

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/HB 349 Uniform Partition of Heirs Property Act

SPONSOR(S): Civil Justice Subcommittee, Ausley and others

TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 580

FINAL HOUSE FLOOR ACTION: 116 Y's 0 N's **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/HB 349 passed the House on March 10, 2020, as CS/CS/SB 580.

A will is a legal document meeting certain requirements that a person may use to determine who gets his or her property after he or she dies. Without a will, a deceased person's (decedent's) estate is distributed pursuant to the intestacy statutes, which distribute a decedent's estate according to default rules. When multiple people receive property pursuant to the intestacy statutes, they own the property as tenants in common. Each tenant in common owns a proportional undivided interest in the property, but may use and possess the entire property, subject to the identical rights of each other cotenant.

Heirs property is a type of tenancy in common in which multiple owners obtain undivided, fractional interests in real property. It often occurs through intestate succession and can leave heirs with unclear titles and unstable property ownership.

A partition action allows two or more people who jointly own property to petition a court to equitably divide property into separate portions. A cotenant's right to file a partition action does not depend on how much of an ownership interest he or she has or the length of time he or she has owned her interest. For example, a cotenant who has acquired a small interest in tenancy-in-common property that family members have owned for generations, may file a partition action in most circumstances. A partition sale may be initiated by an outsider, such as a land developer, who purchases a family member's share. This outsider would own a fractional share of the heirs property and may petition the court for a partition sale. Low income owners often are unable to compete in an auction setting with a party who forced the partition sale. As a result, heirs property forced partition sales have led to significant loss of family land and property often sold for a fraction of its true value. Lack of clear title and fractional ownership also limits the ability of an individual cotenant to sell, improve, renovate, and repair the property or use it as collateral.

The bill adopts the Uniform Partition of Heirs Property Act by the Uniform Law Commission and provides procedures for the partition of heirs property. Specifically, the bill authorizes heirs property cotenants to purchase the property interests of cotenants seeking partition before the property is divided or sold. The bill also requires a court to determine the fair market value of the property, either through court-ordered appraisal or based on the agreement of the parties, before the court proceeds to partition. The bill authorizes cotenants owning real property that is not heirs property to agree to partition such real property using the provisions provided in the bill. Finally, the bill generally requires partitions by sale to be made in an open-market sale by a court appointed real estate broker, instead of an auction as the statutes currently require.

The bill does not appear to have a fiscal impact on state or local governments.

The bill was approved by the Governor on June 20, 2020, ch 2020-55, L.O.F., and will become effective on July 1, 2020.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

A will is a legal document meeting certain requirements that a person may use to determine who gets his or her property after he or she dies. With a will, a testator may devise¹ the estate to whomever they prefer. Without a will, however, a deceased person's (decedent's) estate is distributed pursuant to the intestacy statutes, which devise a decedent's estate according to default rules.

Tenancy in Common Ownership

In Florida, when a person dies without a will and the decedent has no surviving spouse, the decedent's real property is distributed to heirs in the following order:

- To the decedent's descendants (typically children or grandchildren);
- If no descendants, then to the decedent's parents;
- If no surviving parents, then to any siblings.²

When multiple people receive property pursuant to the intestacy statutes, they own the property as tenants in common.³ Each tenant in common owns a proportional undivided interest in the property, but may use and possess the entire property, subject to the identical rights of each other cotenant.⁴ Nationally, tenancy in common is the most common form of legal co-ownership.⁵ In Florida, tenancy in common is the default form of co-ownership in real estate.⁶

Heirs Property

Heirs property is a type of tenancy in common in which multiple owners obtain undivided, fractional interests in real property. It often occurs through intestate succession and can leave heirs with unclear titles and unstable property ownership. In tenancy in common ownership, there is no right of survivorship. When a co-owner dies, their interest transfer to their heirs by intestacy or according to the co-owners wishes in their wills.⁷ Therefore, as generations pass and heirs inherit ownership interests, the number of tenants in common can increase, further dividing the property.⁸ Lack of clear title and fractional ownership limits the ability of an individual cotenant to sell, improve, renovate, and repair the property or use it as collateral.

Partition Process

A partition action allows two or more people who jointly own property to petition a court to equitably divide property into separate portions. As a general rule tenants in common are entitled to partition as a matter of right.⁹ Under current law, a cotenant seeking partition of property must, in a complaint,

¹ To devise means to dispose of real or personal property by will or trust. S. 731.201(10), F.S.

