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NOTE

FOR THE "WEALTHY AND LEGALLY SAVVY": THE WEAKNESSES OF THE UNIFORM PARTITION OF HEIRS PROPERTY ACT AS APPLIED TO LOW-INCOME BLACK HEIRS PROPERTY OWNERS

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Heirs property is a highly unstable form of land ownership resulting from intestacy that grants full ownership rights to all cotenants, regardless of the size of one's fractional interest. This form of land ownership is particularly vulnerable to partition because any use of the parcel requires consensus among all cotenants, which can be difficult given that many heirs do not live on the land and are frequently unaware of their fractional ownership. The Uniform Partition of Heirs Property Act (the UPHPA) was drafted to address heirs property ownership and the difficulties it presents. The Act has been recommended for enactment in all states, and as of February 2021, has been enacted in seventeen states. This Note argues that the legislation falls short of protecting the interests of those who are land-rich but cash-poor and whose single greatest asset is their fractional interest in heirs property. This Note critiques the Act by rooting its shortcomings in the drafters' decision to normalize the property ownership characteristics of those of higher socioeconomic statuses. The UPHPA fails to support heirs property owners because it treats the "wealthy and legally savvy" as

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the norm for property owners in the United States, which is inherently in conflict with the socioeconomic realities of most heirs property owners. This Note proposes amendments to the UPHPA that reflect the ownership characteristics of the average heirs property owner rather than those of the "wealthy and legally savvy."

I.S

INTRODUCTION

In 1897, Matthew Allen's great-grandfather, the son of slaves, purchased a twenty-acre parcel of land in what is now known as Hilton Head, South Carolina.[1] Today, that twenty-acre plot is the largest undeveloped parcel of the now-famous tourist destination.[2] Due to a lack of clear title, Allen and other family members are struggling to maintain ownership of this parcel of land, which has been in his family for over 120 years.[3] The property is co-owned by more than 100 known heirs, which makes it particularly vulnerable to division and sale.[4] This type of land ownership is known as "heirs property,"[5] and is especially prevalent in low-income communities and communities of color.[6] Some scholars estimate that anywhere between one-third and one-half of the land owned by Black people in the United States can be classified in this way.[7]

Heirs property is a form of tenancy in common that results from intestacy, the legal term for dying without a will.[8] When a landowner dies without a will, the whole property is distributed to the original landowner's heirs, who become cotenants, each with equal right to possess and use the entire parcel of land, regardless of the size of one's fractional interest.[9] This form of landownership is precarious because many uses of the land requires consensus among all heirs,[10] which can be

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[1] Leah Douglas, *African Americans Have Lost Untold Acres of Land Over the Last Century*, NATION (June 26, 2017), https://www.thenation.com/article/african-americans-have-lost-acres/ [https://perma.cc/P49D-7KHH].

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Various scholars use the terms "heirs property," "heirs' property," "heir-locked property," and "heir property" to describe this type of land ownership. Because the Uniform Partition of Heirs Property Act refers to this type of property ownership as "heirs property," and for the sake of consistency, this Note uses the term "heirs property" throughout.

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

[7] Janice F. Dyer et al., *Ownership Characteristics of Heir Property in a Black Belt County: A Quantitative Approach*, 24 S. RURAL SOCIO. 192, 193 (2009) [hereinafter Dyer, *Ownership*].

[8] Thomas W. Mitchell, *Historic Partition Law Reform: A Game Changer for Heirs' Property Owners*, TEX. A&M UNIV. SCH. L. FAC. SCHOLARSHIP, 2019, at 65, 67 [hereinafter Mitchell, *Game Changer*], https://scholarship.law.tamu.edu/facscholar/1327 [https://perma.cc/GS8L-NE7M].

[9] B. James Deaton, *A Review and Assessment of the Heirs' Property Issue in the United States*, 46 J. ECON. ISSUES 615, 618–19 (2012).

[10] *Id.* at 619.

difficult given that many heirs property owners do not live on the land and are, in some instances, entirely unaware of their fractional ownership.[11] Without agreement among all landowners, the only legal remedy is a partition action, which can be exercised by any of the cotenants.[12] Partition actions can either result in a partition-in-kind, which is a physical division of the land, or in a partition-by-sale, which forces the sale of the entire property and divides the proceeds, minus legal fees, among all heirs according to respective fractional interest.[13]

The Uniform Partition of Heirs Property Act (the UPHPA or the Act) was written to address the difficulties presented by this form of land ownership.[14] This Note roots the Act's shortcomings in the drafters' decision to normalize the property ownership characteristics of those of higher socioeconomic statuses. This Note argues that the UPHPA does not do enough to protect the land ownership interests of those who are land-rich but cash-poor—those whose single greatest asset is their fractional interest in heirs property. Many scholars have explored the problem of heirs property, and some have addressed and critiqued the effectiveness of the UPHPA.[15] Some have even gone as far to suggest that the adoption of the UPHPA would not be beneficial to heirs property owners given existing state property and partition laws.[16] This Note does not suggest that the Act should be completely disregarded. The Act is a critical first step in protecting heirs property ownership in the United States. Instead, this Note argues that the UPHPA fails to truly support heirs property owners because it treats the "wealthy and

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[11] ANDREW W. KAHRL, THE LAND WAS OURS: HOW BLACK BEACHES BECAME WHITE WEALTH IN THE COASTAL SOUTH 240 (2016).

[12] Deaton, *supra* note 9, at 619.

[13] *Id.*

[14] UNIF. PARTITION HEIRS PROP. ACT intro. note, at 1 (UNIF. L. COMM'N 2010) [hereinafter UPHPA].

[15] *See generally* 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, 508 (2001) [hereinafter Mitchell, *Reconstruction*] (discussing the fraught history of heirs property in the United States); Jesse J. Richardson, *The Uniform Partition of Heirs Property Act: Treating the Symptoms and Not the Cause?*, 45 REAL EST. L.J. 507, 560 (2017) (exploring the importance of land ownership and concluding that the Act only effectively addresses the scenario in which a third party is attempting to force a sale of an entire parcel of heirs property).

[16] *See generally* Manuel Farach, *The Uniform Partition of Heirs Property Act: A Solution in Search of a Problem*, 92 FLA. BAR J. 56 (analyzing whether the adoption of the UPHPA would be effective in Florida given existing state property and partition law).

legally savvy"[17] as the norm for property owners in the United States, which is inherently in conflict with the socioeconomic realities of most heirs property owners.

Part II offers a history of heirs property in Black America, with an emphasis on wealth among Black heirs property owners. This section also discusses the creation of the UPHPA and its most important provisions. Part III elaborates on the weaknesses of the UPHPA. It argues that the Act modeled heirs property on the ownership characteristics of the "wealthy and legally savvy" and therefore fails to address problems faced by low-income cotenants of heirs property.[18] It also discusses the three weakest provisions of the UPHPA: the cotenant buyout provision, the availability of judicial discretion in resolving partition actions, and the absence of solutions to address the exorbitant legal fees that result from partition actions. Part IV presents amendments to the UPHPA that could be included by state legislatures interested in adopting the Act. The amendments reflect the ownership characteristics of the average heirs property owner rather than the experiences of the "wealthy and legally savvy." Specifically, this Note proposes that the attorneys' fees of all cotenants be shifted to the cotenant who initiated the partition action. This may serve as a deterrent to land and real estate developers who are looking to take advantage of heirs property owners, and might indirectly encourage resolutions between family members that do not result in the division or sale of property. Further, unless there is agreement among all located cotenants, partition actions must be resolved in kind rather than by sale. This allows land-rich but cash-poor cotenants who live on the land to keep their homes, while also allowing the cotenant(s) no longer interested in their property interest to be relieved of their duties.

