ACTEC Law Journal

Volume 49 | Number 2 Article 4

3-1-2024

The Importance of Language in the Context of Heirs' Property Policymaking

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INTRODUCTION

> Heirs' property constitutes a common legal form of family property ownership within the African American community as well as within other socioeconomically disadvantaged communities. It is a problematic form of ownership that mostly arises when someone dies without having made a will or other type of estate plan. . . . There are a number of severe problems associated with heirs' property ownership[, including that] a substantial percentage of heirs' property owners lack clear title to their property, which prevents these owners from being able to build and preserve wealth because they are ineligible for many commercial loans and a vast number of governmental programs at the local, county, state, and federal levels . . . .[1]

Professor Reid K. Weisbord's examination of one aspect of the pervasive and long-continuing issue of heirs' property[2]—namely, the additional costs associated with what he calls "postmortem probate inaction" by a decedent's heirs—deserves recognition for its thoughtful approach to explaining the roots of and possible solutions to one strand of a "legal limbo," the impacts of which have only been laid bare in the public eye by recent groundbreaking journalism.[3] Weisbord's discussion of the legal underpinnings of the problem of heirs' property illustrates the reality that lawyers, like journalists, have an important role to play in articulating the

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1 HEIRS' PROPERTY AND THE UNIFORM PARTITION OF HEIRS PROPERTY ACT: CHALLENGES, SOLUTIONS, AND HISTORIC REFORM xix (Thomas W. Mitchell & Erica Levine Powers eds. 2022) [hereinafter HEIRS' PROPERTY].

2 Reid K. Weisbord, *Heirs Property: An Examination of Probate Costs and the Costs of Postmortem Probate Inaction*, 49 ACTEC L.J. 113, 115 (2023).

3 *See, e.g.*, Lizzie Presser, *Their Family Bought Land One Generation After Slavery. The Reels Brothers Spent Eight Years in Jail for Refusing to Leave It*, PROPUBLICA (July 15, 2019), https://features.propublica.org/black-land-loss/heirs-property-rights-why-black-families-lose-land-south/ [https://perma.cc/2FCW-AA2V].

scope of the issue of heirs' property with an eye toward developing remedial policy solutions to the "growing dilution of inherited wealth from estates plagued by heirs[']property, a phenomenon that disproportionately affects individuals already impacted by the racial wealth gap."[4]

Thanks to the work of journalists, lawyers, documentary filmmakers, and others, the economic and societal costs of heirs' property are becoming increasingly prominent in the consciousness of "policymakers" (a term used herein to describe a group of individuals and organizations which includes, but is not limited to, lawyers).[5] As awareness about the systemic causes of the unstable and vulnerable state of heirs' property owners spreads, legal scholars and practitioners have the opportunity to contribute to the formulation and implementation of policies aimed at addressing heirs' property, in part by communicating sophisticated and sometimes obscure legal nuances in terms that are meaningful not only to other lawyers, but also to those non-lawyers who will be stakeholders in the policymaking process.

I. LANGUAGE MATTERS

> What is in a word? Judges and attorneys are taught that the English language—full of subtleties and layers—can be wielded deftly and with the surgical precision necessary to navigate complicated legal concepts.[6]

As is the case with any verbal or written communication, *language matters*, especially with respect to communications intended to convey legal concepts that will shape the discourse around public policymaking. The Swiss politician Pierre Muller defined public policymaking as "the semantic construction of a relationship between actors and the world in which they operate."[7] Accordingly, if legal scholars and practitioners are to fulfill their role of articulating to policymakers, laypeople, and other

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[4] Weisbord, *supra* note 2, at 113.

[5] *See* HEIRS' PROPERTY, *supra* note 1, at xix ("Until recently, the very existence of this type of common real property ownership was hardly known at all, with limited exceptions. However, during the past decade or so, there has been a dramatic and unexpected uptick in interest in a range of heirs' property matters, among academics and other researchers, those in the media, elected officials and other policy makers, those in the for-profit business sector as well as those in the nonprofit sector, and philanthropic organizations.").

[6] Brian D. Bender, *Torts: The Failings of the Misfeasance/Nonfeasance Distinction and the Special Relationship Requirement in the Criminal Acts of Third Persons*—State v. Back, 37 WM. MITCHELL L. REV. 390, 391 (2010).

[7] Claudio M. Radaelli, *Occupy the Semantic Space! Opening Up the Language of Better Regulation*, J. EUROPEAN PUB. POL'Y (2023), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10351582/#CIT0042 (last visited Mar. 25, 2024), [https://perma.cc/3QCF-LXYN].

stakeholders the myriad issues associated with heirs' property, they must employ precision of language such that those who have been harmed by historical economic disenfranchisement and lack of access to justice are not regarded as somehow deserving of those misfortunes.

