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BEYOND INSTITUTIONS: ANALYZING HEIRS' PROPERTY LEGAL ISSUES AND REMEDIES THROUGH A BLACK HISTORY LENS

HEIDI KURNIAWAN*

INTRODUCTION

In 2019, ProPublica and *The New Yorker* published a riveting and award-winning exposé on the loss of Black-owned land in the South.¹ The story focused on two men in North Carolina, named Melvin Davis and Licurtis Reels, who spent eight years in jail for refusing to leave the property they inherited from their great-grandfather and had lived on their whole lives.² Their great-grandfather, one generation removed from slavery, was deeply distrustful of the court system and passed the land down without a will.³ The land, which had been held by their family for a century, had been bought by a developer without the brothers' knowledge through a legal mechanism called heirs' property.

Heirs' property is a unique and complex form of land ownership that exists both outside of the formal legal system and in spite of it. Melvin and Licurtis' story demonstrates how the history of heirs' property is entwined with Black history and how, today, the law and policy concerns around this unstable model of property have an outsized effect on Black and low-income Americans. It is a problem that has contributed to the loss of millions of acres of Black-owned land over the last half-century.⁴ While strides have been made to stabilize heirs' property, many of these reforms fall short of fully addressing the institutional hurdles that marginalized property owners face.⁵ In seeking

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¹ Lizzie Presser, *Their Family Bought Land One Generation After Slavery. The Reels Brothers Spent Eight Years in Jail for Refusing to Leave It*, PROPUBLICA (July 15, 2019), <https://features.propublica.org/black-land-loss/heirs-property-rights-why-black-families-lose-land-south/>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

remedies, policymakers should consider the historical position of vulnerable landowners and look beyond the traditional, conventional institutions that have upheld inequities in property law.

I. BACKGROUND⁶

A. *Overview of Heirs' Property*

The term “heirs’ property” refers to a model of land ownership that occurs when a landowner conveys their property at death to other family members without a deed or probated will.⁷ For example, A owns a plot of land and passes it down to his heirs B and C. The land is owned as a tenancy in common, with each of the heirs owning a fractional share of the entire property.⁸ Thus, no one heir has title to the entire property.⁹ Regardless of the size of the fractional interest, a tenancy in common implies that each “cotenant” (or heir) enjoys the same right to use and enjoy the property.¹⁰ After A dies, B and C share title of the property, including equal rights over its use and enjoyment. Heirs’ property can exist over a span of several generations, and as it continues to be passed down intestate, each owner’s interest decreases in size.¹¹ In our example, B has heirs D and E; C has heirs F and G; B and C continue the model of heirs’ property and pass their share in the property down intestate. After B and C die, D, E, F, and G all have a smaller, equal fractional share of the property.

Heirs’ property has outsized effects on marginalized groups. A substantial percentage of heirs’ property owners are moderate- to low-income, and many end up transferring their real property through intestate succession rather than any formal legal will.¹² This phenomenon is consistent with studies that have found low will-making

⁶ Part I first gives an overview of heirs’ property as an estate law concept, and then discusses its context within American history, with a special focus on Black history in the post-Civil War, post-Reconstruction, and Civil Rights eras.

⁷ Craig H. Baab, *Heir Property Ownership: An Untapped Asset for Low-Wealth Americans and Local Governments*, 33 ST. & LOC. L. NEWS 1, 1 (2010).

⁸ *Id.*

⁹ *Id.*

¹⁰ B. James Deaton, *A Review and Assessment of the Heirs’ Property Issue in the United States*, 46 J. ECON. ISSUES 615, 618 (2012).

¹¹ Rishi Batra, *Improving the Uniform Partition of Heirs Property Act*, 24 GEO. MASON L. REV. 743, 746 (2017).

¹² UNIFORM PARTITION OF HEIRS PROPERTY ACT (UNIF. L. COMM’N, Draft October 19, 2010) [hereinafter UHPA].

rates among low-income Americans.¹³ Many of these heirs' property owners have little to no understanding of the legal rules governing their property, leaving them particularly vulnerable to institutional abuses and predatory speculators.¹⁴ This statistic is a testament to how marginalized communities in society adapt to exist outside of the traditional legal system, for better or for worse. This Comment focuses on one marginalized community specifically—Black heirs' property owners—to examine heirs' property's unique position within Black history. Mirroring the low rates of will-making among low-income Americans in general, seventy-six percent of Black Americans do not have a will, a rate twice that of white Americans.¹⁵ As discussed further in this paper, the unstable nature of heirs' property ownership can create a cycle of dispossession for already marginalized communities.¹⁶

B. Heirs' Property and Black History

The history of heirs' property is entwined with Black history, particularly the relationship between Black Americans and property. The deprivation of not just property, but also life and liberty, from Black Americans has taken shape in many ways over the breadth of U.S. history.¹⁷ Real property has a lasting and unshakeable relationship with race, tracing back to chattel slavery—a system that designated people as property in order to make white Americans' real property more productive.¹⁸ The Civil War was fought over a question of property—who works it, what it means, and who is entitled to it.¹⁹ After Emancipation, property remained an elusive concept for Black Americans.²⁰ In 1865, Congress established the Bureau of Refugees, Freedmen, and Abandoned Lands (Freedmen's Bureau), which brought the promise of “forty acres of land at rental for three years with an option to buy” for every male citizen.²¹ A year later, Congress passed the Southern Homestead Act creating a settlement of forty-six million acres

¹³ *Id.*

¹⁴ UPHPA, *supra* note 12, at 3.

