

Statement of R. Wilson Freyermuth, Curators' Distinguished Teaching Professor of Law, University of Missouri School of Law, in support of SB 286, the Uniform Partition of Heirs Property Act, February 25, 2019

Mr. Chairman, and Ladies and Gentlemen of the Agriculture, Food Production, and Outdoor Resources Committee:

My name is Wilson Freyermuth, and I am a Professor at the University of Missouri School of Law in Columbia. Thank you for considering SB 286, which would enact the Uniform Partition of Heirs Property Act (UPHPA) in Missouri. The UPHPA was approved by the Uniform Law Commission (ULC) in 2010. The ULC is a non-profit organization formed in 1892 to draft non-partisan model legislation in those areas of the law for which uniformity among the states is desirable. I'm here today on behalf of the ULC and bring support for this bill from both Ben Orzeske, Chief Counsel for the ULC, as well as Professor Thomas Mitchell of Texas A&M University, who was the Reporter and primary drafter of the Uniform Partition of Heirs Property Act.

The purpose of SB 286 is to protect the property rights of family members who own what the bill calls "heirs property." A "tenancy-in-common" is a form of legal 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 passes to an owner's heirs at the owner's death, when the owner did not make a will. For example, if a landowner with a spouse and three children died in Missouri without making a will, the surviving spouse and the three children will become tenants in common by inheritance, with the spouse owning a one-half undivided interest in the property and the children each owning a one-sixth undivided interest in the property, as tenants in common. So you can think of "heirs property" as family property that has passed from one generation to the next, typically by inheritance. This property will typically have significant heritage or sentimental value to the family members, as well as monetary value that may represent a large percentage of the family's total wealth.

Unfortunately, under the current law, the co-owners of heirs property are vulnerable to losing this family property, and potentially a significant portion of the wealth that may rest in that property, due to court-ordered sales that often result when a partition action is filed, either as a result of an intra-family dispute or an action filed by a third-party non-family member that has acquired a share of the heirs property from a family member. For example, imagine the Missouri spouse and her three children I mentioned previously. Suppose that the spouse and two of the children would like to maintain family ownership of the farm, but the third child has no interest and needs cash. If the spouse and 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 transfer his share to a creditor to pay debts. Either way, the new co-owner is unrelated to the spouse and the other two siblings, and probably has no personal attachment to the land.

Under current law, this new co-owner can petition the court for a partition of the farm. Partition can occur in one of two ways: a partition-in-kind in which the property is physically divided into separate parcels, with each cotenant receiving individual ownership of a parcel based on his or her ownership percentage, or a partition-by-sale in which the entire property is sold, with the proceeds divided between the co-tenants in proportion to their respective ownership shares. But land that is improved with a home can be difficult to divide into shares fairly, and courts will often thus order a partition-by-sale, forcing the spouse and two siblings in our example to sell their shares of the property against their will.

This disadvantages them in two important ways. First, even if they want to participate in the sale and possibly buy the entire property to keep it in the family, these sales are public auction sales at which the buyer must pay cash. They may not be able to bid successfully at the sale if they don't have ready cash, and they are likely to be unable to use their interest in the property itself as collateral to obtain cash because they don't have full record title to the property. Thus, they are often at a disadvantage as compared to real estate speculators who may have greater cash resources or access to credit. Second, these public auctions sales often bring below-fair-market-value sale prices because the rules governing such sales are designed to sell the property as quickly as possible with minimal notice to the public, little advertising or marketing, and little opportunity for buyers to inspect the property. If the sale does not produce significant competitive bidding, the non-family member may be able to acquire title to the property at a price below the property's fair market value. In the end, the family members would not only lose their ownership rights, but would also lose some of the wealth associated with their previous ownership rights.

Wealthier families do not face this risk because they have typically used more sophisticated estate planning techniques to ensure that family property and family businesses are held in entities such as an LLC. Under these arrangements, this partition risk is not applicable because an LLC agreement will customarily have extensive contractual protections for the family members to ensure that the land remains under family control. If one family member wanted out, he would be unable to force a partition sale of the property, and the other family members would have a contractual right under the LLC agreement to buy him out at a price based on appraised fair market value.

Unfortunately, for our hypothetical Missouri family, they had tenancy in common ownership of heirs property thrust on them, because their ancestor was less affluent or less sophisticated and did not use or have access to sophisticated estate planning. And under the existing common law rules, none of the co-tenants of heirs property would have any of the contractual protections that would protect the family members in a modern family LLC.

SB 286 will protect the property rights of families who own heirs property, and the wealth that is associated with this ownership, by providing them with due process protections in partition that are more equivalent to these contractual rights. If SB 286 is

enacted, a cotenant who files for partition must first notify the other cotenants if the cotenant is seeking a partition by sale. Unless all of the co-owners agree to stipulate the property's value, the court must make a determination of the value of the property, typically by ordering an independent appraisal. The bill would give the other family members who did not ask for a partition a pre-emptive right to buy out the share of the petitioning owner; they would have 45 days in which to give notice of their intent to exercise this right, and an additional 60 days in which to arrange financing. If the cotenants do not exercise this pre-emptive right, the court *must* order partition-in-kind for heirs property unless the court finds, after considering the factors specified in the statute, 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 listed on the open market by a court-appointed real estate broker 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.

