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**REPORT ON LEGISLATION  
BY THE COMMERCIAL LAW AND UNIFORM STATE LAWS COMMITTEE,  
THE HOUSING AND URBAN DEVELOPMENT COMMITTEE  
AND THE PRO BONO AND LEGAL SERVICES COMMITTEE**

**A.7058-A**

**S.4865-A**

**M. of A. Dinowitz**

**Sen. Hoylman**

AN ACT to amend the real property actions and proceedings law, in relation to establishing the uniform partition of heirs property act

**The Uniform Partition of Heirs Property Act**

**THIS BILL IS APPROVED**

The Bill would enact a modified version of the Uniform Partition of Heirs Property Act (the “UPHPA”, and as modified, the “NY UPHPA”) promulgated by the Uniform Law Commissioners (“ULC”) in 2010 by adding it as section 993 of Article 9 of the Real Property Actions and Proceedings Law, which addresses actions to partition real property. The New York City Bar Association (“City Bar”) recommends the adoption of the Bill, which modifies the UPHPA, to make it work more effectively in New York City and other urban areas while retaining its important protections applicable to rural areas. The City Bar has reviewed the Bill, including its modifications to the UPHPA, with the ULC and the modifications are approved by the ULC.

The UPHPA was promulgated by the ULC to address deficiencies in how partition law is applied with respect to real estate owned by tenants in common, a significant percentage of whom are relatives.<sup>1</sup> Such property is frequently referred to as “heirs property.” These tenants-in-common are often lower income individuals or members of minority communities who have inherited their interests but have not had the benefit of legal counsel in structuring their real estate holdings. It had become a serious problem in some parts of the country for speculators to induce one co-tenant to sell a small minority interest, thereby enabling the speculator to commence a partition action. Frequently, such actions would result in partition by sale, rather than physical division of a property (despite the fact that physical partition would have been practical), resulting in a fire-sale price for the entire property at a judicial auction held on short

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<sup>1</sup> NAT’L CONFERENCE OF COMM’RS ON UNIFORM STATE LAWS, UNIFORM PARTITION OF HEIRS PROPERTY ACT 1 (2010), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=a71c418b-c240-a2d6-631a-c4de1d60ec13&forceDialog=0> (hereinafter UNIFORM ACT OR UPHPA). (All websites cited in this report were last visited on May 15, 2019.)

notice and with insufficient effort to obtain fair market value. Because the co-tenant owner families were often land-rich but cash-poor and unable to use their co-tenancy interests to secure a loan to make a competitive bid, the speculator who commenced the partition action was often the only bidder, acquiring the entire property for a fraction of its value. The heir co-tenants who resided on or farmed the property would then find themselves dispossessed, and all the co-tenants would be deprived of the fair market value of their inheritance for the benefit of the purchaser. These practices and the resulting injustices are described in detail in the Prefatory Note to the UHPA with Official Comment.<sup>2</sup>

The problems addressed by the UHPA were generally perceived to be prevalent in rural or agricultural areas, and the drafters of the UHPA were primarily focused on the problems of (i) partition of larger tracts of farmland or undeveloped property and (ii) perceived disregard by the courts of the factors favoring partition in kind over a partition by sale.<sup>3</sup> As of September 2018, eleven states have enacted the UHPA into law: Alabama, Arkansas, Connecticut, Georgia, Hawaii, Iowa, Montana, Nevada, New Mexico, South Carolina, and Texas as well as the United States Virgin Islands.<sup>4</sup> In addition, the legislatures of the District of Columbia, Indiana, Kansas, Mississippi, Nebraska, New York, Oklahoma, Virginia and West Virginia have introduced the UHPA for passage.<sup>5</sup> The Illinois and Missouri legislatures each passed the UHPA this year, with the bills awaiting action by their respective Governors.<sup>6</sup>

More recently, it has become clear that the deficiencies of partition of heirs property is also a significant urban problem. However, unlike rural property for which partition in kind is feasible, partition in kind is not feasible for most urban residential properties because they consist of homes on small lots that cannot be divided. This requires greater focus on improving the procedures for partition by sale to make them fairer for co-tenants of urban heirs property. The NY UHPA does this. Recent news reports in New York City have highlighted the use of current partition law by speculators to target homes owned in tenancy in common and occupied by low-income residents in gentrifying minority neighborhoods.<sup>7</sup> The City Bar Justice Center

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<sup>2</sup> *Id.* at 1-8; see also Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Ownership, Political Independence, and Community Through Partition Sales of Tenancy in Common Property*, 95 NW. U. L. REV. 505 (2001).

