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ABSTRACT

The problem of heirs property is tragic and endemic, especially in minority and low-income communities where family homes and farms are lost because of fractionation through intestate inheritance and failure by heirs to timely probate the land and clear title. But reformers have worked diligently to address the problem by passing the Uniform Real Property Transfer on Death Deed Act, which provides a much-needed mechanism for landowners to avoid probate through execution of a beneficiary deed for real estate. Reformers have also passed the Uniform Partition of Heirs Property Act, which tries to limit the harms from forced partition actions when co-owners cannot agree on management or when a successor purchases one heir's share in valuable land and then forces a sale, usually at below-market terms. But between these two remedies is a great chasm for all the properties that are already in heirs property status and for which probate procedures and property rules disadvantage the heirs, penalizing them for managing the property. Property tax rules, the law on adverse possession against co-tenants, marketable title acts and statutes of limitations, and a variety of other substantive and procedural reforms could be enacted to help those heirs currently grappling with heirs property issues. This Article identifies numerous barriers heirs face to resolving heirs property title issues and draws from recent reforms in similar areas to build a case for a new

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uniform probate act. The Article then provides a sample uniform probate act that would ameliorate the centuries of harm done to vulnerable homeowners by intestacy laws and probate procedures.

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I. A TALE OF TWO NEIGHBORS

Consider two cases. The first is the case of Arthur and Gayle Paulson. Married in the 1960s, they worked their entire lives at modest-paying jobs to raise their two children. Divorced in 1997, Gayle received the family home in Gainesville, Florida, and Arthur bought a small duplex nearby for $78,000, for which he took out a mortgage of $67,000. As property values increased, he refinanced in 2000 and took out some equity, leaving him with a mortgage of nearly $100,000. He had a health scare in 2001, resulting in a $5,000 lien against his house by the local hospital. The hospital removed the lien a few months later, but Arthur struggled financially from then on. In 2005, he sold the duplex for $180,000, paid off his mortgage, and bought a more modest home the next year for $84,000. A few months later, he took out a large equity loan of $100,000 on that home. Two years later, the financial crisis led to drastic devaluation of his home, where it was likely underwater given the high mortgage he had taken out in 2006. Over the next five years, Arthur struggled to pay his mortgage and his property taxes. He was delinquent in his taxes from the time he took out the home equity loan until his death in 2012, although he redeemed the tax certificate in 2009. Arthur died intestate in 2012, leaving two children, five siblings, and his ex-wife. Despite his children having the resources to probate his estate, his home was sold at tax sale for $35,000 in 2014.[1] Assuming the $35,000 proceeds from the tax sale was the outstanding amount on his $100,000 home equity line of credit and his tax debt, his heirs walked away with nothing from his lifetime of real estate investments. A divorce, a health scare, and a financial meltdown wiped out decades of Arthur's real property investments.

Arthur's story is all too common among today's working class. People marry, buy homes, have children, and work hard to live comfortably when a divorce or college tuition for the kids sets them back financially.[2] A decade later, they may regain some financial assets only

1. The only asset being probated was the home, which was lost the following year at tax sale, and possible proceeds from a personal injury suit.

2. *See generally* Philipp M. Lersch & Janeen Baxter, *Parental Separation During Childhood and Adult Children's Wealth*, 99 SOC. FORCES 1176 (2021); *see also generally* ROGER WILKINS ET AL., MELB. INST., THE HOUSEHOLD, INCOME AND LABOUR DYNAMICS IN AUSTRALIA SURVEY: SELECTED FINDINGS FROM WAVES 1 TO 19 (2021), https://bit.ly/3CvCGDe; Ben Steverman, *Divorce Destroys Finances of Americans over 50, Studies Show*, BLOOMBERG: PURSUITS (July 19, 2019, 9:21 AM), https://bit.ly/3CxygMc.

to face a health scare or lose their job.[3] Despite a booming housing market in the early 2000s, Arthur's kids probated his estate and settled his affairs, but lost his single largest asset at a tax sale. Today, his home—an outdated 1980s ranch-style cinder-block house in a working-class neighborhood—is assessed at only $75,000. But its current fair market value on Zillow is nearly $150,000, and it was rented for nearly $1,000 per month shortly after it was sold. Whoever bought it at tax sale more than tripled their investment. Yet after working his entire adult life and investing in the same property, Arthur had no home equity to pass on to his children.

Contrast Arthur's story to that of Mary Artis. Mary and Elmore Artis bought their home in 1986 and regularly paid their $20,000, 30-year mortgage, plus an additional $10,000 mortgage extension provided by the City of Gainesville in 2008. Theirs was a single-story ranch-style cinder-block home assessed at $78,000, very similar to Arthur Paulson's house. Elmore predeceased Mary, who died in 2015 at the age of 86. Mary left two sons and three daughters from a prior marriage. But Mary's estate was not probated and remains titled in the name of Mary's "heirs." In five of the eight years since 2013, the property taxes were delinquent, and the property went to tax certificate but was redeemed in time before being lost at a tax sale. There are no debts on this house, which is valued at over $160,000 today on Zillow. But Mary's heirs are unable to obtain a mortgage, financing for major repairs, or disaster relief if a hurricane were to damage the home. One of Mary's children is living in the home and maintaining it but has not opened probate to settle title, perhaps for fear that the house would be sold in a forced partition action to provide the inheritance for Mary's five children.

Despite the similarities in their real property assets, there are striking differences in Arthur and Mary's stories. Arthur was an insurance agent who was reasonably sophisticated in land ownership and was able to take out substantial mortgages. In 2007, his home was mortgaged to the tune of over $100,000, which was greater than or equal to the market value of the home. Because he was white, Arthur's home was not located in a red-lined area, and he was able to obtain financing multiple times, enabling him to build wealth.[4] But unforeseen

3. *See* Megan Leonhardt, *Rising Health-Care Costs Stall Americans' Dreams of Buying Homes, Building Families and Saving for Retirement*, CNBC: MAKE It (Nov. 4, 2019, 1:28 PM), https://bit.ly/3GOjcMJ; *see also* Lorie Konish, *This Is the Real Reason Most Americans File for Bankruptcy*, CNBC (Feb. 11, 2019, 2:20 PM), https://bit.ly/3jZVnJ3; David U. Himmelstein et al., *Medical Bankruptcy: Still Common Despite the Affordable Care Act*, 109 AM. J. PUB. HEALTH 431, 431 (2019).

4. *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (describing the different ways

circumstances resulted in very little wealth being left to his children. He had multiple opportunities to invest and build wealth, benefiting greatly from zoning and public investments that helped his real property hold value.[5] But he could not escape the financial setbacks of divorce, a health scare, and a recession. Arthur bought three different homes and received mortgages worth hundreds of thousands of dollars. His children probated his estate but ultimately lost his home to tax sale, receiving virtually no inheritance from his lifetime of real estate investments.

On the other hand, Mary also faced the economic setback of divorce, but remarried, raised her five children in the Gainesville family home, and never borrowed more than $30,000. She paid her debts regularly and, until the last two years before her death, paid her property taxes on time. Her home is of comparable value to Arthur's, but it is at risk of being lost to her heirs—even though they own the full equity of the home—simply because they have not retitled it and the legal system disadvantages heirs who maintain the property and pay its expenses.[6] Mary worked as a dietician aide in the cafeteria of the local hospital, likely earning minimum wage or a little above for most of her lifetime, which was likely much less than Arthur earned. Despite redlining, forced segregation, and difficulty in obtaining a mortgage, Mary did everything right. She consistently paid her bills and never took out large mortgages, yet her wealth is at risk not because she squandered it, but because her children are not doing the legal work necessary to preserve it. Mary is a Black woman and Arthur is a white man. Their life stories are vastly different, as are their economic stories. But one story is the same: the role of succession law in failing to preserve their modest wealth for the next generation.

Much can be said about the differences in opportunities, expectations, and second chances to earn and preserve wealth between Arthur, the white man, and Mary, the Black woman. Housing segregation, redlining, discrimination, poor schools, and even health disparities meant that Mary's success in owning a fully paid-off home is remarkable.[7] For that reason, and because she had more home equity and

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in which zoning, redlining, and other government mechanisms have been used to limit racial integration in housing).

5. *See generally* Ira Lindsay, *In Praise of Nonconformity*, 61 SANTA CLARA L. REV. 745 (2021); Brandon M. Weiss, *Progressive Property Theory and Housing Justice Campaigns*, 10 U.C. IRVINE L. REV. 251 (2019); *see also* Christopher Serkin, *The Wicked Problem of Zoning*, 73 VAND. L. REV. 1879, 1879–80 & n.4 (2020) (discussing the racial wealth effects).

6. *See infra* Section III.D.

7. *See* Danaya C. Wright, *What Happened to Grandma's House: The Real Property Implications of Dying Intestate*, 53 U.C. DAVIS L. REV. 2603, 2614–15 (2020) [hereinafter Wright, *Grandma's House*].

her family would likely benefit more from it, the loss of her home is even more tragic than the fact that Arthur's lifetime of investment yielded nothing to his children. Both stories are sad and, considering Arthur's many privileges, he too lost much. But in the end, he was able to cash in on his real estate wealth, leveraging it for personal gain, while Mary's wealth is likely to be entirely lost.[8]

The wealth transfer system in this country is well-suited to facilitate wealth transfers for the affluent, which is no surprise. The multi-millionaire has countless customizable trust products to minimize income, capital gains, and transfer taxes, as well as multiple probate-avoidance devices, from life insurance to payable-on-death provisions to beneficiary designations in securities and bank accounts. These options help the well-heeled pass wealth smoothly and inexpensively to their children. But for the working class, and even many in the middle-class, these mechanisms are often inaccessible. Thus, in many states, people's most valuable asset—their home—must pass through probate, with its costs and delays.[9] Ironically, people can pass vast amounts of wealth by designating a child or a spouse as a beneficiary on a million-dollar insurance policy at an airport kiosk simply by signing their name. Or, they can name a beneficiary on a bank or securities account worth any amount by logging onto their online account, perhaps even without dual authentication, and that wealth will pass automatically at death through a simple, cost-free procedure.

But it is very difficult for Arthur and Mary's $75,000 homes to avoid probate. They can use a trust, which usually costs upwards of $5,000 to establish, or a joint tenancy, which means giving up half ownership and risking a forced partition during life, or in some states a transfer-on-death ("TOD") deed that must be executed with the deed formalities and recorded at the courthouse.[10] The TOD deed, in those jurisdictions that even recognize them, has greatly simplified the wealth transfer process for those of modest estates where the home is the single largest asset and, for most decedents, the only asset requiring court-supervised probate. In states that do not have a beneficiary deed statute,

8. As of March, 1, 2023, Mary's heirs are again delinquent on the property taxes and the delinquency has led to tax certificates being sold for the years 2020 and 2021. *See Real Estate Account #16106 003 000*, ALACHUA CNTY. TAX COLLECTOR, https://bit.ly/3mBiJ95 (last visited Mar. 1, 2023).

9. *See* Danaya C. Wright, *Beneficiary Deeds for Real Estate: Transfer-on-Death, Lady Bird, and Enhanced Life Estate Deeds*, *in* 3 POWELL ON REAL PROPERTY § 25.03 (2022) [hereinafter Wright, *Beneficiary Deeds*] (explaining that roughly half the country allows for a beneficiary deed that avoids the necessity of probate if the deed is executed properly, and twenty-nine jurisdictions have some sort of statute permitting a transfer-on-death designation of a beneficiary for real estate); *see also infra* discussion at note 25.

10. *See generally* Wright, *Beneficiary Deeds*, *supra* note 9.

homeowners might be able to have an enhanced life estate deed drawn up by a lawyer, but that can also cost upwards of $1,000.[11] For Mary Artis, even if the $1,000 was not beyond the reach of a minimum-wage cafeteria worker, she needed to know enough about her estate-planning options to know what questions to ask.

Nevertheless, Mary's family is in pretty good shape considering. Her five children are still alive and, with some relatively small expense, they could open probate and have her home retitled in their names. The cost is likely to be a few thousand dollars but, since the home was Mary's homestead, the heirs may use a summary administration procedure.[12] If they all get along and contribute their fair share, it could be a relatively quick and painless process. But if they do not all get along, and if one child is footing the tax and utility bills or is living in the house and does not want to risk a forced partition sale, lying low and doing nothing may seem like the best idea. Leaving the home in heirs property status certainly may make sense if there are family disagreements, but it makes very little sense if the home needs extensive work, if the children need the inheritance for their own families, if a natural disaster strikes and FEMA relief is only available if one can prove ownership,[13] and so long as the child paying the taxes keeps on doing so. In Florida alone, there are likely more than 100,000 pieces of land held in heirs property status, just one missed payment away from being lost at tax sale, foreclosed upon, or damaged in a natural disaster for which no assistance will be forthcoming.[14] Even if the property is insured, the insurance company will not pay if the policy is based on misrepresentations that the owner of record is alive or that the person paying the premiums is the owner.

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11. Enhanced life estate deeds are used in Texas, Florida, Michigan, Vermont, and West Virginia, and allow a grantor to transfer a remainder interest but retain a life estate and a power of termination/revocation to manage the property during life, revoke the remainder, or transfer unencumbered fee simple title to transferees. *See* Wright, *Beneficiary Deeds*, *supra* note 9, at § 25.05.

12. *See* FLA. STAT. §§ 735.201(2)–735.203 (2022) (stating that Florida law allows for summary administration of estates under $75,000 in addition to protected homestead).

13. *See* Hannah Dreier, *FEMA Changes Policy that Kept Thousands of Black Families from Receiving Disaster Aid*, WASH. POST (Sept. 2, 2021, 6:20 PM), https://bit.ly/3CA41En (explaining that FEMA has adjusted its proof of ownership requirements to make it easier for heirs to receive financial assistance when their family home is damaged, but there are still costs and delays that make it more difficult to get timely assistance than if the home were clearly titled in their names before the hurricane hit); *see also Verifying Home Ownership or Occupancy*, FEMA, https://bit.ly/3Gk7xUA (last visited Sept. 8, 2021).

14. In Alachua County there are roughly 1,700 parcels of land in heirs property status. *See* DANAYA WRIGHT & ANNA PRIZZIA, ALACHUA COUNTY HEIRS' PROPERTY AND ESTATE PLANNING OVERVIEW 2 (2022), https://bit.ly/3Qs8ZJc. Extrapolating based on area, that would mean somewhere near 115,000 parcels of land in the entire state is in heirs property status.

Heirs property has long posed an issue for families who are not adept at navigating the probate system, do not engage in estate planning, or rely on the default rules of intestacy to provide small inheritances to the next generation.[15] But it has become a particularly salient problem in minority communities nationwide that have suffered forced partition by land speculators where they have lost their ancestral lands because fractionated ownership and inflated land values make it nearly impossible for one heir to buy out the others' interests.[16] The law of primogeniture existed in England to avoid fractionation, keep the land consolidated, and pass the land with the aristocratic titles, encouraging parents to use other mechanisms to provide inheritances for daughters and younger sons.[17] But the United States rejected that unequal treatment of children,[18] which, sadly, has resulted for many in complete loss of inheritances. This devotion to equality in succession law has resulted in devastating consequences for Native American families who were subjected to allotments and forced fractionation of ancestral lands.[19] The irony is that America's noble obsession with equality and its rejection of class hierarchy has resulted in massive wealth loss at the lower end of the wealth spectrum and massive wealth accumulation at the upper end where testamentary freedom to deviate from the egalitarian norms can be easily accomplished to consolidate wealth and establish an economic and political oligarchy at least as unequal as that of England and France in the late Medieval period.[20]

15. *See* Danaya C. Wright, *Disrupting the Wealth Gap Cycles: An Empirical Study of Testacy and Wealth*, 2019 WISC. L. REV. 295, 301–04 (2019); Danaya C. Wright, *The Demographics of Intergenerational Transmission of Wealth: An Empirical Study of Testacy and Intestacy on Family Property*, 88 UMKC L. REV. 665, 676–80 (2020) [hereinafter Wright, *Demographics*]; Wright, *Grandma's House*, *supra* note 7, at 2626.

16. *See generally* Thomas W. Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1 (2014); Thomas W. Mitchell, *Growing Inequality and Racial Economic Gaps*, 56 HOW. L.J. 849 (2013); Thomas W. Mitchell, Stephen Malpezzi & Richard K. Green, *Forced Sale Risk: Class, Race, and the "Double Discount*," 37 FLA. STATE U. L. REV. 589 (2010).

17. Providing doweries for daughters and buying commissions in the Army or the Church for younger sons was the common method of providing resources during life so the ancestral property and titles would descend to the eldest son intact. *See* JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 267–69 (4th ed. 2002).

18. *See generally* George L. Haskins, *The Beginnings of Partible Inheritance in the American Colonies*, 51 YALE L.J. 1280 (1942).

19. *See generally* Jessica A. Shoemaker, *Like Snow in the Spring: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 WIS. L. REV. 729 (2003) [hereinafter Shoemaker, *Like Snow*].

20. *See* Carla Spivack, *Broken Links: A Critique of Formal Equality in Inheritance Law*, 2019 WISC. L. REV. 191, 205 (2019); Camille M. Davidson, *To My Children in Equal Shares: The Flaw of Estate Planning When Property is Devised to Beneficiaries as Tenants in Common*, 47 ACTEC L. J. 187, 189 (2022).

