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Improving the Uniform Partition of Heirs Property Act

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IMPROVING THE UNIFORM PARTITION OF HEIRS PROPERTY ACT

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INTRODUCTION

Johnny Rivers was born and had lived his whole sixty-nine-year life on the same seventeen-acre tract on Clouter Creek near the Cainhoy Peninsula of Charleston, South Carolina.[1] His father owned the land since 1888, and his family had worked the land and paid taxes, never missing a tax payment.[2] He thought he and his family would live on the land for the rest of his life.[3]

However, in 2000 he received a letter telling him he was the subject of a legal action called a "partition."[4] A family member who was a part owner of the land and whom Rivers had never met decided he wanted to sell his interest in the land.[5] The court would later order the Rivers family to sell the land and accept the auction bid of an investor for $910,000, of which Rivers received less than 4%.[6] Attorney's fees were charged to the Rivers family which came out of the sale proceeds.[7] Rivers and twenty-five members of his family were evicted in one of the largest evictions in the county.[8] The investor then sold the same property eight months later for three million dollars.[9] The lot was then subdivided into smaller lots around .3 acres, each of which sold for two million dollars or more.[10] All told, Rivers received around only $30,000.[11]

Unfortunately, Rivers, and many other property owners for which this is an all too common occurrence, had no idea that this sort of result is possible. Most assume that because they live on the land, or pay taxes, or because

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1 April B. Chandler, Note *"The Loss in My Bones": Protecting African American Heirs' Property with the Public Use Doctrine*, 14 WM. & MARY BILL RTS. J. 387, 387 (2005).

2 *Id.*

3 *Id.*

4 *Id.* at 389.

5 *Id.* at 388.

6 *Id.* at 387–88.

7 Chandler, *supra* note 1, at 387–88.

8 *Id.* at 387.

9 *Id.*

10 *Id.* at 388.

11 *Id.* at 387–88.

the land ownership is divided among many co-owners, no one can force them to leave.[12]

However, it is exactly because of this last characteristic—the fractionalized ownership of land among many related individuals—a condition known as "heirs property"[13] that the Rivers' land, and so many other pieces of property, are vulnerable. Since any co-owner in this situation can seek an order from a court for the land to be divided,[14] and because courts routinely divide the value of the land not by splitting it into parcels ("partition in kind"),[15] but by auctioning it at a forced sale and distributing the proceeds ("partition by sale"),[16] co-owners in this situation can be forced off their own land despite their familial, financial, or historical connection to it.[17]

Fortunately, the Uniform Law Commission[18] has recently promulgated the Uniform Partition of Heirs Property Act[19] (hereinafter the "Uniform Act") which attempts to address some of the issues caused by partition of heirs property. This act encourages a new way of partitioning the land in partition actions, and also preserves land value if partition sales do happen. States are starting to enact legislation based on the Uniform Act, which is a positive development.[20]

However, the Uniform Act leaves other problems with heirs property partition unaddressed. This paper proposes three additional reforms that will make the act more robust in addressing the ills of partition: a change to how plaintiffs' legal fees are paid by allowing those that object to the sale to avoid having the value of their land reduced, an improved notice provision to require more diligence in finding missing owners, and a mandatory mediation provision to address the root cause of some partition actions.

This paper proceeds in five parts. Part I discusses the problems with heirs property generally, including how it is formed, how it restricts access

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12 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, 6 (2007).

13 Anna Stolley Persky, *In the Cross Heirs*, 95 A.B.A. J. 44, 46 (2009).

14 W.T. Geddings, Jr., *Partition Actions in South Carolina: "Parting is Such Sweet Sorrow"*, 27 S.C. LAW. 18, 20 (2016).

15 Thomas W. Mitchell et al., *Forced Sale Risk: Class, Race, and the "Double Discount"*, 37 FLA. ST. U. L. REV. 589, 610 (2009).

16 *Id.* at 611.

17 *See* 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, 771–74 (2000).

18 Also known as The National Conference of Commissioners on Uniform State Laws.

19 NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM PARTITION OF HEIRS PROPERTY ACT (2010), http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/uphpa_final_10.pdf [hereinafter UNIFORM ACT].

20 The Uniform Act has been enacted in Alabama (ALA. CODE §§ 35-6A-1–14 (2014)), Arkansas (ARK. CODE ANN. §§ 18-60-1001–1014 (2015)), Connecticut (CONN. GEN. STAT. § 52-503f (2015)), Georgia (GA. CODE ANN. §§ 44-6-180–189.1 (2013)), Hawaii (HAW. REV. STAT. §§ 668A-1–14 (2017)), Montana (MONT. CODE ANN. §§ 70-29-401–420 (2013)), New Mexico (H.B. 181, 53rd Leg., 1st Sess. (N.M. 2017)), Nevada (NEV. REV. STAT. §§ 39.600–705 (2011)), South Carolina (S.C. CODE ANN. §§ 15-61-310–420 (2016)), and Texas (S.B. 499, 85th Leg., Reg. Sess. (Tex. 2017)).

to resources, and how it is a major cause of land loss in minority communities. Part II discusses the mechanisms of heirs property partition specifically, and how heirs property actions are conducted. Part III explains why partition results in the loss of both economic and non-economic land value due to: the loss of land value at auction, the exploitation of partition sales by investors, the government-forced sale of ancestral homeland, the lack of notice to all owners, and the loss of value through attorney's fees from the proceeds of the sale. Part IV describes how the Uniform Partition of Heirs Property Act does much to address some of these issues by requiring partition by allotment instead of by sale or in kind, by encouraging partition in kind over partition by sale, and by ensuring that if a sale remedy is sought, it proceeds in a way that ensures fair market value. Part V proposes three additional reforms, as mentioned above: a change to the payment of petitioner legal fees, an improved notice provision, and a mandatory mediation provision. A brief conclusion follows which suggests that heirs property partition is a symptom of the larger problem of heirs property more generally, one that needs to be addressed so we do not have the tragedy of Johnny Rivers reoccur for future generations.

I. THE HEIRS PROPERTY PROBLEM

Over half of Americans die without a will.[21] In certain minority communities, such as the African American community, this rate is much higher.[22] When a landowner dies without a will, land passes by the laws of intestacy in each state.[23] Land that passes by intestacy is owned by future generations in an ownership structure known as tenancy in common.[24] Land owned by tenants in common, where many or all of the owners are related and have acquired the land through intestacy, devise, or gift is known as "heirs property" or sometimes "heir-locked land".[25]

Tenancy in common ownership has certain key features that distinguish it from other forms of property ownership. All tenants in common are said to have an undivided interest in the land, regardless of what percentage they own.[26] This means that all tenants in common can access all parts of the land,

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21 *Majority of American Adults Remain Without Wills*, LAWYERS.COM (Apr. 3, 2007), http://press-room.lawyers.com/majority-of-american-adults-remain-without-wills.html.

22 *Id.*

23 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, 507–08 (2001) [hereinafter Mitchell, *Reconstruction to Deconstruction*].

24 *See id.* at 512.

25 Craig H. Baab, *Heir Property: A Constraint for Planners, an Opportunity for Communities: The Legacy of Steve Larkin*, 63 PLANNING & ENVTL. LAW 3, 6–7 (2011); UNIFORM ACT, *supra* note 19, at 3.