² Ss. 732.102 - 732.104, F.S.

³ See s. 689.15, F.S. (stating that transfers of property create tenancies in common absent an instrument stating otherwise).

⁴ Thomas Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 Ala. L. Rev. 1, 8 (2014).

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2516275 (last visited Mar. 19, 2020).

⁵ *Id.*

⁶ *Id.*

⁷ See, e.g., *In re Suggs Estate*, 405 So. 2d 1360, 1361 (Fla. 5th DCA 1981).

⁸ See Joan Flocks, Sean P. Lynch II, and Andréa M. Szabo, *The Disproportionate Impact of Heirs Property in Florida's Low Income Communities of Color*, The Florida Bar Journal (October 2018), <https://www.floridabar.org/the-florida-bar-journal/the-disproportionate-impact-of-heirs-property-in-floridas-low-income-communities-of-color/> (last visited Mar. 19, 2020).

⁹ *Condrey v. Condrey*, 92 So. 2d 423, 427 (Fla. 1957); Section 64.031, F.S. However, the right of a tenant in common to partition of realty may be waived by the tenant in common, or he may be estopped to enforce the right by agreement not to partition, either express or implied.

describe the property to be partitioned and name all interested parties.¹⁰ If the names of any interested parties are unknown, “the action may proceed as though such unknown persons were named in the complaint.”¹¹

If the court determines a plaintiff’s interest in the property, it can order a partition of that interest, “leaving for future adjustment in the same action the interest of any other defendants” whose interests were not determined in the legal action.¹²

If the court orders partition, it must appoint three commissioners to make the partition.¹³ If the commissioners determine that the property is indivisible and cannot be divided without prejudice to one or more of the owners, and the court accepts that determination, the court may order the land to be sold at public auction by the commissioners or the clerk.¹⁴ The money arising from such sale is paid into the court to be divided among the parties in proportion to their interest.¹⁵ Every party is required to pay the costs of the process, including attorneys’ fees, proportionate to each party’s interest in the property.¹⁶ The court may order these costs and fees be paid out of the proceeds of the property sale.¹⁷

Consequences of Heirs Property

Unclear Title

Banks and other lenders often do not accept fractional interests of tenancies in common as collateral to secure a loan or mortgage.¹⁸ Moreover, although title insurance companies require clear title for insurance purposes before a sale, heirs property is often not considered to have clear title until all heirs consent to the sale.¹⁹ Under current law, if one heir wants to buy out the other heirs, that heir may not be able to secure the funds for the purchase because mortgage companies often do not accept a fractional interest as collateral even in a partition sale. Lastly, state and federal housing assistance programs and private lenders are not likely to approve any funding or assistance for home renovations or repair until the title is clear.²⁰

Partitions and Economic Harm

A cotenant’s right to file a partition action does not depend on how much of an ownership interest he or she has or the length of time he or she has owned her interest. For example, a cotenant who has only recently acquired a very small fractional interest in tenancy-in-common property that family members have owned for generations, may file a partition action in most circumstances.²¹

There are two types of partition commonly used in Florida: partition in kind and partition by sale. Also called an actual partition, a partition in kind is a partition in which the individual interests of owners in a property are severed in a way that each owner can enjoy his or her share of the property or can dispose of his or her share without any obstruction from others.²² Conversely, a partition by sale is often conducted when a property cannot be physically divided into separate parts or when it is not profitable to divide a property because the total value of the divided pieces of the property would be

¹⁰ S. 64.041, F.S.

¹¹ *Id.*

¹² S. 64.051, F.S.

¹³ S. 64.061, F.S.

¹⁴ S. 64.071, F.S.

¹⁵ *Id.*

¹⁶ S. 64.081, F.S.

¹⁷ *Id.*

¹⁸ Joan Flocks, Sean P. Lynch II, and Andréa M. Szabon, *supra* note 7.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Thomas W. Mitchell, *Historic Partition Law Reform: A Game Changer for Heirs Property Owners* (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403088 (last visited Mar. 19, 2020).

