

SPLITTING HEIRS: HOW HEIRS' PROPERTY CONTINUES THE LEGACY OF CHALLENGES TO THE ACCUMULATION OF WEALTH FOR BLACK AMERICANS

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What happens to a dream deferred?
—Langston Hughes¹

Abstract

When people die without executing estate planning instruments, their real property is divided to their heirs as tenants in common. Property owned in this arrangement is called heirs' property. The issues associated with heirs' property are compounded when several generations pass without proper estate planning, and interest in the real property becomes highly fractionated. African Americans are more likely to die without wills, so the risks of heirs' properties are disproportionately felt by people of color. One threat to heirs' property arises when third parties buy out one heir's share to force a partition sale. The Uniform Partition of Heirs Property Act (UPHPA) provides procedural safeguards for these partition sales. This Note explains the history behind Black land ownership in America, the problems associated with heirs' property, and the provisions and shortcomings of the UPHPA.

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1. LANGSTON HUGHES, *Harlem*, in THE COLLECTED WORKS OF LANGSTON HUGHES (Vintage Classics 1990).

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INTRODUCTION

Heirs' property—which is land or other property owned by a family jointly due to intestacy—presents unique challenges to the accumulation of wealth and the free enjoyment of property. In this Note, I will explain how these challenges contribute to the cycle of poverty, particularly in Southern Black American communities. The Uniform Law Commission and other groups have successfully passed some protections for cotenant owners of inherited property, which are being adopted in many states.² I will discuss the Uniform Partition of Heirs Property Act and state responses to it. Lastly, I will discuss the gaps in the Act and the specific actions that counties and states can take to offer much needed protections. The problems facing property owners range from unscrupulous developers to the dwindling ability to enjoy and profit from over-fractionated land. States have a legitimate need to take an active role in clearing land titles, not only to protect impoverished families and communities but also to facilitate greater alienability and efficiency in resources. While the issues surrounding heirs' property affects people of all races with lower- and middle-class incomes, the issues disproportionately affect Black Americans. This disparate impact plays a part in the ubiquitous propensity for American law to disinherit and impoverish people of color—whether intentionally or unintentionally.

I. HISTORY OF BLACK PROPERTY: NO ACRES, NO MULES

America has a long history of denying Black Americans the right to own property. Many systems have contributed to keeping whole communities in perpetual poverty. These systems remain in our laws today, and Black Americans continue to feel the disparate effects. For most of American history, Black people could not own property, as they

2. *Partition of Heirs Property Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?communitykey=50724584-e808-4255-bc5d-8ea4e588371d&tab=groupdetails> [<https://perma.cc/52U6-5QD2>] (last visited July 16, 2022).

were considered property themselves.³ Furthermore, marriages among slaves were not legally recognized, and families were often torn apart by the slave trade, making genealogy an almost impossible feat.⁴ Without any property in an estate to devise or bequest, and no legally-recognizable family to receive property (intestate or otherwise), slaves had no ability to accumulate wealth over time.

Slavery was abolished with the ratification of the Thirteenth Amendment,⁵ and while Black Americans could theoretically hold property, they did not have access to the tools and means necessary to create wealth. For one, the famed and scanty “forty acres and a mule” promise under Order 15, which led many freed families to believe they would have a right to claim forty acres of land to themselves, was outright denied.⁶ The land that Black Americans worked as slaves was still owned by slave masters, and many found themselves employed as sharecroppers for their former masters.⁷ Sharecropping kept workers tied to the land without giving them any rights to it.⁸ Workers were barred from moving to better opportunities and were often forbidden from selling their share of crops to anyone but the landowner.⁹ This system did not begin losing favor until the 1940s.¹⁰

Additionally, years of segregated neighborhoods and schools, coupled with a lack of equal access to the courts, kept Black Americans from the lion’s share of property of any real value, and Jim Crow laws sowed distrust of the legal system in Black communities.¹¹ Presently, the effect of segregation lingers in many ways. The current life expectancy in America is averaged at seventy-seven years.¹² Assuming this life

3. *Slave Codes*, U.S. HISTORY, <https://www.ushistory.org/us/6f.asp#:~:text=Legally%20considered%20property%2C%20slaves%20were,a%20white%20person%20was%20doomed> [https://perma.cc/543P-S5HE] (last visited Oct. 25, 2020).

4. *Id.*

5. U.S. CONST. amend. XIII, § 1.

6. Sarah McCammon, *The Story Behind ‘40 Acres and a Mule’*, NPR (Jan. 12, 2015, 6:02 PM), <https://www.npr.org/sections/codeswitch/2015/01/12/376781165/the-story-behind-40-acres-and-a-mule> [https://perma.cc/3Y8M-5CZ6].

7. *Slavery by Another Name*, PBS, <https://www.pbs.org/tpt/slavery-by-another-name/themes/sharecropping/#5:~:text=Though%20both%20groups%20were%20at,fade%20away%20in%20the%201940s> [https://perma.cc/ZL8S-2QFC] (last visited Sept. 24, 2021).

8. *See id.* (“Sharecropping is a system where the landlord/planter allows a tenant to use the land in exchange for a share of the crop.”).

9. *Id.*

10. *Id.*

11. *See generally* Sarah Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1270–74, 1307 (arguing that civil legal institutions may aid in perpetuating inequality and exclude certain groups from public institutions).

12. SHERRY MURPHY ET AL., MORTALITY IN THE UNITED STATES, 2020 (Nat’l Ctr. for Health Stat. ed., Dec. 2021), <https://www.cdc.gov/nchs/data/databriefs/db427.pdf> [https://perma.cc/CXM8-9YLG].

expectancy, the average person dying today was born in or around 1945. People who were nineteen at the passage of the Civil Rights Act of 1964 are currently at life expectancy today, and the same demographic was approximately twenty-three at the passage of the Fair Housing Act of 1968. It is no temporal wonder to conclude that Black Americans dying at life expectancy today have had to acquire their property in an environment hostile to their rights to own it. Furthermore, 50% of Black Americans die intestate, leaving what property they do own heavily fractionated and burdensome to probate.¹³ This problem is difficult to cope with because Black Americans are far more likely to invest in real property than in stock, and real property is harder to evenly distribute.¹⁴ Many Black Americans choose more tangible forms of investment because they seem safer.¹⁵ The problem with any low-risk investment is diminished reward. In addition, attitudes and tradition have diminished Black Americans' access to, general know-how of, and trust in the processes necessary to plan for and protect one's property.¹⁶ The next section specifically explores several factors about how the theme of inequality for Black Americans and Black property is affected and compounded by death.

