

HEIR PROPERTY: ISSUES AND OPPORTUNITIES

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I. Introduction

A 1982 report to the U.S. President and Congress showed that between 1920 and 1980, almost 94% of farms operated by African Americans were lost; that is, the African-American farmers who had owned the land no longer had ownership rights, whether or not by their choice.² This compares to a loss of only 56% of farms operated by European Americans.³ This loss represents more than just a change in lifestyle and increased urbanization; because land has real monetary value, its loss also meant a reduction in wealth for its former owners.⁴ Perhaps this kind of loss would be acceptable if the sales were voluntary. However, many low and moderate-income family landowners have lost their property through sales and transfers bolstered by laws and regulations that make it harder for families to retain their land than for nonfamily members to acquire it.⁵ For example, the 1887 General Allotment Act (“Dawes Act”) was “directly responsible for the loss of 90 million acres of Indian land.”⁶ The Indian Land Tenure Foundation further notes, “The Act required tribally-held land to be divided among individual tribal members and the remaining ‘surplus’ lands opened to white settlement.”⁷

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² U.S. COMM’N ON CIVIL RIGHTS, THE DECLINE OF BLACK FARMING IN AMERICA 2 (1982), <https://files.eric.ed.gov/fulltext/ED222604.pdf>.

³ *Id.*

⁴ Thomas Mitchell, *Restoring Hope for Heirs Property Owners: The Uniform Partition of Heirs Property Act*, ABA (Oct. 1, 2016), https://www.americanbar.org/groups/state_local_government/publications/state_local_law_news/2016-17/fall/restoring_hope_heirs_property_owners_uniform_partition_heirs_property_act/.

⁵ *Id.*

⁶ *Land Tenure Issues*, INDIAN LAND TENURE FOUND., <https://iltf.org/land-issues/issues/> (last visited Nov. 11, 2018). The land loss caused by the Dawes Act is, of course, in addition to the loss of Native American lands caused by European colonialization.

⁷ *Id.*

Also, until 1983 when the law was changed, tens of thousands of Arkansans lost their land through questionable sales of tax delinquent land, as described below:

Under the old law, speculators or neighbors could pay delinquent taxes on any property—often unbeknownst to the owner—and receive a deed to the land after two years. In other cases, counties auctioned off delinquent properties at midnight sales or through a system that gave political favorites first chance at the best land. “These abuses happened predominantly to blacks. In my four years as state land commissioner, all the contact I ever had about problems came from blacks,” said W.J. (Bill) McCune, now Secretary of State in Little Rock. “We even had some county officials who would rake off the best land for themselves.” In fact, after he became land commissioner, McCune discovered that his predecessor had surreptitiously set up a corporation—with a telephone in his state office—to acquire and resell properties that came up on the delinquent list.⁸

Similar practices across many other jurisdictions have led to a systematic loss of property, particularly among those—often of low or moderate wealth and/or people of color⁹—who have inadequate access to trusted legal counsel to prepare wills and related documents or to otherwise support property owners in the retention of their land.¹⁰

This family land is often held as heir property or tenancy in common property, an inherently unstable form of ownership.¹¹ Heir property occurs when a landowner dies without a will (or the will is not probated) and the laws of intestacy are applied.¹² In these cases, the property is passed down to the legal heirs but is undivided. Each heir, or tenant in common, then owns a fractional percentage of the entire estate and retains rights of usage to the full property.¹³ Over time, if the

⁸ Ward Sinclair, *Black Farmers: A Dying Minority*, WASH. POST (Feb. 18, 1986), https://www.washingtonpost.com/archive/politics/1986/02/18/black-farmers-a-dying-minority/fc558d73-6dc1-486e-8bce-8fd9687afe08/?noredirect=on&utm_term=.7c3142199858.

⁹ Ann Carpenter, *Understanding Heirs' Properties in the Southeast*, FED. RESERVE BANK OF ATLANTA, <https://www.frbatlanta.org/community-development/publications/partners-update/2016/02/160419-understanding-heirs-properties-in-southeast.aspx> (last visited Nov. 11, 2018).

