

HOUSE BILL REPORT

SSB 5005

As Reported by House Committee On:
Civil Rights & Judiciary

Title: An act relating to real property.

Brief Description: Concerning real property.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Pedersen, Padden, Dhingra and Nobles; by request of Uniform Law Commission).

Brief History:

Committee Activity:

Civil Rights & Judiciary: 3/2/23, 3/10/23 [DP].

Brief Summary of Substitute Bill

- Adopts the Uniform Partition of Heirs Property Act to supplement existing state law on partitioning real property held by tenants in common and to govern partitioning of heirs property.
- Adopts the Uniform Easement Relocation Act to govern relocation of easements through civil actions.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: Do pass. Signed by 10 members: Representatives Farivar, Vice Chair; Walsh, Ranking Minority Member; Graham, Assistant Ranking Minority Member; Cheney, Entenman, Goodman, Peterson, Rude, Thai and Walen.

Staff: Yelena Baker (786-7301).

Background:

Tenancy in Common.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

Tenancy in common is a type of ownership of real property by two or more persons where each person—a tenant in common or cotenant—holds an undivided, fractional share of the entire property, and each is entitled to simultaneous possession and enjoyment of the whole property as if he or she is the sole owner. Each cotenant is presumed to have an equal share in the property unless the agreement or deed creating the tenancy in common provides otherwise.

Under state law, a conveyance or devise of interest in real property in favor of two or more persons is presumed to create a tenancy in common, unless clear language expressing an intent to create a joint tenancy is included in the written document creating the tenancy. A tenancy in common may also arise when a joint tenancy is severed or when property passes through by intestate succession.

A tenant in common has the right to sell, mortgage, lease, or otherwise transfer all or part of the tenant's interest without the consent of other cotenants, and such a transfer does not end the tenancy in common. Third parties may deal with one tenant in common with respect to the commonly owned property without having to notify the other cotenants.

Unlike joint tenants, tenants in common do not have a right of survivorship, and, upon death of one cotenant, the deceased's interest does not pass to other cotenants. Instead, the deceased cotenant's interest passes to the deceased's devisees, if the deceased cotenant left a validly executed will, or to the deceased's heirs pursuant to the laws of intestate succession.

A tenancy in common may be terminated by partition. Cotenants may agree to the partition of property, but each cotenant also has the statutory right to seek partition of the property by judicial action.

Actions to Partition Real Property Held by Tenants in Common.

A complaint in a partition action must be served on all known tenants in common. Notice of the partition action may be served by publication if a party who has a share or interest in the property is unknown, cannot be found in the state, or resides out of the state. When service is made by publication, the notice must contain a brief description of the property subject to the partition action.

There are two types of partition: partition in kind and partition by sale. Partition in kind, the preferred approach, is a physical division of the property into separate parcels. If the value of the parcels is not equal due to variations in the land or other factors, such as water access, a court may equalize the distribution by ordering a money payment called owelty.

When partition in kind cannot be made without "great prejudice to the owner," the property may be sold, and the proceeds divided among the cotenants according to their respective shares. Prejudice generally concerns the value of the property to the owners, not secondary effects on the owners. Whether a property cannot be divided without "great prejudice" and thus a sale is required depends on the specific circumstances of each partition case.

To accomplish either partition in kind or partition by sale, the court appoints a referee. One referee is appointed if a sale is ordered; three referees are appointed if partition in kind is ordered. The role of the referees in a partition in kind is to divide the property and allocate the portions between the respective parties, having carefully considered the quality and quantity of the property. To avoid a conflict of interest, the referee is prohibited from purchasing the property at a partition sale.

Easements.

An easement is a right to use the land of another for a specific limited purpose. The land that is benefited by an easement is known as the dominant estate, and the land burdened by an easement is referred to as the servient estate. Common easements include the right to use driveways and private roads, and access utility and sewer lines. Conservation and preservation easements are used to protect land and property with natural, environmental, or open space value, or with historic, architectural, or archeological significance.

An easement may be created by a written instrument or by implication, such as an easement implied from necessity or prior use. State law also recognizes easements by prescription, which are acquired by the exclusive and uninterrupted adverse use and enjoyment of an easement.

