UNIFORM PARTITION OF HEIRS' PROPERTY ACT: PARTITION WITH AN ACETATE OVERLAY

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I. INTRODUCTION

Home ownership has always been a cornerstone of the American Dream, and land a driver of immigration to Texas.[1] The Uniform Partition of Heirs' Property Act (UPHPA) was created and enacted in Texas to protect the generational transfer of family wealth in real property by modifying, much like an acetate overlay, the rules of partition lawsuits involving "heirs' property."[2]

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1. *See* Kit Johnson, *Buying the American Dream*, 81 TENN. L. REV. 829, 831 (2014); Drew Knight, *Texas Still One of the Most Popular States for Relocations, Especially for Californians*, KVUE.COM (Jan. 23, 2020, 12:03 PM), https://www.kvue.com/article/news/local/more-californians-moving-to-texas/269-9bcfcef6-87f5-4b21-8059-d7c28a5f9f08 [https://perma.cc/4RRK-8K8Q].

2. *See* UNIF. PARTITION OF HEIRS PROP. ACT ANN. § 3 (UNIF. L. COMM'N 2010), as available on the Uniform Law Commission's website at https://www.uniformlaws.org/committees/community-

Often a significant portion of an individual's net wealth is in their homestead, rural or urban.[3] When distributing assets at death, the law of intestate succession requires outright distribution in proportionate shares to heirs, and, even among those Texans who die testate, many choose to leave their estates outright among several beneficiaries.[4] These takers, whether beneficiaries under a will or heirs at law, are tenants in common.[5] Inevitably, one cotenant will have want (or need) of liquid assets and sell all, or even a small portion, of their inheritance to a non-heir who has traditionally had a right to file a suit for partition without limitation.[6] Further, in recent decades, a rising number of partitions end with a forced sale of the property which further reduces the value of an inheritance because of the difference between forced sale value and fair market value, in addition to the legal costs and expenses of the suit.[7]

Part II of this article explores in greater detail the reasoning behind the creation of the UPHPA, including the historical context, and outlines briefly the solutions provided in the UPHPA per the Uniform Law Commission.[8]

Part III provides the history of the UPHPA's creation and enactment since its approval by the Uniform Law Commission.[9] Specific information relating to the Texas enactment of the UPHPA and the present status of Texas jurisprudence is also included.[10]

Part IV discusses in detail the operation of the UPHPA in a judicial partition suit.[11] While this does include a procedural analysis of the implementation of the UPHPA, it is beyond the scope of this article to include the many nuances which apply in both the standard partition suit and a partition suit to which the UPHPA applies.[12] Citations herein include works by other Texas attorneys with greater detail and analysis on these matters.[13]

Part V outlines steps that an estate planning attorney can take in preparation of a client's last wishes in order to avoid application of the UPHPA (and standard partition suits) through the use of techniques contemplated by the Uniform Law Commission.[14] Additionally, options

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home?communitykey=50724584-e808-4255-bc5d-8ea4e588371d&tab=groupdetails (last visited Apr. 20, 2020) [https://perma.cc/W35D-UZ72] [hereinafter UNIF. PARTITION OF HEIRS PROP. ACT ANN.].

3. *See id.*
4. *See* TEX. EST. CODE ANN. § 201.001.
5. *See* UNIF. PARTITION OF HEIRS PROP. ACT ANN. § 2 cmt. 3.
6. *Id.* § 3; *see also* Hess v. Webb, 113 S.W. 618, 623 (Tex. 1908).
7. *See* Thomas W. Mitchell et al., *Forced Sale Risk: Class, Race, and the "Double Discount"*, 37 FLA. ST. U. L. REV. 589, 596–601 (2010) [hereinafter *Forced Sale Risk*].
8. *See infra* Part II.
9. *See infra* Part III.
10. *See infra* Part III.
11. *See infra* Part IV.
12. *See infra* Part IV.
13. *See infra* Parts I–V.
14. *See infra* Part V.

related to the administration of an estate to minimize issues of common ownership which often lead to partition suits are also discussed.[15]

II. PURPOSE

According to the Uniform Law Commission, the involuntary loss of property rights through a partition suit and sale, and the accompanying loss of family wealth associated therewith, have potentially extreme consequences for many.[16] As such, the stated purpose of the UPHPA "is to ameliorate, to the extent feasible, the adverse consequences of a partition action when there are some cotenants who wish, for various reasons, to retain possession of some or all of the land, and other cotenants who would like the property to be sold," while simultaneously 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."[17]

Generally, the UPHPA seeks to modify the law of partition in the limited circumstances of related cotenants to provide added protections and therefore a more fair and equitable procedure for the partition of heirs' property, rather than a wholesale abandonment of the standard judicial partition law.[18] Rather than drafting an extensive revision to the very fabric of joint ownership or rights of a joint owner to a partition, the drafters of the UPHPA provided systematic modifications to the standard partition suit, similar to the way in which clear acetate pages can overlay the opaque to show the layers of human anatomy.[19]

A. Identifying the Problem

A majority of American households have a significant portion, if not a majority, of their net worth in real property, often exclusively in the homestead.[20] In fact, according to data from the Federal Reserve Board, as of

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15. *See infra* Part V. For the sake of uniformity, this article will use the spelling of certain terms as they appear in the Texas adopted version of the UPHPA, even when used in quotations by other authors, including information published by the Uniform Law Commission. For example, this article will use "cotenants" as it appears in Section 23A.002(4) of the Property Code rather than "co-tenants" as it used by the ULC.

16. *See* Uniform Partition of Heirs Property Act with Prefatory Note and Comment, drafted by the National Conference of Commissioners on Uniform State Laws, 2010, at 4–5, https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=2df84a2e-2ad1-1735-2caf-e3536111a141&forceDialog=1 [https://perma.cc/TL2U-P8KY].

17. *Id.*

18. *See id.*

19. *See id.*

20. Michael Neal, September Special Study for Housing Economics, *Homeownership Remains a Key Component of Household Wealth*, NATIONAL ASS'N OF HOME BUILDERS (Sept. 13, 2013), [https://perma.cc/JF4Z-NER7].

2016, the primary residence accounted for 62%, on average, of the value of the estate of homeowners.[21] Further, while the percentage of American homeowners has dropped during and since the Great Recession (down to 63.7% in 2016), the mean net housing value (value of a home minus outstanding mortgages) has risen.[22] As such, one can see a concentration of wealth for many Americans into a single, often indivisible asset.[23] And while the size of the typical American family has been shrinking over the past several decades, Census data shows the average American family, with children, in 2019 still has 1.93 children.[24] Thus, the potential for continued issues related to inherited family wealth and potential partition suits in the absence of adequate estate planning persists.[25]

In Texas, as in most other jurisdictions throughout the United States, default ownership among several individuals is a tenancy in common.[26] A joint owner or claimant in real property "may compel a partition of the interest or the property among the joint owners or claimants" under Chapter 23 of the Property Code and the Texas Rules of Civil Procedure.[27]

As an example, imagine a widower, Archer, living on a modest parcel, Best Creek Farm, which had been in the family for several generations on the edge of suburban spread in Fort Bend County, Texas.[28] Archer has heard the horror stories of dying intestate from friends and neighbors.[29] So he asks an attorney to prepare a will for the eventual distribution of his estate among his three children: his sons, Briscoe and Coleman, and his daughter, Delta.[30] Archer selects his brother, Anderson, to serve as independent executor without bond.[31] All three children are of the age of majority with lives, families, and jobs elsewhere in the state.[32] Other than the farm, Archer has modest assets, checking and savings accounts at a local bank, a truck, a

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21. *See* Jesse Bricker et al., *Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finances*, Fed. Rsrv. Bull. Sept. 2017, at 1, 22 (2017).

22. *See id.*

23. *See id.*

24. *Average Number of Own Children Under 18 Per Family, By Type of Family: 1955 to Present*, U.S. CENSUS BUREAU (Nov. 2019), https://www2.census.gov/programs-surveys/demo/tables/families/time-series/families/fm3.xls [https://perma.cc/YJ49-FDFJ].

25. *See id.*

26. *See* Thomas Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1, 9 (2014), available at: https://scholarship.law.tamu.edu/facscholar/790 [https://perma.cc/XV92-FP3A] [hereinafter *Reforming Property Law*] ("Tenancy-in-common ownership represents the most widespread form of common ownership of real property in the United States"); *see also* Corn v. First Tex. Joint Stock Land Bank of Hous., 131 S.W.2d 752, 757 (Tex. App.—Fort Worth 1939, writ ref'd).

27. TEX. PROP. CODE ANN. § 23.001.

28. A hypothetical created by the author for purposes of this article [hereinafter Illustrative scenario created by author].

