

## CALIFORNIA'S ADOPTION OF THE UNIFORM PARTITION OF HEIRS PROPERTY ACT

An inherent risk in owning real property as tenants in common is that a dispute may arise among the cotenants requiring a separation of the ownership interests. Whether the dispute arises from the different goals of the cotenants, failure of one or more cotenants to pay their share of the property's expenses, or simply because the cotenants cannot "get along," such disputes can result in a legal action for partition of the property requiring the parties to separate their interests from one another.

In general, cotenants are entitled to partition "as a matter of right." They need not give any reason for demanding a partition but are entitled to a severance even if it would adversely affect the financial interests of the other cotenants. The only real "requirement" is that the partitioning tenant show their interest or title. There are three types of partition: partition in kind, partition by sale and partition by appraisal, with a partition in kind being the starting judicial preference.

In 2010, the Uniform Law Commission promulgated the Uniform Partition of Heirs Property Act (the "Act"). The Act was drafted to address tenancy-in-common ownership of disadvantaged families where for many decades state partition laws contributed to widespread and devastating involuntary land loss among families who owned real properties together, in particular when the real property was acquired under the laws of intestate succession (i.e., inheritance through probate and without a Will).

When the Uniform Law Commission evaluated this issue, they noted that scholars and practitioners have observed that a relatively high percentage of people who own real property as tenants in common without private co-ownership agreements are members of ethnic minorities, or families of modest economic means regardless of race. These groups have been identified as more likely to hold property under the "default" tenancy in common rules, largely as a result of the transfer of property between generations through the laws of intestate succession. Where low-income groups or members of racial minorities have less access to legal services, intestate succession without written agreements concerning co-ownership is more likely to occur, and can result in greater numbers of cotenants of real property as it passes from one generation to the next. It has been opined that such conditions may contribute to the racial wealth gap by making such communities especially vulnerable to losing their land through court-ordered partition sales.

Under past law, a partition action generally resulted in a market sale of the property unless the cotenants agreed to a buyout of the partitioning party's interest. Without an agreement among the

cotenants, the court could order the property sold and the proceeds divided, if an in-kind division was not possible. Such a forced partition sale often results in the sale of the property at below its fair market value, leaving the cotenants economically disadvantaged.

Since 2010, twenty states, along with the U.S. Virgin Islands, have adopted the Act. On July 23, 2021, Governor Gavin Newsom signed into law Assembly Bill 633

enacting the Uniform Partition of Heirs Property in the State of California and thereby granting heirs who have acquired an interest as tenants in common in real property a statutory right of first refusal to purchase or “buyout” such property in the event of a partition. The Act provides a series of 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 that all parties receive their fair share of the proceeds in the partition of an Heirs Property. These due process protections pursuant to the Act apply to Heirs Property partition actions filed on or after January 1, 2022.

To accomplish its goals, the Act has three major reforms in state partition laws. First, when a cotenant petitions a court to order a partition sale, the cotenants who did not seek a sale must be afforded the opportunity to buy out the petitioning cotenant at a price that represents the value of the petitioning cotenant’s fractional ownership interest. This reform attempts to eliminate the devaluation and discount associated with a minority or fractional cotenant ownership interest.

Second, the Act bolsters the judicial preference for partition in kind, by rejection of application of the economics-only test. In determining whether to order partition in kind or partition by sale, a court must consider several factors that constitute a mix of economic and non-economic factors without deciding beforehand to place more weight on any one factor.

Third, with a revamped sales procedure, the Act implements an “open market sale” as the preferred sale procedure under which the court appoints a disinterested real estate broker to list the property for sale for at least its value as determined by the court and to market the property using commercially reasonable practices.

This new remedy is not applicable to all co-owned real properties. For a partition action to be subject to the rules under the Act, the court must first determine that the real property falls within the definition of Heirs Property, and if not, then the action is subject to the existing longstanding partition rules.

Code of Civil Procedure section 874.312, subdivision (e) defines Heirs Property as real property held in tenancy in common where (1) there is “no agreement in a record binding all the cotenants which governs the partition of the property” and (2) “one or more of the cotenants acquired title from a relative, whether living or deceased.” In addition, any one of the following conditions must apply for a determination of “heirs property”: “(A) Twenty percent or more of the interests are held by cotenants who are relatives. (B) Twenty percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased. (C) Twenty percent or more of the cotenants are relatives.” The Act only requires that at least one of the cotenants acquired title from a relative, either during such relative’s life or on the relative’s death.

It is important for individuals owning an interest in Heirs Property to understand the mandated partition procedures under the Act in the event that you or another cotenant files an action for partition. There are several strategies that could be used to develop co-ownership agreements, or to utilize partnership or corporate ownership

structures. Each of these options has benefits and deficits and needs to be evaluated on a case-by-case basis with an attorney knowledgeable in real estate law and entity formation.

If you own Heirs Property and are contemplating filing or concerned are that another cotenant will file a partition action that will be subject to the Act, you should consider consulting with an attorney to consider entering into pre-litigation conversations with all of the cotenants by using the mandated procedures under the Act as a framework to guide out-of-court settlement.

In the estate planning context, if you own real property and are considering making a lifetime gift or leaving such property on your death to multiple individuals, at least one of whom is a relative as defined under the Act, it is advisable that you speak with an attorney to be educated about the disadvantages of co-ownership of real property and what happens when it “goes wrong.” By having this knowledge, you can plan, to the extent possible, to avoid a situation where one of the cotenants files a partition action to terminate co-ownership under the Act. There are a number of estate planning alternatives to co-ownership as tenants in common. Each of these options has benefits and deficits and needs to be evaluated on a case-by-case basis in light of that person’s financial circumstances, family dynamics, and estate planning goals. Moreover, an important element of evaluating each option is any possible property tax, income tax, and estate tax consequences.

A person acting as a trustee in a post-death administration where there is the potential for making a distribution of Heirs Property should consult with counsel to consider the options available to the trustee in light of this new law.

California’s adoption of the Uniform Partition of Heirs Property Act has made significant changes to partition law. It is important in the trusts and estates context to seek the advice of counsel to understand the impact of the Act on gifting and estate planning, and for those that already own Heirs Property, to understand your rights.

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