Every easement is classified as either affirmative or negative. An affirmative easement authorizes the easement holder to use another's land in a particular manner that, without the easement, would not be possible. Examples of affirmative easements include a right-of-way across another's land or the right to use the servient land for power lines, drainage, hunting, or boating. By contrast, a negative easement gives the easement holder the right to restrict the other landowner's exercise of property rights. An example of a negative easement is an easement of light and air that restricts the landowner from building above a certain height.

The Uniform Law Commission.

The Uniform Law Commission (ULC) is a state-supported, nonpartisan, nonprofit organization that authors and promotes enactment of uniform laws in areas of law where national uniformity is desirable and practical.

In 2010 the ULC promulgated the Uniform Partition of Heirs Property Act (UPHPA) which provides the framework for partitioning real property held by tenants in common, some or all of whom have received their property interest from a relative. The UPHPA has been adopted in 22 states.

In 2020 the ULC promulgated the Uniform Easement Relocation Act (UERA) which provides a process for relocation of easements through civil action if the servient estate owner and the easement holder cannot agree to the relocation of the easement. The UERA has been adopted in Nebraska and Utah.

Summary of Bill:

The Uniform Partition of Heirs Property Act.

The Uniform Partition of Heirs Property Act (UPHPA) is adopted to supplement existing state law related to actions brought to partition real property held by tenants in common.

The UPHPA governs partitioning of "heirs property" which means real property that is held in tenancy in common and that satisfies all of the following requirements:

- there is no written agreement that binds all cotenants and governs the partition of the property;
- one or more of the cotenants acquired title from a living or deceased relative; and
- 20 percent or more of the interests are held by cotenants who are relatives or by an individual who acquired title from a living or deceased relative, or 20 percent or more of the cotenants are relatives.

In an action to partition real property brought under existing state law, the court must determine whether the property is heirs property. If the court determines that the property is heirs property, the property must be partitioned under the UPHPA unless all cotenants otherwise agree in a record.

The UPHPA sets forth several requirements for actions to partition heirs property.

Notice by Posting.

If the plaintiff in an action to partition heirs property seeks an order of notice by publication, the plaintiff must post a conspicuous sign on the property that is the subject of the partition action within 10 days of the court's determination that the property may be heirs property. The sign must state that a partition action has commenced and provide information about the court, the property, and, if required by the court, about the plaintiff and known defendants. The plaintiff must maintain the sign while the action is pending.

Referees.

A referee in an action to partition heirs property must be disinterested and impartial, and may not be a party to or a participant in the action.

Determination of Value.

If all cotenants have agreed on the value of heirs property or a method of valuation of the property, the court must adopt the agreed-upon value or the value produced by the agreed method of valuation.

If cotenants have not agreed on the value of the property or a method of valuation, the court must order an appraisal by a disinterested real estate appraiser to determine the fair market value of the property. If the court determines that the cost of an appraisal outweighs the evidentiary value of the appraisal, the court must hold an evidentiary hearing to determine the fair market value of the property and send notice to the parties of the value.

Once the appraisal is complete, the appraiser must file a sworn or verified appraisal with the court. No later than 10 days after the appraisal is filed, the court must send notice to each party stating the appraised fair market value of the property and informing that a party may file with the court an objection to the appraisal no later than 30 days after the notice is sent.

Regardless of whether or not there is an objection to the appraisal, the court must conduct a hearing to determine the fair market value of the property. In addition to the appraisal, the court may consider any other evidence of value offered by a party. After the hearing, the court must determine the fair market value of the property and send notice of the value to the parties before considering the merits of the partition action.

Cotenant Buyout.

If any cotenants requested partition by sale, the court must send notice to the parties stating that any cotenant not seeking partition by sale may buy all the interests of the cotenants who requested partition by sale.

Procedures and timelines are established to govern the purchase of these interests by one or more cotenants, including procedures for:

- allowing cotenants not requesting partition by sale to express interest in purchasing the interests available for purchase;
- determining the purchase price of each of the interests;
- allocating the right to buy the interests among multiple cotenants electing to purchase;
- giving the purchasers a period of time determined by the court to pay the purchase price; and
- conducting another buyout round and allowing any purchaser who paid their apportioned price on time to buy the entire remaining interest for which purchase money was not timely paid.

