SOLUTIONS FOR HEIRS PROPERTY OWNERS

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Abstract 140
I. Introduction 141
II. Overview of Heirs Property 142
A. Heirs Property and Tenancy in Common 145
III. Heterogeneity with Heirs Property 149
IV. Agricultural Concerns and Farm Bill Provisions 152
A. Agricultural Concerns 152
B. Farm Bill Provisions 152
1. Farm Number 153
2. Relending Program 155
V. Other Policy Solutions 158
A. The Uniform Partition of Heirs Property Act 158
B. The Uniform Tenants in Common Transactions Act (Draft) 162
VI. Tips for Agricultural Attorneys 164

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A. Prevention ... 164
B. Resolution ... 166
1. Overview ... 166
2. An Example: Resolving the Case Study ... 167
VII. Conclusions and Recommendations ... 168

ABSTRACT

What are some solutions for heirs property owners? An offered solution assumes that there is a problem, and the first step must be clearly defining the problem. But, as the authors explain, the term "heirs property" proves difficult to define because of the vast number and scope of heirs property scenarios. Stated very simply, the term refers to a subset of tenancy in common property where the owners received concurrent interests in land through inheritance. But, heirs property is anything but simple. In fact, it is quite complex, beginning with the ownership picture of heirs property tracts of land: the owners are typically related and may number in the dozens, hundreds, or thousands.

The core issues arising from heirs property relate to the legal form of ownership - tenancy in common. Tenancy in common ownership is defined by certain key characteristics that have likely contributed to the complexity of how best to resolve heirs property, particularly in agriculture. Therefore, this article begins by explaining heirs property, and the overarching form of ownership, tenancy in common.

The authors then identify and discuss two major areas of concern with respect to heirs property generally, and more specifically with respect to heirs property that is utilized in production agriculture. First, the economic (or efficiency) concern refers to the fact that the cotenants cannot put the property to its maximum economic use. Second, the vulnerability (or displacement) concern arises where one cotenant fears loss of their fractional interest due to the unilateral actions of another cotenant.

The article goes on to explore potential solutions for heirs property, and particularly those heirs properties that are used in agriculture, including 2018 Farm Bill provisions that attempt to alleviate some of the economic impact of heirs property on farm operators, as well as other policy innovations and draft uniform laws that seek to address heirs property and the impacts of partition on heirs property used in agriculture.

The Article concludes by making recommendations to agricultural attorneys on addressing both the prevention and resolution of heirs property and making

policy recommendations. Along the way, the authors uncover a neglected barrier to resolution of heirs property issues- the lack of sufficient state legislation addressing the clearing of title for heirs property. The authors conclude that heirs property constitutes an urgent problem in the United States, because many acres of farmland lie idle due to the effects of heirs property. There is a need for a sense of urgency in order to address the heirs property conundrum and potentially unlock huge amounts of economic development presently trapped in heirs property.

I. INTRODUCTION

The Jones family traces its roots to a historical African American farming community in southern West Virginia.[1] Ruby Jones is the only family member still residing in their hometown, residing on the homeplace. The homeplace consists of a small residential dwelling and 3 parcels of land totaling 75 acres. Ruby grows hay on a portion of the property, feeding the hay to the small number of cattle that graze on the pastureland on the property. Additionally, about one-third of the property is wooded. Ruby pays the property taxes and insurance, and she runs the farm with her own money, usually making a small profit or showing small losses. She also teaches math at the local elementary school.

Ruby's great-great-grandfather, George, who died in 1904, and her great-great-grandmother, Mary, who died in 1923, acquired the property by deed in 1889. Neither George nor Mary had a will, neither of the two estates were properly probated, and no affidavits of heirs were recorded. No probate has been conducted since. The local real property tax records show the owner of the property as "The Estate of George Jones."

Ruby is the family historian and has meticulously maintained a family tree. 25 heirs of Mary Jones exist, to Ruby's knowledge. She jokingly says that she has not checked Ancestry.com. The locations of all heirs are known, and most are still in West Virginia, with a few in neighboring Ohio and Pennsylvania.

Ruby would like to keep the farm in the family and enroll the land in some federal conservation programs. She thinks that all of the heirs would agree to putting the land in a limited liability company and structuring an arrangement where she could continue to live on the property.

Ruby and her family own the land referred to as heirs property. Heirs property deservedly receives increasing attention as an urgent problem in the

1. This hypothetical is loosely based on a family with heirs property in southern West Virginia.

United States.[2] Little empirical data exists, but heirs property presents issues for large numbers of landowners.[3] This Article will focus primarily on potential use of heirs property in agriculture, including forestry. Owners find it difficult, if not impossible, to farm land held as heirs property, for reasons explained later in this Article.[4]

The Article begins by explaining heirs property and the overarching form of ownership, tenancy in common. Section III provides a brief overview of the highly heterogeneous nature of heirs property, a neglected but important issue.

The authors then explain and analyze the recent farm bill provisions that attempt to alleviate some of the economic impact of heirs property on farm operators. The other major current existing policy innovation, directed at the potential impacts of partition on heirs property, is then examined. Another uniform law, in draft form, seeks to provide default rules for owners of tenancy in common property. This draft effort is analyzed and alternatives are compared.

The Article concludes by making recommendations to agricultural attorneys on addressing both the prevention and resolution of heirs property, walking through the resolution of the Jones family heirs property, and making policy recommendations. Along the way, the authors uncover a neglected barrier to resolution of heirs property issues—the lack of sufficient state legislation addressing the clearing of title for heirs property. The authors conclude that heirs property constitutes an urgent problem in the United States. In particular, many acres of farmland lie idle due to the effects of heirs property. Policy makers presently lack the sense of urgency necessary to address the heirs property conundrum and potentially unlock huge amounts of economic development presently trapped in heirs property.

II. OVERVIEW OF HEIRS PROPERTY

The term "heirs property" proves difficult to define. Stated very simply, the term refers to a subset of tenancy in common property where the owners received concurrent interests in land through inheritance.[5] The owners are typically related

2. B. James Deaton, *A Review and Assessment of the Heirs' Property Issue in the United States*, 46 J. ECON. ISSUES 615, 615–616 (2012) [hereinafter *A Review and Assessment of the Heirs' Property Issue in the United States*].

3. *Id.* at 616.

4. *Id.* at 619.

5. *Id.* at 616.

and may number in the dozens, hundreds, or thousands.[6] The Uniform Partition of Heirs Property Act (UPHPA or the Act) defines the term as:

real property held in tenancy in common which satisfies all of the following requirements as of the filing of a partition action:

(A) there is no agreement in a record binding all the cotenants which governs the partition of the property;

(B) one or more of the cotenants acquired title from a relative, whether living or deceased; and

(C) Any of the following applies:

(i) 20 percent or more of the interests are held by cotenants who are 10 relatives;

(ii) 20 percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased; or

(iii) 20 percent or more of the cotenants are relatives.[7]

The percentages in this definition are not universally agreed upon as being determinative of whether a property is of a type that can be referred to as heirs property.[8] Instead, it appears that the authors of the Act selected these arbitrary figures in an attempt to define heirs property for purposes of the Act.[9]

6. *Id.*

7. NAT'L CONF. OF COMM'RS ON UNIF. STATE L., UNIFORM PARTITION OF HEIRS PROPERTY ACT 9 (2010).

8. *See id.*

9. *See id.*

Heirs property proves particularly prevalent in poor African American and Native American communities,[10] as well as low-income areas of Appalachia.[11] Although the vast majority of scholarship and media coverage focus on African American heirs property issues, heirs property also impacts white families.[12]

Although many interesting issues can be studied, discussed, and debated with respect to heirs property, two major areas of concern arise with heirs property generally—and more specifically, with respect to heirs property that is utilized in production agriculture.[13] First, the economic (or efficiency) concern refers to the fact that the cotenants cannot put the property to its maximum economic use.[14] Second, the vulnerability (or displacement) concern arises where one cotenant fears loss of their fractional interest due to the unilateral actions of another cotenant.[15] Some inconsistency exists in the literature with respect to the vulnerability concern. While citing the concern, anecdotal evidence indicates that owners of heirs property find it "inconceivable" that one owner could force a sale

10. B. James Deaton et al., *Examining the Consequences and Character of "Heir Property"*, 68 ECOLOGICAL ECON. 2344, 2344–45 (2009), https://www.sciencedirect.com/science/article/abs/pii/S0921800909001177 [https://perma.cc/3Y65-2FUZ] (citing Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. UNIV. L. REV. 505, 517 (2001), https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1783&context=facscholar [https://perma.cc/T3MZ-D5LT]); J. F. DYER, ALA. AGRIC. EXPERIMENT STATION, HEIR PROPERTY: LEGAL AND CULTURAL DIMENSIONS OF COLLECTIVE LANDOWNERSHIP 3 (2007), https://aurora.auburn.edu/bitstream/handle/11200/4107/BULL0667.pdf?sequence=1 [https://perma.cc/N8LB-FQ6B]; J. A. Shoemaker, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 WISC. L. REV. 729, 729 (2003).

