

# Estate Planning

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## The Uniform Partition of Heirs Property Act: What Estate Planners Need to Know

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The Uniform Partition of Heirs Property Act (UPHPA) is a model statute designed to address the myriad inequalities faced by lower- to middle-class families who own real property as tenants in common when a partition action is filed. Many states have begun to adopt the provisions of the UPHPA, and it is important to understand the new requirements placed upon the court and parties to a partition of a tenancy in common. A prudent estate planner may utilize this Study to understand the basics of the UPHPA and the purposes behind the adoption of the technical rules that have been put into place to better serve their clients.

- When does the UPHPA apply?
- Preliminary compliance steps
- Buyout and partition options

### A. Introduction

Currently, there are 16 states and the Virgin Islands that have adopted a version of the Uniform Partition of Heirs Property Act (UPHPA): Alabama, Arkansas, Connecticut, Florida, Georgia, Hawaii, Illinois, Iowa, Missouri, Montana, Nevada, New Mexico, New York, South Carolina, Texas, and Virginia. As of July 1, 2020, legislators in the states of Indiana, Massachusetts, Mississippi, Nebraska, New Jersey, and West Virginia, as well as in the District of Columbia, have introduced legislation proposing the adoption of the UPHPA.

As explained by the Uniform Law Commission, the UPHPA:

*helps preserve family wealth passed to the next generation in the form of real property. Affluent families can engage in sophisticated estate planning to ensure generational wealth, but those with smaller estates are more likely to use a simple will or to die intestate. For many lower- and middle-income families, the majority of the estate consists of real property. If the landowner dies intestate, the real estate passes to the landowner's heirs as tenants-in-common under*

*state law. Tenants-in-common are vulnerable because any individual tenant can force a partition. Too often, real estate speculators acquire a small share of heirs' property in order to file a partition action and force a sale. Using this tactic, an investor can acquire the entire parcel for*



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*a price well below its fair market value and deplete a family's inherited wealth in the process. UPHPA provides a series of simple 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 all parties receive their fair share of the proceeds.*

This Study provides an overview of the workings of the UPHPA so estate planners will know when compliance is required and then know how to act accordingly. Note that states often “tinker” with the UPHPA, so each state’s particular enactment must be reviewed.

## B. When Does UPHPA Apply?

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Compliance with the UPHPA is required if the property being partitioned qualifies as heirs property unless all of the cotenants agree otherwise in a writ- ten or electronic record.<sup>2</sup> The term “heirs property” does not limit the property to those cotenants who have acquired their real property through intestacy. Instead, the UPHPA utilizes this language for its colloquial reference to anyone holding as tenants in common regardless of the mode of acquisition.<sup>3</sup> Property is heirs property when all of the following requirements are satisfied:

1. The property is real property. The UPHPA does not apply to co-owned personal property, regardless of its value.
2. The property is held as tenants in common. The UPHPA does not apply to property held as joint tenants with rights of survivorship.
3. There is no prior written or electronic agreement binding all of the cotenants which governs the partition of the property.
4. At least one cotenant acquired title from a relative, whether living or deceased. Relatives include ancestors, descendants, and collaterals, whether related by blood, marriage, or adoption.<sup>4</sup> The UPHPA does not apply to tenancies in common where none of the cotenants acquired title from a non- relative.
5. At least one of the following ownership requirements is satisfied:
  - 20% or more of the interests are held by relatives who are cotenants, 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 are relatives.<sup>5</sup>

Accordingly, the UPHPA may apply when only a small fraction of the property is co-owned by relatives. For

example, if there are 10 cotenants, only two are related, and only one acquired title from a relative, the UPHPA is triggered even though eight of the owners are strangers to each other and to the other two owners. However, there are also other instances where the entire property is owned by cotenants who are relatives, yet the UPHPA will not apply because of an existing binding agreement between all the cotenants.

