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Heirs' Property: Emerging Questions From Education and Outreach Efforts On Voluntary Clear Title Resolution

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Introduction

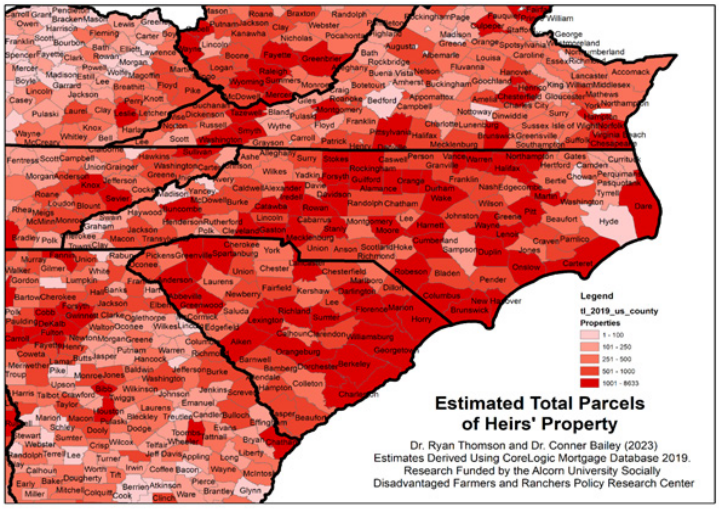
Heirs' property title resolution and retention has emerged as a public policy supporting outreach and education efforts and technical assistance to help heirs' property interest holders voluntarily clear the titles to large amounts of rural and urban acreage. Such efforts provide a window into rural socio-economic concerns including wealth depletion (particularly among Black Americans) and in regard to farm and forest land economic productivity. Unresolved heirs' property title has also been documented as a hurdle to the distribution of disaster benefits, of particular interest in hurricane-prone North Carolina as those programs, like other federal and state conversation and farm programs, require clear title to impacted parcels (Flemming et al., 2016).

In North Carolina, estimates on the acreage and value of heirs' property vary, with one source estimating the assessed (tax) value of 72,914 heirs' property parcels, at $5.5 billion (HAC, 2023). An Auburn University study estimated North Carolina heirs' property at 537,000 acres comprising 88,339 parcels, or 1.85% of the state's non-public land base, with a value of $8.8 billion (Bailey and Thomson, 2023). The Auburn study put forward maps demonstrating relative concentrations of heirs' property by county in the southern states (see Figure 1). Relating to challenges posed by heirs' property and disaster benefits, other authors have matched concentrations of heirs' property with the National Risk Index, showing high concentrations in hurricane-vulnerable Eastern North Carolina (Dobbs and Gaither, 2023; see Figure 2).

Source: Author

Though heirs' property is not limited nationally by geography or race, it is closely identified with fractional ownership held by descendants of enslaved peoples in the American South who inherited their interest from an ancestor who purchased the property at some point during the tenuous

Figure 1. Estimated Total Parcels of Heirs Property in the Appalachian and Atlantic Southeast



Source: Bailey and Thomson, 2023

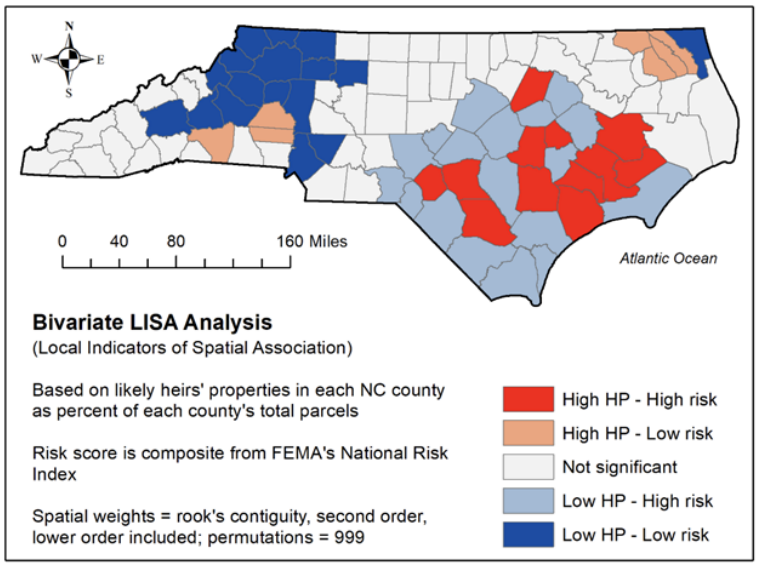
landholding environment in the hundred years following the American Civil War (Reznickova, 2023). While tied to the long trend of land loss among Black farmers, resulting from documented ties to institutional discrimination in private and public lending (Daniel, 2013), heirs' property is said to result from mistrust in the legal system and lack of access to legal services (Breland, 2021).