11. DYER, *supra* note 10, at 12; B. James Deaton, *Land "in Heirs": Building a Hypothesis Concerning Tenancy in Common and the Persistence of Poverty in Central Appalachia*, 11 J. APPALACHIAN STUD. 83, 83–84 (2005) [hereinafter *Land "in Heirs"*]; B. James Deaton, *Intestate Succession and Heirs Property: Implications for Future Research for the Persistence of Poverty in Central Appalachia*, 41 J. ECON. ISSUES 927, 927 (2007) [hereinafter *Intestate Succession and Heirs Property*].

12. Thomas Mitchell, *Historic Partition Law Reform: A Game Changer for Heirs' Property Owners*, *in* HEIRS' PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT 65, 77 (Cassandra J. Gaither et al. eds., 2019), https://www.srs.fs.usda.gov/pubs/gtr/gtr_srs244.pdf [https://perma.cc/ENF5-FMFN].

13. Deaton et al., *supra* note 10, at 2345; *A Review and Assessment of the Heirs' Property Issue in the United States*, *supra* note 2, at 617.

14. Deaton et al., *supra* note 10, at 2345.

15. *Id.*

of the property.[16] These owners often learn of the partition rules after a petition for partition has been filed.[17]

With respect to the economic concern, De Soto labeled land in third world countries plagued by improperly documented ownership rights as "dead capital."[18] These assets cannot be used as collateral or otherwise turned into capital.[19] Noting the similarities, Deaton extends this concept to heirs property.[20] A prevalence of heirs property therefore leads to persistent poverty in a region due to this inability to convert land into wealth because of the limitations on use or sale of the property that would generate an economic return.[21]

Deaton also extends the theory of the anticommons to heirs property, showing how a prevalence of heirs property hinders economic development.[22] In contrast to the "Tragedy of the Commons," where no one holds the right to exclude and many hold the right to use, an anticommons exists where a large number of owners have the right to exclude.[23] Instead of resulting in overuse of the resource, anticommons property is underutilized.[24] That nature of tenancy in common property leads to underutilization as the number of cotenants expand.[25]

A. Heirs Property and Tenancy in Common

The core issues arising from heirs property relate to the nature of the tenancy in common form of ownership,[26] which has been referred to by some as dysfunctional.[27] Tenancy in common is a type of legal ownership of property that involves two or more owners who hold an undivided interest in fractional shares

16. NAT'L CONF. OF COMM'RS ON UNIF. STATE L., *supra* note 7, at 4.

17. *Id.*

18. HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 5–6 (2000).

19. *Id.*

20. *Land "in Heirs," supra* note 11, at 83–84.

21. *Id.* at 84.

22. *Intestate Succession and Heirs*, *supra* note 11, at 928–29.

23. *Id.*

24. *Id.*

25. *Land "in Heirs," supra* note 11, at 84 (explaining that the inclusion of "heirs" in the title results from the fact that the owners are usually related and have acquired the property through inheritance. However, tenancy in common property does not necessarily arise from inheritance.).

26. *Id.*

27. NAT'L CONF. OF COMM'RS ON UNIF. STATE L., *supra* note 7, at 7.

of the real property.[28] The fractional shares need not be equal.[29] The cotenants share the unity of possession, meaning each holds the right to possess the whole property.[30] Each cotenant holds the right to use and occupy the entire property, limited only by the same rights of other cotenants.[31]

Tenancy in common ownership of property forms the default type of tenancy among multiple owners in almost every state, with grants and devises to multiple owners presumed to pass on the property as tenancy in common, unless clear language indicates otherwise.[32] Heirs and co-devisees are also presumed to take as tenants in common.[33]

Tenancy in common ownership is defined by certain key characteristics that have likely contributed to the complexity of how best to resolve heirs property, particularly in agriculture. It is important to note and understand that tenancy in common does not involve the right of survivorship.[34] Instead, upon the death of one cotenant, the undivided fractional share held by that cotenant passes to the cotenant's heirs as part of the deceased cotenant's estate.[35]

In addition, a cotenant may convey their undivided fractional interest by deed, will or otherwise, and may also encumber their interest.[36] With respect to any encumbrances due to a financial obligation of a cotenant, creditors of a cotenant may enforce the debt against that cotenant's interest in the property.[37] Additionally, if a foreclosure occurs, the creditor is substituted as a cotenant.[38]

Another key component of tenancy in common ownership is that any cotenant holds the right to seek a judicial partition, dividing the land among the owners based on each cotenant's fractional share.[39] This "virtually unconditional" right seeks to "prevent a forced continuation of shared ownership of property."[40] Along with the right to alienate, the right to partition provides an opportunity for a

28. 7 *Powell on Real Property* § 50.01(1) (2023).
29. *Id.*
30. *Id.*
31. 7 *Powell on Real Property* § 50.03(1).
32. 7 *Powell on Real Property* § 50.02(2).
33. 7 *Powell on Real Property* § 50.02(6).
34. 7 *Powell on Real Property* § 50.01(2).
35. *Id.*
36. 7 *Powell on Real Property* §§ 50.02(9), 50.06(4).
37. 7 *Powell on Real Property* § 50.05(2).
38. *Id.*
39. 7 *Powell on Real Property* §§ 50.07(1), (3)(a).
40. 7 *Powell on Real Property* § 50.07(3)(a).

cotenant to "exit from contentious relationships."[41] Therefore, the key characteristic of the right to partition also forms a possible solution for some heirs property owners. Indeed, the importance of this ability to escape from being trapped in an untenable ownership situation leads some to suggest that courts may apply the rules relating to partition in such a way as to encourage the filing of partition actions.[42] Denying a partition "effectively expand[s] the property rights of one cotenant at the expense of other cotenants."[43]

With respect to how partition laws are typically applied in an heirs property situation, the partition laws of "[e]very state but Iowa and Indiana express[] a preference for partition in kind."[44] If the land cannot be fairly divided among the owners, only then may the court order that the land be sold and that net proceeds be divided among the cotenant owners in accordance with their fractional ownership.[45] Importantly, at any time, the cotenants may avoid a partition by sale and instead agree to a voluntary division in kind of the property, but all cotenants must join the written agreement for this approach to work.[46]

In addition, 15 states allow for partition by allotment.[47] Partition by allotment could prove particularly valuable in resolving heirs property situations, allowing for one or more cotenants to take shares of the property and pay the other cotenants who wish to exit as cotenant owners for their share.[48] Partition by allotment can also take the form of a partition in kind where the shares are not equal.[49] Cash

41. 4 *Thompson on Real Property* § 31.07(a) (2023).

42. *Id.*; *see, e.g.*, Jesse J. Richardson, Jr., *The Uniform Partition of Heirs Property Act: Treating Symptoms and Not the Cause?*, 45 REAL EST. L.J. 507, 556–59 (2017) (creating a typology of heirs property owners including Identity Owners, Trapped Owners, and Opportunistic Owners).

43. 7 *Powell on Real Property* § 50.07(3)(a) (2023) (the Uniform Partition of Heirs Property has been criticized for expanding the rights of some co-owners at the expense of others); *see* Richardson, *supra* note 42, at 562–65.