## C. Preliminary Compliance Steps

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### 1. Applicability

When receiving an action to partition real property, the court must make a determination whether the property is heirs property. Upon determination that the property meets the definition of heirs property, the court must partition pursuant to the UPHPA.<sup>6</sup> The only instance where the court will not apply the UPHPA to a partition of heirs property is if all cotenants create an agreement regarding the method of partitioning the property and that method of partition is placed into the record.<sup>7</sup>

### 2. Service of Process

The UPHPA does not normally limit or affect the method of service.<sup>8</sup> However, if service is by publication, the plaintiff in a partition action has the obligation within 10 days of when the court determines the property to be heirs property to post a conspicuous sign on the property which states that the action has commenced and provides the name and address of the court as well as the common designation by which the property is known. The court may also require the plaintiff to include his or her name on the sign along with the names of the known defendants. The plaintiff must maintain this sign during the entire time the action is pending.<sup>9</sup>

### 3. Commissioners

If the court appoints commissioners, they “must be impartial and may not be a party to or a participant in the action.”<sup>10</sup> Take note that depending upon the jurisdiction, commissioners may be referred to by different names.<sup>11</sup>

### 4. Determination of Value

In a normal case, the court must ascertain the fair market value of the property by ordering an appraisal.<sup>12</sup> The UPHPA requires the court to appoint a single disinterested appraiser to determine the fair market value of the property.<sup>13</sup> However, depending upon the jurisdiction, there may be additional procedures, such as requiring an additional disinterested appraiser or requiring the appraiser to be state certified and in good standing with the state appraisal authorities.<sup>14</sup>

Once assigned, the appraiser must determine the value of the property assuming the property is in sole ownership in fee simple absolute.<sup>15</sup> In other words, fractional interest discounts are not permitted. The appraiser must file a sworn or verified appraisal with the court.<sup>16</sup>

There are several situations where the court does not need to follow the appraisal process. The first is when all cotenants agree on a method for determining the value of the property.<sup>17</sup> However, the court cannot adopt a monetary value found by agreement of cotenants if any cotenants are missing, unknown, un-locatable, or otherwise remain unascertained.<sup>18</sup>

The second is when cotenants agree to the method of determining valuation.<sup>19</sup> Cotenants may not want the expense of a full appraisal and may submit a less expensive method of determining the value of the property to the court.<sup>20</sup> For example, cotenants could hire real estate brokers to give an opinion on the value of the property and average the amounts listed in the opinions to determine total value of the property.<sup>21</sup> However, the court may not accept an agreement that leaves out unknown, un-locatable, or otherwise unascertained cotenants.<sup>22</sup>

The third and final situation that the court deviates from the normal UHPHA provisions for ascertaining the value of the property is when the court determines that the costs of an appraisal outweighs its evidentiary value.<sup>23</sup> If the court determines the appraisal's cost outweighs its value, then the court determines the fair market value of the property after an evidentiary hearing.<sup>24</sup>

## 5. Notice of Appraised Value

Unless one of the exceptions listed above applies, the court (not the plaintiff) must send notice to each party who has a known address not later than 10 days after the appraisal is filed. The appraisal must include (1) the appraised fair market value, (2) a statement that the appraisal is available for inspection at the clerk's office, and (3) an explanation that a party has 30 days from the date the court sends the notice to file an objection to the appraisal. The objection must state the ground upon which the objection is based.<sup>25</sup>

If the parties agreed to a method upon determining valuation or provided the court with an agreed valuation, then no notice is required as all parties must have been included in the agreement and have received notice. If the court determined that an appraisal's costs outweighed its benefits and held an evidentiary hearing, then the court must send notice of the determined value to all parties.<sup>26</sup>

## 6. Hearing on Appraisal

After 30 days or more have elapsed since the filing of the appraisal and a copy of the notice of the appraisal is sent to each party, the court must conduct a hearing to determine the fair market value of the property.<sup>27</sup> The court must conduct a hearing regardless of whether it receives an objection to the appraisal by one of the parties.<sup>28</sup> The court may consider evidence of value any party provides in addition to the appraisal.<sup>29</sup> After the hearing and before considering the merits of the partition action, the court must send notice of its value determination to all parties.<sup>30</sup>