This article reflects the author's perspective as a former practicing attorney with experience in heirs' property cases who, through his appointment with North Carolina Cooperative Extension, has recently contributed to a series of outreach and education programs on heirs' property title resolution and retention titled *Heirs' Property at the Community Level* [1] ("HP@CL"). This work has been targeted to regions with high concentrations of heirs' property (from the Auburn study maps). This series has underscored the need for investigating the costs of voluntary title resolution of heirs' property title, which are not broadly documented. This series also highlighted estate planning to prevent further fractionalization, and the potential use of retention vehicles (e.g. agreements among partial-interest owners) for long-term management and disposition of parcels currently held as heirs' property, and the experiences of co-tenants engaging in such retention.

What is "Heirs' Property"?

When describing land, "Heirs' Property" generally describes a parcel of real property with multiple concurrent owners (known in common law as co-tenants) who have inherited their interests from a common ancestor through a state's intestate succession statute. Intestate succession laws operate to divide a decedent's estate—all that they owned on their date of death, composed of real property (land) and personal property (everything else)—when no will is submitted to divide property through the county probate process. When one dies without a will, they are said to have died "intestate." A state's intestate

Figure 2. Correlation of National Risk Index and Heirs' Property



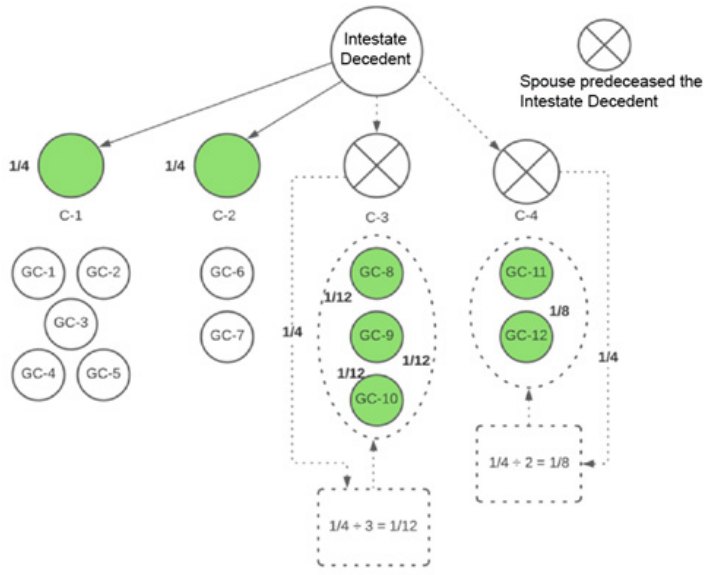
Source: Dobbs and Gaither, 2023

[1] This program was developed by Andrea Barnes, Gloria Bromell Tinabu, and Robert Zabawa, et al., through the Southern Rural Development Center, and funded by USDA's Risk Management Agency through Alcorn State University (Mississippi). The North Carolina Project Investigators are: Robert Andrew Branan, NC State University; Dari Biswanath, NC A&T University; Kurt Smith, NC State University; and Noah Ranells, NC (Cooperative Extension) Extension FarmLink Director. This paper reflects the views of the author alone and is not attributable to these other project investigators.

succession statute (in North Carolina, N.C.G.S. Chapter 29) appoints the shares of the intestate decedent's real and personal property to classes of individuals defined by their lineal (e.g. children, grandchildren, great grandchildren) or marital relationship to the intestate decedent, who are said to inherit by "intestacy." Such apportionment happens automatically, without public notice or court record or other evidence of title transfer in deed registries. For real property, each heir's share—known as an undivided interest—exists as a fraction of the whole of all real property title held by the "decedent," who themselves may have only held a fractional share in the parcel. For an intestate decedent who owned a whole or partial interest in multiple parcels, the division of a heirs' shares is identical for all parcels.