44. Richardson, *supra* note 42, at 530 (citing Iowa Code § 651.2 (2022)); *see also* John D. Casagrande, Jr., *Acquiring Property Through Forced Partitioning Sales: Abuses and Remedies*, 27 B.C. L. REV. 755, 775 (1986), http://core.ac.uk/download/pdf/71458362.pdf [https://perma.cc/4KUR-5ZSN]; *see generally* Ind. Code § 32-17-4-2.5 (2023).

45. Richardson, *supra* note 42, at 531–32.

46. 7 *Powell on Real Property* § 50.07(2).

47. Zachary D. Kuperman, *Cutting the Baby in Half: An Economic Critique of Indivisible Resource Partition*, 77 BROOK. L. REV. 263, 269, 291–92 (2011).

48. *Id.* at 269–70.

49. 7 *Powell on Real Property* § 50.07 (4)(c).

payments, called owelty, are made between the owners in order to equalize the shares.[50]

Partition by allotment is one approach that can facilitate settlement among the heirs who no longer want to own the property as cotenants.[51] If one or more heirs possesses the ability to buy out other shares, then possibilities are expanded.[52] Of course, practical challenges must be addressed, as each piece of land is unique.[53] Even if the land can be divided into equal shares with respect to acreage or land area, the pieces will not be equally valuable.[54] Slopes, soil quality, road access, and other factors will also differ.[55] Therefore, the availability and accessibility of cash can then help equalize the shares among the cotenants.[56]

Because judicial partition laws in most states require the party seeking partition to first prove how, or whether, the land that is owned by cotenants can be divided in kind, any judicial partition proceeding to divide property in kind is not quick or inexpensive; rather, any effort to undergo some type of judicial partition typically comes with significant costs and investments of time.[57] Assuming that most owners want to maintain their fractional share, then such costs and expenses can include those associated with hiring a surveyor, real estate appraiser, and associated legal fees and costs.[58] One study revealed an average completion time for partition cases of 653 days, and cases that were not complete were dismissed after an average of 500 days.[59] In many instances, the legal costs are so significant they exceed the value of the property.[60] Therefore, to the extent possible, cotenants should work to voluntarily partition heirs property or otherwise take steps to voluntarily address the cotenant ownership.

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50. Thomas Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1, 13 (2014).

51. *See generally* Manuel Farach, *The Uniform Partition of Heirs Property Act: A Solution in Search of a Problem*, FLA. BAR J., Nov.–Dec. 2018, at 56 (2018).

52. *Id.*

53. *Id.*

54. *Id.* at 57.

55. *See generally id.*

56. *See id.; see also* Thomas Mitchell, *Reforming Property Law to Address Devastating Land Loss, 66* ALA. L. REV. 1, 13 (2014).

57. *Id.* at 58.

58. *Id.*

59. *Intestate Succession and Heirs Property*, *supra* note 11, at 937.

60. *Id.* at 936–37.

Another tool that is often discussed in the context of property owned by cotenants is to pursue an action based on the doctrine of adverse possession.[61] However, in order to acquire sole title through adverse possession, a cotenant must prove each element of the doctrine of adverse possession, including ouster, or "acts inconsistent with, and exclusive of, the rights of cotenants not in possession."[62] The other cotenants must also have actual or constructive knowledge of those acts.[63] The acts "must be in repudiation of the cotenancy and notice of the repudiation must be clear, unequivocal, and unmistakable."[64] Therefore, despite "coffee-shop law" surrounding adverse possession, merely paying expenses of the property or receiving the rent fails to suffice to establish a claim of ownership based on adverse possession.[65]

III. HETEROGENEITY WITH HEIRS PROPERTY

Although heirs property is a subset of tenancy in common property, the literature fails to clearly delineate the boundaries of the subset.[66] Problems inherent in tenancy in common property are routinely assigned to heirs property, and vice versa.[67] However, "the nature of heirs[]property clearly exacerbates the inherent problems of tenants in common property."[68]

Heirs property can be viewed as a more complex subset of tenancy in common property because of the number of heirs and the distribution of undivided interests.[69] Further complexities arise with heirs property when trying to determine whether all heirs are known, whether the locations of the heirs are known, whether some heirs are located in different states or different countries, and the length of time that the property has been passed down with no corrective action.[70] Other factors that add to the complexity of heirs property generally include the size of

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61. *See, e.g.*, *Heirs' Property*, VT. L. SCH. CTR. FOR AGRIC. & FOOD SYS., FARMLAND ACCESS LEGAL TOOLKIT (June 18, 2023, 9:08 PM), https://farmlandaccess.org/heirs-property/ [https://perma.cc/EC7M-LABG] (state specific heirs property fact sheets, including a section on state adverse possession law).

62. 7 *Powell on Real Property* § 50.03(1)(b).

63. *Id.*

64. *Id.*

65. *Id.*

66. Richardson, *supra* note 42, at 510.

67. *Id.*

68. *Id.*

69. *See Land "in Heirs," supra* note 11, at 84.

70. *See id. See also* Jennifer Harrington, *The Problem with Heirs' Property,* IOWA STATE UNIV. CTR. FOR AGRIC. L. AND TAXATION (Feb. 27, 2022), https://www.calt.iastate.edu/article/problem-heirs-property [https://perma.cc/G9BE-TT6T].

the parcel at issue and value of the land, including its potential for development.[71] These factors, along with geographic dispersion, create complex transactions and substantial legal costs to partition the land or to otherwise clear title.[72]

Furthermore, as the number of owners increases, the transaction costs of selling or mortgaging the property increase significantly.[73] The value of each individual interest depends, in part, on the actions of other cotenants.[74]

Over time, practical problems become unresolvable. Under American law of co-ownership, unless fractional owners unanimously consent, the underlying land cannot be managed in any useful way; nor can it be mortgaged; nor can any discrete fraction of the land be sold. Without effective democratic self-governance mechanisms for co-owned property, '[h]eir property is rarely improved or developed. . . .'[75]

The complexity of each heirs property situation varies with respect to whether prior estates have been probated or not and, if not, the length of time between the last probated estate and the present.[76] Lack of probate is not a prerequisite to the ownership of heirs property.[77] Put another way, heirs property is not solely due to the lack of a formal will, estate planning, or probate proceedings.[78] However, a complete lack of prior probate significantly complicates resolving the title, increases fees and expenses in connection with efforts to resolve title, and, as more time passes between the last probated estate and the present, the more complex and expensive any proposed resolution becomes.[79] In addition, the number of heirs, whether some heirs are unknown, and the location of heirs all impact the complexity of solutions.[80] In particular, if some heirs reside in a different state from which the land is located, or heirs passed away while resident of a different states, tracing and resolving title becomes more complex and fees

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71. *See id.*
72. *Intestate Succession and Heirs Property*, *supra* note 11, at 937.
73. *Land "in Heirs*,*" supra* note 11, at 84.
74. *Id.*
75. Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L. J. 549, 606 (2001).
76. *See*, *e.g., id.* at 551.
77. *See* Jennifer Harrington, *The Problem with Heirs' Property*, IOWA STATE UNIV. CTR. FOR AGRIC. L. AND TAXATION (Feb. 27, 2022), https://www.calt.iastate.edu/article/problem-heirs-property [https://perma.cc/G9BE-TT6T].
78. *See generally id.*
79. *Id.*
80. *See id.*

increase exponentially.[81] These factors similarly effect the feasibility of a partition in kind of the property.[82]

The type of property also impacts whether partition in kind may resolve the title issues and controls the range of possible resolutions. Heirs property ranges from an urban lot or townhome to a rural farm or forest property. Each of these types of properties requires a different approach to resolve the title issues

Even if all prior estates have been probated, and all heirs are known and can be located, the dysfunctional nature of tenancy in common still poses obstacles to efficient use of the property.[83] Unless all heirs agree on the course of action, deadlock might result and the property will then likely lie dormant.[84] Heirs that wish to escape the trap may file a partition action or sell their interest to a third party.[85] Disagreement among the known heirs may lead to unpaid taxes, lack of hazard and liability insurance on the property, and other issues that increase the vulnerability concern.[86]

Finally, and perhaps most importantly, the financial status of the heirs factors heavily into both preventing heirs property from occurring and resolving existing

81. *Id.*; *How to Find Missing Beneficiaries to Ensure They Receive Their Rightful Inheritance*, TITLE RSCH. (June 14, 2022, 10:48 AM), https://www.titleresearch.com/news/finding-missing-beneficiaries [https://perma.cc/SCS9-BZZT].

