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HOLDING ON TO A FAMILY LEGACY

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Real property that has been passed down informally through generations is commonly known as "heirs' property." Usually the landowners die intestate, so the heirs take title as tenantsin common regardless of whether they live on the land, maintain the land or improvements, pay taxes on it, or have ever visited it. The result is all too often the family's loss of the property through partition suits by savvy investors.

The American Bar Association's Real Property Section and Trust & Estates Law Section advocated for the passage of the Uniform Partition of Heirs Property Act (UPHPA). Presently, the UPHPA has passed in 13 states including Virginia, with legislation pending in other jurisdictions. When adopted, the UPHPA requires safety measures designed to protect heirs, including:

- A requirement for an independent appraisal of the property
- The right to first refusal to purchase the share of the petitioner
- In-kind division, if it can be done equitably
- Factors to consider including sentimental attachment and ancestral value
- Listing for sale at appraised value before an auction

Partition suits and forced sales of heirs' property have been the cause of immeasurable amounts of loss and have left many individuals homeless and penniless. This article attempts first to educate those on heirs' property and partition suits generally. Next, it defines the reforms recently put in place, specifically in Virginia, to better protect heirs' property owners. Finally, this article introduces the Black Family Land Trust, Inc., and details the work the Trust has done to help the community in need.

Heirs' Property

Property being transferred from one generation to another by intestate succession is considered "heirs' property." According to state law, when someone who owns real property dies without an estate plan, those deemed to be the heirs of the deceased person are generally entitled to an ownership interest in the real property. If two or more heirs are entitled to receive an interest in the real property, the heirs will own the property as tenants in common with undivided interests and common rights.

Tenancy-in-common is the most widespread form of real property ownership among multiple owners. Individual tenants do not own a particular portion of the property; they own a fractional interest of an undivided whole. The fractions of interest held by each tenant-in-common are not necessarily equal,

but all owners have the same right to occupy and use the property, no matter how small their percentage of ownership. In theory, the idea of transferring land by intestate succession may be thought an easy alternative but it's rife with problems and potential conflicts. A decedent may have been confident that his or her heirs would be able to remain on the property for as long as they wish; however, heirs' property ownership in the form of tenancy-in-common is actually one of the least stable forms of common ownership of real property. Just as all owners have the right to occupy and use the property, each owner can initiate (a) a sale of his or her interest, or (b) a suit in which the court is asked to force a sale of the property. If sold to an outside third party without familial affections, a partition suit is highly likely.

It is not uncommon for heirs' property that has been passed down for generations to be owned by one hundred people or more. The hypothetical below shows how heirs' property can be divided among many individuals in just three generations.

- When A died without a will, his interest passed intestate as follows: 1/3 to B, 1/3 to C, and 1/3 to D.
- When B died without a will his 1/3 interest was divided in half, 1/6 to E and 1/6 to F.
- When C died, his 1/3 interest passed to his only heir, G.
- When F passed without a will his 1/6 was divided in half between his heirs, 1/12 to H and 1/12 to I.

All of those with interest in the property hold title as tenants-in-common. This means that even though H and I only have a one-twelfth interest in the property, they have the same rights to use and enjoyment as any other owner.; They also have the same right to sell their interest or to file a partition suit as any other owner.

Partition of Real Estate

Partition law governs withdrawal from tenancy-in-common ownership. Any tenant, regardless of the fractional interest he or she holds, can file a partition action. Many families assume that the larger percentage of ownership held by the family makes their title secure because of their belief that most common owners must agree to sell. In reality, unrelated individuals or businesses can acquire a small interest in family-owned property and file a partition suit requesting that the court order the entire property be sold. It is not uncommon for real estate speculators to abuse partition suits in order to gain title to large portions of land. By taking advantage of their co-owners' inability to pay cash or secure financing necessary to buy the entire parcel, a speculator can force a sale at auction and take complete ownership at a below fair-market price.

Partition Suits in Virginia

In order to file a suit for partition, the action must first be filed as a civil action in the circuit court, in the city of county in which the land, or part of it, lies. Virginia Code § 8.01-81 defines the procedure to be followed in a suit for partition. The Code places no restrictions or limitations on the courts as a matter of procedure; courts are free to adopt the methods best suited to meet the needs of each case.

The primary issue the court must decide is whether physical division, or partition in-kind, of the property is convenient, practical, and in the best interest of the parties; or, whether their interests will best be served by a partition by sale. Statutorily, a court has no power to order the sale of the property without first determining, from 'competent evidence,' that the land cannot be conveniently partitioned in kind.

When partition in-kind is found to be impractical, there are different avenues provided by statute. Prior to recent amendments, the court would order the public or private sale of the property to an unrelated buyer, and then divide the proceeds among the parties. It was simply up to the court to decide what would be in the best interest of all parties involved.