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

tractor, and the standard tangible personal property to be expected of a man of his age living on a small farm.[33] As to the distribution in Archer's will, after leaving specific gifts of family heirlooms to each child, his residual clause reads as follows: "I give all of my remaining property, including any lapsed gift ("my residuary estate"), to my descendants who survive me, per stirpes."[34] When Archer dies and Anderson probates the will, distribution of the Best Creek Farm is made to Briscoe, Coleman, and Delta, in equal shares as tenants-in-common.[35]

Over time the inevitable issues with co-ownership in real property, financial and functional, begin to emerge: property tax payments are due, failure of the absentee co-owners to agree on use and management of the property, payment of insurance premiums to protect the property, and maintenance and upkeep expenses.[36] Eventually, a beneficiary decides that it is time to sell.[37] Coleman decides that his interest in the family farm could be better invested if he could turn the asset into cash, or maybe Briscoe has a debt problem that forces the issue.[38] Either way, an heir sells to an unscrupulous real estate investor.[39] The investor, upon closing on all or even a small fraction of the interest of one of Archer's children, then proceeds to file a partition lawsuit.[40] Given that the property has only a small portion developed, it is likely that a court would find partition in-kind unfeasible and order sale by public auction.[41] At the auction, the investor buys the remaining property at a potentially sizable discount.[42] The investor then markets the property to a developer with plans for a suburban subdivision.[43] And in the end, the funds received by Briscoe, Coleman, and Delta for the forced sale of Best Creek Farm pale in comparison to the return on investment received by the real estate investor.[44]

B. Historical Context

The example of Archer's family farm is indicative of the issues many beneficiaries and heirs have faced in attempting to maintain wealth contained in a single parcel of real property.[45] Significant scholarly work has been done

33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*

regarding the effect partition suits had on "heirs' property," or so called because it was often property inherited by many descendants through intestate succession, perhaps over generations.[46] No legal scholar appears to have undertaken more exhaustive research and extensive writing on the issues surrounding heirs' property and the solutions incorporated in the UPHPA than Professor Thomas Mitchell, a Professor of Law and Co-Director of the Program in Real Estate and Community Development Law at the Texas A&M University School of Law.[47] This author highly recommends Professor Mitchell's works (as cited herein to any reader interested in learning more of the history or the prevalence of the potential harms in standard partition suits involving heirs' property).[48]

Perhaps no group has been more disadvantaged than African Americans in the South, particularly over the past several decades with suburbanization of previously rural areas near metropolitan centers.[49] These families not only had their property rights extinguished, but also had their property sold for just a fraction of its value, which resulted in substantial loss of the real estate wealth associated with their tenancy in common ownership.[50]

In many ways, Texas sits at the crossroads of each of the groups disadvantaged by the applicability of standard partition suits in practice.[51] With African American populations concentrated in the eastern portion of the state, a large Hispanic population in the southern and western portions, suburban sprawl near major metropolitan areas, and expansive rural land, Texas is somewhat of a microcosm of the country as a whole when analyzing harms of forced sale through standard partition suits of heirs' property.[52]

C. Solution

In balancing the competing interests of all cotenants, the UPHPA protects the right of one cotenant to sell his "interest in inherited real estate," while also ensuring that the other cotenants will be afforded due process to prevent a forced sale: "notice, appraisal, and right of first refusal."[53] Further,

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46. *See* Thomas W. Mitchell, *Restoring Hope for Heirs Property Owners: The Uniform Partition of Heirs Property Act*, 40 ST. & LOC. L. NEWS 6 (2016) [hereinafter *Restoring Hope for Heirs Property Owners*].

47. Thomas W. Mitchell, *Faculty Profiles*, TEX. A&M UNIV., SCH. OF LAW, https://law.tamu.edu/faculty-staff/find-people/faculty-profiles/thomas-w-mitchell (last visited Oct. 12, 2020) [https://perma.cc/6A7D-63YQ].

48. *See id.*

49. *See* Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U.L. REV. 505, 507 (2001).

50. *See Forced Sale* Risk, *supra* note 7, at 613–14.

51. *See Restoring Hope for Heirs Property Owners*, *supra* note 46, at 6.

52. *See id.*

53. *See Summary of The Uniform Partition of Heirs Property Act*, UNIF. L. COMM'N 2, https://www.

if the other cotenants choose not to exercise their right to purchase the property from the seller, the court must, if feasible, order a partition; and, if not, order the sale of the property for fair market value.[54]

III. HISTORY OF THE ACT

A. Uniform Law Commission

In spite of various attempts by many to reform partition laws to alleviate some of the negative impacts felt by many communities, the UPHPA has benefited enormously from the strong support it has received from important national organizations, including: the Uniform Law Commission, the American Bar Association (through its Section of Real Property, Trust and Estate Law and its Section of State and Local Government Law), the Joint Editorial Board for Uniform Real Property Acts, and the American College of Real Estate Lawyers.[55]

The Uniform Law Commission Committee charged with drafting the Act, which included the Honorable Rodney W. Satterwhite, then presiding judge of the 441st Judicial District Court, Midland County, Texas, began its work in the fall of 2007.[56] By July 2010, the Uniform Partition of Heirs Property Act, as it came to be titled, was approved and recommended for enactment by the Uniform Law Commission at its' annual meeting.[57]

In creation of the UPHPA, the Uniform Law Commission sought to create a supplemental set of coherent, default rules related to partition suits involving inherited wealth to remedy the worst substantive and procedural abuses as applied to these specific cases.[58] As such, the UPHPA incorporates certain property preservation and wealth protection techniques, or analogous concepts, already commonly used by estate planning attorneys as well as protections other countries now afford cotenants in partition actions while simultaneously avoiding sweeping changes to over a hundred years of real property law.[59]

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uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=c0b2aafa-168c-e070-d9ff-1df864fd356e&forceDialog=0 (last visited Nov. 11, 2020) [https://perma.cc/RNH4-9REV].

54. *See id.*
55. *See Reforming Property Law*, *supra* note 26, at 39 n.188.
56. *Id.* at 4 n.1.
57. *Id.* at 44.
58. *Id.* at 5.
59. *See id.* at 6–7.

B. Adoption in Other Jurisdictions

Adoption of the UPHPA has progressed in large part through the efforts of the Heirs' Property Retention Coalition—a group of public interest, legal aid, community-based, and civil rights organizations.[60]

Nevada was the first in the nation to adopt the UPHPA in 2011.[61] Since that time, fifteen states, including Texas, and one United States Territory, have enacted the UPHPA according to the Uniform Law Commission's website.[62] A table on the present status of enactment of the UPHPA is included for reference in Appendix A.[63] Two of Texas' contiguous neighbors, Arkansas and New Mexico, are included in the states which have enacted the UPHPA.[64] Additionally, at the time of the deadline of this article, another eight states and the District of Columbia have bills pending for the adoption of the UPHPA, including another Texas neighbor, Oklahoma.[65]

As with other acts promulgated by the Uniform Law Commission, the UPHPA includes a provision on uniformity of application and construction amongst the states where it has been enacted.[66] As such, the practitioner can look to relevant cases from other jurisdictions, which have adopted the UPHPA for additional guidance, as Texas jurisprudence continues to develop.[67] However, precedent is still limited.[68]

C. Texas Enactment — Chapter 23A, Property Code

Texas enacted the UPHPA in the 2017 Legislative Session under Senate Bill 499.[69] Though not a "REPTL" bill—as the term is often used in describing legislation officially requested by the Real Estate, Probate, and Trust Law Section of the State Bar of Texas—SB 499 was authored by Senator Royce West, a Democrat from District 23, and was sponsored by Representative John Wray, a Republican from District 10.[70] Governor Greg

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60. *See Restoring Hope for Heirs Property Owners*, *supra* note 46, at 6.

61. *See* NEV. REV. STAT. § 39.600–.705.

62. *See* graphical of enactment map, Partition of Heirs Property Act, as available at https://www.uniformlaws.org/committees/community-home?communitykey=50724584-e808-4255-bc5d-8ea4e588371d&tab=groupdetails (last visited Nov. 11, 2020).

63. *See infra* Appendix A.

64. *See id.*

65. *See id.*

66. *See* TEX. PROP. CODE ANN. § 23A.012.

67. *See id.*

68. *See id.*

69. Craig Hopper & William D. Pargaman, *Make Probate Great Again, The 2017 Texas Estate and Trust Legislative Update*, Section 7.6, Chapter 3, 16, 41st Annual Advanced Estate Planning & Probate Course, TexasBarCLE, State Bar of Texas, (June 7–9, 2017), Houston, Texas.

70. *Id.* at 15.