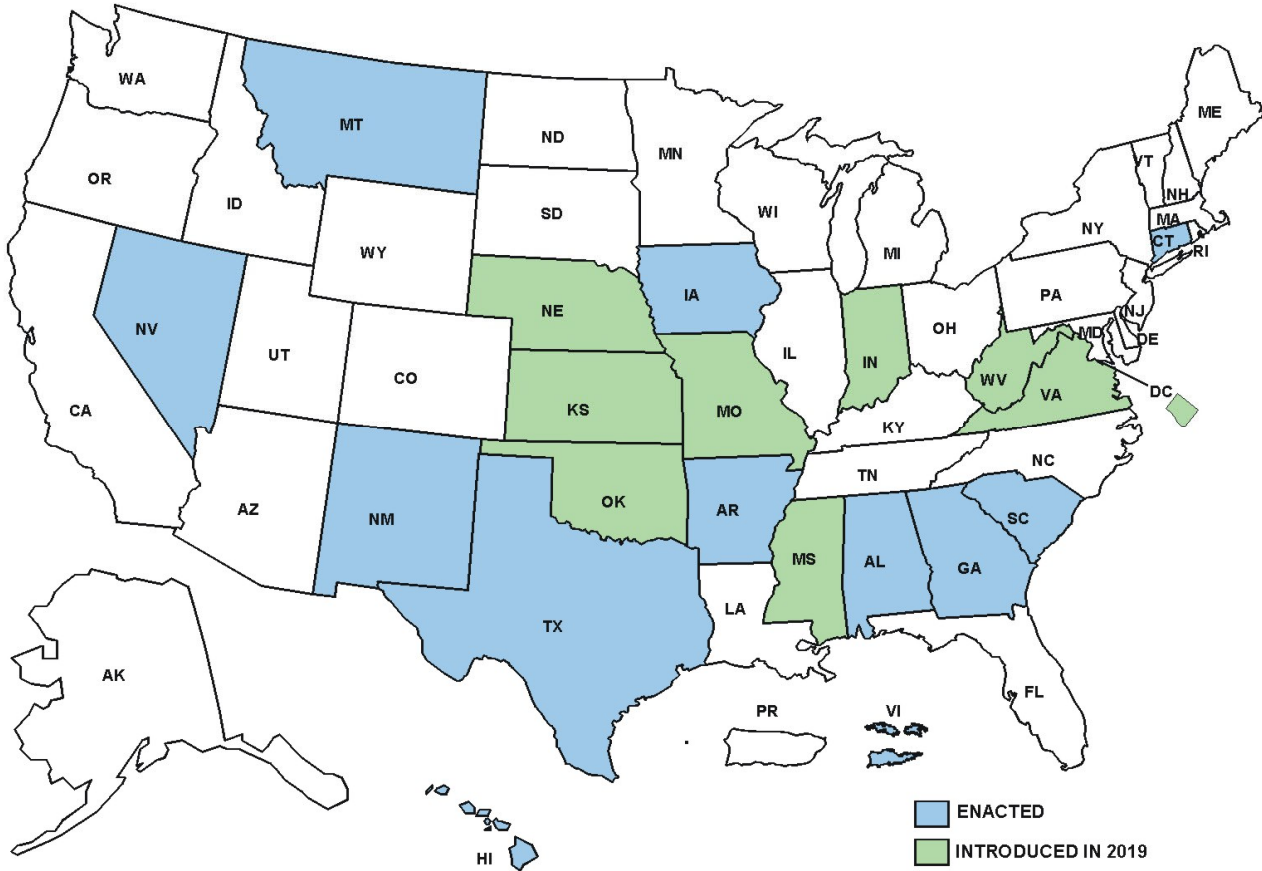
Nothing in SB 286 will prevent a willing buyer and a willing landowner from reaching agreement to sell real estate. It will only apply where the property is heirs property and only when one co-owner of heirs property has asked for partition, such that the remaining co-owners are at risk of being forced to sell against their will.

The UHPA 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. The federal Farm Bill that was signed into law in December 2018 contains two important references to the UHPA that are worth mentioning, because they would enable farmers and ranchers who own heirs' property to participate more fully in certain USDA lending programs. The Farm Bill clarified that co-owners of heirs property can now access certain federal loan programs to help defray legal costs incurred to resolve ownership and succession issues associated with heirs property, and it directed the Secretary of Agriculture to give preference for these loans to applicants from states that have adopted UHPA. The Farm Bill also incentivizes the adoption of the UHPA, by providing that in states that have adopted it, a court decision that property is "heirs property" provides proof of "control" necessary for a co-owner of heirs property to qualify for a farm number, which is necessary to qualify for certain agricultural financing programs. This provision reflects Congress's belief that the UHPA provides a fair process for heirs to consolidate ownership interests in those family members who want to farm, and to fairly compensate other heirs who prefer to liquidate their interests. Since the passage of the Farm Bill, at least 8 other states have or will be introducing similar bills in 2019.

The UHPA has been endorsed by the American Bar Association's (ABA) Section of Real Property, Trust and Estate Law; the ABA's Section of State and Local Government Law, the American College of Real Estate Lawyers; the Center for Heirs' Property Preservation; the Heirs' Property Retention Coalition; and several other organizations. In addition, soon after the UHPA was promulgated, the Council of State Governments included the UHPA in its *Suggested State Legislation* publication.

In summary, enacting SB 286 will protect the property rights of Missourians who inherit real estate, including by protecting their real estate wealth. 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 encourage you to support SB 286 and its enactment into Missouri law.

UNIFORM PARTITION OF HEIRS PROPERTY ACT (2010)



February 6, 2019