



**STATE OF NEW JERSEY**

**NEW JERSEY LAW REVISION COMMISSION**

**Final Report**

Relating to

**UNIFORM PARTITION OF HEIRS PROPERTY ACT**

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## Overview of Uniform Law

In 2010, the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) approved the Uniform Partition of Heirs Property Act (“UPHPA”) for adoption in all states. The UPHPA focuses on problems resulting from the sale by court-ordered partition of real property owned by family members who hold title as tenants-in-common. Recognizing the rights of each cotenant to secure his or her share of the current market value of the property and to consolidate ownership of the property, the act seeks to protect the interests of family member cotenants from the adverse consequences of a partition action where one cotenant wishes to remain in possession of the land and another cotenant wishes the property to be sold.<sup>1</sup> NCCUSL states that the primary aim of the act is to ensure that each cotenant “is treated in a fair and equitable manner.”

Current law presumes that, unless otherwise expressly provided, two or more people who acquire undivided interests in real property take ownership of the property as tenants-in-common (rather than joint tenants).<sup>2</sup> According to NCCUSL, what many family cotenants do not realize is that any tenant-in-common may sell its interest or convey the interest by gift during the tenant’s lifetime to a non-family member without the consent of the cotenants. Of special concern is a non-family member’s attempt to divest a family member of property ownership by forcing partition by court-ordered sale.

Generally, the two principal remedies that a court may order to resolve a partition action are “partition in kind”, where the property is subdivided into separate subparcels with each subparcel proportionate in value to each cotenant’s fractional interest, or “partition by sale”, where the property is sold in its entirety with the sale proceeds distributed among the cotenants in proportion to their relative interests in the property. NCCUSL states that courts typically resolve partition actions by ordering partition by sale, usually resulting in property owners being forced off their land without their consent. This occurs even where the property could have been divided, the majority of cotenants opposed partition by sale, or the only remedy sought was partition in kind.

NCCUSL identifies several problems with court-ordered sales. First, courts often do not place much value on upholding basic property rights. Nor do courts take into

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<sup>1</sup> In the Prefatory Note, NCCUSL explains that scholars and practitioners have observed that a particularly high percentage of minority and poor property owners have acquired real property, and the wealth derived therefrom, by intestate succession instead of by will. Real property transferred from one generation to the next and held in a tenancy in common is referred to in many communities as “heirs property” or “heirs’ property”, a defined term in the act.

<sup>2</sup> Notably, if the two people are married, depending upon state law and unless otherwise expressly provided, they may automatically acquire the real property as “tenants by the entirety”. Such a tenancy is a legal fiction that is wholly based on the doctrine that a husband and wife are one. Each tenant by the entirety holds the entirety of the real estate although divorce will convert such an estate into a tenancy in common. Upon the death of one spouse, the entire estate and interest belongs to the other spouse, not by virtue of survivorship but by reason of the title vested under the original limitation. See *Dorf v. Tuscarora Pipe Line Company, Ltd.*, 48 N.J.Super. 26 (App. Div. 1957). Real property held by spouses as tenants by the entirety may not be partitioned. See *Capital Finance Company of Delaware Valley, Inc.*, *supra* at 227.

account the noneconomic value of the property resulting from the real property's ancestral or historical significance to a family or the property's capacity to provide a place to live. The auction procedures for these forced sales are notorious for yielding sales prices well below market value, and, in many states cotenants that unsuccessfully resist such forced sales also are required to pay a portion of the attorney's fees and costs incurred by the cotenant petitioner in addition to their own attorney's fees. Finally, according to NCCUSL, unscrupulous real estate speculators often purchase small interests in family-owned tenancy-in-common property with the sole purpose of seeking court-ordered partition sales. A speculator thus could submit the winning bid in an auction sale even though that bid represents a fraction of the property's market value.

As a result of these problems, estate planners and real estate attorneys routinely advise clients to enter into privately negotiated tenancy-in-common agreements with their fellow cotenants or choose a different ownership structure such as a limited liability company.

The UHPHA provides coherent default rules that import preservation and wealth protection mechanisms already commonly used in the United States and elsewhere.<sup>3</sup> NCCUSL suggests inclusion of the act *as a part* of each state's existing partition statute. The act has yet to be adopted in any state although it has been approved by the American Bar Association sections on Real Property, Trusts & Estates and State & Local Government.

### Key Provisions of the UHPHA

Section 2 of the act defines key terms, which include "partition by sale", "partition in kind" and "heirs property". "Heirs property" is defined as real property held by tenants-in-common which, at the time of the filing of a partition action, satisfies the following requirements:

- (A) there is no agreement in a record binding all the cotenants which governs the partition of the property; [and]
- (B) one or more of the cotenants acquired title from a relative, whether living or deceased; and
- (C) any of the following applies:
  - (i) 20 percent or more of the interests are held by cotenants who are relatives; [or]
  - (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.

