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INTRODUCTION

Mrs. Brenda, a widow, died at the age of 87. Mrs. Brenda and her husband had five children. She was preceded in death by her husband and two of her children. She was survived by three children. One deceased son, Johnny, had three legitimate children and one questionable child and the other deceased child had no children. Shortly after Mrs. Brenda's death a real estate investor approached the heirs, her children and alleged grandchildren. He offered nominal amounts of money to each of Mrs. Brenda's children, as well as the offspring of her deceased son. Two grandchildren[1] each accepted $2,500 for their share of their grandmother's home. Two children each accepted $7,500 for their share of their mother's home. Mrs. Brenda's home was completely paid for and was located in an area of Mecklenburg County, North Carolina where real estate values were rapidly increasing. Although there was work to be done on the home, it was worth well over $20,000, the total amount the investor paid to heirs to force the partition hearing. One of Mrs. Brenda's surviving children did not succumb to the real estate investor. She wanted to honor mom and dad's legacy. She wanted to keep the home in the family. She found herself as an interested party in a partition matter. Without money for an attorney and the inability to purchase the home, she was not successful. After legal fees and attorney fees were paid, she was left with very little money. The legacy that Mrs. Brenda thought she was leaving to her children was gone—for pennies on the dollar.

Mrs. Brenda had a will. She executed it in the early 2000s. Everything was to go to her husband, then "to my children in equal shares." This scheme of devising to each of her children as tenants in common resulted in what she was attempting to prevent—losing her home to someone outside of her family. Unfortunately, each descendant owned a fractional

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[1] One of Johnny's children was not his legal child. He was born out of wedlock and had not been legitimized. Although the investor paid him, he was not entitled to a share.

share of the home and each was vulnerable to investors. Not only did Mrs. Brenda's family lose the family home, they did not profit from the sale of the home.[2]

In the fall of 2020 and spring/summer of 2021, I was employed as an Assistant Clerk of Court/Judicial Hearing Officer for the State of North Carolina, Mecklenburg County. In North Carolina, the Clerk of Court is an elected official who serves as the Judge of Probate. [3] The Clerk of Court of has original jurisdiction of estate proceedings and matters that include "probate of wills," and "special proceedings relating to the sale, lease, or mortgage of real estate . . . ."[4] The Clerk may appoint Assistant Clerks to serve as hearing officers to preside over hearings and render findings of fact and law in the areas of estates, as well as special proceedings that include commercial and residential foreclosures, partitions, name changes, guardianships, incompetency proceedings, claim and deliveries, adoptions and legitimations.[5]

As an Assistant Clerk/Judicial Hearing officer, I presided over matters in each of these areas. Prior to my role as judicial hearing officer, I taught trust and estates for more than ten years and practiced law in the area for another ten years. I left the position to return to the legal academy as dean of a law school. When I presided over matters, such as Mrs. Brenda's estate, I was able to see first-hand what we miss when we teach law students, and what practitioners often miss when they counsel their clients.

Tenancy in common is the default presumption in intestate succession statutes.[6] Most estates and trusts experts counsel individuals to execute wills (or trusts) to avoid intestate succession. Any law school decedents' estates course introduces the concepts of dying intestate and testate.[7] We discuss how each state has a default distribution scheme and how intestate succession statutes outline such schemes.[8] We share data about how few people take the time to prepare an estate plan.[9] We

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2 The facts are loosely based on an actual hearing, but the names have been changed and any identifying information has been removed.

3 N.C. GEN. STAT. § 28A-2-1 (2021).

4 *Id.* §§ 28A-2-4(a)(1), -5(2).

5 *Id.* § 28A-2-5.

6 *See* United States v. Craft, 535 U.S. 274, 279 (2002) (finding that "[t]he tenancy in common is now the most common form of concurrent ownership.").

7 ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 63 (10th ed. 2017) ("Testate" is dying with a will and "intestate" is dying without a will.)

8 Camille M. Davidson, *Mother's Baby, Father's Maybe! —Intestate Succession: When Should a Child Born Out of Wedlock Have a Right to Inherit From or Through His or Her Biological Father?*, 22 COLUM. J. GENDER & L. 531, 544 (2011).

9 Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 41 (2009) (The number of people who die

talk about how many issues can be eliminated if a person has a will.[10] Practitioners often tout the need for a basic estate plan that includes a will, power of attorney, health care power of attorney and advanced directive.[11] But, we often fail to talk about family conversations that need to accompany an estate plan.

Scholars have written about Black family land loss.[12] More often than not, scholars attribute much of the loss to intestate succession and heirs' property being held as tenants in common.[13] They go on to suggest that Black people are less likely than their white counterparts to have an estate plan, and are thus more likely to be in the tenancy in common situation.[14] What they sometimes fail to address is the situations, like Mrs. Brenda's, where the decedent actually has an estate plan, but the property is still susceptible to loss. For many families, a will that devises property "to my children in equal shares" is no better than intestate succession. Without family conversations, even though there is an estate plan, the end result will be the same problems associated with intestate succession.

"To my children in equal shares" results in a presumption of tenancy in common ownership.[15] Unlike a joint tenancy where there is right of survivorship, a tenancy in common scheme means that each owner has an undivided interest in the property. "Under [a tenancy in common] arrangement, all owners technically have the right to possess and use the entire property."[16] "To my children in equal shares" does not

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without a will based on the article is around 68% and does not include those who are unsure whether or not they have a valid will).

10 *See* SITKOFF & DUKEMINIER, *supra* note 7, at 63-64.

11 Rianka Dorsainvil, *Starting Estate Planning Conversations with Family*, FORBES (Dec. 31, 2019, 11:34 AM) https://www.forbes.com/sites/riankadorsainvil/2020/12/31/starting-estate-planning-conversations-with-family/?sh=67e46d921167 [https://perma.cc/W34Q-3EZ5].

12 *See* Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 506-07 (2001); Faith Rivers, *Inequity in Equity: The Tragedy of Tenancy in Common for Heirs' Property Owners Facing Partition in Equity*, 17 TEMP. POL. & CIV. RTS. L. REV. 1, 2 (2007); 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, 395 (2021); Kevin E. Jason, *Dismantling the Pillars of White Supremacy: Obstacles in Eliminating Disparities and Achieving Racial Justice*, 23 CUNY L. REV. 139, 152 (2020); Reetu Pepoff, *The Intersection of Racial Inequities and Estate Planning*, 47 ACTEC L.J. 87, 89-90 (2021).

13 Mitchell, *supra* note 12, at 518-19; Rivers, *supra* note 12, at 6, 9.

14 *See* Rivers, *supra* note 12, at 45–46.

15 *See* Daniel R. Tilly & Patrick K. Hetrick, *North Carolina's Reincarnated Joint Tenancy: Oh Intent, Where Art Thou?*, 93 N.C. L. REV. 1649, 1694-95 (2015).

16 Pakdel v. City & Cnty. of San Francisco, 141 S. Ct. 2226, 2228 (2021).

account for the differences among children—work ethic, credit, net worth and the like. It makes no distinction between the one who is able to pay for maintenance, taxes and upkeep, and the one who needs a place to live. It doesn't include step-children or grandchildren, and for men, it may not include out-of-wedlock children.[17]

Mrs. Brenda's situation highlights the importance of family conversations when it comes to estate planning. There is no "one size fits all." Although the starting point for most individuals is from a place of equal treatment for all of their children, that may not be the best option. Mrs. Brenda had children in different situations. A family conversation would have brought the dynamics to light and would have resulted in either devising the home to the child who wanted to preserve the parents' legacy, or at least explaining to the others the intangible value of property so that they would not be inclined to sell it so quickly and cheaply. Mrs. Brenda's situation also illustrates another problem—who is an heir? In all jurisdictions, a child inherits his or her deceased parent's share.[18] However, in some jurisdictions, blood relationship alone is not enough to be deemed a child of the biological father.[19] Families are often blended and scattered across the country. Beneficiaries or heirs may not even be on speaking terms. Step-siblings may have closer relationships than blood relatives. Conversations are necessary so that the testator is certain that she has included (or excluded) the appropriate individuals as beneficiaries.