¹⁵ Presser, *supra* note 1.

¹⁶ *See infra* Part II.

¹⁷ Lesley Albritton & Jesse Williams, *Disasters Do Discriminate: Black Land Tenure and Disaster Relief Programs*, 29 J. AFFORDABLE HOUS. & CMTY. DEV. L. 421, 422-23 (2021).

¹⁸ *Id.* at 422.

¹⁹ *Id.* at 423.

²⁰ *Id.* at 428.

²¹ Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. L. REV. 505, 525 (2001).

of public lands for formerly enslaved citizens.²² However, the hope for strides in economic autonomy quickly dimmed.²³ Though the Freedmen's Bureau had control of 850,000 acres of land in 1865, by the middle of 1866, it returned half of the land to its former owners, all of whom were white.²⁴ President Andrew Johnson quickly issued pardons to former Confederates and ordered the commissioner of the Freedmen's Bureau to restore land to those who were pardoned.²⁵ Furthermore, the final text of the Southern Homestead Act permitted land applications from anyone who claimed he had not supported the Confederacy, leading to an estimated seventy-seven percent of applicants under the Southern Homestead Act to be white.²⁶

Despite the institutional failures of Reconstruction, Black Americans acquired over fifteen million acres of land between 1865 and 1910—assuredly far less than what would have been acquired had Reconstruction reached its full potential.²⁷ Systemic discrimination continued to plague Black landowners throughout the twentieth century as well.²⁸ Legal actions such as foreclosure, eminent domain, tax sales, and partition sales were weaponized to dispossess Black landowners of their property.²⁹ Quasi-legal actions were also used, including exclusion from access to credit and federal grants, which led to foreclosures and land loss.³⁰ Violence and intimidation, including “courthouse gangs” of white lawyers, also contributed to forced seizure of property in many cases.³¹ This exclusion from the legal system pushed Black Americans to exist outside of it for survival. Heirs' property was particularly prevalent in the Jim Crow South, as Black families, rightfully distrustful of the legal system, passed down their assets informally.³²

²² *Id.* at 525.

²³ *Id.*

²⁴ *Id.* at 525-26.

²⁵ *Id.* at 526.

²⁶ *Id.*

²⁷ *Id.*; Conner Bailey et al., *Heirs' Property and Persistent Poverty Among African Americans in the Southeastern United States*, in *HEIRS' PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT* 9, 9 (Cassandra Johnson Gaither et al. eds., 2019).

²⁸ Thomas W. Mitchell, *Historic Partition Law Reform: A Game Changer for Heirs' Property Owners*, in *HEIRS' PROPERTY AND LAND FRACTIONATION*, *supra* note 26, at 65, 65-66.

²⁹ *Id.* at 66.

³⁰ RAFTER FERGUSON, *LOSING GROUND: FARMLAND CONSOLIDATION AND THREATS TO NEW AND BLACK FARMERS AND THE FUTURE OF FARMING* 5 (Union of Concerned Scientists, ed. 2021).

³¹ Matt Reynolds, *Fractured: How Jim Crow-Era Laws Still Tear Families from Their Homes*, A.B.A. J., Feb.-Mar. 2021, at 52, 54; Bailey et al., *supra* note 27, at 11.

³² Reynolds, *supra* note 31, at 54.

The property market has historically bent toward dispossession of those in the margins, many of whom are Black and low-income.³³ Black Americans have particularly experienced “tremendous” property loss in the last century.³⁴ Black land loss, or “the coerced taking of land from Black [property] owners,” accelerated throughout the twentieth century to modern day.³⁵ Of the over 15 million acres of land held in full ownership by Black Americans by 1910, only 2.3 million acres remained less than a century later in 1992.³⁶ This decline runs parallel to the decline of Black farmers over the last century; while in 1920, one in every seven farms in the United States was run by a Black farmer, by 2001, this number was only 1%.³⁷ Between 1978 and 1987 alone, the number of Black-owned farms dropped by 23%, while white-owned farms declined by only 6.6%.³⁸ By the end of the twentieth century, over 90% of the land owned by Black farmers’ forebearers had been lost.³⁹ Despite the common belief that dispossession of Black land largely occurred during the Jim Crow era, mass land loss actually occurred in the latter part of the twentieth century.⁴⁰ Heirs’ property owners have been especially vulnerable to systemic deprivation of their land, as antiquated laws that regulate this property type are cited as one of the leading causes of involuntary Black land loss.⁴¹ Additionally, migration from the South, where much of heirs’ property was concentrated, led to a geographic dispersal of heirs, adding an obstacle to keeping track of multi-generational heirs.⁴² Addressing Black land loss must also include addressing heirs’ property, and conversely, any reforms meant to stabilize heirs’ property must take into consideration the particular historical position of Black landowners.

