

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 633 (Calderon)
Version: March 15, 2021
Hearing Date: June 22, 2021
Fiscal: No
Urgency: No
JT

SUBJECT

Partition of real property: Uniform Partition of Heirs Property Act

DIGEST

This bill enacts the Uniform Partition of Heirs Property Act, which establishes a set of protections to help families keep land that has been passed down without a will.

EXECUTIVE SUMMARY

“Heirs property” generally refers to real property passed down without a will. As generations pass, more descendants inherit smaller interests in the property, making retention of the property in the family increasingly tenuous because of rules that enable any person with an ownership interest to trigger the sale of the property. In some areas of the country, opportunistic speculators have exploited this vulnerability by acquiring a family member’s interest in heirs property and forcing the sale of the property, often at below-market value. This has mostly harmed disadvantaged communities, particularly African-American families, who, from 1910 to 1997, lost approximately 90 percent of their farmland.¹

In 2010, in response to scholarship and advocacy efforts, the Uniform Law Commission adopted the Uniform Partition of Heirs Property Act, which establishes a set of protections designed to keep heirs property in the family or at least ensure that the family receives equitable compensation for the property. So far, 17 states have adopted this legislation and several more are considering it. This bill, which is sponsored by the California Association of Realtors and supported by a broad coalition, would enact the Act in California. There is no known opposition. An amendment is described on page 9.

¹ Lizzie Presser, *Kicked Off the Land: Why so many black families are losing their property* (Jul. 15, 2019) New Yorker <https://www.newyorker.com/magazine/2019/07/22/kicked-off-the-land> (as of May 5, 2021); co-published in ProPublica <https://features.propublica.org/black-land-loss/heirs-property-rights-why-black-families-lose-land-south/> (as of May 5, 2021).

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes prerequisites to commence an action for partition of real property:
 - a) Provides that a partition action may be commenced and maintained by an owner of an estate of inheritance, an estate for life, or an estate for years in real property where such property or estate therein is owned by several persons concurrently or in successive estates. (Code of Civ. Proc. § 872.210(a)(2).)² Expressly excludes actions between spouses for partition of community or quasi-community property from these provisions. (*Id.* at (b).)
 - b) Requires that the complaint set forth a description of the property and its street address or common designation, if any; all interests the plaintiff has or claims in the property; all interests of record or actually known to the plaintiff that other persons have or claims in the property the plaintiff reasonably believes will be materially affected by the action; the estate as to which partition is sought and a prayer for partition of the interests therein; and if the plaintiff seeks sale of the property, an allegation of the facts justifying the relief in ordinary and concise language. (§ 872.230.)
 - c) Requires a plaintiff who files a partition complaint to immediately record a notice of the pendency of the action in the office of the county recorder. (§ 872.250.) Provides that from the time of filing the notice for record, all persons are deemed to have notice of the pendency of the action as to the property described in the notice. (*Id.*)
 - d) Provides that service on persons named as parties and other persons named as unknown defendants is by publication. (§ 872.310.)
 - e) Provides that where a court orders service by publication, the plaintiff must post, not later than 10 days after the order is made, a copy of the summons and complaint on the real property that is the subject of the action. (§ 872.320.) Requires that the publication describe the property and give its street address or other common designation, as specified. (*Id.*)
 - f) Requires the plaintiff to join as defendants in the action all persons having or claiming interests of record or actually known to the plaintiff or reasonably apparent from an inspection of the property. (§ 872.510.) If the name of such a person is not known to the plaintiff, the plaintiff must so state in the complaint and name as parties all persons unknown, as specified. (§ 872.520(a).) If the ownership or the share of quantity of the interest of such a person is unknown, uncertain, or contingent, the plaintiff must so state in the complaint. (*Id.* at (b).)
- 2) Requires the court to determine the interests of the parties and the nature of the partition action:

² All further section references are to the Code of Civil Procedure unless otherwise specified.