II. THE PROBLEM WITH DEATH

While commenting on the durability of the U.S. Constitution, Benjamin Franklin famously observed that only two things are certain in this world: death and taxes.¹⁷ And while what happens to a person after they die is one of the great mysteries of life, the impact of that death on the living can be a similarly confusing and cloudy matter. Many Americans die without effective estate planning, and this can have adverse consequences on a family's ability not only to accumulate

13. Tomi Akitunde, *50% Of African Americans Die Without A Will—It's Time To Change That*, MATER MEA, <https://www.matermea.com/blog/estate-planning-basics-african-americans-black-families> [https://perma.cc/E54R-JL4E] (last visited May 26, 2022).

14. Stan Choe, *Stocks are Soaring, and Most Black People are Missing Out*, ASSOCIATED PRESS NEWS (Oct. 12, 2020), <https://apnews.com/article/virus-outbreak-race-and-ethnicity-business-us-news-ap-top-news-69fe836e19a8dfe89d73e8e4be6d480c> [https://perma.cc/B2LN-5V2T].

15. Glenn C. Lowry, *Opting Out of the Boom; Why More Blacks Don't Invest*, N.Y. TIMES (June 7, 1998), <https://www.nytimes.com/1998/06/07/magazine/opting-out-of-the-boom-why-more-blacks-don-t-invest.html> [https://perma.cc/8K25-BW9C].

16. See Shani M. King, *Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African American Staff Attorneys*, CORNELL J. L. & PUB. POL'Y 1, 15 (2008).

17. NCC Staff, *Benjamin Franklin's Last Great Quote and the Constitution*, NATIONAL CONSTITUTION CENTER (Nov. 13, 2021), <https://constitutioncenter.org/blog/benjamin-franklins-last-great-quote-and-the-constitution> [https://perma.cc/6BSA-4ARE]; BENJAMIN FRANKLIN, THE WRITINGS OF BENJAMIN FRANKLIN 69 (Albert Henry Smyth ed., Nabu Press 2010) (1907).

generational wealth but also in staying out of homelessness and poverty.¹⁸ Conversely, 21% of American households can attribute almost a quarter of their wealth to deathtime transfers.¹⁹ It is a surprising figure to reckon with, but it shows how a state's treatment of property at death contributes to the accumulation of wealth. Unsurprisingly, this kind of transfer tends to benefit white Americans more than it benefits Black Americans.²⁰ So while death and property seem to be nebulous concepts, the American system is reliably predictable in who it benefits.

Estate problems disproportionately affect the Black community.²¹ The cycle of poverty in lower-income neighborhoods is stronger in Black communities, in which people are less likely to have a valid will or other estate planning tools in place.²² And this problem is not merely an issue of accumulating property in life but also of having access to the tools that make title in the property durable.²³ Black Americans managed to acquire fifteen million acres of land between the end of the American Civil War and 1919, but today, 97% of that land is no longer in their ownership.²⁴ The loss of wealth galvanizes the poverty cycle so that it is more difficult to break. This Note discusses the modern issues with probate that disproportionately affect Black communities and families. Specifically, this Note will address the loss of property that occurs with heirs, the current legislation to remedy these problems, and possible solutions to the gaps in these laws.

III. WHAT HAPPENS WHEN WE DIE?

First, it is important to explain a possible discrepancy in estate planning statistics. While 78% of Americans aged eighteen to thirty-six do not currently have wills, 81% of Americans aged seventy-two and

18. See Ann Margaret Carrozza, *Don't Let Bad Estate-Planning Make You Homeless!*, HUFFPOST (May 9, 2012, 8:52 PM), https://www.huffpost.com/entry/dont-let-bad-estate-planning-make-you-homeless_b_1503720 [<https://perma.cc/78MX-49V3>].

19. Edward N. Wolff & Maury Gittleman, *Inheritances and the Distribution of Wealth or Whatever Happened to the Great Inheritance Boom?*, J. ECON. INEQ. 440, 463 (2013).

20. Janelle Jones, *Receiving an Inheritance Helps White Families More Than Black Families*, ECON. POL'Y INST. (Feb. 17, 2017), <https://www.epi.org/publication/receiving-an-inheritance-helps-white-families-more-than-black-families/> [<https://perma.cc/3Q8L-Y765>].

21. See *id.*

22. Akitunde, *supra* note 13; see Michelle Fox, *'We are in a State of Emergency.' More than 70% of Black Americans Don't Have a Will. Here's why a Plan is Key*, CNBC (Feb. 7, 2022), <https://www.cnbc.com/2022/02/07/70-percent-plus-of-black-americans-dont-have-wills-why-estate-plans-are-key.html> [<https://perma.cc/AJ5P-DVM4>] (explaining that Black Americans are less likely to have a will or engage in estate planning).

23. Greene, *supra* note 11, at 1270.

24. Sheila McGrory-Klyza, *Preserving African-American Land Heritage*, LAND TRUST ALLIANCE, <https://www.landtrustalliance.org/success-story/preserving-african-american-land-heritage> [<https://perma.cc/7D4D-62E6>] (last visited Sept. 22, 2021).

older do.²⁵ People lack the prescience to know the day or hour of their death, so it is prudent for everyone to plan for their property. However, for the purposes of generational wealth accumulation, the problem has less to do with the amount of living people without wills or other estate planning tools and more to do with how many people actually die without plans for their property. Black Americans are more likely to die without a will than white Americans.²⁶ Additionally, dying testate does little to help anyone if the will is invalid, especially in states with strict requirements for creating testamentary documents, such as Florida.²⁷ This makes access to good estate planning resources crucial.²⁸ Many people hold off making a will until they have enough assets to divide after their debts and expenses, but that is not necessarily the best idea.²⁹ Intestacy affects even modest estates in ways that a will, trust, or other estate planning tools may have prevented.³⁰ In this section, I will cover some of the common intestacy processes and protections and how they still fall short in protecting generational wealth.

