

May 2022

HOT TOPIC ALERT

Tenancies in Common and Heirs' Property



Tenancy in common is the most frequent form of joint ownership of a single property. In many circumstances, this form of ownership works quite well. However, it can have severe adverse consequences on populations who enter this form of ownership through inheriting land intestate—that is, when the owner dies and leaves the land to their heirs without a will. Owning land as tenants in common means individual descendants lack clear title—owning a fractional interest in the entire property rather than a specific piece. After generations of intestate inheritance, ownership may be fragmented among tens or hundreds of heirs. Under the default common law, tenants-in-common may face a court-ordered partition sale by public auction if a single co-tenant demands it. This makes owners of “heirs property” vulnerable to forced sale and eviction, sometimes from land that has been in their family for generations. It is estimated that some 90% of Black-owned farmland acquired since the Civil War has been lost, in many instances due to forced partition.

Through the efforts of many, including many state REALTOR® organizations, these negative consequences are being minimized through the enactment of legislation that provides simple due process protections for owners of heirs' property, such as the Uniform Partition of Heirs' Property Act (UPHPA).

Tenancy in Common

A. Definition of tenancy in common

Generally referred to as concurrent estates, property law includes three types of estates. For the purposes of this paper, we will examine a tenancy in common which is defined by two or more people having separate ownership shares and rights in a property or parcel of land. Each person holds an individual, undivided ownership interest, which gives them an equal right to use the property or to transfer their ownership interest.

B. How tenancies in common are created

The [tenancy in common](#) is formed when two or more owners have an ownership interest in a property. Tenants in common may convey, or transfer, their property interests to another individual at any time during the life of the tenant. In the case where the owner passes without a valid will, the property will pass to their estate under the [rules of intestacy](#). Tenancy in common is the default form of joint ownership. If there is more than one heir under the intestacy rules, they will take the property as tenants in common.

Example: Larry is the sole owner of a small farm. He has he has three daughters, but has never bothered to make a will. He assumes that the daughter who works the farm with him will be the one to take over and inherit the farm after his death. When Larry dies, his property goes to his three daughters as tenants in common. The daughter who worked the farm does not have a greater interest than either of her sisters.

C. Partition of tenancies in common

[Partition](#) is a court action that divides property between co-owners. While joint owners usually can agree to split the property themselves, a partition action is when the court orders the division at the request of one of the co-owners. There are two kinds of partition: partition in kind; and partition by sale. [Partition in kind](#) is a physical division of the property determined by the court. Partition in kind is often difficult to achieve, especially where a structure such as a home is present on the property. Where it is not possible to equitably divide the property, a partition by sale will occur. In a partition by sale, the court forces the sale of the property and each co-tenant receives their share of the profits.

Sometimes, an heir gains ownership to a share of the tenancy in common – either as directed by a will or through intestacy - but has no desire to own part of the property. In fact, the heir may not even have the resources for their share of taxes assessed against the property. In these types of circumstances, the heir/owner may seek any type of cash settlement.

This leaves the other tenant in common owners in a vulnerable position because the purchaser may then force a partition by sale of entire property. Depending on the state where the property is located, this may result in the property being [sold by a court ordered receiver](#), or the property may be sold at auction at less than market value. As a result, the co-tenants lose their property rights and must take proceeds of forced sale, usually less than could have been obtained at an ordinary sale.

In [one tragic case](#) that demonstrates the inequities that can occur, an uncle and a niece inherited a property in North Carolina with a property tax assessed value of \$123,600. Taxes of approximately \$1,600 were due, but neither the uncle nor the niece had the resources to pay the tax. As a result, the county foreclosed on the property and the land went to auction. During the foreclosure process, an unscrupulous individual gave the uncle \$4,400 with an option to purchase his share of the property. Although the uncle was led to believe that the intent of the third party was to help the family keep the property, it was not. In the end, the niece received nothing upon the sale by partition and the uncle became homeless.

Heirs' property

[Heirs' property](#) is family-owned land that is jointly owned by descendants of a deceased person whose estate did not clear probate. The descendants, or heirs, have the right to use the property, but they do not have a clear or marketable title to the property since the estate issues remain unresolved.

Since some segments of the population lack access to legal services, property transfers may occur generation after generation without the benefit of wills or estate plans. When this happens, ownership of the land becomes increasingly fractionated with the passing of each generation, so that over time the lands may be owned collectively by dozens or more descendants. Frequently, some family members may continue to live on and work the land, while other co-tenants may move away and lose any connection to the land. Clearing title after numerous transfers can be expensive and time consuming, even when all co-tenants are in agreement, and is often just not done.

A. Impact of heirs' property on Black Americans

The impact of the issues with heirs' property are felt disproportionately by rural and Black American populations for whom owning property was a mission after the Civil War. Consider, for example, that while Black Americans owned 16 million acres of land in the US by 1910, [that figure had decreased](#) to about 3 million acres by 2012. In addition, [by some estimates](#), heirs property makes up more than a third of black-owned land in the Southern United States — 3.5 million acres, with a value of more than \$28 billion. Essentially, the property rights of the heirs are taken away through no fault of the owners, depriving heirs of generational wealth.

