by Manuel Farach

The Uniform Partition of Heirs Property Act: A Solution in Search of a Problem

A recent article in The Florida Bar *Journal* extolled the virtues of the Uniform Partition of Heirs Property Act (UPHPA or act) and argued for its adoption.[1] Proponents of the UPHPA assert that the act is more protective of heirs' rights than existing law. However, a close examination of the Florida Probate Code reveals that current Florida law is more protective of heirs' rights. F.S. §733.814 permits the personal representative of an estate, or any of the beneficiaries, to petition the court for the partition of property for purposes of distribution. Moreover, the suggested fix to the problems outlined in the prior article create more problems than anticipated and may not help resolve issues. This article neither agrees with nor disputes the factual assertions made in the previous article, but examines the present process and the proposed fix — the UPHPA — and concludes that adoption is not in the best interests of the citizens of Florida. Specifically, we look at adoption of the act, and how it would work under Florida law.

Partition Under the Florida Probate Code

Section 4 of the act permits service of process by posting. Fla. Prob. R. 5.025 identifies a partition proceeding as an "adversary proceeding," which requires the service of formal notice that informs heirs they have 20 days to respond to the petition. Rule 5.040(a) also requires service of formal notice by a method that requires a signature by the recipient, by service of process as required under the Rules of Civil Procedure, or as otherwise provided by Florida law for service of process. In addition, it is less protective of beneficiary rights than current law, which requires actual service evidence by a signature.

The Uniform Law Commission, in the prefatory notes preceding the text of the act, cites a de facto preference for judicial sale instead of in-kind partition.[2] In the probate context, F.S. §733.814 requires a finding that "the property cannot be partitioned without prejudice to the owners and cannot be allotted equitably and conveniently." F.S. §733.814 also permits a court to give a personal representative of an estate authority to sell property privately without resorting to a public auction. Thus, present probate law protects the interest of parties.

The Uniform Law Commission cites a concern for land owners who cannot afford, or do not understand the need for, sophisticated planning that "wealthy and legally savvy clients" are able to access.[3] While this may be true, the Florida Probate Code, particularly F.S. §733.814, does not distinguish between heirs who take under a will and heirs who inherit through intestacy. All of the procedural safeguards relating to the qualifications of a personal representative and the personal representative's duties to estate beneficiaries applies equally for testate and intestate estates. The existing statutory framework for heirs does offer protection for heirs.

Moreover, Fla. Const. art. X, §4(b), provides protection for family members who inherit homestead property, *i.e.*, the primary residence of the deceased owner or the deceased owner's family. The home is exempt from claims of the deceased owner's creditors to the same extent the home would be protected during the owner's lifetime. Under current Florida law, the inheritance of homestead property by family members occurs by operation of law at the moment of the deceased owner's death in both testate and intestate estates. Thus, a personal representative cannot sell a protected homestead because it is not an asset of the estate.[4] While this results in tenancy-in-common ownership by the heirs in many cases, it ensures that the heirs inherit the property and that the property is not lost to creditors or sold to pay estate expenses. The heirs would have to resort to partition under F.S. Ch. 64, if they could not work out the benefits and responsibilities of ownership between them.

Non-Legislative Alternatives

The preventive and educational measures cited in the recent article are the best options for heirs inheriting Florida property. Florida has a strong tradition of protecting the family home as set forth in Fla. Const. art. X, §4, which dates back to 1868. Members of The Florida Bar have stepped up to assist homeowners through pro bono and low-fee will services. The Real Property, Probate and Trust Law Section has established a No Place Like Home program, the purpose of which is:

> [t]o make available RPPTL Section member assistance in clearing title to real property for vulnerable low-income Florida residents, thereby allowing such residents to not only receive disaster-related relief and access to community development funds, but also assuring them available real property tax exemptions.[5]

For example, John J. Kendron recently received a Florida Supreme Court pro bono award for the Third Judicial Circuit for his efforts in support of Three Rivers Legal Services, "helping mostly low-income and elderly homeowners clear title to their property so they can make their homes safe and habitable."[6] Funding for legal aid services is critical to provide educational and preventive measures that would more effectively address the problems cited by the Uniform Law Commission as the reasons to support the UPHPA. These are the initiatives that will assist those in need, not legislation that seeks to reduce the orderly administration of estates.