II. AN OVERVIEW OF HEIRS PROPERTY AND THE CREATION OF THE UPHPA

Heirs property is a highly unstable form of land ownership that grants full rights of ownership to all cotenants, regardless of the size of one's fractional interest and without equally distributing responsibility among the heirs.[19] Lack of responsibility partnered with full rights of ownership mean that any cotenant can force a sale of the entire property, ending the

[17] UPHPA intro. note, at 3.

[18] *Id.*

[19] 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, 38 n.348 (2007).

tenancy-in-common for all cotenants.[20] This section describes the prevalence of this volatile form of ownership in Black communities and articulates some of the challenges faced by heirs property owners of lower wealth brackets. This section also discusses the creation of the UPHPA, which was drafted specifically to address the difficulties faced by low- and middle-income heirs property owners.[21]

A. The Heirs Property Problem in Black America

The challenges associated with heirs property can be seen throughout many communities across the United States.[22] Individuals in lower income brackets and of lower formal education are most likely to own heirs property.[23] Studies have shown that Black landowners are extraordinarily vulnerable to this type of land ownership because of the low rate of will-making in the Black community; up to eighty-three percent of Black people die intestate.[24] When a landowner dies without a will, the parcel generally gets passed down to the decedent's heirs as an undivided unit with no right of survivorship.[25] As each generation dies intestate, the title becomes increasingly clouded

[20] Mitchell, *Reconstruction*, *supra* note 15, at 508.

[21] UPHPA intro. note, at 1.

[22] Thomas W. Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1, 31–33 (2014) [hereinafter Mitchell, *Reforming*].

[23] SCOTT PIPPIN ET AL., U.S. DEP'T OF AGRIC., IDENTIFYING POTENTIAL HEIRS PROPERTIES IN THE SOUTHEASTERN UNITED STATES: A NEW GIS METHODOLOGY UTILIZING MASS APPRAISAL DATA 13 (2017), https://www.srs.fs.usda.gov/pubs/gtr/gtr_srs225.pdf [https://perma.cc/XW3R-YMEY].

[24] Todd Lewan & Dolores Barclay, *Developers and Lawyers Use a Legal Maneuver to Strip Black Families of Land*, AUTHENTIC VOICE, https://theauthenticvoice.org/mainstories/tornfromtheland/torn_part5/ [https://perma.cc/4KV2-ZE7F] (last visited Dec. 24, 2019). One study concluded that sixty-five percent of those whose income falls below $65,000 had not created wills. Mitchell, *Reconstruction*, *supra* note 15, at 507. Furthermore, over seventy-percent of those with estates worth less than $130,000 did not have wills, and fifty percent of those with estates worth less than $260,000 had not created any wills. *Id.* One scholar theorizes that low rates of will-making among Black people can be attributed to a distrust in the government and the mistaken belief that their children will eventually inherit their land. Roy W. Copeland, *Heir Property in the African American Community: From Promised Land to Problem Lands*, 2 PRO. AGRIC. WORKERS J. 1, 2 (2015).

[25] Janice Dyer, Statutory Impacts of Heir Property: An Examination of Appellate and Macon County Court Cases 2 (Dec. 7–9, 2008) (unpublished manuscript) [hereinafter Dyer, Statutory Impacts], http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.569.1533&rep=rep1&type=pdf [https://perma.cc/TP5C-XK4H] (paper presented at the 66th Annual Professional Agricultural Workers Conference, Tuskegee University).

and the property interests more fractionalized.[26] After numerous generations, a situation could arise where, for example, sixty-six heirs own interests in an eighty-acre plot of land, with some heirs owning fractional interests the size of a parking space.[27] This is what happened in to a family Rankin County, Mississippi.[28] One family member wanted her share of the land separated from the lot, while three others with shares the size of parking spots opposed the division because their interest would essentially become worthless after a partition.[29] As a result, a court decided to partition the land by sale and divide the proceeds according to each heir's fractional interest.[30]

More troubling is that each heir has the right to petition for the sale of the entire property.[31] Thomas Mitchell, a professor of law at Texas A&M University who specializes in the problem of heirs property and partition actions, described this dilemma as such: "'Imagine buying one share of Coca-Cola, and being able to go to court and demand a sale of the entire company' . . . . 'That's what's going on here.'"[32]

1. The Consequences of Owning Heirs Property

Scholars have used the concept of "dead capital" to describe heirs property because this type of land cannot be leveraged for financial gain.[33] Hernando de Soto coined the term "dead capital" to describe property situations in developing countries where lack of "necessary formal structure" prevented certain landowners from leveraging their land to secure loans.[34] B. James Deaton, a scholar whose work focuses on heirs property, equated the situation described by de Soto to the difficulties faced by heirs property owners in the United States; cotenants face similar restraints because they cannot leverage their partial interest in the parcel to secure a loan.[35] Many heirs property owners are considered "land rich but cash poor" because the majority of their wealth is tied to their fractional interest in the

[26] *Id.* at 2.

[27] Lewan & Barclay, *supra* note 24.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] Mitchell, *Reforming*, *supra* note 22, at 10.

[32] Lewan & Barclay, *supra* note 24 (quoting Thomas Mitchell, Professor of Law at Texas A&M University).

[33] Conner Bailey et al., *Heirs' Property and Persistent Poverty Among African Americans in the Southeastern United States*, *in* HEIRS' PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE LAND OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT 9, 10 (Cassandra Johnson Gaither et al. eds., 2019).

[34] Deaton, *supra* note 9, at 621.

[35] *Id.*

land,[36] but they are unable to mobilize this wealth due to the financial limitations associated with this dead capital.[37] Banks and other lending institutions, for instance, rarely accept a fractional interest in heirs property as sufficient collateral for a loan.[38] Owners of heirs property are generally ineligible for mortgages or disaster relief through Section 502 of the Housing Act of 1949[39] or other housing programs such as Rural Development loans for repairs.[40] This became a serious problem for low-income heirs property owners whose property was destroyed during Hurricanes Katrina and Rita.[41] According to a study conducted by the U.S. Department of Agriculture, approximately 20,000 heirs property owners were denied assistance grants from the Federal Emergency Management Agency or the U.S. Department of Housing and Urban Development because they lacked the requisite clear title; this number increases when including heirs property owners affected by Hurricane Dolly in Texas.[42]

Unrelated to natural disasters, heirs property owners in Kentucky and Virginia struggle to access grants and loans to upgrade their failing septic systems, which poses a significant health risk not only to the heirs property owners but to others in the community.[43] For one heirs property owner to secure a loan or mortgage, or to build, rebuild, or otherwise use the land, all heirs property owners must agree.[44] Reaching this agreement

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[36] Mitchell, *Game Changer*, *supra* note 8, at 70.

[37] Deaton, *supra* note 9, at 621. *See also* Bailey, *supra* note 33, at 16 (describing the difficulty of using heirs property to its full productive potential).

[38] Mitchell, *Game Changer*, *supra* note 8, at 78. Banks and lending institutions will not accept heirs property as a collateral for a loan unless all living heirs agree to accept the debt. This can be nearly impossible when there are numerous heirs with different ideas of how the land should be used. Those who live on the land generally have no recourse but to live in mobile homes because they can be financed through personal loans; a mortgage is not required. Cassandra Johnson Gaither, *Appalachia's "Big White Ghettos": Exploring the Role of Heirs' Property in the Reproduction of Housing Vulnerability in Eastern Kentucky*, *in* HEIRS' PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE LAND OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT 49, 49 (Cassandra Johnson Gaither et al. eds., 2019).