82. Tristeen Bownes & Robert Zabawa, *The Impact of Heirs' Property at the Community Level: The Case Study of the Prairie Farms Resettlement Community in Macon County, AL*, *in* HEIRS' PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT 29 (Cassandra J. Gaither et al. eds., 2019), https://www.srs.fs.usda.gov/pubs/gtr/gtr_srs244.pdf [https://perma.cc/JLV5-FTY6].

83. *Land "in Heirs," supra* note 11, at 84.

84. *See generally* Bownes & Zabawa, *supra* note 82, at 31; *see also Heirs Property and Generational Land Loss*, THE AM. COLL. OF TRUST AND EST. COUNS. (Oct. 4, 2021) https://www.actec.org/diversity/heirs-property-generational-land-loss/#:~:text=Because%20once%20a%20family%20has,family%20member%20has%20a%20veto [https://perma.cc/VX3H-KQ3X] [hereinafter *Generational Land Loss*].

85. *Resolving Heir Property*, LEGAL AID OF N.C. (June 25, 2023, 9:30 PM), https://legalaidnc.org/resource/resolving-heir-property/ [https://perma.cc/7NQ7-STCJ].

86. *See generally* Harrington, *supra* note 77. *See also* (1) Conner Bailey, Robert Zabawa, Janice Dyer, Becky Barlow, & Ntam Baharanyi, *Heirs' Property and Persistent Poverty among African Americans in the Southeastern United States*, in HEIRS' PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT 3, 14 (Cassandra J. Gaither et al. eds., 2019); Christy Kane, Stephanie Beaugh, & Gerren Sias, *Addressing Heirs' Property in Louisiana: Lessons Learned, Post-Disaster*, in HEIRS' PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT 3, 89 90 (Cassandra J. Gaither et al. eds., 2019).

heirs property issues.[87] Both the experience of the authors and the literature indicate that the owners of heirs property often lack the financial resources to access even the simplest of existing tools to prevent or resolve heirs property issues.[88] If one or more of the heirs possesses financial resources, it significantly increases the possible legal agreements that may be fashioned, the potential for different types of ownership structures, and the possibilities of negotiating a buyout to resolve the dispute.[89]

IV. Agricultural Concerns and Farm Bill Provisions

A. Agricultural Concerns

Tenancy in common creates a number of problems, a central one being the inability of tenants in common to engage in serious transactions related to the property if they cannot obtain unanimous consent from all of the tenants in common.[90] For heirs' property owners seeking to farm the land, there can be obstacles to farming, including lack of access to credit and prohibitions on participating in USDA programs.[91] For example, because heirs' property owners often cannot demonstrate proof of ownership or proof of control of land, no USDA Farm Number will be issued.[92] Without a Farm Number, many different USDA programs are inaccessible.[93]

B. Farm Bill Provisions

In 2018, the United States Farm Bill (Farm Bill) attempted to address some issues that are inherent with heirs property and agricultural production and authorized (1) alternative documentation for heirs' property operators to establish a farm number to qualify for USDA programs and assistance,[94] and (2) a relending program that is designed to assist undivided interest holders in heirs' property finance the purchase of property or the consolidation of property interests, together

87. Bownes & Zabawa, *supra* note 82, at 32.
88. *See* Harrington, *supra* note 77.
89. *See generally id.*
90. Bownes & Zabawa, *supra* note 82, at 32.
91. Harrington, *supra* note 77.
92. Mitchell, *supra* note 12, at 79.
93. *Id.*
94. *See* Agriculture Improvement Act of 2018, Pub. L. No. 115-334, Title XII, § 12615, 132 Stat. 5014, 7 U.S.C. § 2266b (2018).

with financing costs associated with succession plans.[95] These provisions address the economic concern.[96]

1. Farm Number

A "Farm Number"[97] is required to be eligible for many different USDA programs, including lending, disaster relief programs, participation in county committees, and more.[98] Just like a property cannot be mortgaged without the complete agreement of all owners, the USDA required all owners to execute documents that verify 100% ownership of land before a USDA Farm Number is issued.[99] Therefore, many heirs' property farms failed to qualify for USDA farm programs that otherwise would assist in the financial and operational management of the farm.[100] In response, the 2018 Farm Bill authorized alternative documentation for heirs' property operators to establish a farm number.[101]

Today, according to the USDA, "[o]perators on heirs' property who cannot provide owner verification, or a lease agreement, may provide alternative documents to substantiate they are in general control of the farming operation"[102] and therefore will be issued a USDA farm number.[103] A state's enactment and adoption of the Uniform Partition of Heirs Property Act (UPHPA) influences which type(s) of alternative documents are acceptable.[104]

95. *See* Agriculture Improvement Act of 2018, Pub. L. No. 87-128, Title III, § 310I, as added Dec. 20, 2018; Pub. L. No. 115-334, Title V, § 5104, 132 Stat. 4669, 7 U.S.C. § 1936(c) (2018).

96. *See generally id.*; *see also* Pub. L. No. 115-334, Title XII, § 12615, 132 Stat. 5014, 7 U.S.C. § 2266b.

97. 7 C.F.R. § 718.2 (2023) ("*Farm number* means a number assigned to a farm by the county committee for the purpose of identification.").

98. Mitchell, *supra* note 12, at 79.

99. *Id.*

100. *Id.*

101. *See, e.g.,* 7 U.S.C. § 2266b(b)(1) (2018) ("The Secretary shall provide for the assignment of a farm number to any farm operator who provides any form of eligible documentation for purposes of demonstrating that the farm operator has control of the land for purposes of defining that land as a farm.").

102. *See* U.S. DEP'T OF AGRIC. FARM SERV. AGENCY, GUIDANCE FOR HEIRS' PROPERTY OPERATORS TO PARTICIPATE IN FARM SERVICE AGENCY (FSA) PROGRAMS 1 (2022), https://www.farmers.gov/working-with-us/heirs-property-eligibility [https://perma.cc/VS5E-S5Z8].

103. *Id.*

104. *Id.*

In states that have adopted the UPHPA, an operator can use "[a] court order verifying the land meets the definition of heirs' property as defined in the UPHPA, 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."[105]

Alternatively, in states that have not adopted the UPHPA, an operator can use: (1) 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;" (2) tax returns for the previous five years showing the individual has an undivided farming interest; (3) self-certification that the individual has control of the land for purposes of operating a farm or ranch; or (4) any other documentation acceptable by the FSA county office that establishes that the individual has general control of the farming operation.[106] It does appear that farm operators in UPHPA states are also able to utilize these other options to establish a Farm Number, too, if no court order or certification mentioned above are available.[107]

The additional options afforded to the UPHPA states with respect to obtaining a farm number impose a substantial burden on heirs property owners.[108] First and foremost, the authors are aware of no states that authorize courts to *sua sponte* issue a court order verifying the land meets the definition of heirs' property as defined under the UPHPA. Courts may be able to issue such an order in a partition action in UPHPA states, but a partition action seems to defeat the purpose of the Farm Bill provisions.

Similarly, the authors are aware of no states that authorize or require that a local recorder of deeds issue "[a] certification . . . that the recorded owner of the land is deceased and at least 1 heir has initiated a procedure to retitle the land."[109] Nor are the authors aware of statutory authorization for "procedures to retitle land" in any state. These procedures could be part of an effort to encourage adoption of uniform or model state law processes to assist in clearing title for heirs property. However, the procedures do not presently exist.