The default fate of intestate real property is a tenancy in common divided among a decedent's heirs.³¹ State intestacy laws govern how, how much, and to whom property descends. Each recipient has a fractional

25. *More Than Half of American Adults Don't Have Wills, 2017 Survey Shows*, CARING.COM, <https://www.caring.com/caregivers/estate-planning/wills-survey/2017-survey/#:~:text=Age%20and%20assets%20are%20the%20greatest%20barriers&text=According%20to%20the%20survey%2C%2081,do%20not%20have%20a%20will> [https://perma.cc/NEX6-E32F] (last visited Sept. 22, 2021).

26. Fox, *supra* note 22.

27. Some states, including Florida, have strict will requirements. If a testamentary document is deemed invalid, a whole will may be thrown out. Generational mistrust in the legal system and of lawyers adds to this problem because without effective counsel, wills are more likely to have mistakes. See *Florida Will Execution: Strict Compliance with Statute Required*, ADRIAN PHILIP THOMAS, P.A. (Mar. 26, 2019), <https://www.florida-probate-lawyer.com/blog/2019/march/florida-will-execution-strict-compliance-with-st/> [https://perma.cc/P7AB-2DHB]; see also *Proper Will Preparation and Execution*, ADRIAN PHILIP THOMAS, P.A. (Apr. 26, 2010), <https://www.florida-probate-lawyer.com/blog/2010/april/proper-will-preparation-and-execution/> [https://perma.cc/3XBS-RFA7].

28. See *Florida Will Execution*, *supra* note 27.

29. Barbranda Lumpkins Walls, *Haven't Done a Will Yet?*, AARP (Feb. 24, 2017), <https://www.aarp.org/money/investing/info-2017/half-of-adults-do-not-have-wills.html#:~:text=The%20top%20two%20reasons%20of,documents%20and%20plans%20in%20order> [https://perma.cc/3VA8-KWNH].

30. See *Avoiding Probate: The Small Estate*, NOLO, <https://www.nolo.com/legal-encyclopedia/avoid-probate-small-estate-29629.html> [https://perma.cc/G8XH-9PYD] (last visited Sept. 22, 2021).

31. Joan Flocks et al., *The Disproportionate Impact of Heirs' Property in Florida's Low-Income Communities of Color*, 92 FLA. BAR J. 57, 57 (2018), <https://www.floridabar.org/the-florida-bar-journal/the-disproportionate-impact-of-heirs-property-in-floridas-low-income-communities-of-color/> [https://perma.cc/Y24K-HRLX].

interest in the whole property.³² Extreme fractionation can occur when there are multiple heirs.³³ Ownership can continue to splinter into smaller and smaller shares as more people die, as tenancies in common have no rights of survivorship.³⁴ Tenancies in common are tricky forms of ownership.³⁵ Most banks will not accept a cotenant's share as collateral for loans.³⁶ And identifying each cotenant can be difficult and expensive.³⁷ Cotenants have few rights in the property but share the burden of taxation and maintenance.³⁸ It is often unclear who is required to maintain the property, and the incentive to maintain is reduced by the very few rights that maintenance can yield.³⁹ This problem is compounded by how probate law is established to assume and favor a nuclear family—which is less common in predominately impoverished areas.⁴⁰ It is no mathematical marvel that divorce, remarriage, and children born within different marriages increase the number of intestate takers in many probate estates.⁴¹

The Southeast has the largest concentration of heirs' property, and a disproportionate numbers of these heirs' properties are owned in predominately Black communities.⁴² For example, 2.62% of residential property in Alachua County, Florida, is identified as heirs' property.⁴³ The highest concentration is found on the east side of Gainesville, in a

32. *Id.*

33. *How is Land or a House Divided Among More Than One Heir?*, HEIRBASE, https://heirbase.com/dividing_real_estate_among_heirs/ [<https://perma.cc/A6QX-ZX75>] (last visited Sept. 26, 2021).

34. Candace Webb, *Why Tenants in Common Have No Rights of Survivorship*, SFGATE (Jan. 15, 2019), <https://homeguides.sfgate.com/tenants-common-rights-survivorship-1434.html> [<https://perma.cc/EBW5-VQKE>].

35. See Brette Sember, *Joint Tenancy v. Tenants in Common*, LEGALZOOM (May 2, 2022), <https://www.legalzoom.com/articles/joint-tenancy-vs-tenants-in-common> [<https://perma.cc/DN Y9-84X4>] (noting that transfers of tenancy in common can lead to “sticky” situations).

36. Flocks et al., *supra* note 31, at 58.

37. See Sember, *supra* note 35 (explaining that tenancy in common can result in co-owners not knowing each other).

38. Flocks et al., *supra* note 31, at 57–58.

39. See Faith Rivers, *Inequality in Equity: The Tragedy of Tenancy in Common for Heirs' Property Owners Facing Partition in Equity*, 17 *TEMPLE POL. & CIV. RTS. L. REV.* 1, 51 (2007) (“[T]here are no corresponding obligations to contribute to the ongoing costs of maintaining the property.”).

40. See, e.g., Danaya C. Wright, *Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Nontraditional Families*, 25 *CORNELL J. L. & PUB. POL.'Y* 1, 5–6 (2015).

41. See Mary Randolph, *How an Estate Is Settled If There's No Will*, NOLO, <https://www.nolo.com/legal-encyclopedia/how-estate-settled-if-theres-32442.html> [<https://perma.cc/S6J5-G4PA>] (explaining that, depending on state law, a child who is adopted by a stepparent may inherit from the biological parents).

42. Flocks et al., *supra* note 31, at 57.

43. *Id.*

community that is traditionally majority Black.⁴⁴ Rural counties suffer more than non-rural counties, and areas with higher than 2.41% heirs' property are considered at-risk.⁴⁵ To reiterate, even when possessing the means to invest, Black Americans are likely to invest in more tangible, concrete investments, such as real estate as opposed to stock, to build wealth for themselves and their families.⁴⁶

IV. WHAT RISKS DO THESE PROPERTIES FACE?

A purported tactic among land developers is to find fractionated heirs' properties and buy out one of the cotenant's shares.⁴⁷ The developer then forces a partition sale of the whole property, forcing the remaining cotenants to accept less than what their share is actually worth.⁴⁸ Forced partitions of heirs' property have been described as "buying one share of Coca-Cola, and being able to go to court and demand a sale of the entire company."⁴⁹