[39] KAHRL, *supra* note 11, at 176.

[40] Dyer, Statutory Impacts, *supra* note 25, at 3.

[41] PIPPIN, *supra* note 23, at 9–10. Importantly, a large number of wealthy heirs property owners were able to hire attorneys to help the family and land recover from the ravages caused by Hurricane Katrina. UPHPA intro. note, at 6.

[42] PIPPIN, *supra* note 23, at 10.

[43] *Id.* at 10.

[44] Laura Bliss, *The Gullah-Geechee People Called Carolina's Coast Home for Centuries. Then Florence Came*, MOTHER JONES (Sept. 18, 2018), https://www.motherjones.com/environment/2018/09/florence-is-destroying-a-

can be a challenge—if not impossible—particularly in situations similar to that of Matthew Allen whose parcel of land has upwards of 100 co-owners.[45]

Not only do heirs property owners have greatly limited access to services and benefits generally afforded to landowners, they are also extremely susceptible to land loss. In the forty-five years following the end of the Civil War, studies estimate that freed Black people accumulated about fifteen million acres of land, mostly in the South.[46] The land was used primarily for farming, and by the 1920s, there were 925,000 Black-owned farms in the United States.[47] This land, which some hold to be almost sacred,[48] became a source of personal security, independence, satisfaction, pride, and a "will to overcome" for Black families.[49] But by 1975, there were only 45,000 remaining Black-owned farms and as of 2017, only two percent of the farms in the United States were Black-owned.[50] These quantitative valuations of Black land loss stand in stark contrast to the experience of white farmers and farm-owners in similar positions. While the number of Black farmers decreased by 99% between 1920 and 1997, the number of white farmers decreased

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delicate-system-of-land-ownership-going-back-over-100-years/ [https://perma.cc/37ZR-2XZK]. Cain Bryan purchased a parcel of land in South Carolina in 1875. In 2019, his descendants decided to sell the heirs property to land developers. This sale was just as complicated as decisions to use or build on the land. A few family members successfully located all 144 living heirs through court proceedings and research, determined the heirs' respective fractional interests in the land, and ensure that all 144 heirs were in agreement to sell the land. David Slade, *144 Heirs of Black Homesteader Without Will Overcome Odds to Sell Mount Pleasant Property*, POST & COURIER (Sept. 20, 2019), https://www.postandcourier.com/business/real_estate/heirs-of-black-homesteader-without-will-overcome-odds-to-sell/article_84717e74-ba12-11e9-934c-ffa39e62b141.html [https://perma.cc/UG5S-PQRW].

[45] Douglas, *supra* note 1. *See also* John Schelhas et al., *The Sustainable Forestry and African American Land Retention Program*, *in* HEIRS' PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE LAND OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT 20, 21 (Cassandra Johnson Gaither et al. eds., 2019) (describing the difficulty of achieving agreement when heirs are geographically dispersed and diverging interest in the use of the land).

[46] Douglas, *supra* note 1.

[47] *Id.*

[48] Phyliss Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 WASH. U. L. REV. 737, 773 (2000). *See also* Letter from Raymond E. Cole to author (Dec. 30, 2019) (on file with author) ("Land ownership played a huge role [for] Southern Black Americans. . . . Leaving land for the family was a Southern legacy. . . . It's a testament to struggles Black families endured. . . . Land ownership as basically a legacy to be inherited from generation to generation. That's important to me—very!! Not only that, it provides proof that you once existed.").

[49] Bailey, *supra* note 33, at 9.

[50] Douglas, *supra* note 1.

only by 66%.[51] Moreover, almost all of the land lost by Black farmers is now either owned by corporations or white individuals.[52] Commentators estimate that since 1969, Black Americans have lost eighty percent of their land, farms or otherwise—half of which has been lost through the division and sale of heirs property.[53] Due to the vulnerable nature of dead capital as well as landowners' inability to mobilize this land for economic gain, heirs property ownership constrains economic development,[54] prevents the accumulation and transfer of intergenerational wealth, and "contributes to persistent poverty in the Black Belt South."[55]

2. Partition Actions and Their Ramifications

In situations where heirs property owners either cannot agree on how the land should be used, or a co-owner is no longer interested in their fractional interest in the land, the tenancy-in-common can be dissolved through a partition action.[56] There are two primary forms of partition actions. First is a partition-in-kind, which results in the parcel of land being divided among the co-owners according to fractional interest.[57] The land is then allocated to the tenants-in-common.[58] Second is a partition-by-sale, where the entire parcel is forcibly sold and the proceeds (minus the legal fees) are distributed among the various cotenants.[59] Partitions-in-kind present the opportunity for family members to maintain most, if not all, of their land; it also allows cotenants to establish a clear title and better protect their land in the future.[60] For this reason, courts are said to prefer partitions-in-kind to partitions-by-sale.[61]

Scholars have noted that despite this statutory preference, courts tend to order a partition-by-sale to resolve these disputes.[62] One commentator theorizes: "[S]ale normally is the product of a partition proceeding, either because the parties

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[51] Vann R. Newkirk II, *The Great Land Robbery: The Shameful Story of How 1 Million Black Families Have Been Ripped from Their Farms*, ATLANTIC (Sept. 29, 2019), https://www.theatlantic.com/magazine/archive/2019/09/this-land-was-our-land/594742/ [https://perma.cc/6BGK-MXKP].

[52] *Id.*

[53] Lewan & Barclay, *supra* note 24.

[54] Deaton, *supra* note 9, at 621.

[55] Bailey, *supra* note 33, at 11.

[56] Deaton, *supra* note 9, at 619.

[57] Mitchell, *Game Changer*, *supra* note 8, at 73.

[58] *Id.* at 73.

[59] *Id.* at 69.

[60] Rivers, *supra* note 19, at 59.

[61] *Id.*

[62] *Id.*

all wish for it or because courts are easily convinced that sale is necessary for the fair treatment of the parties."[63] Others have suggested that since real property is increasingly considered a fungible commodity, there is less of an interest in protecting the non-economic value of a parcel of land, something that would be protected through a partition-in-kind.[64] This non-economic value is salient in the case of Black-owned heirs property—for many Black heirs, these parcels of land represent a dramatic shift in status from that of their ancestors, a shift from being considered and treated as property to becoming the owners of real property themselves.[65]

Partitions-by-sale pose an additional problem for many heirs property owners. Since the earnings, minus the legal fees, are divided among the cotenants,[66] many cotenants are left with very little after a court has sold the land and distributed the proceeds. Theresa White, a descendant of Gullah freed slaves[67] who lives in South Carolina, 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."[68] There are also instances of cotenants facing homelessness after a partition-by-sale.[69]

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[63] *Id.* at 50. *See also* Sarah Waldeck, *Rethinking the Intersection of Inheritance Law and the Law of Tenancy in Common*, 87 NOTRE DAME L. REV. 737, 751 (2011) ("For the typical tenancy in common, undivided land will be worth more than the sum total of its aggregate parts. Empirical investigation has further suggested that even when land appears to be a good candidate for partition in kind, physical division often works to the disadvantage of one cotenant, at least in financial terms.").

[64] Mitchell, *Reforming*, *supra* note 22, at 12.

[65] Mitchell, *Game Changer*, *supra* note 8, at 65.

[66] Deaton, *supra* note 9, at 619.