³³ Albritton & Williams, *supra* note 17, at 424.

³⁴ UHPHA, *supra* note 12, at 4.

³⁵ Albritton & Williams, *supra* note 17, at 431.

³⁶ Bailey et al., *supra* note 27, at 9.

³⁷ Mitchell, *From Reconstruction to Deconstruction*, *supra* note 21, at 527.

³⁸ Will Breland, *Acres of Distrust: Heirs Property, the Law’s Role in Sowing Suspicion Among Americans and How Lawyers Can Help Curb Black Land Loss*, 28 GEO. J. ON POVERTY L. & POL’Y 377, 396 (2021).

³⁹ *Id.*

⁴⁰ *Id.* at 395-96.

⁴¹ FERGUSON, *supra* note 30, at 5; UHPHA, *supra* note 12, at 4-5.

⁴² GRETA DE JONG, YOU CAN’T EAT FREEDOM: SOUTHERNERS AND SOCIAL JUSTICE AFTER THE CIVIL RIGHTS MOVEMENT 188 (2016).

II. LAW AND POLICY CONCERNS REGARDING THE INSTABILITY OF HEIRS' PROPERTY⁴³

The heirs' property model can be unstable, with adverse consequences to owners.⁴⁴ Land is generally viewed as a productive resource that can be utilized for wealth and economic security.⁴⁵ However, the instability and vulnerability of heirs' property can be a restraint on these aspirations and pose serious socioeconomic barriers for already marginalized property owners.⁴⁶ The lack of institutional support for heirs' property shuts owners out of vital resources for productive use of their property, as well as the benefits that traditional property owners enjoy.⁴⁷ Today, out of the total real property in the entire United States owned by Black Americans, an estimated sixty percent is heirs' property.⁴⁸ Thus, any law and policy concerns regarding heirs' property have an outsized effect on Black landowners.

A. *Unstable Estate Planning*

Clear title, or the concept that a landowner has possession of a property without any encumbrances, is an essential element of owning property.⁴⁹ Heirs' property owners are particularly vulnerable to a lack of clear title, which then can introduce a multitude of other barriers regarding their property.⁵⁰ Usually, heirs' property owners were never explicitly named in a deed or will, but rather assumed ownership quietly without any explicit legal provisions.⁵¹ Heirs then pass down their property to their heirs in the same manner, leaving all owners of the land without the benefit of formal legal documentation.⁵² This could mean that all present heirs, potentially dozens, have no clear title. The heirs' property model creates a culture of "clouded title"—where no clearly

⁴³ Part II looks at the concerns raised by advocates about the heirs' property model. This Part discusses the instability of estate planning and lack of clear title, which leads to the other issues raised, including heirs' property owners' inability to access the value in their land and the volatile nature of partition proceedings.

⁴⁴ Baab, *supra* note 7, at 1, 14.

⁴⁵ Bailey et al., *supra* note 27, at 11.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Albritton & Williams, *supra* note 17, at 433.

⁴⁹ Bailey et al., *supra* note 27, at 11.

⁵⁰ *Id.*

⁵¹ Albritton & Williams, *supra* note 17, at 433.

⁵² *Id.*

defined set of persons has clear title or legal decision-making authority over a property.⁵³

This leads to multiple challenges for those with clouded title. Clear title is required for access to capital—loans, direct payments, federal programs, and conservation programs, for example.⁵⁴ Lack of such access leaves heirs' property owners in an economically precarious position.⁵⁵ Law and society favor productive use of land, which is nearly impossible when resources needed to do so all require clear title.⁵⁶ For Black communities, avoidance of the formal legal system was often intentional; many had a deep distrust of the institution that was designed to prevent them from obtaining rights for so long.⁵⁷ Access to courthouses and attorneys was highly limited, and discrimination was rampant.⁵⁸ Informal inheritance and clouded title, therefore, became the default among many Black landowners.⁵⁹ This historical context is given little consideration by modern institutional actions, exacerbating the challenges of navigating heirs' property ownership for already marginalized landowners.⁶⁰

B. Inability to Access Land Value

Lack of clear title can also act as a disincentive to improving or investing in a property.⁶¹ A 1980 study of Black-owned rural land conducted by the Emergency Land Fund found that heirs' property overall was being used "less productively" than non-heirs' property, and that while 97% of non-heirs' property owners had obtained a loan on their land, 85% of heirs' property owners had not.⁶² Logistically, it is difficult to use heirs' property to secure loans, and a cotenant may be reluctant to do so because ensuring a return on investment is much riskier when there are other cotenants with overlapping rights, interests, and duties.⁶³ Additionally, the cost of developing contracts, either

⁵³ Bailey et al., *supra* note 27, at 11.

⁵⁴ FERGUSON, *supra* note 30, at 5.

⁵⁵ *Id.*

⁵⁶ *Id.* at 2.

