SHOULD IOWA ADOPT THE UNIFORM PARTITION OF HEIRS PROPERTY ACT?

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I. INTRODUCTION

The subject matter of this Note is the Uniform Partition of Heirs Property Act (UPHPA). The UPHPA was drafted and approved in 2010 by the Uniform Law Commission, a 124-year-old organization consisting of more than 300 judges, lawyers, and law professors who have been tasked by various states to "research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical."[1] The Uniform Law Commission has promulgated over 200 acts, including the Uniform Partnership Act, the Uniform Commercial Code, and the Uniform Probate Code.[2] The UPHPA has been enacted into law in five states thus far, with several others currently considering adoption.[3]

The UPHPA is an act designed to combat some of the longstanding problems in property law that occur when courts partition tenancy-in-common ownership of property with family ownership attributes–such as heirs property.[4] This Note will discuss these problems, explain why they are particularly relevant to Iowans and their farmland, and examine the UPHPA as a potential solution. Ultimately, this Note will argue why Iowa should adopt the UPHPA and enact it into legislation.

II. THE PROBLEM

A. A Hypothetical

Envision the following scenario: Sandy Johnson, an elderly Iowa widow, passes away leaving a simple will devising the family farm to her three sons, Earl, Rick, and Kevin.[5] The farm has been in the Johnson family for more than

1. Press Release, Unif. Comm'n, *Arkansas Enacts Uniform Partition of Heirs Property Act*, UNIF. L. COMM'N (Feb. 24, 2015), http://www.uniformlaws.org/NewsDetail.aspx?title=Arkansas%20Enacts%20Uniform%20Partition%20of%20Heirs%20Property%20Act.

2. *Id.*

3. *See id.*

4. Thomas W. Mitchell, Professor, Univ. of Wis. Law Sch., Presentation at 2014 Spring Meeting and 9th Annual State and Local Procurement Symposium: The Uniform Partition of Heirs Property Act: A Section by Section Analysis 2 (Apr. 24-25, 2014), http://www.americanbar.org/content/dam/aba/events/state_local_government/2014/04/2014-spring-meeting/heirs.authcheckdam.pdf.

5. *See generally Partition of Heirs Property Act Summary,* UNIF. L. COMM'N, http://www.uniformlaws.org/ActSummary.aspx?title=Partition%20of%20Heirs%

100 years. The old, rustic farmhouse that sits on the property has sheltered five generations of Johnsons and was built by Sandy's grandfather with his bare hands. Earl and Kevin have worked the family farm for many years, while Rick moved away long ago. Earl and Kevin would like to keep the family farm and continue to work the land in the tradition of their father and their father's father before them. Rick, however, simply needs cash and has no sentimental attachment to the farm. Therefore, he desires to sell. Under Iowa law, unless Sandy Johnson devised the property to her sons with very specific language indicating a contrary intent, the brothers will own the property as tenants-in-common.[6] This means each brother will own a one-third of a transferrable interest in the undivided property.[7] Since Earl and Kevin lack the funds necessary to buyout Rick's share of the property, Rick sells his one-third interest to a real estate speculator. The real estate speculator then immediately files an action with the court to partition (i.e., divide[8]) the property.

Because Iowa law favors partition by sale[9] and because a physical division of the property (partition in kind)[10] would be inequitable and impractical–given that the house cannot be physically divided, yet accounts for the majority of the value of the property–the court would almost certainly order that the entire property be sold.[11] However, the totality of this tragedy isn't limited to Earl and Kevin being forced off of a farm and out of a house that has been in their family for over 100 years. To add insult to injury, the real estate speculator is then able to purchase the farm well below market value, as forced sales usually equate to minor returns.[12]

B. A Real Life Example

While the Johnson hypothetical adequately illustrates the problem, it is important to keep in mind that we do not live in a hypothetical world. This is a real

20Property%20Act (last visited Dec. 13, 2016).

6. *See* IOWA CODE § 557.15(1) (2016).

7. *See Partition of Heirs Property Act Summary, supra* note 5.

8. *Partition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/partition (last visited Dec. 13, 2016).

9. Anderson v. Johnson, No. 4-668, 2004 Iowa App. LEXIS 1299, at *5 (Iowa Ct. App. Dec. 8, 2004).

10. JERRY L. ANDERSON & DANIEL B. BOGART, PROPERTY LAW: PRACTICE, PROBLEMS AND PERSPECTIVES 204-05 (Vicki Been et al. eds., 2014).