[67] The Gullah are a group of Black Americans living on the costal fishing and farming communities of South Carolina and Georgia. Due to geographical isolation and strong community life, they have been able to preserve their African cultural heritage to a larger degree than other groups of Black Americans. Joseph A. Opala, *The Gullah: Rice, Slavery, and the Sierra Leone-American Connection*, YALE UNIV. GILDER LEHRMAN CTR. FOR STUDY SLAVERY, RESISTANCE, & ABOLITION https://glc.yale.edu/gullah-rice-slavery-and-sierra-leone-american-connection [https://perma.cc/AWG4-KQLT] (last visited Feb. 22, 2021).

[68] Meagan Day, *Freedom Gained and Lost*, JACOBIN (Apr. 12, 2019), https://www.jacobinmag.com/2019/04/gullah-geechee-south-carolina-civil-war-slavery [https://perma.cc/6XAD-AN3B].

[69] Craig-Taylor, *supra* note 48, at 757. *See also* UPHPA intro. note, at 2 (recognizing the risk of homelessness faced by individuals who rely on their fractional interest in the land to provide shelter).

Partition actions were intended to resolve disputes between cotenants,[70] but opportunistic land and real estate developers frequently take advantage of this legal mechanism to acquire land far below its market value.[71] Family members no longer interested in the property can "cash out" by selling their interest to a prospective land developer.[72] Once a developer has acquired an interest in the heirs property, a partition action can be initiated.[73] Black heirs property owners in coastal zones or in other areas with a high market value are particularly vulnerable to this type of acquisition. [74] 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.[75] 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.[76] 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.[77] Through the law of partitions, Moffitt received $217,000 for land that she had purchased for only $2,775.[78]

The distressing history of heirs property in the United States, with its devastating consequences for the Black community, has led scholars and commentators to suggest modifications to existing partition law such that heirs property owners can better protect their land. One of the most successful solutions is the Uniform Partition of Heirs Property Act, which was presented in 2010 to protect heirs property owners,

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[70] Lewan & Barclay, *supra* note 24.

[71] KAHRL, *supra* note 11, at 239.

[72] Mitchell, *Reconstruction*, *supra* note 15, at 508.

[73] KAHRL, *supra* note 11, at 239.

[74] *Id.* at 240. *See also* Bailey, *supra* note 33, at 14 ("Such partition sales are most common where heirs' property has a high market value, for example along the 'Gullah-Geechee coast' of South Carolina. African-American populations were established there long before beachfront property in places like Hilton Head became a valuable commodity.").

[75] KAHRL, *supra* note 11, at 240.

[76] Lewan & Barclay, *supra* note 24.

[77] *Id.*

[78] *Id.*

especially those from low income communities and communities of color.[79]

B. The UPHPA is Presented as a Solution

The UPHPA was drafted and proposed for state adoption by the Uniform Law Commission in 2010 as a means of addressing the heirs property problem, especially among low- and middle-income families across the United States.[80] The drafters of the UPHPA recognize that those who are land-rich but cash-poor are the most vulnerable to land loss through partition actions; therefore, the Act has the express purpose of creating and enforcing property preservation and wealth protection mechanisms to the benefit of those with modest means.[81] As of February 2021, the UPHPA has been enacted in seventeen states and the U.S. Virgin Islands, and eight of those states fall in the Black Belt.[82] The Act has also been introduced in five other states.[83]

The UPHPA has a few important provisions created to benefit minority and low-income families. First is the cotenant buyout provision, which gives cotenants who did not initiate the partition action the opportunity to buy the property interests of those who did initiate the partition action.[84] This would, in theory, allow cotenants to preserve the entire parcel of land, while minimizing or completely eliminating legal fees and other costs associated with a partition action.[85] The drafters intended for this provision to promote judicial economy and the consolidation of land ownership.[86] Others have asserted that this

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[79] UPHPA intro. note, at 1.

[80] *Id.*

[81] *Id.*

[82] *Partition of Heirs Property Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=50724584-e808-4255-bc5d-8ea4e588371d (last visited Feb. 19, 2021) (listing Alabama, Arkansas, Connecticut, Florida, Georgia, Hawaii, Illinois, Iowa, Mississippi, Missouri, Montana, Nevada, New Mexico, New York, South Carolina, Texas, and Virginia as states where the UPHPA has been enacted). The Black Belt is a group of eleven Southern states with a high percentage of Black residents. The Black Belt includes Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. Rosalind Harris & Heather Hyden, *Geographies of Resistance Within the Black Belt South*, 57 SE. GEOGRAPHER 51, 52–53 (2017).

[83] *Id.* (listing California, Indiana, Kentucky, Massachusetts, and New Jersey as states where the UPHPA has been introduced).

[84] UPHPA § 7.

[85] *Id.* § 7(g).

[86] *Id.* § 7 cmt. n.1, at 18 ("This Act includes a mechanism for the buyout of interests as the first preferred alternative to partition by sale to promote judicial economy, to encourage consolidation of ownership, and to accomplish the

buyout provision might serve as a "shark repellant," which would disincentivize disinterested cotenants with very small fractional interests in the property from initiating a partition action at the expense of those who depend on their fractional interest in the land.[87] That being said, the buyout provision might only be a theoretical solution that would be difficult to mobilize in practice. Co-owners who live on the land are frequently land-rich but cash-poor and are thus unable to buy out an initiating cotenant's interests.[88]

The second notable provision is the preference for partition-in-kind.[89] The Act requires the order of partition-in-kind unless—after analysis of the factors in Section 9 of the Act—this order would result in "great manifest prejudice" to the cotenants involved.[90] Section 9 requires judges to evaluate factors such as sentimental or ancestral attachment to the property, whether the land can be practicably divided among the cotenants, and whether the land is being lawfully used.[91] Importantly, judges are also permitted to evaluate "any other relevant factor," which may allow for significant judicial discretion.[92] Courts have demonstrated that they are persuaded by the comparative ease of dividing money as opposed to land with numerous heirs.[93] Thus, allowing a judge to consider "any other relevant factor" might sway the balance away from a preference for a partition-in-kind and towards a partition-by-sale.

Lastly, the Act mandates an open-market sale of land that is ordered to be partitioned by sale, unless sealed bids or an auction is economically preferable.[94] Historically, when land is partitioned by sale, the property is frequently sold in an auction, resulting in sales at fire-sale prices, meaning there is a

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larger goal of establishing a default, statutory approach to partition of inherited property which mirrors the best practices used for family property owned by those who are wealthy and legally savvy.").

[87] Mitchell, *Game Changer*, *supra* note 8, at 73.

[88] Meghan E.B. Pridemore, *Tides, Torrens, and Family Trees: Heirs Property Preservation Challenges*, 23 PROB. & PROP. 24, 26 (2009).

[89] UPHPA § 8.

[90] *Id.*

[91] *Id.* § 9(a).

[92] *Id.*

[93] Sara Hitchner et al., *"A Privilege and a Challenge": Valuation of Heirs' Property by African American Landowners and Implications for Forest Management in the Southeastern U.S.*, 16 SMALL-SCALE FORESTRY 395, 398 (2017).