One of Mrs. Brenda's sons was living in the home. He didn't want to pay rent to his siblings, and he did not believe that the property taxes were his responsibility. He "got back at his siblings" by deeding his interest in the home to the investor in return for $7,500. The other son was described as "sometimes homeless." Family members all agreed that he lacked the capacity to enter into an agreement with the investor. Unfortunately, there had never been a legal determination of incompetence. No one even knew where to find him after he received the money from the investor. As for the grandchildren, they just signed on the dotted line for a check, not really understanding what they owned or what they sold. One individual wasn't even a grandchild and didn't even have an ownership interest to sell. When every family member in court stated that she was not a grandchild, I actually had to stop the hearing to see whether any of the statutory requirements for legitimation had been met. [20]

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17 *See* Davidson, *supra* note 8, at 557.

18 *Id.* at 544.

19 *See id.*

20 *Id.* at 589; N.C. GEN. STAT. § 29-19 (2021).

For most people, their largest piece of wealth is real property.[21] The ability to pass this property to the next generation is the American dream.[22] This is how we grow wealth.[23] Homeownership has been the ticket to middle-class security for so many families. Estate planning is a necessary tool for wealth building.[24] Preparing an estate plan without deliberate family conversations is like planting a seed without water. The water is necessary for the seed to grow. Similarly, the conversation is necessary to produce an effective and customized estate plan that captures the family dynamics and preserves wealth for the next generation. Without deliberate conversations, there is really no planning at all. Without conversations, we are left with chaos.

In the city of Charlotte, North Carolina, as well as other cities throughout the country, including Harlem, New York and Washington, DC, white people, who once fled to the suburbs, are returning to city life. Their return means that property values are escalating.[25] It also means that would-be buyers and investors are regularly scouting for property.

When an obituary is posted in the newspaper, investors are often at the courthouse conducting property searches.[26] If they see multiple heirs or beneficiaries, they approach the individuals and try to buy their share. If they are successful in convincing the weakest link to sign a deed, then they are able to force the remaining beneficiaries or heirs to court.[27] More often than not, the remaining heirs or beneficiaries are unable to come up with the money to buy the home at fair market value. Thus, the investors end up with the property. Unfortunately, the fair market value is often less than the resale value. So, the money paid by the investor is a fraction of the worth of the home.

While this issue can affect individuals from any socio-economic background, the result is most felt in lower/working-class families.

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21 *See* Christopher J. Tyson, *Municipal Identity as Property*, 118 PA. ST. L. REV. 647, 662-63 (2014).

22 Latonia Williams, *African American Homeownership and the Dream Deferred: A Disparate Impact Argument Against the Use of Credit Scores in Homeownership Insurance Underwriting*, 15 CONN. INS. L.J. 295, 296 (2008).

23 *See id.* at 300-01.

24 *See* Carla Spivack, *Broken Links: A Critique of Formal Equality in Inheritance Law*, 2019 WIS. L. REV. 191, 205 (2019).

25 *See U.S. Annual Home Prices Gain a Record 18% in July*, INVESTING.COM (Sept. 7, 2021, 12:45), https://in.investing.com/news/us-annual-home-prices-gain-a-record-18-in-july-2874600 [https://perma.cc/7Q8V-BQYN] (finding that home prices increased by 1.8% from June to July 2021).

26 Personal observation of the author in her work at the courthouse.

27 Joan Flocks et al., *The Disproportionate Impact of Heirs' Property in Florida's Low-Income Communities of Color*, 92 FLA. BAR J. 57, 58 (2018).

Those are the families that cannot come up with the money to purchase the home if the investor files for a partition.

Part I discusses the value of real property. After slavery ended, Black people were promised, but never received, forty acres and a mule.[28] Real estate has value, both monetary and sentimental. Part II discusses the problem of tenancy in common and the one size fits all presumption of equal treatment of descendants in a basic will. In many cities we see housing shortages result in aggressive investors.[29] In some instances, we see investors boldly approach owners and attempt to purchase an entire block of homes.[30] In the case of heirs property (or property passed via will as tenant in common), when one owner accepts the money, the investor can bring a partition action to force a sale.[31] With changing dynamics and families living further apart, this can result in forced partition hearings when one owner sells out. Part III discusses the Uniform Partition of Heirs Property Act and its attempt to preserve heirs property. Part IV discusses the importance of family conversations—verbal, written, informal, and formal. Whom the decedent intends to benefit can be ascertained through conversations. Our laws are inadequate, but should they be amended or replaced? Is it an issue of interpretation or enforcement? Is it more than a legal solution? Americans in general, and Black people specifically, are secretive. Is a culture shift possible? The problems will continue unless we can implement a cultural shift that includes deliberate conversations.

I. The Value of Real Property

Real property is defined as "[l]and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land; real property can be either corporeal (soil and buildings) or incorporeal (easements)."[32] An essential component of a civil

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28 Patrick Dankwa John, *Reparations: 40 Acres and a Mule . . . With Interest*, CBA Rec., July/Aug. 2021, at 35, 37.

29 *See* Michele Lerner, *Buyer Demand Reaches Record High as Investors Snap Up Homes*, Wash. Post (Dec. 1, 2021, 5:30 AM), https://www.washingtonpost.com/business/2021/12/01/buyer-demand-reaches-record-high-investors-snap-up-homes [https://perma.cc/536F-VDVL].

30 *See e.g.*, Peter Whoriskey et al., *This Block Used to be for First-Time Homebuyers. Then Global Investors Bought In*, Wash. Post (Dec. 15, 2021), https://www.washingtonpost.com/business/interactive/2021/investors-rental-foreclosure [https://perma.cc/QG4W-7VQ2]; Francesca Mari, *A $60 Billion Housing Grab by Wall Street*, N.Y. Times Mag. (Oct. 22, 2021), https://www.nytimes.com/2020/03/04/magazine/wall-street-landlords.html [https://perma.cc/DA9U-FLQZ].

31 Flocks et al., *supra* note 27, at 58.

32 *Real Property*, Black's Law Dictionary (5th pocket ed. 2016).

society is ownership of real property.[33] As a Black person growing up in the deep south, I was taught that the value of real property was far more than its tax value or fair market value. For my own family, land (and home) ownership was about living the American dream. It meant security and dignity.[34] As Black people, we knew that our ancestors had once been classified as property.[35] As enslaved people, they were bought, sold, and devised in Wills.[36] The law prevented enslaved people from owning land.[37] Instead they labored under the direction of an overseer and enhanced the value of property for others.[38]

Even after slavery ended, it was difficult for Black people to obtain and retain land.[39] "Laws prohibiting enslaved Africans from purchasing real property were enacted near the time they first entered America. Many states erected additive barriers to hinder emancipated Africans from acquiring real property."[40] Once my ancestors became landowners, it was important to pass the legacy from generation to generation.

A. More Valuable than Money

Both of my grandfathers were farmers. They were Black men in Mississippi who owned and worked their own land. They were not sharecroppers. This was (and continues to be) an important part of my family narrative. It was important for both of them that the land remain in the family. My paternal grandmother still lives on the homeplace at 104 years old and my mother and her surviving siblings maintain my maternal grandparents' homeplace. Although there is no present financial advantage to holding on to my maternal grandparents' homeplace, the psychological attachment is significant.[41] The land is valuable to the family because of the struggle to obtain it. "The 'homeplace' may be more important to African Americans because of their struggle to

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33 *See* Mitchell, *supra* note 12, at 536.