## D. Buyout Rights & Partition Options Under the UHPHA

### 1. Cotenant's Buyout Rights

#### a. Notice to Parties

After the determination of value, the court must send notice to the parties (except the party requesting partition by sale) that any cotenant may purchase all the interests of the cotenants who requested partition by sale.<sup>31</sup> The buyout process is mandated only for those cotenants who petition the court to partition the property by sale as they are ready to be divested of their ownership of the land. The UHPHA does not mandate a cotenant who petitions the court for a partition in kind to the buyout process, as the cotenant may still want to have an interest, just one that is separate from the other cotenants.<sup>32</sup>

The purpose of informing the parties of the option to buy out portions of the property is an attempt by the UHPHA to allow property to remain in the hands of relatives and those who have a current stake in the property. Further, while the costs of purchasing the whole property are usually high and unattainable for a lower- to middle-class property owner, the UHPHA assumes that the buyout portion is small enough to allow enough cotenants to purchase proportional amounts and prevent partition by sale.<sup>33</sup> Additionally, the UHPHA provisions are designed with judicial economy in mind as the buyout portion of the act will take only an estimated four to six months.<sup>34</sup>

#### b. Exercise of Buyout Right

Not later than 45 days after the notice, any cotenant (except the cotenant requesting partition by sale) may give notice to the court that the cotenant is exercising his or her right to purchase all the interests of the cotenants requesting partition by sale.<sup>35</sup> The amount a cotenant exercising the buyout right must pay for the share of the cotenant requesting partition is the court-

determined value multiplied by the cotenant's fractional ownership of the entire parcel. Thus, if the value of the property is \$100,000 and the cotenant who seeks partition owns 20%, the cotenant exercising the buyout right would pay \$20,000.<sup>36</sup>

If more than one cotenant elects to exercise the buyout right, the court will allocate the inter ownership of the entire parcel divided by the total fractional ownership of all cotenants making the buyout election. For example, assume that Cotenant A owns 10% and Cotenant B owns 30% of the total property, so together they own 40% of the property. Cotenant A would purchase 25% (10/40) of the share of the cotenant who sought partition, and Cotenant B would purchase 75% (30/40) of that share.<sup>37</sup>

In all cases, the court must give notice to all parties of the result of the elections.<sup>38</sup> If no cotenant elects the buyout option, the court must inform all parties of that fact and then resolve the partition action under §§ 8(a) and (b) of the UHPA.<sup>39</sup>

### **c. Payment for Property**

A cotenant who elects the buyout option must pay for the property by a date set by the court which may not be earlier than 60 days after the court sends the notice. In other words, a purchasing cotenant has at least 60 days to come up with money and pay it into the court.<sup>40</sup>

If all the purchasing cotenants timely deposit their money with the court, the court will allocate the funds and distribute them to the cotenants who requested partition.<sup>41</sup>

If none of the purchasing cotenants timely deposit their money with the court, then the court will resolve the partition action under §§ 8(a) and (b) of the UHPA.<sup>42</sup> The result of none of the purchasing parties depositing their money is the same as if no parties had elected to buy out under UHPA § 7(d)(3).

If some but not all purchasing cotenants timely deposit their money with the court, the court will notify the cotenants who timely paid of the interest remaining and its cost.<sup>43</sup> Not later than 20 days thereafter, the timely paying cotenants may opt to purchase the remaining interest left on the buyout property by the parties who did not pay their buyout deposit. Once the 20 days elapses, the court follows different steps depending on whether only one cotenant pays the entire price, no cotenant elects to pay the entire price, or more than one cotenant pays

the entire price.

If only one cotenant paid for the remaining interest, then the court will issue an order reallocating the remaining buyout to that cotenant and avoid partition of the whole property.<sup>44</sup>

If no cotenant pays for the remaining interest, the court will be forced to return the deposits of the cotenants who pursued the buyout option and proceed under §§ 8(a) and (b) of the UHPA.<sup>45</sup>