Assuming that these barriers can be overcome, in order to obtain a court order or initiate a procedure to retitle land in a UPHPA state, some type of active

105. *Id.*

106. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, Title XII, § 12615, 132 Stat. 5014, 7 U.S.C. § 2266b (2018).

107. *See id.*

108. *See, e.g.,* Mitchell, *supra* note 12, at 80.

109. Heirs' Property Relending Program FAQ, USDA (July 15, 2023, 11:52 PM), https://www.farmers.gov/working-with-us/heirs-property-eligibility/relending/faq [https://perma.cc/NS3S-VHT5].

civil matter—such as a trespass to try title action, a partition suit based on that state's adoption of the UPHPA, or some other state court proceeding to clear title—must be initiated in order to obtain any kind of court order with respect to the ownership or "heirs status" of the property.[110] Civil claims and corresponding court orders or certifications are very effective tools in determining property rights and heirs' property problems.[111] However, in dealing with heirs property, one of the main factors that contributes to heirs property is a lack of resources to pursue legal action at all and otherwise clear title.[112] With the presumption that a lack of access to legal or financial resources has contributed to the "creation" of heirs property, these additional provisions with respect to obtaining a Farm Number in a UPHPA state fail to have the practical effect of assisting heirs' farm operators any more in a UPHPA state than a non-UPHPA state.[113]

2. Relending Program

In dealing with heirs' property issues, some heirs' property owners wish to sell their interests in the land.[114] Unfortunately, no immediate source of funding usually exists among owners who want to buy out existing heirs' owners.[115] The Farm Bill authorized the use of loan funds to purchase and consolidate fractional interests held by heirs' property interest holders.[116] In 2021, the USDA's Heirs' Property Relending Program (HPRP) was announced by the Farm Service Agency[117] as an effort to assist heirs' owners to buy out fractional interest holders and attempt to clear up heirs' title issues.[118]

The basic design of the program consists of loans from the USDA to "eligible intermediaries" who then re-lend the funds to heirs' property holders.[119] Heirs can then use the loan funds to finance the purchase of other undivided interest owners'

110. *See generally* Harrington, *supra* note 77.
111. U.S. DEP'T OF AGRIC. FARM SERV. AGENCY, *supra* note 102.
112. Mitchell, *supra* note 12; Harrington, *supra* note 77.
113. U.S. DEP'T OF AGRIC. FARM SERV. AGENCY, *supra* note 102.
114. *Heirs' Property*, *supra* note 61.
115. Harrington, *supra* note 77.
116. *See* 7 U.S.C. § 1936c (2018); *see also* Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 3101, 132 Stat. 4490, 4669–70.
117. *See generally* 86 Fed. Reg. 150 (Aug. 9, 2021).
118. *See* Harrington, *supra* note 77.
119. *See* 86 Fed. Reg. 150.

property interests, as well as the costs associated with establishing a succession plan.[120]

The Relending Program was announced August 9, 2021.[121] The program was set up in two phases and modeled after USDA Rural Development's relending program.[122] The first phase of the program involves the USDA-FSA selecting the eligible intermediary lenders.[123] The second phase of the program involves the re-lending of those dollars to heirs for the permissible purposes as described in the program rules,[124] highlighted herein. As of the date of this Article, only the first phase of the program has been initiated.[125]

A total of four intermediary lenders have been selected by USDA.[126] In accordance with the Heirs Relending Program Rules, the four lenders are all "certified as [] community development financial institutions."[127] However, if we accept the idea that heirs' property owners have limitations accessing capital and developing lending relationships, then we can only wonder about the effectiveness of a relending program that is implemented by a total of four lenders across the country.

The workload for these four lenders is significant and includes: preparation of a relending plan which includes descriptions of the lender's administration policies and procedures, loan rates, terms, and payment structures for the loans to the heirs' property owners; submittal of the relending plan to FSA for approval; establishing a separate revolving loan fund to be maintained as long as any HPRP loans are outstanding; adoption of annual reporting procedures; submission of periodic reports to FSA that include description of the use of loan funds,

120. Marcus M. Maples & Daniel Moss, *Heirs' Property Relending Program Represents Substantial Investment in Resolution of Heir Property Issues*, BAKER DONELSON (Aug. 26, 2021), https://www.bakerdonelson.com/heirs-property-relending-program-represents-substantial-investment-in-resolution-of-heir-property-issues [https://perma.cc/H8XC-YNHT].

121. *See* 86 Fed. Reg. 150.

122. *See, e.g.*, 7 C.F.R. § 4274 (2023).

123. 7 C.F.R. § 769.150 (2023).

124. *Id.*

125. E-mail from Senior Loan Officer, U.S. Dep't of Agric., Farm Serv. Agency regarding status of program (May 11, 2023) (on file with author).

126. *USDA Announces First Three Lenders for Heirs' Property Relending Program*, U.S. DEP'T OF AGRIC. (Aug. 18, 2022), https://www.usda.gov/media/press-releases/2022/08/18/usda-announces-first-three-lenders-heirs-property-relending-program [https://perma.cc/WCJ6-NLAR] (announcing three lenders, one of which is in partnership with a fourth lender).

127. Maples & Moss, *supra* note 126; 7 U.S.C. § 1936(e)(2)(A); 7 C.F.R. § 769.159 (2023); 86 Fed. Reg. 150 (Aug. 9, 2021).

information regarding the acreage, the number of heirs both before and after loan was made, audit findings, disbursement transactions, and any other information required by FSA.[128]

Under the HPRP, heirs' property owners are to be the "ultimate recipients" of the loan dollars.[129] In order to ensure the HPRP loans are used to assist families in resolving title issues on heirs' property and not to assist investors seeking to acquire land, intermediary lenders will only make loans to heirs who: (1) have an undivided ownership interest in a farm; (2) are individuals or legal entities with authority to incur the debt and to resolve ownership and succession of a farm owned by multiple owners; (3) are a family member or heir-at-law related by blood or marriage to the previous owner of the property; and (4) agree to complete a succession plan as a condition of the loan.[130]As to the second requirement, the authors are aware of no legal way for an individual or legal entity to acquire such authority without the consent of all of the owners.[131] In addition, the rules fail to define or outline the contents of the "succession plan" required under the fourth requirement.[132] Qualifying for these loans may prove extremely difficult, if not impossible.

The heirs may not use loans "[f]or any land improvement, development purpose, acquisition or repair of buildings, acquisition of personal property, payment of operating costs, payment of finders' fees, or similar costs."[133] Heirs may use the loans to resolve title issues by financing the purchase or consolidation of property interests and financing costs associated with a succession plan.[134] More specifically, the FSA has determined that HPRP loan funds may be used to buy out fractional interests held in tenancy in common by other heirs in jointly-owned property in addition to paying for costs associated with developing and implementing a succession plan—such as closing costs, appraisals, title searches, surveys, preparing documents, mediation, and legal services.[135]

FSA has indicated that the loan funds can be used by one co-owner to buy out all of the other heirs' interest; further, the remaining sole owner could sell the

128. *See generally* 7 U.S.C. § 1936 (2008); 7 C.F.R. § 4274 (2023).
129. 7 C.F.R. § 769.153 (2023); Maples & Moss, *supra* note 126.
130. 7 C.F.R. § 769.153; *see also* Maples & Moss, *supra* note 126.
131. *See generally* 7 C.F.R. § 769.153.
132. *See id.*
133. 7 C.F.R. § 769.155 (2023).
134. 7 C.F.R. § 769.150 (2023).
135. 7 C.F.R. § 769.154 (2023).

farmland as long as the FSA loan was re-paid.[136] Is this what the Farm Bill authors intended, that heirs' property loan dollars are being used to take farmland out of production?

The authors agree that access to capital can sometimes be a limiting factor that has prevented heirs' property owners from resolving tenancy in common ownership issues.[137] On its face, the HPRP is a solution because it provides funds to help clear title.[138] However, one must question whether an heirs' property owner incurring additional debt obligations is the best course of action for many heirs' property owners, who may already be facing additional financial challenges.

