TESTIMONY OF THE
COMMISSION TO PROMOTE UNIFORM LEGISLATION

ON S.B. NO. 134, SD 2

RELATING TO PARTITION OF HEIRS PROPERTY

BEFORE THE HOUSE COMMITTEE ON
CONSUMER PROTECTION & COMMERCE

DATE: Monday, March 16, 2015, at 2:00 p.m.
Conference Room 325, State Capitol

WRITTEN TESTIMONY ONLY: For more information, please contact Lani Ewart, Commissioner, Commission to Promote Uniform Legislation, at 547-5600

To Chair McKelvey, Vice Chair Woodson, and Members of the Committee:

My name is Lani Ewart, and I am submitting this testimony on behalf of the Commission to Promote Uniform Legislation (the "Commission"), regarding S.B. No. 134, SD 2, Relating to **PARTITION OF HEIRS PROPERTY.** The Commission takes no position on this measure but submits the following comments.

The Uniform Law Commission, a national organization involving members of the Commission, promulgated the **Uniform Partition of Heirs Property Act** (the "Act") in 2010 to provide a fair, common-sense solution to the risks posed to those who own "heirs property". The Act establishes a hierarchy of remedies which are designed to protect a family's property holdings and their real property wealth to the extent practicable for partition actions involving heirs property. Overall, the Act provides cotenants with many of the protections and rights commonly found in private agreements governing the partition of tenancy-in-common property. The Act does not displace existing partition law for non-heirs property, it does not prohibit a party from petitioning for a partition by sale, and it does not apply to situations where all the cotenants have a written agreement relating to partitioning their property.

"Heirs property" is defined in the Act as real property that is held under a tenancy in common in which there is no binding agreement among the cotenants governing partition of the property. Additionally, one or more of the cotenants must have acquired title from a relative, and

one of the following conditions must be true:

- 20% or more of the interests are held by cotenants who are relatives; or
- 20% or more of the interests are held by an individual who acquired title from a relative; or
- 20% or more of the cotenants themselves are relatives.

In a tenancy-in-common, any cotenant may sell his or her interest without the consent of the other cotenants, making it easy for non-family members – including real estate speculators – to acquire an interest in the property. In a tenancy-in-common, any cotenant may file an action with the court to partition the property. In resolving a partition action, the court has two main remedies available: partition-in-kind or partition-by-sale. A partition-in-kind physically divides the property into shares of equal value and gives each cotenant full ownership of an individual share. However, if the cotenants cannot agree on parcels of equal value, the court will often order a partition-by-sale, whereby the property is sold as a single parcel and the cash distributed to the cotenants in equal shares. In many cases of heirs property, the partition-by-sale resulting from a court action initiated by a non-family cotenant often brings a price well below the market value and the family members lose their most valuable asset.

If heirs property is the subject of the partition action, the Act uses a 5-step process to ensure <u>all</u> owners of heirs property are treated fairly when one or more cotenants wish to sell their share:

1. The cotenant requesting the partition must give notice to all of the other cotenants.

2. The court must order an appraisal to determine the property's fair market value. If any cotenant objects to the appraised value, the court must hold a hearing to consider other evidence.

3. Any cotenant (except the cotenant who requests partition) may buy the interest of the selling cotenant at the court-determined fair market value. The cotenants have 45 days to exercise their right of first refusal, and if exercised, another 60 days in which to arrange for financing. If more than one cotenant elects to buy the selling co-tenant's share, the court will prorate the seller's share among the buyers according to their

existing fractional ownership percentages.

4. If no cotenant elects to purchase the selling cotenant's share, the court must order a partition-in-kind, unless the court determines that partition-in-kind will result in great prejudice to the co-tenants as a group. The Act specifies the factors a court must consider when determining whether partition-in-kind is appropriate.

5. If partition-in-kind is not appropriate and the court orders a partition-by-sale, the property must be offered for sale on the open market at a price no lower than the court-determined value for a reasonable period of time and in a commercially reasonable manner. If an open market sale is unsuccessful or the court determines that a sale by sealed bids or by auction would be more economically advantageous for the cotenants as a group, the court may order a sale by one of those methods.