Additionally, any cotenant entitled to buy an interest during the cotenant buyout process may request the court to authorize the sale of the interests of cotenants who were named as defendants and served with the complaint, but who did not appear in the action. After a hearing, the court may deny the request or authorize the requested additional sale on fair and reasonable terms and subject to specified limitations.

Partition in Kind.

If all the interests of all cotenants that requested partition by sale are not purchased by other cotenants, or if after the conclusion of the buyout process a cotenant remains that has requested partition in kind, the court must order partition in kind unless the court finds that partition in kind will result in great prejudice to the cotenants as a group.

In determining whether partition in kind will result in great prejudice, the court must consider specified economic and noneconomic factors, including:

- whether the heirs property practicably can be divided among the cotenants;

- whether the aggregate fair market value of the parcels resulting from partition in kind is materially less than the value of the property if it were sold as a whole;
- evidence of the collective duration of ownership or possession of the property by any cotenant or certain predecessors in possession to that cotenant;
- a cotenant's sentimental attachment to the property, including ancestral or other special value of the property to the cotenant; and
- the degree to which the cotenants have contributed their pro rata share of the property taxes, insurance, and other expenses associated with maintaining ownership.

If the court orders partition in kind, the court may require one or more cotenants to pay one or more other cotenants an owelty payment to make the partition just and proportionate in value to the fractional interests held.

Additionally, when ordering partition in kind, the court must allocate a part of the property representing the combined interests of cotenants who are unknown, unlocatable, or the subject of a default judgment, and whose interests were not bought out through the cotenant buyout process. This part of the property must remain undivided.

Partition by Sale.

If the court does not order partition in kind, the court must order partition by sale. If no cotenant requested partition by sale, the court must dismiss the partition action.

A court-ordered sale of heirs property must be an open market sale unless the court finds that a sale by sealed bids or an action would be more economically advantageous and in the best interest of the cotenants as a group.

If the court orders an open market sale, the parties must agree on a Washington-licensed real estate broker to offer the property for sale. If the parties do not agree, the court must appoint a disinterested real estate broker and establish a reasonable commission. The broker must offer the property for sale in a commercial reasonable manner at a price no lower than the determined value of the property and on the terms and conditions established by the court.

If the broker does not receive an offer to purchase the property for at least the determined value within a reasonable time, the court may, after a hearing:

- approve the highest standing offer;
- redetermine the value of the property and order the property to be offered for an additional time; or
- order that the property be sold by sealed bids or at an auction.

No later than seven days after receiving an offer to purchase the property for at least the determined value, the broker must file with the court a report that contains specified information about the buyers, the terms and conditions of the proposed sale, and the proposed purchase price.

Applicability.

The UPHPA applies to partition actions filed on or after the effective date of the bill.

The Uniform Easement Relocation Act.

The Uniform Easement Relocation Act (UERA) is adopted to govern relocation of easements through civil action if the servient estate owner and the easement holder cannot agree to the relocation of the easement.

Right to Relocate Easement.

A servient estate owner may relocate an easement under the UERA only if the relocation does not materially:

- lessen the utility of the easement;
- increase the burden on the easement holder after the relocation;
- impair the purpose for which the easement was created;
- impair the safety of the easement holder or anyone entitled to use the easement during or after the relocation;
- disrupt the use and enjoyment of the easement by the easement holder or anyone entitled to use the easement during the relocation, unless the servient estate substantially mitigates the disruption;
- impair the physical condition, use, or value of the dominant estate or any of its improvements; or
- impair the collateral of a security interest holder in the servient or dominant estates, impair a real property interest of a lessee in the dominant estate, or impair a recorded real property interest of any other person in the servient or dominant estates.

Civil Action to Relocate an Easement.

In order to obtain a court order to relocate an easement under the UERA, a servient estate owner must commence a civil action.

The complaint must provide specified information about the relocation, including:

- the nature, extent, and anticipated dates of commencement and completion of the proposed relocation;
- the reason the easement is eligible and satisfies the conditions for relocation under the UERA; and
- a statement that the servient estate owner has made a reasonable attempt to notify the holders of any public utility easement, conservation easement, or negative easement on the servient or dominant estate of the proposed relocation.