<sup>3</sup> Partition is a legal proceeding among tenants in common or tenants by the entirety who own a property. It may result in actual partition or division of the property into separate parcels, each titled in the name of an individual co-tenant according to the co-tenants' respective interests ("partition in kind"), or, alternatively where actual partition would be prejudicial to the co-tenants, by judicial sale of the entire property and division of the net proceeds among the co-tenants according to their respective interests ("partition by sale"). See 24 N.Y. Jur. 2d Cotenancy and Partition §§ 116, 117, 210, 216 and 217.

<sup>4</sup> *Partition of Heirs Property Act*, NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, <https://www.uniformlaws.org/committees/community-home?communitykey=50724584-e808-4255-bc5d-8ea4e588371d&tab=groupdetails>.

<sup>5</sup> *Id.*

<sup>6</sup> Illinois HB3677/SB1780 (2019), <http://www.ilga.gov/legislation/BillStatus.asp?DocTypeID=HB&DocNum=3677&GAID=15&SessionID=108&LegID=120396>; Missouri SB83 (2019), [https://www.senate.mo.gov/19info/BTS\\_Web/Bill.aspx?SessionType=R&BillID=6](https://www.senate.mo.gov/19info/BTS_Web/Bill.aspx?SessionType=R&BillID=6).

<sup>7</sup> Lydia Hu, *Going, Going, Gone: New Tactic by Real Estate Investors Forcing Some New Yorkers from Their Homes*, SPECTRUM NEWS NY1 (Mar. 19, 2019), <https://www.ny1.com/nyc/all-boroughs/news/2019/03/19/going--going--gone--new-tactic-by-real-estate-investors-forcing-some-new-yorkers-from-their-homes-ny1-investigation>.

has represented a number of individuals who have been victims of attempts to partition their residential property by forced sale. The modifications made to the UPHPA by the NY UPHPA will be particularly helpful in correcting the problems of partition law as applied to urban property that is heirs property. Enactment of the Bill will make New York a leader and model for other states with urban heir property problems caused by gentrification.

For these reasons, the City Bar supports the NY UPHPA endorsing the modifications to the UPHPA incorporated in the Bill.

Because the NY UPHPA is also ULC approved, when enacted it will have the additional benefit of entitling New York State to gain priority in the availability of certain federal programs administered by the United States Department of Agriculture, including loan programs, disaster relief programs and a program providing low-interest loans to owners of heirs property to enable them to restructure their legal ownership to make it more stable and to facilitate proper estate planning.<sup>8</sup>

## I. BACKGROUND: A NEED FOR CHANGE

The foreclosure crisis, which hit its peak in 2010 when banks seized more than one million homes and the number of foreclosure filings was 2.9 million<sup>9</sup>, has had a lasting impact on low-income Americans. While wealthy Americans were able to recover from the Great Recession by 2013, many poor families have still not been able to economically recover from the crisis that began a decade ago.<sup>10</sup> Recovery has been particularly difficult for Black and Latinx families, who were disproportionately targeted by subprime mortgage lenders during the crisis and who saw their wealth continue to decline as the wealth of white families stabilized in the years following the crisis.<sup>11</sup> While Black and Latinx families have made some economic gains in recent years, research shows that the racial wealth gap is growing, rather than shrinking.<sup>12</sup>

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<sup>8</sup> Enactment Kit: Agriculture Improvement Act of 2019, S. 2, 115th Cong. (2018), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=2530e96c-d425-890e-29cd-939b6598cd8b&forceDialog=0>; *Why Your State Should Adopt The Uniform Partition Of Heirs Property Act*, NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=9238e44d-8442-8f05-690c-2e0e6f0a32c2&forceDialog=0>.