Abbott signed SB 499 into law on May 29, 2017.[71] For reference throughout the remainder of this article, the full text of Chapter 23A of the Property Code is included in Appendix B.[72]

The UPHPA was added immediately following Chapter 23 of the Property Code where the statutes related to a standard partition suit can be found.[73] For reference, a copy of Chapter 23 of the Property Code is included in Appendix C.[74] Additionally, the remaining rules for the standard partition suit can be found in Texas Rules of Civil Procedure 756 through 771, which are included in Appendix D.[75]

As to available Texas precedent, to date, there is one unpublished opinion from the Amarillo Court of Appeals, which cites to the UPHPA; however, interpretation of the UPHPA was not the issue in the case (a mandamus proceeding), but rather a petition in intervention of a subsurface owner when the surface estate was the subject of the partition suit.[76]

IV. APPLICATION OF THE TEXAS UPHPA

A. Effective Date

The UPHPA expressly applies only to a partition action commenced on or after the effective date of September 1, 2017.[77] Therefore, any ongoing partition action commenced before September 1, 2017 is governed by the law as it existed, and that law is continued in effect for that purpose, whether or not the property at issue would be heirs' property under the UPHPA.[78]

B. Applicability

In an action to partition real property filed pursuant to Chapter 23 of the Property Code, the court shall determine whether the property is heirs' property as defined.[79] If the court determines that the property is heirs' property, the property must be partitioned pursuant to Chapter 23A unless all of the cotenants otherwise agree in a record.[80] Any action governed by the UPHPA, Chapter 23A supersedes any inconsistent portions of Chapter 23 or

71. *Id.* at 16; *see also* Tex. S.B. 499, 85th Leg. R.S. (2017).
72. *See infra* Appendix B.
73. *See* TEX. PROP. CODE ANN. § 23.001–.006.
74. *See infra* Appendix C.
75. *See infra* Appendix D.
76. *See In re* McClellan Creek Ranch, LLC, 07-19-00135-CV, 2019 WL 2238429, at *2 (Tex. App.—Amarillo May 23, 2019, no pet.) (not designated for publication).
77. *See id.*; *see also* Tex. S.B. 499, 85th Leg. R.S. (2017).
78. *See* Tex. S.B. 499, 85th Leg. R.S. (2017).
79. TEX. PROP. CODE ANN. § 23A.003(a).
80. *See id.*

the Texas Rules of Civil Procedure, otherwise it supplements the procedures contained therein.[81]

If the court decides the property is heirs' property, then it must be partitioned pursuant to Chapter 23A unless the cotenants all agree otherwise in a record.[82] If an action is governed by the UPHPA, Chapter 23A supersedes any inconsistent portions of Chapter 23 or the Texas Rules of Civil Procedure, otherwise Chapter 23A supplements the procedures contained therein.[83]

C. Definitions

The most important definition of the UPHPA is that of "heirs' property."[84] The term is the cornerstone of the applicability of Chapter 23A and is the only truly novel concept introduced by the UPHPA.[85] However, other defined terms can be found in Section 23A.002, and include: "ascendant," "collateral," "descendant," "determination of value," "partition by sale," "partition in kind," "record," and "relative."[86] These definitions can be found in Appendix B, though they are primarily a codification of commonly understood terms with which the estate planning and probate attorney is likely familiar.[87]

> Heirs' Property
> Pursuant to Section 23A.002(5), "heirs' property" is the real property held in tenancy in common that meets each of the following requirements at the date the partition action is filed:
>
> (A) there is no agreement in a record binding all the cotenants that governs the partition of the property;
> (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;
> (ii) 20 percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased; or

81. *See id.* § 23A.003(b).
82. *See id.*
83. *See id.*
84. *See id.* § 23A.002(5).
85. *See id.*
86. *Id.* § 23A.002(1)–(4), (6)–(9).
87. *See infra* Appendix B.

(iii) 20 percent or more of the cotenants are relatives.[88]

Therefore, the UPHPA does not apply to (i) personal property, (ii) real property which is not held as a tenancy in common (*e.g.*, as a joint tenancy or by a business entity or trust), or (iii) property held in a tenancy in common but which is the subject of a written agreement which contains a provision governing the partition of the property.[89]

Although the term 'heir' is used in the definition, property passing through a will can be "heirs' property" based upon the ownership and relational connections between the parties, rather than the mechanism by which the interest was received.[90] Further, the UPHPA could apply when only a small fraction of the property is co-owned by relatives.[91]

For example, assume a parcel of property was purchased by four friends (Ellis, Fisher, Gregg, and Hale) as tenants in common for their weekend trips together.[92] When Hale dies leaving his share of the property to his sons, Hardin and Haskell, then the property fits the definition of heirs' property and the UPHPA would apply.[93]

Two related definitions of terms used in the definition of heirs' property appear to be of great importance and potential litigation on the applicability of the UPHPA to a partition suit.[94]

Record

A "record" is information retrievable in perceivable form that is inscribed on a tangible medium or stored electronically or some other way.[95]

Note: This means that a tenants in common agreement need not be as formal as would be recommended by counsel.[96] A rather informal agreement among cotenants, so long as it is binding under the statute of frauds and of some record will prevent the UPHPA from applying.[97]

88. TEX. PROP. CODE ANN. § 23A.002(5).
89. *See id.*
90. *See id.*
91. *See* Gerry W. Beyer, *An Estate Planner's Guide to the Uniform Partition of Heirs Property Act*, SSRN (Aug. 2018), *available at*: https://ssrn.com/abstract=3223963 [perma.cc/F2EP-JQL5].
92. A hypothetical created by the author for purposes of this article.
93. *See* TEX. PROP. CODE ANN. § 23A.003(a).
94. *Id.* § 23A.002(8)–(9).
95. *Id.* § 23A.002(8).
96. *See id.*
97. *See id.*

Relative

A 'relative' is 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 chapter."[98]

D. Partition Procedure under the UPHPA

Nothing in the UPHPA prevents a joint owner or claimant of an interest in real property or an interest from compelling a partition of the interest or the property among the joint owners or claimants under Chapter 23 of the Property Code and the Texas Rules of Civil Procedure.[99] The UPHPA creates supplemental rules to the process of a partition suit when dealing with heirs' property.[100]

The UPHPA applies only in a judicial partition suit.[101] As such, cotenants are still free to effectually partition amongst themselves as has long been available under Texas law.[102] These non-judicial partitions may be in kind or of the proceeds following a sale.[103] But a partition by agreement requires all cotenants to participate voluntarily.[104] Of course, the possibility that any one cotenant may decline to negotiate at all or that the cotenants cannot agree on the division and manner of partition, a likelihood that grows with each additional cotenant, will often leave a judicial partition as the only available recourse.[105]

Once a decision is made by a tenant in common to pursue a partition of heirs' property, what follows is the general procedure under which the case will progress under the UPHPA.[106] A more lineal timeline is provided in a chart attached as Appendix E.[107] Herein, it is the author's intent to present a simple timeline and procedure of a partition suit proceeding when the UPHPA applies; for further analysis of the partition process when the UPHPA does not apply or other issues which can arise and apply uniformly to all partition suits, please see *Partition 2019: Same Old, Same Old?*[108] and *The Road to Partition*.[109]

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98. *Id.* § 23A.002(9).
99. *See id.* §§ 23.001–23A.003.
100. *See id.* § 23A.002(5).
101. *See id.* § 23A.003(a).
102. J. Ken Nunley & Joe M. Davis, TexasBarCLE: The Road to Partition, (June 24–26, 1998).
103. TEX. PROP. CODE ANN. § 23.001.
104. *See* Joyner v. Christian, 113 S.W.2d 1229, 1233 (Tex. Comm'n App. 1938, judgm't adopted).
105. *See id.*
106. *See* TEX. PROP. CODE ANN. § 23A.001.
107. *See infra* Appendix E.
108. Richard C. Mosty & C. Dixon Mosty, TexasBarCLE: Partition 2019 – Same Old, Same Old? (Mar. 14–15, 2019).
109. *See* Nunley & Davis, *supra* note 102.