It is in the context of this focus on the importance of language that the author considers Weisbord's use of the term "postmortem probate inaction." Postmortem probate inaction describes the failure on the part of the inheritors of heirs' property to file a probate petition and properly administer the estate of the decedent through the legal system. The author's reflections on the use of this term are two-fold: (1) the term is effective in contrasting postmortem probate inaction, which is nonfeasance at worst, with postmortem probate avoidance, which sounds in the language of misfeasance; and (2) postmortem probate avoidance bears deceptive resemblance to the term "probate avoidance," which refers to a set of tactics used by those who enjoy and employ access to the very legal and economic resources that would help protect heirs' property owners from the instability and vulnerability of that form of property ownership. Properly labelling the process through which heirs' property was inherited serves to showcase the lack of culpability for the many who find themselves in the heirs' property quagmire.

II. The Risks of Labels

The plain reading of the term "postmortem probate avoidance" supports construction of that term as referring to an affirmative act, distinguishable from instances of inaction that—absent the probate law's protections, safeguards, and contingencies—would, like postmortem probate inaction, give rise to economic harm and the frustration of a property owner's intent.[8] The definition offered by *Merriam-Webster* for "avoidance" is "an act or practice of avoiding or withdrawing from something,"[9] and the definition for "avoid" is "to keep away from," "to prevent the occurrence or effectiveness of," or "to refrain from."[10] Thus, the description of postmortem probate inaction as "postmortem probate avoidance" threatens to, in the minds of lay readers or even certain attorneys, move postmortem probate inaction out of the semantic realm of passive inaction and into the realm of affirmative acts. To those for whom the distinction between misfeasance and nonfeasance holds importance (whether

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[8] *See* Weisbord, *supra* note 2, at 115-19.

[9] *Avoidance*, Merriam-Webster, https://www.merriam-webster.com/dictionary/avoidance [https://perma.cc/E2LK-CWAN].

[10] *Avoid*, Merriam-Webster, https://www.merriam-webster.com/dictionary/avoid [https://perma.cc/92ZH-VHCM].

because of instincts of fairness and justice or because of familiarity with the body of law in the area), the treatment of postmortem probate inaction as an affirmative act could mean the difference between (1) regarding such failure as being blameless on the part of the inheritors of heirs' property, and (2) regarding such failure as being worthy of the unmitigated harmful economic consequences that befall the inheritors of heirs' property due to the chain of events that sometimes includes postmortem probate inaction.

Weisbord suggests that the economic harm that the inheritors of heirs' property experience goes unchecked because "probate's toolkit of contingencies does very little to mitigate the consequences of heirs['] property."[11] Given this context and the general tenor of Weisbord's essay, it almost certainly is not his goal to suggest that the primary behaviors at which remedial policy should be aimed are the behaviors of the inheritors of heirs' property. Indeed, *language matters*, especially in the realm of public policy: the use of the term "postmortem probate inaction" avoids the risk that lawyers and laypeople alike will be swayed to shift their focus away from probate law's failure to protect against the systemic failures that precede postmortem probate inaction and instead focus on the acts (or inaction) of the inheritors of heirs' property.

The language of the heirs' property policymaker should reflect relevant historical and societal context and be tailored to reduce the likelihood of the misconstruction of the problem as a problem primarily caused or proliferated by the misfeasance of the inheritors of heirs' property instead of a problem caused by the rightful targets of remedial action, which are the historic policies that disregarded the development of protections and safeguards for certain vulnerable property owners:

> The property market has historically bent toward dispossession of those in the margins, many of whom are Black and low-income. Black Americans have particularly experienced "tremendous" property loss in the last century. Black land loss, or "the coerced taking of land from Black [property] owners," accelerated throughout the twentieth century to modern day. Of the over 15 million acres of land held in full ownership by Black Americans by 1910, only 2.3 million acres remained less than a century later in 1992. This decline runs parallel to the decline of Black farmers over the last century; while in 1920, one in every seven farms in the United States was run by a Black farmer, by 2001, this number was only 1%. Between 1978 and 1987 alone, the number of Black-owned farms dropped by 23%,

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[11] Weisbord, *supra* note 2, at 116.

> while white-owned farms declined by only 6.6%. By the end of the twentieth century, over 90% of the land owned by Black farmers' forebearers had been lost. Despite the common belief that dispossession of Black land largely occurred during the Jim Crow era, mass land loss actually occurred in the latter part of the twentieth century. Heirs' property owners have been especially vulnerable to systemic deprivation of their land, as antiquated laws that regulate this property type are cited as one of the leading causes of involuntary Black land loss. Additionally, migration from the South, where much of heirs' property was concentrated, led to a geographic dispersal of heirs, adding an obstacle to keeping track of multi-generational heirs. Addressing Black land loss must also include addressing heirs' property, and conversely, any reforms meant to stabilize heirs' property must take into consideration the particular historical position of Black landowners.[12]

