

Virginia's Approach to the Uniform Partition of Heirs Property Act (UPHPA) as Adopted by the General Assembly in 2020

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I. BACKGROUND: HEIRS' PROPERTY

The background of this issue and what is referred to as “heirs’ property” is the subject of numerous articles, several of which are authored by Texas A&M Law Professor Thomas W. Mitchell, perhaps the leading authority on the subject and the Reporter (the person with principal drafting authority for a uniform act) of the Uniform Partition of Heirs Property Act (UPHPA). As Mr. Mitchell explains, following the Civil War, and despite great odds, African Americans in former slave states were able to acquire widespread ownership of agricultural land for farming and waterfront property for fishing. He notes that between 1865 and 1920, approximately 16 million acres of agricultural land was acquired by African Americans. Thomas W. Mitchell, *Destabilizing the Normalization of Rural Black Loss: A Critical Role for Legal Empiricism*, 2005 Wis. L. Rev 557, 563 (2005).

Mr. Mitchell further notes that over the last hundred years, African Americans have lost millions of acres of land. While true that some of this acreage was lost as a result of foreclosure, eminent domain and tax sales, other properties were lost because of partition actions, in a number of cases brought by developers seeking a forced sale at a bargain price. Mitchell, Thomas W., *Historic Partition Law Reform: A Game Changer for Heirs' Property Owners* (June 12, 2019). HEIRS' PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT, Cassandra Johnson Gaither, Ann Carpenter, Tracy Lloyd McCurdy, and Sara Toering, eds., U.S. Department of Agriculture, e-General Technical Report, Forthcoming; Texas A&M University School of Law Legal Studies Research Paper No. 19-27. Available at SSRN: <https://ssrn.com/abstract=3403088> , pp. 1-2.

Likely because of lack of educational opportunities, lack of access to lawyers and justifiable distrust of state and local government administrations following Reconstruction, African American communities, particularly in the South, allowed property to transfer generation to generation by intestacy. Such property held as tenants in common by numerous heirs was referred to in such communities as “heirs’ property.” *Id.* at p. 1.

Mr. Mitchell explains that as cities expanded to include agricultural areas and demand grew for waterfront property, such “heirs’ property” became easy targets for developers in many states, particularly in the South. In a number of jurisdictions, partition actions were used as a vehicle by which developers acquired heirs’ property for a fraction of its value. *Id.* at pp. 7-9. Such developers would buy an interest from one of the heirs, which would entitle the developer to bring a complaint for partition, and then persuade the court that a sale would bring the best value for the owners,

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adopting the so-called “economics-only” test. *Id.* p. 14. Given that most states did not have any legislative provisions requiring any particular method of sale, the developer would often be able to persuade the court to sell the property at a court-ordered auction, at which the developer would buy property well below market. The heirs, “land rich but cash poor,” normally were not in a financial position to even bid for their own property. *Id.* at p. 9. Perhaps the best example is Hilton Head Island in South Carolina, much of which was developed by acquiring African American heirs’ property at below-market rates through partition actions filed by developers. *Id.*

Advocates of the UHPA note that the problems created by heirs’ property are not experienced only by African Americans in the South, but also exist among poor and disadvantaged white Americans, Hispanics and Native Americans in various parts of the country. Thomas W. Mitchell, *Restoring Hope for Heirs Property Owners. The Uniform Partition of Heirs Property Act*, ABA (https://www.americanbar.org/groups/state_local_government/publications/state_local_law_news/2016-17/fall/restoring_hope_heirs_property_owners_uniform_partition_heirs_property_act/) (October 1, 2016), p. 4.

It is important to note, however, that Virginia is a jurisdiction with a strong tradition of protection for “sacred” land rights and a strong statutory preference for partition in kind, backed up by case law that specifically rejects the so called “economics-only test.” Moreover, Virginia by statute already provides for allotment, the buy-out by other owners of a plaintiff who seeks sale of property by partition. Members of the Boyd Graves Committee who practice in this area and who served on the committee studying the UHPA, noted that they have not seen evidence that partition is being abused in Virginia in the manner described in the articles seeking adoption of the UHPA. Nonetheless, the UHPA includes a number of reforms that the Boyd Graves UHPA Committee believes are well worth considering in order to strengthen Virginia’s protection of land rights for all, including those who are disadvantaged.

II. **THE UHPA**

In 2007, the American Bar Association’s Section of Real Property, Trust and Estate Law, persuaded the Uniform Law Commission (“ULC”) to agree to address concerns regarding the loss of real property by poor and disadvantaged communities because of abusive use of partition action. In 2010, the ULC adopted the UHPA, with Thomas W. Mitchell as the Reporter, with a goal “to stabilize tenancy-in-common ownership for disadvantaged families because for many decades state

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partition laws have contributed to widespread and devastating involuntary land loss among families who owned tenancy-in-common properties.” Id. at p. 1.