11. *See Partition of Heirs Property Act Summary, supra* note 5.

12. *Id.*

problem that affects real Americans throughout the nation.[13] Take, for example, the story of Louis Marsh. Mr. Marsh was a freed slave who, after the civil war, accumulated 560 acres of farmland in Jackson Parish, New Orleans.[14] He died in 1906, intestate (without having made a will[15]), which resulted in his children inheriting the property.[16] The children held the property as tenants-in-common until they asked the court to partition it in 1944.[17] The court awarded eighty acres to each of six siblings.[18] The remaining eighty acres would have gone to the remaining sibling, Kern Marsh, but he had fled the state after getting into trouble with law enforcement.[19] In light of this, the court decided to leave the remaining eighty acres to Louis Marsh's children as tenants-in common.[20] The children agreed that one of them, Albert Marsh, would farm those eighty acres in addition to his tract of land.[21] Twenty years came and went with no return of the missing Kern Marsh, and the family came to regard the entire 160 acres as Albert's land, believing it would pass to Albert's children upon his death.[22] Albert passed away in April of 1955, also without a will.[23] Around this same time, oil was discovered in the area and oil rigs began to appear on neighboring properties.[24] After Albert's death, an oil businessman by the name of J.B. Holstead paid $100 and an old used truck to one of Albert's nephews in exchange for his interest in the property.[25] Three days later, he filed an action to force the sale of the entire eighty acres.[26] The judge concluded that, because the partition action in 1944 left the land to Louis Marsh's children as tenants-in-common, the actual owners of the eightyacre tract of land were the twenty-three living descendants of Louis

13. *See* Mitchell, *supra* note 4, at 2.

14. Todd Lewan & Dolores Barclay, *Developers and Lawyers Use a Legal Maneuver to Strip Black Families of Land*, AUTHENTIC VOICE, http://theauthenticvoice.org/mainstories/tornfromtheland/torn_part5/ (last visited Dec. 13, 2016).

15. *Intestate,* MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/intestate (last visited Dec. 13, 2016).

16. Lewan & Barclay, *supra* note 14.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

Marsh.[27] Since this included Albert's nephew, the man with whom Holstead made his agreement, the judge ruled that the interest transfer was valid and granted the partition by sale request.[28] Mr. Holstead then purchased the entire eighty acres for $6,400–split amongst the remaining twenty-two descendants of Louis Marsh–and preceded to immediately sell the entire eighty acres of land, as well as the oil and gas rights, for an undisclosed amount.[29] This is just one of many stories of injustice experienced by American families when it comes to heirs property.[30]

The default partition laws that govern tenancy-in-common have caused a myriad of problems for many families, especially the poor.[31] Those most impacted are low-to moderate-income property owners who reside in areas that refer to ownership of the tenancy-in-common variety as "heirs property" (or a similar derivative).[32] Those hit especially hard have been African Americans in the south, poor whites in places like Appalachia, and Native Americans and Latinos across the country.[33]

C. Why This Problem is Relevant to Iowa Farmland

Unfortunately for some Iowa families, a convergence of factors on the horizon will make the aforementioned hypothetical an unfortunate reality in the years to come. Skyrocketing farmland values,[34] a large increase in real estate speculation,[35] and an elderly landowner population[36] are massive weather fronts

27. *Id.*
28. *Id.*
29. *Id.*
30. *See generally* Mitchell, *supra* note 4.
31. *Id.* at 2.
32. *Id.*
33. *Id.*
34. *Compare* REALTORS LAND INST., SEPTEMBER 2003 SURVEY OF FARM LAND VALUES IN DOLLARS PER ACRE (2003) [hereinafter SEPTEMBER 2003 SURVEY OF FARM LAND VALUES IN DOLLARS PER ACRE], http://www.rlifarmandranch.com/docs/ltv/200309_ltv.pdf (finding the average state price of medium quality soil to be $2,237.00 per acre), *with* REALTORS LAND INST., SEPTEMBER 2015 SURVEY OF FARM LAND VALUES IN DOLLARS PER ACRE (2015) [hereinafter SEPTEMBER 2015 SURVEY OF FARM LAND VALUES IN DOLLARS PER ACRE], http://www.rlifarmandranch.com/docs/fall%202015%20land%20survey.pdf (finding the average state price of medium quality soil to be $7,054.00 per acre).
35. *See* Joshua Rogers, *Dirt Cheap? Investors Are Plowing Into Farmland, Here's Why*, FORBES (Sept. 23, 2014, 10:02 AM), http://www.forbes.com/sites/joshuarogers/2014/09/23/dirt-cheap-investors-are-

set on a collision course which is destined to generate the perfect storm of injustice, underscored in both the Johnson hypothetical and the Marsh's story.

