

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

ENGROSSED

Committee Substitute

for

House Bill 2802

BY DELEGATES J. KELLY, SHOTT, NELSON, ANDERSON

AND CRISS

[Originating in the Committee on the Judiciary,

February 20, 2019.]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
2 designated §37-16-1, §37-16-2, §37-16-3, §37-16-4, §37-16-5, §37-16-6, §37-16-7, §37-
3 16-8, §37-16-9, §37-16-10, §37-16-11, §37-16-12, and §37-16-13, all relating to enacting
4 the Uniform Partition of Heirs Property Act; defining terms; providing for applicability;
5 providing for conflicts with other laws; providing for a court hearing to determine if the
6 partition action concerns heirs' property; providing for notice by publication in a partition
7 action; providing for requirements for commissioners; providing procedures for a court to
8 follow in determining the value of the property and factors for a court to consider for certain
9 types of partitions; providing procedures for cotenant buyout; providing for alternatives to
10 a partition action; providing for certain factors for the court to consider in determining
11 whether partition in kind is appropriate; providing for open-market sales, sealed bids, or
12 auctions; providing reporting requirements for an open-market sale; providing for
13 uniformity of application and construction; and modifying, limiting, and superseding the
14 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 *et*
15 *seq.*

Be it enacted by the Legislature of West Virginia:

ARTICLE 16. UNIFORM PARTITION OF HEIRS PROPERTY ACT.

§37-16-1. Short title.

1 This may be cited as the "Uniform Partition of Heirs Property Act".

§37-16-2. Definitions.

1 As used in this article:

2 "Ascendant" means an individual who precedes another individual in lineage, in the
3 direct line of ascent from the other individual.

4 "Collateral" means an individual who is related to another individual under the law of
5 intestate succession of this state but who is not the other individual's ascendant or descendant.

6 “Descendant” means an individual who follows another individual in lineage, in the direct
7 line of descent from the other individual.

8 “Determination of value” means a court order determining the fair market value of heirs
9 property under §37-16-6 or §37-16-10 of this code or adopting the valuation of the property agreed
10 to by all cotenants.

11 With respect to negotiations, a court may determine the meaning of “reasonable, good
12 faith efforts” by considering:

13 (1) the number of offers and counter offers made during the negotiation;

14 (2) the time period expended during the negotiation;

15 (3) any existing relationships between the parties;

16 (4) the resulting major lease terms found in the final offer or executed lease including,
17 without limitation, the length and method to determine the primary and secondary terms;
18 the size of royalty, bonus, and rental payments, and the defined methods for calculating
19 the same; arbitration, jurisdiction, and Pugh clauses; storage or disposal well provisions;
20 and all other material leasehold terms;

21 (5) major lease terms found in similar leaseholds from the surrounding area;

22 (6) whether the royalty owner was provided a statement containing the extent of the
23 undivided interest;

24 (7) whether the royalty owner was notified in writing during the negotiation process that a
25 partition action may result if they refuse to lease the property, but under such partition
26 action they cannot be deprived of their property if a lease is executed or if reasonable,
27 good faith efforts are not made to obtain a lease; and

28 (9) other relevant information including any information communicated between the parties
29 during negotiation.

30 “Heirs property” means real property held in tenancy in common which satisfies all of the
31 following requirements, as of the filing of a partition action:

32 (1) There is no agreement in a record binding all the cotenants which governs the partition
33 of the property;

34 (2) One or more of the cotenants acquired title from a relative, whether living or deceased;
35 and

36 (3) Any of the following applies:

37 (A) Twenty percent or more of the interests are held by cotenants who are relatives;

38 (B) Twenty percent or more of the interests are held by an individual who acquired title
39 from a relative, whether living or deceased; or

40 (C) Twenty percent or more of the cotenants are relatives.

41 “Partition by sale” means a court-ordered sale of the entire heirs property, whether by
42 auction, sealed bids, or open-market sale conducted under §37-16-10 of this code.

43 “Partition in kind” means the division of heirs property into physically distinct and
44 separately titled parcels.

45 “Record” means information that is inscribed on a tangible medium or that is stored in an
46 electronic or other medium and is retrievable in perceivable form.

47 “Relative” means an ascendant, descendant, or collateral or an individual otherwise
48 related to another individual by blood, marriage, adoption, or law of this state other than this
49 article.

§37-16-3. Applicability; relation to other law.