For illustration of intestate succession, see Figure 3 below. In this example, the intestate decedent owned 100% interest in a parcel, and died intestate with four children and no surviving spouse. The intestate succession statute assigns a share to each child of the decedent, divided by the number of that class (here, a one-fourth [1/4] share). If one or more of this class predeceases the parent yet had children of their own (i.e. grandchildren of the decedent), their 1/4 inherited share is preserved and divided among their children. If one of the four children had predeceased the intestate decedent with no children of their own, their share is extinguished and the divisible would be 3. In Figure 3, two of the intestate decedent's children have predeceased but have children of their own, so their 1/4 share is preserved and divided among their own children (who are grandchildren of decedent). It is not uncommon for grandchildren to predecease their intestate grandparent having produced children of their own (great-grandchildren of decedent). The result in the Figure 3 example is that, at the very moment of the intestate decedent's passing, two siblings each become owners of a 1/4 undivided interest, which is owned in co-tenancy with their nieces and nephews as 1/12 or 1/8 shares depending on how many siblings they have.

Figure 3. Example of Multiple Generation Intestate Succession From Original Landowner



Source: Author

Again, the same percentage allocation exists for all parcels of real property owned by the intestate decedent. For example, if the decedent owned a one-acre residential lot (and house) in town and a 40 acre undeveloped tract elsewhere, each parcel bears the same heirs' property profile. Over several generations, partial interests in title multiply while growing smaller.[2]

Unchecked intestate succession thus presents a labor-intensive—and as we will discuss, a financially risky—challenge to those seeking to determine 100% of the partial interests. Because heirs' property interests pass by intestacy with no will, public estate administration is rare. This leaves no record of property distribution in courthouse estate files and no record of transfers in the chain of title for the parcel in the county register of deeds, apart from principal ancestor's

[2] In the example in Figure 3, imagine that this parcel was purchased in the 1950's by an intestate who passes in the 1970's. By 2024, fractional interests will likely have passed to the great (possibly great-great) grandchildren of the original intestate decedent. It is also possible that spouses of any lineal descendant have inherited undivided interests per marital share allowances in intestate succession law.

original deed to the parcel (e.g. again, the "Intestate Decedent" in Figure 3).

Ownership shares are thus discerned by examining the principal ancestor's family tree. These are often developed by one of the ancestor's descendants to help resolve land title questions. To make a parcel marketable—to certify its title—the family tree must be proven by documentation of births and adoptions, and deaths, in the public record (often referred to as "vital records"). Often in the family tree, multiple descendants may have passed their partial interests via a simple will disposition to their legatees "share and share alike," which further divides that share, albeit with evidence in the public estates record of a transfer of that interest.

Heirs' property ownership profiles vary greatly in terms of numbers of co-tenants and their relationships to one another as siblings, aunts and uncles, cousins, from two at the minimum to potentially hundreds in extreme cases.[3] The author worked on cases where the number of heirs ranged from seven living siblings to 40+ individuals from four generations.[4] All co-tenants own their interests concurrently with full possessory interest in the parcel, meaning that no other partial interest owner (regardless of relative size of interest) can legally force another from occupation and use of the parcel as their own. It is not uncommon—on author's observation— for partial interest owners and their families to live in one or more residences on the property without interference of other co-tenants, some of whom may live far away and may be unaware of their ownership. One or more partial interest owners may farm the parcel but may be unable to access resources to growth their production and upkeep property infrastructure, including residences.