²² U.S. Legal, *Types of Partition* (2019), <https://partition.uslegal.com/types-of-partition/> (last visited Mar. 19, 2020).

lower than the value of property as a whole. In this type of partition, a sale of the property is conducted and the proceeds from the sale are divided among the co-owners.²³

Florida law authorizes a partition by sale only when that partition can be made without prejudice to the owners; however, there is no specific criteria that a court must consider before ordering a partition by sale.²⁴ A partition sale may be initiated by an outsider, such as a land developer, who purchases a family member's share. This outsider would own a fractional share of the heirs property and can petition the court for a partition sale. Low income owners often are unable to compete in an auction setting with a party who forced the partition sale. As a result, heirs property forced partition sales have led to significant loss of family land and property often sold for a fraction of its true value.²⁵

Farm Numbers, Federal Farm Bill, and Disaster Relief

Farmers and ranchers who own heirs property but lack clear title have been unable to secure loans from commercial financial institutions because banks and other lending institutions rarely lend money to property owners who lack clear title to their property when the real property would serve as collateral to secure the loan.

Because they lack clear title, farmers and ranchers also have been unable to participate in a several USDA programs, including:

- Loan programs;
- Commodity support programs; and
- The disaster assistance compensation program.

Historically, farmers and ranchers who own heirs property have faced difficulty obtaining a farm number²⁶ from the USDA to participate in most USDA programs. To obtain a farm number, a farm or ranch operator must demonstrate control of the land in question; however, the USDA has not historically granted farm numbers to heirs property owners who lacked clear title to their property because the USDA made proof of clear title a prerequisite to obtaining a farm number for those claiming to be the owners of farmland or ranchland.

The Agriculture Improvement Act of 2018 (Farm Bill) is federal legislation that reauthorized many expenditures in the prior federal Farm Bill: the Agricultural Act of 2014.²⁷ The bill largely continued previous farm and nutrition policy; however, the bill also included provisions to provide many farmers and ranchers who own heirs property with access to a number of farm programs, including loans and disaster assistance.²⁸ For example, the Emergency Conservation Program (ECP) provides very helpful monetary relief to farmers who experience harm to their farmland and certain structures on their farms as a result of many different types of natural disasters.²⁹ To be eligible for ECP monetary assistance, a farmer is required to have a farm number.³⁰

Effect of the Bill

The bill provides procedures for the partition of heirs property. The bill defines heirs property as real property held by tenants in common where there is no existing agreement governing the partition of the property, one or more of the cotenants acquired his or her property interest from a relative, and:

²³ *Id.*

²⁴ S. 64.061, F.S.

²⁵ United States Department of Agriculture, *Heirs Property and Land Fractionation: Fostering Stable Ownership to Prevent Land Loss and Abandonment* (Sep. 2019), https://www.srs.fs.usda.gov/pubs/gtr/gtr_srs244.pdf (last visited Mar. 19, 2020).

²⁶ A farm number is a number assigned to a farm by the county committee for identification purposes. Thomas W. Mitchell, *supra* note 20.

²⁷ Agricultural Improvement Act, Pub. Law 115-334, 132 Stat. 4670.

²⁸ Thomas W. Mitchell, *supra* note 20

²⁹ *Id.*

³⁰ *Id.*

- Twenty percent of the property is owned by cotenants who are relatives;
- Twenty percent of the owners are relatives; or
- Twenty percent of the property is owned by cotenants who received their interests from a relative.

The bill also requires that the commissioners appointed by the court in a court ordered partition of heirs property must be disinterested, impartial, and not a party or a participant in the action.

Determination of Heirs Property and Appraisal

The bill also requires the court to determine whether the property is heirs property if a cotenant seeks partition. If the court determines the property is heirs property, a plaintiff seeking partition must within ten days post a conspicuous sign on the property naming the court in which the partition action has commenced.

If the court determines that the property is heirs property, it is required to order an appraisal of the property, unless the cotenants have agreed to the property's value or the court determines that the cost of an appraisal would outweigh the appraisal's evidentiary value.

If the court orders an appraisal, the bill requires the court to appoint a disinterested licensed appraiser to determine the property's fair market value and file a sworn or verified appraisal with the court. After the appraisal is filed, the bill requires the court to:

- Notify all known parties as to the property's value;
- Inform the parties that the appraisal is available for review;
- Inform the parties that each party may object to the appraisal within 30 days of the notice.