In the eight years since the UPHPA was first proposed to state legislatures for consideration, the UPHPA has had some success, with 13 states and one other jurisdiction having adopted it, the most recent being Illinois and Missouri this past year. Mitchell, Thomas W., *Historic Partition Law Reform: A Game Changer for Heirs’ Property Owners* (June 12, 2019). HEIRS’ PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT, Cassandra Johnson Gaither, Ann Carpenter, Tracy Lloyd McCurdy, and Sara Toering, eds., U.S. Department of Agriculture, e-General Technical Report, Forthcoming; Texas A&M University School of Law Legal Studies Research Paper No. 19-27. Available at SSRN: <https://ssrn.com/abstract=3403088>, p. 19. It is noteworthy that 5 of the 13 states are from the South, including South Carolina. Id.

The model UPHPA includes four major reforms to partition law in a separate procedural scheme specifically for property defined by statute as “heirs property.”

A. **Court-Ordered Appraisal**

The UPHPA provides that property value is determined by a court-ordered appraisal, unless the parties otherwise agree to a value or the evidentiary value of an appraisal is outweighed by the cost of the appraisal. This provision encourages fairness and should decrease the expense of partition actions.

B. **Buyout Provision**

In cases where a complaint for partition seeks sale of “heirs property,” the UPHPA would provide the other owners the right to buy out the plaintiff for a pro rata share of the appraisal price and thus prevent a sale of the property. The plaintiff is not permitted to buy out the other owners. UPHPA advocates note that just having such a provision arguably may act as a disincentive for developers who otherwise might seek to acquire a fractional interest to force a sale.

C. **“Fortifying” the Preference for Partition in Kind**

The UHPA also purports to strengthen the preference for partition in kind by using a “totality of the circumstances” test, which includes both economic and non-economic factors, set forth as follows:

1. Whether the heirs property practicably can be divided among the cotenants;
2. Whether partition in kind 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 it were sold as a whole, taking into account the condition under which a court-ordered sale likely would occur;
3. Evidence of the collective duration of ownership or possession of the property by a cotenant and one or more predecessors in title or predecessors in possession to the cotenant who are or were relatives of the cotenant or each other;
4. A cotenant's sentimental attachment to the property, including any attachment arising because the property has ancestral or other unique or special value to the cotenant;
5. The lawful use being made of the property by a cotenant and the degree to which the cotenant would be harmed if the cotenant could not continue the same use of the property;
6. The degree to which the cotenants have contributed their pro rata share of the property taxes, insurance, and other expenses associated with maintaining ownership of the property or have contributed to the physical improvement, maintenance, or upkeep of the property; and
7. Any other relevant factor.

As Mr. Mitchell, the Reporter, explains, “[u]nder the multi-factored test, unlike application of the economics-only test, a court cannot decide at the outset to give more weight to any factor whether the factor be economic or non-economic in nature.” *Id.* at p. 15.

D. **Open-Market Sales Procedure**

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The UPHPA also seeks to preclude the possibility of a below-market sale by specifically mandating that any sale of “heirs property” be by “open-market sale unless the court finds that a sale by sealed bids or an auction would be more economically advantageous and in the best interest of the cotenants as a group.” The UPHPA set forth specific procedures for such an open-market sale, including the appointment of a real estate broker and the requirement for a detailed broker’s report before sale approval.

III. **VIRGINIA’S APPROACH AS RECOMMENDED BY BOYD GRAVES**

After careful review of the earlier proposed Virginia legislation, Senate Bill 1190, the UPHPA and related articles, particularly the exceptional work of the UPHPA Reporter, Thomas W.

Mitchell, as well as the recent 2018 Federal Farm Bill,¹ the Boyd Graves UPHPA Committee agreed that Virginia should adopt many of the reforms suggested by the UPHPA, but the Committee did not recommend passage of the model UPHPA. The Committee instead, and with the approval of the Boyd Graves Conference, worked over several months with the Uniform Commission to come up with its own legislative proposal, Senate Bill 553/House Bill 1605, that instead adopted certain UPHPA reforms into the existing partition statute, that governs all partition actions in Virginia.

