safe from a sale unless all of the cotenants would agree to sell.<sup>141</sup> Therefore, many of these families wrongly assume that the large number of family members who own an undivided interest in the property serves as protection from the property being sold. Tragically, the first time many of these families learn about the actual rules governing tenancy-in-common ownership is after one of the cotenants threatens to file a partition action or, in many instances, after such a cotenant has filed a partition action. Further, families often experience difficulty even finding out that a partition action has been filed as a result of antiquated, state notice requirements,<sup>142</sup> which obviously compromises their ability to take any meaningful legal action to protect their property in a timely way.

These families are also particularly at risk of losing much of their real estate wealth as a result of a court-ordered partition sale. With respect to partition sales, the group of people who bid on the property at the public auctions is often quite small and often consists of just one or more of the cotenants themselves. Many heirs property owners are not well positioned to make effective bids at partition sales for the following reasons. First, banks and other financial institutions almost always refuse to accept fractional interests in tenancy-in-common property as collateral for loans.<sup>143</sup> Second, many heirs property owners are “land rich but cash poor,” in that they do not have other substantial liquid assets (or tangible assets for

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County, Alabama, 771 parcels of heirs property with an aggregate tax-appraised value of approximately \$31 million] is not working for the community, much less the owners . . . . While that land is generating tax revenue for the county, it is not generating nearly what it could if the owners could access the land’s equity to improve it.”)

140. Mitchell, *Reconstruction*, *supra* note 34, at 521.

141. EMERGENCY LAND FUND, *THE IMPACT OF HEIR PROPERTY ON BLACK RURAL LAND TENURE IN THE SOUTHEASTERN REGION OF THE UNITED STATES* 123 (1984) [hereinafter *THE IMPACT OF HEIR PROPERTY*].

142. See Baab, *supra* note 139, at 9.

143. See Mitchell, *Reconstruction*, *supra* note 34, at 561 n.346.

that matter) that they can use, including to secure a loan, to enable them to bid effectively at a partition sale.<sup>144</sup>

Because so many heirs property owners lack the financial ability to make competitive bids at partition sales, the winning bidders at these sales—bidders who sometimes are people who recently had acquired a small interest in the property—are often able to acquire the property for a price well below even the property’s forced sale value. As a result, forced partition sales have been particularly devastating economically for poorer tenancy-in-common owners because these owners typically have much less diversified asset portfolios than wealthier people and their real estate holdings tend to constitute a substantial percentage of their overall asset holdings.<sup>145</sup> The loss of real estate wealth that minorities have experienced as a result of partition sales is consistent with a disturbing broader trend in which the wealth gap between whites and many minorities—a gap which had been substantial before the onset of the Great Recession—has increased substantially in recent years.<sup>146</sup>

## *B. Problems Specific Property Owners Have Faced with Partition Actions*

### *1. African-Americans*

The problem that African-Americans have experienced with partition actions has received far more academic and media attention than the problem any other group or community has experienced with partition actions.<sup>147</sup> African-Americans have been particularly at risk of losing their

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144. Cf. Thomas W. Mitchell, *Growing Inequality and Racial Economic Gaps*, 56 HOW. L.J. 849, 860 (2013) [hereinafter Mitchell, *Inequality*] (noting that African-American and Hispanic households have asset portfolios that are much less diversified than the asset portfolios for white households).

145. PEW RESEARCH CENTER, TWENTY-TO-ONE: WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS AND HISPANICS 17–21 (2011), available at [http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report\\_7-26-11\\_FINAL.pdf](http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf) [hereinafter TWENTY-TO-ONE].

146. See Mitchell, *Inequality*, *supra* note 144, at 858 (noting that as of 2009 the ratio of white wealth to black wealth stood at twenty-to-one representing a near doubling of the white wealth-black wealth ratio as compared to the ratio from 2005 and that the ratio of white wealth to Hispanic wealth stood at eighteen-to-one, a ratio that was more than two and a half times as large as the 2005 white wealth–Hispanic wealth ratio). This wealth gap has grown in large part in recent years due to the far greater toll the downturn in the real estate market and the foreclosure crisis have had upon minorities than these phenomena have had upon white Americans. See TWENTY-TO-ONE, *supra* note 145, at 24.

147. See Letter from David J. Dietrich, Co-Chair, Prop. Pres. Task Force of the Real Prop. Probate and Trust Law Section of the A.B.A., to Shannon Skinner, Co-Chair, Joint Editorial Bd. for Unif. Real Prop. Acts 1 (June 16, 2005) (on file with author) [hereinafter June 16, 2005 Letter from Dietrich to Skinner]. See also, e.g., Craig-Taylor, *supra* note 45; Rivers, *supra* note 40; Casagrande, *supra* note 40; Tom Barton, *Hilton Head’s Purchase of Heirs Land Fuels Emotions; Councilman Cites “Mistake” in Proposing Sale*, THE BEAUFORT GAZETTE, (Apr. 13, 2011), <http://www.islandpacket.com/2011/04/13/1619570/hilton-heads-purchase-of-heirs.html>; Anna Stolley Persky, *In the Cross-Heirs*, A.B.A. J. (May 2, 2009, 4:40 AM),

property as a result of partition sales because a substantial percentage of African-Americans who own land in the South own such properties under the default, tenancy-in-common rules, instead of under, for example, what is referred to as a tenancy-in-common agreement or TIC agreement.<sup>148</sup> In fact, studies have documented that African-Americans have lost a significant amount of real property as a result of partition sales.<sup>149</sup> The Associated Press's award-winning 2001 series on black land loss entitled *Torn from the Land*, which featured a segment on partition actions, served as the catalyst for the formation in 2003 of the Property Preservation Task Force (PPTF), a task force of the American Bar Association's Section of Real Property, Trust and Estate Law, which was dissolved in 2011.<sup>150</sup>

## 2. Families Who Own Land in Appalachia

In low-income areas of Appalachia, there is evidence that there is a significant amount of tenancy-in-common ownership. For example, one researcher who evaluated the prevalence of tenancy-in-common ownership in certain areas in Letcher County, Kentucky, discovered that tenancy-in-common ownership was not uncommon as it pertained to the properties he examined.<sup>151</sup> Within low-income communities in Appalachia, a group of researchers discovered that some of those who own tenancy-in-common property in Appalachia have expressed concern about displacement as a result of court-ordered partition sales.<sup>152</sup> For example, these researchers uncovered one case in which certain members of one family filed a partition action in which they requested the court to order a partition in kind. However, after the court-appointed commissioners determined that the property was not divisible, the court considered whether to order a partition sale even though there is no evidence that any of the cotenants had

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[http://www.abajournal.com/magazine/article/in\\_the\\_cross-heirs/](http://www.abajournal.com/magazine/article/in_the_cross-heirs/); Bruce Smith, *Heirs Defy History of Blacks Losing Land*, USA TODAY, (Oct. 15, 2006, 9:07 PM), [http://usatoday30.usatoday.com/news/nation/2006-10-15-slave-descendants\\_x.htm](http://usatoday30.usatoday.com/news/nation/2006-10-15-slave-descendants_x.htm).

148. See Mitchell, *Reconstruction*, *supra* note 34, at 518. A 1984 study estimated that 41 percent of black-owned land in the southeastern states is owned under the tenancy-in-common default rules. THE IMPACT OF HEIR PROPERTY, *supra* note 141, at 64, 475.

149. Mitchell, *Reconstruction*, *supra* note 34, at 511.

150. E-mail from Robin K. Roy, Section Dir., A.B.A. Section of Real Prop., Trust and Estate Law, to Thomas W. Mitchell, Professor of Law, Univ. of Wis. Law Sch. (Sept. 4, 2012, 09:52 CST) (on file with author). The PPTF played the key role in advocating that NCCUSL establish a drafting committee to develop a uniform act to reform partition law as that law applies to tenancy-in-common ownership.

151. See B. James Deaton, *Intestate Succession and Heir Property: Implications for Future Research on the Persistence of Poverty in Central Appalachia*, 41 J. ECON. ISSUES 927, 930-32 (2007).

152. See B. James Deaton et al., *Examining the Consequences and Character of "Heir Property,"* 68 ECOLOGICAL ECON. 2344, 2345 (2009).



requested such a partition sale.<sup>153</sup> This family's experience is consistent with the experience of African-American families and other families who have had property ordered sold in partition actions despite the fact that in these cases no one in the common ownership group petitioned the court for a court-ordered sale.

### 3. *Middle-Class White Families*

A surprising number of families who are not poor or minority have faced problems with tenancy-in-common ownership. In the aftermath of Hurricane Katrina, it came to light that there were many middle-class and wealthy white heirs property owners in New Orleans (in addition to many African-American heirs property owners from different economic classes as well).<sup>154</sup> In addition, there is evidence that in Maine, many middle-class white families own tenancy-in-common property under the default rules. According to Hugh Macgill, the former dean of the University of Connecticut School of Law, whose wife's family owns 350 acres of tenancy-in-common property in rural Maine under the default rules, this type of ownership is commonly known as "heir-locked" property in parts of rural Maine.<sup>155</sup> Macgill characterizes tenancy-in-common ownership under the default rules as "probably the most unstable and vulnerable form of ownership known to the common law."<sup>156</sup> With respect to the farm that his wife's family owns, he states that the vast majority of the cotenants want to address in a proactive way their concern that a developer might be tempted to seek a way to force a sale of the property, which would undercut their desire to preserve their ancestral property.<sup>157</sup>

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153. See *id.* at 2349. In another case, family members who were not able to come to an agreement on partitioning their tenancy-in-common property in kind worried that if a partition action was filed a court might decide to order the property sold even though no cotenant would request such a sale. *Id.* at 2350.