Further, if heirs property exists because of a lack of sufficient capital to deal with undivided interest owners, then perhaps the HPRP program is at least another tool to assist these heirs' property owners. Practically speaking, however, even if heirs' property interest holders apply to obtain the HPRP loan dollars, how many of those applicants could actually repay the loans? Perhaps the availability of USDA Farm Numbers and participation in farm programs, combined with the HPRP loan dollars, could mean a better financial position for these heirs' property farms. It remains to be seen if the debt service burden created by the HPRP could be a potential roadblock in the use—and success—of the HPRP to truly resolve heirs' property issues.

V. Other Policy Solutions

A. The Uniform Partition of Heirs Property Act

Beyond the more targeted policy solutions to address heirs' property issues as described in Section IV, broader efforts to deal with heirs property have also been advanced in recent years.

The UPHPA forms the major existing policy to address heirs' property.[139] The Uniform Law Commission promulgated the UPHPA in 2010.[140] 21 states, the District of Columbia, and the United States Virgin Islands have adopted the

136. E-mail from Senior Loan Officer, U.S. Dep't of Agric., Farm Serv. Agency regarding status of program (Aug. 17, 2022) (on file with author).

137. *Heirs' Property*, *supra* note 61.

138. Harrington, *supra* note 77.

139. Mitchell, *supra* note 12.

140. *Id.*

Uniform Act.[141]The goal of the UPHPA "is to ameliorate, to the extent feasible, the adverse consequences of a partition action when there are some cotenants who wish, for various reasons, to retain possession of some or all of the land, and other cotenants who would like the property to be sold."[142] The prefatory note provides keen insight into what the drafters of the Act were aiming to address, namely that "unscrupulous" developers often buy a small interest in tenants in common property for the sole purpose of forcing a partition sale.[143] However, little or no empirical evidence exists to support or refute that assertion.

While the Act recognizes the inherent economic problems that arise from ownership as tenants in common,[144] the Act's focus is on partition and the vulnerability concern. As discussed in Section II, two main options exist to resolve partition actions—partition in kind or partition by sale.[145] Partition in kind involves physically dividing the property between the co-owners, while partition by sale results in a sale—typically at public auction—of the property and a division of the net proceeds to the co-owners.[146] Although most state statutes indicate a preference for partition in kind over partition by sale, as a practical matter, courts generally order partition by sale.[147]

The drafters of the Act assert that one factor in the de facto preference for partition by sale is that:

> many courts that utilize this approach do not place much value on upholding basic property rights and do not take account of the noneconomic value which many owners place upon their property. These noneconomic values can be substantial as families often value their family real property for its ancestral and

141. *Id.*; *see generally Partition of Heirs Property Act*, UNIF. L. COMM'N (July 9, 2023, 7:08 PM), https://www.uniformlaws.org/committees/community-home?attachments=&communitykey=50724584-e808-4255-bc5d-8ea4e588371d&libraryentry=c668917f-0bfe-4ec2-99af-f09844c55777&pageindex=0&pagesize=12&search=&sort=most_recent&viewtype=card [https://perma.cc/BW95-CTJK] (Alabama, Arkansas, California, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Iowa, Maryland (substantially similar), Mississippi, Missouri, Montana, Nevada, New Mexico, New York, South Carolina, Texas, US Virgin Islands, Utah, Virginia (substantially similar), and Washington).

142. NAT'L CONF. OF COMM'RS ON UNIF. STATE L., *supra* note 7, at 8.

143. *Id.* at 2.

144. *Id.* at 1.

145. *Id.* at 1–2. Note that some states also allow partition by allotment.

146. *Id*.

147. *Id.* at 2.

even historical significance or its capacity to provide shelter that in some cases may prevent homelessness.[148]

Despite the preference among some courts for partition by sale, heirs' property owners who do not want to sell their property are faced with the fact that partition sales are often conducted via auction, "yielding sales prices well below market value."[149] Furthermore, fees and costs must be deducted from that sales price.[150] Costs include surveying fees, attorneys' fees, and the fees of court-appointed commissioners.[151] Cotenants who unsuccessfully challenge a partition action may also be forced to pay a portion of the attorneys' fees that were incurred.[152]

The Act purports to "provid[e] a further set of coherent, default rules reforming the worst substantive and procedural abuses that have arisen in connection with the partition of tenancy-in-common property."[153] To address these concerns, the UPHPA first defines the term heirs property[154] and limits the Act to partition actions involving heirs property.[155] Unless all the cotenants agree to the value, or the court determines that the cost of an appraisal would exceed the evidentiary value, the court must order an appraisal to determine fair market value.[156]

If any cotenant requests a partition by sale, the Act provides a process to give the other cotenants the opportunity to buyout any cotenant requesting sale of the property.[157] If the buyout provisions fail to resolve the issues, the Act mandates "partition in kind unless the court, after consideration of factors . . . finds that partition in kind will result in [great] [manifest][158] prejudice to the cotenants as a group."[159] In addition to the typical factors that courts consider, the factors include longstanding ownership and sentimental attachment to the property.[160]

148. *Id.*
149. *Id.*
150. *Id.* at 7.
151. *Id.*
152. *Id.* at 2.
153. *Id.* at 3.
154. NAT'L CONF. OF COMM'RS ON UNIF. STATE L., *supra* note 7, § 2(5).
155. *Id.* § 3.
156. *Id.* § 6.
157. *Id.* § 7.
158. *Id.* § 8 (each state chooses "great" or "manifest").
159. *Id.* § 8(a).
160. *Id.* § 9(a)(3–4).

If a partition by sale is ordered, the court must order an open-market sale unless "sealed bids or an auction would be more economically advantageous and in the best interest of the cotenants as a group."[161] Under the terms of the Act, a real estate broker charging a reasonable commission must "offer the property for sale in a commercially reasonable manner at a price no lower than the determination of value and on the terms and conditions established by the court."[162]

If the broker fails to receive an offer to purchase the property for at least the determined value within a reasonable time, after a hearing, the court can: "(1) approve the highest outstanding offer, if any; (2) redetermine the value . . . and order that the property continue to be offered for an additional time; or (3) order that the property be sold by sealed bids or at an auction."[163] If the broker sells the property, the Act requires that a report be filed with a list of required inclusions.[164]

Critics of the Act point out that policies that address the vulnerability concern may exacerbate the economic concern.[165] For example, reforms that make it more difficult for a cotenant to force a sale of the property through partition may "lock-in" heirs property by putting heirs in non-cooperative situations.[166] However, allowing partition sales may place efficiency concerns over displacement concerns to the detriment of heirs that wish to maintain their connection to the land, or keep the land in the family for housing or other reasons.[167]

The buyout provisions in the Act are complex and will prove to be expensive if accurately followed.[168] Again, it is the opinion of the authors together with other commentators that many owners of heirs property lack cash assets and the ability to borrow, so the complex buyout process provided for in the Act will be futile.[169] Similarly, the sale provisions are also quite complex and appear to only add time and expense to the process intended to quickly resolve title.[170] Increased

161. *Id.* § 10(a).

162. *Id.* § 10(b).

163. *Id.* § 10(d).

164. *Id.* § 11.

165. Deaton et al., *supra* note 10; *A Review and Assessment of the Heirs' Property Issue in the United States*, *supra* note 2, at 628.

166. Deaton et al., *supra* note 10; *A Review and Assessment of the Heirs' Property Issue in the United States*, *supra* note 2, at 627.

167. Deaton et al., *supra* note 10; *A Review and Assessment of the Heirs' Property Issue in the United States*, *supra* note 2, at 627–28.

168. Farach, *supra* note 51, at 59.

169. Richardson, *supra* note 42, at 545.

170. Farach, *supra* note 51, at 59.

complexity and expense tends to discourage partition and lock the property into the dysfunctional tenancy in common form of ownership.

