

APPALACHIAN STUDIES

Towards a Better Understanding of the Experience of Heirs on Heirs' Property

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Abstract—Heirs' experiences with heirs' property vary considerably. In some cases, the use of heirs' property, and harmonized expectations about those uses, may be difficult to coordinate amongst cotenants. In these cases, heirs may be concerned about their ability to use the land to support wealth creation. On the other hand, some heirs may fear that another heir or non-family cotenant will seek to partition the cotenancy and, as a result, they may be concerned about their vulnerability to forced displacement from the property. These experiences—wealth and vulnerability—both arise because of the unique rights and duties associated with heirs' property as a form of real property called tenancy-in-common. While these rights and duties have dominated debates surrounding heirs' property, this paper draws attention to another set of legal relationships central to the internal life of heirs' property and the experiences of heirs' property owners: liberties and exposures. These relationships are diverse and remain understudied. A unique contribution of the paper is to conceptually demonstrate the importance of liberties and exposures to understanding the experiences of heirs on heirs' property.

INTRODUCTION TO THE WEALTH AND VULNERABILITY CONCERNS

Two general concerns associated with heirs' property emerge because cotenants face the challenge of aligning their expectations around co-owned land (Deaton 2012, Deaton et al. 2009).¹ The "wealth" concern arises when one cotenant bars other cotenants from using the land in their preferred way, thereby diminishing overall wealth. The "vulnerability" concern arises when cotenants are vulnerable to dispossession as the result of a partition action. In our past research, we have generally characterized these two concerns as extreme cases: in the former, cotenants retain legal possession but the land goes unused; in the latter, the land may be transferred to a new owner who can use the land, but the original cotenants lose their property rights altogether. We believe these remain important concerns, but we recognize that the two extremes also fail to capture a range of intermediate situations in which cotenants work to coordinate their land uses. We do not have a good theoretical or empirical understanding of the rules and norms that govern in these

intermediate cases. For example, how do cotenants decide between conflicting land uses? What happens when cotenants on jointly owned farmland disagree on tillage practices? Such choices have economic and environmental consequences. What happens when cotenants want to simultaneously use the land for mutually exclusive activities (e.g., bird watching versus skeet shooting)? The range of potentially conflicting situations is vast and varies depending on the potential uses of the land and the interests of cotenants. In this paper, we develop a conceptual foundation to understand these situations and call for more empirical work to explore the complexity of cotenant relationships.

We have addressed the wealth and vulnerability concerns at length in our earlier research, so we review these only briefly in the next section. In the third section, we argue that these two concerns are grounded in one important set of legal relationships—the reciprocal rights and duties of cotenants to exclude one another. But the path of the law as experienced by heirs depends on a broader set of these legal relationships. Cotenants not only have rights

¹ The terms "wealth concern" and "vulnerability concern" are fully developed in Deaton et al. (2009) and Deaton (2012). Deaton (2012) uses the term "wealth concern" in essentially the same way that Deaton et al. (2009) use "efficiency concern."

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Citation for proceedings: Gaither, Cassandra J.; Carpenter, Ann; Lloyd McCurdy, Tracy; Toering, Sara, eds. 2019. Heirs' property and land fractionation: fostering stable ownership to prevent land loss and abandonment. June 15, 2017, Atlanta, GA. e-Gen. Tech. Rep. SRS-244. Asheville, NC: U.S. Department of Agriculture Forest Service, Southern Research Station. 105 p.

and duties, they also enjoy certain liberties with respect to the land and are thereby exposed to the liberties of others. These liberty-exposure relationships foreground the informal rules of governance that are likely to emerge between cotenants to support effective coordination in some situations. We develop these concepts of “liberty” and “exposure” below and provide examples to illustrate. We conclude with a few ideas about how our conceptual framework might influence our assessment of effective efforts to address concerns associated with heirs’ property.

SUMMARIZING THE WEALTH AND VULNERABILITY CONCERNS

The urgency to examine heirs’ property derives from two concerns that we categorize as “wealth” and “vulnerability.”² These concerns are no doubt stylized and over-simplified characterizations, but we use this approach for two reasons. First, it enables us to summarize a nuanced issue quickly. Second, we use these extremes to help clarify our primary focus in this essay—to encourage a better appreciation for the variation in governance strategies, outcomes, and diverse experiences of cotenants.