154. See, e.g., Ariella Cohen, *Hurdles to Heirship: Heirship Property Prevents Many New Orleans Residents from Receiving Grants*, NEW ORLEANS CITYBUSINESS, (Aug. 4, 2008), <http://www.highbeam.com/doc/1P2-16962570.html>.

155. E-mail from Hugh C. Macgill, Professor of Law, Univ. of Conn. Sch. of Law, to William R. Breetz, President and Exec. Dir. of the Conn. Legal Initiative, Inc., Univ. of Conn. Sch. of Law (July 7, 2010, 14:28 EST) (on file with author).

156. *Id.*

157. *Id.*

4. *Hispanic Communities Who Were Intended Beneficiaries of Community Land Grants Made by Spain and Mexico in New Mexico*

When New Mexico was under Spanish and then Mexican control from the end of the seventeenth century until the mid-nineteenth century, Spain, and then Mexico, made land grants to individuals, groups, and towns.<sup>158</sup> Spain also issued land grants to several groups of indigenous Pueblo people who had long occupied territory in what became New Mexico.<sup>159</sup> In addition to issuing individual land grants under which the land granted became the private property of the individual grantee, Spain and Mexico both recognized a distinct type of land ownership called a community land grant, which was very different from an individual land grant.<sup>160</sup> To this end, the community land grant was considered a quasi-public, corporate entity that was to hold the common land in perpetuity, much like a city owns a park for the benefit of its residents, none of whom has any claim to private ownership of the park, including any right to sell the community land.<sup>161</sup>

The Mexican-American War, which lasted from 1846 to 1848, concluded upon the signing of the Treaty of Guadalupe Hidalgo on February 2, 1848.<sup>162</sup> The treaty provided property right protections to those who had been granted land by Spain or Mexico in the territories that Mexico relinquished to the United States, though the scope of the land grant protections that the treaty provided remains contested.<sup>163</sup> Ultimately, Congress established the Court of Private Land Claims (CPLC) in 1891 to resolve the large backlog of land claims individuals or communities had made with respect to contested land in the states of Colorado, Nevada, and Wyoming, and in the territories of Arizona, New Mexico, and Utah, in an effort to get Congress to affirm their rights to particular properties—rights they claim Spain or Mexico had granted to them.<sup>164</sup> Congress instructed “the CPLC to approve land grants ‘lawfully and regularly derived’ under

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158. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-59, TREATY OF GUADALUPE HIDALGO: FINDINGS AND POSSIBLE OPTIONS REGARDING LONGSTANDING COMMUNITY LAND GRANT CLAIMS IN NEW MEXICO 3 (2004) [hereinafter GAO REPORT], available at <http://www.gao.gov/assets/160/157550.pdf>.

159. *Id.*

160. See David Benavides & Ryan Golten, *Righting the Record: A Response to the GAO's 2004 Report Treaty of Guadalupe Hidalgo: Findings and Possible Options Regarding Longstanding Community Land Grant Claims in New Mexico*, 48 NAT. RESOURCES J. 857, 871–72 (2008).

161. See *id.* at 872.

162. See Christine A. Klein, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo*, 26 N.M. L. REV. 201, 202 n.7, 208 (1996).

163. See Benavides & Golten, *supra* note 160, at 865.

164. See Klein, *supra* note 162, at 226.

the laws of Spain and Mexico in accordance with Treaty provisions and principles of international and Mexican law.”<sup>165</sup>

The CPLC confirmed more non-Pueblo community land grants as tenancies in common than as community land grants under Mexican law.<sup>166</sup> Confirmation of the community land grants as tenancy-in-common grants represented a profound mistake, given that neither Spanish nor Mexican formal law nor customary practice recognized the tenancy-in-common form of ownership as an ownership form under which Spain or Mexico granted land to communities. Community land grants that remained community land grants were not subject to partition suits because individual community members possessed no right to partition the land under the law governing community land grants, but those that became tenancies in common were susceptible to being partitioned.<sup>167</sup>

Two commentators have estimated that 1.6 million acres of property (perhaps much more) in New Mexico that Mexicans had held under Spanish or Mexican community land grants were sold under partition sales or otherwise transferred to others after American authorities improperly confirmed the grants as tenancies in common.<sup>168</sup> In some cases, lawyers who had represented Mexicans in the land grant confirmation process initiated the post-confirmation partition actions and petitioned the courts for partition by sale in these lawsuits.<sup>169</sup> The lawyers in these cases had acquired fractional interests in the parcels of property, sometimes totaling a one-third or one-half undivided interest, pursuant to fee arrangements requiring such property transfers in the many cases in which the Mexican land grant claimants had insufficient liquid assets to pay their attorneys.<sup>170</sup>

In most instances, a subsequent partition sale of a community land grant confirmed as a tenancy-in-common property yielded a price far below the market value of the property in question. For example, more than 27,000 acres of communal land within a community land grant named the Las Trampas Grant sold under a partition sale at an auction for \$17,000 in

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165. Benavides & Golten, *supra* note 160, at 866 (quoting Act of Mar. 3, 1891, ch. 539, sec. 13, 26 Stat. 854, 860).

166. *See id.* at 878.

167. *See id.* at 905–06.

168. *Id.* at 906. Mexicans who had land grants confirmed in Texas subsequently lost a significant amount of this land as a result of partition sales. DAVID G. GUTIÉRREZ, WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS, AND THE POLITICS OF ETHNICITY 25 (1995).

169. In many of these cases, the attorney was able to make a lowball offer because his former clients had no money and, therefore, no ability to bid in any effective way. MALCOLM EBRIGHT, LAND GRANTS AND LAWSUITS IN NORTHERN NEW MEXICO 25 (1st ed. 1994).

170. STEVEN W. BENDER, TIERRA Y LIBERTAD: LAND, LIBERTY, AND LATINO HOUSING 21 (2010).

1903, which represented about sixty cents an acre.<sup>171</sup> Approximately ten years later, the United States acquired the property in exchange for providing its new owner with \$75,000 worth of timber rights in property located elsewhere in New Mexico, which meant that the price the 1903 auction yielded represented 23 percent of the compensation the United States paid to the owner who had acquired the property at the 1903 auction, assuming that there was no significant inflation during that ten-year period.<sup>172</sup> Part of the reason that the community land grants turned tenancy-in-common properties sold for a fraction of their value at partition sales is attributable to the fact that residents of community land grants who suddenly became tenants in common were land rich but cash poor, largely because they had functioned in a non-cash economy. As a result, not unlike many poor and minority owners of tenancy-in-common properties in more recent times, they had no ability to make competitive bids for the property at the public auctions.<sup>173</sup>

### III. HISTORY OF PARTITION LAW REFORM AND SCOPE OF NCCUSL PROJECT

#### A. *Brief History of Partition Law Reform Efforts Prior to the UHPA*

In the decades leading up to the Uniform Law Commission's decision to form a drafting committee to produce a uniform act addressing partition law reform, attorneys working for various public interest and community-based organizations, non-attorney advocates, and a number of law professors highlighted the critical need for legal reform of state laws impacting heirs property ownership. A number of public interest attorneys and law professors even developed specific partition law reform proposals. Though a very limited number of these proposed state law reforms were fairly comprehensive,<sup>174</sup> most were narrowly targeted.<sup>175</sup> However, there

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171. WILLIAM DEBUYS, ENCHANTMENT AND EXPLOITATION: THE LIFE AND HARD TIMES OF A NEW MEXICO MOUNTAIN RANGE 174, 180, 184, 190 (1985). All told, the Town of Las Trampas community land grant encompassed approximately 28,121 acres as approximately 1,000 acres of the property was allotted to individual settlers. See GAO REPORT, *supra* note 158, at 148.

172. DEBUYS, *supra* note 171, at 190.

173. See Benavides & Golten, *supra* note 160, at 886.

174. See, e.g., THE IMPACT OF HEIR PROPERTY, *supra* note 141, at 422–31.

175. Craig-Taylor, *supra* note 45, at 780–86; C. Scott Graber, *Heirs Property: The Problems and Possible Solutions*, 12 CLEARINGHOUSE REV. 273, 282–84 (1978); Chris Kelley, *Stemming the Loss of Black Owned Farmland Through Partition Action – A Partial Solution*, 1985 ARK. L. NOTES 35, 37–40 (1985); Lewis, *supra* note 28, at 390–91; Harold A. McDougall, *Black Landowners Beware: A Proposal for Statutory Reform*, 9 N.Y.U. REV. L. & SOC. CHANGE 127, 135–36 (1980); Hugo A. Pearce III, “Heirs’ Property”: *The Problem, Pitfalls, and Possible Solutions*, 25 S.C. L. REV. 151, 157–58 (1973); Rivers, *supra* note 40, at 68–79; Casagrande, *supra* note 40, at 782–83.

was insufficient political support for any state legislature to act upon any of the proposed comprehensive reforms.

Instead of comprehensive reform, a very small number of states enacted into law some discrete reforms over the past few decades. These reforms were designed to stabilize tenancy-in-common ownership in some small ways or to make the economic impact of partition sales fairer, on the margins, to cotenants who tried unsuccessfully to resist a court-ordered partition sale. For example, Arkansas enacted a statute in 1985 that seeks to discourage real estate speculators and others from purchasing small, undivided interests in tenancy-in-common property purely in an effort to acquire some or all of the property for themselves.<sup>176</sup> The statute seeks to accomplish this by preventing any so-called “stranger to the title” who owns less than a 50 percent undivided interest in a parcel of property from filing a partition action until three years after any such common owner purchased his or her interest.<sup>177</sup> In North Carolina, the legislature approved minor reforms to partition law in 2009, and these reforms included a requirement that those petitioning for partition notify respondents that the respondent may be able to secure free legal services,<sup>178</sup> an extension of the deadline for commissioners to submit their reports specifying how property should be divided in kind,<sup>179</sup> and enhanced mediation provisions.<sup>180</sup>

In addition, the North Carolina State Bar adopted an ethics decision in 2011 that, among other things, limits the situations in which an attorney who represented a party in a partition proceeding may serve as a court-appointed commissioner to conduct the court-ordered sale of the property and prohibits an attorney who represented a party in a partition proceeding from bidding on the property on his or her own behalf.<sup>181</sup> This ethical opinion addressed concerns about possible conflicts of interest that can arise between an attorney and his or her client in partition actions such as some of the obvious conflicts of interest that arose between some attorneys and their clients in partition actions in the early nineteenth century in New Mexico involving former community land trusts as discussed hereinbefore. As discussed earlier, prior to the promulgation of the UHPA, Georgia,<sup>182</sup> Louisiana,<sup>183</sup> and South Carolina<sup>184</sup> enacted into law statutes that provide

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176. ARK. CODE ANN. § 18-60-404 (2003).