The Partition Process Outside of Probate Proceedings

Understanding the operation of F.S. Ch. 64 — partition of property — also demonstrates the well-meaning act may not be a good solution. A brief explanation of the process illustrates why.

Florida jurisprudence dealing with partition actions is well developed. For example, Florida law dictates that both real and personal property may be partitioned.[7] Mineral rights may also be partitioned.[8] The parties that may seek partition (joint tenants, tenants in common, or coparceners, beneficial interests in a "dry trust," and homestead property after the death of the homestead devisor) and those that may not (tenants by the entireties property before divorce, remaindermen and reversionary interests, life estates, property held by bankruptcy trustees) are settled.[9] Likewise, there is settled law that ownership disputes do not preclude partition,[10] nor do adverse claims to the property.[11] The parties to the action include not only the owners entitled to a possessory interest, but also all parties who may have rights impacted by the decision.[12] Verification of the complaint is not required, and the complaint may contain counts for other forms of relief. In short, the body of law surrounding partition actions is well developed and provides for a practical approach to partition actions.[13]

As the prior article states, the Florida Statutes provide that partition may be done by commissioners or a special magistrate.[14] However, the commissioner process is cumbersome and is seldom employed. For example, commissioners merely divide the property in the form and manner as set forth by the court and make no independent decision. The report of the commissioners must be served on the parties, and objections are due 10 days after service of the report. Failure to object to the report confirms the report, and commissioners are entitled to a fee for their services.[15]

As a practical matter, the commissioner process is seldom used in Florida partition actions. As noted above, the trial court makes the hard decisions as to who gets what and in what percentages. Having made the decision, most trial judges want their decision to be implemented as efficiently as possible and adding three commissioners to the process merely slows down the proceedings. Florida trial judges are also acutely aware of the costs of litigation and reluctant to impose additional costs on parties, especially when the additional costs may not benefit the parties.

A word about the unique characteristics of real estate and partitions in kind demonstrates why this process is not used as often as many think. First is the concept that large parcels of real estate may be divisible in equal lot size, but rarely are the resulting lots the same in terms of quality and characteristics of land. To take an example of a "section" of farmland real estate,[16] the 640 acres in the section may be equally split between four cotenants with each cotenant receiving 160 acres of farmland. This seems like a fair division but are the four new parcels the same in all substantial respects? For example, does one parcel have better access to water, thus, being more suitable for farming than the other parcels? Does one parcel have better access to a platted road, providing legal access and making it more valuable than the other parcels? Does one parcel have to provide an easement so that the other parcels can get to a roadway? If the four parcels are equal in size but not equal in quality, character, and value, how does one adjust to make all four parcels equal? Does one take away certain acres from the 160 allotted acres and give to another cotenant, or is there a better way of adjusting for differences? These are just some of the questions that arise in partitions in kind that make process somewhat less desirable than others:

> Because land is not fungible, any parcel of real property is likely to have features that make it more or less valuable than another parcel. Therefore, the shares allotted to the parties in partition need not be exactly equal in value. An unequal division of the property may even be justified where one cotenant has improved the property to be divided without contribution by the other cotenant or cotenants. Under these circumstances, the party who made the improvements should receive the benefit of the enhancement he or she has made to the value of the property if this result can be achieved equitably.[17]

Keeping in mind that partition was probably required because the multiple owners could not agree with each other in the first place, many judges would be reluctant to have the parties remain in place next to each

other. As a result, many trial judges appoint a single special magistrate under F.S. §64.061(4) to carry out the court's directives, if the parties cannot come to an agreement. These are the practical reasons why partitions in kind are rare.