Iowa farmland values have increased significantly over the last decade.[37] In 2003, the average price per acre for medium quality soil was $2,237.[38] In 2015, that number had increased to $7,054 per acre.[39] Although there has been a small dip in the market in recent years,[40] this still equates to a 315 percent increase in farmland values in a twelve-year period.

With such a colossal return on investment, it's easy to understand why investors are lining up to try their luck with Iowa farmland.[41] Since the 1990s, Iowa farmland has consistently beaten the stock market, creating many millionaire farmers in the process.[42] Savvy investors recognize the value in owning hard assets that are imperative to the preservation of the advanced industrial civilization we live in–such as the production of food.[43] This flurry of investor activity has helped drive the steady increase in farmland values.[44]

The final component to this triad of forces that will inevitably lead to increased instances of injustice for property heirs is the fact that the majority of Iowa farmland is currently owned by an elderly population.[45] Specifically, 56 percent of Iowa farmland is owned by people age sixty-five and older, while 30

plowing-into-farmland-heres-why/#41ff36bc2ab2.

36. *See* MICHAEL DUFFY & ANN JOHANNS, IOWA ST. UNIV. EXTENSION & OUTREACH, FARMLAND OWNERSHIP AND TENURE IN IOWA 2012, at 15 (2014) (showing 56 percent of Iowa farmland owned by people older than sixty-five and 30 percent of Iowa farmland owned by people older than seventy-five).

37. *Compare* SEPTEMBER 2003 SURVEY OF FARM LAND VALUES IN DOLLARS PER ACRE, *supra* note 34, *with* SEPTEMBER 2015 SURVEY OF FARM LAND VALUES IN DOLLARS PER ACRE, *supra* note 34.

38. SEPTEMBER 2003 SURVEY OF FARM LAND VALUES IN DOLLARS PER ACRE, *supra* note 34.

39. SEPTEMBER 2015 SURVEY OF FARM LAND VALUES IN DOLLARS PER ACRE, *supra* note 34.

40. *See* Donnelle Eller, *Iowa Farmland Values Drop 15 Percent Over Two Years*, DES MOINES REG. (Mar. 31, 2015, 6:41 PM), http://www.desmoinesregister.com/story/money/agriculture/2015/03/31/iowa-farmland-values/70725978/.

41. *See* Rogers, *supra* note 35.

42. *Id.*

43. *See id.*

44. *Id.*

45. *See* DUFFY & JOHANNS, *supra* note 36, at 15.

percent is owned by people age seventy-five and older.[46] Since the elderly are at a higher risk of death and 33 percent of all Iowa farmland is acquired by inheritance,[47] it doesn't require a Nostradamus-like gift of premonition to envisage the type of scenario described in the Johnson hypothetical increasing in frequency. It is also worth noting that 8 percent of Iowa farmland is already held through tenancy-in-common ownership[48] and thus, is already susceptible to this very problem.

III. AN ANALYSIS OF THE PROBLEM

In order to analyze this problem it is necessary to have a basic understanding of the terminology involved with this issue–namely, "heirs property," "tenancy-in-common" ownership, and "partition" actions.

A. Overview of Heirs Property

While the phrase "heirs property" has been circulating in the public vernacular for quite some time, you would be hard pressed to find the term in a law dictionary, statutory provisions, or in common law decisions.[49] The Uniform Law Commission drafting committee renamed the Uniform Partition of Heirs Property Act after learning that many low-income property owners refer to property held under a tenancy-in-common as "heirs property."[50] The reasoning for this change was based on the logical assumption that the act would be more effective in helping the vulnerable if the vulnerable were first aware of the act.[51] In addition, the drafting committee hoped that by placing the common jargon of the group that the act aims to benefit in the title, it would help speed integration into the public's consciousness and thus, catalyze a grass-roots movement to enact the legislation in the various states.[52]

The UPHPA defines heirs property to mean:

> [R]eal property held in tenancy in common which satisfies all of the following requirements as of the filing of a partition action:
>
> 1. [T]here is no agreement in a record binding all the cotenants which gov-

46. *Id.*
47. *See id.* at 13.
48. *Id.* at 11.
49. Mitchell, *supra* note 4, at 4.
50. *Id.*
51. *Id.*
52. *Id.*

> erns the partition of the property;
>
> 2. [O]ne or more of the cotenants acquired title from a relative, whether living or deceased; and
>
> 3. Any of the following applies:
>
> a) 20 percent or more of the interests are held by cotenants who are relatives;
>
> b) 20 percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased; or
>
> c) 20 percent or more of the cotenants are relatives.[53]

The drafting committee labored to define the scope of the act to include a substantial percentage of all property owned by a tenancy-in-common, where people are most susceptible to the form of devastating property loss illustrated in the Johnson hypothetical and Marsh example.[54] The guiding principle behind the committee's definition seems to be an emphasis on the property having "some indicia of family ownership."[55]

B. Overview of Tenancy-in-Common

Tenancy-in-common ownership is considered to be the most volatile form of common ownership of real property.[56] It is also the default form of co-tenancy.[57] In the majority of states, including Iowa,[58] the presumption is that a tenancy-in-common is created via "a conveyance or devise to two or more people that does not create either a joint tenancy or a tenancy by the entirety."[59] A tenancy-in-common can include any amount of owners (cotenants) and each of them can own unequal shares.[60] Every co-owner in a tenancy-in-common can sell, lease, or encumber their share of the property without requiring the permission of the remaining co-tenants.[61] Finally, each co-owner, regardless of the size of their interest, can file a partition action and request the court to order the forced sale of

53. *Id.* at 4-5.
54. *Id.* at 5.
55. *Id.*
56. *Id.* at 2.
57. ANDERSON & BOGART, *supra* note 10, at 180.
58. *See* IOWA CODE § 557.15 (2016).
59. ANDERSON & BOGART, *supra* note 10, at 180-81.
60. *Id.* at 180.
61. *Id.* at 181.

the property in question in order to divide the proceeds.[62]

C. Overview of Partition

A partition action is the mechanism through which a court terminates the co-ownership of a particular piece of property.[63] Generally speaking, anyone with a joint tenancy or tenancy-in-common interest in a property can request and receive a partition.[64] Partition is favored in property law "because it secures peace, promotes industry and enterprise, and avoids compelling unwilling persons to use their property in common."[65] However, there are a couple of limited exceptions, such as if the proposed partition would violate public policy or if the will or deed that created the co-tenancy prohibits a partition for a reasonable duration.[66] Absent one of these exceptions, if a co-owner of a piece of property requests a partition, a partition will occur; the only question left for the court is *how* that partition will occur.[67] To that end, there are but two options: partition in kind or partition by sale.[68]

A partition in kind is an actual, physical partition of the property in question.[69] The court takes the original piece of property and breaks it into smaller, equitable portions and grants those portions to various co-tenants as separate parcels of property.[70] The majority of states favor partition in kind.[71] In these states, property will only be sold if physically splitting the property into equal shares is either impracticable or would reduce the property value significantly.[72]

A partition by sale, on the other hand, occurs when the court orders the property sold and divides the proceeds of the sale according to the pro rata shares of the owners.[73] This approach is in the minority, nationwide.[74] However, under Iowa rule, "[p]roperty shall be partitioned by sale and division of the proceeds, unless a party prays for partition in kind by its division into parcels, and shows

62. Mitchell, *supra* note 4, at 2.
63. ANDERSON & BOGART, *supra* note 10, at 185.
64. *Id.* at 204.
65. Miller v. Miller, 564 P.2d 524, 527 (Kan. 1977); *see also id.*
66. ANDERSON & BOGART, *supra* note 10, at 204-205.
67. *Id.* at 205.
68. *Id.* at 204-205.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*

that such partition is equitable and practicable."[75] This means that in Iowa, the party seeking to have the property partitioned in kind and not by sale, bears the burden to show that the property can be equitably and practically divided.[76] Iowa case law further counsels that "if a division in kind is impracticable and cannot be effected without sacrifice in value and to the best interests of all parties, a sale will be ordered and the proceeds divided."[77] Fundamentally, while Iowa does indeed favor a partition by sale, it is evident from case law that courts are very much concerned with what is in the best interests of all parties.