The *Gainesville Sun* in Alachua County, Florida, reported on the forced partition of a seventy-acre farm owned by the Buchanons since the 1800s.⁵⁰ After two generations had passed the property with wills, the property was lost when one owner failed to make a will, believing his heirs would follow verbal instructions.⁵¹ Years later, a ninety-eight-year-old cotenant of the property decided to sell her share and the property was lost.⁵² Forced partitions have been heavily reported on over the years.⁵³ A series published by the Associated Press called *Torn from the Land* details the systemic obstacles Black Americans face trying to build lives in America.⁵⁴ The Associated Press reported that of the 80% of lost Black

44. *Id.*

45. *Id.*

46. Choe, *supra* note 14.

47. Ann Carpenter et al., *Understanding Heirs' Properties in the Southeast*, FEDERAL RESERVE BANK OF ATLANTA (Apr. 2016), <https://www.frbatlanta.org/community-development/publications/partners-update/2016/02/160419-understanding-heirs-properties-in-southeast> [https://perma.cc/89KC-XDE6].

48. See Todd Lewan & Dolores Barclay, *Developers and Lawyers Use a Legal Maneuver to Strip Black Families of Land*, THE AUTHENTIC VOICE, https://theauthenticvoice.org/main-stories/tornfromtheland/torn_part5/ [https://perma.cc/6PUU-RF98].

49. *Id.*

50. Danielle Ivanov, *City to Address 'Heirs' Property' Changes*, THE GAINESVILLE SUN (Aug. 8, 2020, 2:21 PM), <https://www.gainesville.com/story/news/local/2020/08/08/city-to-look-at-lsquoheirs-propertyrsquo-changes/42194027> [https://perma.cc/5CR2-9TS5].

51. *Id.*

52. *Id.*

53. *E.g.*, *Torn From the Land*, *The Associated Press*, THE AUTHENTIC VOICE, https://theauthenticvoice.org/teachersguide/teachersguide_tornfromtheland/ [https://perma.cc/R2JV-A6DU] (last visited July 16, 2022) (detailing the Associated Press's project studying forced partitions); see also Lewan & Barclay, *supra* note 48.

54. *Torn From the Land*, *supra* note 53.

property, at least half is attributable to forced partitions.⁵⁵ The coordinator for the Federation of Southern Cooperatives described forced partitions as “the all-time, slam-dunk method of separating blacks from their land.”⁵⁶ Even worse, the Associated Press reported that many of these partitions were not forced by descendants, but by their own lawyers.⁵⁷ While partition in kind is the preferred form, it is rarely considered in these heirs’ property cases.⁵⁸ The *Gainesville Sun* reports that Alachua County will address heirs’ properties problems to foster racial justice.⁵⁹

Another problem heirs’ properties face is back taxes, extra taxes, and other debts.⁶⁰ Tenancies in common are subject to not only the decedent’s creditors, but to state and local governments for property tax.⁶¹ It is not hard to imagine why tenants in common, who failed to probate the decedent’s property in the first place and who may not even know they have a share in the property, may not know they owe the county for their share of property taxes.⁶²

V. THE UPHPA: A DUE PROCESS PROTECTION

The Uniform Law Commission (ULC) recognized the ubiquity of these forced partitions and devised a model act that would offer cotenants some procedural protections against partitions called the Uniform Partition of Heirs Property Act (UPHPA).⁶³ Many states in the Southeast United States have adopted the UPHPA to address their counties at risk for these partitions. The ULC has described the UPHPA as follows:

UPHPA provides a series of simple due process protections: notice, appraisal, right of first refusal, and if the other cotenants choose not to exercise their right and a sale is required, a commercially reasonable sale supervised by the court to ensure all parties receive their fair share of the proceeds.⁶⁴

The UPHPA is the product of research conducted by the ULC. The research revealed that the heirs’ property problem was extensive enough

55. See Lewan & Barclay, *supra* note 48.

56. *Id.*

57. *Id.*

58. *Prefatory Note to UNIF. PARTITION OF HEIRS PROP. ACT (UNIF. L. COMM’N 2010).*

59. Ivanov, *supra* note 50.

60. Flocks et al., *supra* note 31, at 58.

61. See James Chen, *Tenancy in Common (TIC)*, INVESTOPEDIA (Oct. 22, 2021), https://www.investopedia.com/terms/t/tenancy_in_common.asp#:~:text=Property%20Taxes%20With%20Tenancy%20in%20Common&text=This%20stipulation%20means%20each%20of,level%20or%20percentage%20of%20ownership [https://perma.cc/2G6L-43Z5].

62. Flocks et al., *supra* note 31, at 58.

63. *Prefatory Note to UNIF. PARTITION OF HEIRS PROP. ACT (UNIF. L. COMM’N 2010).*

64. *Partition of Heirs Property Act*, *supra* note 2.

to warrant action, and that many such property owners are “depriv[ed] . . . of the fair market value” of their interests.⁶⁵ So far, twenty-one states and American jurisdictions have adopted some form of the UHPA, with currently introduced bills in eight states including the District of Columbia.⁶⁶ The first of the States to adopt the UHPA was Nevada in 2011, and Utah and Maryland were the most recent enactments in 2022.⁶⁷ This section will define what properties are protected and go over the protections and their potential shortcomings.

Crucial to understanding the UHPA is what kinds of properties it protects. The first part of the UHPA provides factors for determining how to identify heirs’ property:

(5) “Heirs property” means real property held in tenancy in common which satisfies all of the following requirements as of the filing of a partition action:

(A) there is no agreement in a record binding all the cotenants which governs the partition of the property;

(B) one or more of the cotenants acquired title from a relative, whether living or deceased; and

(C) Any of the following applies:

(i) 20 percent or more of the interests are held by cotenants who are relatives;

(ii) 20 percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased; or

(iii) 20 percent or more of the cotenants are relatives.⁶⁸

There are three main conjunctive identifiers after establishing a tenancy in common in real property. First is the “no agreement” requirement in Section 2(5)(A) of the UHPA.⁶⁹ This provision is important because properties with agreements that have already undergone probate (or another kind of legally binding administration of the property) do not need the same protections. If an agreement has been made to the partition, the agreement was probably reached by informed consent. These kinds of agreements are enforced by the court and can even be used to override a valid will.⁷⁰ Protections for agreed-to

65. Flocks et al., *supra* note 31, at 60.

66. *Partition of Heirs Property Act*, *supra* note 2.

