



The Judiciary, State of Hawaii

Testimony to the House Committee on Consumer Protection and Commerce

Representative Angus L.K. McKelvey, Chair
Representative Derek S.K. Kawakami, Vice Chair

Monday, March 11, 2013, 2:00 p.m.
State Capitol, Conference Room 325

WRITTEN TESTIMONY ONLY

by
Lori Okita
Chief Court Administrator, First Circuit

Bill No. and Title: Senate Bill No. 499, S.D. 1, Relating to Partition of Heirs Property.

Purpose: Adopts Uniform Partition of Heirs Property Act. Establishes procedures and remedies for use in actions for partition of real property involving heirs property (real property held in tenancy in common that meets certain requirements).

Judiciary's Position:

This measure adds a new chapter to Hawaii Revised Statutes entitled the Uniform Partition of Heirs Property Act that sets forth a protocol for circuit court civil cases where partition of real property is sought.

The Judiciary takes no position on the merits of this measure. S.B. 499, S.D. 1 appears to address the Judiciary's concerns that the bill as introduced placed full responsibility on the court to provide notice of various events in the course of a proceeding involving heirs property. Generally the parties in a civil case are responsible for giving notice and the court determines whether the notice requirements have been satisfied.

Thank you for the opportunity to testify on S.B. 499, S.D. 1.

**TESTIMONY OF THE
COMMISSION TO PROMOTE UNIFORM LEGISLATION**

ON S.B. NO. 499, S.D. 1

RELATING TO PARTITION OF HEIRS PROPERTY

**BEFORE THE HOUSE COMMITTEE ON
CONSUMER PROTECTION & COMMERCE**

DATE: Monday, March 11, 2013, at 2:00 p.m.
Conference Room 325, State Capitol

PERSON(S) TESTIFYING: LANI L. EWART or PETER HAMASAKI,
Commission to Promote Uniform Legislation

To Chair McKelvey, Vice Chair Kawakami, and Members of the Committee:

My name is Lani Ewart, and I am testifying on behalf of the Commission to Promote Uniform Legislation (the “Commission”), on S. B. No. 499, S.D. 1, Relating to **PARTITION OF HEIRS PROPERTY**.

The Commission supported the original version of S. B. No. 499 which was the **Uniform Partition of Heirs Property Act** (the “Act”) promulgated by the Uniform Law Commission in 2010 to provide a fair, common-sense solution to the risks posed to those who own “heirs property”. The Act establishes a hierarchy of remedies which are designed to protect a family’s property holdings and their real property wealth to the extent practicable for partition actions involving heirs property. Overall, the Act provides cotenants with many of the protections and rights commonly found in private agreements governing the partition of tenancy-in-common property. The Act does not displace existing partition law for non-heirs property, it does not prohibit a party from petitioning for a partition by sale, and it does not apply to situations where all the cotenants have a written agreement relating to partitioning their property.

“Heirs property” is defined in the Act as real property that is held under a tenancy in common in which there is no binding agreement among the cotenants governing partition of the property. Additionally, one or more of the cotenants must have acquired title from a relative, and one of the following conditions must be true:

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- 20% or more of the interests are held by cotenants who are relatives; or
- 20% or more of the interests are held by an individual who acquired title from a relative; or
- 20% or more of the cotenants themselves are relatives.

In a tenancy-in-common, any cotenant may sell his or her interest without the consent of the other cotenants, making it easy for non-family members – including real estate speculators – to acquire an interest in the property. In a tenancy-in-common, any cotenant may file an action with the 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 equal value and gives each cotenant full ownership of an individual share. However, if the cotenants cannot agree on parcels of equal value, the court will often order a partition-by-sale, whereby the property is sold as a single parcel and the cash distributed to the cotenants in equal shares. In many cases of heirs property, the partition-by-sale resulting from a court action initiated by a non-family cotenant often brings a price well below the market value and the family members lose their most valuable asset.

If heirs property is the subject of the partition action, the Act uses a 5-step process to ensure all owners of heirs property are treated fairly when one or more cotenants wish to sell their share:

1. The cotenant requesting the partition must give notice to all of the other cotenants.
2. The court must order an appraisal to determine the property's fair market value. If any cotenant objects to the appraised value, the court must hold a hearing to consider other evidence.
3. Any cotenant (except the cotenant who requests partition) may buy the interest of the selling cotenant at the court-determined fair market value. The cotenants 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 cotenant elects to buy the selling co-tenant's share, the court will prorate the seller's share among the buyers according to their existing fractional ownership percentages.

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4. If no cotenant elects to purchase the selling cotenant's share, 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. The Act specifies the factors a court must consider when determining whether partition-in-kind is appropriate.

5. If partition-in-kind is not appropriate 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 cotenants as a group, the court may order a sale by one of those methods.

In summary, the Act preserves the right of a cotenant to sell his or her interest in inherited real estate, while ensuring that the other cotenants will have the necessary due process to prevent a forced sale: notice, appraisal, and right of first refusal. If the other cotenants 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.

The Commission has had discussions with attorneys, a representative of the Judiciary and others who have expressed some reservations about various provisions of the Act. The Commission understands that the amendments to the Act made in S.D. 1 were based, in part, on suggestions from Judiciary in order clarify some of the procedures required under partition actions involving heirs property. However, the amendment which requires that a motion to be made by a party before heirs property procedures are applicable to a partition action goes against the heart of the Act. Because the defending family members in partition actions often cannot afford and do not have counsel and may not understand what rights they have under the partition action, the Act was purposely drafted so that the court should determine, as a jurisdictional matter, whether the property in question is heirs property. The Commission would want to further amend S. B. No. 499, S.D. 1 to revert to the original requirement that the court makes the initial determination that the partition action involves heirs property.

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We wish to continue to work with all interested parties on that that issue and others, but we realize that we may not be able to resolve all matters and have a further amended bill before the end of this legislative session. The Commission, therefore, respectfully requests that S. B. No. 499, S.D. 1 relating to the partition of heirs property be passed by this Committee to the House Judiciary Committee and to be held there pending further discussions by the Commission with interested parties and our reaching an agreement as to an acceptable bill.

Thank you for the opportunity to testify on S. B. No. 499, S.D. 1.