34 Phyliss Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 WASH. U. L. Q. 737, 767 (2000) ("For many African Americans the homeplace is a place that can be created and controlled as a place of dignity, something so often denied African Americans in society at large.").

35 *See* Rivers, *supra* note 12, at 4-5.

36 *See id.* at 5.

37 Mitchell, *supra* note 12, at 523.

38 *See* Rivers, *supra* note 12, at 5.

39 *See* Roy W. Copeland & William K. Buchanan, *The Impact of Access to Credit and Partition Lawsuits on African American Land Ownership: Myths vs. Reality*, 22 RUTGERS RACE & L. REV. 1, 2 (2020) ("The acquisition and retention of real property by African Americans has been historically difficult, if not outright impossible.").

40 *Id.* at 2.

41 Craig-Taylor, *supra* note 34, at 786 ("For many African Americans, property ownership and the retention of heir property are intrinsically connected to concepts of liberty and freedom. Liberty and freedom represent a psychological and internal security.").

achieve land ownership, and because of their need for refuge, solace, and self-determination in a persistently discriminatory social landscape."[42] "[The] cultural and historical ties bind them so closely to the property."[43]

For many people, especially Black people, this view of land as "sacred" has been around for a long time.[44] "Scholars have recognized the continuing cross-cultural importance of land to one's sense of self."[45] "Land symbolizes and represents a diverse number of things for different people at different times."[46] "For African Americans, the viewpoint of land as 'sacred' is directly tied to a people's movement from slavery to freedom."[47]

B. Post-Civil War

In the decades following the Civil War, former enslaved people knew economic freedom was necessary to be absolutely free.[48] They recognized that land ownership was a form of wealth.[49] Real property ownership was necessary for independence.[50] There was a belief that their past labor should have been compensated with land.[51] After the Civil War, the government promised, but did not deliver to former enslaved persons, "forty acres and a mule."[52] Such land would have served two purposes—restitution and economic independence.[53]

Narratives just after the Civil War capture the sentiment of Black people, especially those in the south. "All I wants is to git to own fo' or five acres ob land, dat I can build me a little house on and call my home."[54] Land and homeownership eliminated the dependence on the

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42 *Id.* at 767.

43 *Id.* at 774 (citation omitted).

44 *Id.* at 767 n.182 ("Americans have with notable consistency accorded property an almost sacred position in American culture.").

45 *Id.* at 767.

46 *Id.* at 768.

47 *Id.* at 773.

48 *See id.* at 786.

49 *See id.*

50 Charles Lewis Nier III, *The Shadow of Credit: The Historical Origins of Racial Predatory Lending and its Impact Upon African American Wealth Accumulation*, 11 U. PA. J.L. & SOC. CHANGE 131, 144 (2008).

51 *Id.* at 143.

52 Mitchell, *supra* note 12, at 505 ("Within the African American community, the history of the federal government's failure to deliver 'forty acres and a mule' to African Americans after the Civil War has been kept alive from one generation to another.").

53 *See id.* at 506.

54 Nier III, *supra* note 50, at 143 (quoting LEON LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 401 (1979)).

former owner.[55] "Gib us our own land and we take care ourselves, but widout land, de ole massas can hire us or starve us, as dey please."[56] "At the end of the Civil War, the federal government failed to redistribute land to African Americans. Without such governmental assistance, many African Americans made heroic sacrifices to purchase land on their own."[57]

For my ancestors, the ownership was an outward symbol that they had achieved "some level of equality in American society."[58] "Acquisition of the 'homeplace' or productive land was the first symbolic step toward true liberty or freedom for many African Americans following Reconstruction."[59] "Individual property ownership was viewed as a necessity for adaptation and citizenship."[60]

C. 20th and 21st Century Obstacles

Black people in the south like my family achieved land ownership despite barriers and obstacles. "African Americans throughout the South overcame obstacles to land acquisition by demonstrating what can only be described as heroic action."[61] They "acquired fifteen million acres of land in the South between Emancipation and 1910 almost completely through private purchase, overcoming discriminatory credit practices, violence perpetuated by anti-black groups, and the refusal of many whites to sell to black people."[62]

In the 20th century, "discriminatory zoning ordinances, racial steering, blockbusting, racially strictive covenants, and physical violence" have resulted in lower rates of homeownership for Black people when compared to their white counterparts.[63]

Now, in the 21st century, the predatory business of going after such hard-earned property has taken on a life of its own. Heirs property, whether passed via a will or through intestate succession, is often held as tenancy in common.[64] Since each heir or beneficiary owns a fractional

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55 *Id.*

56 *Id.* at n.72 (quoting WHITELAW REID, AFTER THE WAR: A TOUR OF THE SOUTHERN STATES: 1865 TO 1866, at 59 (1866)).

57 Mitchell, *supra* note 12, at 579.

58 Craig-Taylor, *supra* note 34, at 773.

59 *Id.* at 774.

60 *Id.*

61 Mitchell, *supra* note 12, at 526.

62 *Id.*

63 Nier III, *supra* note 50, at 133.

64 *See Tenancy in Common*, BLACK'S LAW DICTIONARY (5th pocket ed. 2016) (Tenancy in common is "[a] tenancy by two or more persons, in equal or unequal undivided shares, each person having an equal right to possess the whole property but no right of survivorship.").

interest, real estate investors are able to target the weakest or most vulnerable owners. The investors know the value of the property is more than the tax value. They offer pennies on the dollar, become legal owners along with the other heirs, and force a sale of the property. In the next section we discuss the problem of tenancy in common.

II. The Problem of Tenancy in Common

Often when descendants of an original owner lose property that they inherited, scholars suggest that a lack of estate planning was the reason for such loss.[65] Heirs property is the name given to the property that "is passed down without a will to the original owner's descendants."[66] Most property lost by Black families in the United States is said to result from the original owner dying without a will.[67] Unfortunately, a basic will does not solve all issues associated with such property loss.

Real property may be held three ways: tenancy in common, tenancy by the entireties, and joint tenants with right of survivorship.[68] While joint tenancy and tenancy by the entireties property pass to the surviving owner(s), tenancy in common property has "multiple owners of a single piece of property."[69] Each tenant in common owner "[may] use and possess the entire property" and "may alienate her interest during life and at death without seeking consent of her other cotenants."[70] Therefore, the problems associated with heirs property when there is no estate plan also exist when there is an estate plan that passes ownership to beneficiaries to hold as tenants in common.

"Tenancies in common are the most widespread form of concurrent estates in land."[71] Unlike English common law where joint tenancies prevailed, the United States presumes a tenancy in common ownership.[72] Presumably, the rationale is to "provide market access to real

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65 *See* Emily S. Taylor Poppe, *Surprised by the Inevitable: A National Survey of Estate Planning Utilization*, 53 U.C. Davis L. Rev. 2511, 2514 (2020); *see also* Dawn Allison, *The Importance of Estate Planning within the Gay and Lesbian Community*, 23 T. Marshall L. Rev. 445, 446 (1998).

66 Shakisha Morgan, *Using Estate Planning to Plug the Drain of Family Land Loss Through Heirs' Property*, 2 Md. Bar J. 134, 134 (2020).

67 *See id.*

68 *See* Tilly & Hetrick, *supra* note 15, at 1657.

69 Rivers, *supra* note 12, at 3; *see also* Joseph William Singer, Introduction to Property § 8.2.1, at 353 (2d ed. 2005).

70 Mitchell, *supra* note 12, at 512; *see also* Roger A. Cunningham et al., The Law of Property § 5.2, at 188, 190 (2d ed. 1993).

71 Mitchell, *supra* note 12, at 512; *see also* Cunningham et al., *supra* note 70.

72 Rivers, *supra* note 12, at 3; *see also* Cunningham et al., *supra* note 70, § 5.13, at 229.

property."[73] In reality, when the co-tenants do not agree, there are problems.