67. *Id.*

68. UNIF. PARTITION OF HEIRS PROP. ACT § 2(5) (UNIF. L. COMM’N 2010).

69. *Id.* § 2(5)(A).

70. *In re Pendergrass’ Will*, 112 S.E.2d 562, 566–67 (N.C. 1960).

procedures most likely lie in contract remedies and therefore are out of the scope of the UHPA.

Next is the “acquired title from a relative” provision in Section 2(5)(B).⁷¹ Section 2(5)(B) is an interesting provision because it facially provides for more than just intestacy (whether living or deceased).⁷² This may be to protect the interests of cotenants who received their shares by representation of a disclaiming heir, for example. Section 2(5)(B)’s definition requires property to be family-owned to be considered heirs’ property.⁷³ The history described previously helps identify why this language is required.

Finally, the “cotenant relatives” provision in Section 2(5)(C)(i–iii) is satisfied in one of three ways.⁷⁴ These three options may be hard to distinguish. If (1) twenty percent of the property is family property (regardless of the number of members of that family), (2) twenty percent of the property is held by one person under requirement 2(5)(B), or (3) twenty percent of the people who have an interest are family (regardless of the collective percentage of the pie), then the property is protected.⁷⁵

So, the absence of an agreement, relationship between owners, and a percent threshold of interest constitute the definition of heirs’ properties.⁷⁶ This definition covers a good range of different scenarios where heirs’ property may present themselves. It balances the number of heirs and the number of shares in a way that protects controlling family interests.

A. Notice

The first procedural protection the UHPA makes is notice.⁷⁷ Because of Section 4 of the UHPA, heirs’ properties receive the same protections under each adopting state’s laws for notice by publication.⁷⁸ Section 4 requires a petitioner to place a conspicuous notice on the property.⁷⁹ However, some states have recognized the shortcomings of this provision. The Central Alabama Fair Housing Center urged the Alabama Legislature to extend the notice requirement:

The petitioner shall only be permitted to use notice by publication after stating in an affidavit that a reasonable effort has been made to locate the owners that remain

71. UNIF. PARTITION OF HEIRS PROP. ACT § 2(5)(B) (UNIF. L. COMM’N 2010).

72. *Id.*

73. *Id.*

74. *Id.* § 2(5)(C)(i–iii).

75. *Id.*

76. *See id.* § 2(5).

77. UNIF. PARTITION OF HEIRS PROP. ACT § 4 (UNIF. L. COMM’N 2010).

78. *See id.* § 4(b).

79. *See id.*

unknown and providing a description in the affidavit of the steps taken to locate the missing owner. Further, the petitioner shall send a notice to that owner's last known address.⁸⁰

This inclusion, importantly, has a similar flavor to the holding in *Mullane v. Central Hannover Bank & Trust Company*,⁸¹ which required more than constructive notice to individuals whose interests are at stake. This strikes at the heart of procedural protections. After all, “when notice is a person’s due, process which is a mere gesture is not due process.”⁸² The reason these properties need protection is because the owners tend to not understand how direly their property interests are at risk.⁸³ Many of the heirs that need notice might not even be aware of their interests depending on how tangled and clouded the title is. At the very least, the Alabama proposal adds a level of deterrence to a petitioner that would otherwise abuse a partition sale. The petitioner would be required to make the effort to find all individuals with an interest in the property.⁸⁴ Untangling the title in such a notoriously tricky case adds a much-needed layer of protection.

B. Appraisal

The next protection offered by the UPHPA is appraisal for cotenants who agree to a partition by sale. If the court decides that a property to be partitioned is heirs’ property, then the court will determine the fair market value of the property, granted certain conditions are met.⁸⁵ Section 6 of the UPHPA lays out the procedure for determining fair market value.⁸⁶ The first subsection expresses that family agreements on a value are accepted by the court.⁸⁷ This follows the trend in probate that courts play a passive role in probate administration.⁸⁸ Next, the cost of the appraisal should not exceed the evidentiary value of the property.⁸⁹ Appraisals can

80. Letter from John Pollock, Cent. Fair Housing Ctr. to Thomas Mitchell (Oct. 24, 2007) (on file with author).

81. 339 U.S. 306, 313–14 (1950).

82. *Id.* at 315.

83. *See Prefatory Note to UNIF. PARTITION OF HEIRS PROP. ACT* (UNIF. L. COMM’N 2010) (“Many if not most of these heirs property owners have little or no understanding of the legal rules governing partition of tenancy-in-common property.”).

84. *See* Letter from John Pollock, *supra* note 80.

85. UNIF. PARTITION OF HEIRS PROP. ACT § 6(a) (UNIF. L. COMM’N 2010).

86. *Id.* § 6(a)–(g).

87. *Id.* § 6(b).

88. *See UNIF. PROB. CODE art. III cmt.* (UNIF. L. COMM’N 2019) (“Overall, the system accepts the premise that the court’s role in regard to probate and administration . . . is wholly passive until some interested person invokes its power to secure resolution of a matter.”).

89. UNIF. PARTITION OF HEIRS PROP. ACT § 6(c) (UNIF. L. COMM’N 2010).

cost anywhere from \$300 to \$400.⁹⁰ In such a case, the court determines the fair market value by an evidentiary hearing and sends notice to all parties.⁹¹ This ensures that, through these legal proceedings, cost of appraising will not drive up the total partition price.

Barring family settlements and very low-value property estimations, the court appoints an independent property appraiser.⁹² To determine fair market value, the appraiser assumes the price of the property for sole ownership in a fee simple absolute.⁹³ This maximizes the value of the property, since tenancies in common and other fractioned shares are worth considerably less than fee simple ownership.⁹⁴ The procedure for appraisal may be affected by state law—some states require *all* property sales to be appraised in court.⁹⁵

In addition to appraisal rights, the UPHPA provides for the procedure of providing notice of appraisal to the parties.⁹⁶ If necessary, the parties can admit additional evidence to challenge the appraisal value.⁹⁷ This provides not only a safeguard against accidental discrepancies in valuation, but also threatens continued litigation, which drives up the risk of legal fees, thereby making partition less and less attractive.