The act unfortunately does not take into account these practicalities and unintentionally creates more costs and time delays for the parties. For example, §6(a) of the act states a court must order an appraisal unless the parties agree to the value of the property. Again, the fact the parties are involved in a partition action is a good indication they may not be able to agree on the value of the property, so the court will be forced under the act to order an appraisal. If the goal in a particular action is to partition in kind, then there is no need for an appraisal. If the goal in a particular action is to sell the property and divide the proceeds between the heirs, then a partition is not necessary because the best indication of value is a ready, willing, and able purchaser who closes on a contract to buy the property. The act does provide a mechanism for the court to dispense with an appraisal and determine the "fair market value" of the property itself, but that begs the question of why the court would be doing so if chances are the property is to be sold on the open market anyway. If the property is not to be sold but partitioned in kind, then that raises another troubling issue: How does one deal with people who don't get along that are now neighbors?

The act anticipates that resulting neighbors after partition in kind would not get along so a "cotenant buyout" provision is set forth in §7. Again, the act unnecessarily complicates the process, which should be handled by a court using its discretion, and instead devotes three pages of procedures and steps to accomplish the buyout. A brief restating of this section demonstrates its complexity:

> SECTION 7. COTENANT BUYOUT.
>
> (a) If any cotenant requested partition by sale, after the determination of value under Section 6, the court shall send notice to the parties that any cotenant except a cotenant that requested partition by sale may buy all the interests of the cotenants that requested partition by sale.
>
> (b) Not later than 45 days after the notice is sent under subsection (a), any cotenant except a cotenant that requested partition by sale may give notice to the court that it elects to buy all the interests of the cotenants that requested partition by sale.
>
> (c) The purchase price for each of the interests of a cotenant that requested partition by sale is the value of the entire parcel determined under Section 6 multiplied by the cotenant's fractional ownership of the entire parcel.
>
> (d) After expiration of the period in subsection (b), the following rules apply:
>
> (1) If only one cotenant elects to buy all the interests of the cotenants that requested partition by sale, the court shall notify all the parties of that fact.
>
> (2) If more than one cotenant elects to buy all the interests of the cotenants that requested partition by sale, the court shall allocate the right to buy those interests among the electing cotenants based on each electing cotenant's existing fractional ownership of the entire parcel divided by the total existing fractional ownership of all cotenants electing to buy and send notice to all the parties of that fact and of the price to be paid by each electing cotenant.
>
> (3) If no cotenant elects to buy all the interests of the cotenants that requested partition by sale, the court shall send notice to all the parties of that fact and resolve the partition action under Section 8(a) and (b).
>
> (e) If the court sends notice to the parties under subsection (d)(1) or (2), the court shall set a date, not sooner than 60 days after the date the notice was sent, by which electing cotenants must pay their apportioned price into the court. After this date, the following rules apply . . .

Several issues come to mind when reviewing this section of the act. First, it is fairly complicated — as are most involuntary buy-sell provisions. A complicated statute bears the risk of creating additional rather than reducing further litigation, and often comes with increased litigation costs. So if §7 seeks to reduce litigation and costs, it does not accomplish its purpose. If the purported purpose of the act is to preserve real property for people of modest means, then §7 fails to accomplish that goal as it gives one cotenant with more financial power the ability to dispossess another cotenant who is unwilling to sell. Again, Florida's present system in which a trial judge, using his or her fact-finding powers, works better than the act because the trial judge can make the determination whether the parties can peaceably co-exist after partition in kind, and if not, then create a fair sale process.

A more fundamental problem with the act is inconsistency with Florida practice and customs due to the act's emphasis on having a judge drive the process. From making a determination as to whether a property is heirs property (§2) and, thus, entitled to special procedures, to the determination of value (§6), to the cotenant buyout (§7), the act reflects a perspective of having a judge push the proceedings forward. This is, however, inconsistent with the Florida practice of having parties drive the proceedings and is not realistic with the current workload of many trial judges. For example, §6(e) requires a court to send notices to the parties within 10 days after an appraisal is filed, and §6(f) requires an evidentiary hearing in 30 days to decide whether to accept the value set forth in the appraisal. Committing a Florida court to send out notices is difficult, but holding evidentiary hearings within 30 days is next to impossible in some busy court divisions.