Wealth-transfer patterns today have changed dramatically from those of even a generation ago. Today's parents invest significant wealth in their children's education and technical training to enable them to live independently, reducing their need for an inheritance, while allowing the parents to use their savings to provide for their own retirement.[21] Perhaps this was Arthur Paulsen's plan. As inter-generational wealth-transfer patterns have changed, persons of low or modest wealth provide very little inheritances to the next generation, while the wealthier provide quite substantial inheritances for each generation to leverage, increasing the wealth gap between the haves and the have-nots.[22] A profound indictment of our modern system of succession law is that it provides wide flexibility and nearly endless opportunities to the wealthy to protect their property from generation to generation, smoothing the bumps in the process and offering a wide array of succession-planning tools. But those laws provide virtually no support to those near the bottom of the wealth spectrum. Unlike the wealthy, who can afford to opt out of the default rules and procedures, those of little wealth are trapped in a probate system that seems designed to make wealth transfers so difficult that people lose the wealth rather than deal with the system. If there was any doubt about the destructive effects of succession law, a brief examination of Indian land tenure problems will demonstrate the need for immediate solutions.[23]

Some recent legal changes have started to alleviate the problem of wealth loss through intestate descent, but hard work remains to be done. With the adoption of the Uniform Real Property Transfer on Death Act ("URPTODA")[24] in many states, landowners whose only significant asset is their family home can execute a beneficiary deed to enable the real estate to pass outside probate to the designated beneficiary.[25] If

21. *See* THOMAS PIKETTY & GABRIEL ZUCMAN, PARIS SCH. ECONOMICS, WEALTH AND INHERITANCE IN THE LONG RUN 1319–24 (2014), https://bit.ly/3ZnXdDH; ARASH NEKOEI & DAVID SEIM, HOW DO INHERITANCES SHAPE WEALTH INEQUALITY? THEORY AND EVIDENCE FROM SWEDEN 464, 472–75 (2022), https://bit.ly/3vPWYDQ.

22. *See* Wright, *Demographics*, *supra* note 15, at 678–80; *see also* The Indicator from Planet Money, *The Secret to Upward Mobility: Friends*, NPR (Aug. 8, 2022, 6:40 PM), https://n.pr/3XyxAhL; All Things Considered, *White Adults Receive the Most Financial Help from Older Relatives, Poll Shows*, NPR (Aug. 8, 2022, 7:45 PM), http://bit.ly/3ZwP8g9.

23. *See generally* Jessica A. Shoemaker, *No Sticks in my Bundle: Rethinking the Indian Land Tenure Problem*, 63 U. KAN. L. REV. 383 (2015) [hereinafter Shoemaker, *No Sticks*]; Jessica A. Shoemaker, *Complexity's Shadow: American Indian Property, Sovereignty, and the Future*, 115 MICH. L. REV. 487 (2017) [hereinafter Shoemaker, *Complexity's Shadow*].

24. *See generally* UNIFORM REAL PROP. TRANSFER ON DEATH ACT (UNIF. L. COMM'N 2009) [hereinafter URPTODA].

25. *See* Wright, *Beneficiary Deeds*, *supra* note 9, at § 25.03[1] (stating that the URPTODA or a state-specific deed is available in 29 jurisdictions).

Arthur Paulson or Mary Artis could have executed a beneficiary deed for their homes, title would have passed quickly and at virtually no cost to the designated beneficiaries without the need for probate or a lawyer. Likewise, the risk of tax delinquencies or foreclosures would have been reduced, if not eliminated. But without the URPTODA or a similar statutory mechanism, heirs must almost inevitably probate the real property of these decedents, and there are generally no shortcuts for simple, small-value homesteads.[26]

Once heirs retitle the realty in their own names as tenants in common, a new problem arises: the risk of forced partition actions. There again, the law has stepped in to provide a solution in those states that have adopted the Uniform Partition of Heirs Property Act ("UPHPA"),[27] designed to minimize the risk of forced sales by land speculators.[28] The UPHPA limits forced sales and requires meaningful judicial oversight of partition actions. It also limits the ability of non-heirs to force a partition.[29] But between the URPTODA and the UPHPA is a giant abyss where legal protections and assistance for lands held in heirs property status generally do not exist.

There are many reasons why land falls into heirs property and why the heirs do not avail themselves of the regular probate process. For some, the expense is too great. For others, they do not trust lawyers or the legal system. Or, probate is simply beyond them—they may be incarcerated, serving overseas in the military, suffering from addiction, unemployed, or homeless. Imagine what a $30,000 inheritance might do for so many people living paycheck to paycheck trying to raise their children. Losing these ancestral homes to foreclosure or tax sale or letting them linger in heirs property status where they are vulnerable to deterioration or natural disasters means most of Mary Artis and Arthur Paulson's wealth is lost because the process of retitling their homes was simply too difficult.[30]

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26. California allows an affidavit of heirship for real property worth $50,000 or less, a fantasy unlikely to be found outside the inhospitable desert full of horned toads and prickly pear cactus. *See* CAL. PROB. CODE § 13200 (West 2022).

27. *See generally* UNIFORM PARTITION OF HEIRS PROP. ACT (UNIF. L. COMM'N 2010) [hereinafter UPHPA].

28. *See generally id*. The UPHPA has been fully adopted in 20 jurisdictions since it was first promulgated in 2010. *See Partition of Heirs Property Act*, UNIF. L. COMM'N., http://bit.ly/3mtkyos (last visited Mar. 8, 2023) (click "map" for a map view of each jurisdiction that has adopted the UPHPA or "enactment history" for a list view). Two states, Virginia and Maryland, have adopted a version that is substantially similar to the UPHPA. *See id.*

29. *See* UPHPA, *supra* note 27. Sections 8 to 11 of the UPHPA provide for partition alternatives, establishes certain conditions for partition in kind, requires open-market sales, and that a broker file a report with the court on the open-market sale. *See id.* at §§ 8–11.

30. *See* Wright, *Grandma's House*, supra note 7, at 2610–13.

Although scholars have recently begun paying attention to the heirs property issue, little to none of that attention has focused on the probate process itself. As scholars bewail the problem of land loss and the unscrupulousness of land speculators who prey on vulnerable landowners, the answer is usually that they should have better protected themselves with estate planning, or legal aid should help heirs cut through the system.[31] In this Article, however, I try to build a bridge between the URPTODA and the UPHPA by analyzing current probate procedures that frustrate land transfers and examining the social and legal barriers that often arise to prevent timely clearing of title. In this analysis, I consider reforms implemented in other areas of the law to simplify and alleviate inequities. Finally, I propose sample legislation to provide a summary process for handling long-standing heirs property parcels so that we can begin to salvage this wealth for those who earned it, and their dependents who most need it.

II. THE PURGATORY OF HEIRS PROPERTY

Heirs property is not a new phenomenon; it is an inevitable part of the generational cycle and has plagued families, title companies, probate courts, and lawyers for centuries. When a landowner dies, the executors or heirs to the estate must modify the land records to reflect the change in ownership. The new owner may be a will beneficiary or the intestate heirs, depending on whether the owner left a valid will. In most instances, the successors have every incentive to take the necessary steps to retitle the land, whether that means hiring a lawyer and opening a probate proceeding or recording a death certificate or affidavit of heirship, if required. Because the heirs and beneficiaries are likely to receive property of value, they can usually be counted on to expend the resources necessary to probate the decedent's estate and get the property into the appropriate form to enable them to sell, rent, or otherwise benefit from it. In most instances, when a landowner dies owning real property, the probate process will be opened quickly, with debts paid, property disbursed, and the estate closed all within a couple of years.

From the moment of death and through the entire probate process, real estate owned by the decedent is technically in *heirs property* status.

31. *See generally* Maryalene LaPonsie, *Estate Planning Tips to Keep Your Money in the Family*, U.S. NEWS AND WORLD REPORT (Oct. 11, 2021, 9:59 AM), https://bit.ly/3XKgWvF; *see also* Rebecca Wilson, *Protecting Family Property from Unscrupulous Developers and Real Estate Speculators*, 53 U. PAC. L. REV. 271 (2022); Reetu Pepoff, *The Intersection of Racial Inequities and Estate Planning*, 47 ACTEC L.J. 87 (2021) (discussing the myriad ways BIPOC landowners fail to protect inheritances and methods for incentivizing them to engage in better estate planning); Hugo A. Pearce III, *"Heirs' Property" The Problem, Pitfalls, and Possible Solutions*, 25 S.C. L. REV. 151, 164–67 (1974) (discussing legal aid).

This simply means that the owner of record is deceased and that the new owner has not been determined, leaving the records of the tax collector, property appraiser, and clerk of court in a state of limbo. Until a probate court determines that grandma's last will was valid and not the product of undue influence, or who her statutory heirs in fact are (did that rumored love child really exist?), then the records cannot be changed because we do not know for sure who the true owners will be. Moreover, most government entities do not have the resources to cross-check death certificates with land records, so the tax collector may bill the deceased at their last-known address for years without knowing that they died. But for the most part, especially with high-value real estate, the new takers have every incentive to pursue probate quickly, and the probate courts are well-equipped to facilitate the change with relatively few obstacles. For those properties, the legal system works well and personal representatives—even though they are in the legal limbo of heirs property status during the pendency of probate—usually manage the property, pay the taxes, and otherwise take care of the property during this relatively short period. With letters of administration in hand, the personal representative can insure the property, use the decedent's bank account to pay the taxes, invest in renovations or repairs, rent the property, and otherwise do what any normal owner would do to protect the asset, including having it titled in the name of the estate and signing a deed or an affidavit when it is finally settled in the hands of the new owner(s).

But for some inherited land—perhaps as much as 2% of real property at any given time—the successors do not open probate and seek to retitle the land in their name, allowing its legal status to languish for years in a state of limbo.[32] There may be many reasons for this failure, including ignorance of the process, ignorance that they have inherited real estate, their own economic constraints, conflict between existing heirs, physical inability, mistaken belief that someone else is handling it, distrust of the legal system, distrust of lawyers, or even a general fear that calling attention to the situation will open a can of worms.[33] Whatever reasons the successors may have for their inaction, land that remains in heirs property status, especially without a personal administrator serving as a fiduciary to protect and maintain the property, is particularly vulnerable to being lost either legally or physically, as

32. *See* ALACHUA CNTY. PROP. APPRAISER, 2019 ANN. REP. 10 (2019), https://bit.ly/3Y3Q5Lt (showing the total number of residential parcels); discussion *infra* notes 37–38.

33. *See generally* Will Breland, *Acres of Distrust: Heirs Property, the Law's Role in Sowing Suspicion Among Americans and How Lawyers Can Help Curb Black Land Loss*, 28 GEO. J. ON POVERTY L. & POL'Y 377 (2021) (discussing the impact of the Black community's distrust of the legal system and lawyers on land ownership).

when it is sold at tax sale or when it is damaged from a hurricane or wildfire.[34] With each passing year, the process becomes more cumbersome and expensive. Thus, understanding the problem of heirs property requires figuring out how to differentiate the 10% that is in heirs property status with no visible end in sight from the 90% for which heirs property is a short phase as the parties work to clear title and recognize the new owner. Unfortunately, we cannot rely on any one indicator to locate that 10%, such as tax delinquency, since Arthur Paulson's home was in delinquency even though his children opened probate and retitled the home within a year of his death. It is very difficult for government agencies to proactively forestall land loss when the only indicator is that people are not doing anything. It is rather like finding the dog that is not barking in the night.

The particularly vulnerable heirs property parcels are those where the decedent owner has been dead for a considerable time and no one has stepped forward to probate and retitle the estate.[35] In the case of Mary Artis, her home has been in heirs property status for over a decade with no sign of ending, and although it has been in tax delinquency for eight of the past eleven years, the taxes were eventually paid (although the current delinquency is alarming). Tax payments indicate that someone is at least partially tending to the property. What is particularly helpful, however, is that the property appraiser in Alachua County, Florida, cross-references property ownership with death certificates and notes in the public records when an estate has fallen into heirs property status. Most counties in Florida and across the country do not do this, which means that simply identifying the heirs properties, whether they are in probate or not, is next to impossible. And even if probate has been opened, the title records are not usually changed to reflect the new owners until probate is about to close because property distribution is one of the last things done during probate.

As people become more aware of the heirs property situation and try to fashion appropriate remedies, there are ways to create algorithms to try to identify the vulnerable group of heirs property parcels, given the prevalence of online property records and super-computer capacities.[36] But the scale is significant: in Alachua County there are roughly 90,000 parcels of land in single-family residential and non-commercial

34. *See* Wright, *Grandma's House*, *supra* note 7 at 2630–35.

35. *See* Faith Rivers, *Inequality in Equity: The Tragedy of Tenancy in Common for Heirs' Property Owners Facing Partition in Equity*, 17 TEMP. POL. & CIV. RTS. L. REV. 1, 50–52 (2007).

36. For-profit land record databases can identify landowners by age, race, sex and tax delinquency records can be an indicator of heirs property. Tax delinquencies could also be identified and from that information certain neighborhoods could be identified that have a higher percentage of heirs property parcels than others.

agricultural use.[37] Of those 90,000, nearly 2,000 have been identified as being currently held in heirs property status, or roughly 2%. That number is surely an undercount, as it would not catch any properties whose owners died out of the jurisdiction and for which a death certificate would not be readily available or those whose names do not precisely match.[38] Of those parcels in heirs property status, roughly 10% (0.2% of total land parcels) are in tax delinquency and at risk of being lost to the families. Although there is no automatic overlap between tax delinquency and vulnerable heirs property parcels—because time in heirs property status is a more likely indicator of vulnerability than tax delinquency—these records help identify neighborhoods with clusters of heirs property lands. Vacant land citations can also provide a clue.[39] But unless we know that the owner has died, we cannot know how long these properties have been in heirs property status. This is particularly evident by the fact that both Mary Artis and Arthur Paulson's property taxes were delinquent in the years prior to their deaths.

Extrapolating these numbers across Florida suggests that as many as 130,000 parcels of land could be in heirs property status at any time.[40] If the percentages held true, that could mean that as many as 2,000,000 parcels of land are in heirs property status at any time in the United States, with hundreds of thousands falling in the vulnerable category of long-term heirs property at risk of being lost to the intended owners. Although there are countless reasons why individual heirs and devisees do not pursue probate and retitling quickly, there are also numerous systemic barriers that can be removed through legal reform to make probate easier.

A. Systemic Barriers

Imagine a decedent, Grandma Lydia, who had three children and died intestate ten years ago owning a modest home. Since Lydia's death, at least one of her three children has also died, herself leaving behind

37. *See* ALACHUA CNTY. PROP. APPRAISER, *supra* note 32, at 10; *see also* Joan Flocks, Sean P. Lynch II & Andréa M. Szabo, *The Disproportionate Impact of Heirs Property in Florida's Low-Income Communities of Color*, FLA. BAR J., Sept./Oct 2018, at 57, 57 (2018).

38. Very often names do not match because an owner might marry, divorce, be widowed, or change names and not think to change the property records.

39. *See* Rosalie Swingle, *Boarding up Vacancy with Statutory Solutions: Modifying the Partition Process for Heirs Property and Investing in Estate Planning Tools*, 99 WASH. U. L. REV. 1055, 1065–66 (2021).

40. This number is determined by simply extrapolating the population of Alachua County, which is 271,588, across the entire state although this is clearly a rough extrapolation because more populous counties may contain higher populations of renters than homeowners. *See* BUREAU OF ECON. & BUS. RSCH., UNIV. OF FLA., FLA. ESTIMATES OF POPULATION 2020, 9 (2020), https://bit.ly/3iRAGPj.

three children. As the children and grandchildren delay probating Lydia's estate, they risk further complications in the process because they must probate the estates of the heirs who died after Lydia. One of the most obvious barriers to smooth retitling is that as time passes, the complexity increases because they must probate the estates of heirs or beneficiaries who died after the decedent but before the probate process was concluded. In cases involving land that has been held in heirs property status for decades, probate proceedings may need to be opened for a dozen or more people. And unfortunately, the heir who thinks he can outlive his siblings and somehow take a consolidated share is in for a shock when he realizes that, in fact, he now must share the property with *more* potential heirs, not fewer. Like a video game that spawns more obstacles as one shoots them down, heirs property inevitably multiplies in complexity over time.

For instance, if the heirs probated Lydia's real estate when she first died, there would be three heirs who would take title and could sell, lease, consolidate their interests, or make management arrangements as they choose. By waiting until one of Lydia's children died, there are now five or possibly more heirs who take shares of the house, who must be found and notified of probate proceedings, and who may be entitled to a share. If the deceased child was married and died intestate, the real property might pass partially to a spouse and partially to the children, creating the possibility that a portion of the inheritance will pass outside the family.[41] And if any one of those heirs filed a forcible partition action, which is more likely the further away the heirs are from the original landowner, the home would likely have to be sold and a portion of the proceeds might pass outside the family unless the remaining heirs can afford to buy out the heir who sought partition.[42] There will also be costs for probate and sale, both of which increase as ownership issues multiply.

41. Commentators on the heirs property problem have not focused at all on the very real possibility that shares of family property may pass outside the family via intestacy. With the spouse entitled to either 100% or 50% shares under most states' intestacy rules, a spouse of an heir who dies intestate after the landowner will take a portion of that heir's share and, if the pattern prevails, when the spouse dies intestate that share will pass outside the landowner's family. If Grandma Lydia knew that 1/6th of her home will pass to her child's surviving spouse, possibly to pass outside the family to others, I suspect she would have made more effort to plan for the home's succession. *See* Hugo A. Pearce III, *"Heirs' Property" The Problem, Pitfalls, and Possible Solutions*, 25 S.C. L. REV. 151, 152–54 (1974).