26 Thomas W. Mitchell, *Reforming Property Law to Address Devastating Land Loss*. 66 ALA. L. REV. 1, 8–9 (2014) [hereinafter Mitchell, *Reforming Property Law*].

and cannot be excluded from their use by any other co-tenant.[27] Tenants in common can and often do own different fractional shares of the property, even though they have an undivided interest.[28] In the case of heirs property, after several generations, any individual owner can have an incredibly small interest in the property.[29] One example is a co-tenant who had a 1/19440th interest in a partition action.[30] Any tenant in common, no matter how small the interest, may sell his or her interest or convey it by gift during his or her lifetime without the consent of his or her fellow cotenants, making it easy for non-family members—including real estate speculators in a number of instances—to acquire interests in family-owned real property.[31] At a tenant in common's death, his or her interest in the tenancy in common property may be transferred under a will, or if the will is not probated in time or if there is no will, under the laws of intestacy, further dividing the property.[32]

A. *Lack of Access to Resources*

One problem that results from this fractionalized ownership is the lack of access to resources to improve the land. For many families who own heirs property, the land may be their only significant asset.[33] However, they are not able to access the value in this land through loans or lines of credit with the land as collateral, because the presence of multiple owners, some unknown, makes providing merchantable title to secure a loan impossible.[34] Money to invest in improving the land, such as for needed repairs in the case of residential property or irrigation in the case of farmland, is unavailable.[35]

B. *Lack of Access to Government Programs*

The lack of access to resources for heirs property also extends to resources from government programs. An example provided in the notes to the Uniform Act involves poor property owners in New Orleans who were not

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27 *Id.*

28 Mitchell, *Reconstruction to Deconstruction*, *supra* note 23, at 518.

29 *See id.*

30 *Id.* A piece of Native American property suffering from the same type of fractionalization had 439 owners and a common denominator used to compute fractionalized interest in the property over 3 trillion. *Id.* at 521–22 (citing *Hodel v. Irving*, 481 U.S. 704, 707 (1987)).

31 Mitchell, *Reconstruction to Deconstruction*, *supra* note 23, at 512, 517 (discussing characteristics of tenancy in common and land speculators acquiring an interest).

32 *See id.* at 517.

33 *See* UNIFORM ACT, *supra* note 19, at 1, 8.

34 *Id.*; *see also* Mitchell, *Reconstruction to Deconstruction*, *supra* note 23, at 518; Hugo A. Pearce III, *"Heirs' Property" The Problem, Pitfalls, and Possible Solutions*, 25 S.C. L. REV. 151, 152–54 (1974).

35 *See* Mitchell, *Reconstruction to Deconstruction*, *supra* note 23, at 518.

able to access governmental programs such as the Department of Housing and Urban Development's "Road Home" program, established after Hurricane Katrina to provide financial assistance to property owners who had been harmed.[36] Merchantable title problems arose that required resolution before the property owners could qualify for governmental programs because many of these poor property owners owned heirs property.[37] Resolving these issues typically required an attorney, which most of these property owners could not afford.[38]

C. *Major Cause of Land Loss Through Partition*

One final feature of tenancy in common is that any cotenant may file a lawsuit asking a court to partition the property, even though that cotenant may only have recently acquired interest in the property, irrespective of the time that other cotenants may have owned the land, and regardless of how small that interest is.[39] In the case of heirs property, even though other options exist for the court, in the case of partition actions, property is often lost through a forced sale of the property at auction in which there is only one bidder—the plaintiff filing for partition.[40]

Partition sales of heirs property have been one of the leading causes of land loss within the African-American community. Although African-Americans acquired between sixteen and nineteen million acres of agricultural land between the end of the Civil War and 1920, today "African-Americans retain ownership of approximately just seven million acres of agricultural land," which scholars and historians attribute to partition sales.[41]

Other groups have experienced similar land loss from forced partition sales. The effect has been acute in traditionally disadvantaged and less affluent communities. For example, in the years following the Mexican-American War, Mexican-Americans in the American Southwest lost title to several hundred-thousand acres through forced partition sales. There, the erroneous classification of a large proportion of Mexican-American community-owned property as tenancy-in-common property led to the sales, in most cases at significant discount to the land's true value.[42] As was the case for many other communities who lost land in forced partition sales, many Mexican-Ameri-

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36 Baab, *supra* note 25, at 6–7; UNIFORM ACT, *supra* note 19, at 6.

37 UNIFORM ACT, *supra* note 19, at 6.

38 *Id.*

39 *Id.* at 1.

40 *Id.* at 2; *see also infra* Part II.

41 UNIFORM ACT, *supra* note 19, at 4–5; *see also* Persky, *supra* note 13, at 46.

42 Mitchell, *Reforming Property Law*, *supra* note 26, at 34–35; *see also* UNIFORM ACT, *supra* note 19, at 5–6.

cans with rights to the land prior to the forced sales were unable to bid effectively at auction because their primary asset holdings were the land itself.[43] "[I]n parts of Appalachia, heirs property has been hypothesized to be correlated with, and a cause of, the persistence of [multi-generational] poverty."[44] Other instances of similar land loss have occurred in the family property of some Native Americans communities.[45] This pervasive problem is, as one commentator described it, "the worst problem you never heard of."[46]

The next section explains more about the mechanism of how heirs property partition results in land loss.

II. HEIRS PROPERTY PARTITION

Heirs property partition generally works in the following way: After land has passed through intestacy for many generations, devise, and gift, ownership is fractionalized among many tenants in common.[47] One co-tenant, looking to get an immediate economic gain from his or her fractional ownership, often sells his or her fractional share to an investor.[48] In some cases, however, familial disputes are the cause of a partition action, where an unrelated issue causes a rift between family members, and a lawyer for one party convinces the co-tenant to file a partition action.[49] In some cases, investors have acquired fractional shares from those that later claimed they did not know what they were signing, including the elderly, those with less than an elementary school education, persons with mental disabilities, or the imprisoned.[50] Once the investor has acquired a share, he or she may file, as any cotenant may, for partition.[51]

A court typically orders either a *partition in kind* or a *partition by sale* in resolving a partition action. For a *partition in kind,* the court separates the property into sub-parcels proportionately in value according to each cotenant's fractional interest and then distributes these parcels to the co-owners.[52]

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43 *See* UNIFORM ACT, *supra* note 19, at 6.

44 *Id.*

45 *Id.*

46 Persky, *supra* note 13, at 46 (quoting David Dietrich, co-chair of the ABA Property Preservation Task Force).

47 Todd Lewan & Dolores Barclay, *Developers and Lawyers Use a Legal Maneuver to Strip Black Families of Land*, ASSOCIATED PRESS, Dec. 30, 2001, http://theauthenticvoice.org/mainstories/tornfrom theland/torn_part5/.