A tenancy in common ownership means that the owner who refuses to pay his or her fair share is still an owner.[74] He or she does not lose an interest in the property.[75] "Freerider problems" are not uncommon.[76] When tenants in common cannot or will not agree on the use of property, a partition is the main legal remedy.[77] Unfortunately, a freerider's actions may also result in a partition. A freerider may dispose of his interest to another party and that party who is now a co-tenant has the power to force the remaining owners to court in a partition matter.[78]

A. What Is a Partition?

When co-tenants in common cannot agree about the use of a piece of property, partition is the most common way to terminate concurrent ownership.[79] When co-tenants decide among themselves to divide a piece of property into separate parcels, this is a voluntary partition.[80] An exchange of deeds among co-tenants can accomplish the division. "[E]ach co-owner joins in each deed in order to subdivide the subject land into separate parcels."[81] "[T]he co-owners who receive more valuable parcels can compensate other co-owners through money payments known as 'owelty.'"[82] Co-owners may also agree to sell the property and share the proceeds.[83]

All jurisdictions have a legal mechanism called judicial partition.[84] It is a statutory creation, and each state has its own statutory language.[85]

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73 Rivers, *supra* note 12, at 3; *see also* DUKEMINIER ET AL., PROPERTY 276 (6th ed. 2006).

74 *See* Mitchell, *supra* note 12, at 512.

75 *Id.*; *see also* THE EMERGENCY LAND FUND, THE IMPACT OF HEIR PROPERTY ON BLACK RURAL LAND TENURE IN THE SOUTHEASTERN REGION OF THE UNITED STATES 43 (1980).

76 Mitchell, *supra* note 12, at 512; *see also* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 49-50 (4th ed. 1998).

77 Lawrence Anderson Moye IV, *Is it All About the Money? Considering a Multifactor Test for Determining the Appropriateness of Forced Partition Sales in North Carolina*, 33 CAMPBELL L. REV. 411, 414 (2011); *see also* Gillian K. Bearns, Note, *Real Property*—Giulietti v. Giulietti—*Partition by Private Sale Absent Specific Statutory Authority*, 26 W. NEW ENG. L. REV. 125, 142 (2004).

78 *See* Rivers, *supra* note 12, at 3.

79 Moye IV, *supra* note 77.

80 *Id.* at 414-15; *see also* WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 5.11, at 215 (3d ed. 2000).

81 Moye IV, *supra* note 77, at 414-15.

82 *Id.* at 415; *see also* STOEBUCK & WHITMAN, *supra* note 80, § 5.11, at 215.

83 Moye IV, *supra* note 77, at 415.

84 *Id.*; *see also* Ark Land Co. v. Harper, 599 S.E.2d 754, 759 (W. Va. 2004).

85 Craig-Taylor, *supra* note 34, at 753-55.

Any co-tenant, regardless of how small his or her interest is, may file a partition action to terminate the co-tenancy.[86] There are two types of judicial partition actions—in-kind or by sale.[87]

If a court orders partition in-kind, the property is physically divided among the co-tenants.[88] A successful petition results in "the property [being] divided into parcels, and the parcels [being] allotted to the parties by share."[89] Once divided, each co-tenant may dispose of his or her share in whatever manner he or she desires.[90]

A partition by sale means the court orders "the entire property be sold and the proceeds of the sale distributed."[91] Usually the highest bidder prevails.[92] The co-owners who want to keep the property are usually not successful in a court-ordered sale.[93] "[T]he usual end result of such a proceeding is the passage of title to a stranger (by sale of the estate)."[94]

Although most state statutes indicate a preference for in-kind partitions, most courts today award partition sales because of the inability to physically or equitably divide property among co-tenants.[95] Injury is ambiguously defined in statutes using words such as "prejudice," "inconvenience," "practicality," "justice," "equity," and "interest."[96] Most often today, there is a home on the property and "strict application of the common law right to partition in-kind would require the court to

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86 Mitchell, *supra* note 12, at 513.

87 Moye IV, *supra* note 77, at 416-17.

88 Mitchell, *supra* note 12, at 513.

89 Newhall v. Roll, 888 N.W.2d 636, 640 (Iowa 2016); *see also* 68 C.J.S. *Partition* §§ 1, 146 (2022).

90 *See* Benjamin E. Jaffe, *Rebutting the Equality Principal: Adapting the Co-Tenancy Law Model to Enhance the Remedies Available to Joint Copyright Owners*, 32 CARDOZO L. REV. 1549, 1565 (2011).

91 *See* Mitchell, *supra* note 12, at 513.

92 *See id.* at 514.

93 *See id.*

94 Copeland & Buchanan, *supra* note 39, at 19-20; *see also* Ragland v. Walker, 387 So. 2d 184, 185 (Ala. 1980).

95 N.D. CENT. CODE § 32-16-12 (2021) ("[T]o the satisfaction of the court, that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof."); MASS. GEN. LAWS ch. 241, § 31 (2022) ("In partition proceedings the court may order the commissioners to sell and convey the whole or any part of the land which cannot be divided advantageously, upon such terms and conditions and with such securities for the proceeds of the sale as the court may order, and to distribute the proceeds so as to make the partition just and equal."); NEV. REV. STAT. § 39.120 (2021) ("If the evidence establishes to the satisfaction of the court that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners or if the owners consent, the court may order a sale thereof. Otherwise, upon the requisite proofs being made, it shall order a partition according to the respective rights of the parties, as ascertained by the court, and may appoint a master to partition the property.").

96 *See infra* notes 112-117.

divide the house into pieces, forcing cotenants to jointly retain and use the property permanently."[97]

"If heir property in the African American community serves as an anchor that holds families together through the provision of a homestead, then the partition process is a destructive force that pits family members against one another in determining if and how ancestral property should be divided."[98] In a judicial partition action, all co-tenants are parties. They are either petitioners or defendants.[99] "Any cotenant in actual possession of land, or one holding a right to immediate possession of an estate in land, can compel judicial partition."[100]

Partition by sale is even more destructive when a family member disposes of his or her interest in the property for below market value. Not all family members value heirs property in the same manner. A partition by sale doesn't account for the hardship of the person who utilized the real property. The co-tenant who wanted to hold on to the property may end up homeless if he or she cannot purchase the property at the partition sale.[101] Partitions by sale result in "many cotenants . . . left with very little after a court has sold the land and distributed the proceeds."[102] Theresa White of South Carolina, a descendant of Gullah freed slaves, stated, "by the time they finish dividing the money up [in a partition action], it's not enough. You end up in a public housing complex, or Section 8 housing, or in the mobile home park."[103]

The partition by sale is an American creation that did not exist at common law.[104] "[A]t common law[,] tenancy in common was insulated from the threat of judicial partition because only voluntary agreement among all owners or adverse possession could consolidate the property into sole ownership."[105]

B. When Partition Harms the Intended Beneficiaries

"Though many legal rules and processes contribute to black land loss, activists and academics agree that partition sales of land held under

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97 Craig-Taylor, *supra* note 34, at 756-57.

98 Copeland & Buchanan, *supra* note 39, at 19.

99 Moye IV, *supra* note 77, at 415; *see also* STOEBUCK & WHITMAN, *supra* note 80, § 5.12, at 218.

100 Moye IV, *supra* note 77, at 415; *see also* STOEBUCK & WHITMAN, *supra* note 80, § 5.11, at 215, 217.

101 *See* Craig-Taylor, *supra* note 34, at 757.

102 Avanthi Cole, *For the "Wealthy and Legally Savvy": The Weaknesses of the Uniform Partition of Heir Property Act as Applied to Low-Income Black Heirs Property Owners*, 11 COLUM. J. RACE & L. 343, 354 (2021).

103 *Id.*

104 *See* Moye IV, *supra* note 77, at 416.