[94] UPHPA § 10.

significant discount from the fair market value of the land.[95] This sale procedure speaks to a contradiction at the core of partition actions: courts are supposed to select a wealth-maximizing solution, but resolving partition actions through sale is almost always wealth-depleting.[96] An open-market sale ensures that the land is sold at a fair price, maximizing the proceeds received through a partition-by-sale.[97] However, open-market sales yield higher transaction costs,[98] for which the cotenants who did not force the sale may be responsible.[99]

Although the UPHPA presents significant positive changes to the laws of partition, the Act falls short of protecting those who are land-rich but cash-poor and for whom the loss of heirs property can constitute the loss of their single greatest asset.[100]

III. WEAKNESSES IN THE UPHPA AS APPLIED TO LOW-INCOME BLACK HEIRS PROPERTY OWNERS

There are three main problems with the UPHPA as applied to low-income Black heirs property owners: the accessibility of the cotenant buyout, the availability of judicial discretion, and the absence of solutions to address the exorbitant legal fees associated with partition actions. These problems all stem from the legislative purpose of the Act, elucidated in its prefatory note. This section discusses the premise of the UPHPA, and the problems that arise because of the assumptions on which this Act is based.

A. Embracing the "Wealthy and Legally Savvy" as the Norm

The UPHPA was drafted to address the problem of heirs property, seen most frequently in low- to middle-income families across America.[101] The drafters state that the instability of heirs property ownership "stands in sharp contrast" to the property rights enjoyed by wealthier families.[102] The importance of this Act cannot be overstated, as the UPHPA is the most comprehensive and far-reaching reform of partition law seen since the 1800s.[103] The Act, however, is not without fault. The

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[95] Mitchell, *Reforming*, *supra* note 22, at 20.
[96] *Id.*
[97] Mitchell, *Game Changer*, *supra* note 8, at 74.
[98] Richardson, *supra* note 15, at 556.
[99] Mitchell, *Reforming*, *supra* note 22, at 25.
[100] UPHPA intro. note, at 1.
[101] *Id.*
[102] *Id.*
[103] Mitchell, *Game Changer*, *supra* note 8, at 72.

three critical weaknesses of the UPHPA, discussed at length in the following sections, all stem from a major assumption that heirs property owners have the financial ability to protect their land using the same mechanisms as property owners of higher wealth brackets.

In the prefatory note of the UPHPA, the drafters write, "this Act imports certain core property preservation and wealth protection mechanisms already commonly used by wealthy and legally sophisticated family real property owners . . . ."[104] In a way, the drafters' choice to privilege the ownership norms of the wealthy and legally savvy makes sense—the wealthy have the financial means to better protect their land through making wills and hiring attorneys to help with any disputes surrounding ownership of the land. However, a deeper problem emerges in the drafters' decision to treat the wealthy as the norm.

As mentioned in the prefatory note, a large number of heirs property owners cannot afford legal services, thus leaving them vulnerable to the many risks of owning heirs property under the default rules of tenancy-in-common.[105] Thomas Mitchell, the lead drafter of the UPHPA, has also discussed how the economic statuses of heirs property owners impede their ability to protect their land. For example, in a 2010 article, Mitchell acknowledges that property owners who own land under the default rules governing tenancy-in-common (i.e. heirs property) are low- to middle-income people.[106] In a 2014 article, Mitchell does the same.[107] In 2018, Mitchell wrote that the "enhanced instability [of heirs property] arises from the interaction between multi-generational patterns of intestate succession among certain disadvantaged groups, the default partition law, and the low-income/low-wealth status of many heirs' property owners."[108] Despite this repeated recognition that heirs property owners frequently do not have access to the finances and economic stability to protect their land, Mitchell and the other drafters of the UPHPA nonetheless chose to normalize the possession of wealth and used that norm as the

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[104] UPHPA intro. note, at 3.

[105] *Id.*

[106] Thomas Mitchell, et al., *Forced Sale Risk: Class, Race, and the "Double Discount"*, 37 FLA. STATE U. L. REV. 589, 620 (2010) [hereinafter Mitchell, *Forced Sale Risk*].

[107] *See* Mitchell, Reforming, *supra* note 22, at 30–31 ("Many heirs property owners are 'land rich but cash poor,' in that they do not have other substantial liquid assets (or tangible assets for that matter) that they can use, including to secure a loan, to enable them to bid effectively at a partition sale.").

[108] Mitchell, *Game Changer*, *supra* note 8, at 69.

basis for an Act written to support low- to middle-income heirs property owners.[109]

The subsequent sections argue that the drafters' decision to rely on the property ownership practices and norms of the wealthy and legally savvy is why the UPHPA falls short for those who are land-rich but cash-poor.

B. Accessibility of the Cotenant Buyout

Section 7 of the UPHPA presents the option for co-owners of a parcel of heirs property to buy out the interest of the cotenant who has initiated a partition action.[110] After valuation of the property, any cotenant (other than the one who has initiated the partition action) may buy the whole interest of the cotenant(s) who requested the partition.[111] The Act covers scenarios in which more than one cotenant elects to buy out the interest, and describes how the cost is divided among electing cotenants.[112] Section 7 of the UPHPA was included as a mechanism to establish a "default, statutory approach to the partition of inherited property which mirrors the best practices used for family property owned by those who are wealthy and legally savvy," while also promoting judicial economy and consolidating ownership among heirs property owners.[113]

The legislative comments also clarify that the buyout option is mandatory for those who initiated the partition action because, in requesting this action, they have demonstrated that they are willing to be divested of their interest in the heirs property in exchange for cash.[114] On its face, this buyout provision seems like an effective protective mechanism against land loss, as it would prevent a partition-by-sale where family members who live on the land are generally unable to outbid the individual who initiated the partition action in a sale of the entire property.[115] Furthermore, it presents a unique opportunity for heirs property owners to prevent any fractionation of their parcel of land. Despite the potential for these positive outcomes, the buyout provision also demonstrates the dangers of treating the ownership characteristics of the "wealthy and legally savvy" as the norm.

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[109] UPHPA intro. note, at 2.
[110] *Id.* § 7.
[111] *Id.*
[112] *Id.*
[113] *Id.* § 7 cmt. n.1, at 18.
[114] *Id.* § 7 cmt. n.3, at 19.
[115] Dyer, Statutory Impacts, *supra* note 25, at 3.

Heirs property owners are often economically marginalized,[116] and the land in question, even when sold below market value, is frequently too expensive for cotenants.[117] Many times, partition actions place cotenants who wish to maintain their interest in the land, especially those who live on the parcel, under notable financial distress.[118] The buyout provision requires that "a disinterested real estate appraiser . . . determine[s] the fair market value of the property assuming sole ownership of the fee simple estate."[119] The purchase price of the initiating cotenant's fractional interest in the parcel is the fair market value multiplied by their fractional interest.[120] If only one cotenant elects to participate in the buyout provision, the court notifies all located cotenants of this fact,[121] and the electing cotenant is responsible for the entire cost. Alternatively, if more than one cotenant elects to participate in the buyout, the court apportions the cost of the initiating cotenant's fractional interest of the parcel among the electing cotenants.[122] In the event that no cotenants elect to participate in the buyout provision, or no electing cotenant timely pays their apportioned price, the court will proceed to either a partition-in-kind or partition-by-sale under Section 8 of the UPHPA.[123] If some of the electing cotenants fail to timely pay their apportioned price, the remaining cost of the initiating cotenant's interest is shifted to those who have already timely paid their apportioned price;[124] if the remaining electing cotenants are unable to pay the difference, the court proceeds with the partition action under Section 8.[125]

The accessibility of the buyout provision is fatally premised on the assumption that heirs property owners are similar to their "wealthy and legally savvy" counterparts and have sufficient cash on hand to execute the buyout provision. Regardless of whether a state has enacted the UPHPA, heirs property sold in a partition-by-sale was frequently subject to

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[116] Tristeen Bownes & Robert Zabawa, *The Impact of Heirs' Property at the Community Level: The Case Study of the Prairie Farms Resettlement Community in Macon County, AL*, *in* HEIRS' PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE LAND OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT 29, 32 (Cassandra Johnson Gaither et al. eds., 2019).