1. Initial Considerations

a. Jurisdiction and Venue

A cotenant may bring an action to partition the property or interest in a district court of a county in which any part of the property is located, provided that the action must be filed in a court with jurisdiction over the value of the property to be partitioned.[110]

b. Filing the Petition

Texas Rule of Civil Procedure 756 continues to control the required information for the plaintiff's petition which includes:

> a. The names and residence, if known, or each of the other joint owners or claimants in the property;
> b. The share or interest of the joint owners or claimants in the property, so far as known to the plaintiff; and,
> c. A readily identifiable description of the land and the estimated value thereof.[111]

Because a petition in a partition suit does not require that the plaintiff state whether the plaintiff seeks to have the property partitioned in kind or seeks to have the property sold, a plaintiff in the traditional partition suit may not want to commit to the form of the partition in an initial pleading.[112] However, as discussed below, whether or not any party seeking a partition requests a partition by sale is a prerequisite for the applicability of section 23A.007 related to cotenant buyout; therefore, it appears that a party may be compelled to amend an initial pleading to clarify whether partition by sale is requested.[113]

Further, when it appears to a party that the partition suit involves heirs' property, it is prudent practice to plead the facts showing applicability of the UPHPA in that party's initial pleading, be it an original petition or answer so as to ensure the court makes a timely determination on the issues and triggers the protections of the UPHPA.[114]

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110. TEX. PROP. CODE ANN. § 23.002.
111. TEX. R. CIV. P. 756.
112. *See id.*
113. TEX. PROP. CODE ANN. § 23A.007.
114. John J. Hayes, *New Property Law Brings New Pitfalls*, N.Y.L.J. (Apr. 16, 2020, 10:30 AM), available at: https://plus.lexis.com/api/permalink/78f2306b-418e-476b-a253d27c6660cf3f/?context=1530671.

c. Notice and Notice by Literal Posting

Upon the filing of a petition for partition, the clerk shall issue citations for each of the cotenants identified by name, and such citations shall be served in the manner and for the time provided for the service of citations in other cases.[115] However, if the plaintiff makes an affidavit that an interest in the land to be partitioned is owned by a cotenant who is unknown, or whose whereabouts are unknown to the plaintiff, then the Clerk of the Court shall issue citation for publication.[116] When the property at issue is heirs' property, then the UPHPA requires literal physical posting.[117] Once it is determined that the UPHPA applies, then the plaintiff in a suit requiring citation by publication shall post and maintain, while the action is pending, a conspicuous sign on the property that is the subject of the action stating that an action has commenced and identifying the name and address of the court and the common designation by which the property is known.[118] The court may further require that the sign include the name of the plaintiff and the known defendants.[119]

d. Appointment of Attorney Ad Litem for Defendant Failing to Make an Appearance

When the defendant has been duly cited by publication in accordance with Texas Rule of Civil Procedure 758 and no appearance is entered within the time prescribed for pleadings, the court shall appoint an attorney ad litem to defend on behalf of such owner or owners, and proceed as in other causes where service is made by publication.[120] Further, "[i]t shall be the special duty of the court in all cases to see that its decree protects the rights of the unknown parties thereto."[121] Accordingly, "[t]he judge of the court shall fix the fee of the attorney so appointed, which shall be entered and collected as costs against said unknown owner or owners."[122]

e. Right to a Jury Trial

As provided in the Texas Constitution, a party to a judicial partition may make a jury demand.[123] As in other cases, the jury shall determine contested

115. TEX. R. CIV. P. 757.
116. TEX. R. CIV. P. 758.
117. *See* TEX. PROP. CODE ANN. § 23A.004.
118. *See id.* § 23A.004(b).
119. *See id.*
120. *See* TEX. R. CIV. P. 244.
121. TEX. R. CIV. P. 759.
122. *Id.*
123. *See* TEX. CONST. art. V, § 10.

issues of fact, including the location and description of the property, the identity and relative shares of the respective cotenants, and reimbursable contributions by cotenants.[124] One factual matter to note: when the UPHPA applies to a partition suit, there is a strong statutory preference for partition in kind rather than by sale.[125] For discussion on this portion of the UPHPA, see Section IV.D.4.a. below.[126]

2. The New First Trial—Determination of Property Value, Ownership Interests, and Equitable Adjustments

The pre-partition determination of value in cases where the UPHPA applies is the first significant adjustment to the standard petition suit procedure.[127] In the standard procedure, there has traditionally been the First Trial and the Second Trial.[128] In a traditional partition suit, the First Trial would include three main issues: (i) determination of ownership interests, (ii) determination of equitable adjustment, and (iii) determination of the ability to partition the property in kind.[129] However, for the reasons stated herein, it appears that the First Trial will now replace determination of the ability to partition the property in kind, which clearly goes to the merits of the partition action, with a determination of the value of the property.[130]

Pursuant to Texas Rule of Civil Procedure 760, "upon the hearing of the cause, the court shall determine the share or interest of each of the . . . [cotenants] in the real estate sought to be divided, and all questions of law or equity affecting the title to such land which may arise."[131] As a matter of judicial economy, it seems likely that a court would hear these matters in the required hearing on the determination of the property's fair market value.[132] However, it is possible that a court, for various reasons, including an interpretation of the UPHPA that ownership interests or equitable adjustments in the heirs' property go to the merits of the partition suit, may hold the hearing on the determination of fair market value, and at a later date hold a hearing (which would necessarily fall between the Notice of Determined Value and the Notice of Cotenant Electing to Purchase) on issues related to the ownership interests and equitable adjustments discussed in Section IV.D.3 below.[133]

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124. *See* TEX. CIV. PRAC. & REM. CODE. ANN. § 37.007.
125. *See infra* Section IV.D.4.a.
126. *See infra* Section IV.D.4.a.
127. *See* Nunley & Davis, *supra* note 102.
128. *See id.*
129. *See id.*
130. *See id.*
131. TEX. R. CIV. P. 760.
132. *See infra* Section IV.D.3.
133. See *infra* Section IV.D.3.

a. Determination of Value

"If the court determines that the property that is the subject of a partition suit is heirs' property" and the UPHPA applies, then the court shall first determine the property's fair market value by ordering an appraisal.[134] However, an appraisal need not be ordered "if all cotenants have agreed to the value of the property or to another method of valuation."[135] If so, "the court shall adopt that value or the value produced by the agreed method of valuation."[136] Further, if the court determines that the cost of the appraisal outweighs the evidentiary value of an appraisal, "the court, after an evidentiary hearing, shall determine the fair market value of the property and send notice to the parties of the value."[137]

In cases in which the court orders an appraisal, "the court shall appoint a disinterested real estate appraiser to determine" the property' fair market value, assuming sole ownership of the fee simple estate.[138] "On completion of the appraisal, the appraiser shall file a sworn or verified appraisal with the court."[139] Before the tenth (10th) day following the appraisal filing, "the court shall send notice to each known party of the appraised fair market value," the availability of the appraisal through the clerk, and the party's right to file an objection within thirty (30) days of the notice.[140] While not a statutorily mandated title, this Article shall refer to this notice as the "Notice of Filed Appraisal" to clarify with other court required notice contained in the UPHPA.[141]

Not earlier than thirty (30) days after the Notice of Filed Appraisal is sent, the court shall conduct a hearing to determine the property's fair market value whether or not an objection to the appraisal is filed.[142]

In addition to the court-ordered appraisal, the court may consider any other evidence of value offered by a party.[143]

After a hearing on the determination of value, *but before considering the merits of the partition action*, the court shall determine the fair market value of the property and send notice to the parties of the value.[144] While not a statutorily mandated title, this Article shall refer to this notice as the "Notice

134. TEX. PROP. CODE ANN. § 23A.006(a).
135. *Id.* § 23A.006(b).
136. *Id.*
137. *Id.* § 23A.006(c).
138. *Id.* § 23A.006(d).
139. *Id.*
140. *Id.* § 23A.006(e).
141. Author's suggestion for purposes of this comment.
142. *See* TEX. PROP. CODE ANN. § 23A.006(f).
143. *See id.*
144. *See id.* § 23A.006(g) (emphasis added).

of Determined Value" in order to clarify with other court required notice contained in the UPHPA.[145]

b. Determination of Interests of Cotenants

Because the ownership interest of each cotenant is vital to the application of the buyout provisions of the UPHPA described in Section IV.D.3 below, it seems likely that a court would consider and rule on the ownership interests of the cotenants in the heirs' property at the hearing on the determination of value.[146] Specifically, the Notice of Cotenants Electing to Purchase must include the price to be paid into the registry of the court by such electing cotenants based upon their fractional interest; therefore, it is imperative that a determination of the ownership interest among the various cotenants precede this step in the cotenant buyout procedure.[147]

c. Determination of Equitable Adjustments

Similarly, because equitable adjustments between the various cotenants are necessary for the court to make disbursement of amounts held by the court to persons entitled to them, it seems possible that the hearing on determination of value could include a determination on equitable adjustments for eventual payment under the buyout procedures.[148] However, where the fractional interest in the heirs' property is necessary under the statutory buyout calculations, equitable adjustments are not an imperative for the buyout procedures.[149] But because the court is obligated to disburse amounts held to "persons entitled to them," again a court, out of judicial economy and historical precedent, would hear the matter prior to the Notice of Cotenants Electing to Purchase.[150]

3. Cotenant Buyout Procedures

One of the more considerable protections afforded to cotenants in heirs' property is a statutory right of first refusal on the interest of any cotenant seeking partition by sale, which is mandatory, or those cotenants failing to make an appearance in the suit, which is discretionary.[151] The purchase price for the interest of a cotenant requesting partition by sale or those cotenants

145. Author's suggestion for purposes of this comment.
146. *See* discussion *infra* Section IV.D.3.
147. *See* TEX. PROP. CODE ANN. § 23A.006(g).
148. Author's original opinion.
149. *See* TEX. PROP. CODE ANN. § 23A.007.
150. *See id.*
151. *See id.*

failing to make an appearance is the value of the entire parcel determined by the court multiplied by the cotenant's fractional ownership of the entire property.[152] This means that any interest purchased by a cotenant in the buyout procedure will be done without any discounts commonly associated with valuations of less than fee simple ownership.[153]

a. Mandatory Buyout Provision—Cotenants Requesting Partition by Sale

If any cotenant requested partition by sale, after the determination of value at the hearing on the same, the court shall send the Notice of Determined Value to the parties and further notify each that any cotenant (except a cotenant requesting partition by sale) may buy all the interest of the cotenants requesting partition by sale.[154]