177. *Id.* (The parcel of land must also be at least ten acres and have been purchased after June 28, 1985).

178. N.C. GEN. STAT. § 46-2.1 (2013).

179. *Id.* § 46-17.

180. *Id.* § 46-22.1.

181. North Carolina State Bar, Formal Ethics Op. 8 (2009) (approved Jan. 21, 2011) (discussing service as a commissioner after having represented a party to a partition proceeding).

182. GA. CODE ANN. § 44-6-166.1 (2010 & Supp. 2014).

183. LA. REV. STAT. ANN. § 9:1113 (2008) (amended 2014).

cotenants that did not petition a court to partition property the opportunity to buy out the undivided interest of a cotenant that petitioned the court to partition property.

There are a number of reasons that efforts to reform partition law in the decades preceding the drafting of the UHPA failed for the most part. First, the reform efforts, which were efforts restricted to certain states in the South, did not have the support or backing of any prominent state or national organizations with a long history of being able to influence state legislatures.<sup>185</sup> Second, the public interest law firms and nonprofit organizations in certain states in the South that have worked with heirs property owners for a number of years—owners that were mostly but not exclusively African-American—did not have any longstanding history of working together in a structured and coordinated way on partition law reform efforts prior to 2006.<sup>186</sup> Third, in states outside of the South, there were no individuals or groups that highlighted in any significant way the problems tenancy-in-common property owners in those states had experienced with partition law, which helped reinforce a belief among some that heirs property problems were confined to African-Americans who owned property in the South.

*B. Uniform Law Commission Authorized Drafting Committee to Develop Uniform Act Narrowly Tailored to Address Land Loss Issues*

The American Bar Association's Section of Real Property, Trust and Estate Law (RPTE), through its Property Preservation Task Force, played a major role in ultimately convincing the Uniform Law Commission to form a committee to draft a uniform act that would address concerns that many tenancy-in-common property owners have had with partition law.<sup>187</sup> David Dietrich, a leading real estate attorney from Montana who now serves as the Vice Chair of the Trust and Estates Division of RPTE, one of two vice-chairs for the entire section, served as co-chair of the PPTF during the entire time the task force existed. He in particular deserves a great deal of

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184. S.C. CODE ANN. § 15-61-25 (2005 & Supp. 2013).

185. See, e.g., J. Blanding Holman IV, *Time to Move Forward on Heirs' Property*, S.C. LAW., July–Aug. 2006, at 19, 25.

186. Cf. Letter from John Pollock, Attorney, Central Alabama Fair Housing Center on Behalf of the Heirs Property Retention Coalition, to NCCUSL Drafting Committee on Partition of Tenancy-in-Common Real Property Act (Oct. 24, 2007), available at [http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/partition\\_pollockletter\\_102407.pdf](http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/partition_pollockletter_102407.pdf) (indicating that the coalition was formed in 2006 with the original goal of strategizing to impact partition reform in states throughout the country).

187. Memorandum from R. Wilson Freyermuth, Exec. Dir., Joint Editorial Bd. for Unif. Real Prop. Acts, to NCCUSL Comm. on Scope and Program 1-2 (Dec. 31, 2006) (on file with author) [hereinafter Memorandum from Freyermuth to NCCUSL].

credit for championing the ABA's effort to address heirs property issues in general and the ABA's effort in particular to catalyze the development of a uniform act to reform partition law.

The PPTF and the Joint Editorial Board for Uniform Real Property Acts (JEBURPA),<sup>188</sup> a very important but not widely-known organization that the Uniform Law Commission often relies upon when considering whether to approve a uniform act in the area of real property, worked together for approximately a year and a half beginning in 2005 to establish general parameters for a uniform partition act project.<sup>189</sup> The first time the PPTF requested the JEBURPA to recommend to the ULC that it form a drafting committee to draft a uniform partition act, the PPTF identified some potential fundamental changes a drafting committee should consider with respect to reforming some of the rules governing tenancy-in-common ownership in general. Some of the possible reform ideas the PPTF identified for possible consideration were not limited to reform of some aspects of the law of partition as applied to tenancy-in-common ownership. These more comprehensive ideas for possible reform, for example, included a change to adverse possession law that would eliminate the requirement that a cotenant in possession prove ouster in order to claim adverse possession against his or her fellow cotenants not in possession.<sup>190</sup>

The JEBURPA believed that it could not support some of the "more sweeping reform of the rules governing tenancy-in-common ownership and partition" that the PPTF initially suggested for possible consideration because such sweeping reform "would present more comprehensive enactability concerns."<sup>191</sup> After the JEBURPA made this determination, the

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188. JEBURPA consists of members drawn from the Uniform Law Commission, the ABA's Section of Real Property, Trust and Estate Law, and the American College of Real Estate Lawyers. JOINT EDITORIAL BOARD FOR UNIFORM REAL PROPERTY ACTS, THE SIX-MONTH "LIMITED PRIORITY LIEN" FOR ASSOCIATION FEES UNDER THE UNIFORM COMMON INTEREST OWNERSHIP ACT (June 1, 2013), *available at* [http://www.uniformlaws.org/shared/docs/jeburpa/2013jun1\\_JEBURPA\\_UCIOA%20Lien%20Priority%20Report.pdf](http://www.uniformlaws.org/shared/docs/jeburpa/2013jun1_JEBURPA_UCIOA%20Lien%20Priority%20Report.pdf). In addition, JEBURPA includes "liaison" representatives from the American College of Mortgage Attorneys, the Community Associations Institute, and the American Land Title Association. *Id.* It is responsible for monitoring developments in the area of real property that may impact uniform real property acts. It is also responsible for recommending that the Uniform Law Commission form study committees to study particular real property issues in depth as a possible precursor to drafting a uniform real property act, as well as recommending that the Uniform Law Commission form drafting committees to draft a uniform real property act when it believes an issue it has considered has been adequately studied and should be addressed through the drafting of a uniform act. *See* Press Release, Meislik & Meislik, *Ira Meislik Named to Joint Editorial Board for Real Property Acts* (Mar. 29, 2010), [http://www.meislik.com/news/ira\\_meislik\\_joint\\_editorial\\_board/](http://www.meislik.com/news/ira_meislik_joint_editorial_board/).

189. It should be noted that one of the co-chairs of the JEBURPA, William Breetz, and one of its emeritus members, Carl Lisman, are also Uniform Law Commissioners who ended up serving on the drafting committee for the UHPA.

190. June 16, 2005 Letter from Dietrich to Skinner, *supra* note 147, at 3.

191. Memorandum from Freyermuth to NCCUSL, *supra* note 187, at 2.

PPTF and the JEBURPA worked over the course of several months “to focus the proposal more narrowly on those specific problems with partition that have exacerbated the problem of tenancy-in-common land loss.”<sup>192</sup> On November 27, 2006, the PPTF submitted an updated letter to the JEBURPA, and this letter contained proposed reforms to partition law only.<sup>193</sup>

On December 31, 2006, the JEBURPA recommended that the Uniform Law Commission form a drafting committee to draft a uniform act that would address certain aspects of partition law that have contributed to involuntary loss of tenancy-in-common property. In addressing the Uniform Law Commission’s criteria for approving new uniform act projects,<sup>194</sup> the JEBURPA determined the following: given that state law governs partition law, the subject matter for the proposed drafting committee was “appropriate for state legislation”; the drafting and promulgation of a uniform partition act would promote uniformity of the law among states “where uniformity is desirable and practicable”; there existed “an ‘obvious reason’ for an act on the subject” given the fact that tenancy-in-common land loss had been widespread and that those states that had attempted to address the problem through legislation had not done so in a uniform way; there was a reasonable chance that some states would enact a uniform partition act into law; and a uniform partition act would “produce ‘significant benefits to the public through improvements in the law’ by providing a narrowly-tailored legislative remedy for an otherwise intractable problem that has had significant social, political, and economic consequences, particularly within poor and minority communities.”<sup>195</sup>

On February 2, 2007, the Uniform Law Commission’s Committee on Scope and Program recommended to the ULC’s Executive Committee that it form a drafting committee to address certain aspects of partition law, and the Executive Committee approved that recommendation on February 3, 2007.<sup>196</sup> Given that the ULC approved its Committee on Scope and

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192. *Id.*

193. Letter from David J. Dietrich, Co-Chair, Prop. Pres. Task Force of the Real Prop. Probate and Trust Law Section of the A.B.A., to Shannon Skinner, Co-Chair, Joint Editorial Bd. for Unif. Real Prop. Acts, (Nov. 27, 2006) (on file with author) [hereinafter Nov. 26, 2006 Letter from Dietrich to Skinner]. It should be noted that in addition to the members of the PPTF that worked on this proposal, John Pollock, a public interest attorney in Alabama, provided extraordinary assistance to the PPTF as it prepared its proposal. The national survey of state partition law that he prepared proved to be an invaluable resource both to the PPTF and to the UHPA’s drafting committee.