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<sup>3</sup> The act does not apply to real property that either is the subject of a written tenancy-in-common agreement containing a provision that governs the partition of the property or is owned under another form of ownership such as joint tenancy, a limited liability company or a partnership, trust or corporation. Tenancy-in-common property acquired by investors to qualify for federal like-kind exchange treatment under Section 1031 of the Internal Revenue Code is not covered by the act. Nor does the act apply to "first generation" tenancy-in-common property established under the default rules and still owned exclusively by the original cotenants, even if there is no agreement governing the partition of the property.

A “relative” is defined as “an ascendant, descendant, or collateral or an individual otherwise related to another individual by blood, marriage, adoption or law of this state other than this act.”

Section 3 of the act requires that a court first determine whether real property is heirs property. The section requires partition of heirs property in accordance with the act unless all of the cotenants otherwise agree to another method of partition. Section 6 requires the court to determine the fair market value of any heirs property by ordering an appraisal to be conducted by a disinterested state-licensed real estate appraiser. The appraiser estimates the fair market value of the property (assuming sole ownership of the fee simple estate) and then files the appraisal with the court, after which the court conducts a hearing to decide the fair market value. The court may consider other evidence of value offered by a party. All cotenants also may agree to the value of the property or to another method of valuation.

Section 7 of the act sets forth the procedures for a cotenant buyout of the property – the preferred alternative to partition by sale -- which are mandatory only for those cotenants who seek partition by sale. Section 8 sets forth additional alternatives to partition by sale. If all the interests of cotenants that requested partition by sale are not purchased by other cotenants pursuant to section 7, or if, after conclusion of the buyout, a cotenant remains that has requested partition in kind, unless the court finds that partition in kind will prejudice the cotenants as a group, the court shall order partition in kind. The act permits applying a standard of either “great prejudice” or “manifest prejudice”. Subsection c. provides for the payment of what is known in many states, including New Jersey, as owelty, i.e., the valuation difference in the real property after partition.<sup>4</sup>

Section 9 sets forth those factors a court should consider when determining whether partition in kind would result in prejudice to the cotenants as a group, including whether the property practicably can be divided among the cotenants, a cotenant’s sentimental or ancestral attachment to the property, the lawful use being made of the property by a cotenant, as well as the degree to which that cotenant would be harmed if the lawful use could not continue, and the extent to which the cotenants have contributed their pro rata share of the property taxes, insurance, and other expenses associated with maintaining ownership and upkeep of the property. The comment to this section states that “a court in a partition action must consider the totality of the circumstances, including a number of economic and noneconomic factors, in deciding whether to order partition in kind or partition by sale.”<sup>5</sup>

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<sup>4</sup> The Appellate Division stated in *Leonard v. Leonard*, 124 N.J. Super. 439, 442 (App. Div. 1973), that owelty is an amount of money that a cotenant will owe to the other cotenant, and which will equalize the partition, if one cotenant “receives property with a value greater than his proportionate share.”

<sup>5</sup> The comment also recognizes that after considering the factors, a court that decides to order partition in kind may not divide the heirs property in a manner that modifies the pre-partition, fair economic value of any cotenant’s ownership interest in the property unless owelty is also paid.

Section 10 sets forth the procedures for sale of heirs property. Unless the court finds a sale by sealed bids or an auction would be more economically sound and in the best interest of the cotenants as a group, the sale must be an open-market sale which may be conducted by a licensed real estate broker in a commercially reasonable manner at a price no lower than the determination of value, as provided by the court. The broker must file a report with the court in accordance with section 11. The remainder of the act (sections 4, 5, 12, 13 and 14) pertains to its applicability with other laws, impartiality of commissioners if appointed, service issues, the law's effective date and other administrative matters.

### Current New Jersey Law

Partition of real property is governed by statute and court rule. See N.J.S. 2A:56-1 et seq. and R. 4:63-1 through R. 4:63-4. Section 2A:56-2 provides that “[t]he superior court may, in an action for the partition of real estate, direct the sale thereof if it appears that a partition thereof cannot be made without great prejudice to the owners, or persons interested therein.” Rule 4:63-1 of the Rules Governing the Courts of the State of New Jersey provides that:

If in an action for partition or for the admeasurement of dower or curtesy, the court shall be satisfied that a division of the real estate can be made without great prejudice to the owners thereof, it may appoint one or more persons as commissioners to ascertain and report in writing the metes and bounds of each share; if not so satisfied, it may direct a sale or, in its discretion, if the action is one for dower or curtesy, an assignment from the rents and profits.