<sup>9</sup> Corbett B. Daly, *Home Foreclosures in 2010 Top 1 Million for First Time*, REUTERS (Jan. 13, 2011), <https://www.reuters.com/article/us-usa-housing-foreclosures/home-foreclosures-in-2010-top-1-million-for-first-time-idUSTRE70C0YD20110113>.

<sup>10</sup> “The average household income of the bottom 20 percent of Americans fell \$571 between 2006 and 2016, according to Census data, while for the top 20 percent of Americans it grew by \$13,749.” Alana Semuels, *The Never-Ending Foreclosure*, THE ATLANTIC (Dec. 1, 2017), <https://www.theatlantic.com/business/archive/2017/12/the-never-ending-foreclosure/547181/>.

<sup>11</sup> Andrew Haughwout et al., *Subprime Mortgage Pricing: The Impact of Race, Ethnicity, and Gender on the Cost of Borrowing*, in BROOKINGS-WHARTON PAPERS ON PUBLIC AFFAIRS 33, 33-36 (Gary Burtless & Janet Rothenberg Pack eds. 2009).

<sup>12</sup> Tracy Jan, *White Families Have Nearly 10 Times The Net Worth Of Black Families. And The Gap Is Growing*, THE WASHINGTON POST (Sept. 28, 2017), [https://www.washingtonpost.com/news/wonk/wp/2017/09/28/black-and-hispanic-families-are-making-more-money-but-they-still-lag-far-behind-whites/?noredirect=on&utm\\_term=.af4f7b8cf5df](https://www.washingtonpost.com/news/wonk/wp/2017/09/28/black-and-hispanic-families-are-making-more-money-but-they-still-lag-far-behind-whites/?noredirect=on&utm_term=.af4f7b8cf5df).

Meanwhile, property values in rapidly gentrifying urban areas such as New York City have grown exponentially leaving many homeowners in these communities asset rich but income poor.<sup>13</sup> Low to moderate income homeowners find themselves in a precarious position because housing expenses, such as property taxes and insurance rates, have outpaced income growth.<sup>14</sup>

As a result of these factors, tenants in common who own urban heirs property are particularly vulnerable to opportunistic, or even predatory, practices by real estate developers or speculators.<sup>15</sup> The investor targets a vulnerable, uninformed or ill-advised non-resident tenant in common and purchases his or her share of the property, often for just a fraction of the value of the acquired interest. The investor then threatens or commences a partition action. The remaining tenants in common often-times cannot afford to hire counsel. However, even when they are represented, under the current partition law it can be difficult or impossible for them to prevent a court-ordered auction sale of the property. The tenants in common who reside on the property are then faced with both eviction and the potential sale of their inheritance at a below-fair-value, fire-sale auction price.

The net result is that the resident co-tenants are forced out of their homes and communities, and all of the co-tenants lose much of the appreciated value of their inherited real estate.

## **II. UNIFORM PARTITION OF HEIRS PROPERTY ACT (UPHPA)**

In 2010, the Uniform Law Commission drafted the UHPA as a response to the instability of ownership of property by tenancy in common and the hardships imposed by forced, below-market partition sales on the families that own heirs property. The UHPA sought to address shortcomings in partition law as applied to heirs property (but only heirs property) in multiple ways. First it defined certain property as “heirs property” based on its ownership meeting certain criteria, focused mainly on title to the property being held by tenants in common (“TICs”) without a tenancy-in-common agreement (“TIC agreement”) where a significant number of the TICs are relatives, indicating family ownership of the property. Once a property is identified as “heirs property,” a procedure is established for valuation of the property by appraisal. This appraisal serves two purposes. One is to set a floor price in the event partition by sale were ordered. The second is to specify the price at which non-petitioning co-tenants may buy the interests of any co-tenants who sought partition by sale. Such a right to purchase at fair market value the interests of a co-tenant seeking partition is a standard provision in many if not

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<sup>13</sup> *Asset Rich and Cash Poor in Bed-Stuy*, CENTER FOR NEW YORK CITY NEIGHBORHOODS (Apr. 13, 2015), <https://cnycn.org/asset-rich-and-cash-poor-in-bed-stuy/>.