D. The Property Law Principles That Should Guide the Analysis of the Problem and any Proposed Solution

In order to provide a framework from which to properly analyze the problem undertaken by this Note, a quick look at the guiding principles and public policies behind property law is prudent. These principles and policies can be summarized as:

> 1. Economic efficiency: The protection of property gives people an incentive to produce and therefore leads to wealth maximization for society. By making property alienable (that is, able to be transferred), the free market system should help ensure that the property will end up in the use most valued by society (the "highest and best use," the term used by real estate experts to describe the maximally productive and feasible use of property).[78]
>
> 2. Fairness: Property rights are a reward for the labor spent in creating or improving property. Fairness invokes the moral case for property ownership.[79]
>
> 3. Certainty: Property law should create a system in which purchasers can easily determine that the seller is the rightful owner of a particular piece of property, thereby lowering the costs of transactions. Property rules should be clear and easy to administer. Secure property rights promote peace and order.[80]

75. IOWA. R. CIV. P. 1.1201(2) (2016).
76. Spies v. Prybil, 160 N.W.2d 505, 508 (Iowa 1968).
77. Nehls v. Walker, 244 N.W. 850, 851 (Iowa 1932).

78. ANDERSON & BOGART, *supra* note 10, at 8-9.
79. *Id.* at 9.
80. *Id.*

> 4. Personhood: Owning property allows people to express themselves through creative uses of property and serves important ends like privacy and security. Property often has sentimental value that is not accounted for by the market.[81]
>
> 5. Democracy: Unless one's property is protected, all other freedoms may become meaningless. A nation of property owners provides stability, as more people have a stake in maintaining the rule of law.[82]

E. Fairness Considerations

The strongest property law principle that supports the implementation of UPHPA is fairness. Fairness is concerned with who *deserves* the property, regardless of whether or not society is made better or worse as a result.[83] It can be said that fairness invokes the moral argument for property rights in a given situation.[84] The philosopher, John Locke, posited that natural law theory justifies private property rights.[85] According to natural law, all people are vested with a property right in their own body, as well as the labor produced by that body.[86] Mixing one's labor with a piece of property to increase the value of the property bestows upon the laborer the natural right to claim–and thus the moral right to claim–the property.[87] Finally, it is important to note that fairness considerations are aligned symbiotically with economic efficiency considerations.[88] Rulings based on fairness create an incentive to work and improve property, which, in turn, increases overall productivity.[89]

Returning to the Johnson hypothetical, the fairness argument in favor of the Johnsons is virtually axiomatic. On the one hand, you have the Johnson brothers, whose family has worked the land and improved the property through blood, sweat, and tears for over 100 years. On the other hand, you have the real estate speculator whose interest in the property is strictly financial and may only be a few weeks or days old by the filing of the partition action. There is simply no

81. *Id.*
82. *Id.*
83. *Id.* at 13.
84. *Id.*
85. JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT 67 (Barnes & Noble 2004) (1690); *see also id.*
86. ANDERSON & BOGART, *supra* note 10, at 13.
87. *Id.*
88. *Id.*
89. *Id.*

compelling fairness argument in favor of the speculator.

F. Personhood Considerations

Personhood is another property law principle that strongly supports Iowa's implementation of the UPHPA. The English philosopher Jeremy Bentham once wrote, "[O]ur property becomes a part of our being, and cannot be torn from us without rending us to the quick."[90] This is because the property we own becomes an expression of ourselves–of our personalities–and creates a sense of fulfillment in property ownership.[91] In the Johnson hypothetical, the blood, sweat, and tears poured into the land by five generations of Johnsons adds a variable to the equation that cannot be expressed in a dollar amount. The land is priceless to them because it is a part of their identity. Accordingly, courts applying appropriate property law principles must "temper [their] economic efficiency calculus in many cases by recognizing that property carries with it a personal value that cannot be measured accurately."[92] Finally, as was the case in the fairness consideration discussion, there simply is no compelling argument in favor of the real estate speculator with respect to personhood. The speculator simply has not had the requisite amount of ownership time needed to integrate the property into part of his or her identity. The speculator views the land squarely as a business investment.

G. Democracy Considerations

Another property law principle that would support implementation of the UPHPA is the principle of democracy. Many of the founders and early leaders of this country strongly believed that citizens must have secure property rights or risk losing liberty entirely.[93] John Adams opined, "Property [rights] must be secured, or liberty cannot exist."[94] This is a beneficial public policy as well, as landowners are "largely self-sufficient and therefore [are not] dependent on the state for survival."[95] Thus, terminating a family's property interest and forcing them off their land not only offends the notion of democracy, but it results in harm to the institution of democracy itself.