Heirs' Property as Stranded Wealth

As noted earlier, estimates of the assessed value of heirs' property in North Carolina range from $2 billion (Wake Forest School of Law, 2024) to $5.5 billion (HAC, 2023). Heirs' property is considered 'stranded wealth' in that the full economic use and value of a parcel is very difficult to fully realize. From a rural land management perspective, heirs' property ownership represents an insecure form of ownership of private real property in the sizable number of owners who have no structure to guide land management decisions or otherwise grant defensible title and other economic interests in the parcel. These economic interests (and opportunities to the owners) include farm and energy leases, and timber sales on parcels large enough to attract such interest. Such properties cannot produce clear titles to serve as collateral for farm operating loans or other development capital, and may not qualify for cost share and conservation programs that increase productivity or quality of a parcel's natural resources. Many properties fall into disrepair and are unproductive (Farmer, 2021). Lack of accountability and contribution among co-tenants for property taxes may result in foreclosure (Stark and Williamson, 2023).[5]

Lack of clear property title also hinders qualification for disaster payment programs (Berko and Mancini, 2024), although there has been some relaxation on paperwork required to affirm ownership of real property when applying for disaster assistance (FEMA, 2023). This issue was well-documented in the aftermath of Hurricane Katrina (Fleming et al., 2016), and may be identified as a coastal

[3] In the U.S. Supreme Court case of Hodel v. Irving, 481 U.S. 704 [1987], there were 439 co-tenants in a matter concerning lands held by members of the Oglala Sioux tribe. The Court held that a law ordering surrender of partial interests was an unconstitutional taking of private property. Though not explored in this article, heirs' property is a persistent status in Native American communities.

[4] Note that while we often refer to the entire group of fractional interest owners as "a family," who are indeed lineal descendants (and their spouses) of a common ancestor parcel owner the universe of interest holders consists of multiple families related by blood but too often little else due to time and geography.

[5] From professional experience, the author has observed that the tax payments will often fall to one or several co-tenants who making the annual payments without reimbursement from the other co-tenants.

resiliency issue in North Carolina's hurricane-prone coastal counties. As discussed further below, the 2018 Farm Bill relaxed the qualification requirements for some of its programs.

There are two principal challenges to economic use and value realization of heirs' property. First, no less than 100% of the partial interest holders can legally obligate the use and/or value of the entire parcel to a third party, such as collateral to a lender, exclusive occupancy and use to a lessee, or sale of natural resource to a purchaser (e.g. timber, mineral rights). Anecdotally, farmland is rented out and timber is sold without full co-tenant approval (i.e. by one or more co-tenants close by or living on the land), resulting in disputes over proceeds, but no lender will make a loan on land collateral for which title is not 100% accounted for (Davis Sr. et al., 1983). In the author's experience, collateralization requires certification by a professional liability insurance-backed title search and abstract (in North Carolina, by a licensed attorney), or a court order certifying ownership by a quiet title action or partition proceeding.

The second principal challenge in the productive use of heirs' property and property title resolution and retention work is the ever-present threat of partition. Interests in co-tenancy under common law are freely alienable and thus can be transferred by deed (e.g. gifted or sold) to an unrelated party who can then initiate a judicial partition action. In North Carolina and most states, partial interests—regardless how small—carry a right to a partition proceeding, whereby a single partial interest owner may petition for a court-supervised division of the parcel among co-tenants according to their percentage interests.

Partition actions are often considered involuntary title resolution in that they may frustrate the wishes, investments and even the homes of some co-tenants. Partition actions have one of two results: either partition-in-kind, where the parcel is subdivided and deeded to each co-tenant according to their relative share of the acreage, or judicial sale at public auction with distribution of proceeds to the co-tenants. An in-kind result—which courts have proclaimed a preference dating back to the early nineteenth century (e.g. such preference noted in Brown v. Boger, 263 N.C. 248 [1965])—depends largely on the parcel's size and natural features, and the likelihood of using this approach is perhaps inversely related to the number of co-tenants. In-kind partition fails in the face of a preponderance of evidence showing that economic hardship may only be avoided by a judicial sale of the entire parcel, with proceeds divided among the co-tenants according to their share (see N.C.G.S. §46A-75). Judicial sales occur with the sale of the entire parcel at auction to the highest bidder with proceeds distributed, after costs of the proceeding, to the partial interest owners according to their ownership share. Doing so extinguishes all other interests as a matter of law. The successful bid at such auctions may be well below what would otherwise be the market value of the parcel (Mitchell, Malpezzi and Green, 2010). Such partition sales often result in the title "exiting" the lineal family of the original parcel owner.