[117] *Id.*

[118] Mitchell, *Reconstruction*, *supra* note 15, at 508.

[119] UPHPA § 6(d).

[120] *Id.* § 7(c).

[121] *Id.* § 7(d)(1).

[122] *Id.* § 7(d)(2).

[123] *Id.* § 7(d)(3), (e)(2).

[124] *Id.* § 7(e)(3).

[125] *Id.* § 7(f)(2).

auctions, yielding fire-sale prices.[126] Individuals who did not have enough cash on hand were unable to participate in the auction, despite the fact that land was sold far below market value.[127] As a result, many land-rich but cash-poor heirs property owners could not retain their land in a partition-by-sale, even at these reduced prices.[128] Even though the cost of a fractional interest of land at market value might be less than the fire-sale price of an entire parcel of land, it is difficult to know whether those whose most valuable asset is their interest in heirs property would have enough cash to mobilize this buyout provision.

For example, Audrey Moffitt, the white real estate trader discussed above, purchased the combined 1/6 interest of two Beckett family members for $5,800.[129] The land was subsequently appraised at $55,833.[130] If the Beckett family utilized the buyout provision of the UPHPA, cotenants interested in retaining the land would have been responsible for $55,833 to buyout the interest of the two Beckett family members who agreed to sell their fractional interest in the land, given that the UPHPA's buyout provision requires that the land be sold at fair market value.[131] For those who are land-rich but cash-poor, $55,000 may be an exorbitant price that the cotenants cannot afford, even if cotenants electing to mobilize the buyout provision were to pool their assets. The first right of purchase is thus, many times, not a feasible option for low- and middle-income heirs property owners.[132]

The buyout provision also assumes that cotenants are able and willing to work together to pool their liquid assets to purchase the fractional interest of the initiating cotenant. If an individual cotenant interested in retaining the land does not have the financial assets required to utilize the buyout provision of the UPHPA, multiple cotenants could ostensibly pool their resources and successfully buy out the fractional interest of the initiating cotenant.[133] However, there are notable challenges associated with coordinating between multiple cotenants.[134] As the number of shares increase and the size of each individual

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[126] Mitchell, *Forced Sale Risk*, *supra* note 106, at 612.

[127] *Id.* at 605.

[128] Mitchell, *Game Changer*, *supra* note 8, at 70.

[129] Thomas Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, WIS. L. REV. 557, 568 n.39. (2006).

[130] *Id.*

[131] UPHPA § 7(c).

[132] Rivers, *supra* note 19, at 78.

[133] Mitchell, *Game Changer*, *supra* note 8, at 73.

[134] Waldeck, *supra* note 63, at 750.

interest decreases, reaching consensus among cotenants can be extremely difficult.[135] Heirs property is known to be the source of intra-family conflict,[136] and coordination among cotenants can be hard to achieve when a number of heirs do not live on the land or have an interest in maintaining it.[137] Between a lack of cooperation between cotenants[138] and heirs property owners' limited liquid assets,[139] the buyout provision of the UPHPA might be effective in theory, but unviable in practice.

C. Availability of Judicial Discretion

Historically, the law has demonstrated a preference for partition-in-kind as a resolution to partition actions.[140] Courts have stated that a partition-by-sale is a drastic remedy that should only be exercised under specific and limited circumstances.[141] In most jurisdictions, partition statutes only allow for partitions-by-sale if there is evidence to suggest that a partition-in-kind would result in "great prejudice" or "substantial injury" to the cotenants.[142] Despite a *de jure* preference for partitions-in-kind, courts have demonstrated a marked *de facto* preference for partition-by-sale.[143] Legislation preceding the UPHPA relied on an economics-only test[144] that did not specify the definition of "great prejudice" or "substantial injury."[145] Also, courts generally act on the presumption that a large number of heirs partnered with the limited size of property can make a physical division of a parcel complicated to execute.[146] The *de facto* preference for partition-by-sale produces a "vulnerability concern" for cotenants who want to maintain their ownership interest but are dispossessed against their will through a

[135] Dyer, *Ownership*, *supra* note 7, at 195.

[136] Hitchner, *supra* note 93, at 410.

[137] Schelhas, *supra* note 45, at 21.

[138] *Id.*

[139] Bownes & Zabawa, *supra* note 116, at 32.

[140] Deaton, *supra* note 9, at 619.

[141] Thomas Mitchell, *Restoring Hope for Heirs Property Owners: The Uniform Partition of Heirs Property Act*, 40 STATE & LOC. L. NEWS 6, 8 (2016) [hereinafter Mitchell, *Restoring*].

[142] *Id.*

[143] *Id.*

[144] Under the economics-only test that courts have historically relied on to resolve partition actions, courts rarely consider the sentimental attachments landowners might have to the heirs property. Courts would order a sale "if the hypothetical fair market value of the entire property is significantly more than the aggregated fair market value of separately titled parcels which would arise from a partition in kind." Mitchell, *Reforming*, *supra* note 22, at 12–13.

[145] Mitchell, *Restoring*, *supra* note 141, at 8.

[146] Deaton, *supra* note 9, at 619.

partition action.[147] This concern is especially prevalent when a fractional interest is acquired by a non-family member, like a land developer, whose sole interest is forcing a sale of the entire property.[148] Given that courts only "pay 'lip service'" to historical preference for partition-in-kind, real estate developers and traders are able to use partition law to easily (and legally) gain possession of valuable family land.[149]

The UPHPA includes a series of factors that a court must consider to determine whether a partition-in-kind would result in a "great manifest prejudice to the cotenants as a group,"[150] with the intent to demonstrate a strong preference for partition-in-kind.[151] When determining whether a partition-in-kind or a partition-by-sale would be the appropriate resolution for a partition action, the UPHPA utilizes a "totality of the circumstances" test,[152] which requires a court to evaluate:

1. Whether the heirs property in question can practicably be divided among cotenants;[153]
2. Whether the market value of the individual parcels resulting from a partition-in-kind would be less than the heirs property as a whole;[154]
3. Evidence of collective duration of ownership by a cotenant and a predecessor who is related to said cotenant;[155]
4. A cotenant's sentimental attachment to the property, including any ancestral or other unique value;[156]
5. Whether the land is being lawfully used, and the degree of harm if a cotenant is no longer able to conduct such use;[157]

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[147] *Id.* at 622.

[148] *Id.*

[149] Rivers, *supra* note 19, at 60.

[150] UPHPA § 9(a).

[151] *See id.* § 8 legislative note ("Under this Act, there is . . . a strong preference for a partition in kind.").

[152] *See id.* § 9 cmt. n.1, at 26 ("Under this section, a court in a partition action must consider the totality of the circumstances, including a number of economic and noneconomic factors, in deciding whether to order partition in kind or partition by sale.").

[153] *Id.* § 9(a)(1).

[154] *Id.* § 9(a)(2).

[155] *Id.* § 9(a)(3). This section, in essence, asks a court to consider whether the person requesting a partition action is a part of the family that originally owned the heirs property in question, or whether this individual is a non-relative, such as a land developer or real estate trader who acquired the land by buying one family member's fractional interest.

[156] *Id.* § 9(a)(4).

[157] *Id.* § 9(a)(5).