105 Craig-Taylor, *supra* note 34, at 751.

tenancies in common and tax sales are common avenues of land loss."[106] I personally know several people who can point to examples of land loss of friends, neighbors, or family members because "cousins" didn't even know they had ownership in a piece of the family land and failed to appropriately pay taxes.[107] States such as Mississippi have tax sale laws where investors can pay the taxes for a period of time and become the owner of record.[108] While tax sale loss of land is devastating, consider the more difficult narrative of land loss as a result of deliberate action—the co-tenant who deliberately sells his share to an outside party because he or she doesn't care about the property, is in conflict with other owners, or simply falls for the quick-cash scheme. The outside party, now a co-tenant in common, then forces the other family owners to court to defend a partition. When they cannot, the result amounts to a taking of property.[109]

For decades we have heard the narrative that Black people have lost heirs' property because there is no estate plan.[110] Property loss is a result of "uninformed masses" who don't understand the law.[111] Sadly, even those who do understand the law may not be able to prevent the loss. Tom Banks of Alabama lived on and worked the family farm.[112] Imagine a surprised Tom Banks when he found out the family might lose the family farm. It didn't matter whether he paid taxes, worked the land, or lived on the property.

> In 1983, Mr. Banks received notice that a co-owner had petitioned a local court to sell the farm and divide the proceeds of the sale among the ascertainable owners. The petitioner, a local real estate agent, recently had purchased a 1/37 interest in the property from a distant relative of Mr. Banks for $500. That agent now was petitioning the court to sever his interest in the property from the remaining interests. The agent argued,

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106 Mitchell, *supra* note 12, at 511.

107 *See* Danaya C. Wright, *What Happened to Grandma's House: The Real Property Implications of Dying Intestate*, 53 U.C. DAVIS L. REV. 2603, 2610, 2632 (2019) (The heir to the property was unable to pay the property taxes because the heir was in prison. The property's mortgage had been completely paid off for ten years prior).

108 *See* MISS. CODE ANN. § 27-47-3 (2022).

109 *See* John G. Casagrande Jr., Note, *Acquiring Property Through Forced Partitioning Sales: Abuses and Remedies*, 27 B.C. L. REV. 755, 780-81 (1986).

110 Breland, *supra* note 12, at 401-02.

111 *See* Craig-Taylor, *supra* note 34, at 760.

112 Casagrande Jr., *supra* note 109, at 755.

> Tom Banks worked and lived on a ninety-acre family farm in Alabama since he was a child. He and his two brothers, who assisted him on the farm, each owned a fifteen percent interest in the property. Other more distant relatives owned various fractional interests in the property ranging from 1/10 to 5/1053. Many of these co-owners had disappeared or were unaware of their ownership.

> however, that because the farm could not be divided conveniently, including into a 1/37 portion, it would have to be sold. Tom Banks testified at the hearing that he wished to continue farming the land, and that he would be willing to buy the agent's interest or divide the property to the latter's advantage and satisfaction. The court concluded, however, that the property had to be sold to the highest bidder. When put up for sale, the sole and highest bidder was the real estate agent because Tom Banks and his brothers did not have the financial resources necessary to purchase the land. As a result, the Bankses lost their farm, receiving in its place a sum of money worth less than either its actual or replacement value.[113]

Tom Banks' narrative cannot be resolved by simply executing a will. While executing a will may resolve the issue of the unknown heir failing to pay property taxes, it does not resolve the issue of land loss based on the deliberate behavior of a co-tenant in common. Families are still losing property in the same manner that Tom lost the family farm even when the original owner had a will.

Mrs. Brenda, the original homeowner in the introduction, had a will. In her will, she left her home to her children in equal shares. One adult son lived with her while she was alive. Mrs. Brenda thought she was helping him by giving him a share of the home. She wanted to make sure that he had a place to live if she were to predecease him. Although that adult son had never been adjudicated incompetent, he had not ever worked a fulltime job for an extended period of time. He was able to cook for himself and take care of himself. His sister believed that he had the mental and physical ability to contribute to the upkeep of the home after mom's death. She believed that mom had enabled him while she was alive. Thus, she asked him to pay utilities and taxes on the home since he was living in the home.

The tax value of the home was approximately $100,000. Investors were buying homes on the street, renovating them, and reselling for more than twice the tax value. Mrs. Brenda's daughter knew the value of the home and wanted to keep it in the family, especially since there was no mortgage.[114] When an investor appeared at the front door and offered the son who was living in the home $7,500 for his interest in the property, it is unclear whether he even knew what the word "interest" meant. The investor told him that he would have to sign some

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113 *Id.*

114 Narrative is based on the facts of a hearing that she presided over as an Assistant Clerk/Judicial Hearing officer in 2021.

paperwork, and he agreed to do so. He did not tell his sister about the transaction.

The investor, now a co-tenant in common, wanted the home. He was able to broker deals with those whom he thought were two of Mrs. Brenda's deceased son Johnny's children, as well as another child of Mrs. Brenda. Mrs. Brenda's daughter was not interested in selling. She was shocked when she was served with paperwork to appear in court. After all, mom had a will that gave the home to them in equal shares. Property taxes had been paid in full. How could the family home be sold without her consent and signature? Although Mrs. Brenda's siblings could not sell the entire home, what they did was just as damaging to the family legacy. Mrs. Brenda (and her nieces) no longer had control of the inheritance. The outsider now had the ability to force a partition.[115]

Nearly 30 years later, Mrs. Brenda's daughter faced the same issue that Tom Banks faced. While Mrs. Brenda executed a will, the problem of a co-tenant selling his share to an investor did not prevent the loss of the family property.

Whether or not a will exists, when property is owned as tenancy in common, it is unstable.[116] A cotenant can bring a stranger into the relationship at any time. And, no matter how small of an interest a person has, he or she may file a partition action.[117] A partition action does not require the consent of other owners.[118] However, when a family member sells his interest to property in an area where there is a high market value, the remaining owners are vulnerable.[119] Scholars have argued that a partition is essentially a taking.

> The forcing of a non-petitioning co-owner to accept below-market considerations for the property interests which he is judicially ordered to sell is a "taking" in the sense that the gov-

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115 *See* Cole, *supra* note 102, at 348-49, 355.

116 *Id.* at 348.

117 *Id.* at 368.

118 Mitchell, *supra* note 12, at 513.

119 Cole, *supra* note 102, at 355.

In the 1970s, developers began actively searching for heirs property owners who either did not live on the land of interest or had little understanding of the land's true value; the developers would then offer these landowners small sums of money for their interest. In one especially egregious example, a white South Carolina real estate trader named Audrey Moffitt was able to acquire a 335-acre estate that had been owned by the Becketts, a Black family, since the early 1870s. By paying one sick and elderly cotenant $750 for her 1/72 interest (which was actually worth over six times Moffitt's offer), and by buying the interests of six other cotenants, Moffitt was eventually able to force a partition action and acquire the entire property. Through the law of partitions, Moffitt received $217,000 for land that she had purchased for only $2,775.

> ernment, albeit not directly conducting a conversion, facilitates the conversion of real property into a less valuable, inequivalent monetary sum without consent of the holder.[120]

Mrs. Brenda's daughter was shocked to find out that children of her deceased brother had also accepted money from the investor. Those children no longer lived in the area. In fact, one individual who accepted money was not even his legal child, and thus not an actual beneficiary under Mrs. Brenda's will. The investor had paid him money, but he gained nothing in return.