1 (a) This article applies to partition actions filed on or after the effective date of this article.

2 (b) In an action to partition real property under §37-4-1 et seq. of this code, the court shall
3 first determine whether the property is heirs property as that term is defined in §37-16-2 of this
4 code.

5 (c) If the court determines the property is heirs property, the property must be partitioned
6 under this article unless all of the cotenants otherwise agree in a record or unless one of the

7 exceptions in §37-16-3(f) or §37-16-3(g) of this code applies to the property. The court may also
8 apply provisions of §37-4-1 et seq. of this code that are not inconsistent with this article.

9 (d) If the court determines that the property is not heirs property, or if one of the exceptions
10 in §37-16-3(f) or §37-16-3(g) of this code applies to the property, the partition action will be
11 governed under §37-4-1 et seq. of this code.

12 (e) If a parcel of real property has been severed into a surface estate and a mineral estate
13 and either, but not both, of the severed estates meets the definition of “heirs property,” this article
14 applies only to the estate that meets the definition.

15 (f) This article does not apply to the partition of severed coal estates.

16 (g) This article does not apply to the partition of severed oil or natural gas estates if:

17 (1) under §37B-1-4(a) of this code there are six or fewer oil or natural gas royalty owner
18 cotenants, thereby prohibiting the use of §37B-1-1 et seq. of this code for the development,
19 operation and production of oil, natural gas, or their constituents and the plaintiff in the partition
20 action has made reasonable, good faith efforts to locate and negotiate with all oil or natural gas
21 royalty owner cotenants, but has been unable, despite reasonable, good faith efforts, including
22 the delivery in writing of its final lease offer and the passage of 45 days, to obtain consent to the
23 proposed oil and natural gas development from all royalty owner cotenants; or

24 (2) under §37B-1-4(a) of this code there are seven or more oil or natural gas royalty owner
25 cotenants and the plaintiff in the partition action has made reasonable, good faith efforts to locate
26 and negotiate with all oil or natural gas royalty owner cotenants, but has been unable, despite
27 reasonable, good faith efforts, including the delivery in writing of its final lease offer and the
28 passage of 45 days, to obtain consent to the proposed oil and natural gas development from
29 royalty owners vested with at least three-fourths of the undivided right to develop, operate and
30 produce oil, natural gas, or their constituents, thereby prohibiting the use of §37B-1-1 et seq. of
31 this code for the development, operation and production of oil, natural gas, or their constituents.

32 (h) Any interest in oil or natural gas which is covered by a valid oil or natural gas lease,
33 which was negotiated through reasonable, good faith efforts, shall not be sold or transferred in a
34 partition by sale under this article or under §37-4-1 et seq. of this code.

§37-16-4. Notice; Service by posting.

1 (a) This article does not limit or affect the method by which service of a complaint in a
2 partition action may be made.

3 (b) If the plaintiff in a partition action seeks an order of notice by publication and the court
4 determines that the property may be heirs property, the plaintiff, not later than 10 days after the
5 court's determination, shall post and maintain while the action is pending a conspicuous sign on
6 the property that is the subject of the action or in the case of severed mineral estates on the
7 surface overlying the severed mineral estate. The sign must state that the action has commenced
8 and identify the name and address of the court and the common designation by which the property
9 is known. The court may require the plaintiff to publish on the sign the name of the plaintiff and
10 the known defendants.

§37-16-5. Commissioners.

1 (a) The court, in its discretion, may appoint commissioners to make an assessment of
2 partition alternatives under §37-16-8 of this code.

3 (b) If the court appoints commissioners pursuant to §37-16-5(a) of this code, each
4 commissioner must be disinterested and impartial and not a party to or a participant in the action.

5 (c) If the court appoints commissioners under §37-16-5(a) of this code, the commissioners
6 must consider all of the factors in §37-16-9 of this code in evaluating whether partition in kind
7 would result in substantial prejudice to the cotenants as a group. The commissioners must file a
8 report with the court that provides an assessment of whether partition in kind would result in
9 substantial prejudice to the cotenants as a group and this assessment must be supported by
10 sufficient facts.

§37-16-6. Determination of value.

1 (a) Except as otherwise provided in §37-16-6(b), and §37-16-6(c) of this code, if the court
2 determines that the property that is the subject of a partition action is heirs property, the court
3 shall determine the fair market value of the property by ordering an appraisal pursuant to §37-16-
4 6(d) of this code.