<sup>14</sup> In fact, low-income households face the greatest burden in the gap between property tax growth and income growth. From 2005-2016, New York residential property tax has grown at an average rate of 6.4% annually while incomes have grown only by about 2% annually. For households making less than \$50,000 annually, property tax rates have grown by 98% during this time period, while median incomes have declined. These numbers take into account tax credits and other programs designed to reduce property tax burdens on seniors and low-income households. OFFICE OF THE NEW YORK CITY COMPTROLLER SCOTT M. STRINGER, *GROWING UNFAIRNESS: THE RISING BURDEN OF PROPERTY TAXES ON LOW-INCOME HOUSEHOLDS 1-2* (2018), [https://comptroller.nyc.gov/wp-content/uploads/documents/Property\\_Taxes\\_in\\_New\\_York\\_City.pdf](https://comptroller.nyc.gov/wp-content/uploads/documents/Property_Taxes_in_New_York_City.pdf).

<sup>15</sup> Thomas W. Mitchell, Stephen Malpezzi & Richard K. Green, *Forced Sale Risk: Class, Race, and the “Double Discount”*, 37 FLA. ST. U. L. REV. 589, 607-08 (2010).

most TIC agreements, a feature long considered protective of the interests of all co-tenants. That buy-out right also makes perfect sense given that a co-tenant who seeks partition by sale has already evidenced his or her consent to being bought out.

Secondly, it revamps partition sale procedures by placing property on the open market with a real estate broker instead of selling it through a judicial auction with minimal notice, no right of inspection, and no marketing.<sup>16</sup> This open market practice builds on the extensive experience in bankruptcy cases of conducting asset sales professionally to maximize value, by extensive advertising, opportunities for due diligence and inspection rights.

Third, the UHPA bolsters the stated statutory preference for partition in kind (physically dividing up the land into parcels) as opposed to partition by sale (selling the land and dividing the proceeds), by not permitting partition by sale unless a co-tenant has expressly requested a sale, thereby triggering the right of the other co-tenants to buy-out the petitioning co-tenant at fair market value. The pre-existing partition law of many states, including New York,<sup>17</sup> contains an express stated preference for partition in kind, but in practice partition by sale is readily granted even when not requested by a party or when it is only in the interest of a co-tenant who desires to freeze out the interests of his other co-tenants through a bargain auction purchase.

The present stated statutory preference for partition in kind is weakly enforced in most states, including New York, by court decisions that make partition by sale the *de facto* preference. New York courts faced with a partition petition (like the courts in the vast majority of states<sup>18</sup>) primarily limit their consideration of prejudice from partition in kind to economic factors in deciding to order partition by sale.<sup>19</sup> Under this judge-made economics-only test, New York courts consider “whether the aggregate value of the several parts when held by different individuals in severalty would be materially less than the whole value of the property if owned by one person.”<sup>20</sup>

This economics-only test for determining whether to order a partition in kind or by sale often leads to a partition by sale of a home, because there usually is no way to divide an urban residential property in kind without causing some diminution in the value of the property. This problem with an economics-only test of prejudice is exacerbated because New York courts, in applying the test, understate the prejudice that will result from partition by sale by both ignoring the effect of taxes on reducing the net amounts co-tenants may receive and ignoring the fact that the proceeds of a forced auction sale will be substantially below fair market value.<sup>21</sup> Instead, they focus on theoretical gross appraised values in deciding that prejudice may result from a partition in kind.<sup>22</sup> New York’s economics-focused test creates a situation wherein partition by

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<sup>16</sup> *Id.*

<sup>17</sup> N.Y. Real Prop. Acts. Law § 901.

<sup>18</sup> *Tri-State Concrete Co. v. Stephens*, 406 So. 2d 205, 208 (La. 1981) (If partition in kind would result in an “inconvenience to the owner,” the property must be partitioned by sale).

<sup>19</sup> See *Snyder Fulton St., L.L.C. v. Fulton Interest, L.L.C.*, 868 N.Y.S.2d 715, 717 (3rd Dep’t 2008); *Partrick v. Preiser*, 341 N.Y.S.2d 806, 808 (Sup. Ct. Sullivan Cty. 1972).