48 *See id.*

49 *Id.*

50 Lewan & Barclay, *supra* note 47. This article details several egregious examples of developers or other land speculators acquiring fractional ownership of family land, including from a 74-year-old widow with a fourth-grade education who was bedridden with cancer at the time of the sale and an 88 year old man with no formal education. *See id.*

51 Persky, *supra* note 13, at 46.

52 UNIFORM ACT, *supra* note 19, at Prefatory note, 1–2.

For a *partition by sale,* the court forces the parties to sell the property entirely, and then the court distributes the proceeds among the cotenants in proportion to their relative interests in the property.[53] Most states statutorily prefer *partition in kind* over *partition by sale* because the latter is considered an extraordinary remedy that undermines fundamental property rights.[54]

Despite the statutory preference for partition in kind,[55] courts still often resolve partition actions by ordering a partition sale.[56] This results in forcing property owners off their land without consent.[57] Partition by sale occurs even when the property could have easily been partitioned in kind, where a significant majority of the cotenants had opposed partition by sale, or when the only remedy the petitioner requested was partition in kind and *not* partition by sale.[58]

The preference of courts in many states for ordering partition sales, even in the face of other statutory options, has arisen because courts only consider the theoretical economic benefit of partition sales, rather than other non-economic factors.[59] Courts using the partition by sale approach have ignored the sentimental, ancestral, cultural, or historical significance that owners place on the property, as well as its capacity to provide shelter and so prevent homelessness.[60] In addition, the economic value of a parcel partitioned into sub-parcels is rarely greater than the parcel as a whole.[61] Thus, when courts apply an "economics-only" test, and compare the potential monetary sale price of the single parcel against the aggregate sale prices of the sub-parcels which would result from a partition in kind, courts will regularly find the former to be greater and therefore order a partition by sale regardless of the statutory options available.[62]

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53 *Id.* at 2.

54 *Id.*

55 *See, e.g.*, ALA. CODE § 35-6-40 (2014); ALASKA STAT. § 09.45.290 (2016); ARK. CODE ANN. § 18-60-401 (2015); CAL. CIV. PROC. CODE § 872.210 (West 1980); COLO. REV. STAT. § 38-28-101 (2016); CONN. GEN. STAT. Ann. § 52-495 (West 1991); D.C. CODE ANN. § 16-2901 (West 1997); GA. CODE ANN. § 44-6-140 (2016); HAW. REV. STAT. § 668-1 (2016); IOWA CODE § 651.3 (2016); KAN. STAT. ANN. § 60-1003 (2016); KY. REV. STAT. ANN. § 381.120 (West 1998); MD. CODE ANN., REAL PROP. § 14-107 (West 2016); MINN. STAT. § 558.17 (2000); MO. ANN. STAT. § 528.030 (West 2016); MONT. CODE. ANN. § 70-29-101 (2015); NEV. REV. STAT. § 39.010 (2015); N.J. STAT. ANN. § 2A:56-1 (West 2016); N.M. STAT. ANN. § 42-5-1 (2016); N.Y. REAL PROP. ACTS. LAW § 901 (McKinney 1979 & Supp. 2000); N.D. CENT. CODE § 32-16-01 (2016); OR. REV. STAT. § 105.205 (2016); S.D. CODIFIED LAWS § 21-45-1 (2016); UTAH CODE ANN. § 78B-6-1201 (West 2016); WIS. STAT. ANN. § 842.02 (West 2016).

56 UNIFORM ACT, *supra* note 19, at Prefatory note, 2.

57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.*; *see also* Craig-Taylor, *supra* note 17, at 771–79 (discussing the African American connection to land and the particular problem of land loss in that community).

61 UNIFORM ACT, *supra* note 19, at Prefatory note, 7.

62 *Id.*

In addition to considering only economic factors, "[j]udges order partition sales because it's easy."[63] Appraising and dividing property takes time and effort for the court.[64] Often "commissioners" or "referees" or "partitioners" must be hired by the court to determine the appropriate partition in kind[65] and determine appropriate owelty payments if the land cannot be divided in to parcels equivalent to the fractional ownership interests.[66]

Under the above approach, the tenants in common theoretically could still receive an economic benefit from the partition by sale. The next section shows several problems with the partition by sale approach that keep these gains from being realized.

III. HEIRS PROPERTY PARTITION PROBLEMS

Despite courts' insistence that a forced partition by sale will result in an economic benefit for co-tenants, several issues with the process result in the loss of economic and non-economic value of the land.

A. *Loss of Land Value*

Although courts ostensibly impose partition sales for the financial or economic benefit of the landowners, the forced sale procedures courts typically use to sell heirs property are notorious for yielding sales prices well below the market value of the land.[67] The courts order the property sold at auctions, where the property is sold utilizing the procedures used for other forced sales, such as a sale under execution.[68] These forced sales result in property being sold for well below its fair market value for several reasons, despite judges' assumption that the sale will yield a fair market value price.[69] First, these auction sales are not required by law or statute to be conducted in a commercially reasonable manner, and are often not true open auctions.[70] In addition, the auctions tend to be underpublicized and frequently there is only a single bidder for the land.[71] Unsurprisingly, this bidder is often the plaintiff

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63 Lewan & Barclay, *supra* note 47 (quoting Jesse Dukeminier, emeritus professor of law at the University of California at Los Angeles).

64 *Id.*

65 Mitchell, *Reforming Property Law*, *supra* note 26, at 26.

66 UNIFORM ACT, *supra* note 19, at Prefatory note, 7; *see also* Rivers, *supra* note 12, at 76 (discussing owelty payments). Many states provide for owelty payments, which is an underutilized remedy in these cases. *See, e.g.*, ALA. CODE § 35-6-24 (2015).

67 UNIFORM ACT, *supra* note 19, at Prefatory note, 2.

68 *Id.* at 7.

69 *Id.*

70 Mitchell, *Reforming Property Law*, *supra* note 26, at 18–22.

71 *Id.* at 19–20.

in the partition action, as that is the only party other than the family that owns the land that is aware it is occurring,[72] even though auction sales yield higher and more economically efficient prices when publicized to a wider number of potential buyers. When auction sales do yield low sales prices, courts rarely overturn such sales as most courts consider challenges under a lax "shock the conscience" standard to evaluate the sale.[73] Under this lax standard, sales have been upheld even when the property sold for twenty percent or less of its ultimate market value.[74]

B. *Exploitation of Partition Sales*

The fact that any cotenant in a tenancy in common can force a sale of the property is often exploited by investors who wish to acquire the whole of the property. If a developer acquires even a small share from any relative owning heirs property, that developer can file for partition.[75] In many cases, land traders interested in heirs property buy small shares of family estates, sometimes from heirs who are elderly persons, people with mental disabilities, or imprisoned, and then seek partition sales.[76] At these partition sales, the investors are the only bidders in the process, and so may acquire the land for much less than what it is worth.[77] Other co-tenants that wish to keep the property are shut out of the bidding process because the vast majority of their net worth is in the land itself, and they do not have any other resources with which to acquire the land.[78] And, as mentioned above, since the ownership is fragmented, they are unable to use the land to acquire a loan or other capital with which to bid, and the nature of the bidding is such that an upfront, cash payment is often required.[79]

C. *Government Forced Sale of Land*

There are many cases in which outside speculators who acquired small interests in parcels of heirs property land have used the courts to order a partition by sale of the property soon after the speculators had acquired an interest. This is true even in cases where the land had been owned by a family for decades, despite the fact that the family opposed the request for a partition

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72 *Id.* at 20.