⁵⁷ Albritton & Williams, *supra* note 17, at 432.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *See id.* at 439 (discussing FEMA's ignorance of racial composition of income characteristics in a given geographical area when distributing disaster relief, leading to disparities in who gets access to relief funds).

⁶¹ Bailey et al., *supra* note 27, at 15.

⁶² *Id.*

⁶³ Deaton, *supra* note 10, at 620.

formal or informal, with other covenants to secure stability when obtaining a loan may also diminish the expected return on investment.⁶⁴

For many heirs' property owners, their share of the property may be the only significant asset they own.⁶⁵ The inability to access the value in this land through loans or lines of credit with the land as collateral enacts an economic burden on "land rich but cash poor" owners who want to build their equity and capital.⁶⁶ This leads to already marginalized property owners, particularly Black property owners living in the rural South, becoming further entrenched in their socioeconomic status, unable to unlock the value in the largest asset they have.⁶⁷

Additionally, heirs' property owners likely do not qualify for various state and federal grants, many of which could empower them with capital to improve or invest in their land.⁶⁸ For example, disaster relief administered by FEMA comes with stipulations that often exclude heirs' property owners.⁶⁹ FEMA's guidelines for proving ownership when applying for disaster relief are continuously changing and rely on their own discretion, making it difficult for heirs' property owners to verify their property entitlement.⁷⁰ In general, FEMA requires a deed, title, lease agreement, or bill of sale to verify ownership, and the very nature of heirs' property itself makes producing any of those four requirements problematic.⁷¹ After Hurricane Katrina, for example, the U.S. Department of Agriculture found that 20,000 heirs' property owners were denied any recovery benefits, mostly because they lacked clear title.⁷² Heirs' property owners unable to access the federal funds they are entitled to are thus left to watch their property devalue.⁷³

⁶⁴ *Id.*

⁶⁵ Avanthi Cole, *For the "Wealthy and Legally Savvy": The Weaknesses of the Uniform Partition of Heirs Property Act as Applied to Low-Income Black Heirs Property Owners*, 11 COLUM. J. RACE & L. 343, 347 (2021).

⁶⁶ *Id.*

⁶⁷ *Id.* at 358.

⁶⁸ Baab, *supra* note 7, at 14 (2010); FERGUSON, *supra* note 30, at 5.

⁶⁹ Albritton & Williams, *supra* note 17, at 438.

⁷⁰ *Id.* at 437.

⁷¹ *Id.* at 438.

⁷² *Id.* at 439.

⁷³ *Id.*

C. Partition

Partition is arguably the most harmful feature of heirs' property. The tenancy in common model allows any cotenant to file suit asking a court to partition the property.⁷⁴ In other words, an heir to a property can move to end the cotenancy regardless of how long their cotenants have owned the land or how small their own interest in the property is.⁷⁵ A court will typically consider either a partition in kind or a partition by sale. A partition in kind means that the court will separate the property into parcels proportionate to each cotenant's interest; a partition by sale means that the court forces the parties to sell the property entirely and separates the proceeds proportionately to each cotenant.⁷⁶ Additionally, any cotenant, no matter how small their interest in the property, can sell their interest to someone outside of the ownership group without the consent of the other cotenants.⁷⁷ Most jurisdictions statutorily favor partition in kind, but legal scholars have suggested a growing trend of courts favoring partition by sale.⁷⁸ This "de facto preference" for partition by sale has shifted partly due to stronger considerations of beneficial economic effects of a sale rather than partitioning in kind.⁷⁹

Partition leaves heirs' property owners vulnerable in several ways. First, opportunistic real estate speculators can—and have—taken advantage of these rules in order to force a sale on a given property.⁸⁰ "If a [speculator] or developer acquires even a small share [], that developer can file for partition."⁸¹ In many cases, developers will acquire these shares from vulnerable heirs—those who are elderly, mentally disabled, or even incarcerated—and then move for partition in court.⁸²

Second, many heirs' property owners' net worth is in the property itself, meaning that if the court orders a partition by sale, they would have little to no capital to bid on their own property.⁸³ The growing shift to partition by sale as a judicial remedy represents an

⁷⁴ Batra, *supra* note 11, at 747.

⁷⁵ *Id.*

⁷⁶ *Id.* at 748-49; Deaton, *supra* note 10, at 619.

⁷⁷ Mitchell, *From Reconstruction to Deconstruction*, *supra* note 21, at 508.

⁷⁸ Yun-chien Chang & Lee Anne Fennell, *Partition and Revelation*, 81 U. CHI. L. REV. 27, 30 (2014); Mitchell, *From Reconstruction to Deconstruction*, *supra* note 21, at 514; Batra, *supra* note 11, at 749

⁷⁹ UHPA, *supra* note 12, at 2.

⁸⁰ Mitchell, *From Reconstruction to Deconstruction*, *supra* note 21, at 508.

⁸¹ Batra, *supra* note 11, at 751.

