

# Splitting Heirs: Partition of Real Property Act

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Speaker: Kristin N. Capritto



## Kristin Capritto

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Kristin is a partner at Downey Brand LLP, where her practice focuses on estate, business, and tax planning. She frequently litigates trust and estates matters, but always prefers to find a negotiated settlement. Kristin earned dual bachelors degrees at Chico State in Political Science and Philosophy, her law degree at University of the Pacific, McGeorge School of Law, and her master's degree in Conflict Resolution at Brandeis University's Heller School of Social Policy and Management. She ardently believes the best things in life include heirloom tomatoes right off the vine, live music, and authentic connections, with the key to not taking life or law too seriously being spending time with dogs and humans under eight and over 80.

# Learning Objectives

- Explore partition and its importance in estate planning
- Identify issues of access and justice related to heirs property
- Explain amendments to CCP
- Navigate planning tools and considerations



Photo by [Maarten van den Heuvel](#) on [Unsplash](#)

# Attachments

- ✓ Code of Civil Procedure §§ 874.311-874.323

# Partition Basics

- Sale or distribution of property in-kind to cotenants upon petition to court
  - Partition in-kind (CCP §872.810)
  - Partition by sale (CCP §872.820)
  - Partition by appraisal (one or more parties can acquire interests of other owners at appraised value of those interests (CCP §873.910))
- Costly and time consuming
- Generally claims relative to lack of accounting by cotenant, waste, etc.
- Consider having a referee appointed under CCP §873.010(a) “to divide or sell the property as ordered by the court”
- Consider having a receiver appointed under CCP §564(b)(9) “when necessary to preserve the property or rights of any party.”
- Always start with a title report
- Look for oil, gas, mineral, water rights, conservation easements, prescriptive rights, cell towers, Williamson Act designations

# Uniform Partition of Heirs Property Act

Millions of dollars of inherited wealth has been lost by families who were vulnerable to real-estate speculators. UHPA addresses this problem.



**For many lower- and middle-income families, real estate is their single most valuable asset.**



**This act helps families preserve their wealth for generations to come.**



Source: Uniform Law Commission (<https://www.uniformlaws.org/committees/community-home?CommunityKey=50724584-e808-4255-bc5d-8ea4e588371d>)

# Background

- Real estate is generally the most valuable asset for American families
- 2010 Uniform Law Commission study determined that a high percentage of individuals who own real property as tenants in common without a written agreement governing the terms of their co-ownership are people of color or those with resource scarcity
- Many co-owners of inherited property were vulnerable to predatory development tactics:
  - If one co-tenant sells, the new owner of the fractional interest purchased files a partition and forces the buy-out of the other co-owners
- Investors have greater resources to pay for lawyers and cover court costs, remaining co-tenants usually give up

## Background (cont.)

- Investor then acquires other fractional interest/entire parcel for less than fair market value, depleting the family's inherited wealth and increasing the wealth gap
- Without estate planning, properties usually pass intestate; and most families with resource scarcity either can't afford estate planning or don't believe they have enough to need it
- Property passes to multiple heirs, one can sell without the other's permission
- Significant effects in the Southern US, which began during the post-Civil War reconstruction
- Heirs' property is also an issue for communities in Appalachia, Latinx communities in the Southwest, and Indigenous communities living on reservations.



# Uniform Heirs Property Act (UPHPA) of 2010

- Provides a series of due process protections:
  - Notice
  - Appraisal
  - Right of first refusal
- If other co-tenants choose not to exercise right of first refusal and a sale is required, a commercially reasonable sale supervised by the court to ensure that all parties receive their fair share of the proceeds
- Provides for added opportunities for non-partitioning parties to buy out partitioning parties' interest in the inherited property.
- Allows non-partitioning co-owners retain their share of an inherited property by requiring necessary due process to prevent forced sale of the property.