C. *Right of First Refusal*

A right of first refusal is “[a] potential buyer’s contractual right to meet the terms of a third party’s higher offer.”⁹⁸ It gives the potential buyer the ability to enter into an agreement before any other person or entity.⁹⁹ The right of first refusal grants cotenants in heirs’ property the right to accept or decline an offer from a partitioner before any other

90. Ramsey Solutions, *How Much Does a Home Appraisal Cost?*, RAMSEY (June 20, 2022), <https://www.daveramsey.com/blog/how-much-do-home-appraisals-cost> [<https://perma.cc/6FTQ-YCJA>].

91. UNIF. PARTITION OF HEIRS PROP. ACT § 6(c) (UNIF. L. COMM’N 2010).

92. *Id.* § 6(d).

93. *Id.*

94. See Aaron Stumpf, *Higher Valuation Discounts for Undivided Interests?*, STOUT (Mar. 1, 2010), <https://www.stout.com/en/insights/article/higher-valuation-discounts-undivided-interests> [<https://perma.cc/8M99-HAPY>] (“The detrimental economic characteristics of undivided interests permit the application of valuation discounts when estimating their values. For example, if an asset is held through a Tenancy in Common and has a market value of \$100 in fee-simple interest, it is unlikely that a 25% undivided interest would be worth \$25. In fact, . . . the value of an undivided interest may be substantially less than a pro-rata share of a fee-simple interest.”).

95. UNIF. PARTITION OF HEIRS PROP. ACT § 6 cmt. 1 (UNIF. L. COMM’N 2010).

96. See *id.* § 6(e).

97. See *id.* at § 6(f).

98. *Right of First Refusal*, BLACK’S LAW DICTIONARY (10th ed. 2014).

99. James Chen, *Right of First Refusal*, INVESTOPEDIA (Sept. 13, 2020), [https://www.investopedia.com/terms/r/rightoffirstrefusal.asp#:~:text=Right%20of%20first%20refusal%20\(ROFR,free%20to%20entertain%20other%20offers](https://www.investopedia.com/terms/r/rightoffirstrefusal.asp#:~:text=Right%20of%20first%20refusal%20(ROFR,free%20to%20entertain%20other%20offers) [<https://perma.cc/6AER-8ZHG>].

party.¹⁰⁰ This gives cotenants an option to buyout instead of engaging in a forced partition sale. A right of first refusal also protects cotenants in heirs' property by effectively forbidding negotiations with third parties before the qualifying cotenants decline to accept an offer.¹⁰¹ In essence, the difficulty in entering pricing negotiations makes it harder to sell the property, thus making less attractive the acquisition of shares in heirs' property for the purpose of buying families out of their inherited land.

The right of first refusal is codified in Section 7, entitled "Cotenant Buyout," of the UPHPA, and is the longest and most detailed section of the UPHPA. Section 7 lays out the procedures for a cotenant to affect a partition sale.¹⁰² This can only take place after the court-supervised appraisal rights, outlined in Section 6, have been followed.¹⁰³ The Official Comment to Section 7 explains that the mechanics are laid out to help judges understand and implement the math and steps in the buyout process, as many judges in this field may not be familiar with the way the procedure mirrors contractual rights of first refusal and corporate subscription agreements.¹⁰⁴

D. Fair Share

The next due process protection the UPHPA provides heirs' properties is triggered if any cotenants remain after the right of first refusal, and a partition in kind would not result in a great manifest prejudice as a group.¹⁰⁵ The provisions under Sections 8 and 9 conveying these rights ensure a court-supervised sale, so the remaining cotenants receive a reasonable fair share of the commercial price of the sold property.¹⁰⁶

PARTITION IN KIND

The first step after appraisal is to determine whether a partition in kind is more appropriate than a partition by sale.¹⁰⁷ In a partition in kind, the property is split up into unfractionated ownership according to each cotenant's share.¹⁰⁸ For example, a cotenant with 5% ownership in the property could become the sole owner of a parcel representing 5% of the property. Partitions in kind are favored by the court, and Section 9 of the

100. *Id.*

101. *See id.*

102. UNIF. PARTITION OF HEIRS PROP. ACT § 7 (UNIF. L. COMM'N 2010).

103. *See id.* § 7(a).

104. *Id.* § 7 cmt. 2.

105. *Id.* § 8(a).

106. *See id.* §§ 8, 9.

107. *See id.* § 8(b).

108. *Partition by Sale vs Partition in Kind*, KING LAW, <https://kinglawoffices.com/blog/estate-planning/partition-proceedings/partition-by-sale-vs-partition-in-kind-2/> [<https://perma.cc/7SBP-RE8C>] (last visited July 4, 2022).

UPHPA provides a set of factors to consider in determining whether a partition in kind would be a great prejudice.¹⁰⁹ While not all factors need to be present to order a partition in kind, no single factor is dispositive and the totality of all relevant factors and circumstances should be considered.¹¹⁰

Many of the factors in Section 9 contain practical, economic, and even sentimental considerations for the propriety of the partition form:

- (1) whether the heirs property practicably can be divided among the cotenants;
- (2) whether partition in kind would apportion the property in such a way that the aggregate fair market value of the parcels resulting from the division would be materially less than the value of the property if it were sold as a whole, taking into account the condition under which a court-ordered sale likely would occur;
- (3) evidence of the collective duration of ownership or possession of the property by a cotenant and one or more predecessors in title or predecessors in possession to the cotenant who are or were relatives of the cotenant or each other;
- (4) a cotenant's sentimental attachment to the property, including any attachment arising because the property has ancestral or other unique or special value to the cotenant;
- (5) the lawful use being made of the property by a cotenant and the degree to which the cotenant would be harmed if the cotenant could not continue the same use of the property;
- (6) the degree to which the cotenants have contributed their pro rata share of the property taxes, insurance, and other expenses associated with maintaining ownership of the property or have contributed to the physical improvement, maintenance, or upkeep of the property; and
- (7) any other relevant factor.¹¹¹

The UPHPA does not provide how much weight the court should assign each factor. This may give the court ample discretion to unjustifiably order partition by sales. However, discretion serves an important purpose. The Comment to Section 9 provides that while economic considerations are very important, some land has important

109. UNIF. PARTITION OF HEIRS PROP. ACT § 9(a) (UNIF. L. COMM'N 2010).

110. *Id.* § 9 cmt. 1.