If multiple cotenants pay the entire price for the remaining interest, then the court will apportion the remaining interests according to the purchasing parties' original fractional ownership.<sup>46</sup> To illustrate, assume that Cotenants A, B, and C are buying out the interest of Cotenant D who has a fractional ownership of 10%. Also assume that Cotenant A has a fractional ownership interest of 40%, Cotenant B has an interest of 20%, and Cotenant C has an interest of 5%. If the property has a value of \$100,000, the first buyout deposits would amount to A paying \$6,153.84 (40/65\*10,000), B paying \$3,076.92 (20/65\*10,000), and C paying \$769.23 (5/65\*10,000). If upon the deadline to place deposits Cotenant B does not put down his money, but Cotenants A and C do, then A and C can elect to purchase B's buyout and a further pro rata share. Accordingly, if A and C elect to purchase the remainder of the interest and place a deposit, Cotenant A will have to deposit \$2,735.04 (40/45\* 3,076.92) and Cotenant C will have to deposit \$341.88 (5/45 \* 3,076.92). Upon the completion of the deposits, the court will order the interests to be reapportioned and notify all cotenants.<sup>47</sup>

If any cotenant overpaid as the result of the reallocations that occurred, the court must promptly refund any excess payment.<sup>48</sup>

### **d. Sale of Shares of Non-Responding Cotenants**

Not later than 45 days after the court gives notice that any cotenant may purchase all the interests of the cotenants who requested partition by sale, a cotenant entitled to purchase may request the court to authorize the sale of the shares of the cotenants who were named as defendants and served with the complaint, but who did not appear in the action.<sup>49</sup>

The court must conduct a hearing on this request, after which the court may deny the request or authorize the sale on terms which the court determines are fair and reasonable. However, the sale cannot occur until all purchasing cotenants have completed purchase of the

buyout interests. The purchase price for the interest of the non-appearing cotenants is based upon the determination of the court using the appraisal process discussed above.<sup>50</sup>

The effect of the UHPA is to grant the court the discretionary power to conduct a secondary buyout. The purpose of allowing for this secondary buyout is to consolidate the property and make it easier for a partition in kind in the future. Further, it helps give the property greater value, as only active parties have an interest in the property, rather than if cotenants who are unknown, un-locatable, or indifferent were able to maintain an interest.<sup>51</sup>

However, it is important to remember that the UHPA cautions the courts from immediately allowing this secondary buyout option, because many lower- to middle-class real property owners may not be aware of an action taking place or do not understand the need to participate in the action. As it is the mission of the UHPA to protect these lower- to middle-class property owners from losing their property due to a lack of knowledge, Comment 4 of the UHPA urges the court to consider these parties and may indicate that motions for a secondary buyout under § 7(g) and (h) are less likely to be treated favorably by the court.<sup>52</sup>

## 2. Partition Options

### a. In Kind

The partition in kind remedy may be available if either (1) all of the interests of the cotenants who requested partition are not purchased by the other cotenants, or (2) a cotenant remains who prefers a partition in kind. The court will then order partition in kind unless the court finds that partition in kind would result in substantial prejudice to the cotenants as a group.<sup>53</sup> The court must consider the following factors under UHPA § 9(a) in determining whether a partition in kind would result in substantial prejudice and cannot consider any one factor “to be dispositive without weighing the totality of all relevant factors and circumstances.”

- Whether the heirs’ property can be practicably divided among the cotenants,
- Whether an in kind partition “would apportion the property in such a way that the aggregate fair market value of the parcels resulting from the division would be materially less than the value of the property if the property were sold as a whole, taking into account the condition under which a court-ordered sale likely would occur,”

- How long the cotenants and their family members have owned the property,
- Sentimental value of the property to the cotenants,
- Whether the property has an ancestral or other unique or special value to a cotenant,
- The lawful use of the property by a cotenant and how the cotenant would be harmed if the cotenant could no longer continue the same use of the property,
- The degree to which cotenants have paid their pro rata share of property taxes, insurance, etc., or have contributed to the improvement, maintenance, or upkeep of the property, and
- Any other factor the court deems relevant.<sup>54</sup>

If the court does find substantial prejudice, then the court must order partition by sale unless no cotenant requested partition by sale, in which case, the court will dismiss the partition action.<sup>55</sup>