- a) Provides that the interests of the parties may be put in issue, tried, and determined in the action. (§ 872.610.) Provides that where two or more parties are unknown, the court may consider their interests together in the action and not as between each other. (§ 872.640.)
 - b) Requires the court to determine whether the plaintiff has the right to partition. (§ 872.710(a).) Provides that partition as to concurrent interests in the party shall be of right unless barred by a valid waiver. (*Id.* at (b).) Provides that if the court finds that the plaintiff is entitled to partition, it must make an interlocutory judgment that determines the interests of the parties in the property and orders the partition of the property, and, unless it is to be determined later, the manner of partition. (§ 872.720(a).)
 - c) Requires the court to order that the property be divided among the parties in accordance with their interests in the property as determined in the interlocutory judgment. (§ 872.810.) However, the court must instead order that the property be sold and the proceeds be divided among the parties in accordance with their interests in the property if the parties agree to such relief or the court determines that, under the circumstances, sale and division of the proceeds would be more equitable than division of the property. (§ 872.820.)
- 3) Establishes requirements for the physical division of property (§ 873.210 et seq):
- a) Requires a referee appointed by the court to make a division of the property and allot the several portions to the parties, quality and quantity relatively considered, according to their interests, as specified. (§ 873.210.)
 - b) Requires, as far as practical, and to the extent it can be done without material injury to the rights of the other parties, that the property be divided as to allot to a party any portion that embraces improvements made by that party or the party's predecessor in interest. (§ 873.220.) In such division and allotment, the value of the improvement must be excluded. (*Id.*)
 - c) Requires, where prior to the commencement of the action a party has executed a deed purporting to convey to a purchaser a portion of the property to be divided, to the extent it can be done without material injury to the rights of the other parties, that the property be divided so as to allot that portion to the purchaser, the purchaser's heirs or assigns, or such other action be taken as to make the deed effectual as a conveyance of that portion of the property. (§ 873.230.)
 - d) Requires, where real property consists of more than one distinct lot or parcel, the property shall be divided by such lots or parcels without other internal division to the extent that it can be done without material injury to the rights of the parties. (§ 873.240.)
 - e) Provides that if the court determines the combined interests of two or more unknown parties, the entire portion of the property allocated to those parties must remain undivided. (§ 873.270.)

- 4) Establishes requirements for partition by sale of the property (§ 873.510 et seq.):
 - a) Requires the property, or a part of the property, to be sold at public auction or private sale as the court determines will be more beneficial to the parties. (§§ 873.520, 873.530.)
 - b) Authorizes the court to prescribe the manner, terms, and conditions of the sale, or to delegate this duty to the referee subject to the court's approval. (§ 873.610.)
 - c) Requires the court to order distinct lots or parcels to be sold separately unless the interests and rights of the parties will be materially prejudiced thereby. (§ 873.620.)
 - d) Requires that notice of the sale be given in the manner required for notice of sale of like property upon execution and be given to every party who has appeared in the action and to other interested persons who request in writing to receive written notice from the referee. (§ 873.640(a).) Enables the court to order additional notice as it deems proper. (*Id.* at (c).)
 - e) Requires the court to prescribe the contents of the notice of sale, including a description of the property, the time and place of sale, and a statement of the principal terms of sale. (§ 873.650(a).) Requires that a notice of private sale shall state a place where bids or offer will be received and a day on or after which the sale will be made. (*Id.* at (b).)
 - f) Requires a sale at public auction to the highest bidder to be held in the county in which the partition action is pending or such other place as may be specified by the court. (§ 873.670(a).)
 - g) Provides that a private sale shall not be made before the day specified in the notice of sale but requires that it be made within one year thereafter. (§ 873.680(a).) Requires that the bids or offers be in writing and left at the place designated in the notice at any time after the first publication or, if none, the posting of the notice. (*Id.* at (b).)

- 5) Establishes equitable powers of a court in a partition action:
 - a) Enables a court in the conduct of a partition action to:
 - i. hear and determine all motions, reports, and accounts and make any decrees and orders necessary or incidental to carrying out the purposes of the statutory provisions governing partition actions (§ 872.120); and
 - ii. issue temporary restraining orders and injunctions to prevent waste, protect property or title thereto, and restrain unlawful interference with partition of the property ordered by the court (§ 872.130).
 - b) Authorizes a court to order allowance, accounting, contribution, or other compensatory adjustment among the parties according to principles of equity. (§ 872.140.)
 - c) Provides that where division cannot be made equally among the parties according to their interests without prejudice to the rights of some, compensation may be required to be made by one party to another to correct the inequality. (§ 873.250(a).)