73 UNIFORM ACT, *supra* note 19, at Prefatory note, 7.

74 *Id.*

75 *Id.* at 10; *see also* Mitchell, *Reconstruction to Deconstruction*, *supra* note 23, at 510 (discussing laws of the different states and the preference for partition).

76 Lewan & Barclay, *supra* note 47.

77 UNIFORM ACT, *supra* note 19, at 8.

78 *Id.* at 21.

79 *Id.* at 20.

by sale and despite the family's longstanding ownership.[80] Essentially, the law of partition in these cases functions as an eminent domain-like power of condemnation, in which the cotenants who petition a court for petition by sale force their fellow cotenants from the land.[81] However, unlike the protections of eminent domain, those who end up losing ownership of their property in a partition by sale "are not entitled to be paid fair market value compensation or any minimum level of compensation . . . for having their property rights extinguished."[82]

In addition to the economic value of the land, for many families or communities, real property ownership has important ancestral or historical significance.[83] For many African American families in particular, possession of land is a symbol of independence.[84] For many families, the ancestral home can provide a shelter from homelessness, which the equivalent economic value of the land may not do.[85] These lands may also provide bases for long established businesses to flourish.[86] Through the forced sale remedy allowed in partition actions, substantial non-economic value is lost.[87] By forcing the sale of these lands, the government is effectively condemning these properties without any recognition of the other value these places provide.

D. *Lack of Notice to Other Owners*

Another major problem with heirs property partition is that many owners, even those that have an ongoing relationship with the land, are not notified about the partition action until after the sale, or until adverse legal consequences have already taken place.[88] This is because in these actions, petitioners are allowed to notify interested parties by publication.[89] A "notice by publication" is where a notice of the pending action is printed, typically in a local newspaper that is not widely distributed which may exist only for this purpose.[90]

In many states, petitioners are allowed to notify interested parties by publication if such parties are "unknown," but there is no elaboration of this

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80 Lewan & Barclay, *supra* note 47.

81 UNIFORM ACT, *supra* note 19, at Prefatory note, at 4.

82 *Id.*

83 *See* Craig-Taylor, *supra* note 17, at 766–68; Mitchell, *Reconstruction to Deconstruction*, *supra* note 23, at 523–26.

84 Mitchell, *Reconstruction to Deconstruction*, *supra* note 23, at 507.

85 *Id.* at 539.

86 *Id.*

87 *Id.*

88 Mitchell, *Reforming Property Law*, *supra* note 26, at 46.

89 *Id.*

90 *Id.*

provision, and it is mostly left to court discretion.[91] Notice by publication is typically used in these sorts of situations because the petitioner for partition usually represents that they are unable to find many of the owners or they are too numerous to track down.[92] This has resulted in cases where owners have not been given notice of a partition action even when they live in the same town as the land they own, or are known to the plaintiffs in the case.[93]

The lack of notice to owners makes it impossible to determine what these owners wish to have happen with the land. More importantly, it further devalues the land for the notified owners. Those owners that are known or speculated to exist but cannot be notified must have their shares reserved for them in a partition action. This means that after a partition sale, their fractional interest is usually kept by the state in the event that they later appear.[94] However, without good notice to these parties, after a certain amount of time, their interests escheat to the state, further removing the value of family land from the family.[95]

E. *Attorney's Fees*

One other way in which land value is lost during partition actions is through the imposition of fees that are paid from the sale proceeds of the land. A number of fees and costs must first be paid to others before the remaining proceeds of a sale are distributed to the tenants in common.[96] Among the largest are attorney's fees, which can constitute ten or twenty percent of the sales price in the many states that permit such an attorney's fee award in a partition action.[97] At the time a court orders a partition by sale these fees and costs are not often taken into account, although they can be quite substantial and undermine any hypothetical economic benefit a cotenant would receive from a partition sale.[98]

"To make matters worse, in many states cotenants who unsuccessfully *resist* a request for a court-ordered partition by sale are then required to pay

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91 Memorandum from John Pollock to the NCCUSL Drafting Committee on Partition Tenancy-in-Common Real Property Act 3 (Oct. 27, 2007) (on file with the author).

92 *See id.* at 3–4.

93 Mitchell, *Reforming Property Law*, *supra* note 26, at 46.

94 Pearce, *supra* note 34, at 156.

95 *Id.*

96 In addition to attorney's fees, these fees often include costs incurred in selling the property including the fees of court-appointed commissioners or referees (often five percent or more of the sales price) and surveyor fees. *See* Mitchell, *Reforming Property Law*, *supra* note 26, at 26–28.

97 *Id.* at 25–26.

98 *Id.* at 26.

a portion of the attorney's fees and costs incurred by the cotenant *who petitioned the court for a partition by sale.*"[99] This is because attorney's fees are awarded on the theory that partition sales are considered to be for the "common benefit" of all cotenants, regardless of whether that cotenant wished for the partition or not.[100] Resisting cotenants are in effect forced to pay for the deprivation of their property rights and their resulting loss of wealth. These fees and costs are in addition to the attorney's fees they must pay their own attorney which they hired in their unsuccessful effort to resist the sale and maintain ownership of their property.[101]

IV. UNIFORM PARTITION OF HEIRS PROPERTY ACT

In response to some of the above problems, the National Conference of Commissioners on Uniform State Laws (NCCUSL) drafted and approved the Uniform Partition of Heirs Property Act.[102] This act was promulgated in late 2010, and states are starting to enact this as legislation.[103] It has already been enacted in Nevada, Georgia, Arkansas, Montana, Alabama, Hawaii, South Carolina, Connecticut, New Mexico, and Texas and is being considered by other jurisdictions in 2017.[104] This Act makes several changes to the way heirs property partition is handled in order to address some, but not all, of the problems mentioned above.

A. *Partition by Allotment*

The most significant change to state law introduced by the Uniform Act is another option for partition other than partition by kind or by sale. Referred

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99 UNIFORM ACT, *supra* note 19, at Prefatory Note, 2 (emphasis added); *see also* Lewan & Barclay, *supra* note 47. In one case highlighted by the Associated Press, the attorney for a small number of cotenants who were deemed to have petitioned the court in 1996 for the sale of 300 acres of property that had been owned by the Sanders family, an African-American family, for eighty-three years was awarded approximately 20 percent of the $505,000 sales price. Lewan & Barclay, *supra* note 47. The court made this award despite the fact that the majority of the named plaintiffs had indicated that they had not authorized the attorney to file the partition action and despite the fact that several of the cotenants hired another attorney in an effort to contest the request for a partition by sale. *Id.*

100 Mitchell, *Reforming Property Law*, *supra* note 26, at 24.

101 *Id.* at 25.

102 UNIFORM ACT, *supra* note 19.

103 *Partition of Heirs Property Act*, THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIF. LAW COMM'N, http://www.uniformlaws.org/Act.aspx?title=Partition%20of%20Heirs%20Property%20Act [hereinafter *Partition of Heirs Property Act*] (showing a map of enacted states); *see also supra*, note 20 (listing states that have adopted the Uniform Act).