⁸² *Id.*

⁸³ *Id.*

application of the view that a property's value should be determined by the market, and a "parcel of land should be allocated to the party willing to pay the highest price" to ensure efficient use.⁸⁴ In prioritizing the economic benefit of partition sales, courts often ignore the "sentimental, ancestral, cultural, or historical significance" of a property.⁸⁵

Additionally, in many jurisdictions, the highest bidder in a partition sale must pay by cash—a requirement not often met by most heirs' property owners whose largest asset is their land.⁸⁶ Again, "land rich but cash poor" landowners are left without recourse. Partition by sale can be forced even when there are other statutory options available, even when the property could just have easily been partitioned in kind, even when a majority of cotenants oppose a sale, and even when the only remedy requested to the court was a partition in kind rather than by sale.⁸⁷ Courts have the unilateral power to dispossess property owners in favor of the free market, despite any noneconomic interests that may be held.⁸⁸ This creates a condemnation power much like eminent domain, with one key difference: under partition by sale, owners who lose their property have no entitlement to be paid fair market value compensation, or even any level of compensation.⁸⁹ Furthermore, in many states, any cotenants who resist a forced partition sale are required to pay a part of the attorney's fees for the cotenant who originally petitioned the court to make a sale, in addition to any attorney's fees they may have incurred to represent themselves.⁹⁰

Another problem that arises with partition of heirs' property is notice. In many states, notice of a partition by publication is permitted when any of the given parties are "unknown."⁹¹ There is often no elaboration on this provision, meaning that court discretion rules.⁹² Notice by publication is a common avenue in these situations because the petitioner usually has difficulty tracking down all the cotenants.⁹³ Thus, notice of a pending action is often printed in a local newspaper, which is likely not widely distributed and may only exist for the purpose

⁸⁴ Mitchell, *From Reconstruction to Deconstruction*, *supra* note 21, at 514-15.

⁸⁵ Batra, *supra* note 11, at 749.

⁸⁶ Chang & Fennell, *supra* note 78, at 32.

⁸⁷ Batra, *supra* note 11, at 749.

⁸⁸ Mitchell, *From Reconstruction to Deconstruction*, *supra* note 21, at 515.

⁸⁹ UHPHA, *supra* note 12, at 4.

⁹⁰ *Id.* at 2.

⁹¹ Batra, *supra* note 11, at 752-53.

⁹² *Id.*

⁹³ *Id.* at 753.

of publishing notices.⁹⁴ This means that notice may not reach all the cotenants of a given heirs' property, especially if those cotenants span generations and wide geographic ranges.⁹⁵ Lack of clear and deliberate notice often leads to a cotenant unknowingly being deprived of their property.⁹⁶

Heirs' property auctions have played a part in the racial wealth gap, particularly for Black landowners in the rural South.⁹⁷ However, those living in cities can also be vulnerable to forced partition sales, particularly at the hands of developers looking to gentrify an urban area.⁹⁸ For example, in San Antonio, Texas, longtime homeowner Ronald Henry received a letter informing him that a trust had purchased half an interest in the home he had lived in since 1978.⁹⁹ His brother, whom he had not seen in almost ten years, had sold his fifty percent share in the house to an investor, identified as the "San Antonio Arts and Entertainment Revocable Trust," who later attempted to charge Henry \$375 a month for living in his own home before filing a partition action for sale.¹⁰⁰ Predatory investors often look to properties in historically Black or Latinx neighborhoods that have been undervalued due to redlining, discriminatory lending, and disinvestment.¹⁰¹ Much like the heirs' property owners in rural areas, heirs' property owners in urban areas are significantly more likely to be taken advantage of and dispossessed if they are part of an already marginalized group.¹⁰²

Partition is not a new or novel threat to Black-owned land. In fact, in the wake of the civil rights movement, activists organized in the rural South to fight forced partition sales.¹⁰³ The Federation of Southern Land Cooperatives/Land Assistance Fund (FSC/LAF) held numerous workshops in Alabama and Georgia in the mid-1980s to raise Black farmers' awareness of estate planning, tax financing, and lending in order to preserve their ownership.¹⁰⁴ Activists built up a network of lawyers, appraisers, surveyors, and volunteers to organize heirs against forced partition sales.¹⁰⁵ FSC/LAF's efforts, starting in 1984 and

⁹⁴ *Id.* at 752.

⁹⁵ *See id.* at 753.

⁹⁶ *Id.* at 753, 760-61.

⁹⁷ Reynolds, *supra* note 31, at 54.

⁹⁸ *Id.* at 54-56.

⁹⁹ *Id.* at 55.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 56.

¹⁰² *See id.* (explaining why investors "often prey" on homes in Black and Latinx neighborhoods).

¹⁰³ DE JONG, *supra* note 42.

¹⁰⁴ *Id.* at 188-89.

¹⁰⁵ *Id.* at 189.

spanning several years, helped save over 80,800 acres of Black-owned land.¹⁰⁶ Today, similar remedies are needed to mitigate Black land loss and critical issues with partition and heirs' property in general.

