Uniform Law Commission
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

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Statement of Benjamin Orzeske, Chief Counsel of the Uniform Law Commission, to the Kansas Senate Judiciary Committee in support of SB 55, the Uniform Partition of Heirs Property Act, February 5, 2019.

Chairman Wilborn and Members of the Committee:

Thank you for considering SB 55, which would enact the Uniform Partition of Heirs Property Act (UPHPA) in Kansas. This bill is based on a uniform act produced by the Uniform Law Commission (ULC). The ULC is a non-profit organization formed in 1892 to draft non-partisan model legislation in the areas of the law for which uniformity among the states is advisable. Kansas has a long and successful history of enacting ULC acts including the Uniform Commercial Code, the Uniform Transfers to Minors Act, the Uniform Child Abduction Prevention Act, and many dozens of others.

Let me begin by defining two terms. First, a "tenancy-in-common" is a form of ownership where two or more people share an interest in an undivided parcel of real estate. This is the default form of ownership when property is passed to an owner's heirs at death. For example, if a landowner with three children dies without making a will, the three children will each inherit a one-third interest in the entire property as tenants-in-common.

Next, "heirs' property" is defined in this bill as property held as a tenancy-in-common for which there is no written partition agreement, at least one cotenant acquired title from a relative, and 20% or more of the owners or interests are related. You can think of heirs' property as real estate that is passed from one generation to the next. After many years of ownership by the same family, the property may have sentimental value in addition to its monetary value, and it may represent a large percentage of the family's total wealth.

UPHPA protects the property rights of people who inherit family-owned real estate as tenants-in-common. Wealthier families may not need protection because they can use sophisticated estate planning techniques to create trusts or LLCs and ensure the continued ownership of their land. Less wealthy landowners are more likely to use a simple will to pass assets to their heirs, or to die intestate. In either case, the owner's heirs will take ownership of the real estate as tenants-in-common. If the property passes in this manner through more than one generation, the number of cotenants can quickly multiply.

Here is the issue: the current law governing tenancies-in-common leaves heirs' property vulnerable to real estate speculators. An investor who acquires one cotenant's share may file a partition action and potentially acquire the entire property at a price below it's fair market value. An example will illustrate the problem.

Imagine a widow with three children who owns a farm in Kansas. Unless the widow makes other provisions in her estate plan, when she dies her three children will inherit the property as tenants-in-common. Imagine further that two of the children would like to maintain family ownership of the farm,

but the third child needs cash. If his siblings cannot afford to buy his share, the third child might sell it to a real estate investor. Or he might be forced to sell his share to pay debts. Either way, the new cotenant is unrelated to the other siblings and probably has no personal attachment to the land.

Under current law, the new cotenant can petition the court for a partition of the farm, and possibly purchase the other heirs' interests at auction. Partitions can be done in one of two ways: a partition-in-kind in which the property is physically divided into one parcel for each cotenant based on his or her ownership percentage, or a partition-by-sale in which the entire property is sold, and the cotenants split the proceeds. Land that is improved with a home can be difficult to divide into shares fairly. In those cases, a court will often order a partition-by-sale, forcing the two siblings to sell their shares of the property against their will.

Forced sales usually bring meager returns. Depending on the property location and the manner of sale, the investor may be able to buy the other siblings' interests at a price well below the property's fair market value. In the end, the siblings would have little to show for their inheritance.

If UPHPA becomes law, a cotenant who files for partition must first notify the other cotenants of the intent to sell. Unless the parties agree on the property value, the court will order an independent appraisal. Any cotenant may challenge the appraised value and the court, after a hearing, will make the final determination. The cotenants who did not request partition will then have 45 days to exercise a right of first refusal to purchase the seller's share at the court-determined value, and an additional 60 days in which to arrange financing.

If the cotenants do not exercise their option to purchase, the court *must* order partition-in-kind for heirs property unless the court finds, after consideration of factors listed in Section 9 of the bill, that partition-in-kind is not possible or will result in great prejudice to the owners as a group. In that case, the court may order partition-by-sale, but the property must be offered for sale on the open market for a reasonable period of time at a price no lower than the court-determined value. If the property still does not sell, the court may approve the highest offer, or may permit a sale by auction or by sealed bid.

Finally, I want to emphasize what UPHPA will not do. UPHPA does not prevent a willing buyer and a willing landowner from reaching agreement to sell real estate. It only protects landowners who want to keep their property from being forced to sell against their will.

UPHPA was approved by the Uniform Law Commission in the summer of 2010 and has been enacted so far in eleven states and the U.S. Virgin Islands. Last year, the U.S. Congress included a provision in the Farm Bill giving priority for federal farm loans to applicants from states that have adopted UPHPA. This resulted in a number of new states introducing UPHPA bills. In addition to Kansas, at least six other state legislatures will consider a UPHPA bill this year.

UPHPA has been endorsed by the ABA Section on Real Property, Trusts, and Estates; the American College of Real Estate Lawyers; the Center for Heirs' Property Preservation; the Heirs' Property Retention Coalition; and several other organizations.

In summary, enacting SB 55 will protect the property rights of Kansans who inherit real estate. The bill does so by providing a series of reasonable court procedures designed to inform heirs of their rights and

give those who wish to retain family-owned real estate the opportunity to do so, without unduly restricting the rights of heirs who wish to sell their inheritance. For these reasons, I urge you to vote to enact UPHPA in Kansas, and I welcome the committee's questions.