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Heir Property in the African American Community: From Promised Lands to Problem Lands

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HEIR PROPERTY IN THE AFRICAN AMERICAN COMMUNITY: FROM PROMISED LANDS TO PROBLEM LANDS

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Abstract

African American landowners have been reluctant to take advantage of intergenerational succession laws which provide for an orderly transfer of property from one generation to the next. This reluctance has led to a prevalence of heir property. Heir property is created when a person dies intestate. Heir property has created an impediment to wealth accumulation and has contributed to African American land loss in America. Partition actions are a byproduct of heir property which has operated to accelerate the loss of real property in the African American community. The Uniform Partition of Heir Property Act provides for procedural safeguards that would allow for cotenants of heir property to buy out other heirs and provide more discernable notices of partition actions. These factors will likely militate against the precipitous loss of African American lands due to partition lawsuits initiated because of heir property.
Keywords: Heir Property, Partition, Land Loss, Interstate Succession

Introduction

Much doubt has been cast on the legal system and on intergenerational-succession rules designed to allow for real property to be transferred in an orderly fashion from one generation to the next. The reluctance to write wills and take advantage of estate planning has caused much of the land held by African Americans in the southeastern United States to become heir property. Land holdings classified as heir property are susceptible to civil lawsuits known as partition actions, which may ultimately force cotenants off land held by families for generations.

Partition lawsuits generally result from disgruntled heirs who hold real property as cotenants pursuing a legal course of action. This has led to a precipitous decline in African American land holdings in the United States. The Uniform Partition of Heirs Property Act provides possible solutions to stemming the tide leading to the loss of heir property. This paper reviews the literature and explores the reasons why much of African American held land becomes heir property, and analyzes the methods by which partition suits have contributed to African American land loss.

The Prevalence of Heir Property in the African American Community

Heir property is property left by a person who dies intestate. Heir property results from the failure to prepare a will, thereby allowing property to pass to children and other relatives of a deceased person according to a state's interstate succession laws (Baker and McBride, 2013). Once property becomes heir property, an impediment to market exchange or otherwise use of it as a means of exchange is created. The ability to collateralize or leverage real estate is generally believed to be a pathway to wealth in America. Heir property creates a barrier to wealth accumulation and has contributed significantly to land loss in the African American community in the United States. The accumulation of heir property has restrained economic development, and also, led to significant land loss among African Americans (Nembhard and Otabor, 2012).

Scholars who have studied land loss of African Americans estimate that heir property constitutes one-third to roughly fifty percent of all property owned by African Americans in the rural South (Dyer and Bailey, 2008; Pennick, 1987). There are many reasons for the failure of African Americans to write wills, and thus, allow family property to be communally owned by heirs. The failure of African Americans to prepare wills is likely attributable to distrust of government, a belief that their children will ultimately inherit the land and reluctance to cause division within the family. "Many African American families have owned property since the late 19th and early 20th centuries, and therefore could have hundreds of co-owners sharing a miniscule interest in the land; this is known as fractional heir property" (Nembhard and Otabor, 2012, p. 8).

Misconceptions which have led to an abundance of heir property in the African American community include the following:

A. Because the land is heir property, it will remain in the family forever.
B. The payment of property taxes and making improvements is the equivalent of ownership.
C. Living on the property vests a superior claim of right.
D. All living heirs have a pro rata share in the property.

A major reason for the loss of African American-owned real property is due to partition sales, which may ultimately lead to a court-ordered transfer of property in the event heirs are unable to agree to a division of the land. The sale of property prompted by partition actions is thought to be the most commonly used legal tactic contributing to the loss of heir property in the African American community (Casagrande, 1986; Mitchell, 2001). Partition sales are generally initiated by heirs or those whose heirs have transferred their interest to third parties.

Those who hold an interest in heir property do so as tenants in common. Tenants in common, regardless of the number, hold title to property in a manner that vests each "owner" with an undivided interest. A tenancy in common results when two or more individuals own an undivided interest in property. They may own equal shares; however, neither owner's rights to the property are necessarily superior to the other (Official Code of Georgia Annotated, 2010, Section 44-6-120).