Within forty-five (45) days after the Notice of Determined Value is sent by the court, any cotenant (other than those requesting partition by sale) may elect to purchase all the interests of the cotenants requesting partition by sale by providing notice to the court of their election.[155] After the forty-five (45) day period ends, then the court shall notify the parties if any cotenant, or several cotenants, elected to purchase all of the interest of the cotenant(s) requesting partition by sale and identify the purchase price for such cotenant(s) electing to buy.[156] While not a statutorily mandated title, this Article shall refer to this notice as the "Notice of Cotenants Electing to Purchase" in order to clarify with other court required notice contained in the UPHPA.[157]

When more than one cotenant elects to buy all the interest of the cotenants requesting partition by sale, then the court shall make allocation of the interests available to purchase by each electing party based upon each electing cotenant's existing fractional ownership interest of the entire parcel divided by the total existing fractional ownership of all cotenants electing to buy.[158]

For example: Let's assume five siblings (Jones, Kleberg, Lynn, Marion, and Newton) are involved in a partition suit to which the UPHPA applies.[159] All cotenants are equal owners having received their interest from their father, Irion.[160] Lynn and Newton have plead for partition by sale. Kleberg

152. *See id.* §§ 23A.007(c), 23A.007(f)(2).
153. Author's original opinion.
154. *See* TEX. PROP. CODE ANN. § 23A.007(a).
155. *See id.* § 23A.007(b).
156. *See id.*
157. Author's suggestion for purposes of this article.
158. *See* TEX. PROP. CODE ANN. § 23A.007(b).
159. Hypothetical created by the Author for purposes of this article.
160. *Id*.

has also filed for petition, but only desires partition in kind.[161] The Court has determined the value of the Notrees Ranch to be $1,000,000.00 and no equitable adjustments between the cotenants are necessary.[162] After the conclusion of the statutory period beginning with the Notice of Determined Value, Kleberg and Jones have elected to purchase the interest of Lynn and Newton.[163] The purchase price assigned in the Notice of Cotenants Electing to Purchase is as follows: Lynn and Newton's interest (totaling a combined forty percent (40%)) are available for purchase.[164] Kleberg and Jones have elected to purchase.[165] Each electing cotenant's existing fractional interest (being twenty percent (20%)) is divided by the total existing fractional ownership of those electing to buy (being forty percent (40%)).[166] Therefore the statutory fraction is twenty over forty (20/40) which reduces to one-half (1/2) of the interest being sold.[167] Therefore, each electing cotenant is purchasing 1/2 of the total interest available in the sale (40%).[168] So both Kleberg and Jones now have the right to purchase twenty percent (20%) of the Notrees Ranch for $200,000.00 each. [$1,000,000.00 x 20%].[169]

The timeline for payment after making an election to buy the interest of a cotenant seeking partition by sale is to be set by the court in the Notice of Cotenants Electing to Purchase, but it shall not be less than sixty (60) days from the date the notice is sent.[170] At the conclusion of the time period set by the court, if all electing cotenants timely make payment, then the court shall enter an order reallocating the interest of the cotenants and disburse funds held by the court that the cotenants are entitled thereto.[171]

For example: Continuing with Irion's Notrees Ranch, if Kleberg and Jones both make timely payment, then the court should enter an order that ownership in the property is now: Kleberg with forty percent (40%), Jones with forty percent (40%), and Marion with twenty percent (20%). Payment of $200,000.00 each should be disbursed to Lynn and Newton.[172]

However if some, but not all, of the electing cotenants fail to timely make payment, the court shall send notice of the failure to the other electing cotenants and the price for the interest (the "remaining unpaid interest" herein) for which no payment was received.[173] While not a statutorily

161. *Id*.
162. *Id*.
163. *Id*.
164. *Id*.
165. *Id*.
166. *Id*.
167. *Id*.
168. *Id*.
169. *Id*.
170. TEX. PROP. CODE ANN. § 23A.007(e).
171. *See id.*
172. Hypothetical created by the Author for purposes of this article.
173. *See* TEX. PROP. CODE ANN. § 23A.007(e)(3).

mandated title, this article shall refer to this notice as the "Notice of Right to Purchase Additional Interest" in order to clarify with other court required notice contained in the UPHPA.[174] A cotenant who paid their determined consideration following the Notice of Cotenants Electing to Purchase shall have twenty (20) days in which to elect to purchase the remaining unpaid interest by paying the entire price for the remaining unpaid interest into the registry of the court.[175] If only one cotenant makes payment, then the court shall enter an order reallocating the interests of the cotenants and disburse funds held by the court to the cotenants entitled thereto.[176]

If more than one cotenant makes payment of the full price of the remaining unpaid interest, then the court shall "reapportion the remaining interest among those paying cotenants, based on each paying cotenant's original fractional ownership of the entire parcel divided by the total original fractional ownership of all cotenants that paid the entire price for the remaining interest" and "refund any excess payments held by the court."[177]

For example:[178] Still partitioning Irion's Notrees Ranch, if Jones timely makes full payment ($200,000.00), but Kleberg only timely makes partial payment ($100,000.00), then the court should send Notice of Right to Purchase Additional Interests to Jones—the only electing cotenant to have paid the full amount in the Notice of Cotenants Electing to Purchase, to notify him of his right to purchase the "remaining unpaid interest" available for sale.[179] Here, the remaining unpaid interest would be ten percent (10%), because Kleberg paid only one-half (1/2) of the amount necessary to purchase the twenty percent (20%) ownership interest in Notrees Ranch available to him.[180] Within twenty days of sending of the Notice of Right to Purchase Additional Interest, Jones pays an additional $100,000.00 into the court.[181] As such, the court shall enter an order that ownership in the Notrees Ranch is now: Jones with fifty percent (50%), Kleberg with thirty percent (30%), and Marion with twenty percent (20%).[182] Payment of $200,000.00 each should be disbursed to Lynn and Newton.[183]

If no party elects to buy, or if a party fails to timely make payment of the purchase price provided and there is a remaining unpurchased interest of a cotenant seeking partition by sale, then the statutory buyout process is

174. *See id.*
175. *See id.* § 23A.007(f).
176. *See id.* § 23A.007(f)(1).
177. *Id.* § 23A.007(f)(3).
178. Hypothetical created by the Author for purposes of this article.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*

complete and the court shall resolve the partition pursuant to Section 23A.008.[184]

b. Discretionary Buyout Provision—Cotenants Failing to Appear

In the same forty-five (45) day period which begins with the Notice of Determined Value, any cotenant entitled to buy the interest of a cotenant seeking partition by sale may file a request with the court to authorize the sale of the interests of the named cotenants who have failed to make an appearance and who were served with the petition.[185] Upon such timely request, the court in its discretion, after hearing, may authorize the requested additional sale which must occur after the mandatory buyout procedures have been completed and on such additional terms as the court determines are fair and reasonable.[186] However, it appears that the procedure used for the mandatory buyout would be fair and reasonable per se and likely that a court would implement these same procedures in dealing with the sale of an interest of a cotenant failing to appear.[187] Provided, however, that the purchase price must be the value of the interest as previously determined by the court.[188]

For example:[189] One last time to the Notrees Ranch, assume now that Marion, who was properly served and now lives in Las Vegas under the name of Maverick, failed to appear.[190] Upon receipt of the Notice of Determined Value, Jones timely moves to have Marion's interest sold in this proceeding.[191] The court rules that Marion's interest shall be sold using the same procedures as the mandatory buyout under the UPHPA. Jones is the only cotenant who elects to purchase under the discretionary buyout procedure and tenders the full amount to the court.[192] At the conclusion of this process, the court shall enter an order that ownership in the Notrees Ranch is now: Jones with seventy percent (70%) and Kleberg with thirty percent (30%).[193] The court will disburse funds of $200,000.00 each to Lynn and Newton and retain in the registry of the court $200,000.00, which is the purchase price for Marion's interest in the Notrees Ranch.[194]

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184. *See* TEX. PROP. CODE ANN. § 23A.008.
185. *See id.* § 23A.007(g).
186. *See id.* § 23A.007(h).
187. *See id.*
188. *See id.*
189. Hypothetical created by the Author for purposes of this article.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*

One can easily envision a scenario that the issue of whether or not the property is susceptible to partition in kind can be rendered moot through the process of the mandatory buyout of any cotenant seeking partition by sale and discretionary buyout of any cotenant failing to appear.[195]

4. The New Second Trial—Determination of Ability to Partition in Kind

Because the determination of whether or not the property is subject to partition in kind most assuredly goes to the merits of a partition suit and because of the distinct possibility that the partition suit may be moot after the cotenant buyout procedures, a determination of whether the property can be partitioned in kind will be held at a later date than would occur in the traditional petition suit.[196]

a. Statutory Preference for Partition in Kind

Texas law of partitions includes a preference for partition by division.[197] Specifically, Texas Rule of Civil Procedure 770 prefaces the sale of the property on the court's opinion that a fair and equitable division of the property, or any part thereof, cannot be made.[198] However, when the UPHPA applies additional statutory preference for partition in kind, guidance in making this determination applies.[199] First, a court shall order partition in kind, unless the court finds that partition in kind will result in substantial prejudice to the cotenants as a group.[200] Second, the court shall weigh the totality of all relevant factors, including the following, specific to the UPHPA:

> (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 the property 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;

195. Author's original opinion.
196. *See* TEX. PROP. CODE ANN. § 23A.009.
197. *See id.* § 23A.007(h).
198. *See* TEX. R. CIV. P. 770.
199. *See* TEX. PROP. CODE ANN. § 23A.008.
200. *See id.* § 23A.008(a).