5 (b) If all cotenants have agreed to the value of the property or to another method of
6 valuation, the court shall adopt that value or the value produced by the agreed method of
7 valuation.

8 (c) If the court determines that the evidentiary value of an appraisal is outweighed by the
9 cost of the appraisal, the court, after an evidentiary hearing, shall determine the fair market value
10 of the property and send notice to the parties of the value.

11 (d) If the court orders an appraisal, the court shall appoint a disinterested real estate
12 appraiser licensed in this state to determine the fair market value of the property assuming sole
13 ownership of the fee simple estate. On completion of the appraisal, the appraiser shall file a sworn
14 or verified appraisal with the court.

15 (e) If an appraisal is conducted pursuant to §37-16-6(d) of this code not later than 10 days
16 after the appraisal is filed, the court shall send notice to each party with a known address, stating:

17 (1) The appraised fair market value of the property;

18 (2) That the appraisal is available at the clerk's office; and

19 (3) That a party may file with the court an objection to the appraisal not later than 30 days
20 after the notice is sent, stating the grounds for the objection.

21 (f) If an appraisal is filed with the court pursuant to §37-16-6(d) of this code, the court shall
22 conduct a hearing to determine the fair market value of the property not sooner than 30 days after
23 a copy of the notice of the appraisal is sent to each party under §37-16-6(e) of this code, whether
24 or not an objection to the appraisal is filed under §37-16-6(e)(3) of this code. In addition to the
25 court-ordered appraisal, the court may consider any other evidence of value offered by a party.

26 (g) After a hearing under §37-16-6(f) of this code, but before considering the merits of the
27 partition action, the court shall determine the fair market value of the property and send notice to
28 the parties of the value.

§37-16-7. Cotenant buyout.

1 (a) If any cotenant requested partition by sale, after the determination of value under §37-
2 16-6 of this code, the court shall send notice to the parties that any cotenant except a cotenant
3 that requested partition by sale may buy all the interests of the cotenants that requested partition
4 by sale.

5 (b) Not later than 45 days after the notice is sent under §37-16-7(a) of this code, any
6 cotenant except a cotenant that requested partition by sale may give notice to the court that it
7 elects to buy all the interests of the cotenants that requested partition by sale.

8 (c) The purchase price for each of the interests of a cotenant that requested partition by
9 sale is the value of the entire parcel determined under §37-16-6 of this code multiplied by the
10 cotenant's fractional ownership of the entire parcel.

11 (d) After expiration of the period in §37-16-7(b) of this code, the following rules apply:

12 (1) If only one cotenant elects to buy all the interests of the cotenants that requested
13 partition by sale, the court shall notify all the parties of that fact.

14 (2) If more than one cotenant elects to buy all the interests of the cotenants that requested
15 partition by sale, the court shall allocate the right to buy those interests among the electing
16 cotenants based on each electing cotenant's existing fractional ownership of the entire parcel
17 divided by the total existing fractional ownership of all cotenants electing to buy and send notice
18 to all the parties of that fact and of the price to be paid by each electing cotenant.

19 (3) If no cotenant elects to buy all the interests of the cotenants that requested partition by
20 sale, the court shall send notice to all the parties of that fact and resolve the partition action under
21 §37-16-8(a), and §37-16-8(b) of this code.

22 (e) If the court sends notice to the parties under §37-16-7(d)(1) or §37-16-7(d)(2) of this
23 code, the court shall set a date, not sooner than 60 days after the date the notice was sent, by
24 which electing cotenants must pay their apportioned price into the court. After this date, the
25 following rules apply:

26 (1) If all electing cotenants timely pay their apportioned price into court, the court shall
27 issue an order reallocating all the interests of the cotenants and disburse the amounts held by the
28 court to the persons entitled to them.

29 (2) If no electing cotenant timely pays its apportioned price, the court shall resolve the
30 partition action under §37-16-8(a), and §37-16-8(b) of this code as if the interests of the cotenants
31 that requested partition by sale were not purchased.

32 (3) If one or more but not all of the electing cotenants fail to pay their apportioned price on
33 time, the court, on motion, shall give notice to the electing cotenants that paid their apportioned
34 price of the interest remaining and the price for all that interest.