## Endorsed by:

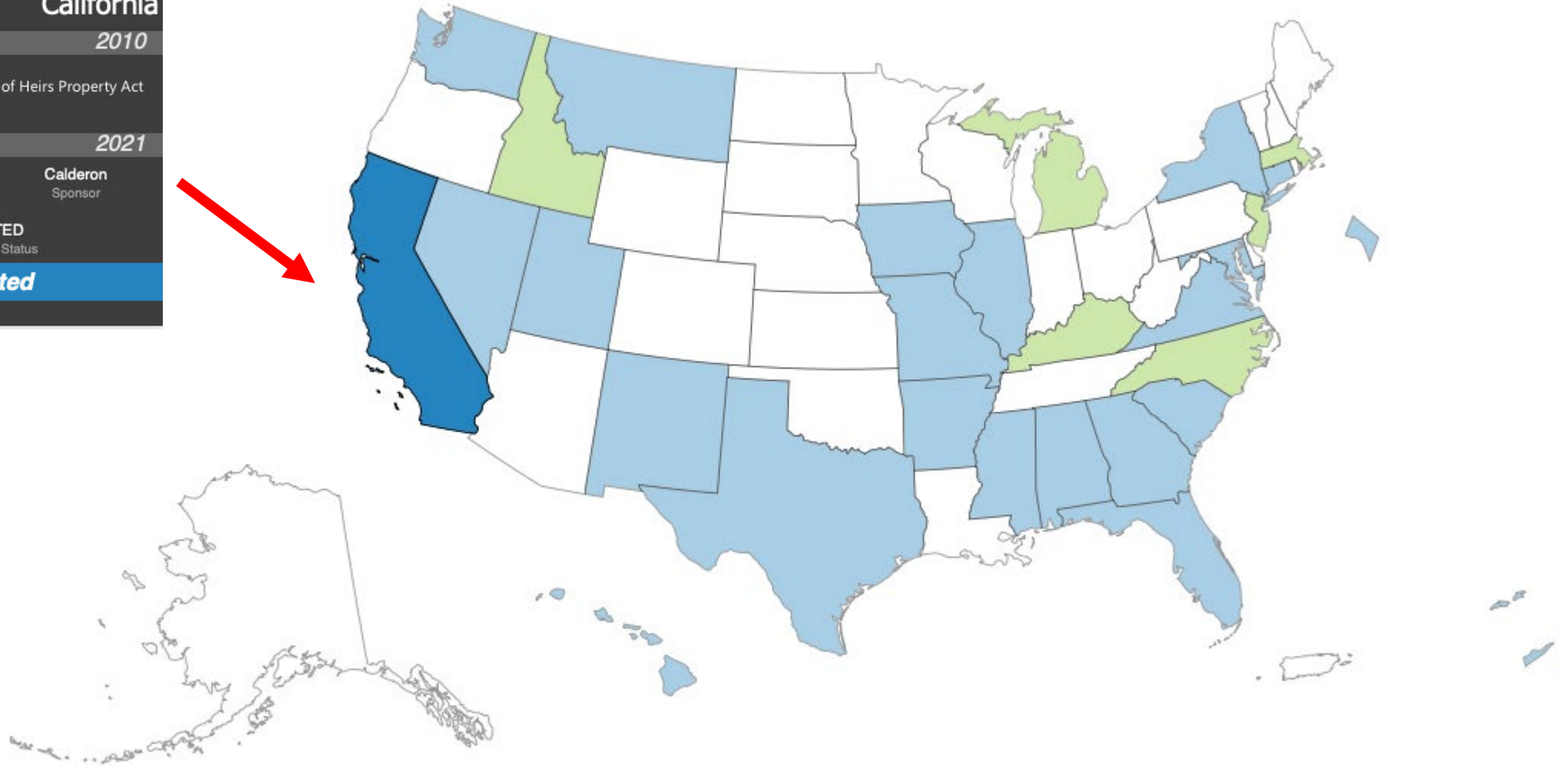
- ABA Real Property Section
- ABA Trust and Estate Section
- ABA Section of State and Local Gov't
- American College of Real Estate Lawyers
- Council of State Gov'ts
- National Bar Association
- National Black Caucus of State Legislators
- Center for Heirs Property Preservation
- Black Family Land Trust
- Federation of Southern Cooperatives
- Heirs Property Retention Collation
- Lawyers Committee for Civil Rights
- Southern Poverty Law Center
- American Planning Association
- NAACP
- Appleseed
- Concerned Citizens of Tillery
- Southern Coalition for Social Justice
- State Legislation by the Council of State Governments (CSG)

**California**  
*Act* 2010  
Partition of Heirs Property Act

*Bill* 2021  
AB 633 Bill Number  
Calderon Sponsor

ENACTED  
Legislative Status

**Enacted**



Source: Uniform Law Commission (<https://www.uniformlaws.org/committees/community-home?CommunityKey=50724584-e808-4255-bc5d-8ea4e588371d>)

# California Adopts in 2021, Effective in 2022

## Legislative Comments from State Senate Judiciary on March 23, 2021:

- “David Dietrich, former co-chair of the ABA Property Preservation Task Force, has called heirs’ property ‘the worst problem you never heard of.’”
- “U.S. Department of Agriculture has recognized it as ‘the leading cause of Black involuntary land loss.’”
- “Heirs’ property is estimated to make up more than a third of Southern black-owned land—3.5 million acres, worth more than \$28 billion. These landowners are vulnerable to laws and loopholes that allow speculators and developers to acquire their property. Black families watch as their land is auctioned on courthouse steps or forced into a sale against their will.”
- “Between 1910 and 1997, African Americans lost about 90% of their farmland. This problem is a major contributor to America’s racial wealth gap; the median wealth among black families is about a tenth that of white families.”