Uniform Partition of Heirs Property Act

The Uniform Partition of Heirs Property Act ("UPHPA") was introduced by the Uniform Laws Commission in 2010 and is designed to remedy the problems those who own family real property face in keeping their property and their wealth within the family. The Act specifically targeted a few key elements of a partition suit that had historically been unfavorable to heirs' property.

Courts traditionally have favored partition by sale over partition in kind, as many have developed and applied an economic test. A sale of the property will be ordered if this test shows that the hypothetical fair market value of the entire property is more than the aggregated fair market value of the sub-parcels that would result from a physical division of the property. The courts would then order the property sold at auction, which would often lend to a sales price much lower than fair market value. In so doing, the emotional or ancestral ties to the land are overlooked. Further complicating the situation, banks and other lending entities will often not accept a partial interest in property as collateral, so poorer families would be unable to secure the financing to be able to bid competitively on the land on which their family had been living for generations. In addition to yielding less than fair value, a number of fees and costs would have to be paid before the remaining proceeds of the sale would be distributed. Typical fees include court-appointed commissioners, surveyor fees, and attorney fees.

Prior to implementation of the UPHPA, partition sales often resulted in an involuntary loss of property rights and a loss of wealth proceeds from the sale of the property. Many former tenants-in-common were left with nowhere to go and no money to show for their loss of property.

The UPHPA addressed a need for notice to all parties, the proper procedure for determination of value, suggested allowing co-tenants to buy out the rights of those filing for partition by sale, suggested partition alternatives, and listed elements that must be considered by the courts when making a final decision. The Uniform Act was written to remedy the inequality of partition suits of heirs' property.

Virginia Adopts Provisions of UPHPA

In the interest of equity, Virginia adopted provisions of the UPHPA for all partition actions filed after July 1, 2020[1]. Updates to the Code included a section defining the need to put a defendant on notice by posting and maintaining a post while the action in pending– a 'conspicuous' sign on the property that is the subject of the action. A new section reads that, unless either the parties agree on the value of the property or the evidentiary value of an appraisal is outweighed by the cost of the appraisal itself, the court must appoint a disinterested appraiser to determine the fair market value of the property. Another addition to the code states that the property may be allotted to any one of the parties who will buy out the other parties' rights to ownership, either by agreement or by court order. Finally, if multiple co-tenants wish to purchase the whole property, the court is required to consider a number of factors in deciding who should get to do so. These factors include how long each person or his or her immediate relatives owned it, whether there is a sentimental attachment to the property, and who has been paying the taxes, insurance, and other expenses. The addition of these sections serves to solidify the fact that a forced sale may only take place where it is neither practical nor equitable for the property to be allotted or sold to co-tenants.

Black Family Land Trust, Inc.

Studies have found that low- to middle-income property owners tend to transfer their property by intestate succession at a much higher rate than wealthier property owners who may have more access to wills and trust attorneys. According to these studies, there is a substantial race element to the patterns of intestate succession due to the significant gap in rates of White Americans and Non-

[1] § 8.01-81, et seq., Code of Virginia, as amended.

White Americans who create an estate plan. One study revealed that 64% of White Americans and only 24% of Black Americans had created a will or estate plan. Further, over the last 15 years, Black American home ownership has significantly decreased. Black home ownership rates stood at 40.6% in 2020, compared to 49.1% in 2004.

Between the end of the Civil War and 1920, Black Americans acquired at least 100 million acres of agriculture land. So many years later, they struggle to maintain their status as property owners. For example, until 1950, a substantial part of Hilton Head Island, South Carolina, was owned by Black American families. Real estate speculators and developers found heirs who owned small portions of these properties as tenants-in-common. They then bought out these individuals' percentages of interest. As the buyers now owned title in the real estate, they were able to file partition suits and force sales of large parcels of Black-owned property. This decimated Black land ownership on the island.

In early 2002, forty black individuals came together to discuss creating a land trust to protect black-owned farms and family lands and then, in February 2004, the Black Family Land Trust, Inc. ("BFLT") emerged. The Trust has led the way in preservation of protection of Black American and other historically underserved populations' land assets.

Today, the BFLT provides educational, technical, and financial services to those in need. They currently work primarily in the Southeastern United States and have active projects in Virginia, North Carolina, and South Carolina. Some of the groups that have partnered with the BFLT to create change include the USDA, the Farm Service Agency, Burt's Bees, Conservation Trust, Center for Heirs Property Preservation, and American Forest Foundation. Over the years, they have worked to retain more than 3,000 acres of family-controlled land assets in twenty-eight designated USDA StrikeForce counties between with a cumulative land-value of over twelve million dollars in Virginia, North and South Carolina.

The Virginia State Bar Real Property Section and Trust & Estates Section are working together to develop Continuing Legal Education programs to better educate attorneys on the UPHPA and the important work of the Black Family Land Trust, Inc. Additionally, efforts are underway for ways in which to educate the general public of resources available to protect common owners of ancestral property. This area of the law continues to develop into a more fair and equitable manner of transferring wealth through real property.