Real estate investors and developers have become the big winners in partitions by sale.[121] Although the investor did not have the percentage of ownership that he thought, he was still successful in forcing a sale. "Once a court finds that compulsory partition by way of judicial sale is necessary, it orders the entire property sold at market price . . . ."[122] Even when a co-tenant wants to keep the property, his or her desire is secondary to the co-tenant who files the partition.[123] The court's focus is whether the cotenant who filed for the partition would be injured.[124] And injury usually means monetary loss.[125] So, if the co-tenant who wants to keep the property doesn't have financial resources equal to the property value, he or she will most likely lose the property. Mrs. Brenda's daughter didn't have the cash or credit to win against the investor. And, while there may have been opportunities for her to prevail in a lawsuit, she didn't have the resources to pursue them. Most likely, information was not properly disclosed to her brother, nieces and nephew. Mrs. Brenda's daughter did not fight because she didn't have the money, time or energy. "According to one legal scholar, the class status of the typical cotenant helps account for the fact that few cotenant conflicts get litigated."[126]

The problem with valuing injury in terms of money is that "[r]eal property is not just a fungible commodity as real estate brokers, land developers, and some attorneys . . . believe."[127] The family home, for

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120 Moye IV, *supra* note 77, at 426.

121 *Id.* at 446; *see also* Thomas W. Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1, 31 (2014) (Many heirs lack the finances to make winning bids at partition sales against investors and real estate developers who have more money and assets).

122 Craig-Taylor, *supra* note 34, at 758.

123 *Id.*

124 *Id.*

125 *Id.*

126 Thomas W. Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, 2005 WIS. L. REV. 557, 584 (2005).

127 Moye IV, *supra* note 77, at 423.

Mrs. Brenda's daughter, was her childhood, her history and pride.[128] Her parents had worked to leave this paid-in-full home to the next generation. Her inability to compete with the deep pockets of the investor resulted in a devastating loss. When the value of the property has increased over time, it is particularly difficult "to compete with the deep pockets of real estate developers and land speculators . . . ."[129]

III. Uniform Partition of Heirs Property Act and Other Solutions

A. The History Behind the Uniform Partition of Heirs Property Act

The issue addressed in this article has not been unnoticed. In 1985, a Commerce Department study concluded that "[l]and traders who buy shares of estates with the intention of forcing partition sales are abusing the law . . . ."[130] Recently, with property values escalating it is even more a "big business."[131] And, the system is so flawed that families "end up paying the fees of the lawyers who separate them from their land."[132] Historically, Black families, in particular, have lost large amounts of land, sometimes from attorneys who purported to represent them.[133] "The AP found several cases in which black landowners, unfamiliar with property law, inadvertently set partition actions in motion by signing legal papers they did not understand. Once the partition actions began, the landowners found themselves powerless to stop them."[134] The Uniform Partition of Heirs Property Act (UPHPA) attempts to change the trajectory.

One of the goals of The UPHPA was "to prevent real estate speculators from . . . forcing partition of a family property . . . [and] purchas[ing] the entire property at below-market rates at a partition sale."[135] It is "specifically aimed at addressing the situation where a third party purchases an interest in a property with the intent of forcing

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128 *See id.*

129 Copeland & Buchanan, *supra* note 39, at 14.

130 Todd Lewan & Dolores Barclay, *Developers and Lawyers Use a Legal Maneuver to Strip Black Families of Land,* Authentic Voice, http://theauthenticvoice.org/mainstories/tornfromtheland/tompart5 [https://perma.cc/34ZL-B57S].

131 *Id.*

132 *Id.*

133 *See id.*

134 *Id.*

135 Lisa C. Willcox, *You Can't Choose Your Family, But You Should Choose Your Co-Tenants: Reforming the UPC to Benefit the Modest-Means Family Cabin Owner,* 87 U. Colo. L. Rev. 307, 344 (2015).

a partition sale, allowing the same third party to purchase the property at a low cost."[136]

The UPHPA drafters recognized many of the problems associated with tenancy-in-common heirs property ownership discussed in the prior section. For example, many co-tenants believe that their ownership is secure since taxes are up to date; they do not understand that consent of all co-tenants is not necessary for any tenant-in-common to sell or convey his or her interest.[137] They do not realize that regardless of when a person becomes a co-tenant, he or she has the right to file a partition proceeding.[138] In jurisdictions that have not enacted the UPHPA, the system rewards the speculator who "purchases a very small interest in family-owned tenancy-in-common property with the sole purpose of seeking a court-ordered partition by sale."[139] Family co-tenants not only face losing the property, they are also disadvantaged because the "fees and costs must first be paid to others before the remaining proceeds of a sale are distributed to the tenants in common."[140] Fees include payment to the court-appointed commissioner, as well as "surveyor fees, and attorney's fees which usually constitute ten percent of the sales price . . . ."[141]

The UPHPA was drafted by the National Conference of Commissioners on Uniform State Laws in 2010 and recommended for enactment in all states. Currently 20 jurisdictions have enacted it.[142] The UPHPA defines heirs property to include tenancy in common ownership acquired by "intestate succession, by will, or by gift."[143] Under the UPHPA, 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;

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136 Jesse J. Richardson, Jr., *The Uniform Partition of Heirs Property Act: Treating Symptoms and Not the Cause?*, 45 REAL EST. L.J. 507, 543 (2017).

137 UNIF. PARTITION OF HEIRS PROP. ACT, prefatory note (UNIF. L. COMM'N 2010).

138 *See id.*

139 *Id.*

140 *Id.*

141 *Id.*

142 *Partition of Heirs Property Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=50724584-e808-4255-bc5d-8ea4e588371d [https://perma.cc/65F6-WPZX] (The UPHPA has been adopted in Alabama, Arkansas, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Iowa, Mississippi, Missouri, Montana, Nevada, New Mexico, New York, South Carolina, Texas, US Virgin Islands, Utah, and Virginia).

143 UNIF. PARTITION OF HEIRS PROP. ACT, prefatory note.

(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 interest 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."[144]

The UPHPA seeks to ensure that "each cotenant in a partition action is treated in a fair and equitable manner."[145] With due process protections, the Act requires "notice, appraisal, right of first refusal, and if the other co-tenants 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."[146]

The UPHPA does not change the law of partition. However, it does use "wealth protection mechanisms," as well as "protections legislatures and courts in other countries now afford cotenants in partition actions . . . ."[147] For example, Section 7 of the UPHPA provides for co-tenant buyout. "[A]ny cotenant except a cotenant that requested partition by sale may buy all the interests of the cotenants that requested partition by sale."[148] The court will reallocate each co-tenant's interests if such individuals have met their responsibility of paying their "apportioned price into court."[149] There are provisions where some, but not all, cotenants fail to pay on time.[150] This approach consolidates ownership and "mirrors the best practices used for family property owned by those who are wealthy and legally savvy."[151] The Act provides for partition alternatives, including partition in kind.[152]

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144 *Id.* § 2(5).

145 *Id.* at prefatory note.

146 *A Few Facts about The Uniform Partition of Heirs Property Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=0eb33adf-6631-aad3-a65c-59593348c817&forceDialog=0 [https://perma.cc/QWA5-MNB3].

147 UNIF. PARTITION OF HEIRS PROP. ACT, prefatory note.

148 *Id.* § 7(a).

149 *Id.* § 7(e)(1).

150 *Id.* § 7(e)(3).

151 *Id.* § 7 cmt. 1.

152 *Id.* §§ 8-9.

B. Does the UPHPA Fix Everything?

In North Carolina, a partition is a special proceeding.[153] At the time of this writing, North Carolina, where I sat as a judicial hearing officer, has not enacted the UPHPA.

The North Carolina statutory process left few ways to for a family to hold on to heirs property that was a single-family dwelling once a partition matter had been filed. First, since any tenant in common can request a partition, an outsider had forced the family to court and as a matter of law the family members couldn't prevent the situation.[154] Secondly, an actual partition of a single-family home is nearly impossible, even though North Carolina has a preference for in-kind partitions[155] and the party seeking the sale must prove substantial injury.[156] The preponderance of the evidence standard that actual partition would cause substantial injury to interested parties was easily met.[157] There would be no way to physically split a house without causing economic waste. Therefore, a partition by sale was really the only option.[158] Without the UPHPA, the co-tenant who initiates the partition action knows "that they will be able to recover their legal fees from the proceeds of the sale."[159] With the ability to leverage resources, the investor really has nothing to lose.