> (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 the cotenants' 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.[201]

When considering whether to order partition in kind, "the court shall approve a request by two or more parties to have the requesting parties' individual interests aggregated."[202] Additionally, when the court orders partition in kind, if any unpurchased interest of cotenants who have failed to make an appearance after the discretionary buyout procedure, then the court shall allocate the portion of the property belonging to such cotenants and that part of the property shall remain undivided.[203] Finally, if partition in kind is ordered, but would leave one cotenant with property of greater or lesser value than their respective fractional interest of the determined value, then the court may require that some cotenants pay other cotenants.[204]

b. Order Partitioning the Heirs' Property in Kind

Upon hearing of the issue of susceptibility of partition, the court shall order that the whole, or any part of such property, is susceptible of partition.[205] When the court finds that partition in kind is proper, then the court "shall enter a decree directing the partition of such real estate, describing the same, to be made in accordance with the respective shares or interests of each of such parties entitled thereto" following the buyout procedures.[206]

i. Appointment and Service of Commissioners

To that end, the court "shall appoint three or more competent and disinterested persons as commissioners to make such partition in accordance

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201. *Id.* § 23A.009(a).
202. *Id.* § 23A.008(a).
203. *See id.* § 23A.008(d).
204. *See id.* § 23A.008(c).
205. *See* TEX. R. CIV. P. 761.
206. *Id.*

with such decree and the law, a majority of which commissioners may act."[207] When the UPHPA applies, and if the court appoints commissioners pursuant to Texas Rule of Civil Procedure 761, then the UPHPA reiterates that the commissioners, in addition to the other requirements and disqualifications, "must be impartial and may not be a party to or a participant in the action."[208] Apparently, other states have less stringent protections against the appointment of interested commissioners than even a standard partition action in Texas.[209]

Following the appointment of commissioners, the clerk shall issue a writ of partition, including a certified copy of the decree of the court directing the partition, directed to applicable county law enforcement, notifying each of the commissioners of their appointment.[210] The writ shall be served by reading it to each of the commissioners.[211] "A writ of partition, unless otherwise directed by the court, shall be made returnable twenty days from date of service on the commissioner last served; and the officer serving it shall endorse thereon the time and manner of such service."[212]

ii. Action of Commissioners

The commissioners shall proceed to partition the real estate described in the decree in accordance with the directions in such decree and applicable law.[213] If the commissioners or the court deem it necessary, either may cause the heirs' property to be surveyed in order to be partitioned into several parcels.[214] The commissioners shall divide the heirs' property into as many shares as there are remaining cotenants.[215] In making this determination, the commissioners should have due regard in the division to the "situation, quantity and advantages of each share, so that the shares may be equal in value, as nearly as may be, in proportion to the respective interests of the parties entitled."[216] The commissioners then proceed, by lot, to set apart to each of the remaining cotenants in their respective shares.[217]

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207. *Id.*
208. TEX. PROP. CODE ANN. § 23A.005.
209. Author's interpretation of content in UNIF. PARTITION OF HEIRS PROP. ACT (UNIF. L. COMM'N 2010).
210. TEX. R. CIV. P. 762.
211. TEX. R. CIV. P. 763.
212. TEX. R. CIV. P. 765.
213. TEX. R. CIV. P. 766.
214. TEX. R. CIV. P. 764, 767.
215. TEX. R. CIV. P. 768
216. *Id.*
217. *Id.*

iii. Report of Commissioners

At the conclusion of this process, Texas Rule of Civil Procedure 769 requires the commissioners to file a sworn, written report.[218] This report must include:

(a) The property divided, describing the same.
(b) The several tracts or parcels into which the same was divided by them, describing each particularly.
(c) The number of shares and the land which constitutes each share, and the estimated value of each share.
(d) The allotment of each share.
(e) The report shall be accompanied by such field notes and maps as may be necessary to make the same intelligible.[219]

Upon the filing of the report, the clerk shall mail a written notice to all parties.[220]

The court shall examine the report and determine, from the report and from evidence submitted by the parties, the complexity and difficulty of making the partition in awarding reasonable fees to the commissioners and any surveyor.[221] The fees awarded shall be taxed and collected as costs of court in the same manner as the other costs in the action.[222]

iv. Objection and Hearing on Report — Now a Third Trial

Any cotenant whose interest is subject to partition in accordance with the report "may file objections to any report of the commissioners in partition within thirty days of the date the report is filed, and in such case a trial of the issues thereon shall be had as in other cases."[223] If the report is found to be materially erroneous, or unequal and unjust, it shall be rejected, and other commissioners shall be appointed to complete the process again.[224]

c. Order for Sale Heirs' Property

Should the court determine that a fair and equitable division of the heirs' property, in whole or in part, would be a substantial prejudice to the cotenants as a group and therefore orders a sale of heirs' property, "the sale must be an

218. TEX. R. CIV. P. 769
219. *Id*.
220. *Id.*
221. *See* TEX. PROP. CODE ANN. § 23.005.
222. *Id.*
223. TEX. R. CIV. P. 771.
224. *Id.*

open-market sale unless the court finds that a sale by sealed bids or at an auction would be more economically advantageous and in the best interest of the cotenants as a group."[225]

If the court decides to order an open-market sale, then the remaining cotenants have ten (10) days in which to agree upon a real estate broker, then the court shall appoint the real estate broker and establish a reasonable commission.[226] However, if the remaining cotenants cannot agree on a broker, the court shall appoint a disinterested real estate broker to offer the property for sale and shall establish a reasonable commission.[227] The real estate broker shall "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."[228]

If the appointed real estate broker obtains an offer to purchase the property for at least the determination of value within a reasonable time, then the broker shall comply with the reporting requirements below and the sale may be completed in accordance with other applicable law.[229] However, if the appointed real estate broker does not obtain

> an offer to purchase the property for at least the determination of value, the court, after hearing, may [either]: (i) approve the highest outstanding offer, if any; (ii) redetermine the value of the [heirs'] property and order that the property continue to be offered for an additional time; or (iii) order the property be sold by sealed bids or at an auction.[230]

The appointed real estate broker must file a report with the court not later than the seventh day after the date an offer is received to purchase the property containing the following information:

(1) a description of the property to be sold to each buyer;
(2) the name of each buyer;
(3) the proposed purchase price;
(4) the terms and conditions of the proposed sale, including the terms of any owner financing;
(5) the amounts to be paid to lienholders;
(6) a statement of contractual or other arrangements or conditions of the broker's commission; and

225. TEX. PROP. CODE ANN. § 23A.010(a).
226. *Id.* § 23A.010(b).
227. *See id.*
228. *Id.*
229. *See id.* § 23A.010(c).
230. *Id.* § 23A.010(d).