The often-lengthy path to establishing clear title to an heirs' property parcel by locating and securing consensus (by written agreement) of all partial interest owners for its management and/or disposition is overshadowed by the ever-present risk that the time and money invested in achieving consensus resolution will be lost in judicial partition sale. Though heirs' property resolution and retention policy, and proposed retention vehicles, are designed to avoid partition sales, such actions—whether partition in-kind or judicial sale—nonetheless clear title to these properties. While partition has been generally regarded as an unfavorable outcome where some interest holders live on the land or are dedicated to preserving family legacy, it is possible to resolve the title cooperatively among the

fraction classes of owners who are willing to forego challenging the partition and accept the valuation determined by the market to their interest.[6]

Instances of "partition-by-predation" have been documented, whereby a freely-transferrable partial interest is sold to someone outside of the parcel's ancestral lineage (e.g. Slade, 2020; Lewan and Barclay, 2002) who then initiates a partition action resulting in a partition-by-sale. Evidence suggests that Black American owners throughout the South have been more aggressively targeted by real estate developers, and with greater effect, than have other heirs' property owners (Mitchell and Powers, 2022). Indeed, one study suggests the threat of partition litigation, initiated by a blood-kin interest holder, is a rarity (Copeland and Buchanan, 2020). Though instances of predation have been documented, the extent to which partition sales have contributed to the historic decline in real property ownership by Black Americans (Francis et al., 2022) is unknown, though this contribution is a logical assumption.

Policy Responses to Heirs' Property

Source: Author

Voluntary title resolution and retention has recently become part of federal public policy, with programs and funding authorized in the 2018 Farm Bill, including United States Department of Agriculture (USDA) grants for resolution and prevention education, and loans to parcel interest owners to pay the costs of resolving title. In 2021, the USDA established the Heirs' Property Relending Program (HPRP) with $67 million in loans available to heirs' property interest holders to pay the costs of title on heirs' property parcels, and possibly to purchase other co-tenants' interests. USDA Risk Management Agency funding has been used to establish education programs, like the HP@CL series, to elevate the discussion of heirs' property resolution and retention. As with the relaxation of ownership documentation requirements by the Federal Emergency Management Agency (FEMA) noted above, the 2018 Farm Bill authorized the Farm Service Agency to accept documentation (short of full title certification) that demonstrates "control of the land for purposes of operating a farm or ranch" by a farm program applicant (USDA-FSA, 2022). Cost-free mediation by state agricultural mediation organizations, such as North Carolina's Agricultural Mediation Program, between co-tenants (including heirs' property cases) was also authorized in the 2018 Farm Bill. Regarding partition, however, the U.S. Constitutional tradition holds that most private land law is reserved for the states—so the threat of partition must be addressed there.

To that end, the primary response to the threat of partition sales has been state adoption of the Uniform Partition of Heirs' Property Act (UPHPA). As of July 2024, the UPHPA has been enacted in 22 states as well as the U.S. Virgin Islands and District of Columbia (ULC, 2024). (The UPHPA was introduced in 2023 in North Carolina as SB548/HB588 but has not yet passed.) The basic principle of the UPHPA is to allow non-petitioning co-tenants to purchase interests of petitioning co-tenants prior to any public sale. In the event of a partition petition demands partition-by-sale, the UPHPA requires the court to value the subject parcel at fair market value without any real market discount that would

[6] This is the author's direct experience using a unique feature of NC law called a timber partition [See N.C.G.S. §§ 46A-80], whereby timber may be severed but the underlying realty remains.

otherwise be attributed to its fragmented title status (i.e. without the costs required to make the parcel freely marketable as a whole). This value becomes the baseline for an "internal market place" among the partial interest owners, who have a time-limited option to acquire the interest of the party seeking partition. If more than one co-tenant elects to purchase the petitioner's share, each may purchase their current fractional interest of the share. In effect, while the statute does not necessarily resolve a parcel's fragmented title, the UPHPA does operate to incrementally consolidate it by reducing the number of co-tenants, and prevent a judicial sale to a buyer outside the family lineage. Apart from adoption of the UPHPA, others have suggested reforming the incidents of co-tenancy law, namely the requirement of 100% agreement, that prevent participation in programs for productive use of the property (Richardson and Miller, 2023).