111. *Id.* § 9(a).

ancestral or religious significance.¹¹² However, the Comment makes clear that if a partition in kind is impractical or it diminishes the separate fair market value, the court should order a partition by sale.¹¹³ This partition determination procedure is designed to differ from specific state partition determinations. The UHPA provides greater protections against states disproportionately ordering partitions by sales.¹¹⁴ “Great prejudice” is at least nominally a high standard to meet.¹¹⁵ Furthermore, the Comment to Section 8 suggests that some states may wish to amend the act to allow for a partial partition in kind and by sale.¹¹⁶

PARTITION ALTERNATIVES

If cotenants do not exercise their right of first refusal, and the court decides that partition by sale is most appropriate for the property in question, the court is responsible for supervising the sale and ensuring the cotenants receive their fair share.¹¹⁷ Section 10 of the UHPA provides that the sale must be done in an open-market sale unless the court finds that an auction or sealed bid would be more economically advantageous to the parties.¹¹⁸

VI. STILL UNDER THREAT: WHAT THE UHPA DOESN'T COVER

The UHPA is undoubtedly well-intentioned, but mere intention is no guarantee that it is well-drafted. As a response to another article published by the Florida Bar Journal, Manuel Farach published: “The Uniform Partition of Heirs Property Act: A Solution in Search of a Problem.”¹¹⁹ Farach argues that the UHPA’s due process protections are already covered by Florida law.¹²⁰ Because Florida identifies partitions as adversary proceedings, strict notice requirements are in place.¹²¹ Farach

112. *Id.* § 9 cmt. 4.

113. *Id.* § 9 cmt. 2.

114. *See Prefatory Note to UNIF. PARTITION OF HEIRS PROP. ACT (UNIF. L. COMM’N 2010)* (“[C]ourts in a large number of states typically resolve partition actions by ordering partition by sale.”).

115. *See UNIF. PARTITION OF HEIRS PROP. ACT § 8(a) (UNIF. L. COMM’N 2010)*.

116. *See id.* § 8 cmt. 1 (“This Act neither prescribes nor prohibits a partition in kind of part of the heirs property and partition by sale of the remainder.”).

117. *Id.* §§ 8(b), 10(a)–(b), 10(e).

118. *Id.* § 10(a).

119. *See Flocks et al., supra* note 31 (describing how heirs’ property issues disproportionately affect Black Americans in Florida); *see also* Manuel Farach, *The Uniform Partition of Heirs Property Act: A Solution in Search of a Problem*, 92 FLA. BAR J. 56, 56 (2018) (“A recent article in The Florida Bar Journal extolled the virtues of the Uniform Partition of Heirs Property Act.”).

120. Farach, *supra* note 119, at 58–59.

121. *Id.* at 58.

also points out the difficulty in ordering partition in kind.¹²² Partitions in kind are often improper because of the easements and other access problems that partitioning introduces to properties.¹²³ It is also difficult to partition land in so many fractioned shares while maintaining a fair distribution.¹²⁴

The Gainesville Sun article seems to posit that the Buchanon farm was unjustly forced into partition by remnants of racist legal regimes.¹²⁵ However, much of the genealogical research cited to by the article was researched and presented by the attorney of the selling cotenant, Adam Towers of Bogin, Munns & Munns, P.A. Apparently, the ninety-eight-year-old cotenant who decided to sell her share approached Towers to initiate the sale because the land was otherwise no use to her or any other heir.¹²⁶ This insight highlights two problems with the UPHPA. First, in keeping with the Gainesville Sun article, news outlets have no issue presenting partition sales in a light that may exaggerate the issue addressed by the UPHPA. Second, and more importantly, the UPHPA was meant to help low-income communities freely enjoy their land as they saw fit, but as Farach argues, the UPHPA hindered families more than it helped. Extra appraising fees and time in court over-encumber the property.¹²⁷ Also, selling cotenants may be barred from getting any benefit from the sale because of the UPHPA's rights of first refusal and the auctioning process.¹²⁸

Another issue is the difficulty in identifying which properties are at risk. First, since the decedents failed to effectively plan for their property after death (whether by conscious decision, lack of resources, or lack of awareness), these estates are predisposed to fall through the cracks. The decedents' heirs own only a fractional share of the land, so many of these heirs lack the resources, incentive, and know-how to properly clear title to the land.¹²⁹ Courts determine whether a property is an "heirs' property," but the issue is circular: a deficiency arising from a lack of access to the court cannot have an effective remedy that requires access to the court. As discussed, the UPHPA addresses the problem of heirs' property having its clouded title taken advantage of by unethical opportunists.¹³⁰ The procedural walls the UPHPA places around heirs'

122. *Id.*

123. *Id.*

124. *Id.*

125. Ivanov, *supra* note 50.

126. Letter from Adam Towers, S'holder, Bogin, Munns & Munns, P.A., to author (Feb. 24, 2021) (on file with author).

127. See Farach, *supra* note 119, at 58 ("The act unfortunately does not take into account these practicalities and unintentionally creates more costs and time delays for the parties.").

128. UNIF. PARTITION OF HEIRS PROP. ACT §§ 7, 10 (UNIF. L. COMM'N 2010).

129. *Prefatory Note to UNIF. PARTITION OF HEIRS PROP. ACT* (UNIF. L. COMM'N 2010).

130. Lewan & Barclay, *supra* note 48.

property rights make it more cumbersome to swoop into family-owned property. However, other problems still affect heirs' property. While the UHPA protects against forced partition sales, it does not address the problems non-probated estates and tenancies in common (the cause and effect of intestacy) have on title and free alienability.¹³¹ The added court costs and procedures only further encumbers the process of allowing families to benefit from their own land.¹³²

The UHPA provides procedural and due process safeguards in partition actions, but the issue remains that the longer a title is clouded, the cloudier a title becomes: the number of cotenants increase exponentially as more people die and pass their property rights (many intestate), and the cotenants become more difficult to identify. Furthermore, it takes time to track down these heirs. Difficulty with identification is compounded by divorces, children born out of wedlock, children from different marriages, and the fact that some estates go decades without being probated. The property then passes further and further out to more distant branches of the family tree. This is a problem because the court and attorney's fees are still paid through the partition sale.¹³³ All this genealogical and title research could potentially eat up the full sale price unless the property is a large, profitable tract of land. The UHPA therefore does little to protect smaller, residential properties—potentially family homes.