Once an appraisal is filed, the court must conduct a hearing to determine the value of the property not sooner than 31 days after the notice has been sent to the interested parties. The court must determine the value of the property before proceeding to the partition action, and must give notice to the parties of the market value.

The bill requires the court to determine the amount of the equitable accounting upon the request of any cotenant and appropriately adjust any price, purchase price, apportioned price, buyout, judgment, or partition based on the results of the equitable accounting. The bill defines equitable accounting as "considering contributions and adjustments of accounts between cotenants, which are related to the real property and are based upon such contributions and adjustments, s. 64.081, and common law."

Cotenant Buyout

If any cotenant requested partition by sale, the bill requires that the court inform any other cotenants who did not request the sale that they may buy all of the interest of the cotenant who requested the sale. The value of each tenant's interest is proportional to his or her fractional interest in the property. Within 45 days of the notice of the requested partition by sale, the other cotenants may give notice that they elect to purchase the interest of the cotenant seeking the sale. The bill requires the court to notify the parties if only one other cotenant gives notice that he or she wishes to purchase the interest of the party seeking sale. If multiple cotenants give notice that they wish to purchase the interest of the party seeking partition by sale, the court must allocate the right to purchase that interest proportional to each cotenant's existing fractional ownership of the property. If one or more cotenants give notice of their desire to purchase the interest of a party seeking partition by sale, the court must set a payment due date at least 60 days from the date that the court gave notice of the desire to purchase.

The bill also requires a court to reallocate the property interests if all parties pay their apportioned price within the time limit set by the court. However, if one or more of the parties do not pay within that timeframe, the court must notice the other cotenants of the price of the remaining interests not purchased, and those other cotenants have 20 days to purchase the remaining interest. If none of the

parties pay within the time frame set by the court, the court must proceed with the partition action as if none of the interests were purchased.

Within 45 days after the initial complaint requesting partition by sale, the bill allows any cotenant entitled to purchase an interest to request that the court authorize the sale of the interests of any defendants named in the complaint who did not file an appearance to the action. The court may grant the request if the court has determined a fair market value of the non-appearing party's interest.

Partition in Kind

If the interests of the cotenants who requested partition are not purchased or if there remains one or more parties who request partition in kind after the buyout outlined in the bill, the court must order a partition in kind unless the commissioners find that a partition in kind will result in injustice, considering a list of factors including:

- Whether physical division is practicable;
- Whether the division would result in inequitably valued parcels;
- A party's sentimental attachment to the property;
- The degree to which parties have contributed their pro-rated share of property taxes; and
- Any other relevant factors.

A judgment for a partition in kind must include the legal description of the real property before partition, the legal description of each new parcel, and the name of each parcel's owner and must be recorded by the clerk of the court in the official records of the county where the property is located.

If the court does not order partition in kind, it may order partition by sale or dismiss the partition action.

Partition by Sale

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 auction would be in the best interests of the tenants. The bill requires the court to appoint a licensed real estate broker within ten days to sell the property in a commercially reasonable manner. For an open-market sale, the broker must report an offer at the court-determined property value within 7 days after receiving the offer.

Property Not Considered Heirs Property

The bill also authorizes cotenants owning real property that is not heirs property to agree to partition such real property using the provisions provided in the bill. All of the cotenants are required to jointly notify the court of such an agreement.

Federal Farm Bill

Under the federal Farm Bill, entities in states having adopted the Uniform Partition of Heirs Property Act are given preference in receiving loans from the U.S. Secretary of Agriculture to assist in the resolution of interests on farmland with multiple owners.³¹ Additionally, farm operators on heirs property in states having adopted the Uniform Partition of Heirs Property Act have a simplified process to be eligible to receive a farm number, a prerequisite to participate in certain programs provided by the Secretary of Agriculture under the Farm Bill.³²

The bill provides effective date of July 1, 2020.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

1. Revenues:

None.

2. Expenditures:

None.

A. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

B. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill requires a court to determine the market value of heirs property before commencing partition proceedings and requires partition by sale to be conducted on the open market by a licensed real estate broker, rather than at auction (unless a court determines that auction or sealed bids would be more economically advantageous). This may help ensure that the heirs property partitioned by sale is sold at fair market value.

C. FISCAL COMMENTS:

None.

³¹ Agricultural Improvement Act, Pub. Law 115-334, 132 Stat. 4670.

³² *Id.* at 5015.