Financial Risks on the Path to Voluntary Resolution

The path to voluntary resolution is long, and with the ever-present threat of partition by a single partial interest owner, time tends to put resources invested in voluntary resolution at risk. The resources invested in resolution may include attorneys' fees, family investigator time and costs (e.g. the person constructing the family tree of descending inheritors of interests from the principal intestate's lineage), property tax reimbursements, postage and delivery, and other costs associated with retrieving affidavits and vital records of marriages, births and deaths, some of which may be held in courthouses in other states and far from the site of the parcel. Though it is possible for a court to award recoupment of these investments, it is not mandatory. The burden of this investment may fall to one or more owners who often bear significant risk given no fractional interest owner can control the ultimate outcome. Indeed, every contact with a partial interest owner—especially letters that make people newly aware there is interest in the property—increases the risk of partition. And along the path toward resolution, an elderly fractional interest holder (who perhaps holds a relatively larger fractional share) might pass, with their share become further fractionalized by will or intestacy. In the event a partial interest owner petitions for partition during the long voluntary resolution process, it is unclear whether the person who has invested legal fees, paid property taxes, etc., can recoup these out-of-pocket costs.

Future Research and Education Directions

The HP@CL series has sought to highlight the economic challenges posed by heirs' property, demonstrate how individuals can prevent fractionalization (or further fractionalization) via thoughtful estate planning, and—once consensus has been reached among all partial interest holders—consider using a retention vehicle for continued management and prevention of partition. Admittedly this is a broad-brush effort to increase awareness. The next phase of this effort in such education will need to target education on facilitation of title resolution, such as creating a chart of interest succession through a family tree of lineal descendants of the original parcel owner, training demonstrations on accessing information from the public record to confirm data in the family tree, and training on real property title and estates research. Such information will be necessary in voluntary title resolution to both inform and convince other cotenants on the size of their partial interest in securing their agreement to participate in the resolution and retention process. This information is also likely necessary to certify land title in court actions where a judge or clerk of court requires evidence to support the percentages of all cotenants. As noted above, such required work is extensive, and probably not affordable if done by a lawyer. For legal practitioners, a logical next step is engagement with members of the legal community with education on resolution processes such as title certification, as well as design of retention vehicles such as limited liability companies and perhaps trusts.

An understudied area is the extent of personal financial resources required for voluntary title resolution versus partition. The monies required to "resolve" an heirs' property case when land retention is the

goal may be substantial; such cases would benefit from including private legal and other practitioners in deciding whether to take on an heirs' property matter, and to better advise clients on the risks and costs of resolving such cases (see Grabbatin and Stephens, 2011). Such research would also help a partial interest owner better understand their road ahead in terms of cost, and to what extent any invested funds are at risk. In addition, further research on the costs of partition would be valuable. Partition petition files and their reports, which include cost information, are publicly accessible in on-site court files. Unlike deed registries, however, which contain property transfer and birth, marriage and death records, partition case files are not widely digitized and available by internet search. Real cost figures on successful retention of title case resolution are elusive due to lack of record-keeping, subjectivity of the client's time valuation, and potentially client confidentiality.