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90. JEREMY BENTHAM, THE THEORY OF LEGISLATION 115 (R. Hildreth trans., Kegan Paul, Trench, Trubner & Co. 1908) (1789); *Id.* at 30.

91. ANDERSON & BOGART, *supra* note 10, at 30.

92. *Id.* at 30-31.

93. *Id.* at 28.

94. 6 JOHN ADAMS, *Discourses on Davila*, *in* THE WORKS OF JOHN ADAMS 223, 280 (Charles Francis Adams ed., 1851).

95. ANDERSON & BOGART, *supra* note 10, at 28-29.

H. Certainty Considerations

Not all property law principles point in favor of the implementation of the UPHPA. The property law principle known as certainty is concerned with creating a system where purchasers can easily determine whether or not a seller has actual rights to the property they are trying to sell.[96] It is also concerned with property rules that are easy to administer and apply.[97] Basic reasoning tells us that allowing all property interest owners–no matter how small the interest—the ability to bring partition by sale actions creates more certainty in the process than does prohibiting a subset of those property owners–when the owners and the property meet certain qualifications–from doing the same. This fact cannot be denied. However, it is important to understand that the UPHPA does not cast an overly large shadow of doubt on to these situations. As will be discussed in the following sections, the UPHPA only applies to a narrow range of properties,[98] and it does not prevent a co-owner from utilizing the court to terminate the co-ownership arrangement.

I. Economic Efficiency Considerations

The strongest principle in opposition to implementation of the UPHPA is economic efficiency. Economic efficiency is the use of a society's resources in a manner that maximizes the economic benefits–such as the production of goods and the offering of services–to the members of that society.[99] Its goal is to have property that will wind up in the use society values most–the use which creates the most wealth for society.[100] It stands to reason that a real estate speculator would have more business savvy than your average poor and/or uneducated person. Thus, it seems reasonable to believe that they would employ their business ability to utilize the property in the most efficient manner possible, creating more economic benefits to society as a whole than a family of modest means and education–whose primary motivation may very well be self-sufficiency–would create.

However, it is important to remain cognizant of the symbiotic relationship between fairness and economic efficiency.[101] When we let the illuminating vision of economic efficiency blind us to the considerations of fairness, we risk de-

96. *Id.* at 17.
97. *Id.* at 18.
98. Mitchell, *supra* note 4, at 3.
99. ANDERSON & BOGART, *supra* note 10, at 9.
100. *Id.* at 8-9.
101. *Id.* at 13.

incentivizing the undertaking of land improvement and maintenance, which can have a domino effect that ultimately damages the overall economy by reducing production and increasing dependency on the state.[102]

IV. THE SOLUTION

A. Why the Uniform Partition of Heirs Property Act (UPHPA) was Created

The UPHPA was created to address the problems with partition actions that have lingered unresolved for decades.[103] Collectively, these problems have been termed a "[R]ubik's [C]ube of property issues."[104] However, before getting into how the UPHPA aims to solve this "[R]ubik's [C]ube of property issues," it's important to understand that the Act is only applicable to a subset of tenancy-in-common property that retains a prominent component of family ownership.[105] Likewise, the act strives to limit its application, while simultaneously preserving the freedom of contract, by exempting its application to situations in which co-tenants have written agreements governing the method of partition to be utilized.[106] Finally, it's important to recognize that the drafters of the UPHPA relied upon sophisticated property preservation strategies, typically utilized by the wealthy, by providing for an especially fair buyout provision under which a co-owner of a property seeking partition by sale may have their interest bought out by a fair price from the other co-owners not seeking partition by sale.[107]

B. Adding Teeth to the Preference for Partition in Kind

The UPHPA's first tool in attacking this problem comes by adding teeth to the court's preference for partition in kind over partition by sale.[108] This manifests by requiring that courts consider a variety of economic and noneconomic factors when deciding whether or not partition in kind is feasible.[109] This is contrary to the prevailing trend in many state courts where only economic factors may be considered or, in the alternative, must be given priority over noneconomic factors.[110] To guide its analysis on whether a partition in kind must be ordered,