42. Although the UPHPA tries to address this fear, there are numerous critiques as to the statute's inadequacies. *See generally, e.g.*, Avanthi Cole, *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*, 11 COLUM. J. RACE & L. 343 (2021); Risha Batra, *Improving the Uniform Partition of Heirs Property Act*, 24 GEO. MASON L. REV. 743 (2017).

This greater and greater fractionation that comes with intestacy and ownership in tenancy in common is a well-documented problem.[43] In the case of allotted land to Native Americans held in trust, the Supreme Court found that after just a few generations there were parcels of land in which individuals had such minute fractional shares that they were entitled to only a few pennies in rent every decade, and the cost of administering the land interests was more than the land itself was worth.[44] Further, with more and more owners, it becomes exponentially more difficult to agree on how to manage the property. In the case of Native Indian trust land, the only solution has become leasing, which means the owners cannot benefit physically from the land and, in the case of Indian trust lands, has exacerbated the poverty of vast numbers of native peoples.[45]

This compounding of the problem is a direct result of partible inheritance and the fact that inheritances are taken as tenancies in common. In Lydia's case, if the land had descended as joint tenancy with rights of survivorship, the interest that passed to the now-deceased child would have revested in the two living children, thereby consolidating the interests and making the probate process much simpler. If all three of Lydia's children were deceased at the time her estate was finally probated, the heirs of the last surviving child would be the only ones entitled to take if inheritance were in joint tenancy rather than tenancy in common. But under tenancy in common and a *per stirpes* distribution, the grandchildren, great-grandchildren, and some unrelated spouses might all be entitled to small fractional shares. A 5% share in a $75,000 home is only worth $3,750—an inheritance hardly worth the cost of hiring a lawyer and probating the property, yet sizable enough that few people would willingly give it up.

In other cases, the heirs may have an oral agreement that one child would continue to reside in the home and title would be settled at that child's death. Perhaps the agreement was in exchange for that child taking care of the aging parent and sacrificing other opportunities to do so. But even if the parties comply with the oral agreement, any one heir can challenge it, seek partition, and force an expensive suit in equity to determine the terms and conditions of the oral agreement. If the property shares are not worth the cost of litigation, heirs may choose to forego their rights, jeopardizing the plan and disadvantaging the resident child. In the aggregate, the loss of property may be substantial even if it is relatively modest for each shareowner.

43. *See* Spivack, *supra* note 20, at 208–10.
44. *See* Hodel v. Irving, 481 U.S. 704, 713 (1987).
45. *See* Shoemaker, *No Sticks*, *supra* note 23, at 394–99.

The Uniform Law Commission established a drafting committee to look at tenancy-in-common default rules, such as how to make decisions when some co-tenants have not been located or are not cooperating, and another on how to deal with partition of tenancy-in-common property.[46] These are important steps, but they assume that the property has already been probated and that we know most, or all, of the heirs who are now struggling to manage the property. Thinking of heirs property as akin to quicksand, there are things that can be done to avoid the trap altogether, like estate planning to avoid probate; and there are ways to escape by using a rope and lying on one's back. When an estate is probated quickly, it is like stepping into the quicksand up to the ankles, realizing what it is, and getting out quickly. But standing there doing nothing or struggling as the villain usually did in old Western movies can lead to the proverbial drowning. Once out, usually with the help of co-heirs, there are numerous other legal challenges, even though that obstacle has been surmounted, at least temporarily until the next shareowner dies.

B. Go Around: Don't Drown

In the cliched Western, the villain rushes headlong into the quicksand, not seeing the dilapidated warning sign. In the case of heirs property, however, that sign does not exist at all, and many heirs are not taught to identify the traps and warning signs. The skeptic will chime in that Lydia could have avoided all these issues with a little bit of simple estate planning. The only problem is that it is not just a little bit of estate planning; it is a *lot* of estate planning. Until recently, real estate had to be probated unless it was retitled in trust prior to the landowner's death or was transferred away in joint tenancy or as a life estate and remainder. The cost of an average trust is upwards of $3,000, which includes the legal fees to execute and record a new deed to convey title to the trustee of the trust, and the cost very often substantially exceeds that amount.[47]

46. *See generally* Memorandum from Sally Brown Richardson, Rep., & Christopher K. Odinet, Assoc. Rep, Unif. L. Comm'n, to the Tenancy in Common Ownership Default Rules Drafting Comm. (Sept. 10, 2021), https://bit.ly/3QUHKXS; TENANCY IN COMMON OWNERSHIP DEFAULT RULES ACT (UNIF. L. COMM'N, Draft June 14, 2022), https://bit.ly/3HY6YC0; PARTITION OF TENANCY-IN-COMMON REAL PROP. ACT (UNIF. L. COMM'N, Draft Nov. 21–22, 2008), https://bit.ly/40tpyJi.

47. Although the average cost of a trust is touted on the internet as being between $1500 and $2500, these are for simple, form trusts. A good breakdown of all the ways trusts cost more can be seen in this estate planning guide. Trusts for special needs dependents, Medicaid trusts, and trusts involving complex property like business interests cost significantly more. In addition, real property needs to be retitled in the name of the trustee and refiled, thus requiring deed and title work that is added on top of the basic cost of the form trust. *See Derek Silva, How Much Does It Cost to Set up a Trust?*, POLICYGENIUS (Jan. 20, 2022), http://bit.ly/43fHYib. Moreover, a trust generally requires

The alternative would be for Lydia to execute a deed to convey the land to herself and a child in joint tenancy or to pass a remainder to the child, retaining a life estate for herself. Both the joint tenancy and life estate/remainder are good ways to avoid probate, but they come with the very real risk that a child (or worse, a child's creditors or soon-to-be ex-spouse) could force a partition or encumber the property prior to Lydia's death that would risk her losing her home.[48] If Lydia needed a new roof or wanted to take out a reverse mortgage on her own home, she could not do so if she gave up ownership interests during her life.

Fortunately, roughly half of states have adopted beneficiary deed statutes, like the URPTODA, which permit landowners to designate a beneficiary to take title to the land at the donor's death simply by executing an affidavit or filing a death certificate.[49] Most of these reforms have occurred in the last 20 years, meaning that many seniors may not be aware of them, and many lawyers are not always eager to recommend a mechanism to avoid probate that is simple, efficient, and cost-effective for clients. And for clients like Lydia, who cannot afford a lawyer anyway, they are unlikely to know the benefits of these statutes. But undoubtedly, beneficiary deed statutes for real estate are game changers in helping avoid the heirs property quicksand. The biggest hurdle now is making beneficiary deeds available across the country and educating people as to their benefits.

Critics of probate, like Norman Dacey, made probate out to be like a Dickensian nightmare of lawyer fees and court delays,[50] and yet it is the 30-year-old heirs property proceeding that usually proves Dacey right. Of course, all legal proceedings are more cumbersome than simply doing nothing, but probate has received a bad name over the years.[51] In most cases, probate judges are helpful and efficient, staff attorneys provide pro bono assistance, probate forms are relatively straightforward and, if the personal administrator is even remotely competent, the

a lawyer to set it up and, as noted earlier, many people in underserved communities are understandably mistrustful of lawyers. *See supra* note 33 and accompanying text.

48. *See generally, e.g.*, *In re* Antonie, 447 B.R. 610 (D. Idaho 2011).

49. *See* Wright, *Beneficiary Deeds*, *supra* note 9, at § 25.03[1]. These deeds have different names, such as revocable-transfer-on-death deeds, transfer-on-death deeds, beneficiary deeds, ladybird deeds, and enhanced life-estate deeds, although there are subtle differences between them. *See id.*

50. *See generally* NORMAN DACEY, HOW TO AVOID PROBATE (1980).

51. *See, e.g.*, *The Perils of Probate, Part One*, DYER BREGMAN FERRIS WONG & CARTER, PLLC, https://bit.ly/3QTovy2 (last visited Jan. 21, 2023); Barry E. Haimo, *3 Dangers of Probate You Should Know*, HAIMO L. (Sept. 6, 2021), https://bit.ly/3XNcU5W; *What Are the Pitfalls of Probate?*, FLA. FIN. ADVISORS, https://bit.ly/3Xtj0ID (last visited Jan. 21, 2023); Blake Harris, *The Perils of Probate and the Benefits of a Revocable Trust*, BLAKE HARRIS L., https://bit.ly/3GZnijV (last visited Jan. 21, 2023).

process can be quick and painless. The problem is that probate has a bad reputation; lawyers are often seen as too expensive or litigious, and many heirs might not want to include their siblings in probate proceedings. So, the barriers seem insurmountable and the costs of doing nothing seem small. And it does not help that estate planners spend a lot of time focusing on probate-avoidance tools rather than helping people realize the many other barriers to effective wealth transfer. For instance, many advocates urge people to write a will to avoid the heirs property problem, which avoids neither probate nor fractionation if the will simply gives all a decedent's property equally to her children. Clients think they are solving problems by treating their children equally and passing property to them in undivided equal shares. But for anyone who has inherited property in tenancy in common, it can often be a real challenge to unravel the property and clear up inheritances. On the other hand, if Lydia left her home to one child, her bank accounts to another, and her personal property to a third, she might not be treating them exactly equally, but each could move forward without being beholden to the others. Today, wills are hardly better than intestacy unless they limit the number of takers for the land, for they do not avoid probate and often fail to cure fractionation.[52]

Finally, in cases where the heirs do not get along or are not close, oral agreements or informal arrangements are less likely to function, forcing the heir in possession to make a difficult choice. Failing to probate the land means not stirring the pot, so to speak. Where probate notices may risk a partition action, the child who continues to reside in mom's house, pays the taxes and handles the upkeep, and will not receive any recompense for financial outlays when partition finally occurs, may feel very reluctant to act. Because the child who is footing the bills is not the personal representative at the time of payment, these are not expenses of the estate and are instead treated as uncompensated personal expenditures. Keeping the status of mom's house hush-hush is often easier than locating her heirs, notifying them, and incentivizing them to challenge the estate, try to remove the heir in possession, or force a sale.

C. Between a Rock and a Hard Place: The URPTODA and the UPHPA

To date, the only real efforts to solve the heirs property dilemma have been to encourage states to adopt the URPTODA to avoid land

52. In a study of nearly 300 wills in Alachua County, Florida, the majority of testators left their property equally to "all their children." *See* Danaya Wright & Beth Sterner, *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family*, 42 ACTEC L.J. 341, 363 (2017).

falling into heirs property status, and the UPHPA to help prevent forced partition sales once it has been retitled in the names of the heirs. But no real efforts have been made to address the very significant barriers that heirs face in the probate process itself. Admittedly, probate scholars insist that probate itself is fairly inexpensive, efficient, and not the real barrier. The real barriers, they suggest, are the misconceptions people hold about probate and the personal and economic reasons individual heirs might have for not opening a probate proceeding. For them, it is not the law so much as the personal situation of those deciding not to use the law at all.[53] But it is more than just the probate process itself that sets up barriers: it is a perfect storm of procedural difficulties and substantive rules that disincentivize title-clearing.

Furthermore, if heirs will not use the law, then perhaps the law should meet heirs where they are—a state of distrust about what will happen and ignorance about the risks they are running by failing to act. Heirs in possession are also quite likely correct about the risks of informing the out-of-possession heirs of their property rights, and often their economic calculations are quite rational since the heir in possession is disadvantaged and costly litigation may be required to find an equitable remedy that reflects the intentions of the deceased landowner.[54]

53. *See generally, e.g.*, Catherine S. Curtis, *128A Notice Requirements: Adding to the Burden or Preventing Fraud for the Texas Probate System?*, 16 TEX. WESLEYAN L. REV. 437 (2010); Ann Bradford Stevens, *Uniform Probate Code Procedures: Time for Wyoming to Reconsider*, 2 WYO L. REV. 293 (2002) (arguing that Wyoming should follow Colorado in adopting procedures to simplify probate); Johan D. Zimiles, *Probate is Not a Dirty Word in New Jersey*, N.J. LAW., July/Aug. 1992; Clifton B. Kruse, Jr., *Twenty-Six Reasons for Caution in Using Revocable Trusts*, 21 COLO. LAW. 1131 (1992) (cautioning that the need for expensive revocable trusts is not necessary when probate is inexpensive and efficient).

54. To understand how the probate laws should be reformed, however, we need to understand the unique circumstances that drive them to do nothing, rather than something, and one of the most significant is economic. Consider the case of Mary Artis again. She has five children who have inherited her modest $75,000 home but it remains titled in the name of "Mary Artis Heirs." To probate her home, one of her heirs will need to file a petition with a filing fee of $400 and will need a lawyer to file the probate petition which must include numerous documents and pieces of information. If Mary's other probate property is worth less than $75,000, she can take advantage of a lower filing fee of $200 for summary administration, but she still must have a lawyer. Assuming the lawyer was willing to file the petition and the relevant documents for $1,000, we are looking at a small but still significant amount of money that must be provided up front. Assuming this same heir has also been paying the taxes on the property since Mary's death, which was $10,613 just through 2020, this one heir has already invested roughly $12,000 toward protecting this property and doing the work to get it retitled. But when the probate order comes down, this heir will receive no offset for these expenses and will take the same $15,000-share that each of the other heirs takes. If the heir delays for another five years but continues to pay the taxes, that person will have paid another $10,000 toward the property that he or she is unable to recoup unless the other heirs voluntarily choose to forego a portion of their interest in the house. After a certain amount of time, the expenditures outweigh the inheritance, and it's unlikely that

Right now, the URPTODA can help stem the flow of parcels into heirs property status in those states that have beneficiary deed statutes. Yet nearly half of the states do not have an efficient and simple way of keeping these properties out of probate, so the flow continues unabated. Of course, the UPHPA helps prevent loss for those few heirs who inherit valuable farmland that is attractive to land developers and speculators. But the UPHPA does little or nothing for those who own modest homes and for whom one heir is footing the bills while the others are unable or unwilling to help but would gladly take a small cash inheritance if it were readily available. For these people, it is not the land developer who seeks to buy up fractionated shares at below-market values that poses the real problem; it is the grandchild or niece who wants her 5% share of grandma's house and will seek a forced sale if the other heirs cannot buy her out.

Admittedly, doing the probate work to get the house retitled in the name of the heirs does not necessarily solve the problem that the heir in possession may face in the demands and expectations of siblings and other family members who want cash without the expenses or management headaches. Thus, if states provided a comprehensive statutory scheme to address as many of these issues as possible, with remedies up front to stem the flow of heirs properties, they may reduce the likelihood that these properties will be lost at tax sale, foreclosures, or forced below-market-value partition sales. Perhaps then people will trust the probate process and do the necessary legal work to retitle the land at the death of each generation the next time around.

III. PROBLEMS PLAGUING HEIRS AND POSSIBLE SOLUTIONS

Heirs have identified numerous barriers that have prevented probate of an ancestor's estate and the necessary title-clearing to insure, protect, and preserve real property wealth. Removing some of these barriers will require increased access to legal assistance for low-income homeowners and, as such, will simply cost money. Other barriers, like a distrust of lawyers or governments or courts, will take work to change people's minds. But some of these barriers may be addressed through legislative reform. Thus, this Article focuses on possible statutory reforms to break through those barriers, leaving the more personal, social, and cultural barriers for another time. In each of these areas, this Article provides evidence of how the barriers operate and possible legislative reforms to address them. Notably, the legal rules discussed below are obstacles for

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the other four heirs are going to chip in their pro rata share in taxes and lawyer fees if the one sibling is benefitting from the home by living there rent-free. The rational economic calculation is simple: once a sufficient amount of time has elapsed, the cost of acting is higher than the benefit and so people will walk away from the home.

heirs seeking to settle title to ancestral property but have been ameliorated in other contexts for other, often wealthy petitioners. By drawing on the ways in which the rules have been softened for others, we can balance the laws and provide relatively straightforward improvements for heirs without fundamentally changing the rules of real property.

For purposes of the following discussion, assume that grandma has died intestate leaving four children, three of whom are living and one of whom is deceased. Of the living children, one, her daughter Sally, is living in grandma's home and maintaining it under either an oral agreement with grandma or with her siblings. The deceased sibling, Roger, has three children and a living spouse, and also died intestate. Upon grandma's death, her home, which is her only asset requiring probate, passed directly to her heirs *per stirpes*, so Sally and her two living siblings each own one-quarter shares, Roger's spouse owns a one-eighth share, and his three children own one-twenty-fourth shares.[55] Grandma died five years ago, and Sally has been paying all expenses for the home since her siblings and nieces and nephews all live out of state. In fact, one of Sally's siblings, Carol, has been out of touch with her family since 1980 and no one knows where she is living. Although Sally would like to probate her mother's estate so she can correct the title to the house, obtain insurance, and get a mortgage to fix the roof, she has not done so for multiple reasons.

A. Oral Agreements – "We all knew Sally was to get Mom's house"

For many heirs who live in the ancestral home, pay taxes, and maintain it, they often expect that they should own it. Anecdotal evidence suggests that often there is an oral understanding when a parent dies that a specific child will "get the house." I have heard people explain that "mom said I would get the home at her death, so when she died, I moved in," or "we decided that since Sally was taking care of mom, she should live there until she passed." Many heirs are perplexed that the property records could not simply be changed to reflect the terms of the oral understanding. Others I spoke with were more ambivalent about their right to the home, acknowledging that they shared title with their siblings, but felt that their time and financial investment in the home justified their superior rights.

