

Family, Land, Legacy, Wealth

Adopting and Implementing The Uniform Partition of Heirs Property Act

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What is Heirs Property?

- Default form of land ownership by 2+ persons is “Tenancy-in-Common” or “Cotenancy”
- When a Cotenant inherits an interest, it becomes Heirs Property
- Term “Heirs Property” more common in Southeastern U.S., but Heirs Property by any name exists in all US States / Jurisdictions
- Yet THE Most Unstable Form of Ownership

How is Heirs Property Created?

- 2+ persons buy real estate together without using a Trust, Corporation, Partnership or LLC (creates CoTenancy)
- 1 person inherits real estate interest under a Will and no Trust established = Heirs Property
- 1 person inherits real estate interest without a Will (e.g., Intestacy / Intestate Succession) = Heirs Property

5 Key Problems of Heirs Property

- Can't access equity (banks won't lend on partial interests)
- Easily lost in tax sales (each CoTenant waits for another to pay – “Free Rider” problem)
- Conflicts among CoTenants re: use
- Any CoTenant can sell her interest to any stranger at any time
- Easily lost in partition actions (any CoTenant can file for partition at any time)

What is Partition?

- Division of real property (or sale and split of proceeds) held in Tenancy in Common by a Court
- Most State laws recommend Courts divide property In Kind (Subdivide 1/3 in value of Blackacre to each of Cotenants A, B and C)
- Courts find this burdensome, instead they order property sold to “maximize value”
- Problem: Courts use Auction Sales, which Minimize Value

Partition = Private Eminent Domain

- 2001 AP Story: “Torn from the Land”
- Numerous Law Review Articles
- Developer sees desirable land for resort community, buys 1% Cotenancy interest for cheap from 1 Heir, brings Partition Action, Buys land at auction for Below FMV
- Family members who lived on land or used land for small business evicted and receive “peanuts” for their land

What do Wealthy / Smart Families Do?

- Use Trusts to make sure real estate does not go into ownership by multiple individuals
- Put “Heritage Property” (Family Ranch, Multi-Generation Vacation Home, etc.) into Family Limited Partnership or LLC
- Limit sales of interests by contract, require ROFOs, ROFRs and Interest Buyouts

Genesis of Proposed Uniform Act

- Uniform Law Commission, HQ in Chicago (founded 1892), assists States in clarifying / coordinating statutory law.
- Drafting Committee prepared background and draft Act with Prof. Thomas Mitchell, U. Wisc. Law
- Three Years Intensive drafting by 13 Members and Advisors from Across the Nation with Pro Bono counsel and Observers.
- Unanimously approved by Commission in 2010 and American Bar Association in 2011
- Pending in NV and OR, considered in 6 others.

What does New Uniform Act Do?

- Bring the Best Practices of the Private Sector into Statutory Law
- Does for Law of Partition what Intestacy Law did for people without Wills: Create clear, certain, fair, default rules
- REFORMS the Partition Process

Details, Details

- Uniform Act is a model for all States to adopt (inherited property can be in any State and heirs can be in any State, so valuable to have Uniformity in State Real Property Law)

Details, Details (2)

- “Heirs Property” subject to Reformed Partition:
 - real property, not subject to a binding agreement among the Cotenants,
 - held in tenancy in common
 - one or more Cotenant acquired title from relative
 - any of the following: 20%+ interests held by relatives; 20%+ of interests held by even one person who acquired title from relative; OR 20%+ of Cotenants are relatives
- In any Partition case, Court first needs to determine if Heirs Property involved

Details, Details (3)

- Reform Rules apply to Partition of Heirs Property:
 - Post sign on property to encourage word to get out / missing Cotenants to be informed
 - Court-appointed Partition Commissioners / Masters / Referees must be Disinterested
 - Court obtains Disinterested Appraisal, unless All Cotenants agree to another value or approach or cost outweighs benefit

Details, Details (4)

- FIRST, All Cotenants who did not request Partition by Sale have Right to Buy Out Cotenants who Asked for Partition by Sale @ Court-set FMV
- Fast, “stock-subscription” model used for Buyout and Payment to Plaintiff
- All Cotenants with Right to Buyout can Buy Pro Rata Share of Plaintiff’s Interest

Details, Details (5)

- Parties to Partition Action Encouraged to do Voluntary Buyouts among themselves to Consolidate Interests
- Court can use Discretion to use more rounds of Buyouts to Consolidate Interests
- If Buyout of Interests doesn't resolve the case, or if any Cotenant has requested Partition In Kind, Court next Subdivides

Details, Details (6)

- Court Must use Partition In Kind unless Great or Manifest Prejudice to All Cotenants would result (property really too small to be subdivided; subdivision would clearly devalue property; 5 other key factors to consider in § 9 of Act)
- Only if Great or Manifest Prejudice to All Cotenants from Partition in Kind may Court order Partition by Sale

Details, Details (7)

- If Partition by Sale ordered, Court Must List Property via usual brokerage / listing arrangements in area for market sales
- If final offer at or above Court-set FMV, close sale
- If not, Court can lower price and relist
- Sale by Auction is the Last Resort

Web Resources

<http://www.nccusl.org>

- in the “Find an Act” search bar, enter “Heirs Property”

<http://www.southerncoalition.org/hprc>