102. *See id.*
103. Mitchell, *supra* note 4, at 2.
104. *Id.* at 3.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 18.
110. *Id.*

the court must utilize a totality of the circumstances approach that includes the following considerations: practicability, value, longstanding ownership/ possession, sentimental attachment, lawful use, responsible common ownership, and any other relevant factors.[111]

However, the drafters of the UPHPA recognize that a partition by sale may be the most equitable remedy in many situations.[112] When a partition by sale is necessary, the UPHPA "establishes a sales process that is much more likely to vindicate the wealth maximization goals many courts have relied upon in ordering partition by sale."[113] This process involves requiring courts to utilize an open-market sale where a court-appointed real estate broker offers the property using "commercially reasonable practices."[114] This method aims to combat the below market values or in some cases, fire sale values, typically associated with partition by sale.[115]

C. When Would the UPHPA be Applicable?

The first step in determining whether the UPHPA is applicable requires courts, in partition of real property actions, to determine whether or not the subject property meets the definition of "heirs property."[116] If the court determines that the subject property does indeed meet this definition then the property must be partitioned according to provisions of the UPHPA.[117] However, an exception to this can be made if every cotenant with an interest in the property enters into an agreement–on the record–to partition the property in another manner.[118] Absent that exception, once a determination has been made that the property in question is indeed an heirs property, the UPHPA then supplants the provisions of that particular state's partition statutes, which are inconsistent with the UPHPA.[119]

The Uniform Law Commission believed that it was critical for the courts to make the determination of applicability as opposed to requiring the parties to the

111. *Id.* at 18-19.
112. *Id.* at 3.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 7.
117. *Id.*
118. *Id.*
119. *Id.*

action to plead such applicability.[120] This distinction was important because the Commission believed that, in many instances, the only party to the action that would be aware of the UPHPA's existence would be the co-tenant requesting the court to partition the property by sale, with the goal of acquiring said property below its market value.[121] Such self-interest would likely prevent the initiator of the action from pleading that the subject property qualifies as heirs property and therefore, should be governed by the provisions of the UPHPA.[122]

The creators of the UPHPA give three main reasons that heirs property owners are unable to effectively participate in partition actions–thus, warranting the requirement that the court make the determination of applicability.[123] First, many owners of heirs property are served notice of partition actions via publication only.[124] This includes owners who reside outside of the state where the action is initiated.[125] The Commission also noted that there has been troubling evidence suggesting that even when action initiators knew names and addresses or could have known through reasonable diligence, they simply chose to only serve notice via publication.[126]

Second, many owners of heirs property do not participate in partition actions because they are unable to secure the services of an attorney.[127] This is mainly due to either lacking the financial resources necessary to procure representation or an inability to find attorneys in the areas that they reside that are willing to represent them–be it for conflict or other reasons.[128]

Lastly, a significant portion of heirs property owners represent themselves *pro se* when it comes to partition actions.[129] These litigants simply don't have the requisite legal knowledge to represent themselves in an effective manner.[130] The Commission believed that, even in jurisdictions where the UPHPA had been adopted, many of these *pro se* cotenants would not have the skills required to recognize the UPHPA's applicability and then to plead accordingly.[131]

120. *See id.* at 8.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*

D. The UPHPA's Notice by Posting Requirement

To combat the problems with publication as a means of notice, the Uniform Law Commission drafted a "notice by posting" requirement.[132] This requires a plaintiff in a partition action seeking to provide notice [via] publication to post a sign conspicuously on the property in question, no more than ten days following the court's determination that the subject property is indeed considered to be heirs property.[133] This sign must convey that a partition action has been initiated.[134] It must also clearly identify the name of the court as well as its address.[135] Furthermore, it must clearly identify the designation to which the property is most commonly known.[136] Finally, the court may also require that the plaintiff publish the plaintiff's name and any known defendants on the sign.[137]

This requirement does not replace, affect, or limit the methods in which complaint service can be completed.[138] Instead, it is meant to serve as an additional safeguard for defendants in partition actions by increasing the likelihood that those defendants will discover that a partition action is pending.[139] The Commission noted that many defendants served by publication only, are never aware of the pending partition action.[140] The signage requirement increases the odds for defendants by allowing them to potentially find out about the pending litigation either through personally observing the sign or by being notified by someone else who observed the sign.[141]