Tenants in common lack the authority to compel cotenants to pay taxes or contribute to the upkeep and maintenance of the common property. Multigenerational transfers of heir property causes further fractionalization of interest, thus creating a likelihood that disgruntled cotenants will demand a partition sale of the property against the desires of the other cotenants. Alternatively, a cotenant might sell his or her share of the property to a third party who will then file an action to partition the property. Any cotenant is entitled to file a partition action to terminate the tenancy in common (Mitchell, 2001). The partition suit occurs because a cotenant has sold his or her interest to an outsider or has been encouraged to commence the action at the behest of a real-estate speculator or the cotenant's self-interest (Casagrande, 1986). For these reasons, tenancy in common has been called one of the most unstable forms of land ownership, and the heirs of such property the most vulnerable owners (Uniform Partition of Heirs Property Act, 2010).

The Partition Sale

Those who have an interest in heir property generally lack a marketable or clear title due to the multiplicity of owners. This is due primarily to the fact that the original owners did not prepare a will. Heir property presents a two-fold problem for its owners. "First, like many other poor Americans, rural African American landowners have tended not to make wills; at the owners death, state intestacy laws enable a broad class of heirs to acquire an interest in real property of the decedent" (Mitchell, 2001, pp. 507−508).

The second part of the heir property problem emanates from the right of cotenants to file a civil action to partition the property. A partition lawsuit is a means of dividing property held by two or more owners. "When two or more persons hold an undivided interest in land, their interest can be separated only in one of two ways, either by an amicable partition in releasing to each other or by a statutory proceeding in partition" (*Corpus Juris Secundum*, 2009, p. 14). The rights of cotenants to voluntarily separate their interest or seek a judicial declaration dividing their interest has been long recognized (Thompson, 1979).

Historically, courts favored a division of real property in kind, however, "the routine trend in Alabama and other jurisdictions is for courts to order sales of property" (Casagrande, 1986, p. 757). The propensity of Alabama courts to order partition sales was elucidated in *Ragland v. Walker*, wherein the court offered the following example:

> Suppose six children of intestate parents wish to preserve the family property intact, but the seventh child wants his share of the inheritance. By invoking Section 35-6-20, he can enforce either a partition in kind or a sale of the whole and division of the proceeds. Except in the rarest of circumstances which permit judicial equitable partition, the usual end result of such proceedings is the passing of title to a stranger (*Ragland v. Walker*, Ala. 1980).

Because of the reversal by courts favoring the sale of heir property rather than dividing it in kind, there is increased need for the protection of heir property. The judicial preference for in kind partition is a relic of a bygone era. The ability to divide proceeds from a sale and make a monetary division to cotenants is now viewed as an easier way to dispose of cotenants interest in undivided real property. This means of resolving heir property disputes is summed up as follows:

> Lip service is still given to the historical preference for physical division of the affected land, but sale normally is the product of a partition proceeding, either because the parties all wish it or because courts are easily convinced that sale is necessary for the fair treatment of the parties (Powell, 1982, p. 758).

It is the province and duty of the courts to prevent partitioning sales actions from being used as a tool to acquire property otherwise unavailable. This is particularly true where "minority interest, such as those of southern black cotenant farmers, are vulnerable to powerful market place pressures" (Powell, 1982, p. 758). State legislatures are not absolved from their responsibility to protect vulnerable individuals from losing property as a result of partition sales. In 2010, the State of Georgia passed the Uniform Partition of Heirs Property Act; in 2012, it became the second state (after Nevada) to adopt this Act (hereinafter referred to as the Act). The Act became

effective on January 1, 2013 and was written to provide protection to cotenants of heir property involved in partition actions. One purpose of the law is to provide alternatives to uprooting cotenants from heir property. "Georgia's adoption of the Act seeks to provide protections not previously afforded owners of heirs property, and give credence to subjective factors traditionally ignored for purposes of assigning fair-market value to heirs property" (Baker and McBride, 2013, p. 18). Adopting the provisions of the Act would likewise inhibit the loss of property due to court-ordered sales.