(7) other material facts relevant to the sale.[231]

"If the court orders a sale by sealed bids, the court shall set terms and conditions of the sale."[232] However, "[i]f the court orders an auction, the auction must be conducted in the manner provided by law for a sale made under execution."[233]

Whether the sale is by open-market, sealed bid, or auction, if a purchaser is a cotenant entitled to part of the proceeds of the sale, such cotenant is "entitled to a credit against the price in an amount equal to the purchaser's share of the proceeds."[234]

V. PRACTICAL APPLICATIONS TO THE ESTATE PLANNING AND PROBATE PRACTICE

The committee drafting the UPHPA included in their commentary to the Act that more affluent and legally savvy individuals face the issues of cotenancy, and thereby partitions, less frequently than others due to sophisticated estate planning, asset preservation, and wealth transfer techniques based upon the advice and with the assistance of counsel.[235] As such, we as estate planning and probate attorneys are uniquely situated to minimize the applicability of the UPHPA.[236] Not in a manner or for the purpose of taking advantage of those the UPHPA seeks to protect, but by circumventing the issues addressed by the UPHPA in an attempt to accomplish client objectives for the betterment of the family as contemplated by the committee.[237]

A. Estate Planning

In an attempt to avoid the application of the UPHPA, there are several planning opportunities for the distribution of real property which can minimize the likelihood of a partition, primarily by preventing the co-ownership of heirs' property all together.[238] Each option discussed herein has benefits and limitations which make the appropriate action different for

231. *Id.* § 23A.011(b).
232. *Id.* § 23A.010(e).
233. *Id.*
234. *Id.* § 23A.010(f).
235. *See* National Conference of Commissioners on Uniform State Laws, *supra* note 16, at 4, 5.
236. Author's original commentary.
237. *Id*.
238. *See infra* notes 69–86.

each client's needs and desires.[239] For purposes of illustration, we will return to the example of Archer above.[240]

1. Inter Vivos Transfer

Often we must remind clients of two simple truths of their own demise: (i) you cannot take it with you, and (ii) you cannot give what you do not have.[241] One option, therefore, is not to own real property at the time of your death.[242] An inter vivos transfer of the real property during life may be a good option for a client, particularly one who may already own heirs' property.[243] For instance, let us assume Archer received Best Creek Farm from his parents and his only brother, Anderson, received Other Creek Place.[244] Best Creek Farm and Other Creek Place are adjoining tracts, and both Archer and Anderson have lived their lives working their family parcels.[245] Considering that Archer's children do not live nearby or have any interest in working the land, maybe a sale from Archer to Anderson makes sense.[246]

Of course many people are hesitant to sell their home, even if a lease agreement for the use of the property is determined in advance, and there is also the loss of the homestead protection in Best Creek Farm, which may subject the property to concerns of seizure.[247]

2. Use of Specific Devises

Perhaps the simplest option, both in terms of drafting and administration, is to provide for the distribution of real property through the use of specific devises.[248] By providing that each beneficiary receives a parcel as their sole and separate property in fee simple, the issues of heirs' property are eliminated as there is no tenancy in common.[249]

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239. Author's original commentary.

240. *Id*.

241. Author's original thoughts.

242. *See* David J. Willis, *Living Trusts for the Homestead*, LONESTARLANDLAW.COM, https://lonestarlandlaw.com/living-trusts-for-the-homestead/ (last visited Oct. 11, 2020) [https://perma.cc/SL2J-VHE3].

243. Author's original thoughts.

244. Illustrative scenario created by author, *see supra* notes 28–45 and accompanying text.

245. *Id*.

246. *Id*.

247. *See* Willis, *supra* note 242.

248. *See* Brad Wiewel, *Texas Estate Planning Handbook*, TEXASTRUSTLAW.COM, 15–17 (2018), https://www.texastrustlaw.com/wp-content/uploads/TexasEstatePlanningHandbook.pdf [https://perma.cc/MWJ8-BZUB].

249. *See* case law update, Gerry W. Beyer, *Estate Planning Highlights of the 2017 Texas Legislature*, SAN ANTONIO EST. PLANNERS COUNCIL 1–2 (2017), https://www.sanantonioepc.org/assets/Councils/SanAntonio-TX/library/2017%20Legislative%20Update%20--%20Beyer%20--%20SAEPC%20(11-17-2017)%20(1).pdf [https://perma.cc/9X3Q-6JYX].

The most obvious limitation with this option is the number of beneficiaries as compared to the value of the estate available to make equalizing gifts to similarly situated beneficiaries as many testators prefer.[250] Remember, Archer wishes to treat each child equally, but has little assets outside of his rural homestead.[251] If Archer felt Best Creek Farm was too small to subdivide and distribute under the will, he would likely be unable to accomplish the competing goals of equal treatment of each child and avoiding cotenancy in Best Creek Farm through a specific devise.[252] Even if he had sufficient other assets to treat each child equally, while giving the entirety of the Best Creek Farm to one child, the reliance upon financial assets, which can easily be removed from known accounts and made to pass outside probate, or on personal property which could be sold, stolen, or lost, could have dramatic unintended consequences.[253] Specifically, a beneficiary may receive substantially less than other beneficiaries.[254] We often refer to these individuals by the title of plaintiff.[255]

3. Forced Sale Clause with Right of First Refusal

For the testator like Archer, who has few assets beyond the real property and several beneficiaries he wishes to treat equally, perhaps a better option is to direct the personal representative to sell the land and split the proceeds evenly.[256] In doing so, an estate plan can easily be drafted so that each beneficiary, or another individual like his brother, Anderson, shall have a right of first refusal to purchase at a fair market value price, as defined in the testamentary document, within a time period set therein.[257] The share, which would have passed to the purchasing beneficiary, can be drafted as an offset to the purchase price, which may help a beneficiary obtain liquid capital for the purchase.[258] If more than one beneficiary elects to purchase, then lots could be cast, or if few enough beneficiaries elect to purchase, perhaps the

250. *See* Wiewel, *supra* note 248, at 7.

251. Author's original thoughts.

252. Author's original thoughts.

253. *See* Wiewel, *supra* note 248, at 7–8.

254. Amy Fontinelle, *Advice on Wills: Should Each Child Get the Same?*, INVESTOPEDIA (Nov. 24, 2019), https://www.investopedia.com/articles/personal-finance/102215/advice-wills-should-each-child-get-same.asp [https://perma.cc/DE3Z-E75N].

255. *See* Laurie Ratliff et al., *Standing, Capacity, and Necessary Parties in Trust Litigation*, IKARD LAW 1, https://ikardlaw.com/wp-content/uploads/2019/04/Standing-Capacity-and-Necessary-Parties-State-Bar-Draft-002.pdf (last visited Oct. 13, 2020) [https://perma.cc/AR9R-D7FR].

256. *See* Beyer, *supra* note 249, at 1; Illustrative scenario created by author, *see supra* notes 28–45 and accompanying text.

257. *See* Beyer, *supra* note 249, at 1; Illustrative scenario created by author, *see supra* notes 28–45 and accompanying text.

258. *See* Beyer, *supra* note 249, at 1; Illustrative scenario created by author, *see supra* notes 28–45 and accompanying text.

parcel could be divided equitably to still be a parcel worth owning.[259] In some ways this option is an attempt to create the buyout procedures of the UPHPA outside the judicial system with the associated costs.[260]

Generally, the most difficult aspect of this option is the sentimental value of the real estate in the eye of the testator.[261] For many, like Archer, who have received the property as an inheritance from prior generations, or others who diligently saved in order to purchase their own little slice of heaven, the thought that it would be sold without being given to their descendants is too great a hurdle, no matter the likelihood that the property will be sold eventually.[262]

4. Trusts

Although trusts have additional ongoing obligations, the split of legal and equitable title in the real estate places the fiduciary duty on the trustee to preserve trust assets for the use and enjoyment of the beneficiaries.[263] This might be a workable option if Best Creek Farm has a source of cash flow (such as rents and mineral royalty) to allow the trustee to make distributions to the beneficiaries, and the testator has an individual worthy of service as a trustee (Archer's brother, Anderson).[264]

However, absent sufficient language in the trust instrument, the trustees' holding of a small parcel without cash flow sufficient to cover costs and provide funds for distribution may be a breach of their fiduciary duty in failing to make the assets productive of income (particularly in a QTIP-able marital trust) and failing to diversify the investments of the trust.[265]

Moreover, unless the heirs' property is in a pot trust (something this author loathes in almost every conceivable circumstance) the use of a trust may not prevent partition.[266] "The Texas Trust Code expressly gives a trustee the power to partition real property . . . in the absence of contrary provisions in the trust agreement itself."[267] Therefore, if Archer's will distributed the Best Creek Farm in equal shares to separate trusts for each of his children

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259. *See* Beyer, *supra* note 249, at 1; Illustrative scenario created by author, *see supra* notes 28–45 and accompanying text.

260. Author's original thoughts.

261. *See Assets with Sentimental Value Require Extra Planning*, THEUS L. OFFS., https://theuslaw offices.com/assets-with-sentimental-value-require-extra-planning/ (last visited Oct. 10, 2020) [https://perma.cc/7EDC-FF5C].

262. *See id.*; Illustrative scenario created by author, *see supra* notes 28–45 and accompanying text.

263. *See* 72 TEX. JUR. 3d *Trusts* § 32 (2020).

264. Illustrative scenario created by author, *see supra* notes 28–45 and accompanying text.

265. *See* 72 TEX. JUR. 3d *Trusts* § 144 (2020).

266. *See Family-pot Trust*, BLACK'S LAW DICTIONARY (11th ed. 2019).