A hearing is not required in all partition matters. When no issues are raised in an answer about the partition, the clerk (sitting as the court) may act on the petition summarily and appoint commissioners as long as all interested parties have notice of the proceeding.[160] At the time I heard this case, since the investor requested a partition by sale, a hearing was required. As the judicial hearing officer/assistant clerk I needed to determine whether a sale in lieu of partition was necessary. That step was necessary even if all interested parties had consented to selling the land, failed to object, or failed to file an answer.[161] Although

153 N.C. GEN. STAT. § 46A-1 (2021).

154 *Id.* § 46A-21(a); *see* Richardson v. Barnes, 77 S.E.2d 925, 927 (N.C. 1953).

155 N.C. GEN. STAT. § 46A-75(a) (Partition by sale is only allowed if the court "finds by a preponderance of the evidence that an actual partition . . . cannot be made without substantial injury to any of the parties.").

156 *Id.*

157 *See id.* § 46-75(b). The determination of in-kind vs. sale is a question of fact for the Clerk. Factors for the Clerk to consider include nature, character, extent, condition, and location of the property, respective ownership interests, number of owners, possibility of dividing the land, and economic waste caused by the division. *See also* Duke v. Hill, 314 S.E.2d 586, 587 (N.C. Ct. App. 1984).

158 *See* Craig-Taylor, *supra* note 34, at 752-53.

159 Cole, *supra* note 102, at 368.

160 *See* N.C. GEN. STAT. § 1-401.

161 *See* Lyons-Hart v. Hart, 695 S.E.2d 818, 819-20 (N.C. Ct. App. 2010). The former N.C. GEN. STAT. § 46-22(a) was replaced by N.C. GEN. STAT. § 46A-75 which now states

not necessary, since a spouse has a marital interest in property, such individuals are typically included as parties.[162]

The family members who objected to the partition were not prepared to be in court. Although the petition that the investor filed notified the respondents of the right to seek the advice of an attorney and even stated that free services through Legal Aid may be available, they were still representing themselves.[163] Conversely, the real estate investor had an attorney. And by statute, the court was mandated to "allocate among all the cotenants of the property those reasonable attorneys' fees incurred by any cotenant for the common benefit of all cotenants, unless a cotenant shows that doing so would be inequitable."[164]

Mrs. Brenda's daughter did not grasp the complexity of the partition proceeding. Since at least one of her siblings' whereabouts was unknown, she assumed that the proceeding could not continue. In fact, a "notice by publication" and appointment of a disinterested party to be the guardian ad litem ensured that the proceeding would move forward.[165] Her blame and anger were directed at me. I reminded her that it was her brother and nieces and nephews that had sold their interest in the property to the investor.

Although I reminded her that she did not have to agree to a sale, she did so anyway, stating that there had already been too much hassle and emotion. Thus, all parties consented to the sale. Acting under the authority of the Clerk of Court, I appointed a commissioner to sell the property.

By statute, all owners were responsible for attorney's fees and court fees.[166] I did not have room to consider "noneconomic or subjective value" of the property.[167] While it may have changed the sales price, the family members were still not in a position to "buy out" the investor.

If North Carolina were to enact the UPHPA, it would apply to future situations like Mrs. Brenda's estate.[168] "At minimum, for tenancy-in-common property to be considered heirs property, title must be ac-

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that if any interest is disputed, the court is not required to decide the issue before ordering the partition sale. *See also* N.C. GEN. STAT. § 46A-75(d).

162 *See* N.C. GEN. STAT. § 46A-21.

163 *Id.* § 46A-2(b)(1).

164 *Id.* § 46A-3(a).

165 *See id.* § 46A-76(d).

166 *See id.* § 46A-27 (Recent changes to NC law allow for co-owners to seek contribution for paying carrying costs—such as property taxes and insurance).

167 Richardson, Jr., *supra* note 136, at 514.

168 "[T]he Act does not apply to 'first generation' tenancy-in-common property established under the default rules and still owned exclusively by the original cotenants even if there is no agreement in a record among the cotenants governing the partition of the property." UNIF. PARTITION OF HEIRS PROP. ACT § 2 cmt. 3 (UNIF. L. COMM'N 2010).

quired by at least one of the cotenants in an intergenerational transfer from a relative of that cotenant who was either that cotenant's ascendant, descendant, or collateral that the time title was transferred."[169] The UPHPA would apply to a situation where "tenants in common acquire their interests through a deed or a will that does not govern the manner in which the tenancy-in-common property may be partitioned . . . ."[170]

The UPHPA requires the court to "consider not only the economic but also the social, cultural, and historic value of the land as well as the impact on its occupants' use of the property in the ultimate decision to sell or parcel it out."[171] Unfortunately, those co-owners who are "cash-poor" are still not protected.[172] The "open market sale instead of an auction . . . prevent[s] . . . speculators from forcing partition auctions in order to acquire heirs' property for a small fraction of its value."[173] However, if the co-owner doesn't have cash or the ability to get cash, the UPHPA is not an effective remedy because the first right of refusal is not practical for low income co-owners.[174] The property that is the subject of the partition is typically referred to as "dead capital" because it cannot be leveraged to obtain a loan unless co-owners agree.[175]

The UPHPA attempts to provide remedies to a bad situation. It is effective only after a partition has been filed. It does not address legal fees; instead it suggests that states use their existing partition law.[176]

After the hearing I entered an order allocating the shares to the various tenants in common.

IV. The Importance of Family Conversations and the Role of Attorneys in Encouraging Them

A. Attorneys and Counselors at Law

It is common knowledge that a majority of Americans do not have estate plans.[177] The number of those without a basic will increases in

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169 *Id.*

170 *Id.* at cmt. 4.

171 Thomas W. Mitchell et al., *Expansion of New Law in Southeast May Stave Off Black Land Loss*, Tex. A&M U. Sch. L. (Oct. 2020), https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=2424&context=facscholar [https://perma.cc/D3Y9-65LU].

172 *See* Cole, *supra* note 102, at 347.

173 Mitchell et al., *supra* note 171.

174 *See* Cole, *supra* note 102, at 350-51.

175 *Id.* at 350.

176 *See* Unif. Partition of Heirs Prop. Act § 12 (Unif. L. Comm'n 2010).

177 Diane J. Klein, *Knocking on Heaven's Door: Closing the Racial Estate-Planning Gap by Ending the Ban on Live Person-To-Person Solicitation*, 44 J. Legal Pro. 3, 3 (2019).

communities of color.[178] While scholars often discuss the importance of planning,[179] rarely does the discussion include information about the necessity of family conversations. When an individual executes an estate plan, especially a basic one, without engaging in family conversations, the resulting document may not provide such individual with the protections that he or she thinks it does.

Attorneys who are estate planners are constantly using the "counselor" part of "attorney and counselor at law."[180] And the role of counselor requires that we understand how to communicate with individuals from various backgrounds. Counselors at law have an affirmative obligation to educate and inform the community about various issues. Property ownership and family dynamics are some of those issues. Estate planners should be well trained in cultural competency.[181]

Generally speaking, real property, for most middle-class and working-class individuals, is their largest asset.[182] As discussed in prior sections, homeownership connotes security for most Americans and most desire to pass the home to the next generation. If a person does not have a will, his or her estate passes through intestate succession. Intestacy statutes in all jurisdictions treat children equally.[183] Intestacy statutes do not account for stepchildren and oftentimes, individuals who are related by blood may not have a legal relationship to the decedent.[184] If property passes through intestate succession, it is owned by the next generation as tenants-in-common. Scholars have suggested that this intestate succession that results in fragmented ownership is responsible for Black family land loss.[185]

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178 *See id.*

179 Breland, *supra* note 12, at 401 n.180 ("'A will is the least expensive thing you can do to leave intergenerational wealth . . . [t]he importance of estate planning is critical.'").