55. This hypothetical assumes that Roger's children are not the issue of his surviving spouse, so that his spouse takes half of his share and his three children split the remaining half. Under the Uniform Probate Code this would be the likely distribution assuming Roger's estate was large enough to cover his surviving spouse's elective share and other entitlements. *See* UNIF. PROB. CODE § 2-102 (UNIF. L. COMM'N 1969).

Two conclusions jump out from these stories. First, many people have oral understandings about property rights and do not know how to modify the official records to reflect the oral understanding, if that is even possible. Second, many others understand the property rights distribution, but disagree with how they apply it in their individual circumstances. If we tackle this situation from each perspective, we can perhaps craft a better solution for everyone involved. For instance, consider the oral agreement problem. We all realize that the statute of frauds is a barrier to validating oral agreements about real property rights.[56] But how many cases exist in which oral agreements are given effect because of equitable principles, because constructive trusts and other equitable remedies are excluded from the statute of frauds, or because failure to recognize the oral agreement would lead to injustice?[57] If we can reach the proper remedy through litigation, the question then should be whether we can reach the same equitable remedy without litigation. Why adhere to strict, formal rules only in those cases where the parties are not equipped to litigate, while we allow deviation from the formal rules when people show a good excuse and can afford to push that excuse in court? This is just the first of many instances in which the wealthy may obtain legal outcomes that more accurately reflect their expectations because they can afford the legal proceedings to deviate from the default norms.

Generally, the elements required for a constructive trust are (1) clear and convincing evidence of an oral agreement; (2) the agreement was supported by adequate consideration; (3) the claimant performed her part of the agreement; (4) the decedent did not perform her part of the agreement; (5) there is no other adequate remedy at law; and (6) the

56. All states have a statute of frauds, based on the 1677 Statute of Frauds of England, requiring that certain types of wills, contracts, leases, surrenders, and grants of real property be in writing. Statute of Frauds (1677), 29 & 30 Car. 2 c. 2 (Eng.); *See* U.C.C. § 2-201 (AM. L. INST. & UNIF. L. COMM'N 1977). Most states have exceptions for interests in real property of less than one year's duration, that may be enforceable even if not in writing. *See* U.C.C. § 2-201. Most of the requirements of the original statute of frauds were repealed in England and have been repealed, modified, or ameliorated in the U.S. *See* Leo M. Drachsler, *The British Statute of Frauds – British Reform and American Experience*, SEC. INT'L & COMPAR. L. BULL., Dec. 1958, at 24.

57. For instance, most states have adopted the remedy of a constructive trust to realign property rights that have become inequitably titled in the wrong way. Constructive trusts are either expressly exempted from state statutes of fraud, or have become exempt by common law. *See, e.g.*, Little v. Fambrini, No. C064330, 2012 WL 2989814, at *3 (Cal. Ct. App. July 23, 2012) (oral agreement to make a will in exchange for being adopted upheld and constructive trust imposed on estate property); Edwards v. Edwards, 482 S.E.2d 701, 702–03 (1997) (finding that evidence of an oral agreement to transfer land to a grandson was sufficient to defeat a summary judgment motion); Potts v. Emerick, 445 A.2d 695, 696 (1982) (imposing constructive trust on funds in joint bank account when co-owner promised to use funds to benefit will beneficiaries based on oral agreement).

accidental beneficiaries would be unjustly enriched if the oral agreement were not enforced.[58] In the situation where a child gives up other opportunities to live at home with an aged parent in exchange for getting the house after the parent's death, the elements of a constructive trust would be met. Although the typical situation involving heirs property is not the same as the promise to make a will that is often the issue in constructive trust cases, the equities are the same. The oral agreement may be between the parent and the child, or between the children themselves, that the child in possession of the house is deserving of it for taking care of a parent. And failure by the siblings to probate title or assert property rights during the child's life reasonably can be seen as evidence of the agreement. We are far from the eighteenth-century expectation that the spinster daughter will forego marriage opportunities to care for aged parents;[59] today, the child who invests the time and effort to care for an aging parent is entitled to compensation, whether through a larger share of an inheritance, the right to live in or take title to the family home, or some other arrangement.[60] The point is not that the parties must agree that Sally would get the home in exchange for taking care of mom; the point is that oral agreements often exist in families—even wealthy families used to hiring lawyers—and equity may provide a remedy to enforce those oral agreements. Thus, if there is evidence of an oral agreement, the issue in the heirs property context should be whether and how to enforce the terms of the agreement without requiring complex or expensive litigation.

Addressing this problem could be as simple as switching the burden of proof from the person claiming the oral agreement having to prove the terms of that understanding to the person objecting to it having to show there was no oral understanding. It would make sense, if the burden were shifted to the opponent to show there was no oral agreement, to require evidence to counter the oral understanding offered by the person in possession. Thus, if the agreement was that Sally would get mom's house at mom's death because she cared for mom or lives nearby or was the neediest, the other siblings would need some evidence to rebut that claim since the daughter's living in the house unmolested by her siblings for a sufficient period of time (in this example, six years) would be strong evidence favoring her claim. In other words, if there was no oral

58. *See Little*, 2012 WL 2989814, at *3.

59. *See generally* Linda A. Pollock, *Women Alone: Spinsters in England 1660-1850 (Review)*, 33 J. OF INTERDISC. HIST. 616 (2003) (book review), https://bit.ly/3k7ctot; *see also* Barry J. Jacobs, *When Genders Collide While Caregiving*, AARP, https://bit.ly/3WYiguN (last visited Jan. 10, 2023).

60. *See generally* Dana Shilling, *Recent Developments for Family Caregivers*, ELDER L. ADVISORY, June 2018; *see also* Richard L. Kaplan, *Family Caregiving and the Intergenerational Transmission of Poverty*, 46 J.L. MED. & ETHICS 629 (2018).

agreement, then those heirs out of possession should have done something to challenge the apparent implication that Sally is entitled to the house. Their failure to act after a reasonable time can be evidence that they understood the oral agreement and adhered to it.

Certainly, some heirs out of possession may argue that they had no knowledge of an oral agreement and did not even know they were entitled to a share of mom's house, or that the oral agreement was that Sally could live there but would not necessarily be entitled to ownership. This could be the case with Carol, the long-lost daughter. But given that most states cut off creditor claims after a certain time for failure to assert their claims against an estate,[61] is there any reason why heirs should be given an unlimited amount of time to claim their partial interest in an inheritance if they also were legally entitled to open probate themselves and protect their own interests? The law commonly cuts off the rights of those who sleep on them or fail to protect them after a sufficient period.[62] If the heirs out of possession fail to protect their interests, and the actions of the parties support the existence of an oral agreement, then the burden should be on those who slept on their rights to assert them in a timely manner and disprove the existence of an oral agreement.

Others argue that the existence of an oral agreement that Sally can, perhaps, live in the house until she dies should not result in the other siblings losing their property rights when they conform to the agreement. In other words, the law should not strip the rights of the heirs out of possession who conform to the terms of an oral agreement by giving the heir in possession title in all cases by creating a presumption of an oral agreement. In fact, we would not want the heir in possession to benefit unfairly after orally agreeing that she could only live in the house but would not own it just because the rest of the family may look like they are sleeping on their rights, but are actually adhering to the agreement.

There are two considerations in deciding whether it makes sense to allow the property rights to continue in limbo while the parties voluntarily adhere to some oral agreement, or to set a time by which the rights will be settled in the heir in possession regardless of the oral agreement if the parties have not taken steps to memorialize their understanding. The first consideration is the various parties, every single one of whom has the legal right to insist that the property rights be settled and memorialized in writing. The second is the public, the neighborhood, and third parties who rely on property records to determine who has title to land. It would seem reasonable that after a

61. One of the most important aspects of probate is its ability to terminate any future creditor claims. *See, e.g.*, FLA. STAT. § 733.710 (2022) (stating that in Florida, no creditor may assert a claim against an estate after two years).

62. *See* discussion *infra* Section III.C.

period, perhaps the same period used in the state for adverse possession,[63] property rights could be settled in the heir in possession to facilitate the orderly maintenance of property records and settling of property rights. Since every heir can protect his or her legal rights in the property, failure to do so after a certain time could result in cutting off those rights in the name of public policy. Ten or twenty years of inactivity could be asserted as the outermost length of time during which property records can remain in limbo while the parties conform to an oral agreement that does not entitle the heir in possession to ownership. Of course, if the parties title the land in the name of the living heirs and then choose, orally or in writing, that one person will live there, then the non-possessory heirs lose nothing. This rule would only apply when the land title records have not been cleared, the property remains titled in the name of the decedent, and possession is based on an unwritten, unenforceable agreement.

Of course, we can argue at great length about what constitutes evidence sufficient to defeat a claim of an oral agreement, but courts heavily rely on an objective assessment of the parties' actions to determine if an oral agreement was reasonable.[64] If there was no oral agreement that Sally would take title to grandma's house upon grandma's death, then what were the rest of the heirs doing sitting on their rights? As so many states have shortened their period for adverse possession to clear title and protect the interests of those paying the taxes and maintaining the property, extending the oral agreement doctrine to deal with the endemic and intractable heirs property problem would be potentially transformative in helping to preserve family wealth. Admittedly, such a change will preserve the wealth in one or a few persons, at cost to other family members, but it will not upset settled expectations or jeopardize the property with partition and foreclosure actions that currently cause so much wealth loss among under-represented groups.

B. Adverse Possession – "I have lived there forever, why don't I own it?"

Critics assert that, unlike the interests of creditors whose rights are cut off quite quickly, heirs have a vested property right to justify treating their interests with more deference, even if they have not asserted their rights, probated the property, or retitled the land in their own name. But adverse possession and marketable title acts are regularly used to

63. *See* discussion *infra* Section III.B.

64. *See generally, e.g.*, Liger6, LLC v. Antonio, Civil Action No. 13-4694, 2019 WL 643576 (D.N.J. Feb. 14, 2019).

terminate ownership interests in property that are not preserved by the owner after sufficient time has elapsed.[65] Statutes of limitations on claims by heirs to either assert title to real property or rebut claims of an oral understanding could give those heirs in possession closure after a reasonable time, especially if they have been unable to locate the heirs or some heirs refuse to participate in probate or maintain the property.[66] After all, regardless of whether there was an oral agreement, the out-of-possession heirs have done nothing to assert their rights, which leaves the heir in possession vulnerable and the property records in error.

The law of adverse possession has existed for centuries and cuts off the claims of owners who sleep on their rights or removes stale interests of those in possession of land.[67] Typically, adverse possession simply settles the expectations of those using land by aligning the legal interests with the actual use. A squatter who settles on land and improves it can gain title after a sufficient period, historically 21 years. Adverse possession may also cut off future interest holders from reclaiming possession upon breach of a condition subsequent when the condition occurred in the past and the future interest holder took no efforts to reclaim the property.[68] Finally, adverse possession is often used to settle boundary disputes or remove clouds on title after the statutory period has run.[69]

The public policy benefits to adverse possession are significant as they recognize and reward the person in possession of land, whose dispossession will be detrimental to his interests, and cut off stale reversions and even fee title held by people who have slept on their rights. As Lee Anne Fennell has explained:

> Although variously stated, there seem to be three main clusters of justifications: (1) those that focus on protecting the expectations or investments of the possessor; (2) those that focus on procedural values such as neatening up titles, reducing litigation, and generally increasing the security of land holdings; and (3) those that focus on prodding the sleeping owner or rewarding the productive possessor.[70]

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65. *See* discussion *infra* Section III.C.

66. Oregon provides just such a statute. *See, e.g.*, OR. REV. STAT. § 105.615 (2022) (stating Oregon cuts off the claims of co-heirs out of possession after 20 years so long as the heir in possession paid the taxes).

67. *See* Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2434–35 (2001).

68. *See* Chasteen v. Chasteen, 213 So.2d 509, 510 (Fla. Dist. Ct. App. 1968) (involving minors whose future interests did not ripen until the death of their mother who held the life estate under Florida homestead law).

69. *See* Weiss v. Alford, 267 S.W.3d 822, 827 (Mo. Ct. App. 2008).

70. Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 NW. U. L. REV. 1037, 1059 (2006).

In recent years, many states shortened their statutory period for adverse possession to ten, seven, or even five years to recognize the important public policy benefits that adverse possession plays in settling land titles and property rights.[71] Adverse possession is simply a statute of limitations that provides a lengthy period for property owners to assert their rights, often much lengthier than the period for typical civil claims that are cut off within a year or two.[72] Recognizing the importance of settling property rights and removing clouds on title, states have adopted other statutes, like stale uses and reversions acts, and marketable title acts, discussed below.[73] But even in states that retain the 21-year statute of limitations for adverse possession, the doctrine is usually applied in ways that promote equitable expectations and reasonable claims. Professor Richard Helmholz studied adverse possession decisions and found that the vast majority of courts use equitable considerations when applying the doctrine, and that courts objectively balance the interests of those in possession and those who have slept on their rights.[74]

Shortening the statutes of limitations for adverse possession promotes marketability of title and recognizes that people in possession of land, who have been paying taxes and maintaining property, have equitable interests in settling title.[75] However, few states have modified their statutes to permit heirs in possession to adversely possess against co-tenants. Consider this: a squatter can move into grandma's house upon her death and after five or seven years claim title by adverse possession against all the heirs who did nothing to protect their interests or who may not have even known they had an interest. But an heir in possession who is doing all the maintenance and paying taxes generally cannot claim title by adverse possession against the very same group of heirs ever, even after 50 years. What justifies the difference?

The difference relies on the common law principle of unity of possession, an archaic doctrine that in this situation means that an heir's possession is not adverse to co-heirs without some explicit act of ouster because the heir is legally entitled to possession.[76] A complete stranger

71. Emily Doscow, *State-by-State Rules on Adverse Possession*, NOLO, https://bit.ly/3GTOHoH (last visited Feb. 4, 2023).

72. *See* Beach v. Lima Twp., 770 N.W.2d 386, 392 (Mich. Ct. App. 2009).

73. *See* Fla. Dept. of Transp. v. Clipper Bay Invs., LLC, 160 So. 3d 858, 863 (Fla. 2015).

74. *See generally* Richard Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331 (1983).

75. *See* GEORGE W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF PROPERTY 656, 657 n.3 (John S. Grimes, ed., 1979) (providing historical background on statutory periods and state-by-state survey of current law); Stephen Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 462 n.146 (1982).

76. *See* W. W. Allen, Annotation, Adverse *Possession Between Co-Tenants*, 82 A.L.R.2d 5 § 14 (1962).

may adversely possess simply by entering into possession. But does it make sense for the fiction of unity of possession to result in such divergent outcomes when the unities have been dispensed with in so many other contexts?[77] Adverse possession is based on two primary principles: protecting the expectations and investments of those who possess and maintain property, and clearing archaic clouds on title that upset the expectations of the living.[78] Both principles are served by granting the heir in possession clear title after a certain time, during which the heirs out of possession failed to protect their own interests. This would clear title after a sufficient period so the property can be managed, insured, sold, and otherwise protected from loss while protecting the parties' expectations, whether reflected in an oral agreement or simply from ignorance of one's rights. Furthermore, allowing adverse possession to operate against co-heirs would be an incredibly simple legislative fix that would further the expectations of most of the parties and not result in undue hardship that could not have been otherwise avoided.

Oregon has adopted precisely such a provision. O.R.S. section 105.615 provides:

> Unless otherwise agreed or provided in a granting document, a tenant in common of real property may acquire fee simple title to the real property by adverse possession as against all other cotenants if the tenant in common or the tenant in common's predecessor in interest has been in possession of the real property, exclusive of all other cotenants, for an uninterrupted period of 20 years or more and has paid all taxes assessed against such property while in possession. Notice of the exclusive possession need not be given to the other cotenants by the cotenant in possession.

Although the statutory period of 20 years is longer for adverse possession against co-tenants in Oregon than for adverse possession against strangers, which is only ten years,[79] the Oregon law recognizes the value in eventually quieting title in the heir in possession. The statute also codifies what has come to be a general rule in other jurisdictions,

77. For instance, most states have relaxed the requirement that the grantor may not transfer property to herself and others as joint tenants, thus ameliorating the unity of time requirement. Other states have ameliorated the unity of interest requirement when joint tenants mortgage or lease their interests, thus reducing their property sticks vis-à-vis their co-tenants. Other states recognize that when co-equal rights to possession are impossible, a practical ouster will have occurred. *See, e.g.*, Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships*, 85 MARQ. L. REV. 423, 425–26 (2001).

78. Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1126–31 (1984).

79. *See* OR. REV. STAT. § 105.620 (2022).

that adverse possession against a co-tenant requires twice the amount of time to imply an ouster.[80] Thus, since mere possession is usually not considered an ouster, courts sometimes view possession for the initial period as an implied ouster that then takes another statutory period to run. Although this rule may be consistent with the general idea that mere possession would not run against co-tenants unless some clear evidence of ouster occurs, the double time period poses a hardship on the tenant in possession who is paying all the bills and maintaining the property without assistance from co-tenants.

