

# HEIRS' PROPERTY OWNERSHIP:

## MOVING FROM SEEMINGLY INTRACTABLE PROBLEMS TO WORKABLE SOLUTIONS



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*Heirs' Property in the South: Fostering Stable Ownership to  
Prevent Land Loss and Abandonment*

# Heirs' Property Ownership

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- Subset of tenancy-in-common ownership
  - Tenancy-in-common ownership most prevalent type of common ownership of real property in the United States
- Under commonly understood definition, results from intestate succession
- Ownership form is what the law provides to those who do not develop their own common ownership legal agreements governing the ownership and management of their common real property. Those who do consult business and real estate lawyers when entering into common real property ownership agreements rarely choose the legal rules that govern tenancy-in-common ownership under the default rules.
  - Privately negotiated agreements tend to have provisions that:
    - Support continuity of ownership over time
    - Allocate rights and responsibilities in a rational way
    - Establish rules that provide for exit of individual members on fair terms

# Heirs' Property Ownership Challenges

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- Unstable and Insecure Ownership: Vulnerable to Forced, Partition Sales
  
- Problem with ownership which often becomes fractionated over time
  - Can result in property becoming paralyzed, inhibiting wealth generation given:
    - Default rules which don't allocate rights and responsibilities rationally
      - ✓ Often source of tension with respect to so-called carrying charges: *e.g.*, property taxes & insurance
    - Requirement of 100% agreement among cotenants on some important matters
  
- Problems with Lack of Clear Title
  - *E.g.*, Porterdale, Georgia's Heirs' Property Problem

# Property Owners Impacted

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- Generally: Tend to be low- to moderate-income property owners who are either not legally sophisticated or who lack access to affordable legal services. Some refer to these property owners as those who are *land rich but cash poor*.
- Those most at risk of losing their property as a result of a partition sale are those relatively poorer tenancy-in-common property owners whose property is either in the zone of development or in the path of development
- African Americans across the United States with rural property in question located mostly in the South
  - Estimated to be between 10-40% of black-owned property in many municipalities or regions
- Latinos/Hispanics in the southwest
- Poor white Americans in regions such as Appalachia
- Disadvantaged, disproportionately minority, property owners in urban centers
- Some Native Americans who own their property in fee simple as opposed to under a trust relationship with U.S.
- Some wealthier families who own what is sometimes described as “heir-locked” property

## Intestacy by Race and Educational Level

- Overall Intestacy Rate in U.S.: 42%
- Rates Correlate With Educational Level
- Stark Racial Differences in Rates

	<b>White</b>	<b>Black</b>
Black-White Intestacy Rates	35%	79%
Intestacy Among Those Without High School Degree	41%	79%
Those with college + graduate or professional degree	28%	68%

# Black Agricultural Land Ownership and Loss Statistics

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- In 1920 African Americans owned between 16 and 19 million acres of agricultural land
- By 1969 this number was approximately 6 million acres
- 2012 Agriculture Census (limited to agricultural land owners who also operate farm)
  - 44,629 full and part African-American owners own 3.6 million acres of land
    - Reasons to be skeptical? 1997 Census of Agriculture indicated that 18,451 black farmers owned between 1 and 2 million acres of land. Has there really been this much growth? Some believe these numbers; others do not.
- 1999 Agricultural Economics Land Ownership Survey (AELOS) indicated that there were 7,629,000 acres of black-owned agricultural land worth \$14.4 billion. AELOS is broader study than agricultural census as it includes all owners of agricultural land whether are not they operate farm, rent farm, or even do nothing with their land.

# Causes of Black Property Loss

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## **Non-Legal**

- Violence & Intimidation
- Voluntary Transactions

## **Involuntary Legal**

- Foreclosure
- Tax Sales
- Eminent Domain
- Partition Sales
- Adverse Possession

# Workable Solutions – Partition Action Abuses: Uniform Partition of Heirs Property Act – Promulgated by the Uniform Law Commission

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- Buyout Provisions
- If buyout does not resolve action, partition in kind unless great or manifest prejudice to cotenants as a group would result
  - Whether great or manifest prejudice would result determined utilizing multifactor test under which judge must weigh both economic and noneconomic factors. Provides substance to preference for partition in kind.
- Completely restructured sales process drawing upon partition law in other countries and the practice of a very limited number of state court judges in the United States
  - “Open-market” sales conducted by real estate broker under commercially reasonable circumstances, unless
  - “Sale by sealed bids or an auction would be more economically advantageous and in the best interest of the cotenants as a group”
  - Flexibility to sell property if no offers received within reasonable time



# Status Report on UHPA

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## Nationally

- Status of Enactment Efforts

## In South Carolina: Clementa C. Pinckney Uniform Partition of Heirs' Property Act



# Clear Title Problem

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- Without clear title, actual owners do not have the range of important property rights normally associated with ownership. These include:
  - Obtaining government grants to be used for the property, whether funds come from a municipal, county, or state government or from the federal government;
  - Selling or otherwise alienating the property in some other way;
  - Refinancing one's property;
  - Obtaining a governmental or private loan for which heirs' property constitutes collateral;
  - Obtaining notice about alleged property tax delinquency or other legal matters that could result in the involuntary loss of the property or in fines; and
  - Cashing insurance checks

# Workable or Possibly Workable Solutions – Making Title Clear:

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- Affidavits of Heirship or Small Succession/Estate Affidavits
  - In aftermath of Hurricane Katrina, response to thousands of families in New Orleans and in other parts of Louisiana who owned heirs' property but who lacked clear title to their property.
    - As a result, they were ineligible for federal monies made available to Louisiana under the Road Home program.
    - One Louisiana real expert has estimated that between \$65,000,000 and \$165,000,000 of Road Home funds never were claimed due to families who lacked clear title.
    - Those eligible to use heirship affidavits or small estate or small succession processes available in various states can save a significant amount of the expenses and expenditure of time associated with probating an estate
- Laws Enabling One Co-Tenant to Adversely Possess Against Another Co-Tenant
  - Permitted in some jurisdictions by statute and/or common law (judge-made law)
  - Can help consolidate ownership making property more manageable

## Problems with Ownership Structure Inhibiting Goals of Common Ownership Group

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- Direct Service Providers that Assist Individual Families in Some States
  - *E.g.*, Center for Heirs' Property Preservation in South Carolina
  
- Possible Ideas
  - Uniform Heirs' Property Act 2.0?
    - Allowing super majority of tenants in common to reach agreement to change ownership structure to one that enables families to implement more rational rules enabling property to be used in way that vindicates family's vision for the property
      - ✓ Would dispense with current requirement in all states that 100% of tenants in common unanimously agree on changing ownership form