Uniform Partition of Heir Property Act

Need for Passage of the Act

While there were significant gains in African American property ownership from 1870 to 1910, "…[a]fter 1920, rural black ownership began a steep decline that paralleled the demise of the black farmer in America" (Mitchell, 2001, p. 509). "Today, there are fewer than 18,000 African American farmers in the United States, and African American farmers own less than 3 million acres of land" (*Pigford v. Glickman*, 2001). The U.S. Department of Agriculture is viewed by many as having played a critical role in the decline in African American land ownership (Civil Rights Action Team, 1997). While land redistribution programs of the government failed to address the post-Civil War needs of African Americans, and the U.S. Department of Agriculture's discriminatory lending practices combined to contribute to African American land loss in the United States, one cannot overlook the extent to which heir property has also led to land loss by African Americans. "The heart of the problem is the inadequate protection given to property owners in the context of partition proceedings", and "the right of cotenants to partition does not yield to considerations of hardship, inconvenience, or motivation of the petitioner" (Craig-Taylor, 2000, pp. 741, 752). The Act employs procedural safeguards, such as broader and more conspicuous notice requirements, and a buyout provision for cotenants. Moreover, it allows courts to reconsider subjective factors in determining whether to order an in kind division as opposed to a sale of heir property.

Intent of the Act

Forced sales of heir property is extremely harmful to the cotenants; for example, families who have resided upon jointly owned property for generations may be forced to relocate, the property may be sold at less than market value, and the "…cross-cultural importance of land to one's sense of self" may be lost (Baker and McBride, 2013, p. 21). The Act will curtail "…an array of persons and entities that prey on the heir property situation by practices which are, although technically legal, clearly unscrupulous" (Emergency Land Fund, 1984, p. 44). The Prefatory Note of the Act provides that:

> "The purpose of this Act 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" (Uniform Partition of Heirs Property Act, 2010, p. 6).

The Act generally defines heir property as real property held in tenancy in common. However, there are certain specific requirements that must be met as of the date of the filing of an action for partition. Those requirements are:

A. There is no agreement in a record binding all of 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. Twenty percent or more of the interest are held by cotenants who are relatives;
    ii. Twenty percent or more of the interest are held by an individual who acquired title from a relative, whether living or deceased; or
    iii. Twenty percent or more of the cotenants are relatives (Uniform Partition of Heirs Property Act, 2010, p. 6).

The Act precludes those with binding cotenant agreements from coverage. "A cotenancy agreement is an agreement among tenants in common that governs the various rights and obligations of joint land ownership, including payment of taxes and insurance premiums; such agreements may also govern partitions of the property" (Baker and McBride, 2013, p. 18). Further, the Act prohibits tenants-in-common property obtained by investors who are bound by agreements that are subjected to partition sales (Uniform Partition of Heirs Property Act, 2010, Section 2, Comment 3).

The second determinant of heir property under the Act is that one or more of the cotenants must have acquired their interest from a relative. The comments of Section 2 of the Act take an expansive approach to defining the term relative. The Act defers to state laws to determine relatives, which may include individuals who are not genetically related, such as adopted children (Uniform Partition of Heirs Property Act, 2010, Comment 6). Upon meeting this requirement, the Act requires the common owners to meet the twenty percent requirement discussed above.

The Notice Provision

One of the most striking provisions is the notice requirement. This requirement provides an additional means of making heirs aware of a partition action. The Act provides that if a plaintiff seeks notice of the partition action by publication, the plaintiff must post a conspicuous sign on the property that is subject of the lawsuit (Uniform Partition of Heirs Property Act, 2010, Section 4). The posted sign must advise that a partition action has been commenced, state the name and address of the court, and sufficiently identify the property that is the subject of the suit (Uniform Partition of Heirs Property Act, 2010, Section 4). Posting notice may prompt those who distrust the legal system to seek assistance and may provide a better means of alerting absentee cotenants of the partition action. The purpose of the notice requirement is to put all who might see the posting of the notice on alert and have the effect of allowing the word to spread in the local community and beyond of the pending partition action.