Georgia has codified its rule on adverse possession by co-tenants to clarify the need for explicit ouster, requiring actual ouster, exclusive possession after demand, or express notice of adverse possession, in addition to the usual elements of adverse possession. [81] Although there is wide-standing acceptance of the rule that adverse possession against co-tenants requires actual ouster or a longer period before the statute of limitations runs, perhaps that higher standard should be reconsidered. From the perspective of the four unities, it is understandable that possession by a co-tenant should not be considered adverse against other co-tenants, since all are entitled to possession. However, it seems unfair that a stranger can divest all the heirs who are sleeping on their rights after a relatively short period of time, while an heir in possession who is paying the bills and maintaining the property cannot ever adversely possess against co-heirs who are arguably sleeping on their rights. If the point of adverse possession is to divest people who are sleeping on their rights, then the co-tenants' relationship should not matter. Instead, if we are going to assume that co-tenants are always in agreement and there is consent for one heir to do all the work and pay all the bills, then there should be some attempt to determine if that reflects the accuracy of most heirs property situations. If it does not, then it would make sense to amend the law to allow the same rule to apply regardless of the relationship between the adverse possessor and those who are sleeping on their rights.

If the law of adverse possession were reformed to permit an heir in possession to claim title against co-heirs out of possession after a sufficient period, the fairness problem might be solved, but it would make little sense for the law to provide a remedy for failing to timely probate an estate that entails litigation. This gets to the real gist of the issue—heirs often do not probate their rights because they distrust lawyers, government, and the courts, they lack the financial wherewithal, or they simply do not know they should probate. Providing a remedy that

80. *See* Myers v. Bartholomew, 697 N.E.2d 160, 160 (N.Y. 1998).
81. GA. CODE ANN. § 44-6-123 (2022).

requires litigation will not solve the underlying problem for these heirs. Rather, some form of simplified process is necessary, a process that treats the heir in possession as the true owner, clears title for that heir, and resolves claims outside of court with the option that those whose rights are extinguished may always challenge that process. Marketable title acts do precisely that.

C. Marketable Title and Stale Uses and Reversions Acts – How to Take Responsibility for One's Own Interests.

Adverse possession is not the only doctrine that cuts off property rights for those who have slept on their rights. Many states have adopted marketable title acts and stale uses and reversions acts to terminate unlimited future interests that threaten to dispossess an owner in possession based upon a breach of a condition subsequent.[82] Even vested rights can be cut off, such as reversions and vested remainders. A typical example is the Uniform Marketable Title Act, which provides that any remainders, reversions, or executory interests that cloud marketable title are extinguished after 30 years if they are not periodically re-recorded.[83] Similarly, stale uses and reversions acts simply terminate certain future interests in real estate after a certain period of time; in Florida, that is 21 years.[84] On the other hand, New York permits termination of such uses and reversions upon application to a court.[85] Importantly, these laws promote marketability of title over the interests of future interest holders to protect the interests of those in possession and serve the public policy goal of removing clouds on title and making land more marketable.[86]

The same considerations certainly play out in the context of heirs property, although the analogy is not exact. An important lesson, however, is that rather than require an owner of land that is subject to a long-standing executory interest or reversionary right to sue to terminate those future interests, the law cuts them off automatically, but gives those future interest holders the right to protect themselves by recording their interests in a timely manner or challenging the extinction of these

82. *See generally* Jay M Zitter, *Construction and Effect of "Marketable Record Title" Statutes*, 31 A.L.R.4th 11 (1984); *Retroactive Termination of Burdens on Land Use*, 65 COLUM. L. REV. 1272 (1965); Charles Szypszak, *Real Estate Records, the Captive Public, and Opportunities for the Public Good*, 43 GONZ. L. REV. 5, 31–32 (2007–08).

83. *See* UNIF. MARKETABLE TITLE ACT § 3 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1990)

84. *See* FLA. STAT. § 689.18 (2022).

85. *See* N.Y. REAL PROP. ACTS. LAW §§ 1954, 1955 (Consol. 2022); *see also* DANAYA WRIGHT, THE LAW OF ESTATES AND FUTURE INTERESTS: CASES, EXERCISES, AND EXPLANATIONS 137–49 (2015).

86. *See* Szypszak, *supra* note 82, at 17.

rights within a certain period of time. Thus, law reform that treats the heir in possession as the title holder of the land, retitles it in the public records in that person's name upon signing an affidavit that the person has been in uninterrupted possession for, say, six years, has paid all taxes and maintenance without participation of co-heirs, and then gives co-heirs a one- or two-year period to challenge the title, would provide closure for heirs in possession and not deprive heirs out of possession since they can protect their interests.[87] Failure to protect the interests of co-heirs is no different than what statutes of limitations do all the time and what the doctrine of adverse possession does—it puts the onus on the persons out of possession to protect their interests, thus furthering several key principles of property law.[88]

More importantly, a marketable-title-act remedy in the heirs property context would allow the heir in possession to retitle the land, insure it, pay taxes on it, and maintain it, so the heir is safe in the knowledge that her investment will not be lost. If heirs out of possession record their interests, then the title records will identify the people who have claims to the land and that will make it more marketable, allowing the relevant heirs to use the land to build wealth. The heirs can pledge it as equity to help put their children through college or insure it. And the rights of heirs that do not act to protect their interests are extinguished just as so many other property rights are terminated when the owners do not act.

D. Tax Sales and Foreclosures – "I've paid the taxes; why don't I own it?"

Unfortunately, many people do not understand property taxes and their relationship to title. If heirs pay the taxes, they feel they should own the property. And in those states that have added payment of taxes as a requirement to their adverse possession statutes, the link makes sense. Although payment of taxes on land one is adversely possessing does not promote the legislative goals, for reasons that are too complex to go into in this Article,[89] the connection between property taxes and property rights is not altogether unreasonable.

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87. Marketable title acts were upheld by the Supreme Court as not a taking of property rights in *Texaco, Inc. v. Short*, because of the ability of the property owner to protect him or herself. *See* Texaco, Inc. v. Short, 454 U.S. 516, 532–33 (1982).

88. Numerous real property principles strive to protect settled expectations, like adverse possession, laches, waiver, abandonment, and the like. *See* State v. Hess, 684 N.W.2d 414, 422 n.7 (Minn. 2004); *see also* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

89. Generally speaking, there are two situations in which adverse possession is commonly used: the first is the squatter who moves onto abandoned land and improves it and the second is the boundary error, where the property records show a slightly different

In most states, property taxes are imposed on parcels of land based on their assessed value, with exemptions and discounts for certain protected classes of owners, like homeowners, surviving spouses, veterans, and first responders.[90] If the taxes are not paid after a certain time, tax certificates are issued, land speculators may purchase the tax certificates and, if the certificate is not redeemed by the time the owner pays the back taxes, the speculator may force a tax sale of the real property. Paying taxes in a timely manner is obviously crucial to preserving property rights. Yet when a homeowner dies, and the home enters heirs property status, the tax period is not tolled and the statutory period before a tax sale is very often shorter than the actual period needed to close probate.[91] Many heirs in possession, however, do pay the taxes and therefore often feel that they are protecting the property from being lost at tax sale while the rest of their co-heirs do nothing. After a few years, they justifiably believe that they should be entitled to clear title because they have paid taxes sometimes more than their shares are worth.

Although it would take many years of paying property taxes to buy the entire value of a home, in states with relatively high tax rates, like New Jersey, Illinois, New Hampshire, and Connecticut, which all have rates higher than 2%, an heir may have paid 20% of the value of the home in ten years and yet would be entitled only to whatever percentage share she takes as a co-heir. For instance, if grandma died in New Jersey,

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boundary, but neighbors act as though the fence or the understood boundary is legally accurate. In the case of the boundary dispute, the parties are already paying the appropriate property taxes because those are assessed based on market value of the actual use, as examined by the property assessor, and not by the legal description. Thus, adding a payment of tax requirement in the boundary situation is meaningless since the property taxes are already being paid by the adverse possessor. In the case of the squatter, payment of taxes would put the true owner on further notice and thus defeat the claim of the adverse possessor. So, in one case, the payment of taxes requirement may frustrate the goal of adverse possession, and in the other case it is irrelevant. *See* Averil Q. Mix, Comment, *Payment of Taxes as a Condition of Title by Adverse Possession: A Nineteenth Century Anachronism*, 9 SANTA CLARA L. REV. 244, 250–54 (1969).

90. For a discussion of how tax foreclosures affect affordable housing, see Kegan Sheehan, *Protecting Homeowners and Preserving Affordable Housing: How New York City's Third Party Transfer Program Can Be Reformed to Better Serve Both Ends*, 52 SETON HALL L. REV. 1633 (2022); *see also* Caroline Enright, Note, *Someone to Lien On: Privatization of Delinquent Property Tax Liens and Tax Sale Surplus in Massachusetts*, 61 B.C. L. REV. 667, 669–72 (2020).

91. Robert Esperti & Renno Peterson, *Proper Drafting and Planning for the Use of Revocable Trusts*, 21 COLO. LWYR. 2565, 2566 (1992) (stating that there is not a lot of data on how long it takes to probate an estate but that it is almost impossible to do it in less than a year). Given the increased number of deaths as a result of the Covid pandemic, it seems that a year to probate would be almost a miracle. *See* Liz Weston, *How the COVID-19 Pandemic is Delaying Inheritances*, L.A. TIMES (June 16, 2020, 1:47 PM), bit.ly/3WbstmM.

which has a 2.5% tax rate, and there are five children who each take one-fifth shares of the home valued at $200,000, the heir in possession who pays all of the taxes for ten years will have paid $50,000 in taxes, or the equivalent of one-fourth of the home's value. But if the parties then probate the house, that heir would receive only her one-fifth share. Oddly, if the property were sold, the heir who paid the taxes would receive a credit for money spent on taxes and maintenance of the property.[92] But simply retitling the property in the names of the heirs will not give the heir any larger share to reflect credit for payment of taxes or maintenance. This failure to credit the person paying the bills is often given as a reason why an heir in possession does not want to probate a home where they might receive a share in the house that is worth less than the amount already paid in taxes. Of course, not probating the property leaves that heir in possession on an even more treacherous financial footing, but it explains some of the hesitation heirs experience.

But why could a probate court not grant the heir in possession a larger share based on payment of taxes and/or maintenance? There is no logical reason why it could not do so if the probate laws were amended to recognize this phenomenon. Of course, many people would argue that doing so might turn into an administrative nightmare, and perhaps one would need to offset rental value inuring to the person in possession, which might make the whole thing not worth the bother. But property taxes are a known quantity, unlike rental value and critical maintenance, so perhaps just a percentage of the property taxes could be credited in division of shares.

Consider that in a typical situation, where a child cares for an aging parent and gradually pays some of the expenses, including property taxes, while the parent is still alive, the child would be entitled to reimbursement from the parent's estate for those taxes and expenses,[93] but would not be entitled to any credit for payment of taxes after the parent's death unless the house were sold. Although not all states have the same rules regarding payment of property taxes, the ubiquitous misunderstanding about how taxes are related to title of land calls for an intervention.

One clear way to address the situation is giving the person who paid taxes a credit through a larger share of the property rather than as a credit only upon sale. Furthermore, if payment of taxes is a requisite element for adverse possession,[94] as it is in many states, then payment of taxes should become evidence of an adverse claim against co-heirs. And if the

92. *See* Adams v. Adams, 156 S.W.2d 610, 618 (1941); Gordon v. McLemore, 186 So. 470, 474 (1939).

93. *See* P.R. LAWS ANN. tit. 31, § 2823 (2023).

94. *See* Luce v. Marble, 127 P.3d 167, 175 (Idaho 2005).

co-heirs successfully defeat the adverse possession claim, at the very least the heir in possession should be entitled to a credit for payment of those taxes that they were required to make to successfully claim title by adverse possession. As the law is currently written, the heir is damned if she does and damned if she does not. If she does not pay the taxes, she cannot claim adverse possession and the entire property may be lost at tax sale. But if she does pay the taxes but the property is probated by a co-heir before the statute has run, she gets no credit for those payments. If payment of taxes is requisite to an adverse possession claim, then the heir in possession should be given credit regardless of whether the adverse possession claim is successful.

Again, this is an easy legislative fix to translate property taxes into a percentage increase in that heir's share. Thus, if an heir in possession pays five years of property taxes charged at 2% of assessed value per year, that heir should receive an additional 10% of the property, prorated against the shares of the non-contributing heirs. This legislative fix would encourage tax payments and hopefully prevent some loss of homes due to tax sales. It would also encourage any heir to work to save the property even if co-heirs do nothing. Thus, this is a critical reform because so many heirs in possession feel cheated by co-heirs who do not maintain the home but still expect their proportionate share.

On the flip side, however, co-heirs out of possession who face losing a percentage of their shares because they do not pay taxes may understandably cry foul that the heir in possession gets a larger percentage while also getting the benefit of living in the house. From this perspective, the co-heirs might demand that in return they get a credit assessed against the heir in possession for the full rental value of the home. While this is an understandable concern, the law currently does not give co-heirs a right to rent from the heir in possession because all are given the legal right to possess.[95] And without evidence of ouster, the heir in possession has not infringed the rights of the co-heirs. But if the law gives the heir in possession the possibility of gaining title by adverse possession, which technically implies an ouster, the co-heirs may want to claim rent in exchange.

There are two ways the law could deal with this. First, legislatures could simply retain the common law presumption that there is no ouster for purposes of paying rent even as they assume a presumption of constructive ouster for purposes of adverse possession. There is no absolute requirement that the law be internally consistent on all points at the same time and the equities of the situation could accommodate the

95. *See* Taylor v. Canterbury, 92 P.3d 961, 964 (Colo. 2004); Garland v. Holston Oil Co., 386 S.W.2d 914, 915–16 (Tenn. Ct. App. 1964).

idea that the heir in possession is possessing adversely to the co-heirs and failure to pay rent is unrelated to adverse possession. Or, the law could treat failure to pay rent as an element of that adverseness, further supporting the claim of adverse possession. Hence, if the heir in possession satisfies the statutory requirement for clearing title by living in the house for, say, six years and paying taxes and no rent, the co-heirs would simply be out of luck, just as all true owners are when there is a successful adverse possession claim by a stranger. Furthermore, this heir would be conforming to the tax-payment requirement of adverse possession statutes.

The second, and less ideal option is to credit the co-heirs with the right to receive rent from the heir in possession, but only if they take steps to protect their interest within the requisite period and can prove an ouster by the heir in possession. This is how the law generally operates now, which would require litigation to prove whether there was or was not evidence of actual or constructive ouster. Of course, because the goal of legislative reform is to reduce litigation, it would make sense to have a presumption of no rent unless there is clear evidence of an ouster beyond merely living in the home and paying the taxes.

The relationship between payment of property taxes and ownership interests in heirs property is an important one to get right because too many people lose family wealth because there is no coordination between the heirs to all contribute to tax payments, or the heir in possession has no financial incentive to pay the taxes for everyone. A simple fix of allowing the heir in possession some credit through a larger share when the land is finally retitled would encourage payment of taxes and help forestall property loss. It would also help the heir in possession prove adverse possession against co-heirs.

But there are other situations where the time delays of probate, locating heirs, and giving them time to find sufficient funds to pay the taxes may make it impossible even for a single heir to stave off a tax sale. Thus, other reforms could be adopted, such as tolling the tax sale statute for an extra year or two if the property is in heirs property status. Some have argued for eliminating tax sales of real property altogether, given their disproportionate impact on lower-wealth individuals.[96] And while there is some merit in those arguments, local governments require funds to operate, and if there were no mechanism to collect property taxes, and no risk of losing the property, few landowners would pay their taxes at all. But there is no reason why the tax sale period should be so

96. *See* Tracy Gordon, *Critics Argue the Property Tax is Unfair. Do They Have a Point?*, TAX POL'Y CTR. (Mar. 9, 2020), bit.ly/3ZtD7YB; Jason Grotto, *How Unfair Property Taxes Keep Black Families from Gaining Wealth*, BLOOMBERG (Mar. 9, 2021), bit.ly/3IEpIMU.

short—usually two years—when probate itself often takes longer than that. Thus, if the threat of tax sale could be forestalled for, say, five years upon proof that the record owner has died, that would hopefully give the heirs time to pay the estate bills, probate the estate, and then agree on a payment plan for taxes among themselves. This benefit of a longer statutory period before a tax sale could be conditioned on opening probate proceedings, thus providing an incentive to heirs to do the title work necessary to clear title and agree on how to deal with mom's house. So long as the law does not punish those who do nothing, then that is what many people will do, even if they risk losing their house in the meantime.

Another possible area of reform is to allow a single co-heir to purchase the property at tax sale on his or her own behalf. Some courts have held that if an heir purchases the property at tax sale, she does so on the account of all the co-heirs.[97] Thus, even though she is presumably managing the property, she cannot allow it to fall into tax delinquency and then purchase it and thereby cut off her co-heirs' interests. But why not? If the other co-heirs are not contributing to the property taxes or the maintenance of the property, and it fell into tax delinquency and was sold to a stranger, their interests would be entirely cut off. Why should purchase by a co-tenant lead to a different outcome? As far as the heirs out of possession are concerned, they are sleeping on their rights and doing nothing to maintain the premises, and it is a fortuitous accident that a co-heir is the purchaser at tax sale and not a stranger. Like the special rule denying adverse possession by co-tenants, this disadvantage to co-tenants in the tax sale context makes it very difficult to settle title and thus operates against public policy. It is especially problematic since sophisticated buyers can use a straw man and avoid the rule, but the average co-owner of heirs property might not have the wherewithal to take advantage of the option.