The servient estate owner must serve a summons and complaint on the easement holder, security interest holder, any lessee of the dominant estate, and any other owner of a recorded real property interest if the relocation would encroach on an area of the servient or dominant estate that is burdened by the interest.

Security interest holders, lessees of the dominant estate, and other owners may waive the right to contest or obtain relief in connection with the relocation.

Relocation of Easement.

The court may approve relocation of an easement only if the servient estate owner establishes the easement is eligible for relocation and the relocation satisfies the conditions for relocation.

A court order approving relocation of an easement must contain specific details regarding the relocation process, conditions that the servient estate owner must satisfy, and provisions for payment by the servient estate owner of relocation expenses. Before proceeding with relocation, the servient estate owner must record a certified copy of the court order in the land records of each jurisdiction where the servient estate is located.

After the court approves relocation of an easement, all parties in the relocation action must act in good faith to facilitate the relocation.

Expenses of Relocation.

A servient estate owner is responsible for reasonable expenses related to the relocation of an easement, including costs related to: constructing improvements; mitigating disruption to the easement holder and other persons entitled to use the easement; obtaining required permits; insurance premiums related to relocation; hiring of experts to review plans and specifications; and obtaining any third-party consent required to relocate the easement.

Limited Effects of Relocation.

Easement relocation is not:

- a new transfer or grant of an interest in the servient estate or the dominant estate;
- a breach or default of a lease; or
- a fraudulent conveyance or voidable transaction.

Additionally, easement relocation does not breach or trigger a due-on-sale clause or other transfer-restriction clause in a security instrument, and does not affect the priority of the easement transfer restriction.

Nonwaiver.

The right of a servient estate owner to relocate an easement may not be waived, excluded, or restricted by agreement.

Applicability.

The UERA applies to easements created before, on, or after the effective date of the bill and does not apply to relocation of an easement by consent. The UERA may not be used to relocate: public utility easements; conservation easements; negative easements; or easements whose proposed location would encroach on an area of an estate burdened by a conservation easement, or that would interfere with the use or enjoyment of a public utility

easement or an easement appurtenant to a conservation easement.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Heirs property is a very widespread form of common real property ownership, particularly among low- to moderate-income families from every ethnic and racial group, and it implicates property both in urban and rural areas.

The Uniform Partition of Heirs Property Act (UPHPA) is designed to address the abuse of partitions actions that has resulted in substantial loss of property and family generational wealth. The bill enhances the due process and property rights of the owners of heirs property, thereby enabling them to better maintain ownership of their property and protect their real estate related generational wealth, including in the circumstances of a forced partition sale. The UPHPA enables a cotenant to buy out the interests of cotenants who seek partition by sale and fortifies the preference for the physical division of property, as opposed to a forced sale. Additionally, the UPHPA provides for an open market sales procedure that is very much designed to mimic a sale between a willing seller and a willing buyer; unsurprisingly, this procedure has been yielding substantially higher sales prices in the jurisdictions that have enacted this law.

The UPHPA is among the most successful uniform real property acts and has been enacted in 22 states. In addition to Washington, four other states are considering the UPHPA. In the last few years, four states have made the UPHPA the general partition law governing all tenancy in common property, with California becoming the most recent state to do that.

The Uniform Easement Relocation Act (UERA) addresses a typical issue that arises in easement relationships: a servient estate owner's property is undeveloped or vacant land near a city, and an easement was created many decades ago when parties did not give much attention to the particular location of an easement. Time passes, circumstances change, and the servient estate now has tremendous development potential—it could be used for renewable energy projects or to build affordable housing, for example. Under the traditional common law rule, the easement holder could block the development of the servient estate even if the proposed new easement location would cause no material harm to the easement holder. This is the problem addressed by the UERA. There are a number of procedural safeguards in place to protect the easement holder, including requiring a servient estate owner who seeks the relocation to bring a civil action. The UERA will bring

flexibility to easement law and allows many other parties to benefit from easement relocation without causing any harm to the interests of an easement holder.

(Opposed) None.

Persons Testifying: Senator Jamie Pedersen, prime sponsor; and Thomas Mitchell, Jane Sternecky, and John Lovett, Uniform Law Commission.

Persons Signed In To Testify But Not Testifying: None.