III. THE UNIFORM PARTITION OF HEIRS' PROPERTY ACT AS A REMEDY¹⁰⁷

Various law and policy solutions have been introduced to address the instability of the heirs' property model. Several historically Black land grant universities have programs specifically designed to assist heirs' property owners with legal tasks such as clearing their title and applying for state and federal grants, in addition to conducting research and outreach around heirs' property.¹⁰⁸ The 2018 Farm Bill contained a provision providing opportunity for heirs' property owners to document their interest, opening up access to a variety of USDA programs and grants.¹⁰⁹ The Farm Bill also acknowledged the primary remedy for heirs' property issues that has been developed in the last year, the Uniform Partition of Heirs Property Act (UPHPA).¹¹⁰ Farmers in states that enacted the UPHPA were given more options under the Farm Bill to obtain a farm number and gain clear title.¹¹¹ The following sections will discuss the history of the UPHPA, its provisions, enactments, and the improvements that can be made to further address heirs' property issues.

A. *About the UPHPA*

In 2001, the Associated Press published an award-winning series called "Torn from the Land," the product of many months of research and interviews, with a feature on partition action abuses.¹¹² The series gained national attention and highlighted how partition sales have been used in particular to dispossess Black Americans of their land and wealth.¹¹³ As a result of this series, the American Bar Association's

¹⁰⁶ *Id.*

¹⁰⁷ Part III examines the Uniform Partition of Heirs Property Act, a model state statute that aims to address several issues with heirs' property. Part III looks at some concerns with the statute as written, and how several states have enacted it.

¹⁰⁸ Bailey et al., *supra* note 27, at 17.

¹⁰⁹ *Id.* at 16.

¹¹⁰ Mitchell, *Historic Partition Law Reform*, *supra* note 28, at 79.

¹¹¹ *Id.*

¹¹² *Id.* at 72.

¹¹³ UPHPA, *supra* note 12, at 5.

Section of Real Property, Trust and Estate Law (RPTE) created a task force to submit a proposal to address the legal issues stemming from partition actions to the Uniform Law Commission, an organization which works to develop model state laws.¹¹⁴ The task force submitted its proposal in 2006, and the Uniform Law Commission accepted it.¹¹⁵ For the next several years, a drafting committee worked on the model state statute, which was ultimately named the Uniform Partition of Heirs Property Act.¹¹⁶ In drafting the UHPA, the committee aimed to provide the most comprehensive and far-reaching reform of partition law since the 1800s.¹¹⁷ The committee also explicitly acknowledged the disproportionate burden that the heirs' property model has on low-income and Black property owners, dedicating a portion of the Prefatory Note of the UHPA towards discussing this topic.¹¹⁸

There are several key provisions in the UHPA meant to minimize the harmful effects of partition. First, the UHPA provides for allotment, which gives owners who oppose opportunity to buy the property from the owner seeking partition.¹¹⁹ This buyout provision aims to address the "land rich but cash poor" problem by allowing heirs who lack any financial resources to participate in a traditional partition sale to benefit from the buyout.¹²⁰ This creates an avenue for property owners to prevent a sale of their property even when a court may order it. Advocates have described the buyout provision as a defense against developers and speculators seeking to acquire properties for sale.¹²¹

Second, the UHPA creates several buffers designed to slow down the rate at which courts are ordering partition sales. The law directs courts to use a "totality of the circumstances" test when considering whether to order a partition in kind or partition by sale.¹²² Currently, most courts apply an economics-focused analysis that considers the theoretical economic value of the property, which, as discussed earlier, has led to a large shift in favor of partition by sale.¹²³ Under the UHPA, a court is required to make findings on a variety of

¹¹⁴ Mitchell, *Historic Partition Law Reform*, *supra* note 28, at 72.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ UHPA, *supra* note 12, at 1.

¹¹⁹ *Id.*; *see also* Deaton, *supra* note 10, at 624.

¹²⁰ Mitchell, *Historic Partition Law Reform*, *supra* note 28, at 73.

¹²¹ DAVID GOGAL, VIRGINIA'S APPROACH TO THE UNIFORM PARTITION OF HEIRS PROPERTY ACT (UHPA) AS ADOPTED BY THE GENERAL ASSEMBLY IN 2020, at 3 (2020).

¹²² Mitchell, *Historic Partition Law Reform*, *supra* note 28, at 74; UHPA, *supra* note 12, at 26.

¹²³ Mitchell, *Historic Partition Law Reform*, *supra* note 28, at 73-74.

both economic and non-economic factors, and cannot give more weight to any specific factor.¹²⁴ The comments in this part of the model statute highlight the importance of non-economic factors, including “sentimental value” and “emotional interests.”¹²⁵ Furthermore, the UPHPA stipulates that if no cotenants requested a partition by sale, the court is to dismiss the action; this stands in stark contrast to the current reality, where courts can order a sale even if one was not requested.¹²⁶