Section 10 of the act also conflicts with Florida law in that it requires an "open market" sale, *i.e.*, through brokers and sales agents, "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." Section 10 then describes in detail procedures a court must follow in providing for a sale. Partition actions in Florida are equitable in nature and trial judges in these proceedings have a great deal of discretion to fashion an appropriate remedy.[18] Many trial judges are convinced an open market sale is the best process, but a practitioner could reasonably be concerned the act would deprive a trial court of its discretion and flexibility to fashion an appropriate remedy in a particular case.

Conclusion

Florida has a robust body of law and protections for parties involved in partition proceedings. The act appears to be more appropriate for a jurisdiction that does not have a well-developed body of law detailing appropriate procedures in partition

actions. The act also brings with it some unintended consequences, the most troubling being the limitations the act would place on the discretion of trial courts in partition actions, and the resulting increased litigation and attendant costs the act would impose on parties due to its numerous required procedures. The buyout provisions appear too complicated and expensive for those of modest means, and may have an unintended consequence of dispossessing the very parties that the act seeks to preserve in real estate. The sale procedures are likewise complicated and deprive a trial court of the flexibility to fashion an appropriate result for real estate, which by its nature is unique. In short, the act may have a laudable goal, but appears to be a solution not needed in Florida. A greater focus on education, prevention, legal aid organizations, and volunteer efforts would best serve the needs of those who inherit property in Florida.❑

[1] Joan Flocks, Sean P. Lynch II & Andrea Szabo, *The Disproportionate Impact of Heirs' Property in Florida's Low-Income Communities of Color*, 92 FLA. BAR J. 57 (Sept/Oct 2018).

[2] Unif. Partition of Heirs Property Act at 2.

[3] *Id.* at 3.

[4] FLA. STAT. §733.608.

[5] The Florida Bar Real Property, Probate and Trust Law Section, RPPTL Provides "No Place Like Home" Program, http://rpptl.org/DrawOnePage.aspx?PageID=106.

[6] The Florida Bar, Press Release, *21 Lawyers to Receive Florida Bar Pro Bono Service Awards in Supreme Court Ceremony Jan. 25* (Jan. 8, 2018), *available at* https://www.floridabar.org/news-release/pro-bono/21-lawyers-to-receive-florida-bar-pro-bono-awards-in-supreme-court-ceremony-jan-25/.

[7] FLA. STAT. §64.09.

[8] *Robinson v. Speer*, 185 So. 2d 730 (Fla. 1st DCA 1966).

[9] *See generally* FLA. STAT. §64.031; *Elvins v. Seestedt*, 193 So. 54 (1940); *Donly v. Metropolitan Realty & Investment Co.*, 72 So. 178 (1916); *Weed v. Knox*, 27 So. 2d 419 (1946); *Barden v. Pappas*, 532 So. 2d 707 (Fla. 5th DCA 1988); *Hobbs v. Frazier*, 47 So. 929 (1908).

[10] *Biondo v. Powers*, 743 So. 2d 161 (Fla. 4th DCA 1999).

[11] *Camp Phosphate Co. v. Anderson*, 37 So. 722 (1904).

[12] *Cline v. Cline*, 134 So. 546 (1931).

[13] *See* MANUEL FARACH, FLORIDA REAL ESTATE LAW, Ch. 36.

[14] *See* FLA. STAT. §64.061.

[15] *Id.*

[16] Under the Public Land Surveying System used by surveyors, a "section" is an area of 640 acres as set forth on a rectangular grid.

[17] *Schroeder v. Lawhon*, 922 So. 2d 285, 293 (Fla. 2d DCA 2006).

[18] *Id.*

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