104 *See Partition of Heirs Property Act*, *supra* note 103 (listing states considering adoption of the Uniform Act).

to in other literature as partition by *allotment*,[105] it gives the owners not seeking partition the right to buy the property from the owner seeking partition.[106] It is important to note that partition by allotment gives the petitioner the right to sell the property, but only gives the right to buy to other owners.[107] In this way, the petitioning party, at least at this first stage, cannot use the partition action to buy the property themselves.[108]

If the court chooses partition by allotment, the other "cotenants who did not request partition by sale have a right to buy out the interests of those who have done so, at a price equal to the court-determined value multiplied by the fractional interest of the cotenant that is bought out."[109] If more than one cotenant elects this option to purchase the interests of those proposing sale of the property, then "the interests for sale are apportioned among the electing cotenants based upon their relative interests in the property."[110] So, for example, if Anne, Betty, Charles, and David each own one fourth of a property, and David files a partition action, Anne, Betty, and Charles each have the right to buy out one third of David's interest, as they each own one third of the property that is not allotted for partition. If Charles decides not to participate in purchasing David's property, Anne and Betty each can purchase up to half of David's interest, if they decide to do so. Of course, this is the maximum each could purchase, and Anne and Betty could choose to buy one quarter and three quarters of David's interest respectively.[111]

The Act also allows for the court to order "a second buyout of the interests of cotenants named as defendants who were served with the complaint but who did not appear in the action."[112] This allows for partition in kind of the property to become more feasible by reducing the number of interests and to consolidate ownership among fewer members.[113]

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105 Rivers, *supra* note 12, at 57.

106 UNIFORM ACT, *supra* note 19, at §7(a) ("If any cotenant requested partition by sale, after the determination of value under Section 6, the court shall send notice to the parties that any cotenant except a cotenant that requested partition by sale may buy all the interests of the cotenants that requested partition by sale.").

107 *Id.* §7, cmt. 3 ("Only those cotenants that seek partition by sale are mandatorily subject to the buyout. A cotenant who seeks partition by sale has already determined that he or she is willing to be divested of any interest in the real property owned in common in exchange for being paid money for any such divested interest.").

108 *Id.*

109 Uniform Partition of Heirs Property Act, Key Points Sheet (on file with the author) [hereinafter Key Points Sheet].

110 *Id.*

111 *See* UNIFORM ACT, *supra* note 19, at § 7, cmt. 7 (providing a more in-depth example).

112 *See* Key Points Sheet, *supra* note 109.

113 *Id.*

B. *Choosing Partition in Kind over Partition by Sale*

As mentioned above, despite courts' insistence that partition in kind (i.e., dividing the property among cotenants) is preferred over partition by sale (selling the property at auction and dividing the proceeds), most courts in partition actions order a partition by sale, either because it is more feasible for the court or because, as they reason, it provides a greater economic advantage.[114] Unfortunately, the economic advantage is not often realized.[115] Perhaps as importantly, the non-economic value of the land is lost.[116]

The Uniform Act recognizes these deficiencies, and if partition by allotment is not feasible, encourages the choice of partition in kind over partition by sale.[117] The Act states that a court shall proceed with a partition in kind unless "great" or "manifest" prejudice to the cotenants as a group would result.[118] Rather than using the "economics only" test that many courts have applied, interestingly, the Act provides a list of both economic *and* non-economic factors which a court should consider in determining whether prejudice would occur in the case of a partition in kind.[119]

Among the economic factors considered are whether partition in kind would result in less "aggregate fair market value" of the property, practicality

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114 See *supra* Section II.

115 Mitchell, *Reforming Property Law*, *supra* note 26, at 18–19.

116 *Id.* at 12.

117 *Id.* at 54–55.

118 UNIFORM ACT, *supra* note 19, at § 8(a) ("If all the interests of all cotenants that requested partition by sale are not purchased by other cotenants pursuant to Section 7, or if after conclusion of the buyout under Section 7, a cotenant remains that has requested partition in kind, the court shall order partition in kind unless the court, after consideration of the factors listed in Section 9, finds that partition in kind will result in [great] [manifest] prejudice to the cotenants as a group. In considering whether to order partition in kind, the court shall approve a request by two or more parties to have their individual interests aggregated.").

119 *Id.* at § 9 ("(a) In determining under Section 8(a) whether partition in kind would result in [great][manifest] prejudice to the cotenants as a group, the court shall consider the following: (1) whether the heirs property practicably can be divided among the cotenants; (2) whether partition in kind would apportion the property in such a way that the aggregate fair market value of the parcels resulting from the division would be materially less than the value of the property if it were sold as a whole, taking into account the condition under which a court-ordered sale likely would occur; (3) evidence of the collective duration of ownership or possession of the property by a cotenant and one or more predecessors in title or predecessors in possession to the cotenant who are or were relatives of the cotenant or each other; (4) a cotenant's sentimental attachment to the property, including any attachment arising because the property has ancestral or other unique or special value to the cotenant; (5) the lawful use being made of the property by a cotenant and the degree to which the cotenant would be harmed if the cotenant could not continue the same use of the property; (6) the degree to which the cotenants have contributed their pro rata share of the property taxes, insurance, and other expenses associated with maintaining ownership of the property or have contributed to the physical improvement, maintenance, or upkeep of the property; and (7) any other relevant factor. (b) The court may not consider any one factor in subsection (a) to be dispositive without weighing the totality of all relevant factors and circumstances.").

of division, harm to existing uses of the property, and the degree of contribution by cotenants to property taxes, insurance, maintenance, and other expenses.[120] Non-economic factors include collective duration of ownership and a "cotenant's sentimental attachment to the property, including any attachment arising because the property has ancestral or other unique or special value to the cotenant."[121] None of these factors are considered dispositive, and the court may consider "any other relevant factor."[122]

By explicitly including these non-economic factors, including sentimental attachment to the land, the Act recognizes a personality theory of property.[123] Under this theory of property, property (both real and personal) has value not only because of the economic benefits it can bring, but because of the attachment that people have to the property itself.[124] Under this theory, for example, the loss of a wedding ring should be compensated not just for the value of the ring, but the sentimental value that it represents.[125] While not generally recognized in property law, we do see this occasionally recognized in areas regarding emotional harm.[126]

By encouraging courts to recognize the non-economic, personal value of the land, courts are more likely to choose partition in kind if partition by allotment is not feasible. This partition in kind division is more likely to result in retention of land by current landowners, and also preserve the historical, ancestral non-economic value of the land.[127]

C. *Ensuring Fair Market Value*

As mentioned above in the case of Johnny Rivers and others, much of the economic land value in partition sales is lost because during a partition by sale, property is often sold at auction, and often to a single bidder who is the party who filed for partition.[128] This results in severe undervaluing of the property for those cotenants who do not purchase the land.[129] Under the Act, a number of safety measures are in place to ensure that the property sells for a fair market value.

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120 *Id.*

121 *Id.*

122 *Id.*

123 *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959–61 (1982).

124 *Id.* at 959–60.

125 *Id.* at 959.

126 *Id.* at 984–85.

127 *See* Rivers, *supra* note 12, at 54–56 (providing more insight on the connection between personhood theory and heirs property).