6. The degree to which each cotenant has paid their share of fees to maintain the property, including property taxes;[158] and
7. "any other relevant factor."[159]

These considerations are supposed to ensure a *de jure* and a *de facto* preference for partition-in-kind by eliminating the economics-only test that states have historically used to justify a partition action by sale.[160] Instead, courts must equally consider both economic and non-economic considerations,[161] with no one factor being dispositive.[162] Despite these new requirements, though, the UPHPA still gives judges substantial discretion to resolve a partition action by sale rather than in kind. In doing so, the Act does not do enough to protect the land ownership interests of heirs property owners who are land-rich but cash-poor.

First, the Act falls short of preventing partitions-by-sale, even though the drafters claim to have promoted a strong preference for partitions-in-kind.[163] The first factor asks a court to determine whether a parcel of land can be practicably divided among cotenants, although historically that question has not swayed the balance in favor of a partition-in-kind.[164] In many instances, judges have ordered a partition-by-sale, even when a physical division of property is feasible or when the majority of the heirs did not want the land to be divided through sale.[165] Also, the Act's recommendation that the courts rely on "any other relevant factor" could continue to allow a court to resolve a partition action by sale for ease. This election for a partition-by-sale is due, in large part, to the comparative convenience of dividing money rather than dividing physical property.[166]

The UPHPA introduces two factors by which to determine "manifest prejudice" or injury—a cotenant's sentimental attachment to the property, including ancestral value,[167] and the degree to which a cotenant would be harmed if no longer allowed

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[158] *Id.* § 9(a)(6).
[159] *Id.* § 9(a)(7).
[160] Mitchell, *Game Changer*, *supra* note 8, at 73.
[161] *Id.*
[162] UPHPA § 9(b).
[163] *Id.* § 8 legislative note.
[164] Mitchell, *Game Changer*, *supra* note 8, at 69.
[165] *Id.*
[166] Hitchner, *supra* note 93, at 398.
[167] UPHPA § 9(a)(4).

to continue lawful use of the property.[168] However, the remaining factors in the "totality of the circumstances" test still lean towards a preference for partition-by-sale, especially for those who are land-rich but cash-poor. The third factor requires evidence of collective duration of ownership by a cotenant and a related predecessor.[169] This can be difficult to prove when the "pattern of property transfer" occurs informally without any documentation, especially among low-income individuals.[170] Further, the land in question frequently cannot be used lawfully, for any purposes, commercial or otherwise, as required by the fifth factor, especially when a cotenant is unable to achieve consensus on how to use the land, assuming they are even able to locate all living tenants.[171] Heirs property is a classic example of the tragedy of the anti-commons—since any economically viable use of the land requires the consent of all cotenants, heirs property owners are inhibited from applying the property to productive, legal use without consensus.[172] No single cotenant can legally use the property without the consent of the other cotenants.[173] Lastly, the chances that cotenants pay their pro rata share of taxes and other maintenance fees, as required by the sixth factor,[174] become more unlikely as the number of heirs increases. It is often too complicated to organize and distribute responsibility for these payments when a number of heirs do not live on the land or have any interest in maintaining it.[175]

The "totality of the circumstances" test is undoubtedly more comprehensive than the economics-only test that courts relied on prior to the enactment of the UPHPA, but these factors still fail to ensure that heirs property is fully protected from partitions-by-sale. These weaknesses stem from the assumption of wealth upon which this Act is based. The requirements that heirs property owners provide evidence of their collective duration of ownership[176] and that every heir pay their pro rata share of taxes[177] assumes that the family has the financial means to access legal services to produce wills and deeds showing

[168] *Id.* § 9(a)(5).
[169] *Id.* § 9(a)(3).
[170] PIPPIN, *supra* note 23, at 16.
[171] UPHPA § 9(a)(5).
[172] Richardson, *supra* note 15, at 511.
[173] *Id.*
[174] UPHPA § 9(a)(6).
[175] Hitchner, *supra* note 93, at 398.
[176] UPHPA § 9(a)(3).
[177] *Id.* § 9(a)(6).

familial ownership of the land[178] and that every heir is able to pay taxes.[179] This is more likely the case for the "wealthy and legally savvy" than for the low-income cotenants the drafters claim the Act was designed to help.[180] The strong possibility for a partition-by-sale under the Act's "totality of the circumstances" test, despite the stated preference for partition-in-kind, demonstrates the dangers of treating the socioeconomic positioning of the "wealthy and legally savvy" as the norm for land-rich but cash-poor heirs property owners.

D. Legal Fees Associated with Partition Actions

Legal fees are another aspect of a partition action that can be particularly harmful to those who are land-rich but cash-poor. Heirs property owners who defend against partition actions can incur thousands of dollars in legal fees,[181] which include attorneys' fees, court fees, and the cost of surveying the land.[182] The exorbitant nature of these fees can undermine any economic benefit cotenants would theoretically receive through a partition-by-sale.[183] In one instance, a parcel of heirs property that had been in the Sanders family for eighty-three years was purchased by a timber company for $505,000.[184] The attorney involved in the partition action collected roughly 20% of the land's proceeds in attorneys' fees, which amounted to $104,730.[185] This left $389,170[186] to be divided among ninety-six heirs ($4,053.85 per heir), who declined to appeal the sale

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[178] *See* Mitchell, *Reconstruction*, *supra* note 15, at 517 (discussing the low incidence of will-making and estate planning among poor Black landowners). *See also* Christy Kane et al., *Addressing Heirs' Property in Louisiana: Lessons Learned, Post-Disaster*, *in* HEIRS' PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE LAND OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT 89, 90 (Cassandra Johnson Gaither et al. eds., 2019) (stating that many heirs are unable to afford the legal services required to secure clear title).

[179] *See* Mitchell, *Reconstruction*, *supra* note 15, at 513 (acknowledging that in many instances, one cotenant will pay more than his pro rata share of taxes).

[180] *See* UPHPA intro. note, at 1 ("The Uniform Partition of Heirs Property Act is an act of limited scope which addresses a widespread, well-documented problem faced by many low to middle-income families across the country who have been dispossessed of their real property and much of their real property-related wealth over the past several decades as a result of court-ordered partition sales of tenancy-in-common properties.").

[181] Lewan & Barclay, *supra* note 24.

[182] Hitchner, *supra* note 93, at 398.

[183] UPHPA intro. note, at 8.

[184] Lewan & Barclay, *supra* note 24.

[185] *Id.*

[186] *Id.*

because they could not afford the legal fees of additional court proceedings.[187]

Individual cotenants who own a small interest in the heirs property can initiate a partition action knowing that they will be able to recover their legal fees from the proceeds of the sale.[188] However, cotenants who want to contest the sale of the property in court are responsible for their own legal fees.[189] This limits the ability of those who are land-rich but cash-poor to protect their fractional interest in the land, which is frequently their most valuable asset.[190] The drafters of the UPHPA recognize the challenges posed by the current allocation of legal fees in partition actions, noting that in most states, those who unsuccessfully resist a partition action are subsequently made responsible for the attorneys' fees of the initiating cotenant, on top of their own fees resulting from hiring counsel to resist the partition action.[191] Currently, partition law only adds insult to injury for those who want to preserve their fractional interest in heirs property;[192] cotenants are forced "to pay for the deprivation of their property rights and their resulting loss of wealth."[193]

Despite the drafters' acknowledgement that the existing distribution of legal fees can be extremely harmful to cotenants, especially those of modest means, the UPHPA does not include any provisions to address these concerns. The drafters suggest that state legislatures include the UPHPA as part of the state's existing partition law,[194] which would mean that state laws dictating the division and allocation of legal fees will remain unchanged. The UPHPA offers no protection for those whose net compensation, which includes deductions for legal fees, does not exceed the perceived financial and sentimental loss.[195]