If the court orders partition in kind, the court may order one or more cotenants to pay money to one or more of the other cotenants so that the value of the property plus the payments is proportionate in value to the fractional interests they hold.<sup>56</sup> For example, if one of the partitioned segments contains a home, the cotenant receiving that portion may have to pay money to the cotenants who are receiving unimproved land.<sup>57</sup>

In addition, the court must allocate in an undivided share of the property an amount which constitutes the interests of cotenants who are unknown, un-locatable, or the subject of a default judgment assuming those cotenants’ interests were not bought out by the other cotenants.<sup>58</sup>

Additionally, the UHPA does not prohibit or prescribe a court from, in its discretion, allowing a partition in kind of part of the heirs property and a partition of sale of the remainder. So, while the court may use the equitable remedy of “owelty,” it may be more prudent and fair to partition the remainder interest by sale in some instances. For example, a land-rich but cash-poor cotenant who receives property may be unduly burdened by owelty and be forced to sell portions of his newly obtained real property. Before deciding to order a part partition in kind, part partition by sale, it’s likely the court will first utilize the secondary buyout mechanism.<sup>59</sup>

### b. By Sale

It is important to remember that under the UHPA,

the partition by sale is a “last option” approach. The purpose of the UPHPA is to avoid partition by sale unless absolutely necessary, because the sale of property owned by lower- to middle-class individuals who are usually related may rob those individuals of a home, land held by the family for generations, or other noneconomic value in the property. Therefore, as an estate planner, it is important to attempt other avenues for remedy before the partition by sale, as this remedy will likely be viewed unfavorably by the court.

If there is a partition by sale, the sale will normally be via an open-market sale unless the court determines that a sale by sealed bid or auction would be financially better for the cotenants as a group and in their best interest.<sup>60</sup>

#### (1) Open-Market Sale

The parties have 10 days after the court orders the sale to agree on a real estate broker. If they agree, the court will appoint the broker and establish a reasonable commission. If they do not agree on a broker, the court will appoint a disinterested broker and establish the commission. The broker cannot offer the property for sale lower than the appraised value, and the broker must conduct the sale in a commercially reasonable manner. The court has the discretion to impose additional terms and conditions on the sale.<sup>61</sup>

If the broker finds a buyer within a reasonable time willing to pay at least the appraised value, the broker must file a report no later than seven days after the broker receives an offer for at least the appraised value. This report must contain **(1)** a description of the property, **(2)** the name of each buyer, **(3)** the purchase price, **(4)** the terms and conditions of the sale including the terms of owner financing, if any, **(5)** the amounts to be paid to lienholders, **(6)** information about the broker’s commission, and **(7)** all other material facts relevant to the sale.<sup>62</sup> After reporting the proposed sale, the broker is authorized to complete the sale according to state law.<sup>63</sup>

If the broker does not find a buyer within a reasonable time willing to pay at least the appraised value, the court must conduct a hearing and then may **(1)** approve the highest offer, **(2)** re-determine value and let the broker try again, or **(3)** order the property sold by sealed bids or at an auction.

#### (2) Sealed Bid

If the court orders a sale by sealed bid, the court must set the terms and conditions of the sale.<sup>64</sup>

#### (3) Auction

If the court orders a sale by auction, the court must set the terms and conditions of the sale. The auction must follow the same procedures as a sale made under execution.<sup>65</sup>

It is important to note that courts may be extremely wary of authorizing a partition by sale via auction for property that falls under the purview of the UPHPA. One of the harms that the UPHPA specifically attempts to address according to its prefatory note is partition by sale via auction, explaining that auctions harm most tenants in common.<sup>66</sup> Pursuing this remedy under the UPHPA will likely be difficult to achieve.

### E. Conclusion

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The UPHPA is designed to protect family members who receive land via intestacy or a will and own that property jointly with other family members. The Act attempts to prevent the partition of heirs property via sale, and to consolidate property to active owners who are likely to value and maintain the property for economic and noneconomic reasons. The goals of the Act are laudable. However, a prudent estate planner must be aware that the UPHPA may apply in situations where at first glance it would appear that no compliance with the statute would be necessary. For example, if just two of 10 cotenants are related, compliance with the UPHPA may be required. In addition, the UPHPA is highly complex, containing many technical steps with rigid time requirements. Accordingly, practitioners must tread carefully when representing a plaintiff in a partition action. Likewise, judges must be vigilant as they maneuver the UPHPA to assure they are in compliance.