E. Statute of Limitations on Opening Probate – "Can I open probate on great grandma's estate 80 years later?"

Although there are statutes of limitations on opening probate proceedings in many states, these statutes are ineffective in the context of heirs property because the public policy of settling property titles overrides any statute.[98] Thus, even if a state requires that probate be

97. *See* Noble v. Noble, 303 P.3d 907, 910–11 (Okla. Civ. App. 2013); Turner v. Miller, 276 So.2d 690, 692 (Miss. 1973). Other states hold that a co-tenant's purchase of the property at tax sale is not on account of all co-tenants. *See* Hamilton v. Shaw, 334 S.E.2d 139, 141 (S.C. Ct. App. 1985).

98. *See generally, e.g.*, Brackney v. Walker, 629 S.W.3d 834 (Mo. Ct. App. 2021); Sonenthal v. Wheatley, 661 S.W.2d 169 (Tex. App. 1983).

opened within, say, three years of the decedent's death, what is a court going to do if probate is not opened within that time? And even if grandma's estate cannot be probated, the real property is always subject to a quiet title suit. A court would not leave title in the name of a deceased landowner indefinitely. Instead, most statutes of limitations operate against creditors making claims against an estate but permit the heirs or will beneficiaries to bring proceedings to settle title at any time, perhaps even decades after the decedent landowner's death. Other rules, like those requiring that a will be filed with the court within ten days of the decedent's death, are more often breached than honored, largely because it takes longer than that to get through the funeral and find a lawyer.[99]

So why do states have statutes of limitations that can be worked around? Perhaps they are aspirational and perhaps they do operate at times to cut off certain claimants. The most common claimants whose rights are cut off are creditors of the estate, and not heirs and beneficiaries who can bring suit at any time to prove their right to title. But if states prohibit a landowner from dispossessing an adverse possessor after six or seven or ten years under adverse possession statutes, why not cut off the property rights of potential heirs or will beneficiaries after a certain period of inaction? In other words, we are back to a version of the question I asked earlier—if a stranger can move into grandma's house and acquire clear title after six years, cutting off the property rights of all successors, then why not cut off the rights of any heirs or beneficiaries who do not undertake to settle their property rights by opening probate proceedings within a similar period of time?

In this example, where Sally resides in grandma's house and her three siblings live out of state or even across town, it might make sense to impose a statute of repose on the ability of the out-of-possession heirs to open probate after a certain period. This would operate just like adverse possession against co-tenants in that the heir in possession would evolve into the true owner after a sufficient period. And if no heir or beneficiary is living in the home during that time, then regular adverse possession could operate against the owners by whoever is in possession. If no one is in possession, at least the person paying the property taxes should be deemed to be in constructive possession. In other words, if we flipped the presumption so that the person in possession was likely to gain clear title after a short period of time, not only would title be cleared relatively quickly, but the rule would encourage people to live in the

99. Florida law requires that a lawyer who is in possession of a will must file it with the court within ten days. *See* FLA. STAT. § 732.901 (2022).

home and maintain it, which would have salubrious effects on neighboring lands.

The analysis should be quite simple. If grandma died and left four children, and one of them (Sally) lives in the home and pays taxes and maintains it, then after a certain time (say six years), the out-of-possession siblings would be precluded from opening probate or claiming their share of the home and Sally would be automatically entitled to full ownership upon filing an affidavit stating that she was in possession and paying taxes during the requisite six years. Even if Sally does not live in the home, but pays the taxes and leases it, or simply takes efforts to maintain it, then she would have the right to claim ownership after her siblings sat on their rights and failed to probate the home for the statutory period. The key here would be aligning the state's law on adverse possession with its probate rules to encourage quieting title in family members who are taking care of the property.

But what if the four siblings did not know they had a legal right to grandma's house? What if, for instance, great-grandma left a will giving grandma a life estate in the house, with a remainder to grandma's brother on condition that he had issue, but if he does not have issue, then to grandma outright. If the brother dies without issue ten years after grandma has died, grandma's life estate would ripen into fee ownership and would then pass to her four children. In that case, grandma's children would not know they had any property rights until the brother died without issue ten years after grandma. This is the classic case of newly acquired property, which always justifies opening probate to settle title for property that the parties did not know was in the estate the first time around. The same statute of repose could work in this instance as well. Once the property rights vested in grandma upon her brother's death, the six-year period could start to run, and failure to probate their interests would cause any out-of-possession heirs to lose their property rights. This leaves the parties in the same position they were at grandma's death—the heir in possession should open probate and settle title within the statutory period of their uncle's death, but failure to do so should not bestow any benefits on the heirs out of possession. Their failure to pursue probate to protect their own interests should cause them to be cut off.

It is important to understand, however, that an enforceable statute of limitations on opening probate will only operate against heirs out of possession and that it is their failure to act that causes their interests to be terminated. The failure of the heir in possession to open probate is equally culpable but should not lead to cutting off her rights for two reasons. First, she is in possession, maintaining the property, and presumably investing her own money and time into maintenance of the

property, and so if anyone should be protected, it is the heir in possession. Second, statutes of repose should cut off the rights of those who inexcusably slept on their rights, not those who are exercising them. If the statute cut off the right of the heir in possession as well, then no one would be able to claim title and communities would find that legal ownership had simply evaporated. This is especially compelling because one of the public policy goals of statutes of limitation is to settle property rights. If the statute were applied equally to all heirs, regardless of whether they were in possession of the property or not, then presumably no one could be deemed the true owner and title would remain clouded indefinitely. If the heir in possession could not adversely possess against co-owners, and a stranger could not adversely possess because an heir is in possession, then title could never be settled. Thus, this reform would be to adopt a selective statute of limitations that cuts off claims of those who are sleeping on their rights but not of those who are working to preserve the property.

Of course, cutting off the rights of heirs to open probate must serve a public purpose, and the title must be settled somewhere. The logical place is the heir in possession who has been paying taxes and living in the property as an owner. Although adverse possession was typically a 21-year period, many states have dramatically shortened that timeframe in recent years.[100] It makes sense that cutting off the rights of potential heirs to probate an estate will settle the property in ways that promote stability and investment just as the laws of adverse possession and marketable title acts do. Thus, it would not be inconsistent to limit opening probate to a period of, say, six or seven years.[101] Failure to open probate suggests that the heirs have slept on their rights and the property, for the sake of public policy and stability, should be settled in the name of the possessor. Thus, limiting the time to open probate provides closure, even if it is arbitrary closure, since cutting off claims by statutes

100. For instance, Arizona has amended its statute on adverse possession to a period of three years if the possessor is paying taxes. *See* ARIZ. REV. STAT. ANN. §§ 12-523 et seq. (2022). California, Montana, Nevada, and Texas have reduced it to five years if the possessor is paying taxes. *See* CAL. CIV. PROC. CODE § 325 (West 2022); MONT. CODE ANN. § 70-19-411 (2021); NEV. REV. STAT. § 11.150 (2021); TEX. CIV. PRAC. & REM. CODE ANN. § 16.025 (West 2021). Florida, Illinois, Kentucky, Utah, Washington, and Wisconsin have reduced it to seven years upon payment of taxes. *See* FLA. STAT. § 95.12 (2022); 735 ILL. COMP. STAT. ANN. §§ 5/13-109 (West 2022); KY. REV. STAT. ANN. §§ 413.010, 413.060 (West 2022); UTAH CODE ANN. §§ 78B-2-208 to 78B-2-214 (West 2022); WASH. REV. CODE ANN. §§ 4.16.020, 7.28.050 (West 2022); WIS. STAT. ANN. §§ 893.25 to 893.27 (West 2022).

101. Notably this is often the same length of time used to create a presumption of death for missing persons in most states, although some have reduced it to five, and Georgia and Minnesota have reduced the period to four years. *See* GA. CODE. ANN. § 53-9-1 (2022); MINN. STAT. 578.16 (2022).

of limitation is widely recognized as a legitimate goal of legislation and the parties whose claims are cut off have a reasonable opportunity to protect themselves.

F. Homestead Protections

In certain states, like Texas and Florida,[102] homestead protections provide both property tax discounts and protection against unsecured liens and forced sale. For many heirs who have simply remained in possession of an ancestor's property, homestead status can be quickly lost, and penalties may accrue for failure to notify the tax collector or property appraiser of the change in ownership. If the property appraiser learns, perhaps by examining death certificates, that a record owner has died, the homestead exemption may be automatically removed, resulting in potentially higher property taxes. Or, if the appraiser does not know the record owner has died, when the family finally gets around to probating the property they may find themselves hit with significant back taxes and penalties for failure to notify the officials of the change in status. Yet, for the vast majority of heirs who reside in an ancestor's home, homestead protections normally accrue to them anyway if they simply retitled the land promptly and filled out the proper homestead application forms. The question then is whether the laws could be selectively amended to maintain the homestead status through a simpler process than probate for heirs in possession who are paying taxes but have not probated the land to clear title.

One easy fix would be to grant homestead protection to people living in an ancestor's home and paying taxes, even if the home is not transferred into their names. Understandably, homestead laws do not fit nicely onto complicated heirs property parcels. Imagine grandma's house, which she owned outright at grandpa's death, and for which she has a typical homestead exemption and protections against creditors. But when she dies intestate, leaving five living children and two grandchildren from a predeceased child, there are now seven different fractional shares in that home. All those lineal descendants would be entitled to continuation of the homestead if they individually acquired the home and resided in it. But because only one is likely living in the home, that is the only person who would normally be entitled to homestead.

In Florida, which is a typical state in this regard, only the person residing in the home is entitled to the homestead tax exemption, but only up to that person's proportionate ownership share if the share is held in tenancy in common. Thus, if there are five co-owners of a home, and the

102. *See* Hankins v. Harris, 500 S.W.3d 140, 144 (Tex. App. 2016); FLA. CONST. art. X, § 1.

home is only worth $100,000, the owner in possession can use the full value of the homestead tax exemption, which is $25,000, to offset her taxes—but the others cannot. In this scenario, each person's share is only worth $20,000, which means that the person in possession can offset her taxes entirely with her homestead exemption, but the non-resident heirs may not use the excess. In that case, although the $100,000 home would normally be entitled to a tax exemption on $25,000 worth of value, only $20,000 worth of value will be offset, and the remaining $5,000 exemption will be lost.[103]

Given the vagaries of homestead laws and the penchant of heirs not to probate heirs property and title it as tenants in common in the names of multiple heirs, we must ask whether anything can be done to help protect these properties from penalties or excess taxes to keep the land in the family. One option is to allow the full value of the homestead exemption during the period it is held in heirs property status on the relatively reasonable assumption that the lineal descendants are entitled to the property and the exemption. A penalty or back taxes would be due only if it turns out that the new owner is not qualified to receive the homestead exemption when the property is finally probated and title cleared. Thus, rather than kicking up the taxes as soon as the property enters heirs property status, and then providing a refund if the heir was entitled to homestead tax exemptions, the law could keep the homestead discount and only kick it up when it is determined that the exemptions were not available. Such a simple change might protect heirs from unexpected escalating taxes. Again, this is a very state-specific situation, but the transfer of the home from single, undivided ownership by grandma to tenancy in common by the heirs can quickly cause homestead tax discount headaches.

Given that many co-owners of heirs property struggle financially, some sort of change should be made to permit the homestead protections to remain during the period the property is in heirs property status and, once it is removed, to give the heir in possession the full value, even if that heir does not own a share large enough to justify the entire exemption. If other reforms were adopted, such as allowing the heir in possession to claim title quickly and easily through adverse possession, the period of uncertainty would be greatly reduced and there would be more security for tax collection by incentivizing the heir in possession to timely pay taxes. In any event, the law should focus on better facilitating the smooth operation of the homestead exemption across the inheritance

103. *See* Joseph M. Percopo, *The Impact of Co-Ownership on Florida Homestead*, FLA. BAR J., May 2012, at 32–33.

divide. But because this is a state-specific issue, this type of reform would need to be custom-tailored to each state.

G. The Transmissible Remainder Issue Redux: How Many Estates Have to Be Opened?

One artifact of traditional estates law is that multiple estates may have to be opened to probate an untimely intestate estate. For instance, assume grandma died intestate in 2000, leaving four children. In 2002, one child died intestate, leaving three grandchildren. In 2004, another child died testate, leaving everything to her spouse. In 2010, when a surviving child finally gets around to probating grandma's estate, she must open probate of the two deceased children to determine where their one-fourth shares go. For the child who died intestate, proof of heirship will be necessary to divide that child's one-fourth share among her three children. For the child who died testate, probate must be opened (or re-opened) to pass that child's one-fourth share to the spouse. Unsurprisingly, it does not take long for the estates to stack up. Perhaps even more problematic for the family, shares of grandma's house may pass outside the lineal descendants to spouses either through intestacy or a will.[104]

More affluent heirs may avoid this requirement to pass shares of property through multiple estates in other trusts and estates contexts. For instance, if a trust settlor establishes a trust to pay income for life to a surviving spouse and then to children for life, with a final payout to grandchildren alive at distribution, the final gift might fail under the state's rule against perpetuities or failure of final beneficiaries. When that happens, the remainder reverts to the trust settlor through a resulting trust, to be distributed to the settlor's legal heirs alive at the time of distribution. Even though we may have known the trust remainder failed under the rule against perpetuities, we would not determine who gets the final principal until the termination of the intervening life estates. This prevents precisely the problem of processing the remainder through the estates of the settlor's actual heirs who would have been determined at the settlor's death.

A similar result occurred in the famous case of *Evans v. Abney*, in which the Supreme Court held that Senator Augustus Bacon's gift of land for a whites-only park in Macon, Georgia, eventually failed when it

104. In many states, if the spouse is not the parent of the children, a decedent's estate will be split between the surviving spouse and the lineal descendants resulting in partial shares transferring to non-family members and, perhaps ultimately, to the spouse's lineal descendants. And of course, any beneficiary may be named in a will. Thus, if an intestate heir dies after the decedent homeowner and leaves a will naming a spouse, a friend, or a charity, then that heir's share will pass outside the family to non-members.

became illegal.[105] The heirs of Senator Bacon, alive at the time the trust failed, were entitled to the trust property, not the estates of Senator Bacon's heirs who were his actual heirs at the time of his death but who had died in the meantime.

In the trusts and estates world, this is called the *transmissible remainder* problem.[106] In a typical case of a trust to pay income to a spouse for life, with the principal paid out at the spouse's death to the children, any child who dies before the spouse will never benefit from the trust principal. Despite never enjoying it, the property will be deemed to pass through that child's estate to his heirs or devisees, where it will be administered and potentially taxed. Had the child predeceased the trust settlor, a state's anti-lapse statute might have created a substitute gift in the child's lineal descendants, but anti-lapse statutes do not apply to beneficiaries who die after the trust settlor or testator but before any gift of a remainder becomes possessory. Passing the property through these deceased persons' estates is both inefficient and potentially economically devastating. That was the situation in the famous case of *Estate of Houston*, where the trust established that the principal of the trust would pass to grandchildren after the death of the spouse and children.[107] In that case, three of the grandchildren predeceased the life tenants, and yet their shares of the trust passed through their estates, requiring estate tax payments, even though those three grandchildren never actually controlled that property as part of their estates.

The inefficiency and potential tax liability of the transmissible remainder problem led the Uniform Law Commission to promulgate section 2-707 of the Uniform Probate Code. That provision mandates that, unless there is evidence of contrary intent, any remainder interest in a trust is conditioned on surviving to distribution. If a trust beneficiary fails to survive to distribution, then an alternate gift is created in that beneficiary's living lineal descendants. If there are no living lineal descendants, then the gift lapses and passes back to the trust settlor generally to pass to the settlor's living descendants alive at the time the trust interest fails. In the trusts world, which tends to benefit the wealthy, the law has addressed the transmissible remainder issue, but it only

105. *See* Evans v. Abney, 396 U.S. 435, 439–40 (1970).

106. *See, e.g.*, Rutherford Cnty. v. Wilson, 121 S.W.3d 591, 596–98 (Tenn. 2003); Concord Nat. Bank v. Hill, 310 A.2d 130, 132–33 (N.H. 1973); *see also* David M. Becker, *Uniform Probate Code 2-707 and the Experienced Estate Planner: Unexpected Disasters and How to Avoid Them*, 47 UCLA L. REV. 339, 345 (1999) (discussing UPC § 2-707's method of avoiding the transmissible remainder problem for trusts); Susan F. French, *Imposing a General Survival Requirement on Beneficiaries of Future Interests: Solving the Problems Caused by the Death of a Beneficiary Before the Time Set for Distribution*, 27 ARIZ. L. REV. 801, 804–05 (1985).

107. *See In re* Estate of Houston, 201 A.2d 592, 596 (Pa. 1964).

applies to trust interests. Imagine if a similar solution could be applied in the heirs property context for the less wealthy.

Certainly, even after UPC section 2-707, there are cases where property must be passed through the estates of deceased takers. However, that usually only happens when there are remainders that vested while the person was alive but become possessory only later after the remainderman had died, as in *Estate of Houston*. Nevertheless, the transmissible remainder issue has become so anathema that courts regularly construe ambiguous remainders as contingent on surviving to distribution to simplify administration, prevent property from passing outside the family, and avoid devastating estate taxes. It makes no sense whatsoever to pass property to heirs who have since died rather than to the heirs who are currently alive.