E. Commissioner Requirements

Most state laws require a commissioner (sometimes referred to as a referee or partitioner) to oversee the partition, but the UPHPA legitimizes this process by requiring that the commissioner appointed be "disinterested and impartial"–not a party to the action.[142] Remarkably, some states currently allow parties to the action to serve as commissioners, such as the lawyer for the party seeking parti-

132. *Id.* at 9.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*

tion.[143] These states assume, incorrectly, that all parties in the action have the same self-interest in obtaining the highest selling price possible.[144] However, the commission found many documented cases in which the party seeking partition ultimately ended up procuring the property at a price well below fair market value.[145]

F. Value Determination

The UPHPA requires that all partition actions involving heirs property must first have the property value determined by the court.[146] This determination is necessary for two reasons.[147] First, the value determines how much an eligible cotenant must pay in order to buyout the interests of the cotenant seeking partition by sale.[148] Second, in actions where the court does order a partition by sale, the commissioner appointed to oversee the sale must not offer the property at a lower asking price than the court determined value.[149]

The determination of the value can be calculated in one of two ways–via appraisal or cotenant agreement.[150] The appraisal must be conducted by a disinterested and licensed real estate appraiser.[151] Within ten days of the appraiser filing the appraisal, the court must send notice to all parties stating:

> (1) The appraised fair market value of the property;
>
> (2) That the appraisal is available at the clerk's office; and
>
> (3) That any party may file an objection to the appraisal within thirty days after the notice is sent provided that any objection must state the grounds for the objection.[152]

No sooner than thirty days after the notice of appraisal has been sent to all known parties, the court must hold a hearing to determine the property's fair

143. *Id.* at 10.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 10-11.
151. *Id.* at 10.
152. *Id.* at 11.

market value.[153] At this hearing the court will consider the appraisal, as well as any filed objections regarding the appraisal, in making its value determination.[154] In addition, the court may consider other evidence regarding the fair market value of the property offered at the hearing itself.[155] Upon completion of the final determination of value, the court must notify all parties of its determination.[156]

The other acceptable method of value determination is a cotenant agreement.[157] This method allows cotenants the ability to avoid the costs of an appraisal and to control determination of the property's value themselves.[158] However, this approach is only possible if all of the cotenants reach agreement on the value or on a particular method of determining the value.[159] If this method can be achieved, it will alleviate the requirement that value be an approximation of fair market value for the subject property.[160]

G. Cotenant Buyout Provision

Under the provisions of the UPHPA, any cotenant that requests a partition by sale must have their interest offered up for sale to any remaining cotenants that did not participate in partition request.[161] In addition, the court may also authorize the sale of any cotenant's interest in the subject property that was served notice of the complaint but chose not to appear in the action.[162] There are two separate procedures the court must follow to effectuate the buyouts.[163]

For the first buyout procedure, after determining the value of the property, the court must notify all parties that any of them can buy out the interest of the party requesting the partition by sale.[164] Any interested cotenants must notify the court of their intention to purchase the initiator's interests within forty-five days of the date of the court's notice.[165] The purchase price is calculated as the pro rata share of the initiator's interest in the property based on the previously estab-

153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* at 12.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*

lished fair market value determination made by the court.[166] The act further specifies guidelines governing the procedure used for when multiple cotenants wish to purchase the initiator's interest.[167]

The second buyout procedure is essentially the same as the first, but it is reserved for purchasing the interests of cotenants who were served notice of the partition action and chose not to appear.[168] The main difference between the two procedures is that this second procedure is subject to the discretion of the court.[169] They are not required to honor such requests and may deny them if they conclude such an action is prudent in the given situation.[170] The committee included this option as a tool to help eligible cotenants consolidate their ownership of the property in order to improve their ability to utilize the property in a more productive manner.[171]

V. CONCLUSION AND RECOMMENDATION

The bottom line is that this legislation is an appropriate and fair remedy to a loophole problem currently existing in Iowa partition law. As discussed previously, Iowa is a ripe breeding ground for the potential injustices illustrated by the Johnson family hypothetical. Since Iowa courts appear to be primarily concerned with the best interests of all cotenants, Iowa legislators should align the law with its court's intentions and adopt the UPHPA. The UPHPA is a well-crafted piece of legislation, supported by property law principles and public policy and created by a highly respected organization with a proven track record of successful legislative construction.

166. *Id.* at 13.
167. *Id.*
168. *Id.* at 15.
169. *See Id.*
170. *Id.*
171. *Id.* at 16.