194. *Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Uniform and Model Acts*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/Narrative.aspx?title=Criteria%20for%20New%20Projects> (last visited Aug. 6, 2013).

195. Memorandum from Freyermuth to NCCUSL, *supra* note 187.

196. Nat’l Conference of Comm’rs on Unif. State Laws Meeting Minutes of the Committee on Scope and Program: Pasadena, California, at 6 (Feb. 2, 2007) (on file with author).



Program's recommendation to form a drafting committee to address "tenancy in common land loss,"<sup>197</sup> more comprehensive reforms to the laws governing tenancy-in-common ownership such as those the PPTF initially identified for possible consideration in 2005 were clearly outside the scope of the drafting committee's charge. Nevertheless, the drafting committee ultimately had to decide not only which specific aspects of partition law were relevant to addressing "tenancy-in-common land loss" but also to which specific subset of tenancy-in-common ownership the uniform act would apply.

#### IV. ANALYSIS OF KEY SECTIONS OF THE UHPA

As indicated previously, in a global sense, the UHPA establishes a hierarchy of remedies for courts to apply in partition actions in which the property at issue may be heirs property. These remedies are designed to preserve property rights for those who own heirs property when possible and to preserve the real estate wealth of those who own heirs property when a court determines that the only feasible remedy in a particular case is partition by sale. The UHPA prioritizes affording members of the common ownership group that want to maintain ownership of the entire property an opportunity to maintain such ownership, in cases in which at least one cotenant has petitioned a court for partition by sale. In such circumstances, these cotenants are given an opportunity to buy out, on economically fair terms, any cotenant that wants the property sold.

To the extent that the buyout provision cannot resolve the partition action for one reason or another, under the UHPA, there is a strong preference for partition in kind instead of partition by sale. The UHPA's preference for partition in kind is quite different from the statutory preference for partition in kind in most states, a preference that has been hollowed out by common law decisions or by statute in many instances.<sup>198</sup> In these jurisdictions, courts decide whether to order partition in kind or partition by sale by considering primarily economic factors.<sup>199</sup> In contrast, the UHPA provides substance to the preference for partition in kind by requiring courts to consider several economic and noneconomic factors in determining whether the preference for partition in kind may be overcome.<sup>200</sup> Finally, if a court determines that partition by sale must be ordered, the UHPA establishes a hierarchy of sales processes designed to

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197. *Id.* at 5.

198. *See, e.g.*, N.C. GEN. STAT. § 46-22(b1) (2013).

199. Mitchell, Malpezzi & Green, *supra* note 5, at 610–14.

200. UHPA, *supra* note 1, § 9.

maximize the price that property ordered sold will sell for in order to protect the real estate wealth of tenants in common.

In addition to these major goals, the UPHPA seeks to address a number of other issues that often arise in partition actions that present real challenges to heirs property owners seeking to protect their property rights, including many issues that academics have not focused upon before now. Many of the observers who work as attorneys for state and regionally-based public interest law firms and community-based organizations that serve poor and minority property owners brought these issues, which have flown under the radar for decades, to the attention of the drafting committee. This critically important unearthing of partition law issues, unknown to most of those on the drafting committee, underscores the invaluable role the observers played in helping draft the UPHPA. This section provides an analysis of many of the key sections of the UPHPA.

### A. *Definition of Heirs Property*

Even prior to the approval of the uniform act project, there was broad consensus that any uniform partition act should exempt certain categories of tenancy-in-common property.<sup>201</sup> After the drafting committee formed, however, agreeing on what subset of tenancy-in-common property the Act would cover proved to be a substantial challenge, perhaps the biggest challenge the drafting committee faced during the three years it existed. Given the primary goal of stemming involuntary loss of family property, there was broad consensus that the committee should exclude certain types of commercial or investment tenancy-in-common properties from the Act's scope, such as those investors utilize in Internal Revenue Commission § 1031 like-kind exchange transactions.<sup>202</sup> The ownership of these types of tenancy-in-common property is almost universally subject to an agreement that governs the partition of the property. The definition of "heirs property" therefore excludes real property held in a tenancy in common in which there is an "agreement in a record binding all the cotenants which governs the partition of the property."<sup>203</sup>

Further, the drafting committee established a requirement that for property to be "heirs property," at least one of the cotenants must have acquired title from a relative as that term is defined under the act.<sup>204</sup> To this end, the act defines a "relative" as "an ascendant, descendant, or collateral or an individual otherwise related to another individual by blood, marriage,

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201. Nov. 26, 2006 Letter from Dietrich to Skinner, *supra* note 193, at 4.

202. UPHPA, *supra* note 1, § 2 cmt. 3.

203. *Id.* § 2(5)(A).

204. *Id.* § 2(5)(B).

adoption, or law of this state other than this [act].”<sup>205</sup> In applying this definition of relative to particular cases, a transfer of an interest from an ascendant to a descendant, such as from a parent to a child, certainly satisfies the UHPHA’s acquisition of title from a relative requirement.

However, in recognizing that property interests are transferred among family members in other ways, both in other intergenerational ways and in ways that involve intragenerational transfers, the Act does not require one of the cotenants to have acquired his or her interest from a family member who was older at the time of the transfer. Therefore, a transfer from a child to parent would satisfy the requirement as well. Further, a transfer of an ownership interest to one of the current cotenants from that cotenant’s sibling would satisfy the acquisition from a relative requirement, even if the sibling who transferred the ownership interest is or was younger than the cotenant who acquired the interest.

In addition to the requirement that at least one of the cotenants must have acquired title from a relative, the Act establishes another requirement for tenancy-in-common property to be considered sufficiently family-owned to be heirs property. To this end, if one or more of the cotenants acquired title from a relative, then one of the following criteria must also be present:

- (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.<sup>206</sup>

Under these family ownership criteria, the UHPHA would not apply to “first generation” tenancy-in-common properties first established by volition by the current group of cotenants themselves under the default rules, even if all of the cotenants are related and even if there is no agreement in a record governing the partition of the property.<sup>207</sup> Such a tenancy in common would not qualify as heirs property because none of the

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205. *Id.* § 2(9).

206. *Id.* § 2(5)(C)(i)–(iii).

207. The decision that the UHPHA would not apply to these type of tenancies in common was made because many members of the drafting committee, as well as the ULC’s leadership, believed that there was a need to limit the scope of the Act, though other members believed that the reforms the UHPHA makes to partition law should apply to a much broader subset of tenancy-in-common ownership. The drafting committee excluded “first generation” tenancies in common that are not established by devise or intestate succession from the definition of heirs property because most members of the drafting committee believed that the type of tenancy-in-common land loss that influenced the ULC to establish a drafting committee in the first instance occurred in cases in which there had been some transfer of interests in tenancy-in-common property among family members.

cotenants could claim to have acquired title from a relative.<sup>208</sup> In the end, the scope of the Act is broad enough that it would apply to all or nearly all of the types of tenancy-in-common properties that advocates for heirs property owners have been most concerned about for decades.

Just as the drafting committee spent a considerable amount of time establishing the scope of the UPHPA, the issue of the proper scope of the Act inspired the most robust discussion at the Uniform Law Commission's Annual Meeting in July 2010, where the Commission considered the Act for final approval.<sup>209</sup> Interestingly, there was quite a range of opinions about the scope of the Act. There were some commissioners who expressed concern that the scope of the Act was too broad, or at least that it might be applicable to a broader range of tenancy-in-common properties than many might appreciate.<sup>210</sup> Others simply noted that the UPHPA appeared to be quite narrow in scope and that the Act would not apply to most tenancy-in-common property owners.<sup>211</sup>

There were also a few commissioners who felt that the UPHPA was not broad enough for different reasons. Those most concerned that the Act was too narrow were concerned that the Act's definition of "relative" would exclude in a particular state a cotenant who is in a long-term, committed relationship, such as a same-sex relationship with one of his or her fellow cotenants, because these cotenants might not be eligible to be considered related by marriage or adoption under the law of that particular state.<sup>212</sup> Unless ownership of the tenancy-in-common property could otherwise qualify as heirs property, cotenants in relationships with other cotenants that a particular state's laws do not recognize as constituting a family relationship would have to invoke the partition remedies available under a state's general partition statute.

In the end, the effort to broaden the UPHPA in a way that might have expanded the definition of family, or what it means to be related, beyond what a particular state might currently recognize did not succeed. It fell short because a substantial majority of the commissioners believed such an expansion would transform the Act from one that addresses a "relatively

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208. However, if at least one of the original "first generation" tenants in common acquired his or her interest from a relative, then the tenancy in common may be deemed heirs property if the other criteria are satisfied, even if the property is still owned exclusively by all of the original cotenants. This could happen, for example, if the property was devised by a testator or testatrix who had sole ownership of the property in question to a group of people, provided that the group contained at least one relative of the testator or testatrix. In addition, this could happen if the property is transferred by intestate succession to two or more heirs of an intestate who had sole ownership of the property.

209. Transcript of the Consideration of UPHPA at NCCUSL's 2010 Annual Meeting 13–18 (2010) [hereinafter 2010 Annual Meeting Transcript].

210. *Id.* at 51–54.

211. *Id.* at 17.

212. *Id.* at 100–13.

discrete issue on a relatively technical question and make it subject to a much broader debate, which will make it very unlikely in many states that the act would ever be passed.”<sup>213</sup> Even so, it is interesting to note that the discussion about this effort to broaden the Act consumed more time than the discussion about any other issue during the Commission’s consideration of the Act for final approval, which surprised many members of the drafting committee who had anticipated that there might have been robust discussion about a perceived need to narrow the scope of the Act.