However, as stated by the New Jersey Supreme Court in its seminal case on the subject, *Newman v. Chase*, 70 N.J. 254 (1976), partition is an inherent equitable power of the court independent of statutory grant, for which “our courts of equity have not hesitated to exercise discretion as to the particular manner in which partition is effected between the parties.” 70 N.J. at 263. See also *Swartz v. Becker*, 246 N.J.Super. 406, 413 (App. Div. 1991) (although partition is a matter of statute, “it is also said to be an inherent power of the court’s equitable jurisdiction.”)

Generally, the right to partition in New Jersey is a remedial right that is construed liberally. The law favors partition in kind, and a court may order partition in kind regardless of the individual lot lines. However, courts have held that a partition in kind should not be ordered where it would be detrimental to the interests of the joint owners. See *Swartz v. Becker*, 246 N.J.Super. 406, 412 (App. Div. 1991).

Partition sales may be ordered if the court finds that the property is so situated that it is not suitable for a division by metes and bounds, or that partition in kind would be impracticable because of the small size of a party’s interest. *Swartz*, supra, p. 412. However, a sale is never ordered “unless a partition [division of the property] cannot be made without great prejudice to the interest of the owners, and this must be so determined by the court.” See *Davidson v. Thompson*, 22 N.J.Eq. 83, 83 (Ch. Div. 1871). See also *Swartz*, supra, p. 413 (“In sum, before a partition sale may be ordered, a finding is

usually required that a division cannot be made without prejudice to the parties, or that a sale will better promote the interest of the parties.”)

Applying equitable principles, New Jersey courts have been flexible in addressing claims for partition. For example, in *Reitmeier v. Kalinoski*, 631 F. Supp. 565 (D. N.J. 1986), the court, applying New Jersey state law, determined that New Jersey’s highest court would permit a partition in which one party took the entire property and compensated the other with an owelty. Further, the court, enunciating the principles set forth in *Newman*, determined that under the specific circumstances of the case, the equities favored allowing the plaintiff to retain the house for which partition was sought. Plaintiff had lived in and maintained the home for more than a year, had paid the mortgage and insurance costs for the home in substantial part, and had expressed the desire to continue to live in the house.

In *Baker v. Drabik*, 224 N.J. Super. 603 (App. Div. 1988), the court entered a judgment of partition where the parties were involved in a joint venture. The court reversed the lower court ruling that the defendant could remain as sole occupant in the property without payment to plaintiff of any owelty, instead permitting defendant, in lieu of a court-ordered sale, to purchase the plaintiff’s interest at the current fair market value less credits for payments already made by plaintiff. The court further ordered the appointment of an appraiser to determine the market value if the parties could not agree on a fair price. Defendant had primarily occupied the property for approximately ten years and had paid the majority of the mortgage and other maintenance expenses.

In *Leonard v. Leonard*, 124 N.J. Super. 439 (App. Div. 1973), the court, reversing the lower court decision, held that a sale of five noncontiguous properties owned by the parties as cotenants in common was not mandated by the fact that no one parcel was capable of physical partition. The court, after directing that the properties be appraised if the parties could not agree on their value, simply divided up all five properties, allotting to the husband the business property and the residence in which he resided, and allotting to the wife the three remaining properties with an owelty for the difference in value between the properties allotted to the husband and those allotted to her.

The *Leonard* court was persuaded by *Ierrobino v. Megaro*, 108 N.J. Super. 556 (Ch. Div. 1970), where the court held that when properties sought to be partitioned “consist of separate and distinct parcels, the whole may be treated as one estate for the purpose of making division and allotment where no injustice results. Thus, one tract may be allotted to one party and another to another . . . or the share to which a party is entitled may be set off to him entirely out of one of several tracts if the rights of the other parties are not thereby prejudiced.” p. 561. Accordingly, partition in New Jersey may be affected by the appropriate allotment of separate parcels of realty.<sup>6</sup>

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<sup>6</sup> The *Reitmeier* court also discussed compensation of cotenants in partition situations. The general rule is that absent “ouster”, a cotenant out of possession of the property is not entitled to an accounting for use and occupancy by the tenant in possession of the property. Thus, a tenant who excludes the cotenant from the premises, either by taking sole possession of the premises that are not capable of joint occupation and thus “ousting” the cotenant, or expressly refusing access to the cotenant, is entitled to an accounting for the use

New Jersey law further provides that the burden of proof to establish the necessity for a partition sale, rather than a partition in kind, is on the party alleging the necessity and advisability of the sale. See *Gombosi Kingwood Farms, L.L.C. v. Gombosi*, 2005 WL 2219482 (Ch. Div. 2005) (unpublished opinion); *Swartz v. Becker*, 246 N.J. Super. 406, 411 (App. Div. 1991).