The absence of a provision accounting for the exorbitant legal fees speaks again to the consequences of normalizing the wealthy and legally savvy. As the drafters explain in the prefatory note to the UPHPA, low-income heirs property owners

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[187] Rivers, *supra* note 19, at 62 n.575.
[188] *Id.* at 61–62.
[189] *Id.* at 62.
[190] UPHPA intro. note, at 1.
[191] *Id.* intro. note, at 2.
[192] Bailey, *supra* note 33, at 14.
[193] UPHPA intro. note, at 2.
[194] *Id.* § 1 note, at 9.
[195] B. James Deaton & Jamie Baxter, *Towards a Better Understanding of the Experience of Heirs on Heirs' Property*, *in* HEIRS' PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE LAND OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT 44, 45 (Cassandra Johnson Gaither et al. eds., 2019).

do not know about and/or are unable to afford legal services that could mitigate the risks of owning heirs property.[196] Also, as described above, cotenants of modest means decide not to pursue appeals when their land is subject to a partition action because they are unable to afford the associated legal fees.[197] Modelling partition law after the ownership characteristics of the wealthy and legally savvy results in the drafters failing to devise effective solutions that address, or at least recognize, the fundamental problem that prevents heirs property cotenants from protecting their land—a lack of liquid and tangible assets, or in other words, a lack of wealth.

IV. MODIFICATIONS TO THE UPHPA TO BETTER PROTECT THE LAND-RICH AND CASH-POOR

This Note proposes two modifications to the UPHPA to better address the needs of heirs property owners who are land-rich but cash-poor. First is a fee-shifting provision that would make the initiating cotenant responsible for all legal fees associated with a partition action. Second is a mandate that all partition actions be resolved through a partition-in-kind, unless there is consensus among all located cotenants that a partition-by-sale is preferred. These proposals tackle the consequences of relying on the "wealthy and legally savvy" as the norm for property ownership.

A. Fee-Shifting Provision

The UPHPA does not include any provisions that address the extreme financial strain cotenants face when seeking to retain their land in a partition action.[198] Some heirs property owners decline to contest a partition action in court because of these legal fees.[199] Due to the challenges posed by the legal fees associated with partition actions, this Note suggests that the UPHPA be amended to include a fee-shifting provision that shifts all legal fees to the individual who initiated the partition action.

The payment of attorneys' fees has historically been allocated according to one of two practices. The English rule, used in countries across the world, utilizes a "loser pays" system, in which the prevailing party's legal fees are paid by the losing

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[196] UPHPA intro. note, at 3.
[197] Rivers, *supra* note 19, at 62 n.575.
[198] UPHPA intro. note, at 2.
[199] Lewan & Barclay, *supra* note 24.

party.[200] The United States generally follows the "American Rule," under which each party is only responsible for their own legal fees.[201] However, in the case of partition actions, courts seem to follow the English rule, in that the initiating cotenant can recoup their legal fees from the proceeds of a partition sale (to which every heir is entitled), and that contesting heirs must pay for their own legal fees.[202]

The American Rule, importantly, is only common practice; exceptions to this "rule" can be made through statute by legislatures.[203] In other words, as long as fee-shifting rules are based in statute, they can be considered exceptions to the American Rule.[204] As such, the UPHPA should be amended to shift the legal fees of all non-initiating cotenants to the cotenant who initiated the partition action. This modification has the potential to minimize the number of partition actions of any type, as well as protect the land ownership interests of all heirs, especially those who are land-rich and cash-poor. If the action is initiated by land developers, this provision might serve as a financial deterrent. Real estate traders and other opportunistic individuals like Audrey Moffitt might be hesitant to buy out an individual interest in heirs property to force a sale of the entire parcel[205] because cotenants would be financially empowered to fight the partition action. There would no longer be scenarios of cotenants declining to resist the sale due to exorbitant legal fees for which they would be responsible.[206] If the partition action is the result of a family disagreement, the financial burden facing the initiating cotenant might encourage less expensive options, such as mediation. This provision would, at its core, discourage long and arduous legal battles to sell or protect the land in question. It would deter land developers from using partition actions to acquire parcels of land that frequently hold financial and sentimental significance for Black families, and it would encourage heirs property owners to search for inexpensive and mutually agreeable solutions.

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[200] John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1569 (1993).

[201] *Id.*

[202] Rivers, *supra* note 19, at 61–62.

[203] Vargo, *supra* note 200, at 1587.

[204] *Id.*

[205] Mitchell, *Forced Sale Risk*, supra note 106, at 612.

[206] Rivers, *supra* note 19, at 62.

B. Mandate for Partition-in-Kind

The "totality of the circumstances" test in Section 9 of the UPHPA is supposed to demonstrate a strong statutory preference for partition-in-kind,[207] but historically, a *de jure* preference for this resolution has done very little to influence courts.[208] This leaves cotenants who want to maintain their fractional interest in the land at risk, especially when the sale of the land is forced by a non-family member, such as a real estate trader or land developer.[209] The recommendation for a fee-shifting provision can reduce the chance of a partition-by-sale because those interested in preserving their interest would not have to worry about the legal fees associated with contesting the partition action. That being said, a mandate for partition-in-kind in scenarios where cotenants are unable to reach a consensus on how to treat the land would better preserve the interests of those who depend on their fraction of the land.

A mandate for partition-in-kind would create protections for all co-owners of a parcel of heirs property. First, it most obviously would protect the interests of cotenants who live on the land, who want to maintain their fractional interest. A partition-in-kind would ensure that their fractional interest remains undisturbed, and these cotenants can continue to rely on the land to serve as their home. Second, this mandate can protect heirs property owners who are no longer interested in their fraction of the parcel. A co-owner selling their interest could still recover fair market price of their fraction of the land, which is required under the buyout provision and Section 6 of the UPHPA.[210] As such, the cotenant who no longer wants their interest in the property would receive fair compensation for their fraction of the parcel, while the cotenants who want to maintain the heirs property, especially those who live on the land, can continue to do so. Finally, land developers and real estate traders looking to capitalize on heirs property would have to ensure that all located cotenants agree to relinquish their fractional interests in the property in exchange for the fair market value. Without

[207] UPHPA § 8 note, at 23 ("Under this Act, there is . . . a strong preference for a partition in kind.").

[208] Mitchell, *Restoring*, *supra* note 141, at 8.

[209] Deaton, *supra* note 9, at 622.

[210] UPHPA § 6 (articulating how a court is to determine the fair market value of a parcel of land).

this consensus, a forced sale, similar to what the Becketts[211] and other families have experienced,[212] could not occur.

V. CONCLUSION

The UPHPA is a strong start for providing some solutions to the heirs property problem, but there is room for improving this legislation to better address the issues faced by the socioeconomic groups it was designed to help.[213] Given that the UPHPA is adopted on a state-by-state basis,[214] and that the drafters recommend the Act be included into existing state partition law,[215] state legislatures could modify the Act or its existing law to include the reforms prescribed in this Note. These amendments will only strengthen the UPHPA and ensure the drafters' intent of protecting heirs property in minority and low-income communities.

[211] Lewan & Barclay, *supra* note 24.
[212] Mitchell, *Forced Sale Risk*, *supra* note 106, at 612.
[213] UPHPA intro. note, at 1.
[214] *Partition of Heirs Property Act*, *supra* note 82.
[215] UPHPA intro. note, at 8.