*B. Applicability: Requiring Courts in All Partition Actions to Determine if the UPHPA May Apply*

Under the UPHPA, those who own heirs property, as defined by the Act, who end up being either plaintiffs or defendants in partition actions are likely to have their cases decided under the UPHPA. Under the UPHPA, in every partition action within a jurisdiction that enacts the UPHPA into law, a court must determine if the property that is the subject of the action is heirs property. If the court so determines, “the property must be partitioned under this [act] unless all of the cotenants otherwise agree in a record.”<sup>214</sup>

Though this applicability section of the UPHPA constitutes a technical litigation procedural issue, which some but not other commissioners considered unusual,<sup>215</sup> the drafting committee believed that this provision provides essential protections to many owners of heirs property, though such legal protections may not be obvious to those who are not experienced litigators. Heirs property owners are often only served by publication in partition actions which means that many never end up appearing in the actions.<sup>216</sup> Other heirs property owners are often unrepresented by attorneys in partition actions because they lack the financial resources to hire attorneys, which renders them vulnerable.<sup>217</sup> Some of these owners who lack an attorney choose not to proceed pro se, while others represent themselves in an ineffective way because they lack any sophisticated knowledge of the law.<sup>218</sup> In sum, many heirs property owners who have little access to legal services would lack sufficient information to be able to

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213. *Id.* at 103.

214. UPHPA, *supra* note 1, § 3(b).

215. 2010 Annual Meeting Transcript, *supra* note 209, at 34–38. Commissioner Barbara Ann Atwood from Arizona believed that this procedure would require courts in partition actions to function “more like a German court . . . in a civil system where the court is an active investigator.” *See id.* at 36. In contrast, Commissioner Lee Yeakel from Texas, a federal district court judge who previously served as a state court judge, indicated that as a judge he didn’t “find this [procedure] either unusual or burdensome.” *See id.* at 37–38.

216. *Id.* at 36.

217. *Id.*

218. *Id.*

invoke the UPHPA in those instances in which these owners were to become parties to a partition action.

Finally, the drafting committee believed that in many partition actions, the only cotenant who would realize that the property may qualify as heirs property is the cotenant who petitioned the court to order a partition sale and who hopes to acquire the property for a fraction of its value.<sup>219</sup> Such a cotenant would have little incentive to file a motion or to petition the court in some other way, requesting the court in a state that had enacted the UPHPA into law to determine whether the property in question qualifies as heirs property. There would be a disincentive for such a cotenant to file such a motion because if it was determined that the property was heirs property and that the UPHPA would then apply, the nonpetitioning cotenants would have greater legal rights than such nonpetitioning cotenants would have under general partition laws.<sup>220</sup>

### C. Notice by Posting

Many of the observers claimed that many cotenant defendants in partition actions who have not participated in the actions—and as a result have often been the subject of default judgments—received only service by publication, despite the fact that the plaintiffs in these actions could have identified and located these defendants using reasonable diligence.<sup>221</sup> Some of the observers even claimed that in some partition actions the plaintiffs in fact knew the residences of the nonresident defendants who were served by publication.<sup>222</sup> To this end, depending upon the jurisdiction, service by publication in partition actions may be sufficient if cotenant defendants are known but unlocatable,<sup>223</sup> unknown,<sup>224</sup> or nonresidents of the state where the action was filed.<sup>225</sup>

The drafting committee was quite concerned that many cotenant defendants in partition actions do not participate in such actions because insufficient (though perhaps minimally constitutionally-valid) notice of these actions was provided to them.<sup>226</sup> The drafting committee was even more concerned that permitting service by publication in partition actions for nonresident defendants whose addresses or locations are known by a plaintiff, or could be known by a plaintiff using reasonable diligence, may

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219. *Id.* at 36–38.

220. *Id.*

221. *Id.* at 46–47.

222. *Id.*

223. *See, e.g.*, TEX. R. CIV. P. 758.

224. *See, e.g.*, S.C. CODE ANN. § 15-61-30 (2005).

225. *See, e.g.*, KAN. STAT. ANN. § 60-307 (2005 & Supp. 2013).

226. 2010 Annual Meeting Transcript, *supra* note 209, at 46–47.

violate federal due process requirements.<sup>227</sup> However, in accordance with one of the Uniform Law Commission's general guidelines, the drafting committee ultimately decided against developing specialized procedural rules establishing the circumstances under which plaintiffs may use service by publication in partition actions that the UHPA may govern.<sup>228</sup>

In lieu of developing specialized procedural rules governing the conditions under which service by publication may be made in partition actions, the UHPA requires that in cases in which a plaintiff seeks an order of notice of publication and a court determines that the property in question may be heirs property, the plaintiff post a conspicuous sign on the property.<sup>229</sup> This requirement is similar to provisions found in some state statutes that require a sign or notice to be posted, under certain circumstances, on real property scheduled to be sold pursuant to a court order.<sup>230</sup> If the plaintiff must post a sign, in addition to stating that the partition action has commenced and identifying the name and address of the court, the sign must identify "the common designation by which the property is known,"<sup>231</sup> such as "the Hazel Jones estate," for example. The UHPA's drafters believe the signage requirement will increase the

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227. Though in *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), the Supreme Court indicated that personal service has very "often been held unnecessary as to nonresidents," some members of the drafting committee were skeptical that service by publication to nonresidents who own interests in tenancy-in-common property is constitutional in those cases in which the plaintiffs know the addresses of these nonresident defendants or could discover the addresses using reasonable diligence. To this end, in *Mullane*, the Supreme Court further stated the following: "Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Id.* at 318. Though courts across the country do not appear to have decided in a uniform way whether nonresidents with known addresses in partition actions may be served by publication, certain state courts have held, at least in certain types of cases, that service by publication to nonresident parties whose residence is known or reasonably ascertainable by the party who provided service by publication constitutes a denial of due process under the due process clause of the Fourteenth Amendment to the Constitution of the United States. *See, e.g.*, *Baggett v. Baggett*, 541 S.W.2d 407, 411 (Tenn. 1976) (It must be noted that this case was a case considering the sufficiency of service by publication to a nonresident spouse in a divorce case and that the case was not a partition action.).

228. This decision was consistent with the Uniform Law Commission's more general policy of refraining from developing specialized procedural rules for uniform acts that are primarily substantive in nature. *See* Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 WASH. L. REV. 361, 378 (1994).

229. UHPA, *supra* note 1, § 4(b). The Alabama Uniform Partition of Heirs Property Act that will begin applying to partition actions filed in Alabama on or after January 1, 2015 further requires that the sign be durable and that it must be "at least 11 x 17 inches in size." ALA. CODE § 35-6A-4 (Supp. 2014).

230. *See, e.g.*, ARIZ. REV. STAT. ANN. § 42-18266 (2006).

231. UHPA, *supra* note 1, § 4(b). The requirement that the sign identify the property by its common designation addresses the fact that a property is often commonly known by the property's street address or by some unofficial name, including the name of the family that has owned the property for a long period of time. For example, as indicated above, many people in a rural community may commonly refer to a hypothetical property as the Hazel Jones estate.

chances that a defendant whom the plaintiff served by publication in a partition action may end up participating in the action.

*D. Qualifications for Court-Appointed Commissioners or Referees*

In most jurisdictions, any commissioner or referee whom a court appoints in a partition action must be disinterested,<sup>232</sup> and in some states, statutes deem certain people ineligible to serve as a commissioner or referee.<sup>233</sup> In some states, the relevant partition statute only explicitly provides for the appointment of commissioners or referees if the court orders a division in kind and in all or nearly all of these states any commissioner or referee who is appointed must be disinterested.<sup>234</sup> In some states, however, statutes do not address whether a commissioner, referee, or officer, whom a court has appointed to sell property in a partition action, must be disinterested.<sup>235</sup>

In a small number of states, courts that have ultimately ordered a partition sale have allowed someone who participated in the partition action on behalf of one of the parties before the court ordered the property sold, including an attorney or witness for one of the parties, to serve as a commissioner or referee to make the sale.<sup>236</sup> To this end, in permitting a real estate agent who had served as a witness for one of the parties to serve as the commissioner for the sale of the property, an Indiana appellate court held that “[t]he statute governing the appointment of a commissioner to sell land does not require that the commissioner be disinterested, unlike the statute regarding commissioners for the partition of land.”<sup>237</sup> The court justified this distinction as follows:

If allowed, interested commissioners could easily prejudice one cotenant while physically partitioning land because the cotenants necessarily have adverse interests. However, there is not so much to gain, if anything, from an interested commissioner when selling property because, as Defendants have noted, all parties have the common objective of maximizing the sales price.<sup>238</sup>

In West Virginia, which also has a statute that does not require commissioners appointed to make judicial sales including partition sales to

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232. See, e.g., MASS. GEN. LAWS. ANN. ch. 241, § 12 (West 2004 & Supp. 2014).

233. See, e.g., CAL. CIV. PROC. CODE § 873.050 (West 1980).

234. See, e.g., N.Y. REAL PROP. ACTS. LAW § 915 (McKinney 2009 & Supp. 2013).

235. *Id.* at § 231.