B. Stories demonstrating impact

The plight of Black American property owners is detailed by the story of [Evelina Jenkins](#). Ms. Jenkins, at 65 years old, had lived most of her life on property that her grandfather had farmed and raised his family on. For years, she paid a man \$15 a year that she was led to believe was for the payment of taxes on the land. Then, one year Mrs. Jenkins went to the man with the annual \$15 payment but was told that her payment for all those years was not for taxes but instead was an annual rent payment. He informed her that he owned the property during this time, not her. He also told her that he had now sold the property

and she would need to vacate the premises. It appears that the man had let the property taxes lapse on the land, and then bought it himself when the county sold it at auction. She now lives on land owned by her cousin, while her property has been transformed into what has been called a “a middle-class white playground and residential community worth many thousands of dollars.”

Another illustrative story is the case of [two brothers](#) - Melvin Davis and Licurtis Reels. The Reels family has ties to property in North Carolina dating back to Reconstruction, when apparently the land was gifted to family ancestors after being freed from slavery. Elijah Reels appears to have taken formal ownership of the land in 1911. Elijah’s grandson, Mitchell, eventually took ownership of the land but died intestate, which led to a distant relative being able to claim ownership of a portion of the land.

Although descendants of Mitchell Reels, brothers Licurtis Reels and Melvin Davis, continued to occupy and claim ownership of the property, the land was sold by another co-tenant in 1985 and then again in 1986, without their consent. From that time until 2011, the purchaser took the brothers to court numerous times and won judgment after judgment for the brothers to remove their homes and promise not to trespass on the land their family had owned for generations. But they refused to vacate the property or to concede ownership. Finally, in 2011 a Contempt of Court order was issued and the brothers were ordered to jail until they agreed to abide by the judgment to remove their homes and not trespass on the land. The brothers spent eight years in jail protesting the sale of property owned by their family as far back as 1911. The brothers remain in contempt of the court order even though they were released from jail in 2019. See also [Adams Creek Assoc. v. Davis, 257 N.C. App. 391, 810 S.E.2d 6 \(2018\)](#), *vacated and remanded* 371 N.C. 464, 818 S.E.2d 100 (2018).

C. Uniform Partition of Heirs’ Property Act (UPHPA)

The [Uniform Partition of Heirs Property Act \(UPHPA\)](#) helps preserve family wealth passed to the next generation in the form of real property. The UPHPA does this by providing a series of simple due process protections:

- notice,
- appraisal,
- right of first refusal, and
- if the other co-tenants choose not to exercise their right and a sale is required, a commercially reasonable sale supervised by the court to ensure all parties receive their fair share of the proceeds.

The has been adopted by 20 states and US Virgin Islands. [Legislation to adopt the Act](#) is pending in eight states and the District of Columbia.

The UPHPA is a model law promulgated by the Uniform Law Commission (ULC). The ULC, also known as the National Conference of Commissioners on Uniform State Laws, established in 1892, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

The UHPA was principally drafted by [Prof. Thomas Mitchell](#) at Texas A&M University.

Professor Mitchell is a [nationally recognized expert](#) on Black land loss. Professor Mitchell began taking action after witnessing the erosion of property rights by Black and other disadvantaged populations through heirs property. His work has identified the most vulnerable property owners as those who have a low income or low wealth and lack of access to legal services, and thus have a low rate of will making or estate planning (approximately 24% of Black Americans have a will, as opposed to approximately 61% of non-Latino white Americans). Their properties are located in areas undergoing intensification of development and a rapid appreciation of property values.

Since its introduction in 2010, the UHPA has had a positive impact in the twenty states where it has been adopted. There has been a significant reduction in number of abusive partition actions being filed in many states that have adopted the UHPA, including [Georgia](#) and South Carolina. The UHPA has also helped bring about a dramatic increase in sales prices being realized for partition sales under UHPA'S open-market sale procedure. For example, in one [Texas case](#), property sold for \$3,000,000 using UHPA open-market sales procedure, instead of the \$1,000,000 that would have been realized using the normal judicial sale, auction procedure conducted at the courthouse.

D. Heirs Property Relending Program

Federal legislation has also been enacted to help with the problem of heirs property. The [Heirs' Property Relending Program \(HPRP\)](#), established as part of the 2018 Farm Bill ([PL 115-334](#)) lends funds to eligible entities to make loans to assist heirs with resolving ownership and succession issues on farmland with multiple owners. [Eligible lenders](#) may borrow up to \$5 million for relending, at an annual interest rate of 1%. The Department of Agriculture (USDA) provides funds to intermediary lenders who, in turn, make loans to qualified individuals. Funds may also be used for buying out the interests of other heirs in jointly-owned property, and for expenses incurred in clearing the title to the heirs property, including closing costs, appraisals, title searches, surveys, preparing documents, mediation, and legal services. To date, [\\$67 million](#) has been appropriated for the HPRP.

E. HPRP alternative documentation

In addition to loans, the HPRP established a program to assist the operators of heirs property in becoming eligible for federal agricultural assistance. The USDA requires a farm number for participation in these programs, but with unclear title, such a number can be difficult, if not impossible, to obtain. The HPRP allows heirs' property operators (not just owners) to establish a farm number, to be eligible for USDA programs. These programs include lending, disaster relief programs, and participation in county committees.