- d) Provides that a court may vacate the sale and direct that a new sale be made if it determines any of the following:
 - i. the proceedings were unfair or notice of sale was not properly given;
 - ii. the sale price is disproportionate to the value of the property; or
 - iii. it appears that a new sale will yield a sum that exceeds the sale price by at least 10 percent of the first \$10,000 and 5 percent on the amount in excess thereof, determined after a reasonable allowance for the expenses of a new sale (§ 873.730(c)).

This bill:

- 1) Establishes the Uniform Partition of Heirs Property Act, which applies to partition actions filed on or after January 1, 2022.
- 2) Defines “heirs property” as real property held in tenancy in common which satisfied all of the following requirements as of the filing of a partition action:
 - a) There is no agreement in the 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.
 - c) 20 percent or more of the interests are held by relatives, or by an individual who acquired the interest from a relative, or 20 percent or more of the cotenants are relatives.
- 3) Requires a court, in a partition action, to determine whether the property is heirs property. If so, the property must be partitioned under provisions described below.
- 4) Within 10 days of a determination that the property is heirs property, requires the plaintiff seeking partition to post and maintain, while the action is pending, a conspicuous sign on the property that states that the action has commenced and identifies the name and address of the court and the common designation by which the property is known. The court may require the plaintiff to publish on the sign the name of the plaintiff and the known defendants.
- 5) Requires that any referee appointed by the court be disinterested and impartial.
- 6) Requires the court to determine the fair market value of the property by ordering an appraisal, except as specified. The appraiser must be a disinterested real estate appraiser licensed in California. Upon completion of the appraisal, the appraiser must file a sworn or verified appraisal with the court. Within 10 days of the filing of the appraisal, notice must be sent to each party with a known address with the appraised value of the property and a statement that the party may object to the appraisal not later than 30 days after the notice is sent. After 30 days have elapsed, the court must hold a hearing regardless of whether an objection is filed. Following

the hearing, the court must determine the fair market value and send notice of the value to the parties.

- 7) If a cotenant requests partition by sale, requires the court, after determining the fair market value, to send notice to the parties that any cotenant except the cotenant seeking the sale may buy all the interests of the cotenants that request partition by sale. Sets forth procedures for a cotenant or multiple cotenants to buy the interests of the cotenants that requested partition by sale.
- 8) If all the interests of all cotenants that requested partition by sale are not purchased by other cotenants, or if after the conclusions of the buyout a cotenant remains that has requested partition in kind, the court must order partition in kind unless the court, after considering specified economic and non-economic factors, finds that partition in kind will result in great prejudice to the cotenants as a group. If the court orders partition in kind, authorizes the court to require one or more cotenants to pay one or more other cotenants amounts so that the payments taken together with the value of the in-kind distributions to the cotenants, make the partition just and proportionate in value to the fractional interests held. The court must allocate to cotenants that are unknown, unlocatable, or the subject of a default judgment, a part of the property representing the combined interests of these cotenants as determined by the court, if their interests were not bought out.
- 9) Provides that if the court orders a sale of heirs property, the sale must be an open-market sale unless the court finds that a sale by sealed bids or an auction would be more economically advantageous and in the best interest of the cotenants as a group. Requires the court to appoint a disinterested real estate broker licensed in California if the parties cannot agree on one, to 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.
- 10) Requires a broker appointed to offer heirs property for open-market sale to file a report with the court not later than seven days after receiving an offer to purchase the property for the court-approved value.
- 11) Requires that, in applying and construing the act, consideration be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.
- 12) Includes a provision to ensure that the Act accords with the federal Electronic Signatures in Global and National Commerce Act (E-SIGN), which governs the use of electronic signatures and records in transactions affecting interstate or foreign commerce (15 U.S.C. § 7001) and set forth requirements that a state law must meet in order to modify, limit, or supersede E-SIGN without being federally preempted (*id.*, § 7002).