180 *See* Ronald D. Aucutt, *Creed or Code: The Calling of the Counselor in Advising Families*, 36 ACTEC L.J. 669, 670-72 (2011).

181 Aastha Madaan, *Cultural Competency and the Practice of Law in the 21st Century*, PROB. & PROP., Mar./Apr. 2016, at 29, 29.

182 *See* Wright, *supra* note 107, at 2612, 2624.

183 *See* Danaya C. Wright, *The Demographics of Intergenerational Transmission of Wealth: An Empirical Study of Testacy and Intestacy on Family Property*, 88 UMKC L. REV. 665, 676 (2020) ("Because the American founders feared the tyranny of a land oligarchy, they established partible inheritance which treated all children equally under the laws of descent.").

184 *See* N.C. GEN. STAT. § 29-19(a) (2021) ("For purposes of intestate succession, a child born out of wedlock shall be treated as if that child were the legitimate child of the child's mother, so that the child and the child's lineal descendants are entitled to take by, through and from the child's mother and the child's other maternal kindred, both descendants and collaterals, and they are entitled to take from the child.").

185 Craig-Taylor, *supra* note 34, at 772.

B. Levels of Estate Planning

Mrs. Brenda should be commended for executing a basic will because "[s]ome amount of planning is better than none at all."[186] She understood that estate planning was important. Unfortunately, what she did not understand was that there are different levels of estate planning. Her lack of knowledge resulted in a will that gave tenancy-in-common ownership among her children that was no less fractured than if she had died intestate.[187]

Mrs. Brenda's estate highlights the need for important family conversations. Like many working and middle-class individuals, her estate was not sophisticated enough to warrant a trust or LLC. However, had she engaged in conversations with her children prior to executing her will, the family home might still be in the family. Conversations with family members can begin to identify who values the real and personal property. Attorneys who draft basic wills should encourage their clients to engage in these types of conversations.

Many working-class individuals utilize legal services, clinics and other such public service entities to engage in legal work. When they execute documents, the documents are often standard in nature. Generally speaking, when parents think about who will inherit the family property, most think "to my children in equal shares." Since they love their children equally, "[t]ypically, parents want to bequeath each child an equal share of their wealth after both of their deaths."[188] But, what happens when all of the children are not in the same financial position or all of the children do not value the home the same? When parents choose to treat all of their children the same and leave them with joint ownership of property, these "co-ownership situations among unmarried individuals, even siblings, can have unexpected and sometimes disastrous consequences."[189] Such was the case with Mrs. Brenda's descendants. Although tenancy-in-common ownership meant that they were all responsible for the maintenance and upkeep of the home,[190] each of them could not, or would not, contribute equally.

When Mrs. Brenda left her home to her children in equal shares, each child did not value it the same way. "[T]he significance of a particular piece of property may vary from one co-tenant to the next. One co-tenant may covet the inherited property primarily because of what it

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186 Willcox, *supra* note 135, at 327.

187 *See id.* at 319.

188 *Id.* at 347.

189 *Id.* at 318.

190 *See* Breland, *supra* note 12, at 388.

embodies about self and family; while another may be much more interested in economic value."[191]

For her daughter, the family home, where holidays and milestones occurred, was identity property. In many families, property may be identity property for some children, but not others.[192] "Identity property is closely linked to one's sense of self and family and is valued primarily for what it signifies and embodies, not for its economic worth."[193] For Mrs. Brenda's daughter, the home itself far outweighed any money that someone was willing to pay for it. Unfortunately, her siblings and the offspring of her deceased sibling did not feel the same way.[194]

Had she sat down with her children during her lifetime, Mrs. Brenda could have shared her desires and expectations with her children, and each of them could have let her know their interests. Perhaps a conversation during Mrs. Brenda's lifetime would allow all children to know that she preferred one to live in the home and the others to take care of him. "Creating the agreement with everyone's input also gives an opportunity for the first-generation owners to ascertain the wishes of the second generation and act accordingly."[195]

C. Limitations of the UPHPA

In the previous section, we discussed the UPHPA and how it attempts to address the issues associated with tenancy-in-common ownership of heirs property. Although the UPHPA attempts to "defuse this disconnect between partition and identity property,"[196] it is only relevant if a co-tenant files a partition action. Also, as previously discussed, few jurisdictions have enacted the UPHPA.

"[T]he UPHPA does not fully prevent co-tenancy problems, but rather only lessens the sting of their results. In order to truly address co-tenancy problems, a greater awareness of these problems must be brought to co-tenants [sic] attention before entering a tenancy in common."[197] This is especially true for co-tenancies that are a result of intergenerational transfers—with or without a will. This is why family conversations matter. Ideally, Mrs. Brenda's property should have been

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191 Sarah E. Waldeck, *Rethinking the Intersection of Inheritance and the Law of Tenancy in Common*, 87 NOTRE DAME L. REV. 737, 765 (2011).

192 *Id.*

193 *Id.* at 739.

194 *See* Willcox, *supra* note 135, at 328 ("It is also possible that some of the children do not view the [home] as identity property while others do.").

195 *Id.* at 348.

196 Richardson, Jr., *supra* note 136, at 526.

197 Willcox, *supra* note 135, at 346.

saved before the investor came in and disrupted the family by purchasing an interest and filing a partition matter.

Since heirs property is generally tenancy in common and each owner has "the right to occupy and utilize the entire property but cannot exclude other co-owners from exercising the same right,"[198] such property is vulnerable. Conversations help mitigate the vulnerability that is associated with heirs property.[199] There is no "default doctrine for situations in which identity property is inherited by more than one individual."[200] Conversations are necessary to avoid loss of such property.

Professor Ritshi Batra suggested mandatory mediation provisions for states that adopt the UPHPA.[201] "[M]ediation can be useful as a way of resolving the spite issues, anger issues, and complex family dynamics that may arise as multiple family members quarrel."[202] While I agree with Professor Batra, such issues should be addressed before a partition is filed. An early family conversation can result in a resolution to the issue that prompted the partition in the first place, or a solution that allows the family to keep the property.[203]

V. CONCLUSION

While estate planners encourage individuals to draft wills, a majority of Americans do not. And further, when those with less means engage in estate planning, they still end up passing fragile ownership of their property to their descendants.

Estate planners should help families resolve issues before partitions have been filed. Such lawyers have an affirmative duty to educate the community. Thus, law schools must produce culturally competent attorneys.[204]

In both rural and urban settings, the homestead is often the most significant asset for many working-class and-middle-class individuals.[205] Since "[h]ome ownership has always been a cornerstone of the American Dream," preserving the dream for the next generation is important for most people.[206] Unfortunately, with or without a will, that property

198 Richardson, Jr., *supra* note 136, at 519.

199 *See id.* at 520.

200 *Id.* at 526.

201 Rishi Batra, *Improving the Uniform Partition of Heirs Property Act*, 24 GEO. MASON L. REV. 743, 763 (2017).

202 *Id.*

203 *Id.* at 763-64.

204 Breland, *supra* note 12, at 377-78.

205 R. Shaun Rainey, *Uniform Partition of Heirs' Property Act: Partition with an Acetate Overlay,* 13 EST. PLAN. & CMTY. PROP. L. J. 233, 235 (2020).

206 *Id.* at 234.

often ends up being owned by tenants in common. That property, with its fragile ownership status, is often lost through partition sales.[207] The UPHPA seeks to remedy the standard partition action that leads to family property loss when related co-tenants-in-common disagree about the use of the property.[208] But, the act only applies in jurisdictions that have adopted it, and only when a partition action has commenced.[209] Agreements and conversations among family members should take place before the court is involved and before an estate plan is executed.

207 *Id.* at 236.
208 *Id.*
209 *See id.* at 241.