¹⁰ Sarah Breitenbach, *Heirs' Property Challenges Families, States*, PEW CHARITABLE TRS. (July 15, 2015), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/07/15/heirs-property-challenges-families-states>; see e.g., Todd Lewan, *Alabama Pushed a Black Family Off Its Land—And Left It Empty for Years*, MAMIWATA.COM, <http://www.mamiwata.com/sweetwater.html> (last visited Sept. 13, 2019).

¹¹ Mitchell, *supra* note 4.

¹² *Id.*

¹³ *Id.*

title to the property is not cleared, the number of heirs can become very large¹⁴ causing numerous challenges, including difficulty in identifying or locating all the heirs; inability of the heirs to agree on the uses of the land; and due to a lack of clear title, inability to finance land improvements, use the land as collateral, or lease the land.¹⁵ If one of the many heirs (or other owners) wants the monetary value of their land, there are two commonly available remedies: (1) divide the land and allow the heirs to sell their portions; or (2) sell the land and divide the proceeds.¹⁶ The latter, especially for larger families, is far more common and contributes significantly to land loss.¹⁷

Many organizations work effectively with families to help them set and meet goals for their property and reduce land and wealth loss. Heir property often gets increased attention from these groups and others in the aftermath of destructive storms (e.g. Hurricanes Katrina¹⁸ and Florence¹⁹) because natural disasters can highlight the difficulties some families have in accessing services for rebuilding. Families who live on and have a legal and personal interest in the property but do not have clear title may not be able to access emergency or other funds.²⁰ Large scale events magnify pre-existing situations and increase the need for services that are critical all the time. Most of the services focus on the early stages of heir property resolution, specifically:

- *Prevention* through wills and related documents to transfer property; and

¹⁴ TEDx Talks, *Promoting Social Change: The Most Important Question for Promoting Social Change* / Karama Neal / TEDxMarkhamSt, YOUTUBE (Sept. 16, 2015), <https://www.youtube.com/watch?v=Xc-lXiJV8i4>.

¹⁵ GA. APPLESEED, HEIR PROPERTY IN GEORGIA (2010), <https://gaappleseed.org/media/docs/heirproperty.pdf>.

¹⁶ UNIF. PARTITION OF HEIRS PROPERTY ACT § 7-9 (UNIF. LAW COMM'N 2018).

¹⁷ Mitchell, *supra* note 4.

¹⁸ CHRISTY KANE, LA. APPLESEED, HEIR PROPERTY IN LOUISIANA (2017), <https://www.frbatlanta.org/-/media/documents/news/conferences/2017/0615-heirs-property-in-the-south/christy-kane.pdf>.

¹⁹ *Historian Highlights the Struggles African-American Communities Hit by Florence Face*, NPR (Sept. 21, 2018, 7:28 PM), <https://www.npr.org/2018/09/21/650643749/history-professor-highlights-the-struggles-african-american-communities-hit-by-f>.

²⁰ *Id.*

- *Title clearance* to facilitate access to financial resources, property management, and other services for the owners.²¹

While these services are critical, additional attention is needed in a third area known as *ownership structure* to help families identify and appropriate business structure that will allow them to set and meet goals around property productivity in addition to simply attaining stable ownership. In this paper, I identify key issues and opportunities affecting various stages of property ownership and operation and offer reasons as to why heir property matters in the effort to close the racial wealth gap²² and build rural economies.²³

II. Heir Property Resolution

Because of the challenges many family owners face in accessing and improving the value of their assets, heir property is often seen as a problem that needs to be fixed.²⁴ While the unstable legal status of heir property has been shown to lead to land loss, it is important to differentiate between the problematic legal status of the property and other, often positive, aspects of the property.²⁵ This paper highlights economic benefits in particular, but there are also others. For example, when families work together to clear title, they can meet relatives they otherwise might never have known. While it would have been legally and perhaps financially beneficial for the property to have been properly probated at the time of the original owner's death, that fact that it

²¹ See, e.g., *New Bowen Clinic Helps Heirs Preserve Family Lands*, UA LITTLE ROCK (July 17, 2018), <https://ualr.edu/law/2018/07/17/new-bowen-clinic-helps-heirs-preserve-family-lands/>.