In states without the UPHPA, the threat of a partition suit, along with a likely sale of the property to a third party, incentivizes the owners to reach an agreed partition in kind.[171] Both authors have experiences in situations where the owners of heirs property seemed entrenched in positions that could not be reconciled. Once a partition suit was threatened or filed, the owners suddenly realized that sale of the property to a third party was inevitable if a partition moved forward. The owners suddenly became reasonable and voluntary partitions in kind were agreed upon, avoiding both the emotional and financial cost of litigation, and the sale of the property. Once the threat of a partition sale is removed with the UPHPA, then no incentive exists for certain heirs to cooperate, and the property remains locked-in as heirs property.[172]

B. The Uniform Tenants in Common Transactions Act (Draft)

The Uniform Law Commission is presently drafting a uniform law that seeks to give "tenants in common the ability to maintain their tenancy in common relationship and engage in transactions that can benefit all tenants in common even though some of the tenants in common cannot be located."[173] Presently titled the Uniform Tenants in Common Transactions Act (TICTRACT), this additional effort to address heirs property and provide default rules for owners of heirs property saw its latest draft published on June 7, 2023.[174]

Instead of requiring 100% of all owners to approve an action, the Draft Tenants in Common Transactions Act requires 100% of ascertainable tenants in common to approve an action to encumber or transfer property,[175] or to endorse an agreement that binds all tenants in common.[176] Where some tenants in common are unascertainable, notice must be posted on the real estate.[177] "'Ascertainable tenant in common' means a tenant in common whose name and contact information are known or found after a diligent effort."[178]

171. Richardson, *supra* note 42, at 545.
172. *Id.* at 547.
173. NAT'L CONF. OF COMM'RS ON UNIF. STATE L., TENANTS IN COMMON TRANSACTIONS ACT 1 (2023).
174. *Id.*
175. NAT'L CONF. OF COMM'RS ON UNIF. STATE L., TENANTS IN COMMON TRANSACTIONS ACT § 4(a) (2023).
176. *Id.* § 4(b).
177. *Id.* § 5(c).
178. *Id.* § 2(1).

The Act also provides a procedure whereby a tenant in common who pays certain expenses like real estate taxes and assessment may be reimbursed by the other tenants in common.[179] The reimbursement may come from excess income generated by the property,[180] and the right to recoupment creates a lien on the interest of the individual tenant in common owing recoupment.[181]

These provisions likely fail to help many, if any, tenants in common holding heirs property. As the number of co-owners increases, reaching unanimity on any issue become increasingly unlikely, even if the unanimity is limited to ascertainable owners.[182] The due diligence process itself can be extremely expensive for heirs property.[183]

The West Virginia Cotenancy Modernization and Majority Protection Act (Cotenancy Act)[184] represents a different, and perhaps better, model. This Act is limited to oil and natural gas rights,[185] which are highly fractionated in West Virginia. However, the provisions are easily transferrable to highly fractionated interests in real estate. As in the Uniform Tenants in Common Transactions Act, operators or owners must use due diligence to attempt to locate all oil or natural gas owners.[186]

Under the Cotenancy Act, if an operator or owner makes reasonable efforts to negotiate with royalty owners, and at least three-fourths of the owners consent to the development, the development of the oil or natural gas may proceed.[187] Nonconsenting cotenants are entitled to receive royalties on a basis calculated to be at least equal to the consenting cotenants, and may elect among various methods of calculation.[188] The interests of unknown or unlocatable interest owners are also compensated and protected.[189] The liability of nonconsenting and unknown or unlocatable interest owners is limited.[190]

179. *Id.* § 6(a).
180. *Id.* § 6(b).
181. *Id.* § 6(c)(3).
182. *Id.*
183. *Id.* § 4(a)(1).
184. W. VA. CODE ANN. § 37B-1-1 (West, Westlaw through 2023 Regular Session).
185. W. VA. CODE ANN. § 37B-1-4(a) (West, Westlaw through 2023 Regular Session).
186. W. VA. CODE ANN. § 37B-1-3 (West, Westlaw through 2023 Regular Session).
187. § 37B-1-4(a) (Westlaw).
188. W. VA. CODE ANN. § 37B-1-4(b)(2) (West, Westlaw through 2023 Regular Session).
189. W. VA. CODE ANN. § 37B-1-(4)(d) (West, Westlaw through 2023 Regular Session).
190. W. VA. CODE ANN. § 37B-1-5 (West, Westlaw through 2023 Regular Session).

Coupled with the Farm Bill provision that allows a majority of owners to consent to obtain a Farm Number and make production decisions,[191] and the Uniform Partnership Act requiring the same,[192] the provisions of the Cotenancy Act provide a baseline for default rules that would assist owners of heirs property.[193] Namely, a majority of ascertainable heirs should be empowered to make decisions on the economic activities on the property.[194] A supermajority, whether that be two-thirds or three-fourths or another percentage should be empowered to make decisions to transfer or sell the property.[195] These provisions strike a proper balance between the rights of the minority and majority owners of the property.

VI. Tips for Agricultural Attorneys

Beyond attempts to create new policies addressing heirs property, practical considerations and steps can be taken by practitioners to deal with heirs property situations. As is often the case, prevention proves to be much easier than the cure with respect to heirs' property. For the practitioner presented with property that has not been probated for decades with dozens, hundreds, or thousands of heirs, clearing title may take years and entail hundreds of thousands of dollars in legal fees. On the other hand, a few relatively simple steps can prevent heirs' property issues from arising in the first place.

A. Prevention

To avoid or mitigate heirs' property issues, practitioners should: (1) Encourage clients to plan. In a farm family setting, many parents instinctively wish to leave the farm to the children equally. That path may cause a number of issues, so practitioners should urge parents to pick one child, or to set up a business

191. *See generally* 7 U.S.C. § 2266b (2018).

192. Unif. P'ship Act § 401 (amended 2013) (Am. L. Inst. & Nat'l Conf. of Comm'rs on Unif. State L. 1997).

193. W. Va. Code Ann. § 37B-1-(4) (West, Westlaw through 2023 Regular Session).

194. Unif. P'ship Act § 401(d) (amended 2013) (Am. L. Inst. & Nat'l Conf. of Comm'rs on Unif. State L. 1997).

195. Unif. P'ship Act § 401(k) (amended 2013) (Am. L. Inst. & Nat'l Conf. of Comm'rs on Unif. State L. 1997). Although the Uniform Partnership Act, at Section 401(k), requires unanimous consent for conduct of business "outside the ordinary course of business of a partnership," heirs property may be distinguished in two ways. First, heirs property does not have an "ordinary course of business." Second, partners dissociated from the partnership receive compensation for the value of their partnership interest, even if the disassociation was wrongful. Uniform Partnership Act Sections 603, 701. Heirs have no comparable right except for the right to partition, which has been severely limited in states adopting the Uniform Partition of Heirs Property Act.

structure with business agreements to accomplish family goals and to avoid deadlock due to a multitude of owners.

(2) Do not kick the can down the road. Heirs' property issues that are difficult today become impossible in the future. Address the issues as soon as possible to minimize cost and difficulty.

(3) Carefully draft and corroborate affidavits of heirship. Verify the affidavits of heirship with as many people as possible. Consider having multiple people file affidavits of heirship to strengthen the clarity of title. Clarify exactly what elements of heirship that each affiant can verify. Finally, review the affidavit with the affiant and ensure that the affiant understands and possesses sufficient knowledge to sign.

(4) Ask a lot of questions of a lot of different people. Cast a wide net when gathering information. Sometimes the first or tenth person that you talk to is not the key person. Try to locate the family historian. A family tree can be extremely helpful but must be verified.

(5) Identify and remember who you represent. As always, identify your client at the beginning of the process and document the representation with an engagement letter. Remember who you represent and make required disclosures when contacting others.

(6) Utilize resources, databases, and non-attorneys. Information can be gleaned from a number of different sources. Non-attorneys can provide assistance at a lower cost and often with more expertise in that particular area than an attorney. Utilize these sources.

(7) Be practical and help clients be practical. The cost of clearing title in many heirs' property situations can far exceed the value of the property. While various groups continue to seek better and more cost-effective solutions, you need to help your client today. How much can your client afford to pay? Are pro bono resources available? How much risk can your client assume?

(8) Promote the use of wills that do not convey property to multiple heirs.