COMMENTS

1. Establishes protections against the sale of heirs property

When a person dies without a will, their property passes to their descendants according to a set of default rules known as intestate succession. Over the course of generations, such property may “become highly fragmented, splintering the [property] into hundreds and even thousands of interests.”³ The descendants inherit their interest in the property as “tenants-in-common,” which means they each own a proportional interest in property, like stock in a corporation. Generally, any co-tenant has the right to seek to partition their interest in the property. A partition may be “in kind,” in which case the fractional interest of the owner is physically partitioned from the remainder of the property, or “by sale,” in which case the entire property is sold, often at below-market prices, and the proceeds are apportioned among the co-owners according to their relative interests.

Although most states, California included,⁴ require courts to favor partition in-kind over partition by sale, scholarship has shown that it is often easy to force a sale, leading to considerable land loss among disadvantaged communities that are less likely to use estate planning and have access to legal representation. Often, a far-flung heir, unbeknownst to the heirs that maintain the property and wish to keep it in the family, sells their interest to an opportunistic lawyer or real estate speculator who furtively intends to force a partition sale.⁵

While the attrition of heirs property has affected a diverse array of communities – working-class families in Brooklyn, rural Appalachians, Hispanic communities in the southwest, and Native Americans dispossessed of their homelands⁶ – it has especially impacted African-Americans in southern states.⁷ An award-winning article co-published in *ProPublica* and *The New Yorker* recently documented the patterns of dispossession of African American families in North Carolina, including two brothers who spent years in jail for refusing to leave the waterfront property that had been acquired by developers without their knowledge.⁸ The article states:

³ Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence and Community Through Partition Sales of Tenancies in Common* (2001) 95 NW. U. L. Rev. 505, 580.

⁴ § 873.730(c)(2-3) A partition sale may be vacated if “[t]he sale[t] price is disproportionate to the value of the property” or if “[i]t appears that a new sale will yield a sum that exceeds the sale price by at least 10 percent on the first ten thousand dollars (\$ 10,000) and 5 percent on the amount in excess thereof, determined after a reasonable allowance for the expenses of a new sale.”

⁵ Mitchell, *supra*, fn. 3 at 507-08, 523.

⁶ Michelle Chen, *Black Lands Matter: The Movement to Transform Heirs’ Property Laws* (Sept. 25, 2019) *The Nation* <https://www.thenation.com/article/archive/heirs-property-reform/> (as of May 5, 2021).

⁷ Carla Spivack, *Broken Links: A critique of formal equality in inheritance law* (2019) Wis. L. Rev. 191, 206.

⁸ Presser, *supra*, fn. 1.

Between 1910 and 1997, African Americans lost about 90% of their farmland. This problem is a major contributor to America's racial wealth gap; the median wealth among black families is about a tenth that of white families. Now, as reparations have become a subject of national debate, the issue of black land loss is receiving renewed attention. A group of economists and statisticians recently calculated that, since 1910, black families have been stripped of hundreds of billions of dollars because of lost land. Nathan Rosenberg, a lawyer and a researcher in the group, told me, "If you want to understand wealth and inequality in this country, you have to understand black land loss."⁹

Owing to the scholarship of Texas A&M Professor Thomas Mitchell, whose work on securing protections to help African-American families keep their lands recently earned a MacArthur grant, a nationwide reform effort is underway.¹⁰ Following his seminal article on the subject,¹¹ Mitchell became the principal drafter of the Uniform Partition of Heirs Property Act, which was adopted by the Uniform Law Commission in 2010 and has received the endorsement of the American Bar Association.¹² The Act establishes a set of protections designed to keep heirs property in families or ensure they receive equitable compensation for the property. Broadly, the Act requires that the other heirs receive notice, provides for appraisal of the property, grants to the other heirs the right of first refusal, and if a sale is required, it must be a commercially reasonable sale supervised by a court to ensure all parties receive a fair share of the proceeds. Additionally, the Act requires courts to consider non-economic factors, such as the historic value of the property and the consequences of eviction, in weighing whether to order the sale of the property.

This bill would enshrine the Act in California law. The author writes that the bill "codifies a fair process to address the sale of heir's property in partition actions. Today, it is too easy for real estate speculators and developers to legally force the sale of heirs property. Seventeen states and the U.S Virgin Islands have already taken measures to codify protections for these heirs and their property. It is time California does the same."