128 *See supra* Section III.D.

129 *Id.*

First, under the Act, the court appoints a disinterested real estate appraiser to assess the fair market value of the property.[130] The court can use this fair market value for the property to determine the value of any fractional interest that is being distributed through a partition by allotment.[131] Secondly, the Act requires that if a partition in kind is ordered, any commissioners that divide the land must be disinterested parties.[132] This addresses the situation in which commissioners who are appointed have an interest in the land or are participants in the partition action, sometimes even the lawyer for the plaintiff.[133] As a further disincentive to partition by sale actions, if none of the parties request a partition by sale (say, in the case of a family member that wished to get a certain parcel of the land, but does not want the land sold), the court can dismiss the action.[134]

Finally, if a partition by sale is ordered, it must be done as an open-market sale rather than a sealed bid or auction.[135] A broker is agreed on or appointed, and the broker must offer the property for sale "in a commercially reasonable manner" and shall list the property for sale at the value the court has determined through the appraiser.[136] As a final safety valve, if no offer is

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130 UNIFORM ACT, *supra* note 19, § 6 ("(a) Except as otherwise provided in subsections (b) and (c), if the court determines that the property that is the subject of a partition action is heirs property, the court shall determine the fair market value of the property by ordering an appraisal pursuant to subsection (d). (b) If all cotenants have agreed to the value of the property or to another method of valuation, the court shall adopt that value or the value produced by the agreed method of valuation. (c) If the court determines that the evidentiary value of an appraisal is outweighed by the cost of the appraisal, the court, after an evidentiary hearing, shall determine the fair market value of the property and send notice to the parties of the value. (d) If the court orders an appraisal, the court shall appoint a disinterested real estate appraiser licensed in this state to determine the fair market value of the property assuming sole ownership of the fee simple estate. On completion of the appraisal, the appraiser shall file a sworn or verified appraisal with the court.").

131 *Id.*

132 *Id.* § 5 ("If the court appoints [commissioners] pursuant to [insert reference to general partition statute], each [commissioner], in addition to the requirements and disqualifications applicable to [commissioners] in [insert reference to general partition statute], must be disinterested and impartial and not a party to or a participant in the action.").

133 Mitchell, *Reforming Property Law*, *supra* note 26, at 27–28.

134 UNIFORM ACT, *supra* note 19, § 8(b) ("If the court does not order partition in kind under subsection (a), the court shall order partition by sale pursuant to Section 10 or, if no cotenant requested partition by sale, the court shall dismiss the action.").

135 *Id.* § 10 ("(a) If the court orders a sale of heirs property, the sale must be an open-market sale unless the court finds that a sale by sealed bids or an auction would be more economically advantageous and in the best interest of the cotenants as a group. (b) If the court orders an open-market sale and the parties, not later than 10 days after the entry of the order, agree on a real estate broker licensed in this state to offer the property for sale, the court shall appoint the broker and establish a reasonable commission. If the parties do not agree on a broker, the court shall appoint a disinterested real estate broker licensed in this state to offer the property for sale and shall establish a reasonable commission. The broker shall offer the property for sale in a commercially reasonable manner at a price no lower than the determination of value and on the terms and conditions established by the court.").

136 *Id.*

received at or above the court-determined value, the court can either approve the highest offer, re-determine the value of the property, hold the property open until a satisfactory bid is received, or order an alternative sale.[137] All of these options encourage the court to protect the value of land for the cotenants and prevent the vast underbidding at the auction sale.

V. ADDITIONAL SOLUTIONS THAT SHOULD BE CONSIDERED

While the Uniform Partition of Heirs Property Act does address some of the problems with heirs' property, it leaves other problems unaddressed. Namely, it does not consider the land value that is lost through legal fees paid for from the sale of the proceeds, does not consider the lack of notice to co-owners, and does not address some of the root causes of partition due to family disputes. I propose that states adopting the Uniform Act consider adding three changes that will address these issues and make the Act more robust: changing the way legal fees are paid for, adding a heightened showing for notice by publication, and requiring mediation for partition actions.

A. *Petitioner Legal Fees*

Two solutions are available for states considering passing the Uniform Act regarding petitioner's legal fees. First, and most simply, the state could require that, as is typical in many other cases, the petitioner for partition must pay all the legal fees associated with the partition action.[138] Under this solution, the legal fees for the action would not be tied to the proceeds of the sale at all, and the original petitioner for partition would pay the fees from his or her own pocket.[139]

This solution is subject to three major objections. First, this could result in a windfall for those owners who favor selling the land but do not file the action. These owners clearly benefit from the action, as they are able to access the cash value of the land due to the petitioner's (and his attorney's) actions, but are not required to contribute in any way.[140]

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137 *Id.* § 10(d) ("If the broker appointed under subsection (b) does not obtain within a reasonable time an offer to purchase the property for at least the determination of value, the court, after hearing, may: (1) approve the highest outstanding offer, if any; (2) redetermine the value of the property and order that the property continue to be offered for an additional time; or (3) order that the property be sold by sealed bids or at an auction.").

138 *See generally* John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984).

139 *See generally id.*

140 *See* Persky, *supra* note 13, at 49 ("The problem is people are going to take advantage of the statute. There will be false positives, where people will raise the protections of the statute and later just make a profit off of it." (quoting Patrick Randolph, a professor at the University of Missouri-Kansas City School of Law who specializes in property and real estate issues)).

Second, this solution may result in access to land's value being unavailable even in situations where all or many of the owners of the land are in favor of a partition action but do not have the resources to pay an attorney other than through the proceeds of sale. Requiring attorney fees to not be tied to the sale of the land could mean that the petitioners would have no other feasible way to compensate their attorney. This could be solved by a contractual arrangement with an attorney where the petitioners promise that the fees will come out of the petitioners' proceeds of the sale after the sale is completed. Each petitioner would then have to share the costs in some sort of private arrangement among the petitioners themselves. But cost sharing can become exceedingly complicated, especially if a majority of the owners are in favor of partition, but some are not. The objectors could be the only ones that end up with any land value since they would not have had to pay legal fees, even though they would have rather owned the land ex ante.

Third, attorneys who practice in the states where this might be adopted would most likely object to this solution. Attorneys who practice in the area of partition actions are often politically powerful groups in the state where they practice, and eliminating the legal fees that they depend on would make these reforms difficult to adopt.

A second option related to petitioner legal fees is to allow for a partition action to be paid from the sale of the property, but also allow those parties who object to the sale to choose to not have their share reduced by the value of the attorney fees. This option would still allow parties who wish for a partition sale to occur to access the benefit of this action through the value of their land, but would not further negatively impact those parties who opposed the action by suffering the indignity of having to pay for the action as well.