267. Dierschke v. Cent. Nat'l Branch of First Nat'l Bank at Lubbock, 876 S.W.2d 377, 380 (Tex. App.—Austin 1994, no writ) (citing TEX. TRUST CODE ANN. §§ 113.009(1), 111.002(a) (West 1984) (now codified in the Texas Property Code)).

and named each child as trustee of their respective child's trust, it would create the same conditions for partition issues and possibly remove the protections of the UPHPA entirely.[268]

5. Entities

Entity ownership of the property is another method that could prevent the application of the UPHPA by alleviating issues of tenants in common.[269] A simple limited liability company, which has minimal costs of formation and maintenance expenses and is more income tax advantageous as compared to other entities, may be a good choice of entity.[270] With the entity owning the property, interests in the entity are the asset which is subject to distribution and can easily be divided in any percentage.[271] A well-drafted company agreement ensures matters of governance and decision making can be structurally determined prior to any particular issue and can include buyout procedures in order to ensure that Best Creek Farm stays in the family through the entity.[272]

Again, the use of this option is almost certainly predicated on cash flow sufficient to cover costs, including potential management fees, and to provide funds for distribution to the entity owners.[273] Additionally for Archer, consideration should be given to dividing Best Creek Farm into the pasture parcel and the homestead to provide Archer the benefit of the constitutional and statutory protections afforded during his life.[274]

B. Probate

1. With Great Power Comes Great Responsibility, Use It!

The personal representative is entrusted with the highest duties under the law, great power (both granted in a testamentary instrument and by statute), and also the air of authority granted by the position with which a personal representative can further the wishes of the testator and protect the interests of the beneficiaries potentially for generations to come.[275]

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268. *See id.*; Illustrative scenario created by author, *see supra* notes 28–45 and accompanying text.

269. *See supra* Section IV.C.

270. *See supra* Section IV.C; Author's original thoughts.

271. *See* Michael Spadaccini, *The Basics of Business Structure*, ENTREPRENEUR (Mar. 9, 2009), https://www.entrepreneur.com/article/200516 [https://perma.cc/JY98-DNNV].

272. Illustrative scenario created by author, *see supra* notes 28–45 and accompanying text; *see supra* Section IV.C; *see* Spadaccini, *supra* note 271.

273. *See How to Handle LLC Capital Contributions and Distributions*, INCNOW (Mar. 29, 2019), https://www.incnow.com/blog/2019/03/29/capital-contributions-distributions/ [https://perma.cc/U8H9-NNY4].

274. *See id.*; illustrative scenario created by author, *see supra* notes 28–45 and accompanying text.

275. *See infra* Sections V.B.1.a–c.

a. Power of Sale

Even as an independent executor (or administrator), a personal representative in Texas generally has only the same power of sale of estate property that a personal representative has in a supervised dependent administration, but without the need for court approval.[276] In a supervised administration, a court may order the sale of personal or real property to pay: (1) expenses of administration; (2) the decedent's funeral expenses; (3) expenses of the decedent's last illness; (4) allowances; or (5) claims against the estate.[277] Unless a will restricts or expands this power of sale, an independent executor or administrator has the authority to sell only for these purposes.[278]

Always check the will for the power of sale and limitations set therein.[279] Often, it will be granted with the language granting the executor the same powers as those given to trustees under the Texas Trust Code, which would allow for more expansive reasoning for a sale.[280] Where a decedent dies intestate or the will does not authorize the personal representative to sell property, the court may include authority to sell as the distributees agreed in an application.[281]

b. In Kind, Non-Pro Rata Distributions

Another provision of the Texas Estates Code Section 405.0015 became effective on September 1, 2017.[282] Section 405.0015 provides that unless a will or a court order provides otherwise, an independent executor with the power of sale may, in distributing property not specifically devised:

(1) make distributions in divided or undivided interests;
(2) allocate particular assets in proportionate or disproportionate shares;
(3) value the estate property for the purposes of acting under Subdivision (1) or (2); and
(4) adjust the distribution, division, or termination for resulting differences in valuation.[283]

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276. *See* TEX. EST. CODE ANN. § 402.052.
277. *See id.* §§ 356.101, 356.251.
278. *See id.* § 402.052.
279. *See id.*
280. *See id.*; 2 JAMES N. JOHNSON, TEXAS PRACTICE GUIDE: REAL ESTATE TRANSACTIONS § 10:251 (2020).
281. TEX. EST. CODE ANN. § 401.006.
282. *See id.* § 405.0015.
283. *Id.*

Therefore, an independent executor with the power of sale has the authority to make non-pro rata in-kind distributions by statute even when not included in the terms of the will.[284]

Prior to this statute, when a will did not partition or distribute the estate, then the executor did not have the power or authority to make non-pro rata in-kind distributions of such properties in his sole discretion.[285] However, the independent executor could—but was not required to—petition the probate court for a partition and distribution of the estate or an order of sale of any portion of the estate that is not capable of fair and equal partition or distribution which is discussed below.[286]

c. Partition by the Personal Representative

Another aspect of the Code's provision is that an independent executor with the power of sale may make non-judicial partition and distribution of an estate.[287] The independent executor may even make it when the will does not provide specifically for that power nor provide the method or the means for its partition.[288] A personal representative's right to seek partition by judicial procedure is still available when no will has been probated or if the will does not provide the power of sale.[289] If the court finds that any portion of the estate is not capable of fair and equal partition or distribution, partition and distribution or sale is done as in supervised estates.[290]

2. Family Settlement Agreements

Family Settlement Agreements are favorites of the law.[291] The tax ramifications of using a family settlement agreement in the absence of the power to make non-pro rata, in-kind distributions under a will or trust that does not expressly provide for the power is beyond the scope of this Article.[292] The tax ramification can effectively be used to make distributions

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284. *See id.*

285. Gonzalez v. Gonzalez, 469 S.W.2d 624, 630 (Tex. App.—Corpus Christi 1971, writ ref'd n.r.e.) (citing Terrill v. Terrill, 189 S.W.2d 877 (Tex. App.—San Antonio 1945, writ ref'd).

286. Catherine H. Goodman, *When Independent Administrations Aren't So Independent*, State Bar of Texas, TexasBarCLE, 39th Annual Advanced Estate Planning & Probate Course, Chapter 35, June 10–12, 2015, Dallas, Texas.

287. *See* TEX. EST. CODE ANN. § 405.0015.

288. *See id.*

289. *See id.*

290. *See id.* § 405.008.

291. Stringfellow v. Early, 40 S.W. 871 (Tex. App. 1897, writ dism'd); Crossley v. Staley, 988 S.W.2d 791, 796 (Tex. App.—Amarillo 1999, no writ).

292. *See* Sarah Patel Pacheco & Mickey R. Davis, *Peace Treaties: Considerations When Negotiating, Drafting, & Enforcing Settlement Agreements & Releases*, State Bar of Texas, TexasBarCLE, 26th Annual Estate Planning & Probate Drafting Course, Chapter 13, Oct. 8–9, 2015, Houston, Texas.

not otherwise included in the testamentary instrument upon the agreement of all the parties.[293] These can be done despite the language of the will related to distributions or powers.[294] Although he has no obligation to do so—nor the authority to require it—Anderson, as the chosen executor and brother of Arthur, has a great deal of clout with which to explain the situation and benefits of a family settlement agreement to minimize or eliminate joint ownership.[295]

3. Tenants in Common Agreement

Lastly, a personal representative can encourage the cotenants to enter into their own agreement that includes language on the rights and procedure for a cotenant to be bought out without the necessity of court proceedings.[296] The UPHPA expressly does not apply when the tenants have an agreement that includes provisions governing partition.[297] Similar as with the use of a family settlement agreement, Anderson has no obligation to do so, nor the authority to require it.[298] But Anderson can encourage and assist in the preparation of an agreement prior to or shortly after distribution of Best Creek Farm in undivided shares.[299]

VI. CONCLUSION

Like the anatomy pages and World Book Encyclopedia, the Uniform Partition of Heirs' Property Act modifies the law of partition when dealing with heirs' property to provide added protections creating a more fair and equitable procedure for partition, rather than a wholesale abandonment of the standard judicial partition law.[300] In doing so, the UPHPA provides for additional notice requirements, a determined fair market value, a cotenant buyout procedure, a preference for partition in kind, and open-market sales.[301] Understanding the new procedure will be of great importance to both attorneys seeking to effectuate the partition of heirs' property and to those seeking to circumvent the application of the UPHPA (and standard partition

293. *See id.*
294. *See id.*
295. *See id.*; Illustrative scenario created by author, *see supra* notes 28–45 and accompanying text.
296. *See* TEX. PROP. CODE ANN. § 23A.002(5)(A).
297. *See id.*
298. *See id.*; Illustrative scenario created by author, *see supra* notes 28–45 and accompanying text.
299. *See* TEX. PROP. CODE ANN. § 23A.002(5)(A); Illustrative scenario created by author, *see supra* notes 28–45 and accompanying text.
300. The author of this article had an almost complete set of The World Book Encyclopedia, 1987 Edition, which were claimed out of a grandparents moving sale.
301. Author's original opinion.

suits for that matter) through the use of estate planning and probate techniques contemplated by the Uniform Law Commission.[302]

302. *Id*.