<sup>20</sup> *Snyder Fulton St., L.L.C.*, 868 N.Y.S.2d at 717; *Partrick*, 341 N.Y.S.2d at 808.

<sup>21</sup> *Loughran v. Cruickshank*, 778 N.Y.S.2d 225, 228 (3rd Dep’t 2004).

<sup>22</sup> *Snyder Fulton St., L.L.C.*, 868 N.Y.S.2d at 717.

sale will almost always end up being the default option for urban residential heirs property, despite the statutory language that suggests otherwise.

### III. NEW YORK'S IMPROVEMENTS TO THE UHPA

While the UHPA is an excellent step toward ensuring more just outcomes for families subjected to forced partitions, the experience in other States and suggestions of experts have identified a number of ways to improve its functioning, which have been incorporated into the NY UHPA.

#### a. Mediation Settlement Conference

The first modification, incorporated from the general partition laws of at least two states and endorsed by a number of experts<sup>23</sup>, is the addition of a mediation/settlement process that can be used to foster negotiations among the tenants in common, often to ameliorate family disputes that are causing pressure for partition and to encourage a higher offer from a petitioning co-tenant interested in developing the property. Mediation provisions are part of the general partition laws of North Carolina and Indiana.<sup>24</sup>

Mediation allows parties to “participate in the process, to tell their side of the story and to contribute in determining the outcome of the dispute.”<sup>25</sup> Many attorneys find that mediation improves their communication with their clients.<sup>26</sup> Additionally, litigants in cases with earlier mediation referrals “filed fewer motions and had conducted less discovery,” suggesting that mediation can have an effect on “reducing costs.”<sup>27</sup> Indeed, to the extent that mediation encourages and creates more opportunities and incentives for litigants to settle, it likely will reduce costs.<sup>28</sup>

These aspects of mediation could benefit many individuals involved in a dispute over property partition. Enabling litigants to participate in the process and help determine the outcome of the dispute may encourage creative decision-making that could highlight non-economic factors and lead to a greater frequency of partitions-in-kind. Additionally, reducing the costs of litigation, encouraging settlement, and reducing the time the cases take before resolution will particularly benefit low-income clients.

Statutorily-mandated mediation does not exist in New York for partition actions. New York, however, already has a framework to allow for settlement negotiations in the residential

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<sup>23</sup> Rishi Batra, “Improving the Uniform Partition of Heirs Property Act,” *George Mason Law Review* 24 (2017), 763-765; *see also*, Heller, Michael A. and Dagan, Hanoch, “The Liberal Commons,” *The Yale Law Journal* 110 (2001), 595.

<sup>24</sup> N.C. Gen. Stat. § 46-22.1; Ind. Code § 32-17-4-2.5.

<sup>25</sup> Dorcas Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing A Court-Mandated Mediation Program*, 11 *CARDOZO J. OF CONFLICT RESOLUTION* 479, 482 (2010).

<sup>26</sup> Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 *OHIO ST. J. ON DISP. RESOL.* 641, 691 (2002).

<sup>27</sup> *Id.* at 695.

<sup>28</sup> *Id.* at 672-73.

foreclosure context under N.Y. C.P.L.R. 3408. The NY UHPA incorporates a similar mediation provision in subdivision 5 under the title “Settlement Conference.” The foreclosure settlement conference is essentially a court-monitored mediation that requires the parties to sit down and negotiate in good faith in an attempt to avoid the unnecessary foreclosure of the home.<sup>29</sup> Residential foreclosure actions are similar to partition actions in that the end result is a judicial sale of the real property.<sup>30</sup> The topics for such settlement conferences may include negotiation among interested parties with the goals of avoiding unnecessary litigation of issues, the unnecessary loss of the home and displacement of heir occupants; methods of sale or partition in kind; means of obtaining financing for the heir co-tenants; and consideration of equities beyond the established economic ones that often benefit the investor seeking partition by sale.

As in the foreclosure process, a mandatory partition settlement conference will give unrepresented heirs an opportunity for meaningful participation. The typical co-tenant defendants in a partition or foreclosure action may not realize the need to file a formal answer within 20 days of service of a summons and complaint, but it has been shown that if they are given notice by mail they will appear in person at a court-monitored conference.<sup>31</sup> Thus, the settlement conference prevents default judgments, and the co-tenants will also learn how to obtain legal services and will be informed of the procedural rules governing the partition action.