Heirship is determined at the time of distribution in other contexts as well. For instance, a straightforward bequest of a life estate to a spouse, then to children for life, and then to the donor's heirs would be deemed a contingent remainder in the heirs with their identity being determined at the time of possession, not at the time of the donor's death. The same happens with class gifts generally.[108] When possession to a class like heirs, or kin, or descendants is set to take effect in the future, we do not open the estates of class members who failed to survive to possession.[109]

The logic of determining rights at the time of possession is so ingrained in the probate and estate planning field that it is almost counterintuitive to pass shares of property through the estates of predeceased heirs. It is probably malpractice too if a lawyer established a trust that required such an inefficient administration with the potential for the property to pass outside the family. But the norm in estate planning and the rules of trusts regarding transmissible remainders do not apply in the context of intestacy, which is more likely to be the law of the poor. Given today's probate code, it is almost inevitable that shares of grandma's house will pass to the unrelated spouses, and perhaps to their unrelated lineal descendants, if we must pass shares through the estates of deceased lineal heirs. Of course, any one of grandma's children could devise their shares in her house to their spouse, neighbor, friend, or favorite charity after acquiring that share. But in such cases, they intentionally make such a devise, knowing that they have a fractional

108. *See* Hanley v. Craven, 263 N.W.2d 79, 87–89 (Neb. 1978); *In re* Estate of Mooney, 267 N.W. 196, 200 (Neb. 1936).

109. *See* Benge v. Thomas, No. 13-18-00619-CV, 2020 WL 5054800, at *13–14 (Tex. App. Aug. 27, 2020); Chambers v. Devore, No. W2008-02548-COA-R3-CV, 2009 WL 3739443, at *4 (Tenn. App. May 12, 2009); Rawls v. Early, 381 S.E.2d 166, 169 (N.C. Ct. App. 1989); *In re* Waggoner's Estate, 538 P.2d 141, 144 (Wash. Ct. App. 1975).

share in grandma's house. For many heirs, however, the share may pass via intestacy to a spouse and then unrelated children without the heir even being aware of the existence of that property. In such a case, it is quite likely that grandma would prefer that her house pass to her living lineal descendants, whenever the title is probated, rather than through the estates of lineal descendants who died after her and who likely did not know they were even entitled to any shares.

Of course, property rights are vested in intestate heirs at the time of death, but they are vested in testate beneficiaries only upon probate of a valid will.[110] And the distinguishing feature of whether property passes through a deceased person's estates is whether the property rights are vested. Rights that are contingent on survivorship do not require opening the estates of long-deceased heirs. But is there any real benefit to maintaining that distinction because the administrative costs fall heavily on an already struggling population? Why should an arcane distinction punish people who die intestate, a population that tends to have less wealth and less access to estate planning services, while those who have greater wealth and access to resources are not similarly affected by that arcane rule because everyone knows to draft around the problem? *Tempora mutantur*, I would say. If property rights did not vest until probate, then once probate occurs, the only heirs would be those alive at time of distribution. This would solve not only the need to administer multiple estates, but it would also avoid shares of family property passing outside the family through either intestate shares to surviving spouses or through testacy.

Fortunately, making this statutory change is not difficult because there is a precedent in UPC section 2-707. That provision requires survivorship for any future interest in a trust to avoid this very inconvenient transmissible remainder problem. Thus, for remainder interests in trusts, the UPC requires survivorship until distribution and creates a substitute gift in lineal descendants if the remainderman fails to survive to distribution and leaves issue, or a reversion in the trust settlor's estate if the remainder-person fails to survive and leaves no

110. *See* Glaser v. Chi. Title & Tr. Co., 66 N.E.2d 410, 416 (Ill. 1946); Beier v. Bd. of Pro. Resp., 610 S.W.3d 425, 438 n.11 (Tenn. 2020) (citing TENN. CODE ANN. § 31-2-103 (2015)); *In re* Rodriguez, 488 B.R. 675, 678–79 (Bankr. E.D. Cal. 2013). Some states also state that death vests intestate property in the heir. *See, e.g.*, FLA. STAT. § 732.101(2) (2022) (the decedent's death is the event that vests the heirs right to intestate property). Testate property often vests in the executor or personal administrator immediately upon death, but then courts use the relation-back doctrine once a valid will has been probated to vest the property in the hands of the devisees. *See generally, e.g.*, Burmeister v. Schultz, 154 N.W.2d 770 (Wis. 1967). While many probate codes state that real property vests in the devisee upon death, personal representatives have a power to sell to pay debts of the deceased. *See* AMY MORRIS HESS, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 12 (2022).

descendants. This provision has been criticized, but it certainly seeks to avoid transmissible remainders by converting even vested remainders in trust to contingent remainders so multiple estates do not need to be opened for beneficiaries who die before they can benefit from the trust interest. But whose estates pay the price? It is perhaps quite telling that the Uniform Law Commission created a sensible solution for trust interests, especially since those are often used by the wealthy for whom estate tax liability in those pass-through estates are a real problem, but they have not provided a similar remedy for low-wealth individuals. It seems unfair that modest family homes are lost because, under the default rules, intestacy leads to further and further fractionation, while the use of an expensive trust could have avoided the problem entirely.

A simple remedy, therefore, would provide that heirship under intestacy is determined at the time of distribution, not at the decedent's death. Some protestors may complain that this change will incentivize delaying probate to cut out the rights, perhaps, of an ailing surviving spouse or an elderly child. Maybe a safeguard could be implemented that would vest property rights at the death of an intestate decedent unless probate is delayed six or seven years or more. Conveniently, this could be the same time used to determine rights by adverse possession and the statute of limitations barring opening of probate. Thus, if probate is opened promptly, the heirs are determined at the time of death. But if probate is delayed more than seven years, for instance, heirs would be determined at the time of distribution. Fortunately, there would be no need to create a substitute gift in the lineal descendants of predeceased heirs because, under intestacy, they would take in their own right. Hence, this provision would be even simpler than UPC section 2-707 and would avoid the property passing out of the family altogether.

Notably, a majority of states do not allow the estate of a surviving spouse to elect; the spouse must be alive to take an elective share of a decedent spouse's estate.[111] Those statutes also incentivize the personal representative to delay probate in the hopes of forestalling an election by an ailing surviving spouse. Yet, that incentive does not appear to have caused terrible injustices, especially because courts have provided remedies against fraudulent delay by the representative to counter that incentive.[112] A similar provision could be built into probate reforms of this sort for heirs property. Of course, the problem here is that delay is the norm, and it would have the effect of potentially denying rights in the

111. *See, e.g.*, ALA. CODE § 43-8-71 (2022); ARK. CODE ANN. § 28-39-405 (2022); HAW. REV. STAT. § 560:2-212(a) (2022); IOWA CODE §§ 633.242, 633.236 (2022); *see also* Jeffrey Schoenblum, MULTISTATE GUIDE TO ESTATE PLANNING 6012–33 tbl 6.02 (2021).

112. *In re* Estate of Wurcel, 763 N.Y.S.2d 902, 905–06 (Sur. Ct. 2003).

estates of later deceased heirs and their beneficiaries if the delay is allowed. But so long as the delay is not undertaken to deny a particular heir an interest, and given that the death of that heir does not normally increase the share of the heir undertaking probate,[113] there is little likelihood that the delay is motivated by a desire to cut out the interest of co-heirs.

A further benefit of such a provision is that it would limit the possibility of intestate passage of property to spouses of heirs, thus resulting in transfer out of the family. With most intestacy statutes treating the surviving spouse as the primary heir, it is easy to imagine that the shares of an heir who died after the homeowner but before distribution would pass to a surviving spouse, not the lineal descendants of the homeowner. If the surviving spouse was also the parent of all lineal descendants of that heir, it might be less of a problem, as the surviving spouse's property may ultimately pass to the children. But dealing with in-laws may be even more difficult than dealing with blood relatives, and if the surviving spouse is not the parent of the heir's children, things could get very ugly. In our example, the child who died intestate leaving a second spouse and three children would cause that child's one-fourth share of grandma's house to pass one-eighth to the surviving spouse and into one-twenty-fourth shares for the three grandchildren. Where is the sense in that?

H. What Form Must Title Take?

Another issue that ought to be considered is whether all heirs under intestacy must take title as tenants in common. Although tenancy in common is the default form in all states, it is a significant shift from the way title was taken under the common law of England. For instance, land descended in most of England by primogeniture to the eldest son, but in the absence of sons it descended to daughters originally as joint tenants with right of survivorship and not as tenants in common.[114] Creating a rebuttable presumption of joint tenancy could result in reaggregation of the property unless the parties chose to sever or partition it, rather than further fractionation, which is the current result under tenancy in common. In other words, the consequence of doing nothing should be reaggregation, not fractionation. If the parties could opt for tenancy in common, they could protect their interests and obtain inheritable estates. But there is no reason for the law to provide a default rule that increases

113. Delay in probating an estate would result in an increase in the shares of co-heirs only if the deceased co-heir died without issue. Only if the deceased co-heir wrote a will would the intentions of that co-heir be frustrated, since issue or collateral relatives would take in their own right if the co-heir died testate.

114. *See* BAKER, *supra* note 17, at 268.

the likelihood of fractionation or loss through partition or abandonment. To the extent heavily fractionated heirs property is against public policy—because it is likely to be lost and because the land itself becomes unmarketable due to multiple undivided interests—a change in the default form of title could lessen those harms if it provided adequate methods to opt out of the default.

Notably, shifting to a joint tenancy norm to deal with the harms of fractionation is not uncommon. Under the American Indian Probate Reform Act ("AIPRA") regulations adopted in 2006, a devise by will of Indian trust land to any group of two or more will be deemed a joint tenancy with right of survivorship unless there is clear language that a tenancy in common was intended.[115] Thus, fractionated shares would be acquired by beneficiaries as joint tenants rather than as tenants in common so, upon the subsequent death of the beneficiary, the land shares would be consolidated rather than further fractionated. The 2006 AIPRA goes even further to avoid fractionation by providing that fractional shares smaller than 5% shall pass by intestacy to the eldest lineal descendant, omitting all others.[116] Although we might not be prepared to move to primogeniture in this country for all purposes, the intense fractionation caused by the egalitarian tenancy in common has caused the old versions of intestate limitations to be reconsidered.[117]

Currently, the ability to execute a will provides an opportunity and incentive to opt out of the cumbersome default of fractionated ownership interests that are created by intestacy and the tenancy in common default. Shifting to joint tenancy interests under intestacy would reverse that, so the opt-out would be necessary to create the less desirable alternative. This means that doing nothing would lead to better outcomes in most cases than it does now, while still allowing individuals to protect their individual interests. This change would therefore put the interests of family wealth and stability above the interests of the individual while providing an adequate mechanism for the individual to protect him or herself. This was the structure used for hundreds of years under the common law and was changed to reflect the individual rights focus of American law only in the past few hundred years.

Sadly, the fractionation problem was anticipated by lawmakers in the 1880s who recognized that the allotment scheme of the Dawes Act, by which American Indian allottees were given between 40 and 160 acres outright in individual ownership, would cause land loss and impoverishment of the Indian landowners. Rather than continuing the tribal customs of the earlier years, the Dawes Act allotted individual

115. *See* 25 U.S.C. § 2206(c)(1).
116. *See* 25 U.S.C § 2206(a)(2)(D)(i).
117. *See* Spivack, *supra* note 20, at 202–06.

Indians separate parcels of land, but then tied them up in a trust structure that all but guaranteed continual fractionation through intestacy to the point that the average parcel of Indian trust land today has more than 25 owners, and many have more than a few hundred co-owners.[118] Senator Dawes predicted that individual allotments would quickly result in the Indian landowners becoming farmers and taking charge of their lands and its succession. Instead, with essentially forced intestacy and the continuation of the trust status, the lands have become so fractionated that often no one co-owner can exercise dominion over any single parcel, thus leading to paralysis and the land itself becoming fallow if it could not be leased to third parties.

Despite anticipating the dire effects of fractionation caused by the Dawes Act, Congress went ahead with allotment through 1934, when it officially ended. But by that time, the damage was done, with the loss of nearly two-thirds of Indian land and nearly half of what remained being considered desert and uninhabitable for non-Indian settlement.[119] Since 1934, fractionated landownership has gotten worse, despite congressional attempts to solve the self-created problem through the 1983 Indian Land Consolidation Act ("ILCA"), the 2000 amendments to ILCA, and the 2004 AIPRA. Consequently, as lawmakers propose federal solutions to deal with the extreme fractionation problem created by Congress's allotment policy, we can learn some important lessons. Ironically, the only solutions Congress has adopted are ones that hearken back to the common law of England—primogeniture and joint tenancy—and not to forms of communal land ownership, land trusts, or flexible succession, as was the custom among the native Indians prior to their contact with the colonists.

Although it would be unlikely that states would adopt joint tenancy as the default under intestacy, or even strongly encourage joint tenancy through testate succession, as is the case with AIPRA, landowners and heirs could be encouraged to accept heirs property in joint tenancy. For instance, when an heir is undertaking probate and is providing notice to remote co-heirs of an interest in real property, those co-heirs could be encouraged to either disclaim their interests or take it as joint tenancy rather than as tenancy in common to consolidate the shares. To the extent many families operate under oral agreements, a simple way to disclaim or change the tenancy to one with a right of survivorship could provide a mechanism for abiding by the oral agreement without necessitating litigation or extensive legal proceedings.

118. *See* Shoemaker, *Complexity's Shadow*, *supra* note 23, at 490.
119. *See* Shoemaker, *Like Snow*, *supra* note 19, at 743.

I. What Constitutes Reasonable Notice to Heirs?

One issue often expressed by heirs in possession is that they do not know where possible co-heirs are living, especially remote cousins, and often they do not know who their kin might even be. To the extent probate is stalled because of inability to locate heirs, or the high cost of genealogical searches, logical reform should address the issue of notice. In most cases involving claims against real property, notice in a local newspaper is considered adequate,[120] but there are valid concerns that notice in a local newspaper would not be an adequate method of reaching remote heirs. Of course, to the extent probate reform is intended to cut off claims of remote heirs who have not bothered to protect their own interests by opening probate themselves or contacting their relatives, perhaps we should not be particularly worried about their interests. But to respond to the protests of probate lawyers that inadequate notice cuts off vested rights in heirs, there must be some way to reach people that is better than newspaper notice in the situs of the real property but does not entail the time and expense of a thorough genealogical search.

One option, given the plethora of online search services, would be to require a reasonable but inexpensive search on a service like Lexis/Nexis or Ancestry.com with mail notice, along with newspaper notice. If the courthouse had a subscription and librarians skilled at using these websites, people would not need to hire lawyers, but could assemble a family tree at the local library. Once a reasonable family tree was assembled, mailing a form notice that permits potential heirs to register their interests, or disclaim them, and provides a mechanism for informing the court of other missed heirs should be sufficient. Failure to respond should be accepted as an act of abandonment of any claim. Remember, the purpose of probate reform is to settle title in those who are actively protecting the property and investing financially in it. Parties who are difficult to track down may end up losing their property rights if they do not take reasonable steps once they are given notice. But ultimately cutting off claims of people who do not choose to protect their rights is the point of any notice requirement, and notice cannot be guaranteed to everyone in all situations.[121]

Such a potentially harsh provision should allow those who want to protect their rights as co-heirs a relatively simple process for doing so. Thus, submitting a notice of claim should be sufficient to entitle a

120. *See* T.C.W., Annotation, *Constitutionality of Provision for Service by Publication of Notice of Proceeding by Purchaser at Tax Sale to Foreclose Delinquent Owner's Right of Redemption, or of Other Proceeding to Perfect Tax Purchaser's Title*, 145 A.L.R. 597 (1943). For examples of states allowing publication notice, see FLA. STAT. § 49.011 (2022); NEV. REV. STAT. § 14.040 (2021).

121. *See* T.C.W., *supra* note 120.

potential co-heir to receive notice and an opportunity to prove heirship without requiring that the heir hire a lawyer or enter an appearance. Or, an heir could simply file a claim with the property appraiser's office, as is routinely done in marketable-title-act claims. The point is to ask what level of notice is reasonably necessary and whether reducing the cost of doing a genealogical search could facilitate the probate process and settle cloudy titles without unduly jeopardizing the rights of out-of-possession heirs.

J. Do We Need Judicial Supervision? – How About an Affidavit of Heirship?

To effectuate meaningful reform, it must be considered whether we can forego judicial supervision in the process. To the extent heirs in possession indicated their distrust of government and the legal system, their concern with the cost and delays of probate, and their misunderstanding about the role of the probate process, some reform needs to focus on the probate process itself. This forces us to consider how we balance the protections of probate with the costs, to see if we can tip the scale to make it more responsive to the needs of lower wealth individuals without losing the important protections for creditors and co-heirs.

Most states have a summary administration process for small-value estates, thus recognizing that when the property is relatively low in value there is no need for full-blown formal administration.[122] Many states, however, deny that process if there is real property in the estate. So, any change to address heirs property should begin with a simplified process that is available even if there is real property in the estate. A second change must recognize that land values have increased significantly in the last 30 years, yet most states have not amended the threshold for summary administration. For instance, New Jersey allows summary administration if the estate is under $20,000,[123] and Michigan, North Carolina, and South Carolina have values between $15,000 and $25,000.[124] Few parcels of land today are valued so low. For instance, California provides a summary procedure, but the gross value of California real property must not exceed $55,425.[125] I challenge anyone to find a piece of California real property worth less than $55,425!

122. *See* Schoenblum, supra note 111, at 4001–4137 tbl 4.

123. *See* N.J. REV. STAT. § 3B:10-4 (2023).

124. *See* MICH. COMP. LAWS ANN. § 700.3983(1)(a) (West 2023) ($15,000); N.C. GEN. STAT. ANN. § 28A-25-1(a) (West 2022) ($20,000); S.C. CODE ANN. § 62-3-1201(a)(1) (2022) ($25,000).