236. See, e.g., *Cohen v. Meyer*, 701 N.E.2d 1253, 1256 (Ind. Ct. App. 1998).

237. *Id.*

238. *Id.*



be disinterested,<sup>239</sup> courts apparently usually appoint the attorney who represented the plaintiff to serve as the commissioner to sell property ordered sold in a partition action.<sup>240</sup>

The ULC approved the formation of a drafting committee to address problems with partition actions in large part because of the many documented cases in which a cotenant initiated a partition action requesting the court to order partition by sale and then ended up purchasing the property at the partition sale at a fire sale price. In many of these cases, it seems clear that this is the result the petitioning cotenant had hoped for all along. The drafting committee therefore rejected the notion that in all partition actions in which courts order property sold, all of the parties desire to maximize the sales price and that, therefore, court-appointed commissioners do not have to be disinterested. In addressing the property qualifications or disqualifications for any court-appointed commissioner or referee more generally, the UHPHA prescribes that any commissioner or referee “must be disinterested and impartial and not a party to or a participant in the action.”<sup>241</sup>

#### *E. Courts to Determine Value of Property*

Under the UHPHA, if a court determines that property in a partition action constitutes heirs property, the court then must further determine the value of the property, which in almost all instances will mean the fair market value of the property.<sup>242</sup> This valuation must be done before the court considers the merits of the partition action.<sup>243</sup> Though this requirement is quite unusual in comparison to general partition law statutes in states throughout the United States,<sup>244</sup> the requirement serves two important purposes. First, the valuation enables the buying out of a cotenant’s interest, pursuant to section 7 of the UHPHA, to occur. To this end, the price at which a cotenant can be bought out under section 7 can only be determined after a court first determines the value of the property

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239. W. VA. CODE ANN. § 55-12-1 (LexisNexis 2008).

240. *Carney v. Carney Splice Protector Co.*, 168 S.E. 478, 478 (W. Va. 1933).

241. UHPHA, *supra* note 1, § 5.

242. *Id.* § 6.

243. *Id.* § 6(g).

244. New Mexico represents one of the very few, if not the only, states that requires property that is the subject of a partition action to be appraised before the court can order a partition in kind or a partition by sale under certain circumstances. *See* N.M. STAT. ANN. § 42-5-7 (LexisNexis 1978). This New Mexico statutory requirement, however, is more limited than the UHPHA’s requirement that a court determine the value of heirs property before it considers the merits of a partition action. In New Mexico, a court must only determine the value of property in a partition action if the commissioners advise the court that if the property in question were to be partitioned in kind it would result in manifest prejudice to the cotenants as a whole. *See id.*

as a whole. Second, given that the UHPA requires that property ordered sold under a partition by sale should be sold in most cases by open-market sale in which a real estate broker must list the property for not less than its court-determined value, it is first necessary for the court to determine the value of the property.

In determining the fair market value of heirs property, unless one of two exceptions apply, a court must appoint a real estate appraiser licensed in the state in which the heirs property is located to appraise the property “assuming sole ownership of the fee simple estate.”<sup>245</sup> Those who participated in the drafting of the UHPA recognized that requiring an appraisal to be done in a partition action represents a cost that the parties must bear. Recognizing that the cost of an appraisal in some cases may be too high, the UHPA provides a court with some discretion to forego appointing an appraiser if the court determines that “the evidentiary value of an appraisal is outweighed by the cost of the appraisal.”<sup>246</sup> In such circumstances, instead of requiring an appraisal to be done, the court shall hold an evidentiary hearing and then establish the fair market value of the property by considering evidence, other than a court-ordered appraisal, about the value of the property.<sup>247</sup>

Moreover, instead of a court determining the fair market value of property in a partition action that has been determined to be heirs property, the UHPA enables the cotenants in a partition action to establish the value of the heirs property themselves—whether such value is purportedly at, above, or below the property’s fair market value—or to agree upon another method of valuation that will yield a value for the property.<sup>248</sup> However, an agreement in which the cotenants establish the value of the heirs property themselves or another method of valuation must be an agreement reached by all of the cotenants. A court cannot accept such an agreement even if the only cotenants who did not agree are unknown, unlocatable, or otherwise are cotenants who remain unascertained.

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245. UHPA, *supra* note 1, § 6(d).

246. *Id.* § 6(c).

247. *Id.*

248. *Id.* § 6(b). Other methods of valuation that the cotenants may agree to use include using one or more real estate broker’s opinion of value, a valuation method that is almost always less expensive than the cost of an appraisal. *See id.* § 6(b) cmt. It should be noted that cotenants in a partition case governed under the UHPA may want to establish the value of the property that is the subject of the action by themselves to limit the costs of the action or they may have non-economic reasons for wanting to determine the value themselves.

*F. Cotenant Buyout*

The UPHPA's buyout provision is significantly different than the buyout provisions currently available in partition actions under the law of various states, including the three states that have buyout provisions that ostensibly make a buyout remedy available only to cotenants who are deemed to be nonpetitioning cotenants under those statutes. The UPHPA only subjects the interest of a cotenant that requested partition by sale to be bought out and only a cotenant that had never requested partition by sale may buy out that interest.<sup>249</sup> The drafting committee recognized that unlike a nonpetitioning cotenant or a cotenant that petitioned a court for partition in kind, a cotenant that petitions a court for partition by sale has unequivocally signaled his willingness to have his real property interest extinguished in exchange for a monetary payment.<sup>250</sup>

The purchase price for the interest of a cotenant that petitioned the court for partition by sale is “the value of the entire parcel determined under Section 6 multiplied by the [petitioning] cotenant's fractional

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249. *Id.* § 7(a). The UPHPA's buyout provision bears some resemblances to the Alabama statutory buyout provision that the Alabama Supreme Court in *Jolly v. Knopf*, 463 So. 2d 150, 153 (Ala. 1985), determined violated state and federal equal protection provisions in that the only interests that are subject to being bought out mandatorily are interests of a cotenant that petitioned a court for partition by sale, and only cotenants that did not petition a court for partition by sale are eligible to buy out such interests. As discussed hereinbefore, the *Jolly* court's equal protection analysis is very questionable as the Alabama Supreme Court itself subsequently made clear in a 1999 opinion. *See supra* Part II.B.2.c.3. Moreover, even if the current Alabama Supreme Court would consider *Jolly* still to be good law, the UPHPA's buyout provision is distinguishable from the buyout provision considered by the *Jolly* court in terms of the legislative purposes of the two different statutes. In *Jolly*, the Alabama Supreme Court noted that the legislative purpose of the statute it ruled unconstitutional, in terms of how the buyout provision favored nonpetitioning defendants over cotenants that had petitioned a court for partition by sale, was to provide co-owners *in general* with protections against other co-owners that request a court to order the co-owned land to be forcibly sold for a pro rata distribution of the sale proceeds. *Jolly*, 463 So. 2d at 153; *see also* 1 JESSE P. EVANS III, ALABAMA PROPERTY RIGHTS AND REMEDIES, 11–26 (5th ed. 2012).

Chief Justice Torbert suggested in his special concurrence that if the statute had been more narrowly tailored “to preserve family estates by preventing title from passing to a stranger” as he believed was the real intent of the statute instead of applying to “any property held by *joint owners or tenants in common*” the statute would have been deemed constitutional. *Cf. Jolly*, 463 So. 2d at 154 (emphasis in original). In contrast to the statute at issue in *Jolly*, the UPHPA was drafted specifically to alleviate tenancy-in-common land loss for families that own heirs property. To this end, the UPHPA can be distinguished from the statute at issue in *Jolly* in three ways. First, in contrast to the statute at issue in *Jolly* that applied to property held by joint owners or tenants in common, the UPHPA only applies to tenancy-in-common property. Second, the UPHPA only applies to tenancy-in-common property owned by family members in substantial part. Third, the UPHPA does not apply to all tenancy-in-common property that is substantially owned by families but only to such family-owned tenancies in common in which at least one cotenant acquired title from a relative.

250. UPHPA, *supra* note 1, § 7 cmt. 3. Many cotenants that petition courts for partition by sale do not end up bidding on the property at the partition sale. Though other cotenants that petition courts for partition by sale do intend to participate in the bidding at any partition sales courts may order, these cotenants, of course, have no legitimate guarantee that they will be the winning bidders.

ownership of the entire parcel.”<sup>251</sup> In comparison to buyout provisions contained in many tenancy-in-common agreements that utilize discounts of one type or another to value the interest of a cotenant that may be bought out, the UPHPA’s formula for determining the purchase price for the interest of the cotenant that petitioned the court for partition by sale is quite generous.<sup>252</sup> More generally, tenants in common who sell their fractional interests voluntarily normally receive substantially discounted sales prices for their interests in part because tenancy-in-common ownership represents a particularly unstable form of ownership.<sup>253</sup> The drafting committee concluded that providing cotenants that petitioned courts for partition by sale with somewhat more compensation than they normally could expect from arms-length, negotiated sales of their interests—or from distributions from forced partition sales conducted under general partition statutes—is reasonable, taking into account the fact that the UPHPA mandates that those who petition courts for partition by sale are subject to having their interests involuntarily bought out.<sup>254</sup>

Under the UPHPA’s buyout provision, any cotenant that did not petition the court for partition by sale “may buy all the interests of the cotenants that requested partition by sale.”<sup>255</sup> However, if more than one eligible cotenant elects to buy the interests of the cotenants that petitioned for partition by sale, “the court shall allocate to the cotenants 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.”<sup>256</sup> Unlike the Georgia<sup>257</sup> and South Carolina<sup>258</sup> statutes that provide a mechanism for cotenant buyout, the UPHPA contains an explicit savings clause that permits electing cotenants that paid their apportioned purchase price to pay within a discrete period of time the entire purchase price for any interests that were not purchased in the first round of the buyout due to

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251. *Id.* § 7(c).

252. For example, a model tenancy-in-common agreement that the ABA’s Property Preservation Task Force made available to the public contained the following formula that is to be used to determine the discounted price cotenants that do not want to partition a particular parcel of property subject to the tenancy-in-common agreement have to pay to buy out the interest of a cotenant who desires to file a partition action: “(I) the Property’s appraised value, times (ii) the partitioning Owner’s percentage ownership interest in the Property, times (iii) .75.” Model Tenancy in Common Agreement (formerly available at <http://www.abanet.org/dch/committee.cfm?com=RP018700>) (on file with author).

253. UPHPA, *supra* note 1, § 7 cmt 5.

254. *Id.*

255. *Id.* § 7(a).

256. *Id.* § 7(d)(2).