35 (f) Not later than 20 days after the court gives notice pursuant to §37-16-7(e)(3) of this
36 code, any cotenant that paid may elect to purchase all of the remaining interest by paying the
37 entire price into the court. After the 20-day period, the following rules apply:

38 (1) If only one cotenant pays the entire price for the remaining interest, the court shall
39 issue an order reallocating the remaining interest to that cotenant. The court shall issue promptly
40 an order reallocating the interests of all of the cotenants and disburse the amounts held by it to
41 the persons entitled to them.

42 (2) If no cotenant pays the entire price for the remaining interest, the court shall resolve
43 the partition action under §37-16-8(a) and §37-16-8(b) of this code as if the interests of the
44 cotenants that requested partition by sale were not purchased.

45 (3) If more than one cotenant pays the entire price for the remaining interest, the court
46 shall reapportion the remaining interest among those paying cotenants, based on each paying
47 cotenant's original fractional ownership of the entire parcel divided by the total original fractional

48 ownership of all cotenants that paid the entire price for the remaining interest. The court shall
49 issue promptly an order reallocating all of the cotenants' interests, disburse the amounts held by
50 it to the persons entitled to them, and promptly refund any excess payment held by the court.

51 (g) Not later than 45 days after the court sends notice to the parties pursuant to §37-16-
52 7(a) of this code, any cotenant entitled to buy an interest under this section may request the court,
53 as part of the pending action, to authorize the sale of the interests of cotenants named as
54 defendants and served with the complaint but that did not appear in the action.

55 (h) If the court receives a timely request under §37-16-7(g) of this code, the court, after
56 hearing, may deny the request or authorize the requested additional sale on such terms as the
57 court determines are fair and reasonable, subject to the following limitations:

58 (1) A sale authorized under this subsection may occur only after the purchase prices for
59 all interests subject to sale under §37-16-7(a) through §37-16-7(f) of this code have been paid
60 into court and those interests have been reallocated among the cotenants as provided in those
61 subsections; and

62 (2) The purchase price for the interest of a non-appearing cotenant is based on the court's
63 determination of value under §37-16-6 of this code.

§37-16-8. Partition alternatives.

1 (a) If all the interests of all cotenants that requested partition by sale are not purchased by
2 other cotenants pursuant to §37-16-7 of this code, or if after conclusion of the buyout under §37-
3 16-7 of this code, a cotenant remains that has requested partition in kind, the court shall order
4 partition in kind unless the court, after consideration of the factors listed in §37-16-9 of this code,
5 finds that partition in kind will result in substantial prejudice to the cotenants as a group. In
6 considering whether to order partition in kind, the court shall approve a request by two or more
7 parties to have their individual interests aggregated.

8 (b) If the court does not order partition in kind under §37-16-8(a) of this code the court
9 shall order partition by sale pursuant to §37-16-10 of this code or, if no cotenant requested
10 partition by sale, the court shall dismiss the action.

11 (c) If the court orders partition in kind pursuant to §37-16-8(a) of this code, the court may
12 require that one or more cotenants pay one or more other cotenants amounts so that the
13 payments, taken together with the value of the in-kind distributions to the cotenants, will make the
14 partition in kind just and proportionate in value to the fractional interests held.

15 (d) If the court orders partition in kind, the court shall allocate to the cotenants that are
16 unknown, unlocatable, or the subject of a default judgment, if their interests were not bought out
17 pursuant to §37-16-7 of this code, a part of the property representing the combined interests of
18 these cotenants as determined by the court and this part of the property remains undivided.

19 (e) If the court orders a partition in kind of real property, the initial survey and final partition
20 shall be conducted by a professional surveyor licensed to practice surveying in West Virginia and
21 in compliance with the provisions of §30-13A-1 et seq. of this code.

§37-16-9. Considerations for Partition in Kind.

1 (a) In determining under §37-16-8(a) of this code whether partition in kind would result in
2 substantial prejudice to the cotenants as a group, the court shall consider the following:

3 (1) Whether the heirs property practicably can be divided among the cotenants;

4 (2) Whether partition in kind would apportion the property in such a way that the aggregate
5 fair market value of the parcels resulting from the division would be materially less than the value
6 of the property if it were sold as a whole, taking into account the condition under which a court-
7 ordered sale likely would occur;

8 (3) Evidence of the collective duration of ownership or possession of the property by a
9 cotenant and one or more predecessors in title or predecessors in possession to the cotenant
10 who are or were relatives of the cotenant or each other;

11 (4) A cotenant's sentimental attachment to the property, including any attachment arising
12 because the property has ancestral or other unique or special value to the cotenant;

13 (5) The lawful use being made of the property by a cotenant and the degree to which the
14 cotenant would be harmed if the cotenant could not continue the same use of the property;

15 (6) The degree to which the cotenants have contributed their pro rata share of the property
16 taxes, insurance, and other expenses associated with maintaining ownership of the property or
17 have contributed to the physical improvement, maintenance, or upkeep of the property; and

18 (7) Any other relevant factor.