(9) Reduce transaction costs of cooperation between tenants. Legal education, better access to legal counsel, and better access to and assistance in interpretation of land records can help determine number, identity and respective ownership share of all existing cotenants.[196] These steps reduce transactions costs. Provision of low-cost or pro bono assistance to owners of heirs property aids these efforts greatly. Legal Aid or clinics at law schools could prove vital in this effort.

196. Deaton et al., *supra* note 10.

B. Resolution

1. Overview

Many of the steps outlined to prevent heirs property from occurring in the first place can also help in resolving heirs property issues. However, resolution proves to be more difficult and requires additional steps. In general, real property vests immediately in the beneficiaries of the will or the heirs at law for decedents without a will.[197] Documentation of title occurs when personal representatives qualify under the Last Will and Testament or under intestacy.[198] In both of these instances, an affidavit of heirs is filed in the same office where deeds are recorded.[199] This document lists the heirs at law of the decedent.[200] In combination with the Last Will and Testament, if any, title to real property is documented.[201] Affidavits of heirs may be problematic in heirs property situations. For example, West Virginia law only provides for affidavits of heirs in connection with two situations.[202] First, when an executor for a will or administrator of an intestate estate qualifies, the clerk of court requires an affidavit of heirs.[203] Second, where real estate in West Virginia was owned by a decedent who was a nonresident of West Virginia and died intestate, and for which no personal representative or administrator need be appointed for ancillary administration, an affidavit of heirs may be filed by a person having interesting in the real estate.[204] Texas and New Mexico also seem to lack a process to file affidavits of heirs to clear title to heirs property.[205]

Of the states in which the authors practice—Texas, New Mexico, West Virginia, and Virginia—only one, Virginia, provides statutory authority for a

197. 26B C.J.S. *Descent and Distribution* § 83 (2023); 97 C.J.S. *Wills* § 1803 (2023). The principle holds true in West Virginia. *See, e.g.*, King v. Riffee, 309 S.E.2d 85 (W. Va. 1983); Gaylord v. Hope Nat. Gas Co., 8 S.E.2d 189 (W. Va. 1940) (a West Virginia statute subjecting real estate to decedent's death does not change the common law.); McFaddin v. United States, 10 F. Supp. 286 (Ct. Cl. 1935); *accord* TEX. EST. CODE ANN. § 101.001 (West 2014); *The Personal Representative's Power to Sell Realty in Virginia*, 15 WM. & MARY L. REV. 949, 949 (1974); N.M. STAT. ANN. § 45-3-101 (West 1978) (effective Jan. 1, 2012).

198. 26B C.J.S. *Descent and Distribution* § 83 (2023).

199. *Id.*

200. *Id.*

201. *Id.*

202. W. VA. CODE ANN. § 44-1-13 (West, Westlaw through 2023 Regular Session).

203. *Id.*

204. W. VA. CODE ANN. § 44-1-4(b) (West, Westlaw through 2023 Regular Session).

205. *See* TEX. EST. CODE ANN. § 101.001 (West 2014); N.M. STAT. ANN. § 45-3-101 (West 1978) (effective Jan. 1, 2012).

process to clear the title of heirs property through the filing of affidavits of heirs.[206] Like most states, Virginia requires that the personal representative of any decedent, whether dying with or without a will, file an affidavit of heirs when qualifying.[207]

If no one qualifies as a personal representative within 30 days of the date of death, an affidavit of heirs may be filed by any heir of a decedent who died intestate.[208] The personal representative receives no compensation until the affidavit is filed, unless an affidavit is filed declaring that "the heirs are unknown to him and that after diligent inquiry he has been unable to ascertain their names, ages, or addresses, as the case may be."[209]

The Clerk of the Circuit Court must record the affidavit in the will book and index the list in the name of the decedents and the heirs.[210] The recording of the affidavit constitutes "prima evidence of the facts contained" therein.[211] If any changes are discovered after filing the affidavit, an additional affidavit must be filed.[212]

2. An Example: Resolving the Case Study

To resolve the case study and achieve the goals of the Jones family, the attorney would first trace title back from the 1889 deed to ensure that George and Mary held valid title. Once valid title in George and Mary has been confirmed, the attorney would determine the heirs of George Jones under West Virginia intestacy law at the time of his death in 1904. Next, the heirs of each of those heirs would be determined under the intestacy laws of the state of their residence at the date of death and at the time of their death.

This process would be repeated with respect to each heir until the present. The family tree needs to be confirmed by searching birth records, death records, and other available resources. Family members should be interviewed as well. Once the family tree has been confirmed and annotated with dates of death, certified death certificates must be obtained for each deceased heir.[213] Affidavits of heirs need to be recorded for each deceased heir, along with a certified copy of

206. VA. CODE ANN. § 64.2-509(D) (West, Westlaw through 2023 Regular Session).
207. VA. CODE ANN. § 64.2-509(A) (West, Westlaw through 2023 Regular Session).
208. VA. CODE ANN. § 64.2-509(B) (West, Westlaw through 2023 Regular Session).
209. § 64.2-509(D).
210. VA. CODE ANN. § 64.2-509(C) (West, Westlaw through 2023 Regular Session).
211. *Id.*
212. VA. CODE ANN. § 64.2-509(E) (West, Westlaw through 2023 Regular Session).
213. W. VA. CODE ANN. § 44-1-4(b)(2) (West, Westlaw through 2023 Regular Session).

the death certificate.[214] Some state probate statutes, like West Virginia's, may not provide for the filing of affidavits of heirs unless a personal representative or executor qualifies.[215]

Once this process has been completed, gather the heirs to determine whether a common set of goals can be determined.[216] If so, register a limited liability company and draft an operating agreement, or draft a trust to accomplish the goals of the heirs. Once the documents have been drafted, have all heirs sign the documents.

The process for this relatively simple situation would involve determining the heirs for dozens of decedents, based on the laws of intestacy in approximately three states at various points in time. Divorces may complicate the matter even more. Certified copies of death certificates need to be obtained, and Ruby or other family members with knowledge of the deceased would have to affirm the information on the Affidavits of Heirs, under oath. The cost could easily approach or exceed the value of the property in this case.

VII. Conclusions and Recommendations

Heirs property presents an urgent problem in the United States. Families, communities, and economies are negatively impacted. The necessary sense of urgency to resolve these issues is presently lacking, and some policies while well-intentioned, either focus on narrow issues or provide ineffective solutions.

Two good starting points for policy reform center on (1) revising state procedures on affidavits of heirs to clearly provide a solution that clears title for heirs property, and (2) providing a set of model default rules for tenancy in common property that will allow a majority of owners of heirs property to productively use the land.

Of the four states that the authors examined—Texas, New Mexico, West Virginia, and Virginia—only Virginia law addressed the affidavit of heirs issue in a way that would efficiently allow the clearing of title for heirs property. The Virginia provisions provide a clear, concise model for other states.

Although the Uniform Law Institute's draft of the Tenancy in Common Ownership Default Rules Act seeks to provide relief to owners of heirs property with a set of default rules, the reforms do not go far enough. Requiring 100%

214. *Id.*

215. W. Va. Code Ann. § 44-1-13 (West, Westlaw through 2023 Regular Session).

216. *See generally* Bownes & Zabawa, *supra* note 82, at 31; *see also Generational Land Loss*, *supra* note 84.

consent of the ascertainable tenants in common tracks closely with the present requirement, excluding only unascertainable heirs from the process. A better model is provided by the Farm Bill and the West Virginia Co-Tenancy Act. A majority of ascertainable tenants in common should be able to take action to make the land economically productive, with safeguards for the unascertainable heirs. A supermajority of ascertainable heirs should be able to transfer or encumber the property.

Finally, attorneys who advise clients who own real estate should prioritize the prevention of heirs property forms of ownership. Where heirs property already exists, a sense of urgency should guide actions to remedy the situation. In those cases where the cost of resolution exceeds the value of the property or the resources of the client, law clinics and Legal Aid may offer assistance. However, before law clinics and Legal Aid can provide meaningful assistance, federal and state government efforts must include funding nonprofit legal efforts to resolve and prevent heirs property.