⁹ *Id.*

¹⁰ Chen, *supra*, fn. 6.

¹¹ *Id.* Background materials are available at the Uniform Law Commission's webpage for the Partition of Heirs Property Act: <https://www.uniformlaws.org/viewdocument/enactment-kit-34?CommunityKey=50724584-e808-4255-bc5d-8ea4e588371d&tab=librarydocuments> (as of May 11, 2021).

¹² Partition of Heirs Property Act, Uniform Law Commission, available at <https://my.uniformlaws.org/committees/community-home?CommunityKey=50724584-e808-4255-bc5d-8ea4e588371d> (as of June 12, 2021).

2. Amendment to allocate costs of partition in accordance with the purposes of the Act

Section 874.040 generally requires the court to apportion the costs of partition among the parties in proportion to their interests or make such other apportionment as may be equitable. Section 874.010 provides that the costs of partition include: reasonable attorney's fees incurred or paid by a party for the common benefit; the fee and expenses of the referee; the compensation provided by contract for services of a surveyor or other person employed by the referee in the action; the reasonable costs of a title report; and other disbursements or expenses determined by the court to have been incurred or paid for the common benefit.

To ensure that the costs associated with actions to partition heirs property are allocated in accordance with the spirit of the bill, the author has agreed to the following amendment:

Amendment

874.321.5. In an action under this Chapter, the court may apportion the costs of partition, including an appraisal fee, pursuant to section 874.040, except that the court shall not apportion the costs of partition to any party that opposes the partition unless doing so is equitable and consistent with the purposes of this Chapter.

3. Support

The bill's sponsor, the California Realtors Association, writes:

All too often in our country's history, real estate speculators have exploited the land holdings of heirs by acquiring a small share of heir's property and forcing a partition action. The speculator then turns around and is able to acquire the property in a court ordered partition sale for far less than the market value, and, in turn, depletes a family's inherited wealth. Property owners that have both the financial means and the expertise needed to access estate planning attorneys have the ability to avoid the harsh consequences of a partition sale. But low to moderate income and otherwise disadvantaged heirs' property owners are vulnerable to these types of loss. For example, a recent ProPublica investigation found that 76% of African Americans do not have wills. This is more than twice the percentage of white Americans. These property owners' heirs could very well find themselves in these situations. While these exploitive situations have classically occurred with rural landownership, in modern times, urban landowners have also found themselves subject to these losses.

For low and moderate income homeowners, the home and the property it sits on is quite often the only significant wealth that the homeowner has to pass on to their heirs. The [Act] ensures that guardrails are put in place to protect tenants-in-common from these predatory practices.

The California Low-Income Consumer Coalition, which consists of fourteen legal services providers from across California, adds:

AB 633 puts guardrails in place to protect tenants-in-common from being taken advantage of in court-ordered partition actions. It accomplishes this in three ways: the law adds a buyout provision for co-tenants opposing the sales request; it adds substance to the existing preference for a partition-in-kind by instituting a totality-of-the-circumstances test that looks at more than just economic factors; and it substantially restructures the sales procedure so that the resulting sale (should a sale be ordered) is fair and at market value.

Not every property owner has the means to access trusts-and-estates planning attorneys. AB 633 will help to ensure that even heirs without attorneys are treated in an equitable manner when it comes to the disposition of property.

SUPPORT

California Association of Realtors (sponsor)

American Farmland Trust

Bet Tzedek Legal Services

California Bankers Association

Centro Legal de La Raza

Community Legal Services of

East Palo Alto

East Bay Community Law Center

Elder Law & Advocacy

The Justice & Diversity Center

Legal Aid of Marin

Legal Aid Society of San Bernardino

Public Counsel

Public Law Center of Orange County

Riverside Legal Aid

Santa Clara University

Alexander Community Law Center

UC Irvine Consumer Law Clinic

Watsonville Law Center

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation: None known.

PRIOR VOTES:

Assembly Floor (Ayes 74, Noes 0)

Assembly Judiciary Committee (Ayes 11, Noes 0)