The UPHPA does not preclude courts from ordering partition by sale; in fact, it recognizes that sometimes sale is the most equitable remedy.¹²⁷ However, the UPHPA contains proposals to try and ensure that a sale yields a maximum economic return for the owners, preserving as much of the wealth associated with their land as possible.¹²⁸ For example, the UPHPA restructures the sales procedure by mandating open market sales rather than a sealed bid or auction unless it would be less economically advantageous.¹²⁹ In an open market sale, the court must appoint a real estate broker who will list the property for a court-appointed value, generally the fair market value as determined by an appraiser.¹³⁰ Open market sales allow for greater notice and exposure to the public as well as more time for prospective buyers to inspect the property and secure contingent financing.¹³¹ This encourages significantly higher sale prices, allowing for preservation of wealth to the property owners.¹³² This provision targets the problem of auction sales quickly going to the highest bidder—often a speculator or developer with lots of capital—a process not conducive to maximizing profit for land rich but cash poor property owners who would previously experience a drain in their wealth through forced sales.¹³³

B. Concerns and Potential Problems with the UPHPA as Written

The UPHPA is the most significant modern reform to partition law, and an ambitious aim at the problems plaguing heirs’ property

¹²⁴ *Id.* at 74; UPHPA, *supra* note 12, at 26.

¹²⁵ UPHPA, *supra* note 12, at 26.

¹²⁶ *Id.* at 23.

¹²⁷ Mitchell, *Historic Partition Law Reform*, *supra* note 28, at 74.

¹²⁸ *Id.*

¹²⁹ UPHPA, *supra* note 12, at 27-28.

¹³⁰ *Id.* at 28.

¹³¹ Mitchell, *Historic Partition Law Reform*, *supra* note 28, at 75.

¹³² *Id.*

¹³³ *Id.* (illustrating how the alternative of open market sales allows property owners a greater opportunity to purchase the property).

owners.¹³⁴ In drafting the law, the committee took into consideration the vulnerable status of many heirs' property owners who live on the margins of the economy and society.¹³⁵ However, there are still several critiques that scholars and advocates have brought up concerning the UHPA, especially regarding how well the model statute actually addresses the options available to already marginalized heirs' property owners.

Some critics have taken aim at the buyout provision and questioned its true applicability. They argue that there may be many instances where the only heirs able to meaningfully apply the buyout provision are those who are "at least solidly middle class," as it requires existing capital.¹³⁶ As previously discussed, many heirs' property owners are economically marginalized. The buyout provision requires that an appraiser determine a fair market value of the property; the purchase price of the initiating cotenant is their fractional interest multiplied by that fair market value.¹³⁷ If only one cotenant wants to initiate the buyout provision, they are responsible for "the entire cost."¹³⁸ This is potentially problematic for property owners whose largest asset is in fact, their interest in their heirs' property; they likely would not have enough money to enact the buyout provision.¹³⁹ This raises the question of how truly effective the buyout provision is at preserving property, as it operates at least in part on the assumption that property owners have the resources available to meet that first right of purchase.¹⁴⁰ When heirs lack the capital to purchase their own property, as many likely do, the buyout provision becomes futile.¹⁴¹

Another critique of the UHPA is its failure to address legal fees. Legal fees pose another economic burden, especially to owners without much capital outside of their property.¹⁴² Property owners defending their land against a partition "can incur thousands of dollars in attorneys' fees, court fees, and [survey fees]."¹⁴³ While the drafters acknowledged that legal fees can be harmful for economically

¹³⁴ Thomas Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1, 6 (2014).

¹³⁵ See Thomas W. Mitchell, *Restoring Hope for Heirs Property Owners: The Uniform Partition of Heirs Property Act*, 40 ST. & LOC. L. NEWS 6, 6 (2016).

¹³⁶ Mitchell, *Reforming Property Law*, *supra* note 134, at 73.

¹³⁷ Cole, *supra* note 65, at 361.

¹³⁸ *Id.*

¹³⁹ *Id.* at 361-62; Jesse R. Richardson, Jr., *The Uniform Partition of Heirs Property Act: Treating Symptoms and Not the Cause?*, 45 REAL EST. L.J. 507, 545 (2017).

¹⁴⁰ Cole, *supra* note 65, at 361-62.

¹⁴¹ Richardson, *supra* note 139, at 545.

¹⁴² Cole, *supra* note 65, at 367.

¹⁴³ *Id.*

vulnerable owners, there are no provisions in the UPHPA to address this concern.¹⁴⁴ This leaves the determination of allocation of legal fees up to existing state law, which, as discussed previously, mostly places enormous burden on owners fighting partition. Vulnerable property owners who lack wealth and are unable to incur massive legal fees have no recourse and will be less likely to appeal an unwanted partition.¹⁴⁵ A fee-shifting provision could potentially mitigate this issue. A provision shifting the legal fees of all non-initiating cotenants to the tenant initiating partition could minimize the number of partition actions in general, preserve ownership, and act as a deterrent against predatory developers looking to snatch up land through partition sales.¹⁴⁶ Land speculators may be hesitant to buy out an individual interest to force a sale because they would know that the other cotenants have a means to defend against a potential partition action.¹⁴⁷