257. GA. CODE ANN. § 44-6-166.1(e)(1) (2010 & Supp. 2014).

258. S.C. CODE ANN. § 15-61-25(E) (2005 & Supp. 2013).

the fact that one or more other electing cotenants failed to pay their apportioned purchase price on time.<sup>259</sup>

The UHPA's buyout provision not only seeks to promote greater continuity of ownership for those who own heirs property, but it also seeks to enable consolidation of tenancy-in-common properties in some limited ways that may make the ownership more manageable going forward. A successful buyout under the UHPA of the interests of those in a particular case that petitioned a court for partition by sale will itself result in a tenancy in common that is more consolidated. In some cases the consolidation may be fairly robust, but in others it may be quite modest. Further, the UHPA's buyout provision provides for a possible second buyout by cotenants who did not petition for partition by sale and who appeared in the partition action of "the interests of cotenants named as defendants and served with the complaint but that did not appear in the action."<sup>260</sup>

Though this second discretionary buyout could have substantial benefits in terms of consolidating ownership among a significantly smaller, more active group of cotenants, the drafting committee deliberately structured this second buyout so that it would not undermine other important principles the drafting committee considered important. First, any sale of interests under the second buyout may only occur after a buyout of the interests of cotenants that petitioned the court for partition by sale has been completed.<sup>261</sup> The UHPA's buyout section is structured in this way because the drafting committee believed that providing for simultaneous, nondiscretionary buyouts of the interests of cotenants that petitioned a court for partition by sale, and of the interests of non-appearing cotenants, could result in many eligible cotenants who would like to utilize the buyout provision failing to do so. This could occur simply because these eligible cotenants might have insufficient money to buy out all those interests that would be subject to such a simultaneous sale. To this end, many, if not most, cotenants eligible to buyout interests would need to draw upon personal savings or other liquid assets because lenders almost never allow tenants in common to use their fractional ownership interests as collateral to secure loans, as indicated previously.

The drafting committee also decided that courts should have discretion to authorize or reject any request for a buyout of interests of non-appearing cotenants. Provision for this possible second buyout takes into account the fact that sometimes cotenants that do not participate in partition actions are inactive cotenants that have done little to help maintain the property, or are

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259. UHPA, *supra* note 1, §§ 7(e)(3)–(f).

260. *Id.* §§ 7(g)–(h).

261. *Id.* § 7(h)(1).

cotenants who are indifferent with respect to receiving money for their interests, as opposed to maintaining their ownership interests in heirs property. However, the drafters also recognized that some cotenants who do not participate in partition actions do not do so because they never received effective notice of the partition action. Others do not participate, for example, because they do not have the financial resources to hire an attorney to enable them to participate in the partition action in a meaningful way. Still others do not participate for other legitimate reasons.

*G. Reinstating or Fortifying the Preference for Partition in Kind*

Many, but not all, partition actions involving heirs property could be completely resolved under the UPHPA's buyout provision. There are three circumstances under which the UPHPA's buyout provision could not help a court completely resolve a partition action. First, there are cases in which a cotenant or cotenants have only petitioned a court for partition in kind, which would render the buyout provision inapplicable. Second, the buyout provision would not resolve a partition action subject to the UPHPA if eligible cotenants do not purchase all of the interests of cotenants that petitioned a court for partition by sale.<sup>262</sup> Further, even if there were a successful buyout of all the interests of cotenants that petitioned a court for partition by sale, if there is at least one cotenant that still requests partition in kind at the conclusion of the buyout, the court must proceed to resolve the case in some other way.

The UPHPA maintains the preference for partition in kind that is found in the clear majority of general state partition statutes which require a court to order partition in kind unless this remedy would result in great prejudice, substantial injury, or some other similar formulation of the prejudice standard.<sup>263</sup> In seeking to make partition in kind more feasible in some cases, the UPHPA explicitly gives cotenants the right to aggregate their interests to make division more possible;<sup>264</sup> requires courts to consider interests held by cotenants that are unknown, unlocatable, or the subject of a default judgment as one unit;<sup>265</sup> and explicitly permits a court to use owelty to make partition in kind feasible in those instances in which it might otherwise be impracticable.<sup>266</sup> Under the UPHPA, if partition in kind would result in great prejudice or manifest prejudice, a court must order

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262. *Id.* §§ 7(e)(2)–(f)(2).

263. *Id.* § 8(a); Mitchell, *Reconstruction*, *supra* note 34, at 513.

264. UPHPA, *supra* note 1, § 8(a).

265. *Id.* § 8(d).

266. *Id.* § 8(c).

partition by sale unless no cotenant petitioned the court for partition by sale. In the latter instance, a court must dismiss the partition action.<sup>267</sup>

Though on the surface the UHPA is simply consistent with general partition statutes throughout the country in preferring partition in kind to partition by sale, the UHPA provides real substance to this preference. In contrast, the preference under general state partition statutes has been substantially undercut as discussed earlier by courts that apply purely economic tests<sup>268</sup> or tests that explicitly make any noneconomic considerations subordinate to economic considerations.<sup>269</sup> Therefore, the standard that a court must use under the UHPA to determine whether partition in kind would result in great or manifest prejudice to the cotenants as a group represents a very substantial reform to the extant partition law under general partition statutes, which in many instances has become a de facto preference for partition by sale. In determining whether partition in kind is feasible under the UHPA, a court must weigh the totality of all relevant factors and circumstances consistent with an approach used by a very small minority of states in partition actions arising under general state partition laws.<sup>270</sup>

The factors a court must weigh in deciding whether partition in kind is feasible under the UHPA include a number of economic and noneconomic factors.<sup>271</sup> First, a court simply must consider whether the property practicably can be divided. Second, a court must consider whether the aggregate fair market value of the parcels that would result from a division in kind would be materially less than the value of the property if it were sold as a whole, provided that a court must take into account the economic condition under which a partition sale would occur. Third, a court must consider any evidence of longstanding family 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.”<sup>272</sup> Fourth, a court must consider any cotenant’s sentimental attachment to the property, including attachment that arises because the property has ancestral or other unique value. Fifth, a court must consider any cotenant’s lawful use of the property and the

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267. *Id.* § 8(a). This provision of the UHPA seeks to address the fact that there are cases in which courts have ordered partition by sale notwithstanding the fact that, though one or more of the cotenants petitioned the court for partition in kind, none of the cotenants ever petitioned the court for partition by sale. *See supra* text accompanying notes 152–153.

268. *See, e.g.,* *Ashley v. Baker*, 867 P.2d 792, 796 (Alaska 1994).

269. *See, e.g.,* *Fike v. Sharer*, 571 P.2d 1252, 1254 (Or. 1977).

270. *See, e.g.,* *Delfino v. Vealencis*, 436 A.2d 27, 33 (Conn. 1980); *Eli v. Eli*, 557 N.W.2d 405, 409-411 (S.D. 1997); *Ark Land Co. v. Harper*, 599 S.E.2d 754, 761 (W. Va. 2004).

271. UHPA, *supra* note 1, §§ 9(a)(1)-(7).

272. *Id.* at § 9(a)(3).

extent to which such a cotenant would be harmed if such a cotenant could not continue to use the property in the same lawful way as a result of the partition action. The lawful uses that a court may consider can include residential or commercial uses. Sixth, a court must consider the extent to which the cotenants have been responsible in terms of contributing their pro rata shares of the carrying charges, such as the property taxes and the property insurance, *or* in contributing to physically improving and maintaining the property. In addition to these six factors, a court shall consider any other relevant factor.

Unlike states that use an economics-only test or a test that subordinates any noneconomic considerations to economic factors in deciding whether partition in kind is feasible, a court deciding whether partition in kind is feasible under the UHPA may not decide that one factor is dispositive without weighing all other relevant factors and circumstances.<sup>273</sup> In sum, the UHPA does not make noneconomic considerations a court may consider in deciding how to partition property subordinate to economic considerations, or economic concerns subordinate to noneconomic concerns for that matter.

#### *H. Reforming Partition Sales Procedures to Increase Sales Prices*

Though the UHPA's provision for cotenant buyout and the statute's fortification of the preference for partition in kind were designed to reduce the frequency with which courts order partition sales of family-owned property in jurisdictions that enact the UHPA into law, of course there still will be instances in which courts resolve partition actions appropriately by ordering partition by sale. In recognizing this fact, the drafting committee for the UHPA sought to ensure that partition sales under the UHPA do not end up causing tenancy-in-common owners significant or even devastating economic harm. Under the UHPA, partition sales should be conducted in ways that are dramatically different from the way in which a typical partition sale is conducted in jurisdictions throughout the United States. As a result, under the UHPA, heirs property owners should receive more value (and in many cases significantly more value) for their property interests than heretofore has been the case under partition sales conducted under general state partition laws. The changes the UHPA makes to the partition sale process are also likely to serve as a strong disincentive to cotenants who might otherwise be motivated to file a partition action in which they would request partition by sale solely or in large part because they hope to purchase the property for themselves at a fire sale price.

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273. *Id.* § 9(b).



Under the UPHPA, a partition sale is required to be “an open-market sale 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.”<sup>274</sup> If a court orders that a partition sale will be an open-market sale, the court will appoint a licensed, real estate broker to offer the property for sale.<sup>275</sup> Consistent with other provisions of the UPHPA that seek to provide the parties with some significant control over different aspects of the partition action, the parties first have the opportunity to agree upon which real estate broker the court shall appoint.<sup>276</sup> If the parties do not agree upon the selection of a real estate broker within ten days of a court’s decision to order an open-market sale, the court will appoint a disinterested, licensed, real estate broker.<sup>277</sup> Any real estate broker appointed by a court in a partition action to offer property for sale by open-market sale, “shall offer the property for sale in a commercially reasonable manner at a price no lower than the determination of value and on the terms and conditions established by the court.”<sup>278</sup> In short, if a court in a partition action orders partition by sale by open-market sale, a real estate broker appointed to offer the property for sale should seek to sell the property in question in much the same way such a broker would seek to sell property he or she offers for sale on behalf of a willing seller who voluntarily seeks to sell her property.