A. Reforms Should Apply to All Partition Actions

¹ In Mr. Mitchell's most recent and well-researched article, he notes that passage of the Uniform Partition of Heirs Property act would provide a farmer with two additional forms of documentation under the Federal Farm Bill to qualify for a farm number that would open the door for possible Energy Conservation Program (ECP) assistance for crops disaster relief and potential participation in USDA loan programs. *Id.* at pp. 23-24. This collateral "benefit" arguably may be a bit overstated with respect to Virginia when one considers the actual complete definition of "eligible documentation" which includes: "(1) in states that have adopted the Uniform Partition Heirs Property Act, a court order verifying the land meets the definition of heirs property or certification from the local recorder of deeds that the recorded land owner is deceased and not less than one heir has initiated a procedure to re-title the land; (2) a tenancy-in-common agreement that sets out ownership rights and responsibilities among all of the landowners; (3) tax returns for the preceding five years; (4) self-certification that the farm operator has control of the land; and (5) any other documentation identified by the secretary as an alternate form of eligible documentation." First, there is nothing in the UPHPA which authorizes a Virginia court to enter an order verifying that land meets the definition of "heirs property," except perhaps in the context of a partition action, nor does the UPHPA authorize a circuit court clerk (the land recorder) to certify that a land owner is deceased and that an heir has initiated a procedure to re-title land. Again, given that under Virginia law, upon intestacy, land passes directly to heirs at law, an action "to re-title land" presumably would require a partition lawsuit. On the other hand, the other forms of documentation arguably appear to be much easier to produce if the heir in fact has been farming the property. Also, the Secretary has discretion to add other forms of documentation to meet the legislative goal of providing such USDA program to operators of farms on "heirs' property".

Mr. Mitchell also notes that the Farm Bill provides another incentive to adopt the UPHPA, which is potential participation in a program that makes or guarantees loans to lenders or non-profits so that they can lend to others to fund projects to help owners of heirs' property to "resolve ownership and succession on farmland." *Id.* at 24-25. The farmer or ranchers who borrow funds under the program are required to complete an estate plan as a condition of the loan. *Id.* at 25. As Mr. Mitchell notes, adoption of the UPHPA is not a requirement to participate in this new loan program designed to address ownership/succession issues, but the program does appear to give a "... preference to cooperatives, credit unions, and non-profit organizations that (1) have at least ten years of experience working with socially disadvantaged farmers and ranchers; (2) are entities that are located in states that have enacted the UPHPA into law. *Id.* at 25. Mr. Mitchell also notes that currently this particular loan program is not funded by Congress. Even if it does get funded, it is unclear to what extent Virginia farmers would decide to participate in such a loan program limited to resolving ownership/succession issues. In short, the Boyd Graves UPHPA Committee did not believe that these UPHPA "incentives" were substantial enough to warrant wholesale adoption of the UPHPA without careful consideration of how its goals may be better addressed by other statutory provisions, arguably better suited to Virginia which traditionally already has a strong preference for partition in kind, considerable discretion for allotment, and unique procedural concerns.

A fundamental concern of the Committee was that the model UHPA legislation creates a separate procedural scheme with specific reforms and specific deadlines, which would only apply to partition of property defined as “heirs property”. The UHPA definition itself is inherently arbitrary and certainly is not limited to poor and disadvantaged property owners, but would instead extend to any property where there is no written agreement among cotenants and provided one of the cotenants acquired title from a relative and one of the following is true: (1) 20% or more of the interests are held by cotenants who are relatives; or (2) 20% or more of the interests are held by an individual who acquired title from a relative; or (3) 20% or more of the cotenants are relatives. Given the arbitrary nature of what is defined as “heirs property”, that a separate procedure for “heirs property” with its own specific court deadline could be an additional unnecessary burden for our already overburdened courts and most importantly, because the Boyd Graves UPHAP Committee believed that many of the UHPA reforms should be adopted for all partition actions, the Committee recommended the adoption of legislation, SB 553/HB 1605, that would make certain of the UHPA reforms, discussed below, applicable to all partition actions in Virginia.

B. Court-Ordered Appraisals Should be Adopted

The Committee agreed with the UHPA that it would be preferable to have court-ordered appraisals and agreed that there should be exceptions as noted in the new statute, 8.01-81.1, for situations where the parties may have already “agreed to the value of the property or another method of valuation” or where “the evidentiary value of an appraisal is outweighed by the cost of appraisal.” The Committee did not believe it should be the court’s obligation by statute to provide notice of valuation and to serve copies of the appraisal within ten days of filing, but instead that the appraiser would do so. The Committee further noted that a similar appraisal process already exists in the Virginia Code for tax sales, Va. Code 58.1-3969, where an appraisal is used as guide by the court to insure fairness in the sale of property.