Legal practitioner education might include demonstrations of the right cause of action to "certify" title for such transactions. Clear title is essential in most third-party transactions of interests in real property, such as timber, an energy lease or easement, or the entire parcel. What we call "cloudy title," the potential existence of claimants to an interest who are not part of the present transaction, presents partition risk to the grantee. A self-warranty of real property title not backed by an attorney's professional liability policy—a requirement to qualify for title insurance against adverse claims—may be of little practical value. Title certification requires an insurable certainty that there are no unknown heirs or non-participating partial interest owners in a transaction. For heirs' property cases, even extensive documentation and affidavits attesting to every individual owner's share and (lack of) transaction history concerning their share would likely not create an insurable certification where major capital is involved such as for loans, property sales, and long term solar leases. For cases with numerous partial interest owners where unknown or unlocatable heirs are an issue, legal counsel may choose to proceed in court with a quiet title action under state law, which is a plea to a court with jurisdiction to determine the definitive owners of a parcel as a matter of law, either removing or isolating clouds on title. Successful quiet title actions (or other declaratory judgment action, perhaps on an old deed) will require extensive documentation to achieve a court order declaring final ownership.

In the event that a certifiable clear title is achieved, a structure for management of co-tenancy interests that curtails their right of partition, provides management regime, restricts transfers of interests and creates an internal marketplace of interests (e.g. options upon occurrence of events and a valuation method for interests) must be drafted and presented to all cotenants, who should understand what they are being asked to sign. The three most common methods to prevent partition are through: a tenancy-in-common (TIC) agreement; an entity such as a corporation or a limited liability company (LLC); or a trust (often referred to as a "land trust"). A TIC is simply a contract between the co-tenants regarding land management and use, recorded in a chain of title. Creation of an entity can be accompanied by an operating agreement (contract) between the partial interest owners who deed their partial interests to the entity. In doing so they convert a real property interest to an intangible personal property interest. The question then becomes long-term sustainability of the entity, which may require contribution of members toward taxes, etc. and must have a system of accountability for non-participation.[7]

Perhaps the ultimate question in choosing between trust or LLC is how disputes and inaction—such as non-participation in decisions, non-contribution of taxes, or needed maintenance and improvement capital—would be handled. The question may lie in a comparative review of state trust

[7] Regarding the question of using a limited liability company or a trust, during the continuous back-and-forth of audience questions in the HP@CL series, multiple audience members suggested they were forming a trust on advice from legal counsel. Perhaps a matter of preference, the author primarily prescribed trust formation for "short term" management and asset distribution purposes such as following the death of trust settlor/grantor, or death of surviving settlor grantor for married clients. For longer-term management arrangements, the author prescribed a limited liability company.

law versus state "corporate" law, as to the relative strengths of beneficiary rights under a trust and shareholder/member rights under entity contract. There may be two sides to this coin: on one, the relative "safety" of the trustee or entity manager to serve the interests of the participants in the resolution who have contributed their partial interests to a unifying scheme; on the other, those trust beneficiaries or entity share owners who become frustrated with the trustee or entity manager's stewardship of the retention resolution. Relevant research issues include costs of administering such instruments, ease of long-term succession of management, efficacy of buy-sell options in the "internal marketplace" (which prescribes contractual process for valuation of interests, time frame for exercise, method of payment) drafted into trust or operating agreement (LLC).

Other questions also remain. As noted above, if indeed there is a judicial tendency to order the sale of the land when a partition-in-kind is feasible, will the consolidation of a majority of partial interests into a common entity (e.g. LLC) make partition-in-kind more feasible, or make a partition sale order less affirmable on appeal? Further research into a comparison between the sale and in-kind partition results of open land partition (i.e. farmland, forest tracts) and residential partition may not only establish a draw connection between sales and farmland loss, but allow more counsel to confidently prescribe the entity route to a client who can secure the contribution agreement of a majority of the interest holders.

Conclusion

Much of the focus of heirs' property outreach and education tends to focus on legacy preservation of lands that contribute to the cultural identity of at least some descendants of an original owner. Indeed, given the concerns outlined in advocacy for passage of the UPHPA, many consider voluntary heirs' property resolution a historical imperative. With the goals of wealth and legacy retention, most educational efforts, including the Heirs' Property at the Community Level project, focus on "how to prevent" and "how to prevent further fractionalization" of property. These efforts emphasize family communication and estate planning, and this is a necessary prelude to more in-depth to further education and training on the methods of voluntary title resolution.

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