To avoid a "free rider" problem where all parties who might wish for the action to take place or who are at least neutral towards the sale to gain the benefit of not paying attorney's fees by objecting to the sale, this proposal requires that parties who wish to object must make an appearance in court and state their objection to the sale on the record. This relatively small barrier prevents those who do not have a strong interest in the property or its value from objecting to the sale, as the cost of showing up in court would likely equal or exceed the amount by which their share would be reduced. In addition, this would create a record for the presiding judge of which owners truly object to the sale, and if these numbers are great enough, he or she would be able to prevent the sale as provided for by other sections of the Act.[141]

B. *Improved Notice Provisions*

The Uniform Partition of Heirs Property Act does not adequately address the issue of lack of notice to those impacted by the forced sale of heirs'

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141 *See supra* Section IV.

property. As noted above, this lack of notice can be egregious since those who have an interest in the land that live in proximity to the land, even in the same town, often fail to receive notice of the sale.[142]

Legal notice, in general, is defined to be that which is "reasonably calculated" to inform known parties about the proceedings.[143] In the case of heirs property, the typical notice given is "notice by publication."[144] A "notice by publication" is where a notice of the pending action is printed—typically in a local newspaper that is not widely distributed, and may exist specifically for this purpose.[145] Notice by publication is typical in these sorts of proceedings because the petitioner for partition usually represents that they are unable to find many of the owners or that the owners are too numerous to track down.[146]

Such notice by publication is particularly inadequate in the case of heirs property because ownership is distributed across many owners due to potential generations of inheritance and those owners can be widely geographically dispersed. These needs, however, are not addressed by the Uniform Act in a meaningful way.

The Act specifically states that "This [act] does not limit or affect the method by which service of a [complaint] in a partition action may be made."[147] The one change to notice standards is in Section 4(b) which requires that in the case of a partition action, if the petitioner files for notice by publication, they must also publish a notice at the property with the name and

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142 *See supra* Section III.D.

143 Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

144 *See, e.g.*, N.C. GEN. STAT. ANN. §1-339.17 (2013) ("Public Sale; posting and publishing notice of sale of real property: (a) Subject to subsection (d) of this section, notice of public sale of real property shall: (1) Be posted, in the area designated by the clerk of superior court for the posting of notices in the county in which the property is situated, for at least 20 days immediately preceding the sale; and (2) Be published once a week for at least two successive weeks: a. In a newspaper qualified for legal advertising published in the county; or b. If no newspaper qualified for legal advertising is published in the county, in a newspaper having general circulation in the county. (b) When the notice of public sale is published in a newspaper: (1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than seven days, including Sundays; and (2) The date of the last publication shall be not more than 10 days preceding the date of the sale in a sale by auction or the date on which sealed bids are opened in a sale by sealed bid.").

145 *See* Mitchell, *Reforming Property Law*, *supra* note 26, at 19.

146 *See id.*

147 UNIFORM ACT, *supra* note 19, § 4(a) ("This [act] does not limit or affect the method by which service of a [complaint] in a partition action may be made.").

address of the court and the name of the property.[148] The court may also require the names of the plaintiff and known defendants as well.[149]

This small improvement, while helpful, does not address the issue of geographically dispersed defendants who are not attending to the property. To address the issue of lack of adequate notice to these defendants, states should require a showing of what has been done to find all defendants. This showing should be deemed adequate by a judge before he or she grants a notice by publication. The petitioner shall only be permitted to use notice by publication after stating in an affidavit that a reasonable effort has been made to locate the owners that remain unknown and providing a description of the steps taken to locate the missing owner.[150] Further, the petitioner should have to send a notice to any owner's last known address.[151]

Since these are often family disputes, as in the family law context, this showing should include the effort to interview known family members to see if unknown or unlocated members that may have an interest in the property can be found. Claims of numerosity such that actual notice is infeasible should be set at a high threshold. For example, in the UCC context, to show that actual notice in a bulk sale would be infeasible, the number of potential claimants needs to exceed 200 persons.[152] While heirs property claims do have numerous members, the potential owners rarely meet this high number.

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148 *Id.* § 4(b) ("If the plaintiff in a partition action seeks [an order of] notice by publication and the court determines that the property may be heirs property, the plaintiff, not later than 10 days after the court's determination, shall post [and maintain while the action is pending] a conspicuous sign on the property that is the subject of the action. The sign must state that the action has commenced and identify the name and address of the court and the common designation by which the property is known. The court may require the plaintiff to publish on the sign the name of the plaintiff and the known defendants").

149 *Id.*

150 *See* Letter from John Pollock, Att'y, Cent. Ala. Fair Hous. Ctr., on behalf of the Heirs' Prop. Retention Coal. to NCCUSL Drafting Comm. on Partition of Tenancy-in-Common Real Prop. Act (Oct. 24, 2007) (on file with the author) (suggesting a similar proposal).

151 *Id.*

152 U.C.C. § 6-105 (AM. LAW INST. & UNIF. LAW COMM'N 2014) ("(1) Except as otherwise provided in subsection (2), to comply with Section 6-104(1)(d) the buyer shall send or deliver a written notice of the bulk sale to each claimant on the list of claimants (Section 6-104(1)(b)) and to any other claimant of whom the buyer has knowledge at the time the notice of the bulk sale is sent or delivered. (2) A buyer may comply with Section 6-104(1)(d) by filing a written notice of the bulk sale in the office of the [Secretary of State] if: (a) on the date of the bulk-sale agreement the seller has 200 or more claimants, exclusive of claimants holding secured or matured claims for employment compensation and benefits, including commissions and vacation, severance, and sick-leave pay; or (b) the buyer has received a verified statement from the seller stating that, as of the date of the bulk-sale agreement, the number of claimants, exclusive of claimants holding secured or matured claims for employment compensation and benefits, including commissions and vacation, severance, and sick-leave pay, is 200 or more.").

C. *Mediation of Heirs Property Disputes*

Finally, states considering adopting the Uniform Act should enact a mandatory mediation provision to encourage the resolution of such actions without the creation of more heirs property. Partition actions are often initiated due to family divisions where one family member decides to start a partition action as a way of spiting other family members over unrelated issues.[153] This can result in a developer or other investor coming in and acquiring the land at a significant discount, even if most of the family objects.[154]

Mediation has been used in many other contexts to prevent property loss. States such as Maine have mandatory foreclosure mediation when a lender is foreclosing on an owner-occupied home.[155] Delaware lawmakers were explicit in their decision to enact mandatory mediation for foreclosures when they issued a policy statement that stated the purpose of foreclosure mediation was to save homeowners.[156] Many other states have enacted similar policies.[157] In divorce proceedings, another area with familial disputes, mediation is mandatory in many states to resolve issues over division of property and who will retain the family home.[158]

In the context of heirs property disputes, mediation 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. Mediation is widely recognized as a way to resolve emotional disputes that the court system is not designed to handle. As Lon Fuller famously observed, mediation's central quality is "its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."[159] A mediator, rather than creating rules by which disputing parties will be bound, "induce[s] the mutual trust and understanding that will enable the parties to work out their own rules."[160]

In a mediation session, families who are considering partition can potentially resolve the underlying disputes that may be causing the desire for

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153 *See supra* Section II.

154 *See supra* Section III.B.

155 ME. REV. STAT. ANN. tit. 14, § 6321-A (2014).

156 *See* H.R. 58, 146th Gen Assemb. (Del. 2011).

157 *See, e.g.*, HAW. REV. STAT. § 667-71 et seq. (2011) (note especially HAW. REV. STAT. § 667-74); NEV. REV. STAT. ANN. § 107.086 (2011); *see also* Lydia Nussbaum, *ADR's Place in Foreclosure: Remedying the Flaws of a Securitized Housing Market*, 34 CARDOZO L. REV. 1889, 1891–92 (2013).