## ENDNOTES

1. Governor Preston E. Smith Regents Professor of Law, Texas Tech University School of Law, Lubbock, Texas. Prof. Beyer holds a J.D. summa cum laude from the Ohio State University and LL.M. and J.S.D. degrees from the University of Illinois. Previously, Prof. Beyer served as a professor or visiting professor at Boston College, La Trobe University (Melbourne, Australia), Ohio State University, Southern Methodist University, St. Mary's University, University of New Mexico, and Santa Clara University. As a state- and nationally recognized expert in estate planning and a frequent contributor to both scholarly and practice-oriented publications, Prof. Beyer was inducted into the National Association of Estate Planning Councils' Estate Planning Hall of Fame in November 2015. He is a member of the Order of the Coif, an Academic Fellow and Regent of the American College of Trust and Estate Counsel, and a member of the American Law Institute.  
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2. Uniform Partition of Heirs Property Act § 2(5) (Unif. Law Comm'n 2010).
3. *Id.* at p. 4.
4. *Id.* § 2(9).
5. *Id.* § 2(5).
6. *Id.* § 3(b).
7. *Id.* § 3 cmt. 2.
8. *Id.* § 4(a).
9. *Id.* § 4(b).
10. *Id.* § 5.
11. *Id.* § 5 legis. note.
12. *Id.* § 6(a).
13. *Id.* § 6(d).
14. *Id.* § 6 cmt. 4.
15. *Id.* § 6(d).
16. *Id.* § 6(d).
17. *Id.* § 6(b).
18. *Id.* § 6 cmt. 2.
19. *Id.* § 6(b).
20. *Id.* § 6 cmt. 3.
21. *Id.*
22. *Id.* § 6 cmt. 2.
23. *Id.* § 6(c).
24. *Id.*
25. *Id.* § 6(e).
26. *Id.* § 6(c).
27. *Id.* § (f).
28. *Id.*
29. *Id.*
30. *Id.* § 6(g).
31. *Id.* § 7(a).
32. See *Id.* § 7 cmt. 3.
33. *Id.* § 7 cmt. 2.
34. *Id.*
35. *Id.* § 7(b).
36. *Id.* § 7(c).
37. *Id.* § 7(d)(2); *Id.* § 7 cmt. 7.
38. *Id.* § 7(d).
39. *Id.* § 7(d)(3).
40. *Id.* § 7(e).
41. *Id.* § 7(e)(1).
42. *Id.* § 7(e)(2).
43. *Id.* § 7(e)(3).
44. *Id.* § 7(f)(1).
45. *Id.* § 7(f)(2).
46. *Id.* § 7(f)(3).
47. *Id.* § 7 cmt. 7.
48. *Id.* § 7(f)(3).
49. *Id.* § 7(g).
50. *Id.* § 7(h)(2).
51. *Id.* § 7 cmt. 4.
52. *Id.*
53. *Id.* § 8(a).
54. *Id.* § 9 (a).
55. *Id.* § 8(b).
56. *Id.* § 8(c).
57. *Id.* § 8 cmt. 2 (The equitable remedy of owelty is a method for the court to utilize partition in kind, while allowing the court to adjust any variance in the value due to improvements on the partitioned property by requiring parties with improvements to provide monetary payments to the parties with partitioned property without improvements).
58. See *id.* § 8 cmt. 3 (§ 8(d) of the UHPHA mimics the law of some states which requires an undivided partition of property for those cotenants who are unknown or unlocatable at the conclusion of the action).
59. *Id.* § 8 cmt. 1.
60. *Id.* § 10(a).
61. *Id.* § 10(b).
62. *Id.* § 11(b).
63. *Id.* § 10(c)(2).
64. *Id.* § 10(e).
65. *Id.*
66. See *id.* p. 7 (Claiming that partition by sale at auctions almost always results in a substantially lower yield for tenants in common than fair market value, the results of which are almost never overturned by the court due to the "shock the conscience" standard).