If a state has adopted the UHPA, a farm number will be issued on presentation of:

- A court order verifying the land meets the definition of heirs' property as defined in the UHPA; or

- A certification from the local recorder of deeds that the recorded owner of the land is deceased and at least 1 heir has initiated a procedure to retitle the land.

In states that have not adopted the UHPHA, a farm number can be obtained by presenting:

- A tenancy-in-common agreement, approved by a majority of the owners, that gives the individual the right to manage and control a portion or all of the land,
- Tax returns for the previous 5 years showing the individual has an undivided farming interest,
- Self-certification that the individual has control of the land for purposes of operating a farm or ranch,
- Any other documentation acceptable by the FSA county office, that establishes that the individual has general control of the farming operation, including, but not limited to, any of the following:
 - o affidavit from an owner stating that the individual has control of the land
 - o limited power of attorney giving the individual control of the land, or
 - o canceled checks and or receipts for rent payments and/or operating expenses.

F. REALTOR® Association activity

The National Association of REALTORS® (NAR) represents 1.5 million residential and commercial practitioners involved in all facets of the industry as brokers, sales agents, property managers, appraisers, and counselors. As the largest professional trade association in the United States, NAR advocates for policies that promote and protect a dynamic U.S. real estate market and fosters homeownership and investment opportunities for qualified purchasers of real property. A fundamental principle of NAR is the protection of property rights.

The National Association of REALTORS® State and Local Issues Policy Committee and the Fair Housing Policy Committee examined these issues through an informational webinar on April 13, 2022. As of this publication, the State and Local Issues Policy Committee is determining whether to add a policy statement to encourage its state associations to promote legislation to reform state laws that provide due process protections for owners of heirs' property, such as the UHPHA.

State REALTOR® associations have helped the UHPHA over the finish line in several state legislature

South Carolina – With the support and efforts of the South Carolina Association of Realtors, the [Clementa C. Pinckney Uniform Partition of Heirs' Property Act](#) was passed in 2016. The Act was named in honor of the late pastor and Senator Clementa Pinckney, who was killed in the [2015 Emanuel African Methodist Episcopal Church shooting in Charleston](#), and whose legislative career included advocacy on behalf of disadvantaged property owners. Local affiliates, like the Charleston Trident Area Association of REALTORS®' Diversity and Inclusion Task Force, also continue to work to educate the

public on property rights and assist those that are dealing with heirs' property issues.

California – On March 8, 2021, the California Association of Realtors (CAR) announced a Fair Housing and Equity legislative package designed to help address ongoing fair housing and equity issues that persist, especially for communities of color. Recognizing the need to address California's worsening housing affordability and availability crisis with increased housing supply and fair housing reforms, C.A.R. has established the Californians Need Housing Now initiative. This initiative has urged the Legislature to enact the bills specifically designed to address the historic and ongoing inequities facing black, indigenous, and people of color (BIPOC) communities that have made it harder for these communities to access and afford housing in California. Included in this package was [Uniform Partition of Heirs Property Act](#). This bill adds California to the list of states that utilize the Uniform Partition of Heirs Property Act (UPHPA), an act promoted by the Uniform Law Commission.

Other state associations are working for adoption of the UPHPA. In Massachusetts, a state in which legislation to enact the UPHPA is pending, [the Association of Realtors®](#) has an online seminar series given by Professor Mitchell, in which the UPHPA is explained and which sets out suggestions for advocacy for the UPHPA. The Maryland Association of Realtors® has put its support behind [HB 777/SB 92](#), bills to enact the UPHPA. Both bills passed the Legislature by unanimous votes, and are being sent to the Governor for approval.

G. Other Organizations

The UPHPA has support from a wide range of organizations. The [American College of Real Estate Lawyers](#) was an early supporter of the Act. The American Bar Association, particularly its sections of [State and Local Government Law](#) and [Real Property, Trust and Estate Law](#), has also advocated for the UPHPA, and continues to provide education materials on the Act and also engages in discussion regarding ways to strengthen the protections for owners of heirs property.

Other [organizations who support the UPHPA](#) include the NAACP, the American Planning Association, and the American Land Title Association.

The farm machinery manufacturer [John Deere](#) has joined with the [National Black Growers Council](#) and the [Thurgood Marshall College Fund](#) to establish a [coalition](#) focused on the work needed to improve the livelihoods of Black farmers. The coalition will place a particular emphasis on the preservation of heirs' property in rural communities. The Federation of Southern Cooperatives, with funding provided by John Deere, is sponsoring [summer interns](#) to work on the legal issues surrounding heirs property.



CONCLUSION

The Uniform Partition of Heirs Property Act and similar legislation holds remarkable promise for protecting property rights, curbing partition abuse, and preserving family wealth. More work needs to be done to get this important legislation enacted into all remaining US jurisdictions, with state REALTOR® associations playing an important role in this effort. REALTORS® can help reform property law to address the loss of property and wealth by vulnerable populations.

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