#### **b. Right of Heirs to Acquire Interests of Petitioning Co-Tenants**

The UHPA provides co-tenants with the right to purchase the interest of any co-tenant who petitions for partition by sale. The NY UHPA clarifies this right. First, it makes clear that partition by sale includes not only a sale of the entire property but also a sale of the portion of the property on which an heir resides. This protects against an outcome in which a small portion of land is partitioned in kind but provision is nonetheless made for a co-tenant buyout of the residence where partition in kind is not feasible. Second, the NY UHPA clarifies the requirement that co-tenants declare their intention to seek partition by sale by a deadline set by the court. The NY UHPA expressly states that such co-tenants, by requesting sale, have consented to the purchase of their interests at the court-determined fair market value. Finally, the NY UHPA provides that in the event the right to purchase is fully or oversubscribed by the co-tenants, it will be allocated, first, among co-tenant heirs resident on the property and, second, to the remaining co-tenant heirs.

### **IV. PROTECTION OF THE RIGHT TO PARTITION**

The NY UHPA is not intended to change the basic New York law applying to partition of tenancies in common. The Bill applies only to situations in which there is no TIC agreement

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<sup>29</sup> The 2008 legislation that created the conference is set to expire on February 20, 2020 but there is proposed legislation to extend the conferences.

<sup>30</sup> In fact, owner-occupied homes that are above water and reach a final judgment of foreclosure and sale could also benefit from the home being placed on the open market to maximize the sale price of the home to the benefit of all parties. The existing judicial foreclosure process results in a potential deficiency judgment and loss of equity to the homeowner and a windfall to purchasers at auction.

<sup>31</sup> Armentrout, Lynn, “Foreclosed Homeowners Foreclosed From Telling Their Stories,” NY Law Journal (Mar. 16, 2016) <https://bit.ly/2WKLtKT>.



among the co-tenants and the tenancy in common involves heirs property, i.e., property substantially owned or occupied by heirs of an original owner who did not have the foresight or the means to provide for a TIC agreement or some similar arrangement among his or her heirs addressing the issue of partition. Furthermore, it continues to protect the right of partition by sale even as to heirs properties. Consistent with New York's ostensible statutory preference for partition in kind, the Bill strengthens the preference for partition in kind when that is feasible, but still makes partition by sale available for those who demand it, even when partition in kind would result in great manifest prejudice. It protects the right of each co-tenant to demand and receive its share of the court-determined fair market value of the property. It does so in the manner in which a well-drafted TIC agreement would ordinarily do so if proper planning had occurred. If the heir co-tenants are unable to raise the funds required to exercise their fair-market buy-out rights and partition by sale is then ordered, then that sale will be a brokered sale designed to maximize the sale proceeds to benefit all of the co-tenants proportionately in their capacity as co-tenants.

The intent of the law is not to make partition proceedings unduly difficult or expensive but to provide reasonable, basic procedural protections for the legitimate expectations and economic rights of the co-tenants against practices of speculators or developers who buy a fractional interest in a co-tenancy cheaply (not as an investment but to acquire the ability to demand partition) and then seek to take advantage of both deficiencies in current law and the socio-economic and legal circumstances of their other co-tenants in order to acquire the entirety of a desirable and appreciated property for a fraction of its value. Existing New York State partition law in practice leaves co-tenant heirs subject to such opportunistic or predatory behavior and results in occupant heirs being particularly vulnerable to displacement.<sup>32</sup>

## **V. RECOMMENDATION**

The New York City Bar Association recommends that the New York State Legislature enact the NY UHPHA.

Commercial Law and Uniform State Laws Committee  
Alan Kolod, Chair

Housing and Urban Development Committee  
Daniel M. Bernstein, Co-Chair

Pro Bono and Legal Services Committee  
Amy P. Barasch, Co-Chair  
Jennifer K. Brown, Co-Chair

Updated and Reissued June 2019

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<sup>32</sup> See Hu, *supra* note 6; Mitchell, Malpezzi & Green, *supra* note 14, at 607-08.