The UPHPA accounts for the fact that properties offered for sale by open-market sale may in a substantial percentage of cases generate offers for at least the court-determined valuation and for those instances in which a court-appointed broker may not receive an offer for the court-determined valuation within a reasonable period of time. In the former circumstances, the broker shall file a report of the sale that complies with the UPHPA’s reporting requirements.<sup>279</sup> After a broker files such a report with a court, the sale may be completed in accordance with state law provisions other than the provisions of the UPHPA.<sup>280</sup>

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274. *Id.* § 10(a).

275. *Id.* § 10(b). A very limited number of courts in a small number of states in the United States have ordered that partition sales be conducted in a way that approximates how property is typically offered for sale by sellers under fair market value conditions, conditions which typically include the use of a real estate broker in the effort to sell the property. *See, e.g.,* *McCorison v. Warner*, 859 A.2d 609, 614 (Conn. Super. Ct. 2004) (ordering that the property be listed by a real estate broker for up to two years provided that at least 25 percent of the parties agreed to continue to have the property listed by a broker after the first year if the property had not been sold by that time); *Orgain v. Butler*, 496 S.E.2d 433, 435 (Va. 1998) (reversing chancellor’s order that property be sold at a public auction because the property would yield a much better price if it were offered for sale on the open market by a real estate broker).

276. UPHPA, *supra* note 1, § 10(b).

277. *Id.*

278. *Id.*

279. *Id.* §§ 10(c)(1), 11.

280. *Id.* § 10(c)(2).

In the circumstance in which a court-appointed broker does not receive an offer for the court-determined valuation within a reasonable period of time, the court has several options. First, the court can simply approve the highest outstanding offer if there is such an offer<sup>281</sup> and then the sale can be completed consistent with how a sale may be completed if the broker had received an offer for at least the court-determined value within a reasonable time. Second, the court can redetermine the value of the property and then order that the broker should continue to offer the property for sale for some additional period of time.<sup>282</sup> Third, the court can determine that it is no longer feasible to continue to offer the property for sale by open-market sale and can instead order that the property be sold by sealed bids or at an auction.<sup>283</sup> In any case in which a court orders a sale by sealed bids or an auction, the court must set the terms and conditions of the sale.<sup>284</sup> This is the case whether the sale by sealed bids or the auction was ordered in the first instance or only after a court determines that it would be unwise to continue to offer property that is the subject of a partition action for sale by open-market sale after the lapse of a reasonable period of time in which no offer for the court determined value was made. Such terms and conditions for a sale by sealed bids or an auction could include, for example, a reserve price below which the property may not be sold.

#### V. CONCLUSION

The development of the UPHPA culminating in its promulgation in 2010, and its enactment into law in four states thus far, including two in the heart of the South, represents a truly remarkable legal development that very few people believed to be achievable up until just a few years ago. Many different people played key roles, and some played simply indispensable roles, in the drive to convince the ULC to form a drafting committee to develop a uniform partition act and in the drafting of the UPHPA over the course of three years. Many others are making important contributions to the ongoing advocacy work that is being done to convince states to enact the UPHPA into law, including staff at the ULC, many members of the HPRC, this author, and others. The commissioners on the drafting committee, including some with long experience in drafting uniform real property acts, the ABA advisors, an unusually varied and committed group of observers, including many from local and regional public interest legal organizations that had never previously participated in

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281. *Id.* § 10(d)(1).

282. *Id.* § 10(d)(2).

283. *Id.* § 10(d)(3).

284. *Id.* § 10(e).

the process of drafting any uniform act, and this author in my role as Reporter for the UHPA, ended up working very well together and forming a real esprit de corps.

The drafting committee was often able to reach compromises that satisfied most or all of the members of the drafting committee and the observers. However, the issue of the circumstances in which attorney's fees could be awarded in partition actions under the UHPA was decided in a way that left some members of the drafting committee and an even larger number of the observers dissatisfied, at least at the time this decision was made. The UHPA drafts up until the final meeting of the drafting committee included significant language restricting the ability of a court to award attorney's fees in a partition action, consistent with the American rule on attorney's fees.<sup>285</sup> However, the ULC's leadership expressed serious concern at the final drafting committee meeting that such a provision on attorney's fees could harm enactment efforts in some states that otherwise might be inclined to enact the UHPA into law. After hearing this concern, the commissioners on the drafting committee decided in the end against including any provision in the UHPA that would restrict the ability of a court to award attorney's fees in partition actions decided under the UHPA.<sup>286</sup>

Even though the UHPA as approved does not prohibit a court from making an attorney's fee award in a contested partition, the act does include significant provisions that serve as "shark repellent" as one law professor stated in a written submission to the drafting committee,<sup>287</sup> for those cotenants interested in forcing the sale of family-owned, tenancy-in-common property in the hopes that such a cotenant could acquire the property for a fire sale price. Among other provisions that would disincentivize such a cotenant from filing a partition action in order to acquire family-owned property are the buyout provision, the provision fortifying the preference for partition in kind, and the provision requiring

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285. See, e.g., Nat'l Conference of Comm'rs on Unif. State Laws, UHPA May 2009 Interim Draft, *available* at [http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/upipa\\_cleandraft\\_may09.pdf](http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/upipa_cleandraft_may09.pdf); Nat'l Conference of Comm'rs on Unif. State Laws, UHPA March 26–27, 2010 Committee Meeting Draft, *available* at [http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/upipa\\_mtgdraft\\_clean\\_031110.pdf](http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/upipa_mtgdraft_clean_031110.pdf).

286. The drafting committee's decision to strike any language from the UHPA that would prohibit a court from making an attorney's fee award does appear to have been helpful in the ultimately successful effort to enact the UHPA into law in Alabama. In enacting the UHPA into law in Alabama, the Alabama legislature added language to the UHPA making it clear that the Alabama Uniform Partition of Heirs Property Act does not make any changes to the provision in Alabama's general partition law that permits a court to award attorney's fees in a partition action. See ALA. CODE § 35-6A-3(d) (Thomson Reuters Supp. 2014).

287. See E-mail from Hugh C. Macgill, *supra* note 155.

that partition sales be conducted in a manner designed to maximize the sales price with the open-market sale representing the preferred sales method.

Though the UHPA represents the most substantial reform effort in modern times to reinforce family ownership of tenancy-in-common property in the United States, it does not address every challenge those who own heirs property face. Many families still own heirs property that could be better consolidated under the family's continued ownership so that the property could be better utilized. Given that the UHPA provides for consolidation mostly on the margins, a family interested in consolidating their tenancy-in-common ownership would have to pursue other strategies in most instances to seek such consolidation. These strategies could include private ordering strategies such as converting a family's tenancy-in-common ownership into another form of common ownership such as a limited liability company. Additional law reform efforts also could be pursued that might include a statute that would enable those owning a supermajority of the interests in a tenancy in common to change their ownership form into a form that is more functional, including a limited liability company, as opposed to the current state laws that require all the cotenants to agree to such a change.<sup>288</sup>

Further, many who own heirs property are unable to improve their property in any significant way or to use their property to develop income-generating activities and wealth that can help them move beyond being merely "land rich but cash poor," a typical economic condition for a substantial number of heirs property owners. This substantial underdevelopment of heirs property holdings is attributable in part to the fact that those who own heirs property are often unable to secure financing so that they can realize the potential economic value of their tenancy-in-common ownership. To this end, lending institutions typically refuse to accept heirs property as collateral for loans due to concerns that those who own heirs property lack clear title. A number of initiatives could be undertaken in an effort to help convince private and government lenders to make financing more available to those who own heirs property.

Nevertheless, in those states that have enacted the UHPA into law, heirs property owners now possess substantial new legal protections and rights that those who have worked with heirs property owners for decades had long sought, though the chance of securing these rights seemed quite small until the Uniform Law Commission decided to begin work on drafting the UHPA. In addition to the four states that have enacted the

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288. See Mitchell, *Reconstruction*, *supra* note 34, at 568–72.

289. See Thomas W. Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, 2005 WIS. L. REV. 557, 578–79 (2005).

UPHPA into law, a number of other states from many different regions of the country are likely to consider it over the course of the next few years according to the legislative counsel staff member at the ULC who is working to help enact the UHPA into law. The UHPA concededly offers no benefits to the substantial number of heirs property owners who have already involuntarily lost their property in partition actions over the course of the past several decades. Nevertheless, the enactments and potential enactments of the UHPA are significant because poor and disadvantaged heirs property owners own more property than many people realize. For example, African-Americans own several million more acres of agricultural land alone, worth several billion dollars, than most academics have realized,<sup>289</sup> including many academics who have suggested that black landowners are on the verge of extinction. Much of this agricultural land is heirs property. Further, the UHPA stands to benefit the large number of families that own heirs property that is not agricultural land whether the properties are located in cities, along the oceanfront, or in rural locations.

Finally, the effort to reform partition law by drafting a uniform partition act has had other noteworthy, secondary benefits that hold the potential to build upon the progress that has been made in reforming partition law to provide heirs property owners with more stable ownership. For example, important relationships were forged during the drafting of the UHPA, including among members of the Heirs' Property Retention Coalition that had not had a history of working together in any substantial way before 2006. There is a fair chance at least that these new (or at least improved) relationships could be leveraged in a meaningful way to help address other significant problems heirs property owners face. More broadly, the UHPA's very solid record of introductions and enactments should be drawn upon as an instructive case study to help convince various important legal actors that property law can be reformed in a constructive way, in more instances than many of these people may have thought possible, to serve the interests of a broader group of people, including those with little economic or political power.

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