158 *See e.g.*, UTAH CODE ANN. § 30-3-39 (West 2016) ("There is established a mandatory domestic mediation program to help reduce the time and tensions associated with obtaining a divorce.").

159 Lon L. Fuller, *Mediation: Its Forms and Function*, 44 S. CAL. L. REV. 305, 325 (1971). Mediators realize this "reorientation" in a variety of ways and different philosophies have emerged about the mediator's role and the purpose of the mediation process itself.

160 *Id.* at 326.

partition, and even if that is not possible, may be able to agree on other solutions that preserve family land. The family may be able to agree among themselves to a partition in kind, or possibly their own partition by allotment through a payment plan. Or, they may agree on improving the way the land is currently managed. In non-heirs property ownership, where there are multiple owners of a property, land is often held in a trust or LLC that allows multiple members to better manage the land. This also consolidates ownership in a way that allows access to resources through clearer title.[161] In other cases, a tenancy in common agreement can be created that allows for each co-tenant to have voting rights in the management of the land and includes a buyout provision for those that wish to leave the agreement.[162] The family, through the process of mediation, may be able to consolidate ownership in one of these alternative forms to improve the way the property is managed and inherited in the future.

Even in the case where the plaintiff filing for partition is a developer or other investor who has already acquired an interest in the property and is filing an action against the wishes of a family who owns the land, mediation may still be beneficial. Because of the new provisions in the Uniform Act which make it more difficult for a partition by sale to take place, the developer may be more inclined to offer a larger settlement figure to entice the family off of the land and therefore preserve more of the land value for the family. In addition, the plaintiff may save both time and money by resolving or partially resolving the dispute during mediation instead of by continuing with the partition action with the associated legal costs, and so may be incentivized to settle with the family at the mediation table. This incentive to settle will also exist for the family, who may save associated legal costs which would be incurred in challenging the partition action. It is also possible that the family, depending on the circumstances, would be able to buy out the developer's interest.

During the mediation, a developer could also use the process to learn information that would be valuable to a future owner which is only known to the family, such as a history of hazardous material in the soil, and may add additional value to the settlement for this purpose which would not be possible in litigation. Mediation may also reveal other creative solutions that would allow the family some access or benefit to the land while the developer may still benefit economically. For example, the developer could select a set number of acres of the estate in return for dropping the partition action. Finally, even if the developer is not willing to use the mediation process fully, a skillful mediator can resolve disputes among the family members who may also have disputes amongst themselves.

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161 *See* Mitchell et al., *supra* note 15, at 616 (discussing how financial and estate planning practitioners advise clients to structure their real property ownership away from the default rules of tenancy in common property in to more stable forms of ownership such as TIC agreements).

162 *Id.*

Of course, as with any mediation program, there are a number of questions that must be resolved. In the case of mandatory mediation, states would have to decide whether the mediation should be mandatory for all cases, or if the judge should have some discretion to waive the mediation requirement. In addition, states would need to resolve what sort of showing a party must make, just as in the family law or other contexts, to demonstrate that mandatory mediation will not be beneficial. If one party, particularly an outside party such as a developer, states that they do not wish to participate, how much should that desire be respected? Furthermore, any time mandatory mediation is considered, the parties need to be willing to negotiate in good faith, otherwise the mediation is of scant value. States will need to resolve what sort of sanctions can be put in place for parties who do not participate faithfully in the process.

The issue of cost must also be addressed. While in many jurisdictions, volunteer mediators resolve different types of disputes and so may not add to cost, these mediators may not be effective in a mediation where detailed legal knowledge of partition actions and intestacy law may be required. If experienced mediators are required for these disputes, this will add additional expense for parties who may not be able to afford their services. And, if the mediation is unsuccessful, due to the lack of meaningful participation or for any other reason, this will add both time and cost that parties may not be able to afford.

Given the potential benefits of the mediation process in the particular context of consolidating heirs property and given that mediation has been used successfully in other family law contexts in preserving property, states that are adopting the Uniform Act should include a mediation requirement as part of this new law.

CONCLUSION

The problem of heirs property partition has deep and lasting effects on family land ownership, especially among poor and middle income minorities. The Uniform Partition of Heirs Property Act makes strides towards addressing the issues caused by heirs property partition by changing to a system of partition by allotment when possible, encouraging partition in kind over partition by sale, and ensuring the fair market value of the property is realized in any sale. States that adopt the Uniform Act should add three other provisions that address heirs property partition issues: A solution for plaintiff's legal fees that allows those that object to the sale to opt out of paying legal fees for the partition, a more robust notice provision that requires a heightened showing that the petitioner made diligent efforts to find each possible owner, and a mediation provision that requires parties to attend mediation sessions to resolve the dispute. These three additions will make the Act more robust in addressing issues of heirs property partition.

This will not, however, address some of the larger issues at play. Heirs property partition is just one symptom of the larger problems inherent to heirs property. All landowners, but particularly those of low and middle income who are likely to pass without a will, should be encouraged to stop the creation of more heirs property through intestate succession and to consolidate existing heirs property in to more manageable and more secure forms of ownership such as trusts, LLCs, and tenancy in common agreements.[163] To do so, more education is needed in these communities to dispel the myths of intestate succession such as the idea that all owners need to consent to allow for a sale to take place.[164] More education can also promote the benefits of having a will in place.[165] Law schools may be in a good position to provide this outreach and education through clinics or other forms of student community involvement.[166] If this is done, we may be able to stop the next Jimmy Rivers from having to say that he "feel[s] the loss in his bones."[167]

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163 These other forms of ownership are more stable, and promoted by estate planners as an alternative to traditional tenancy in common structures. *See* Thomas W. Mitchell, *Reconstruction to Deconstruction*, *supra* note 23, at 579–80; Mitchell et al., *supra* note 15, at 616 (discussing how TIC agreements are more stable forms of ownership that are suggested by estate planning professionals to get around default tenancy in common rules).

164 *See* Rivers, *supra* note 12, at 52.

165 *See* Mitchell, *Reconstruction to Deconstruction*, *supra* note 23, at 517–23 (speculating on the reasons for rates of low rates of estate planning among minority communities).

166 *See, e.g.*, Southern Coalition for Social Justice, Harvard Negotiation and Mediation Clinical Program, https://blogs.law.harvard.edu/hnmcp/projects/the-southern-coalition-for-social-justice/ (describing such a program focused on mediating heirs property disputes among one family, albeit a one-time project). Several law schools have permanent clinics that focus on Wills or Foreclosure that could be harnessed in this manner. *See, e.g.*, New York Law School's Wills Clinic, http://www.nyls.edu/academics/office_of_clinical_and_experiential_learning/clinics/wills_clinic/; University of Alabama Law School's Foreclosure Clinic, http://www.law.ua.edu/academics/law-clinics/foreclosure-relief-clinic/; Elon Law School's Wills Clinic, https://www.elon.edu/e/law/academics/clinics/wills-drafting-clinic.html.

167 Chandler, *supra* note 1, at 388.