Another issue with the heirs' property model that the UPHPA fails to address is the problem of notice. As discussed previously, existing rules around notice are not satisfactory to the interest of the property owners. The model statute does change notice standards in small part to require that a petitioner filing notice by publication also publish a notice at the property with the name and address of the relevant court.¹⁴⁸ This improvement is small and helpful, but does not address the true heart of the notice issue, which relates to the geographic dispersal of many heirs' property owners.¹⁴⁹ Especially in the case of Black heirs' property owners who migrated north in large numbers during the twentieth century,¹⁵⁰ notice at the property is not useful. One-way scholars have suggested ameliorating problems surrounding adequate notice is to require a showing to the court of efforts made to locate all heirs' property owners.¹⁵¹ For example, the petitioner filing for partition would have to state in an affidavit that they made a reasonable effort to locate all existing owners and describe the steps they took to do so before issuing a notice by publication.¹⁵²

Finally, scholars have also suggested adding a provision for mandatory mediation. This aims to address the underlying cause of a

¹⁴⁴ *Id.* at 368.

¹⁴⁵ *Id.* at 368-69.

¹⁴⁶ *Id.* at 370.

¹⁴⁷ *Id.*

¹⁴⁸ UPHPA, *supra* note 12, at 12-13.

¹⁴⁹ Batra, *supra* note 11, at 761-62.

¹⁵⁰ DE JONG, *supra* note 42, at 188.

¹⁵¹ Batra, *supra* note 11, at 762.

¹⁵² *Id.*

significant number of heirs' property disputes that arise from family divisions.¹⁵³ Mediation is already used by several states in other property law contexts, including mandatory foreclosure mediation.¹⁵⁴ Additionally, mediation has proven effective in family law disputes, including divorce proceedings where issues over division of property often arise.¹⁵⁵ Due to the nature of heirs' property as a complex inter-generational web, a mediation provision may prove effective in settling disputes outside of court.

C. State Enactment

So far, the UHPA has been enacted in nineteen states and introduced in eight more, plus the District of Columbia.¹⁵⁶ In Virginia, Governor Ralph Northam signed the state's enactment of the UHPA into law in 2020.¹⁵⁷ The Virginia enactment (HB 1605) is unique because legislative committee did not recommend passage of the model UHPA, but instead spent several months working with the Uniform Commission to create a unique statute that incorporated certain UHPA reforms and introduced their own.¹⁵⁸ Most notably, HB 1605 expands the language of the model statute to extend beyond simply heirs' property to "any property where there is no written agreement among covenants," citing the "arbitrary nature" of the UHPA's formal definition of heirs' property.¹⁵⁹ This makes the adoption of HB 1605 relevant to all partition actions in the state, giving the statute a larger breadth.¹⁶⁰ Given the fact that heirs' property by nature is unstable and difficult to formally pin down, expanding the provisions to all partition actions attempts to catch the fluid situations that may fall through the cracks of a strict definition. Additionally, HB 1605 went further than the UHPA in terms of favoring partition in kind. While the UHPA

¹⁵³ *Id.* at 763.

¹⁵⁴ *Id.*; see Foreclosure Mediation Program, ME. REV. STAT. ANN. tit. 14, § 6321-A (2021) (mandating foreclosure mediation when a lender is foreclosing on an owner-occupied home); Residential Mortgage Foreclosure Medication Program, DEL. CODE ANN. tit. 10 § 5062C (2019) (same).

¹⁵⁵ Batra, *supra* note 11, at 763.

¹⁵⁶ *Partition of Heirs Property Act*, UNIF. LAW COMM'N, <https://www.uniformlaws.org/committees/community-home?communitykey=50724584-e808-4255-bc5d-8ea4e588371d> (last visited Jan. 6, 2022).

¹⁵⁷ Press Release, Office of the Governor, Governor Northam Signs 32 Bills into Law (Mar. 4, 2020), <https://www.governor.virginia.gov/newsroom/all-releases/2020/march/headline-852985-en.html>.

¹⁵⁸ Gogal, *supra* note 121, at 5-6.

¹⁵⁹ *Id.* at 7.

¹⁶⁰ *Id.*

introduced a totality of the circumstances test in order to shift a court's decision making toward partition in kind, adopting the language as is in Virginia would have weakened already existing statutory preference against partition in sale.¹⁶¹ HB 1605 instead enshrined this preference by creating a three-step approach for Virginia courts to "first consider partition in kind, then allotment/buyout with enumerated factors," and then "sale only as a last resort."¹⁶²

CONCLUSION

The Virginia enactment acts as a model for states seeking to adopt the UHPA and tailor it to its own unique legislative circumstances. Legislative advocacy for heirs' property reform often involves various actors, including land trust organizations, farm organizations, realtors' associations, and legal organizations. While the UHPA is certainly a significant step towards reforming the law around heirs' property, it should not be a blanket rule to be applied blindly in every jurisdiction. Heirs' property rose to prominence purposefully outside conventional institutions, and consideration of this history is critical to any remedy. Cultural context helps place vulnerable property owners at the center of policymaking, which in turn can allow for more far-reaching remedies.

¹⁶¹ *Id.* at 8.

¹⁶² *Id.* at 9.