

To: New Jersey Law Revision Commission
From: Staff
Re: Uniform Partition of Heirs Property Act
Date: January 10, 2011

MEMORANDUM

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 Prefatory Note explains that the act addresses a “widespread, well-documented problem faced by many low to middle-income families across the country who have been dispossessed of their real property and much of their real property-related wealth over the past several decades as a result of court-ordered partition sales of tenancy-in-common properties.” This memorandum examines the UPHPA and whether the Commission should recommend its adoption by the Legislature.

OVERVIEW

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 legitimate rights of each cotenant to secure his, her, or its relative share of the current market value of the property and to seek 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 some or all of the land and another cotenant wishes the property to be sold.¹ Overall, the Act seeks to improve the law of partition by ensuring that each cotenant in a partition action involving family-owned tenancy-in-common property “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).² According to NCCUSL, what many

¹ 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” although this designation may cover property acquired by gift or even purchase. “Heirs property” is a defined term in the act.

² 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); *Capital Finance Company of Delaware Valley, Inc. v. Asterbadi, et al.*, 389 N.J.Super. 219 (Ch. Div. 2006). Real property held by spouses as

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. NCCUSL is especially concerned with a non-family member seeking to divest a family member of ownership of property by forcing a partition by court-ordered sale. However, the uniform law does not alter the right of a cotenant to seek to partition the property, even if the cotenant only recently acquired an interest in property owned over a long time period by related cotenants or the cotenant's interest in the property is very small.

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. According to NCCUSL, 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 in cases where the property could have been divided, the majority of cotenants opposed partition by sale, or the only remedy sought by a cotenant 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 account the noneconomic value of the property -- which may be substantial -- resulting from the real property's ancestral or historical significance to a family or because of the property's capacity to provide a place to live. In addition, the auction procedures for these forced sales are notorious for yielding sales prices well below market value. In many states cotenants that unsuccessfully resist a court-ordered partition by sale also are required to pay a portion of the attorney's fees and costs incurred by the cotenant petitioner in addition to the attorney's fees they must pay their own attorneys.

Finally, according to NCCUSL, unscrupulous real estate speculators, seeing an opportunity to take control, 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 the winning bid represents a fraction of the property's market value.

As a result of these various 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 uniform law provides coherent default rules that import preservation and wealth protection mechanisms already in common use in the United States and in other countries. The law does not apply to real property that either is the subject of a written tenancy-in-common agreement containing a provision that governs

tenants by the entirety may not be partitioned. See *Capital Finance Company of Delaware Valley, Inc.*, *supra* at 227.

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.³

The UHPA is suggested for inclusion by NCCUSL *as a part* of each state's existing partition statute. It has yet to be adopted in any state although it has been approved by the American Bar Association sections on Real Property, Trusts and Estates and State and Local Government.

A SUMMARY OF KEY PROVISIONS OF THE UHPA

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.

Joint tenancy property is not covered by the act. Once a joint tenancy is severed, in accordance with the requirements of state law, the act may apply if the property is determined to be heirs property at the time of the filing of a partition action even if two or more individuals who had formerly been joint tenants prior to severance of the joint tenancy remain joint tenants after severance.

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. The comment to the section notes that a final order in a partition action filed on or after the date the act becomes effective is subject to challenge if the court fails to determine whether the real property in question is heirs property as defined under the act.

³ 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 among the cotenants governing the partition of the property.

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, which are mandatory only for those cotenants who seek partition by sale. Cotenant buyout is the first preferred alternative to partition by sale in order to promote judicial economy, encourage consolidation of ownership, and establish a statutory approach to partition of inherited property that mirrors practices used by wealthy and legally savvy family property owners.

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 gives an option for 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.⁴

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, among other things, 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.”⁵

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. This

⁴ 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.”

⁵ 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 permits the cotenants or the court to select a licensed real estate broker (or the court will appoint one) to 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. 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 of the property 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 the highest court of New Jersey 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 tenants in common 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 between the parties: the husband was allotted the business property and the residence in which he resided, and the wife was allotted 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 where 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.⁶

⁶ 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

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.")

Other New Jersey cases have consistently followed the principles set forth in *Newman* and *Swartz*. However, none of the cases cited in this memorandum (and no case discovered in Staff's research on partition), specifically discusses heirs property, as that term is defined under the Uniform Act.

DISCUSSION OF UHPA AND NEW JERSEY LAW AND CONCLUSION

Staff is not convinced at this time that adoption of the UHPA is either necessary or beneficial in New Jersey.

New Jersey courts have long applied equitable principles to partition actions and already apply many of the principles enunciated in the act to partition claims generally. Clearly our State courts, in response to partition claims, do not automatically implement partitions by sale. Our courts consistently and coherently fashion equitable remedies to fit the circumstances before them.

If a court does order a partition by sale, New Jersey case law already supports the use of appraisals in order to determine fair market value in the event the parties cannot

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 and occupancy of the resident cotenant. See *Lohmann v. Lohmann*, 50 N.J. Super. 37 (App. Div. 1958). The *Reitmeier* court, however, denied the defendant compensation for use or occupation of the property, having determined that exclusive possession of the property by a cotenant claiming the property as its own is not an ouster unless there first is a claim for access by the cotenant out of possession that is refused by the tenant in possession, which, in this case, was never made. 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.

otherwise agree on the property's value. The concepts of owelty and ouster also are weighed and implemented, as appropriate, in fairness to all parties.

Most important, however, it is not clear whether New Jersey even faces the problems addressed by the act. There are no reported (or identified unreported) New Jersey partition cases that mention heirs property, as that term is defined in the Uniform Act, and real property title experts consulted by Staff are unfamiliar with the concept of heirs property or the concerns addressed by the act. For these reasons, Staff does not recommend adoption of the UHPA.