²² For an excellent discussion of the racial wealth gap, see DEDRICK ASANTE-MUHAMMAD ET AL., *THE EVER-GROWING GAP* (2016), https://ips-dc.org/wp-content/uploads/2016/08/The-Ever-Growing-Gap-CFED_IPS-Final-2.pdf.

²³ For an excellent discussion of the visibility of black land ownership, see Thomas W. Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, WIS. L. REV. 557 (2005).

²⁴ See, e.g., Breitenbach, *supra* note 10; see also Kristen Powers, *Heir's Property: Facilitating a Solution for the Worst Problem You Never Heard of*, S. COALITION FOR SOCIAL JUSTICE (Oct. 20, 2009), <https://www.southerncoalition.org/heirs-property-facilitating-a-solution-for-the-worst-problem-you-never-heard-of/>.

²⁵ Mitchell, *supra* note 4.

was not means that, in some cases, future generations have closer relationships and reasons to interact than they would have had otherwise. Still, for families with heir property, it can become critical to resolve the legal status of such property. Often, the focus is only on clearing the title. However, if the title is cleared with no plan for usage or long-term management, the family may feel that very little has been accomplished functionally. For this reason, it is important to focus on productive property management *as well as* title clearance. Together, these form a functional definition of heir property resolution that is meaningful to families. Certain aspects of these areas of work, along with method of preventing land from heir property, will be explored below.

A. Title Clearance

As the most prominent area of work in heir property resolution and the first legal step in the process, title clearance activities offer at least four issues for consideration:

i. Uniform Partition on Heirs Property Act

If all the heirs are known and in communication with each other, identifying heirs and clearing title may be legally straightforward.²⁶ However, in larger families or in cases where the heir property status is particularly old, additional protections may be needed in order to take the first steps to clear title, especially if the family wants to keep their land in the family. In these cases, the Uniform Partition on Heirs Property Act²⁷ (“Uniform Act”) provides protections for families who want to keep their land as they identify and work with previously unknown heirs and other interest holders.²⁸ Without such protections, it may well be inadvisable to search out heirs because of the likelihood of alerting some to property they did not previously know about and the

²⁶ If heirs are considering initiating title clearance, it may not be advisable to proceed even if all heirs are known if, (1) some heirs would prefer cash for their interest and (2) there are no legal protections that balance the rights of those who want to sell their interest with those who want to retain the family land. In all such situations, consulting an attorney is critical.

²⁷ UNIF. PARTITION OF HEIRS PROPERTY ACT, *supra* note 16.

²⁸ Mitchell, *supra* note 4.

subsequent risk of these previously unknown relatives seeking to sell the entire property simply to acquire the cash value of their interest.²⁹ Currently, thirteen states and the U.S. Virgin Islands have passed the Uniform Partition on Heirs Property Act.³⁰ Passage by more states would provide these protections to more family owners.

ii. Title Clearance Goals

Title clearance, especially for large or complicated family owner groups, can be expensive, time-consuming, and emotionally fraught, given the need to hire an attorney and identify and legally engage many, often distant and previously unknown family members. Many families will gladly develop or update their family tree, but may be hesitant to start the often difficult and costly legal portion of the title clearance process without a clear vision for what the positive outcomes might be. In the authors experience, if families see few or no opportunities for developing their asset, they may not be willing to hire an attorney, determine a fair method of paying attorney fees, or risk damaging existing or emerging family relationships over disagreements over money, property management goals, and the like. Families will balance the potential for damaging relationships with the potential for meaningful opportunities, as well as with their property interests. A shared and achievable vision for long term, collaborative property management is critical, not just after the title is cleared but before the title clearance process begins.

