

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

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

RELATING TO PARTITION OF HEIRS PROPERTY

**BEFORE THE HOUSE COMMITTEE ON
JUDICIARY**

DATE: Friday, January 24, 2014, 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 Rhoads, Vice Chair Har, 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”), in support of S. B. No. 499, S.D. 1, H.D. 1, Relating to **PARTITION OF HEIRS PROPERTY**.

In 2010, the Uniform Law Commission promulgated the **Uniform Partition of Heirs Property Act** (the “Act”) 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 Act has been enacted in Nevada, Georgia and Montana, and so far this year has also been introduced in the legislatures of South Carolina and the District of Columbia.

H.D. 1 of S. B. No. 499 has removed the reservations we had to S. B. No. 499, S.D. 1, and we now support the passage of S. B. No. 499, S.D. 1, H.D. 1. However, the Commission has had discussions with attorneys and others, including the Judiciary, who have expressed some reservations about various provisions of the Act. The Commission understands that there is a desire to clarify some of the procedures required under partition actions involving heirs property and will be working with interested parties to reach an agreement as to an acceptable bill.

Thank you for the opportunity to testify in support of S. B. No. 499, S.D. 1, H.D. 1.



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ATTACHMENT 1
Judiciary Testimony
on SB499, SD1, HD1
JUD Hearing 1/24/14

The Judiciary, State of Hawaii

Testimony to the Senate Committee on Judiciary and Labor

Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

Friday, February 15, 2013, 10:00 a.m.
State Capitol, Conference Room 016

WRITTEN TESTIMONY ONLY

by
Lori Okita
Chief Court Administrator, First Circuit

Bill No. and Title: Senate Bill No. 499, 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, but has concerns with the costs of uniquely placing the responsibility on the courts to give notice. Generally, the parties in a civil case are responsible for giving notice and the court will determine whether the notice requirement has been satisfied. Notice requires postage, staffing and other resources.

Within the new chapter, under § -6 Determination of value, unless all cotenants agree to the value of the property or agree to a method of valuation other than appraisal, the court must order an appraisal to determine the fair market value of heirs property, unless the court determines that the cost of an appraisal outweighs its evidentiary value.



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If the court orders an appraisal to be conducted, the appraiser must file the appraisal with the court. Thereafter, a *notice must be sent to each party with a known address*, stating 1) the appraised fair market value of the property; 2) that the appraisal is available at the clerk of the court's office; and 3) that a party may object to the appraisal. Not earlier than thirty days after a copy of the notice of appraisal is sent to each party, the court conducts a hearing to determine the fair market value of the property, whether or not an objection to the appraisal is filed. After the hearing, the court determines the fair market value of the property, and *notice of the value must be sent to the parties*.

If the court determines that the cost of an appraisal outweighs its evidentiary value, the court determines fair market value after an evidentiary hearing without an appraisal. After the hearing, the court determines the fair market value of the property, and *notice of the value must be sent to the parties*.

Within the new chapter, under § -7, Cotenant buyout, if, after the court determines fair market value, any cotenant requests partition by sale, *notice must be sent to the parties* that any cotenant (other than a cotenant or cotenants who requested partition by sale) may buy the interest of the cotenant(s) who requested partition by sale.

If no cotenant elects to buy all the interests of the cotenants who requested partition by sale, *all the parties must be notified* of the fact that no cotenant elects to buy all the interests of the cotenants who requested partition by sale.

If only one cotenant elects to buy all the interests of the cotenants who requested partition by sale, *all the parties must be notified* of the fact that only one cotenant elected to buy the interests of the cotenants who requested partition by sale. If more than one cotenant elects to buy all the interests of the cotenants who requested partition by sale, *all of the parties must be notified* of the fact that the court allocates the right to buy those interests among the electing cotenants based on each electing cotenant's existing fractional ownership of the entire parcel divided by the total existing fractional ownership of all cotenants electing to buy, and must be notified of the price to be paid by each electing cotenant. If one or more cotenants elects to buy all the interests of the cotenants who requested partition by sale, the court sets a date by which electing cotenants must pay their apportioned price into the court. After this date, if one or more but not all the electing cotenants fail to timely pay their apportioned price, on motion to the court, *notice of the interest remaining and the price of all of that interest must be given to the electing cotenants who paid their apportioned price*.

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pre-addressed envelopes for the court to use to send such notice. Such a procedure is provided in subsection -7(e)(3) of the H.D. 1 version, which in part states:

...
Unless otherwise ordered by the court, for any notice that the court is required to give *pursuant to this paragraph*, the movant for notice to be given to electing cotenants pursuant to this paragraph shall deliver to the chambers of the presiding judge a notice in blank to be completed by the court with sufficient copies for service on the electing cotenants along with envelopes stamped with sufficient postage and addressed to each electing cotenant. The court may direct the movant to provide notice of the value by any other means.

(emphasis added).

The Judiciary recommends that the above procedure as outlined in subsection -7(e)(3) of the current H.D. 1 draft be adopted and included in other sections of this chapter as applicable. The Judiciary further recommends that if this bill is further amended, it should be reviewed for consistency when referring to any such instances that require the court to provide the notice.

Alternatively, the Committee may wish to consider an amendment to the bill to create a “stand-alone” section of the chapter that incorporates the above procedure, but that would apply to any instances within the chapter for which the court is required to give notice.

Attachment 1, the Judiciary’s testimony on SB499 submitted in 2013, provides further detail related to the Judiciary’s position regarding notice requirements outlined in the bill, as introduced.

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