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MEMORANDUM

To: Senate Committee on Judiciary
From: Jason Thompson, Senior Assistant Revisor of Statutes
Date: February 7, 2018
Subject: Bill Brief for SB 329

SB 329 would enact the uniform partition of heirs property act. K.S.A. 60-1003 governs partition, an action relating to property under the code of civil procedure that allows for the division of jointly held property. Generally, the property itself will be divided (partition in kind) if possible, and if not possible, the court can order a sale and have the proceeds divided (partition by sale).

As stated in Section 3, this uniform act supplements K.S.A. 60-1003 and, if an action is governed by the act, replaces provisions of K.S.A. 60-1003 that are inconsistent with the act. A few of these differences are highlighted below.

If the court determines that the property is heirs property, the property must be partitioned under the uniform act, unless all of the co-tenants otherwise agree in a record. “Heirs property” is defined in Section 1(e) as real property that is (1) held in tenancy in common, (2) without a written agreement governing partition, (3) with one or more co-tenants who acquired title from a relative, whether living or deceased, and (4) with 20% or more of the ownership interests traceable to a family member.

The uniform act creates a procedure for determining the fair market value of the property in Section 6 through an appraisal and an evidentiary hearing or, if the evidentiary value of an appraisal is outweighed by the cost of the appraisal, through an evidentiary hearing without an appraisal. This would differ from the procedure for appointment of commissioners and appraisal provided in K.S.A. 60-1003(c)(2) and (3).

After the value is determined, Section 7 provides the co-tenants with a right of first refusal and outlines procedures for situations where more than one co-tenant elects to buy the interests or where no co-tenant elects to buy the interests. These procedures would differ from the procedures outlined in K.S.A. 60-1003(c)(4).

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Section 8(a) provides a strong preference for partition in kind, requiring consideration of numerous factors listed in Section 9 before the court can find that partition in kind will result in manifest prejudice to the co-tenants as a group. Section 8(b) then provides for partition by sale under Section 10 or, if no co-tenant requested partition by sale, the court shall dismiss the action. The factors in Section 9 are not in K.S.A. 60-1003, and there is no provision in current law for dismissal if partition by sale was not requested.

Section 10 provides for an open-market sale, sealed bids, or an auction. Open-market sales will use a licensed real estate broker, who has additional reporting requirements under Section 11. Sealed bids and auctions will be on terms and conditions set by the court, and auctions must be conducted under K.S.A. 60-1003.

60-1003. Partition. (a) *Petition.* (1) When the object of the action is to effect a partition of personal or real property or an estate or interest created by an oil, gas or mineral lease or an oil or gas royalty, the petition must describe the property and the respective interests of the owners thereof, if known.

(2) If the number of shares or interests is known, but the owners thereof are unknown, or if there are, or are supposed to be, any interests which are unknown, contingent or doubtful, these facts must be set forth in the petition with reasonable certainty.

(3) Persons claiming or having a specific or general lien upon all or any portion of the property, may be made parties.

(4) An allegation of ownership of an interest implies an allegation of right to possession of the property, and it is not necessary to claim the remedy of ejectment in an action for partition.

(b) *Answer.* The answers of the defendants shall include allegations of the nature and extent of their respective interests. They may also deny the interests of any of the plaintiffs, or any of the defendants. Any claim of adverse possession shall be affirmatively pleaded and the burden of proving the same is on the defendant.

(c) *Procedure.* (1) *Order of partition.* The judge shall first determine and make an order specifying the interest of the respective parties and directing partition.

(2) *Commissioners.* Upon making an order of partition, the judge shall appoint three (3) commissioners to partition the property among the parties according to their respective interests, but if such partition cannot be made without manifest injury, or is for any reason impracticable, the commissioners shall appraise the value of the property, valuing each tract separately, if more than one, and report their conclusions to the court.

(3) *Exceptions to commissioner's report.* Any party may file exceptions to the commissioners' report and the judge may, after hearing with reasonable notice to all parties affected approve or disapprove the same, or make such modifications as justice and equity may require, including an order requiring specific portions of the property to be awarded to specific parties, or direct such further proceedings as the judge deems equitable, but if no exceptions are filed to the commissioners' report as to division in kind the judge shall so enter judgment in accordance with the report.

(4) *Election or sale.* Where the property is not subject to partition in kind, any one or more of the parties may elect within a time so fixed by the judge to take the property or any separate tract at the appraised value, but if none of the parties elect to so take the property, or two or more elect to so take, in opposition to each other, the judge shall order the sheriff to sell it in the manner provided for sale of property on execution. No sale shall be made at less than two-thirds of the valuation placed upon the property by the commissioners.

(5) *Costs and fees.* The court making partition shall tax the costs, attorney fees and expenses, including an allowance for preparation or bringing up to date of an abstract of title or title insurance to the real estate involved in the action, which may accrue in the action, and apportion the same among the parties according to their respective interests, and may award execution therefor, as in other cases.

(d) *General powers of judge.* The court shall have full power to make any order not inconsistent with the provisions of this article that may be necessary to make a just and equitable partition between the parties, and to secure their respective interests, or may refuse partition if the same would result in extraordinary hardship or oppression.

History: L. 1963, ch. 303, 60-1003; Jan. 1, 1964.

Revisor's Note:

Agreements waiving rights with respect to partition or alienation of property jointly owned by utilities, see [16-115](#), [16-116](#).



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Partition of Heirs Property Act Summary

THE UNIFORM PARTITION OF HEIRS PROPERTY ACT

- A Summary -

The Uniform Partition of Heirs Property Act addresses a problem faced by many middle to low-income families who own real property: dispossession of their land through a forced sale. For many of these families, real estate is their single most valuable asset. Rural African-American families have been hit especially hard. Following the civil war, African-Americans acquired between sixteen and nineteen million acres of agricultural land by 1920. Today, African-Americans retain only about seven million acres of that land.