C. Buyout Provision Unnecessary Under Virginia Law and Could Have Unintended Consequences

The Committee did not recommend the buyout provision as drafted by the UHPA for several reasons. First, unlike many other jurisdictions, Virginia has long provided its courts with the discretion to order allotment, which essentially provides for such a buyout if the court deems it appropriate. The Committee noted that Virginia’s remedy of allotment could be improved by clarifying by statute that it is the second remedy a court should consider after partition in kind, but

before a sale. Also, the Committee noted that the Virginia partition statute could be improved by clarifying what factors should be considered by the court in deciding whether to order an allotment, which included the factors enumerated by the UHPA. Finally, particularly given the broad definition of “heirs property,” the Committee disagreed that a plaintiff, who could, for example, also be an heir with strong attachment and financial commitment to the property, should automatically be excluded from acquiring the property by allotment just because such person filed the partition action. These reforms are reflected in the new amended 8.01-83, which includes applying the UHPA factors in deciding allotment.

D. Current Virginia Law Stronger on Partition in Kind Than UHPA

While the UHPA appeared to “fortify” the preference for partition in kind in those states that have adopted the “economics-only test”, it arguably would have weakened Virginia’s much stronger preference for partition in kind. Under well-established Virginia law:

First, the court must conclude that the property cannot be conveniently partitioned. Next, the court must decide whether sale is in the best interest of the parties. If the first step is not reached the second step cannot be taken.

Sensabaugh v. Sensabaugh, 232 Va. 250, 258-59 (1986). Quoting Dr. W.M Minor Lile, the court noted “If the property be divisible in kind, any co-owner has the right to insist that partition be made. The majority of the co-owners in such case may not insist on a sale against the will of any of their fellows.” Id. at 257, quoting Lile’s Eq. Pl. & Pr., Section 389, page 196. In Leake v. Casati, 234 Va. 646 (1988), the court noted that “[t]he partition of property in kind is an ancient heritage of equity jurisdiction” while “. . . the court’s power to decree a sale in lieu of division in kind is relatively new and is carefully limited.” Id. at 649. “The statute is an innovation upon the common law, taking away from the owner the right to keep his freehold, and converting his home into money. That must not be done except in cases of imperious necessity . . .”. Id. (citations omitted). Thus, “[e]ven evidence that the property would be less valuable if divided was held ‘insufficient to deprive a co-owner of his sacred right to property’.” Id. at 650.

Adoption of the UHPA, specifically the “totality of the circumstances” approach, would fundamentally weaken Virginia’s strong preference for partition in kind and the “sacred right” to property, by making “convenient” or “practical” division just one of many factors, including whether more value could be obtained by a sale. The Committee strongly believed this would have

been a mistake to adopt the UHPA “totality of the circumstances” approach as it would have been an unwarranted reversal of long-held protection of rights to land.

In short, the new revised Section 8.01-81 and 8.01-83 enshrine the preference for (1) partition in kind, (2) then allotment and finally (3) sale only as a last resort. Section 8.01-83 also incorporates the UHPA factors in determining any allotment of the property, thus further protecting heirs.

E. **Open-Market Sales Procedure Should be Adopted**

In principle, the Committee agreed that Virginia partition law would be improved by adoption of an open-market sales procedure in the partition statute. The Committee believed that most Virginia courts currently have the discretion to require use of a broker and, in the Committee’s collected experience, most do. The Committee acknowledged it would be helpful if the Virginia Code would require it or at least state a preference for such a procedure. The Committee noted a few reservations regarding the model UHPA language. The strict time requirements would have been difficult, or at least burdensome, for many Virginia courts. The Committee believed it to be preferable if the judges had the discretion to set appropriate deadlines by court order, considering the circumstances of each case. The open-market sale requirement is now enshrined in Section 8.01-83.1.

V. **CONCLUSION**

While the Committee commends the exceptional work of the Reporter Thomas W. Mitchell and his UHPA committee who have made great strides to address an important social injustice existing in many parts of our country, and while the Committee agreed with the vast majority of the reforms proposed by the UHPA, the Committee and the Boyd Graves Conference did not support wholesale adoption by Virginia of the UHPA model. Instead, the Committee sought and obtained passage of SB 553/HB 1605, Virginia’s own approach that would apply substantive UHPA reforms to all partition actions, adopting procedures for court-ordered appraisals, for open-market sales, and a three-step approach in which a Virginia court would first consider partition-in-kind, then allotment/buyout with enumerated factors, and only order a sale as a third step if necessary after exhausting the first two steps. Attached as an Addendum is the legislation which just passed in the

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General Assembly, HB 1605, which the Committee worked on and which the Uniform Law Commission has approved as substantially similar to the UHPA, and thereby also will qualify Virginians for benefits under the 2018 Farm Bill.