iii. Quantity and Location of Heir Property

Heir property clinics provide information and support for families seeking to clear the title on their land.³¹ While there is philanthropic and other support for these clinics, it is not enough to

²⁹ *Id.*

³⁰ *Partition of Heirs Property Act*, UNIF. LAW COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=50724584-e808-4255-bc5d-8ea4e588371d> (last visited Aug. 30, 2019)

³¹ *See, e.g.,* UA LITTLE ROCK, *supra* note 21. The author and her family have been clients of the Bowen School of Law Heir Property Clinic.

meet the geographical and numerical need. That may be, in part, because the need is not fully documented. To understand the full scope and nature of heir property, it would be helpful to have additional research on its prevalence, location, age, owner characteristics, and other factors. Georgia Appleseed's research in *Unlocking Heir Property* provides an example of this kind of data.³² Projects such as these can help practitioners and the public understand who is affected by heir property and could attract more attention and resources to the issue. This is particularly useful because certain industries (e.g. timber companies, housing redevelopment companies) have already developed methods of identifying heir property so that they can acquire ownership for their own business purposes.³³ Such research would also be helpful for recognizing the breadth of this issue, as heir property can be found among African Americans,³⁴ Asian Americans and Pacific Islanders,³⁵ European Americans,³⁶ Latinx Americans,³⁷ and Native Americans.³⁸

iv. Incentives for Heir Property Resolution

Property that has been listed as heir property for a long period of time may have a significant past-due tax burden associated with it as the cotenant family members may be unsure when the taxes are due, if they have been paid, or even that they are even co-owners of the property.

³² GA. APPLESEED, UNLOCKING HEIRS PROPERTY: ASSESSING THE IMPACT ON LOW AND MID-INCOME GEORGIANS AND THEIR COMMUNITIES (2013), <https://gaappleseed.org/media/docs/unlocking-heir-property.pdf>.

³³ Pers. Comm.

³⁴ CASSANDRA JOHNSON GAITHER, USDA FOREST SERV., "HAVE NOT OUR WEARY FEET COME TO THE PLACE FOR WHICH OUR FATHERS SIGHED?": HEIR PROPERTY IN THE SOUTHERN UNITED STATES (2016), https://www.srs.fs.usda.gov/pubs/gtr/gtr_srs216.pdf.

³⁵ For example, several residents of Hawaii were able to retain their family land after Facebook founder Mark Zuckerberg attempted purchase. Jon Letman & Julia Carrie Wong, *Hawaiians Call Mark Zuckerberg "The Face of Neocolonialism" over Land Lawsuits*, GUARDIAN (Jan. 23, 2017), <https://www.theguardian.com/technology/2017/jan/23/mark-zuckerberg-hawaii-land-lawsuits-kauai-estate>; Elizabeth Weise, *Mark Zuckerberg Drops Suits to Force Sale of Hawaiian Lands*, USA TODAY (Jan. 27, 2017, 4:47 PM), <https://www.usatoday.com/story/tech/news/2017/01/27/zuckerberg-drops-kauai-land-suits-hawaii-quiet-title/97152332/>.

³⁶ For an Appalachian example, see Cassandra Johnson Gaither & Stanley J. Zarnoch, *Unearthing "Dead Capital": Heirs' Property Prediction in Two U.S. Southern Counties*, 67 LAND USE POL'Y 36 (2017).

³⁷ For an example from the Colonias, see Cassandra Johnson Gaither, *Spatial Dimensions of Heirs' Property in Maverick County, TX*, 57 SOUTHEASTERN GEOGRAPHER 371 (2017).

³⁸ GAITHER, *supra* note 34, at 19.