The Issue: State Laws Create a Tenancy-in-Common by Default

Most higher-income families engage in sophisticated estate planning, ensuring a smooth transfer of wealth to the next generation. In contrast, lower-income landowners are more likely to use a simple will to divide property among children, or to die intestate. Unless a landowner specifies a different form of ownership in an estate plan, the owner's descendants will inherit real estate as tenants-in-common under state property statutes. A tenant-in-common may sell his or her interest without the consent of the co-tenants, making it easy for non-family members to acquire an interest in the property. This condition has allowed many real estate speculators to acquire heirs property at a price below its fair market value, depleting a family's wealth in the process.

An Example of Heirs Property Loss

To illustrate the problem, imagine a widow with three children who owns a small farm, including a farmhouse where she lives. Unless the widow makes other provisions in her estate plan, when she dies the three children will inherit the property as tenants-in-common. That is, the children will each own a one-third share of the undivided piece of real estate. Imagine further that two of the children would like to maintain their ownership of the farm, but the third child wants to convert his share into cash. Because his siblings cannot afford to buy him out, he sells his one-third interest to an unrelated real estate investor.

In a tenancy-in-common, any co-tenant may file an action with a court to partition the property. In resolving a partition action, the court has two main remedies available: partition-in-kind or partition-by-sale. A partition-in-kind physically divides the property into shares of proportional value and gives each co-tenant full ownership of an individual share. However, if it is not possible to divide the property equitably, the court will often order a partition-by-sale, whereby the property is sold as a single parcel and the cash distributed to the co-tenants in proportion to their ownership.

Returning to our example, the unrelated investor-owner can petition a court for partition of the farm. If the property contains only one farmhouse, dividing it into shares of equal value may be difficult or impossible. Therefore, a court is likely to order a partition-by-sale, forcing the two siblings to sell the property against their will. Even worse, forced sales often bring meager returns. The investor might purchase the remaining shares at a price well below their fair market value, and the siblings would have little to show for their inheritance.

The Solution: A Statute that Balances the Interests of *All* the Owners

The Uniform Partition of Heirs Property Act (UPHPA) helps to solve the problem while preserving a co-tenant's right to sell his or her share of property. It is important to note that the act only applies to heirs' property – one or more co-tenants must have received his or her property interest from a relative – and only when there is no written agreement governing partition among the owners. If both of those conditions exist, the act requires certain protections when a co-tenant files for a partition order:

1. The co-tenant requesting the partition must give notice to all of the other co-tenants.
2. The court must order an independent appraisal to determine the property's fair market value as a single parcel. If any co-tenant objects to the appraised value, the court must hold a hearing to consider other evidence.
3. Any co-tenant (except the co-tenant(s) requesting partition-by-sale) may buy the interest of the co-tenant seeking partition for a proportional share of the court-determined fair market value. The co-tenants have 45 days to exercise their right of first refusal, and if exercised, another 60 days in which to arrange for financing. If more than one co-tenant elects to buy the shares of the co-tenant(s) seeking partition, the court will pro-rate the sellers' shares among the buyers according to their existing fractional ownership percentages.
4. If no co-tenant elects to purchase shares from the co-tenant(s) seeking partition, the court must order a partition-in-kind, unless the court determines that partition-in-kind will result in great prejudice to the co-tenants as a group. UPHPA specifies the factors a court must consider when determining whether partition-in-kind is appropriate.
5. If partition-in-kind is inappropriate and the court orders a partition-by-sale, the property must be offered for sale on the open market at a price no lower than the court-determined value for a reasonable period of time and in a commercially reasonable manner. If an open market sale is unsuccessful or the court determines that a sale by sealed bids or by auction would be more economically advantageous for the co-tenants as a group, the court may order a sale by one of those methods.

Conclusion

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

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Legislative Fact Sheet - Partition of Heirs Property Act

Act Partition of Heirs Property Act

Origin Completed by the Uniform Law Commission in 2010.

Description The Uniform Partition of Heirs Property Act (UPHPA) helps preserve family wealth passed to the next generation in the form of real property. Affluent families can engage in sophisticated estate planning to ensure generational wealth, but those with smaller estates are more likely to use a simple will or to die intestate. For many lower- and middle-income families, the majority of the estate consists of real property. If the landowner dies intestate, the real estate passes to the landowner’s heirs as tenants-in-common under state law. Tenants-in-common are vulnerable because any individual tenant can force a partition. Too often, real estate speculators acquire a small share of heirs’ property in order to file a partition action and force a sale. Using this tactic, an investor can acquire the entire parcel for a price well below its fair market value and deplete a family’s inherited wealth in the process. UPHPA provides a series of simple due process protections: notice, appraisal, right of first refusal, and if the other co-tenants choose not to exercise their right and a sale is required, a commercially reasonable sale supervised by the court to ensure all parties receive their fair share of the proceeds.

Endorsements ABA – Real Property, Trusts, and Estates Section; ABA – State and Local Government Section; American College of Real Estate Lawyers; Council of State Governments; National Bar Association; National Black Caucus of State Legislators; Center for Heirs Property Preservation; Black Family Land Trust; Federation of Southern Cooperatives; Heirs Property Retention Coalition; Lawyers Committee for Civil Rights; Southern Poverty Law Center; American Planning Association, NAACP, Appleseed, Concerned Citizens of Tillery, Southern Coalition for Social Justice.

Enactments Alabama, Arkansas, Connecticut, Georgia, Hawaii, Montana, Nevada, New Mexico, South Carolina, Texas

2018 Introductions District of Columbia, Iowa, Kansas, Mississippi, Tennessee, West Virginia

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