Land can be tied up in an unclear title for years. The families that lacked the means or foresight to plan for the future are unlikely to effectively carry out probate. Many times, the name of a deceased original owner or deceased cotenants remain on the title for years, possibly for the duration of ownership.¹³⁴ Fixing this problem is timely and tedious.¹³⁵ Lawyers at county and city levels would need to identify heirs' property at their own initiative and prepare the necessary documents to transfer title to the rightful owners. The U.S. Department of Agriculture has identified the volatile nature of heirs' property and the consequences it has on communities and governments.¹³⁶ The study aims to help local governments to identify heirs' properties, but the local

131. Flocks et al., *supra* note 31, at 59.

132. *See* Farach, *supra* note 119, at 59 (“The act also brings with it some unintended consequences, the most troubling being . . . the resulting increased litigation and attendant costs the act would impose on parties due to its numerous required procedures.”).

133. *Prefatory Note to UNIF. PARTITION OF HEIRS PROP. ACT (UNIF. L. COMM’N 2010)*.

134. *Should You Remove a Deceased Owner from a Real Estate Title?*, DEEDS.COM, <https://www.deeds.com/articles/should-you-remove-a-deceased-owner-from-a-real-estate-title/> [<https://perma.cc/R49Q-EP5Z>] (last visited Sept. 30, 2021).

135. SCOTT PIPPIN ET AL., U.S. DEP’T AGRIC. FOREST SERV., IDENTIFYING POTENTIAL HEIRS PROPERTIES IN THE SOUTHEAST UNITED STATES 10 (Sept. 2017), https://www.srs.fs.usda.gov/pubs/gtr/gtr_srs225.pdf [<https://perma.cc/N3U6-R3WQ>].

136. *Id.* at 8–9.

governments must try to verify the findings and identify the properties themselves.¹³⁷ The issues lie beyond the free market, unethical purchasers, and inaccessible banks. Federal and state taxes still need to be paid on these properties, and “[b]ecause it is so difficult to keep track of who should be paying taxes, property can be lost through tax sales.”¹³⁸ Identifying heirs’ properties is not merely an altruistic act by the government or a facilitation of the free market. Inasmuch as property is subject to and threatened by the state, the state should bear some burden in identifying who owns and owes what.

VII. POSSIBLE SOLUTIONS

Firstly, the UHPA should be narrowed to ensure it only covers the types of sales it purports to monitor. Cotenant heirs ought to be free from the UHPA’s restrictions and protections, and the UHPA should only apply when non-heirs seek a partition. Because similar protections already exist for probate and partition actions, the UHPA should be narrowly tailored to only extend protections in particularly suspect situations.

The current role of courts in managing estates is passive.¹³⁹ To require courts to intervene in these delicate family situations is no light matter. It would be inappropriate for a court to identify and resolve all these problems. The burden of addressing these issues should fall on the entities that benefit from heirs’ properties. Local government agencies levy and collect property taxes.¹⁴⁰ Therefore, local governments ought to take responsibility in propelling these solutions. Farach mentioned pro bono services throughout Florida providing low-income individuals and the elderly with will services.¹⁴¹ A similar approach could be taken to clear heirs’ property titles.

County and municipal governments should institute programs to identify heirs’ properties. Local governments face the issue of the cost of clearing title. Adam Towers mentioned that Bogin, Munns & Munns advanced the costs of the partition to allow the Buchanon farm to be sold before any lawyers were paid.¹⁴² Had the property not sold, there may not

137. *See id.* at 21 n.79 (“[T]his methodology attempts to quantify . . . the heirs property . . . by using existing sources of aggregate parcel-level data. Unless and until the owners associated with a property are contacted . . . absolute verification of the property’s status is generally not possible.”).

138. *Id.* at 9.

139. *See* UNIF. PROB. CODE art. III cmt. (UNIF. L. COMM’N 2019) (describing the role of the courts as “wholly passive” in the area of probate and estate administration).

140. *Florida Tax Guide*, STATE OF FLORIDA.COM (2021), <https://www.stateofflorida.com/taxes/#:~:text=Though%20the%20state%20government%20does,the%20value%20of%20the%20property> [<https://perma.cc/BN6D-5QEJ>].

141. Farach, *supra* note 119, at 56.

142. Letter from Adam Towers, *supra* note 126.

have been any payment at all. If local governments advance the costs of identifying, appraising, and facilitating a clear title, attorneys will have a greater incentive to help these families maximize their enjoyment of their property.

The problem with localized solutions is the lack of centralized effort—all local governments would need to keep tabs on this problem and remedy it. Because the courts play passive roles in estate administration,¹⁴³ and because these families are less likely to seek out the legal help they need, local officials and attorneys must take the lead in finding and advertising the procedure that families should follow to protect their property rights.

Admittedly, any approach that requires lawyers and city officials to step in and tell families what they need to do might feel too paternal. However, inasmuch as America's standing legal tradition holds low-income families (particularly Black low-income families) from accumulating property by sowing distrust and limiting access, the onus is on the officers of that tradition to rectify its mistakes. Furthermore, there are larger economic implications and incentives for local governments to get involved. Whatever solution states decide on, it is crucial to remember that efforts need to extend beyond protecting not only agricultural property but also residential property as well.

CONCLUSION

Heirs' property concerns more people than just the heirs involved. More land tied up in clouded title means less efficient municipal, county, and state development. Free alienability lies at the core of American property law but is routinely unrealized in hundreds of acres of heirs' property. In addition to helping communities break the cycle of poverty and decrease the wealth gap, land presently tied up in non-probated estates will be free and open to the market and to the owners for full beneficial use of their property. The UHPA provides at least some protection for these families to do with their property what they will.

The problem remains that the UHPA mainly helps commercial, agricultural, and otherwise valuable land. Residential properties where taxes are missed are slipping through the cracks. Effective steps must be taken to ensure title is vested in the proper individuals in a timely manner. A real problem here is striking the proper balance between ensuring the government helps protect property in poorer communities and preventing the government from over-exerting its authority or taking a parental role in citizens' lives. At the very least, if the government will seize property from a de facto owner for failure to pay taxes, then the government should play a role in ensuring that property owners have notice before their land

143. UNIF. PROB. CODE art. III cmt. (UNIF. L. COMM'N 2019).

is in jeopardy. If heirs bear the risk of adverse government action, then it stands to reason that they should be afforded the rights and benefits of title.