In summary, the Act preserves the right of a cotenant to sell his or her interest in inherited real estate, while ensuring that the other cotenants will have the necessary due process to prevent a forced sale: notice, appraisal, and right of first refusal. If the other cotenants do not exercise their right to purchase property from the seller, the court must order a partition-in-kind if feasible, and if not, a commercially reasonable sale for fair market value.

The Act has been enacted in Nevada, Alabama, Georgia, Montana and Arkansas, and so far this year has also been introduced in the legislatures of South Carolina, Connecticut and the District of Columbia.

The Commission notes that in S. B. No. 134, SD 2 certain revisions have been made to the Act as originally proposed by the Uniform Laws Commission. For example, one revision requires that a motion to be made by a party before heirs property procedures are applicable to a partition action and that appears to go against the heart of the Act. Because the defending family members in partition actions often cannot afford and do not have counsel and may not understand what rights they have under the partition action, the Act was purposely drafted so that the court should determine, as a jurisdictional matter, whether the property in question is heirs property. The Commission has had discussions with attorneys and others, including the Judiciary, who have expressed some reservations about various provisions of the Act. The Commission

understands that there is a desire to clarify some of the procedures required under partition actions involving heirs property and will continue to work with interested parties to reach an agreement as to an acceptable bill. Since the Act has recently become law in several states, there should soon be additional information regarding how other courts and attorneys have addressed the concerns raised in Hawaii.

Thank you for the opportunity to submit this testimony regarding S. B. No. 134, SD 2.

The Judiciary, State of Hawaii

Testimony to the House Committee on Consumer Protection and Commerce
Rep. Angus L.K. McKelvey, Chair
Rep. Justin H. Woodsen, Vice Chair

Monday, March 16, 2015, 2:00 p.m.
State Capitol, Conference Room 325

WRITTEN TESTIMONY ONLY

by
Rodney A. Maile
Administrative Director of the Courts

Bill No. and Title: Senate Bill No. 134, S.D.2, Relating to Partition of Heirs Property.

Purpose: Adopts Uniform Partition of Heirs Property Act. Establishes procedures and remedies for use in actions for partition of real property involving heirs property (real property held in tenancy in common that meets certain requirements).

Judiciary's Position:

This measure adds a new chapter to Hawaii Revised Statutes entitled the Uniform Partition of Heirs Property Act that sets forth a protocol for circuit court civil cases where partition of real property is sought.

The Judiciary takes no position on the merits of this measure. However, the Judiciary respectfully submits that it prefers the H.B. 152 H.D. 2 version of this bill, which holds parties in a civil case responsible for giving notice. This is in keeping with existing notice requirements in circuit court civil cases, where responsibility for giving notice generally rests with the parties. For consistency, the Judiciary recommends that parties in a civil case be responsible for giving notice, which allows the court to determine whether the notice requirements have been satisfied.

To this end, the Judiciary respectfully requests that S.B. 134 S.D. 2, section -7, subsections (b), (d), and (e) be replaced with the corresponding section -7, subsections (b), (d),

and (e) from H.B. 152 H.D. 2, as follows:

> S.B. 134 S.D. 2, page 8, lines 3-7, be replaced with H.B. 152 H.D. 2, page 8, lines 4-8, such that the language "may give notice to the court" is replaced with "may give notice to the court and to all parties."
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> S.B. 134 S.D. 2, page 8, lines 12-21, and page 9, lines 1-17, be replaced with H.B. 152 H.D. 2, page 8, lines 13-21, and page 9, lines 1-16, such that all instances directing the court to send notice are replaced with language directing the court to order the electing cotenant(s) and/or movant to send notice to all the parties.
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> S.B. 134 S.D. 2, page 9, lines 18-21, page 10, lines 1-21, and page 11, lines 1-6, be replaced with H.B. 152 H.D. 2, page 9, lines 17-21, and page 10, lines 1-17 such that all instances of the court "send[ing] notice" are replaced with the court "order[ing] notice."

Thank you for the opportunity to testify on S.B. 134, S.D. 2.