An independent commissioner, who may be appointed in accordance with our court rules to evaluate how partition should be implemented, whether in kind or by sale, will make findings and report to the court. See *Gombosi Kingwood Farms, L.L.C. v. Gombosi*, 2005 WL 2219482 (Ch. Div. 2005) (unpublished opinion); R. 4:63-1. Where partition is granted as a remedy, the parties also have a right to an evidentiary hearing to challenge the commissioner's report and the right to interest on any delayed owelty payment ordered by the court. *Prostak v. Prostak*, 257 N.J. Super. 75, 82 (App. Div. 1992) ("The commissioner's report and the valuation figures of his appraiser are subject to challenge in an evidentiary hearing if they have been placed in legitimate dispute by an offer of contrary proof or demonstrated internal weakness.")

Although other New Jersey cases have consistently followed the principles set forth in *Newman* and *Swartz*, none of the cases cited above (and no case discovered in Staff's partition research), specifically discusses heirs property as defined under the act. In a series of cases, the New Jersey Supreme Court has ordered that a constructive trust be imposed against an heir hunter and in favor of a claimant seeking to foreclose tax sale certificates or to quiet title. In each case, the heir hunter had uncovered and made agreements with lost heirs in order to gain an economic advantage at the expense of the innocent claimant.<sup>7</sup>

### Recommendation

After deliberation, the Commission decided not to recommend adoption of the UPHPA in New Jersey. The Commission considered the goals of the UPHPA in light of

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and occupancy of the resident cotenant. See also *Lohmann v. Lohmann*, 50 N.J. Super. 37 (App. Div. 1958). Although the *Reitmeier* court found no ouster here, the court ordered the defendant to contribute "for the additional risk which will devolve solely upon [plaintiff]" by virtue of his assuming the mortgage, explaining that New Jersey courts generally allow cotenants in possession a contribution from their fellow cotenants for mortgage payments, taxes, necessary repairs, maintenance, carrying charges and insurance.

<sup>7</sup> For example, in *Wattles v. Plotts*, 120 N.J. 444 (1990), the plaintiff sought to foreclose tax sale certificates on a 6.21 acre parcel of vacant land adjacent to land owned by his family. Before entry of a default judgment against "unknown heirs", an heir hunter, National Asset Recovery, uncovered out-of-state heirs of the last record owner and entered into an agreement with the heirs providing that, if the heirs were successful in upsetting the tax foreclosure and obtaining title, National would arrange the sale of the property and divide the net profits of sale with them. The Supreme Court, upholding the lower courts' determination that the heirs had the right to redeem the property, imposed a constructive trust on National's interest in favor of the plaintiff. Plaintiff and the heirs were ordered to reimburse National for its reasonable expenses under the contract before distribution of any sale proceeds. The Supreme Court relied upon the *Wattles* holding in *O & Y Bridge Development Corp. v. Continental*, 120 N.J. 454 (1990) in which the Court reached a the same result on similar facts. Both cases relied on an earlier holding in *Bron v. Weintraub*, 42 N.J. 87 (1964) where the Court imposed a constructive trust on an heir hunter's interest in favor of an innocent homeowner.

current New Jersey law, recognizing that New Jersey law already protects tenant-in-common property owners -- including family members who share ownership of family-owned property -- from the forced partition sale of their real property and from heir hunters. The equitable concepts in the UHPA already are an integral part of the fabric of New Jersey jurisprudence. New Jersey courts have long applied many of the principles enunciated in the act to partition claims generally.

Indeed, New Jersey courts do not automatically implement partitions by sale; they have consistently and coherently fashioned equitable remedies to fit the circumstances before them, including buyouts by one cotenant of another and the division of noncontiguous parcels between cotenants. When a New Jersey court does order a partition by sale, appraisals are used in order to determine fair market value (in the event the parties cannot otherwise agree on the property's value) and open-market sales are ordered in order to fairly dispose of the property. The concepts of owelty and ouster also are weighed and implemented, as appropriate, in fairness to all parties.

Staff also consulted with property title experts who did not believe that the concerns with heirs property were prevalent in New Jersey. Although an issue concerning "heir hunting" was raised, whereby a company that seeks out unknown heirs acquires parcels of real property upon which tax sale certificates are issued and then uses partition as a remedy to bring the parcels to market, heir hunters have not been tolerated in New Jersey. Over the course of almost forty years, our Supreme Court has repeatedly imposed constructive trusts on the interests of heir hunters in favor of the innocent claimants seeking to exercise their rights in these disputed properties.