Such a burden can serve as a barrier to starting the title clearance process. As municipalities understand how much their property they have in their districts and how it might be made more productive, they could incentivize title clearance and productive property management through a tax incentive that reduces or delays the tax payments for families who are successful. This may be particularly true in cases where there are no other potential buyers for the property. Even with reduced tax revenue in the short term, the municipalities could benefit from increased revenue in the long term because of more productive property in their district. Such an incentive could be considered a smaller version of the large-scale tax incentives used to entice large corporations to locate in, or relocate to, certain areas.

B. Property management and ownership structures

For families (or specific family members) who want to do something economically productive with their property, particularly if it is a use different from that which was already in place, clearing title is just the first step in their property resolution. In order to reach their goals, they need effective organizational structures and property management plans. This area of work offers at least two issues for consideration:

i. Linking Services

Business clinics³⁹ and technical assistance providers should understand what their property is and what steps are needed before the property can serve as the basis for a business (e.g., a campground), as collateral for a loan for separate business, or how the planned business might be

³⁹ For example, the Bowen School of Law Business Innovations Clinic. *Business Innovations Clinic Publications*, UA LITTLE ROCK, <https://ualr.edu/law/clinical-programs/business-innovations-legal-clinic/business-innovations-clinic-publications/> (last visited Sept. 13, 2019).

financed.⁴⁰ These business service providers link property owners to information and help them create a vision that justifies the investment needed to unlock the property's value.

ii. Business Structure Decision Tree

Family land can have many uses and certain business structures are more appropriate for specific land use plans than others based on, for example, the different family sizes, abilities to directly manage their property, and land uses. A business structure decision tree would help families select the best structure (e.g., cooperative, limited liability corporation, benefit corporation) for them based on the features and goals of the family. Attorneys play a critical role in this process, but a publicly available decision tree would help families see what is possible with their property and help them justify and commit to the process of title clearance.

C. Prevention

Given the challenges families face in resolving heir property and making it productive, significant attention is given to preventing land from becoming heir property at all, often through preparation and execution of wills and other documents that transfer property with clear title. This area of work offers at least two items for consideration:

i. Access to Paid Legal Services

Heir property often results from lack of access to trusted legal services to prepare wills or other documents to transfer property.⁴¹ This access problem⁴² is often worse in rural⁴³ areas and in

⁴⁰ See, e.g., Karama Neal, *Heir Property and Economic Mobility: Tools for Policy and Practice*, MDC: BLOG (Apr. 8, 2015), <http://stateofthesouth.org/2015/04/08/heir-property-and-economic-mobility-tools-for-policy-and-practice/>. Financing may also be needed to fund the title clearance process.

⁴¹ See, e.g., TEDx Talks, *supra* note 14.

⁴² Lack of access to legal services affects a variety of legal areas. For an examination of access to legal services in Arkansas, see NIGEL HALLIDAY, BRIDGING THE MAP: THE GEOGRAPHY OF LEGAL NEED AND AID IN ARKANSAS (2017), <https://arkansasjustice.org/wp-content/uploads/2017/04/Bridging-the-Map.pdf>.

⁴³ For an examination of the lack of access to legal services in rural areas of Arkansas, see LISA R. PRUITT, ET AL., ACCESS TO JUSTICE IN RURAL ARKANSAS (2015), <https://arkansasjustice.org/wp-content/uploads/2017/04/AATJPolicyBrief2015-0420.pdf>.

communities where a history of racial and class injustice reduces or eliminates the ability of potential clients to trust the few attorneys in their area. Increasing access to attorneys through bundled legal services, virtual legal services, and incentives for attorneys to practice in underserved areas will help reduce the occurrence of heir property and promote the resolution of other legal issues.

ii. Access to Pro Bono Legal Services

Pro bono wills clinics offered through legal aid organizations can be very beneficial by providing targeted legal services in underserved areas. These can be particularly effective when tools for avoiding probate are available and the clinic is offered in conjunction with an event that is appealing to the those who may need legal services.⁴⁴