125. *See* CAL. PROB. CODE § 13200(a)(5) (2022). For the value after April 2022, see JUD. COUNCIL OF CAL., MAXIMUM VALUES FOR SMALL ESTATE SET-ASIDE & DISPOSITION OF ESTATE WITHOUT ADMINISTRATION (2022), https://bit.ly/42tAqaK.

Oregon and Wyoming, however, have quite high thresholds for summary administration of $275,000 and $200,000, respectively.[126] And some states, like Florida, allow an amount of personal property in addition to unlimited real property so long as the latter qualifies as homestead.[127]

Despite its low value threshold, California is on the right track when it allows for administration through a simplified affidavit procedure in which the personal representative files affidavits of heirship and the title to the land is cleared without judicial proceedings.[128] It would be relatively simple to allow a similar procedure in all states, with a reasonable opportunity for co-heirs to challenge the proceedings within a one- or two-year period before their rights to contest are barred. Most importantly, however, this procedure should be available for properties that have remained in heirs property status for a relatively long period of time. For instance, if title has remained in heirs property status for seven or ten years perhaps, then an affidavit procedure could be used regardless of the value of the land at issue. The public policy benefits of clearing title would heavily outweigh the potential for abuse when all co-heirs have had the chance to probate grandma's estate in the intervening decade and would have a chance to contest the proceeding even after.

Probate benefits everyone by affirming the validity of a will and ensuring that the personal representative appropriately maintains and distributes the estate property in conformity with his or her fiduciary obligations. It also settles the claims of creditors. For those reasons alone, many people will undertake timely and efficient probate of a relative's estate, especially when the estate contains sufficient property. But with estates that consist only of a piece of real estate, and especially when the landowner died intestate, the public policy benefits of clearing title quickly and efficiently more than outweigh the risks of potential wrongful or unethical behavior by heirs in possession or careless personal representatives. A new summary administration procedure is therefore necessary for small estates as well as for estates that have remained un-probated for years, regardless of the value, so long as the only property requiring probate is a single-family home.

When I provide estate planning seminars to the local community, I cannot emphasize enough the importance of planning for succession of the family home. While most people can add someone's name to a bank account, designate beneficiaries in bank and securities accounts, or simply provide a list of who should have certain personal property and hope the survivors honor their wishes, it is very difficult to maintain

126. *See* OR. REV. STAT. ANN. § 114.510(1) (West 2022); WYO. STAT. ANN. § 2-1-205(a) (West 2022).

127. *See* FLA. STAT. ANN. § 735.201(2) (2022).

128. *See* CAL. PROB. CODE §§ 13100–13115 (2022).

ownership of the home until death and settle it in a way to avoid probate. Even in states with transfer-on-death deed capabilities, the landowner must do something to arrange for the post-death transfer of the property.[129] And for those parcels already in heirs property status, there is not much to be done but grit one's teeth, hire a lawyer, and start the probate process. However, if some of these proposed changes were made, it would be much easier for heirs to settle cloudy title and move toward protecting the land, preserving its wealth for the family, and allowing it to be used profitably by the next generation without cutting off vested property rights.

IV. CONCLUSION

As you can see, if states implemented certain legal changes, like the presumption of joint tenancy rather than tenancy in common, and a presumption of adverse possession after a certain period of time coupled with a statute of limitations on the ability to open probate by heirs not in possession, a simple affidavit could suffice if the requisite legal elements are otherwise met. Thus, an heir in possession who has paid the taxes for seven years and can attest that no other heirs have contributed to the property could simply file for a declaration of ownership that could be recorded and, if no challenges are made within one or two years, the declaration becomes dispositive. This would remove the probate court altogether unless a challenge was leveled against the claim, and it would be simple enough to prove payment of taxes. And public recording of the affidavit would put the world on notice of the adverse possession claim.

Importantly, even if states adopted these reforms and the heir in possession could file a simple affidavit to claim heirship to avoid probate proceedings, there should also be a simpler way of resolving heirship challenges if a co-heir contested the claims of the heir in possession. Perhaps a neutral third-party mediator or magistrate could talk with the parties, investigate, and provide a schedule of ownership interests that could be recorded to reflect the appropriate title to the property in the rare case that title was challenged. That magistrate or mediator would identify, as best she can, the relevant legal heirs alive at the time of the challenge and make a recommendation to the probate judge for an order of distribution. This process could bypass the estates of deceased heirs and avoid any intestate transfer to surviving spouses of heirs because property rights would not vest until the judicial order was entered.

Of course, both processes should be appealable by an interested party up to two years after recordation of the order or affidavit, and a probate court could be brought in only when someone challenges the

129. *See* Wright, *Beneficiary Deeds*, *supra* note 9, at § 25.03[2].

case or mediation fails. Given that the vast majority of probate actions are unchallenged, simplifying the process and providing adequate notice would likely not generate significant litigation by disgruntled heirs.

And we cannot forget that an invaluable legal reform would be to make transfer-on-death deeds readily available and easy to use without a lawyer in relatively simple cases. If a landowner could execute a transfer-on-death deed at the property appraiser's office, just as they can change beneficiaries on their bank account at a bank branch, without needing a lawyer or even a notary, the process could be overseen by real estate professionals who understand the nuances of property title. For instance, only if land is owned individually in fee simple absolute could a homeowner execute an affidavit designating a beneficiary or two and record that affidavit in one-stop, as can be done in Ohio.[130]

Certainly, another major factor in clearing the backlog of heirs property cases would be to provide better funding for legal services or paralegal assistance of heirs in undertaking heir searches and title searches. Part of the problem in this backlog is that lawyers are expensive and have time constraints that prohibit them from doing the background work necessary to create an adequate file. Paralegals or other professionals in their offices are also quite expensive and often do not have the necessary skillset to evaluate title risks and legal standards. And yet, most of the work necessary to clear title does not require the skills of a real estate attorney. It can be done by a knowledgeable professional who is trained in probate and estate matters. Court library staff or local law students could assist with filling out affidavits or doing internet searches for heirs. Local law school clinics, like low-income taxpayer services, could assist in relatively simple estates. The important point is that if the law and procedure were simplified, more people could qualify to assist, and the backlog could be managed.

Probably the most important change would be to provide educational resources for heirs about the law, probate procedures, how tax sales work, and the like. Websites should be updated with information about estate planning services and forms should be provided so people can do it themselves as much as possible. It is ironic that we allow an individual to change a beneficiary designation on a multi-million-dollar investment account simply by signing into the institution's website and making the change, but creating a process for smooth transmission of a $75,000 home takes a revocable trust in many states. Even in states that allow transfer-on-death deeds for real estate, the witness and notary requirements far exceed the requirements of adding a beneficiary to a bank account or securities account. That very difference

130. *See* OHIO REV. CODE ANN. §§ 5302.23(B)(1), 5302.23(B)(6) (West 2022).

shows the law's solicitude for the wealthy and its lack of solicitude for those of modest wealth, particularly those whose main asset is the family home. As we have failed to address the needs of the latter, while providing countless tax-preferred and probate-avoidance mechanisms for transferring non-real property wealth, we have dammed up the river for those of modest wealth while we have removed obstacles and channeled the river for those of higher wealth. Surely, modest changes in the law to update it to meet the needs of the current time are justifiable? The only barrier seems to be that those of modest wealth, and those heirs in possession who don't know how to probate their ancestor's estates, simply do not have the resources to influence state legislatures to help them preserve and pass on generational wealth. For that reason, I have drafted a proposed probate reform act.

V. SAMPLE *FAMILY PROPERTY PROBATE AND PRESERVATION ACT*

In 2010, the Uniform Law Commission adopted the Uniform Partition of Heirs Property Act ("UPHPA") to forestall the loss of heirs property through forced partition actions when it passed to heirs and devisees through tenancies in common. Tenancy-in-common ownership is highly unstable since any tenant may sell or convey his or her interest to a successor, and in many cases do convey to a land speculator, who can force a partition action and buy up the remaining shares at a fraction of their worth. The problem is particularly acute in the African-American community.[131] The UPHPA limits partition actions to promote buyout of interests as the first preferred alternative to partition, then partition in kind, before partition by sale which must be an open-market sale to preserve the value for the co-tenants.

But the UPHPA is a band-aid designed to protect valuable lands from land speculators who would use partition actions to force a sale and acquire valuable farmlands. Forced partition is unlikely to be an issue in Arthur Paulsen or Mary Artis's estates, where the size of the inheritance

131. *See generally, e.g.*, THE EMERGENCY LAND FUND, INC., THE IMPACT OF HEIR PROPERTY ON BLACK RURAL LAND TENURE IN THE SOUTHEASTERN REGION OF THE UNITED STATES (1980); 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 (2000); Chris Kelley, *Stemming the Loss of Black Owned Farmland Through Partition Action: A Partial Solution*, 1985 ARK. L. NOTES 35 (1985); Harold A. McDougall, *Black Landowners Beware: A Proposal for Statutory Reform*, 9 N.Y.U. REV. L. & SOC. CHANGE 127 (1979–1980); 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 (2001); Faith Rivers, *Inequity in Equity: The Tragedy of Tenancy in Common for Heirs' Property Owners Facing Partition in Equity*, 17 TEMP. POL. & CIV. RTS. L. REV. 1, 58 (2007).

is small, the expenses are relatively large, and the potential for inflaming family conflicts is ever-present. In too many cases, modest-value homes are lost to foreclosure, tax sale, or below-market sales because the cost and delay of probate is too great for the anticipated benefit of a one-fifth interest in a $75,000 home. This is especially true if the decedent who was living in the home suffered a lengthy period of decline in which maintenance was neglected and no one heir is likely to expend a lot of money either paying the tax delinquencies or maintaining the property when he or she will not receive an offset for expenses when final distribution occurs.

Significant work needs to be done between the adoption of the URPTODA and the UPHPA to grapple with the probate piece. To fill that gap, I propose that states adopt the following legislation to facilitate the orderly probate of real property for those estates in which the real property is the only asset requiring probate:

I. Short Title

This section may be cited as the ***Family Property Probate and Preservation Act***

II. Definitions – As used in this section, the term:

Affidavit of Heirship means a signed and notarized instrument filed with the clerk of the court of the county in which the real property is located claiming heirship of real property that is in heirs property status.

Affidavit of Ownership means a signed and notarized instrument filed with the property appraiser's office claiming ownership of real property held in heirs property status by an heir who has been in possession of the real property for at least six years.

Decedent means an owner of a freehold interest in real property who has died and whose estate has not been probated.

Declaration of Heirship means a finding by an authorized, court-appointed, fact-finder that the decedent died intestate and that the designated heirs are legally entitled to ownership of the real property.

Heir means an intestate heir of a deceased landowner who is entitled under the state's statute of descent to a share of the deceased landowner's real property.

Heir in Possession means an intestate heir or will beneficiary of a deceased landowner who is occupying the real property or is managing and maintaining it to the exclusion of other co-heirs or co-beneficiaries.

Heirs Property Status means a freehold interest in real property, or an undivided share in real property, that was owned by a person who has been deceased for at least two years but who remains listed as the owner of record of the real property, or the property records list as owner the "heirs of" the deceased landowner.

Real Property means any freehold interest in land located in the state, whether present or future, or any freehold interest in a common interest community, but does not include interests in leases or co-operative corporations.

Use of the singular includes the plural for purposes of this statute.

III. Applicability

This Act applies to real property in the estate of any decedent where the real property is the only asset of the estate that requires judicial administration and the real property has been in heirs property status for at least __ (two, five, seven, ten?) years.

IV. Nonexclusivity

This Act does not affect any method of transferring or probating property otherwise permitted by the law of __.

V. Affidavit of Conditional Ownership

For any real property located in this state that has been in heirs property status for at least six years, the following applies:

(a) Any person who is a legal heir of the deceased real property owner of record, who is in possession of the real property for at least six years, and has paid the property taxes on that real property during the period of residence, may file an affidavit of ownership with the property appraiser's office of the county in which the real property is located, declaring conditional undivided ownership of the real property, and record title to the property shall be amended to reflect the conditional undivided ownership of the affiant.

(b) For any property held in conditional undivided ownership for a period of two years, without being contested, or any claim being filed

pursuant to Section VI, the term "conditional" shall be removed, and the affiant shall be deemed the owner of record thereafter.

VI. Affidavit Procedure for Summary Administration of Heirs Property

For any real property located in this state that has been in heirs property status for more than two years but less than six years, the following applies:

(a) Any person who is a legal heir of the deceased real property owner of record may file for summary heirs property administration of the real property if there is no other property in the Decedent's estate requiring judicial administration by filing an affidavit seeking a determination of heirship with the clerk of the court of the county in which the real property is located. The affidavit must provide the following information:

i. The names and addresses of all known living heirs of the deceased.

ii. The name and relationship of any person or persons who have paid the property taxes on the real property.

The affidavit may provide the following additional information:

i. The name and relationship of any person or persons who have paid insurance, mortgage payments, utility expenses, and/or costs of maintenance in excess of $500.

ii. Any written documents pertaining to any oral or written agreements, if any, as to ownership and/or residence in the Decedent's property.

(b) The cost of filing for summary heirs property administration shall be set at $100.

(c) Upon filing for summary heirs property administration, the clerk of the court shall assign the case to a staff attorney, magistrate, court-appointed mediator, or other authorized professional, to investigate the facts and determine heirship.

(d) Prior to determining heirship, the authorized finder of heirship shall cause a notice to be sent to all heirs listed in the affidavit of heirship by

certified mail and notice shall be posted on the property appraiser's website and published in the local newspaper in the county in which the real property is located. The authorized finder of heirship shall also undertake reasonable efforts to ascertain that all heirs have been identified and provided appropriate notice of the request for a determination of heirship. The notice shall include an option to all noticed heirs that they may disclaim their interest in the real property, may partake of an interest as joint tenants with rights of survivorship, or may partake as tenants in common, and the final determination of heirship shall reflect that choice. In the case no return is provided by an heir, the finder of heirship shall assign to that heir a share in the real property as a joint tenant with right of survivorship. To the extent the finding of heirship results in shares of different sizes, joint tenancy interests shall terminate and be distributed pro-rata to surviving heirs regardless of the requirement of unity of interest.

(e) In determining heirship, the authorized finder of fact shall assign heirship interests only to living heirs who shall be entitled to shares by representation, per stirpes (or per capita), as though the decedent landowner had died intestate at the time the determination of heirship is being made and shall not include heirs who survived the decedent landowner but failed to survive to the time of determination of heirship. At no time shall a surviving spouse of an heir who failed to survive to the time of determination of heirship be entitled to a share of the heirs property, either as a testate beneficiary, intestate heir, or through elective share.

(f) Once a determination of heirship is made, title to the real property shall be changed to reflect the new ownership shares but title shall be identified as "conditional" for two years after the filing of the determination of heirship with the property appraiser's office to allow a non-recognized co-heir to contest the determination of heirship. If a co-heir files a claim contesting the determination of heirship within two years but fails to pursue legal avenues to assert the claim and no determination is made within three years from filing the claim, the term "conditional" shall be removed and the rights of the contestant shall be terminated.

(g) After two years with no claim being filed by any contestant, the "conditional" label shall be removed, and the record title shall reflect ownership of the real property consistent with the determination of heirship.

VII. Tolling of Tax Delinquency

(a) The tax collector of the county in which any heirs property is located shall not permit a tax certificate to issue if the collector is informed that the owner of record is deceased, the land is currently in probate or heirs property proceedings, or the land is titled in the name of "heirs of" the deceased landowner for two years after being informed of the heirs property status of the property.

(b) Any real property that is purchased at tax sale by an heir shall be owned individually and outright by that heir and such purchase shall cut off the claims of all co-heirs to that property unless the heir expressly, or by implication, purchases the real property on behalf of all the co-heirs.

VIII. Marketable Record Title

Any real property that is subject to a summary administration of heirs property proceedings and filing of a determination of heirship shall be deemed to be owned individually and exclusively by the heir or heirs identified in the determination of heirship and any transfer by the identified heir or heirs to any third party shall be conclusive as to ownership as against unnamed co-heirs from two years after the date of the determination of heirship. Any co-heir claiming an interest in the real property shall have two years from the filing of the determination of heirship to file a claim against the property with the property recorder's office of the county in which the real property is located. If no claim is recorded within two years of the filing of the determination of heirship, title to the real property shall be deemed settled in the designated heir or heirs for all purposes. Any claimant who challenges the title to the real property after two years shall not have a claim against the real property but may pursue a personal action against the heir or heirs of title for misrepresentation, fraud, or other personal wrongdoing.

IX. Statute of Limitations for Filing Affidavit of Heirship

Any heir who has been in possession of real property that is in heirs property status for at least two years may file an affidavit of heirship at any time thereafter to settle title in the heir or heirs identified in the determination of heirship. Any heir who is not in possession of real property may file an affidavit of heirship within six years of the death of the landowner of record and failure to file within that time operates to terminate any claims to the real property by all heirs out of possession.

X. Homestead

Homestead status shall remain on all real property held in heirs property status for six years following the death of the owner of record. If a determination of heirship is filed within six years, and the heir or heirs designated in the determination of heirship are entitled to homestead status, there shall be no requirement that the heir or heirs rerecord their homestead requests. If a conditional affidavit of ownership is recorded, the new owner of record is required to submit a homestead application.

XI. Effective Date

This law shall become effective on _____ (date) for all properties that are currently in heirs property status or that come into heirs property status in the future.