[https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=202120220AB633#](https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB633#)

# California Adopts in 2021, Effective in 2022

- Indigenous people also hold a significant amount of US land as “heirs’ property”
- Dawes Severalty Act of 1887 (the General Allotment Act) allowed for division of Native American reservations into allotments for individual tribal members and made inheritance of these plots of land subject to state law.
- Native Americans did not treat land as a commodity, were not legally permitted by the US to use wills to transfer land until 1910, and were unfamiliar with U.S. legal mechanisms such as wills.
- If someone died “owning” an allotment, their heirs were left the property via intestate succession laws of the state, title remained in the name of the ancestor who died, creating significant amounts of heirs’ property.

# Amends CCP to add § §874.311-874.321.5:

§874.312	<p>Defines "Heirs Property" as real property held as tenants in common which, at the time of the filing of the partition action:</p> <ul style="list-style-type: none"><li>• Not subject o to an agreement in a record binding all of the cotenants (does not need to recorded anywhere, just exist in tangible form)</li><li>• One more or more of the cotenants acquired title from a relative, either living or dead; and</li><li>• For which any of the following apply:<ul style="list-style-type: none"><li>▪ 20% or more of the cotenants are relatives</li><li>▪ 20% or more of the interests who acquired title from a relative</li><li>▪ 20% or more of the cotenants are relatives</li></ul></li></ul>
§874.313	Effective for partition actions filed after January 1, 2022
§874.314	Retains former service rules
§874.315	Requires disinterested and qualified referee/receiver (if one is required)
§874.316	<ul style="list-style-type: none"><li>• Requires appraisal unless (a) all cotenants have agreed to a price, or (b) a valuation method, and allows the court to set a value if appraisal too costly,</li><li>• If appraisal is conducted, appraiser must be qualified and disinterested</li><li>• Also requires notice to all cotenants of appraised value not more than 10 days later, and gives cotenants 30 days to object to appraisal</li><li>• Allows court to consider another value or valuation method as set forth in objection</li><li>• Court then determines FMV and provides notice to cotenants.</li></ul>

# Amends CCP to add § §874.311-874.321.5:

§874.317	If partition by sale, court notifies other cotenants then can exercise right of first refusal, with buy-out price being determined by pro rate fractional ownership interests; if no cotenant wants to purchase it, then can be sold
§874.318	Authorizes court to determine a partition in kind is in the best interests of the cotenants not seeking partition, and court can order offsets/compensation between cotenants based on equity of amounts received by partition in kind
§874.319	Sets forth considerations court must make when partitioning in-kind: can the property be divided fairly, would the parts in the aggregate be materially less than the value of the whole if sold, what is the relationship between the cotenants and duration for which they've held their interests, considerations of a cotenants sentimental attachment, ancestral value of the property, the use of the property, nature of continued expenses, any other relevant factors equity requires.
§874.320	Requires open-market sales, unless sealed bids would be more economically beneficial for the balance of cotenants; requires a licensed, disinterested broker (no private deals); property must go to highest bidder
§874.321	Requires appraisal by disinterested and qualified appraiser unless all cotenants agree to price, or other valuation method; court may also determine value if appraisal is too costly  Also requires notice to all cotenants of appraised value not more than 10 days later, and gives cotenants 30 days to object to appraisal, and allows the court to consider another method or value presented in objection. Then, court determines FMV and provides notice to cotenants.

# And then...

- January 2023, legislature enacted the Partition of Real Property Act (“PRPA”) and eliminated the need for new provisions to apply to “heirs”



- Protections now apply to all joint owners of real property, not just heirs!

# Planning Tools/Considerations:

- Use FLPs, LLCs, TIC agreements with restrictive transfer provisions
- Monitor liquidity
- Look for creative ways to offset
- Anticipate the discord/have the conversation/be transparent
- Provide for disposition in trust agreement (transfer to specific beneficiary, dictate sale terms, etc.)
- Think about liquidity issues
- If primary residence, consider property tax issues (Prop 19)





# Planning Tools/Considerations:



- Use land trusts, conservation easements, other philanthropic methods
- Use GST trusts, but careful... need to allow for market changes, income tax (gains) issues, lack of flexibility and changing desire for families – consider trust protectors
- Reevaluate farm leases – use clear lease terms, unrelated counsel, watch out for related parties wearing too many hats

# Speaker Contact Info

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# CEB Resources to Check Out

- **CEB DailyNews**

- Bruce Last, *How Climate Change May Drive the Need for Flexibility in Estate Planning* (Mar. 15, 2023)

- **CEB Practitioner**

- Strategy Note: *Estate Planning Drafting Strategies to Avoid Subsequent Challenges and Litigation* (2022)
- How to Guide: *How to Determine if Real Property Will be Negatively Affected by Property Tax Reassessment (Estate Planning)* (2023)

- **CEB Publications**

- *California Trust and Probate Litigation* (Mar. 2023)
- *California Real Property Remedies and Damages* (Aug. 2023)

# History

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