19 (b) The court may not consider any one factor in §37-16-9(a) of this code to be dispositive
20 without weighing the totality of all relevant factors and circumstances.

§37-16-10. Open-market sale, private and public auctions, sealed bids.

1 (a) If the court orders a sale of heirs property, the court shall first ascertain which cotenants
2 are relatives, as defined by this article, and after notice to all cotenants, if a relative vested with
3 an interest in the property desires to purchase the whole of the heirs property, the court shall
4 conduct a private auction for the whole of the heirs property among all the relatives vested with
5 an interest, but with a reserve price equal to the court determined fair market value established
6 under §37-16-6 of this code.

7 (b) If one or more relatives vested with an interest do not purchase the whole of the heirs
8 property in the court supervised private auction, the court shall then sell the heirs property by an
9 open-market sale, unless the court finds that a sale by sealed bids or a public auction would be
10 more economically advantageous and in the best interest of the cotenants as a group.

11 (c) If the court orders an open-market sale and the parties, not later than 10 days after the
12 entry of the order, agree on a real estate broker licensed in this state to offer the property for sale,
13 the court shall appoint the broker and establish a reasonable commission. If the parties do not
14 agree on a broker, the court shall appoint a disinterested real estate broker licensed in this state
15 to offer the property for sale and shall establish a reasonable commission. The broker shall offer

16 the property for sale in a commercially reasonable manner at a price no lower than the
17 determination of value and on the terms and conditions established by the court.

18 (d) If the broker appointed under §37-16-10(c) of this code obtains within a reasonable
19 time an offer to purchase the property for at least the determination of value, the broker shall
20 comply with the reporting requirements in §37-16-11 of this code and, the sale may be completed
21 in accordance with state law other than this article.

22 (e) If the broker appointed under §37-16-10(c) of this code does not obtain within a
23 reasonable time an offer to purchase the property for at least the determination of value, the court,
24 after hearing, may:

25 (1) Approve the highest outstanding offer, if any;

26 (2) Redetermine the value of the property and order that the property continue to be
27 offered for an additional time; or

28 (3) Order that the property be sold by sealed bids or at an auction.

29 (f) If the court orders a sale by sealed bids or an auction, the court shall set terms and
30 conditions of the sale. If the court orders an auction, the auction must be conducted under the
31 §37-4-1 et seq. of this code.

32 (g) If a purchaser is entitled to a share of the proceeds of the sale, the purchaser is entitled
33 to a credit against the price in an amount equal to the purchaser's share of the proceeds.

§37-16-11. Report of Open-Market Sale.

1 (a) Unless required to do so within a shorter time by §37-16-1 et seq. of this code, a
2 broker appointed under §37-16-10(c)(7) of this code to offer heirs property for open market sale
3 shall file a report with the court not later than seven days after receiving an offer to purchase the
4 property for at least the value determined under §37-16-6 or §37-16-10 of this code.

5 (b) The report required by §37-16-11(a) of this code must contain the following information:

6 (1) A description of the property to be sold to each buyer;

7 (2) The name of each buyer;

8 (3) The proposed purchase price;

9 (4) The terms and conditions of the proposed sale, including the terms of any owner
10 financing;

11 (5) The amounts to be paid to lienholders;

12 (6) A statement of contractual or other arrangements or conditions of the broker's
13 commission; and

14 (7) Other material facts relevant to the sale.

§37-16-12. Uniformity of Application and Construction.

1 In applying and construing this uniform act, consideration must be given to the need to
2 promote uniformity of the law with respect to its subject matter among states that enact it.

§37-16-13. Relation to Electronic Signatures in Global and National Commerce Act.

1 This article modifies, limits and supersedes the Electronic Signatures in Global and
2 National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit or supersede
3 Section 101(c) of that act, 15 U.S.C. Section 7001(c) or authorize electronic delivery of any of the
4 notices described in Section 103(b) of that act, 15 U.S.C. Section 7003 (b).