The harms borne of the prevalence of heirs' property have deep societal roots, and the language presented to and by policymakers and stakeholders in service of remedying those harms should give due accord to the context of the systemic failures that have resulted in the proliferation of those harms. The use of the term "postmortem probate inaction" instead of "postmortem probate avoidance" constitutes one semantic step toward clarifying to even the most cursory observer that it is inaction against the backdrop of default rules and policies of the status quo, rather than deliberate "avoidance" of probate, that should be addressed by policymaking. The distinction, although based on a semantic tweak, is not solely semantic because of the divergent treatment of action and inaction for purposes of attributing liability under centuries-old jurisprudence (and, arguably, for purposes of attributing blame under common-sense principles). "Negligence doctrine has long distinguished misfeasance (a 'misdoing') from nonfeasance (a 'not doing'), purporting to provide that the former occasions liability and the latter does not."[13] Considering this aspect of negligence doctrine and applying it by analogy to the task of policymaking, policymakers should be careful to ensure that the language they use to describe postmortem probate inaction shifts the conceptual onus of responsibility for the failure of probate law to protect vulnerable

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[12] Heidi Kurniawan, *Beyond Institutions: Analyzing Heirs' Property Legal Issues and Remedies Through a Black History Lens*, 22 U. MD. L.J. RACE RELIG. GENDER & CLASS 148, 152 (2022).

[13] Jean E. Rowe & Theodore Silver, *The Jurisprudence of Action and Inaction in the Law of Tort: Solving the Puzzle of Nonfeasance and Misfeasance from the Fifteenth Through the Twentieth Centuries*, 33 DUQ. L. REV. 807, 807 (1995).

landowners away from those vulnerable landowners and onto the relevant ineffective and inequitable historical policies and circumstances that offer no protections for the inaction of those vulnerable landowners.

III. The Deceptive Similarity of the Term "Postmortem Probate Avoidance" to the Well-Established Practice of "Probate Avoidance"

"Probate avoidance," as it is commonly understood within the estate planning community, is an intentional strategy undertaken by an individual or family, usually prior to the death of the person with respect to whose estate probate is sought to be avoided, in the context of an estate plan:

> Avoiding probate has been a staple of estate planning for decades. Whether or not a plan involves estate tax planning, probate avoidance is a cornerstone of most plans. In fact, a cottage industry has developed around the concept, with written materials and seminars prolific about the costs of not planning properly. The deluge of propaganda on the subject makes it almost certain that a client is at least aware of the issue.[14]

There are treatises with entire chapters on probate avoidance techniques, including one[15] that cites the following "reasons to avoid probate": (1) provide non estate-planning benefits, (2) accelerate asset distribution, (3) reduce estate planning and administrative expenses, (4) enhance confidentiality, (5) minimize taxes, (6) retain flexibility, (7) change with less difficulty, (8) protect from creditors, (9) isolate from contest, and (10) increase understandability.

"Probate avoidance," as a term, has come to refer to sophisticated planning, usually executed with the assistance of one or more professional advisors, that allows decedents to spare their heirs the inconveniences of probate. The term "postmortem probate avoidance," which on its face appears to refer to a species of probate avoidance planning that occurs after death, actually refers to postmortem probate inaction, which lies on the opposite ends of the sophistication and resource spectrums from "probate avoidance." As such, the use of the term "postmortem probate avoidance" is deceptively similar to the term "probate avoidance" because "postmortem probate avoidance" (which is more accurately

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[14] Mohammed J. Bidar, *Avoiding Probate-More Important Than Ever*, 19 Ohio Prob. L.J. 156 (2009).

[15] *See* Gerry W. Beyer, Law of Wills 269 (2022).

described as postmortem probate inaction) is usually accompanied by a *lack of* planning, knowledge, and resources. From a policymaking perspective, it is important to distinguish postmortem probate inaction from probate avoidance, as the prevalence of the former reflects a dire need for public policy intervention, while the prevalence of the latter reflects access to resources and expertise enjoyed by select private market participants.

CONCLUSION

In the absence of nuance and context, postmortem probate inaction could easily be framed as a failure or refusal of individuals to access channels of justice that are readily available to all. However, informed analyses of the factors at play have concluded that vulnerable families may be less likely to engage in voluntary services due to logistical barriers, lack of knowledge, hesitancy, and mistrust, among other factors.[16] To compound upon the lack of knowledge that contributes to the proliferation of postmortem probate inaction and the gap in probate law's protections against that inaction, there are also, as Weisbord points out, minimal "economic incentives for private actors to help heirs overcome this information asymmetry."[17] Considering these factors, the historical context around heirs' property and its roots, and the "soundbyte era" in which we live, lawyers should make efforts to ensure that their semantic choices in describing the many strands of the heirs' property problem do not invite distortion or obfuscation of the relevant context, which could impede effective policymaking in the space.

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[16] Harvard Kennedy School Government Performance Lab, *Engaging Vulnerable Families in Voluntary Prevention Programs* 1, 3, https://govlab.hks.harvard.edu/files/govlabs/files/engaging_vulnerable_families_policy_brief.pdf (last visited Mar. 25, 2024).

[17] Weisbord, *supra* note 2, at 118.