Assessing Value of Heir Property

The valuation of heir property may be determined by one of four methods:

1) By agreement amongst the cotenants;

2) By the court, if the "evidentiary value of an appraisal is greater than its cost. In such cases, the Court will determine the fair-market value of the property.
3) By disinterested real estate appraisers who are licensed in the state of the heir property;
4) In the event of a court-ordered appraisal, a party may object and provide grounds for the objection. The court will then conduct a hearing. At the hearing, "in addition to the court-ordered appraisal, the court may consider any other evidence of value offered by a party" (Uniform Partition of Heirs Property Act, 2010, Section 6).

Given the number of challenges associated with heir property (familial, social, economic), consideration of other issues could quell family turmoil and help those affected better understand the legal concepts associated with heir property.

Cotenant Buyout

Upon the determination of value, all cotenants, except those who filed the partition by sale, must be notified that they may purchase the interest of the other cotenants (Uniform Partition of Heirs Property Act, 2010, Section 7). The cotenants who did not petition for partition by sale must inform the court of their election to purchase the interest of the cotenants who requested the partition by sale within forty-five days (Uniform Partition of Heirs Property Act, 2010, Section 7). After the expiration of the forty-five day period, the following rules govern the sale:

1) If one or more of the cotenants elect to purchase the property, the court is required to notify all parties to the partition action, and sixty days therefrom those cotenants are required to tender their purchase price to the court.
2) "If all electing cotenants pay their apportioned price into court, the Court shall issue an order reallocating the interests of the cotenants and disburse the amounts held by the court to the persons entitled to them" (Uniform Partition of Heirs Property Act, 2010, Section 7(e)(1)).

Although the Act favors a cotenant or cotenants purchase, either wholly or partially, it offers a default if no electing cotenant pays its prorated price in a timely manner, or if interests in the property remain unpurchased.

Partition actions are one of the most notable legal procedures leading to the loss of heir property (Emergency Land Fund, 1984). In partition actions, "the property is usually sold to the highest bidder at a public sale held in front of the county courthouse" (Emergency Land Fund, 1984, p. 271). "While partitioning by division in kind vests each cotenant with his or her property interest, partitioning sales typically result in the sale of those property interests to a third party" (Casagrande, 1986, p. 756). Historically, in kind partitions were favored; however, the trend is towards partition sales. The Act expresses favor towards partition in kind. In cases where cotenants are unable to purchase the interest of other cotenants and after exhausting buyout opportunities, if a remaining cotenant requests a partition in kind, the Act requires that the request be granted unless there is manifest prejudice to the cotenants (Uniform Partition of Heirs Property Act, 2010, Section 8). Even a partial partition was viewed as a progressive means of stemming the tide of African American land loss by the Emergency Land Fund in 1984. A partial petition allows the heirs to sell part of the land and divide the remainder which may be shared by cotenants as tenants in common. North Carolina is the only state which recognizes a partial

partition (Emergency Land Fund, 1984, p. 274). The Act (2010) does not specifically authorize a mixed remedy of a partial partition in kind and a partition by sale of the remainder.

In Kind Partitions: A Totality of the Circumstances Approach

Under Section 9 of the Act, courts must take into consideration a variety of other factors in determining whether to grant a partition by sale or in kind. Absent an agreement between the heirs, "courts, in most jurisdictions, usually take the position that land cannot be equally divided…" (Emergency Land Fund, 1984, p. 255). The totality of the circumstances approach is not a novel idea. In its 1984 study, the Emergency Land Fund recommended: "A closer look at state laws suggests that courts should look at various factors to determine if the land can or cannot be divided in kind" (p. 275). The factors recommended by the Emergency Land Fund "…are the number of tenants in common, the sizes of their interest, as well as the nature, character and location of the property" (p. 275). Once a partition action has been instituted, in most cases, the sale of the property is inevitable. Most state statutes provide that a physical division of the property is the preferred remedy in a partition action; and that a partition sale be ordered when a partition in kind would cause inequities (Mitchell, 2001).