III. Conclusions

The data and opportunities outlined here and in the broader literature support at least four economic reasons to invest in the full spectrum of heir property resolution services:

A. Wealth Creation for Families

Productively managing prior heir property can create wealth for the owners and, importantly, that can happen without the purchase of additional property. For example, an unoccupied family home could be renovated and rented out to provide income for the family (and a home for another family). At scale, this can help shrink the racial wealth gap. The Georgia Appleseed study gives an example of the potential impact.⁴⁵ Tax data analysis for five representative counties showed 1,620 likely heir property parcels worth more than \$58 million.⁴⁶

⁴⁴ For example, there are examples of wills clinics being offered in conjunction with free tax preparation. This author serves as president of Southern Bancorp Community Partners. *See* Southern Bancorp, *Super Saturday—Free Tax Prep and Legal Assistance*, FACEBOOK (Feb. 11, 2017), <https://www.facebook.com/events/1236813126373313/>.

⁴⁵ GA. APPLESEED, *supra* note 32.

⁴⁶ *Id.*

There are 159 counties in Georgia and many other regions across the United States where heir property obscures potential wealth.

B. Wealth Creation for Communities

The municipalities where the properties exist can benefit from an increased tax base. For example, timberland that is under forestry management may be taxed at a different rate than land that is fallow and the timber itself is also taxed.⁴⁷ Many communities could benefit from an increased tax base.

C. Economic Ties to Out-of-State Owners

Productive heir property can reconnect far flung family members to each other and to the region. That region may benefit from tourism and related revenues from greater economic activity resulting from increased visits to and investments in the property and the region. Communities that have experienced outmigration⁴⁸ can particularly benefit from broad-based ties to their narrow geography. For example, a study conducted by the Emergency Land Fund (later merged⁴⁹ with the Federation for Southern Cooperatives) was cited in a 1986 Washington Post article:

An ELF study found that more than a fourth of all black-owned parcels in the Southeast were heir properties, each owned jointly by an average of eight people, of whom five lived outside the region. Another nugget: more Mississippi land is owned by blacks in Chicago than by blacks in Mississippi.⁵⁰

⁴⁷ See, e.g., Arkansas, NAT'L TIMBER TAX WEBSITE, <https://www.timbertax.org/statetaxes/states/proptax/arkansas/> (last visited Aug. 30, 2019).

⁴⁸ For a state by state analysis of migration patterns, see Gregor Aisch, Robert Gebeloff, & Kevin Quealy, *Where We Came from and Where We Went, State by State*, N.Y. TIMES (Aug. 19, 2014), <https://www.nytimes.com/interactive/2014/08/13/upshot/where-people-in-each-state-were-born.html?rref=upshot&module=inline#Arkansas>.

⁴⁹ Greg Irving, *Federation of Southern Cooperatives Marks 52nd Anniversary Amid New Awareness of Involuntary Black Land Loss*, NAT'L COOP. BUS. ASS'N CLUSA INT'L (Aug. 30, 2019), <https://ncbaclusa.coop/blog/federation-of-southern-cooperatives-marks-52nd-anniversary-amid-new-awareness-of-involuntary-black-land-loss/>.

⁵⁰ Sinclair, *supra* note 8.

These kinds of studies could be updated and expanded to understand where targeted heir property services might be offered. It may be beneficial to locate services where the owners are in addition to where the property is.

D. Proof of Concept

Increased heir property productivity can provide a proof of concept for what is possible with other property that already has clear title. For example, it could show what new business types are viable or change willingness to invest in certain areas, particularly those where land is relatively inexpensive.

These benefits affect families, communities, and properly scaled, society at large and are thus worthy of our attention. Productive ownership of land by people who have low or moderate wealth can be a game changer for families and for small or rural communities where modest numbers can affect the local wealth gap. Realizing the full value of heir property requires creating new opportunities and seizing existing ones through a combination of policy, research, and practice which can unlock the untapped wealth that heir property represents for so many people, families, and communities.