Laws governing heir property and tenancy in common do not prohibit a sale of an interest held by an heir. Frequently, however, "…partition lawsuits are brought by outside developers who have acquired an heir's interest, or the suits are funded by developers who have established an agreement to purchase the property pursuant to negotiations with an heir" (Rivers, 2006, p. 23). Lawyers who bring partition actions on behalf of developers who have acquired an heir's interest are not proponents of in kind partition. Developers and their representatives are interested in the most efficient and effective path to securing clear title to property in order to maximize its use and economic value subsequent to the partition sale. A confluence of the developers' and partitioners' interests, along with the interests of the defending heirs inescapably leads to a sale. The merging of the defending heir's interest is prompted by the desire to sell the property to the highest bidder.

Section 9(2) of the Act takes into consideration the conditions under which a forced sale occurs. That section provides that a court should consider the total value of the property as a whole versus the fair market value of the property subdivided as a result of a partition suit (Uniform Partition of Heirs Property Act, 2010, Section 9(2)). Under this section of the Act, courts would be allowed to assess the conditions under which the sale was conducted. "In conducting this assessment, a court must take into consideration the type of sales condition under which any court-ordered sale would occur as property that is sold at a forced sale" (Uniform Partition of Heirs Property Act, 2010, Comment 1). The Act recognizes that forced sales commonly result in a realized price substantially lower than fair-market value.

Mitchell (2001, p. 214) noted that while there are "some courts and commentators [who] still refer to partition sale as a drastic remedy, the current preference for partition sale reflects the ascendant economic view that places primary importance on individual wealth maximization." "Under the principle of wealth maximization, when property is placed on the open market, the courts are assured that the property will fetch the highest price possible and will end up in the hands of the party who values it the most" (Reid, 1986, pp. 835, 879). "Typically, a court-ordered sale draws less than optimal value because of the forced, timed conditions of the court

sale where there are willing buyers but 'court-ordered' sellers" (Rivers, 2006, p. 20). These types of pressured sales lack the components of a free market, which would yield the optimum value of land. Fair-market value presupposes that the parties are motivated by self-interest, as opposed to the intervention of the courts, which in judicially-ordered sales merely act to ensure that the statutory requisites of these sales are met. Fair-market value or optimum-price realization assumes there is a willing purchaser and a willing seller.

Conclusion

African Americans were undaunted by the reneging of a promise by government officials, after the civil war, to provide them land on which they could establish a degree of independence and economic freedom. Despite the reneging of the promised lands, they accumulated significant land holdings by other means. The acquisition of land was necessary to ensure their continued freedom and survival. Because of the failure of many African Americans to write wills or otherwise engage in estate planning, land was passed down pursuant to intestate succession laws; thus, property owned by heirs was held as tenants in common. Much of the land acquired by African Americans, therefore, became problem lands, because the heirs lacked clear title. The prevalence of heir property in the African American community makes land ownership prone to partition law suits.

Partition suits frequently result in court-ordered sales requiring property to be sold to the highest bidder at a public auction. Court-ordered sales are a euphemism for forced sales, which hamper the ability of market forces to function. Forced sales generally benefit developers and land speculators who purchase property at low prices and either resell or develop the land for sale at significantly higher prices. Consequently, this leads to loss of land in the African American community. A solution is to encourage and allow partition in kind. Allowing partitions in kind will provide heirs with an opportunity to retain property. The Uniform Partition of Heirs Property Act [of Georgia] provides hope to those who hold heir property, because it encourages partitions in kind. It can also provide guidance for other legislatures that want to adopt similar laws to solve the problem of heir property, or prevent or minimize African American land loss. Moreover, African American families must be encouraged to write wills to protect family land from being subjected to partition suits and the possible loss of land.

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