The wealth concern arises in situations where heirs’ property becomes “dead capital”—an asset that cannot be leveraged effectively to generate new assets.³ Overlapping property rights can make it difficult for cotenants to coordinate their activities to use land in an entrepreneurial manner to generate wealth. For example, banks are unwilling to allow one cotenant to mortgage heirs’ property without the consent of the other cotenants (Deaton 2007). Similarly, one cotenant cannot use heirs’ property in ways that would arguably prevent other cotenants from using the land: e.g., in some cases one cotenant cannot agree to have the land timbered without the consent of the other cotenants. In these and other situations, heirs’ property will limit some uses of the land either because cotenants disagree on the appropriate use or the costs of effectively coordinating activities are too high. At the micro level, this may prevent the use of land in a manner that would generate income and wealth. In regions where heirs’ property is prevalent, the diminished capacity of land to act as a form of capital may stymie regional development.⁴ As Deaton (2007) argues, when the costs of “exit” are high relative to the benefits of a legal partition (i.e., a dissolution of the cotenancy relationship), the wealth concern can become a persistent problem

that is embedded in the landscape. In previous research, the importance of the character of local ownership has been underemphasized. Specifically, in the context of Appalachia, studies like “Who Owns Appalachia?” (ALOTF 1983) focus on the large quantity of land owned by people outside the region rather than the way land is owned by small holders who remain in the region—particularly low-income households.

In contrast to the wealth concern, which is focused on the exchange values associated with the use of land, the vulnerability concern recognizes that cotenants value heirs’ property for a myriad of reasons and that these values are vulnerable to the rights of other cotenants to seek partition. Deaton et al. (2009) provide three case studies from the central Appalachian region that address this issue with specific examples. For example, one heir (under the pseudonym Bernice Jones) expresses a fear of losing her personal attachment to the land as a legacy from her father, and a desire to maintain control over conservation measures. If the court awards a partition by sale,⁵ then all the other cotenants could be unwillingly disposed of their land and their net compensation—which will vary depending on the size of their partial interest, the sale price, and the legal fees, and may not exceed their perceived loss.

At first blush, and in the extreme, the vulnerability concern provides an important counterweight to the wealth concern. The former concern aligns with efforts to maintain an heirs’ property situation while the latter concern calls into question such efforts. While there is value to developing arguments around heirs’ property using extreme characterizations of these two concerns, as a matter of experience, they do not fully characterize the variety of relationships that meaningfully describe heirs’ experiences with heirs’ property. In the remainder of this essay, we provide some thoughts on how to better organize thinking about these experiences that comprise the “internal life” (Alexander 2012) of heirs’ property.

BEYOND WEALTH AND VULNERABILITY: RIGHTS, DUTIES, LIBERTIES, AND EXPOSURES

In this section we suggest that the wealth and vulnerability concerns dominate debates about heirs’ property, in part, because our existing conceptual approaches to cotenancy⁶

² Deaton et al. (2009) provide a detailed discussion of these concerns both conceptually and in the context of case studies.

³ De Soto (2000) famously defined this term in the context of emerging markets where many of the poor are *de facto* owners of land but do not enjoy *de jure* rights. As a result, he argues, these *de facto* owners are less likely to use the land in entrepreneurial ways—e.g., investment, collateral, etc.—that support economic growth. In short, he argues that the poor have assets like land, but the lack of legal rights prevents it from effectively acting as capital.

⁴ Deaton (2007) points out that this argument is best understood as a hypothesis. There remains a need to empirically assess this hypothesis.

⁵ Deaton (2012) reviews the history of partition law in the United States and explains why partition by sale is a likely outcome.

⁶ Deaton et al. (2009) fully develop the wealth/efficiency and vulnerability concerns.

tend to overlook certain important relationships between cotenants. Our starting point is to note that the competing concerns about wealth and vulnerability are primarily based on worries about how cotenants deploy one subset of their legal relationships—namely, the different exclusionary rights they can claim against one another. On the one hand, the wealth concern arises because cotenants sometimes have the right to exclude other cotenants from certain land uses or from obtaining a mortgage. In these situations, the other cotenants are under a legal duty to seek permission for the actions they wish to pursue, raising the spectre of coordination failures. On the other hand, the vulnerability concern arises because cotenants have the right to seek a partition of the property, resulting in a legal power to alter and often eliminate the property rights of other cotenants (as well as their own). While this emphasis on exclusion tracks much of the recent focus in property law scholarship more generally (Merrill 1998), as a descriptive matter it leaves out many of the other “governance” relationships (Alexander 2012, Smith 2002) that characterize heirs’ property.

We aim to go back to basics, returning to the “fundamental legal conceptions” developed by Hohfeld (1913) in the early 20th century and later modified by Commons (1959). We use these fundamental legal conceptions—rights, duties, liberties, and exposures—to describe the relationships between heirs, and between heirs and non-heirs, with respect to heirs’ property. While rights and duties have been the focus of much of our previous research, in the remainder of this paper we emphasize the importance of liberties and exposures as concepts that can help us to better understand: (1) the variety of relationships that exist between cotenants; (2) the consequences of those different relationships for heirs who are differently situated (e.g., local versus absentee co-owners); and (3) the implications for enforcement of heirs’ entitlements through informal means. We do not attempt to fully explore each of these issues here, but rather to suggest a promising conceptual framework for future analysis.

In the remainder of this section we develop the Hohfeld (1913) and Commons (1959) approach in the context of heirs’ property. For simplicity, assume that we wish to describe the complete set of possible legal relationships that exist between two cotenants, A and B (though the description below extends to heirs’ property with any number of cotenants). Commons, drawing on Hohfeld’s initial framework, identified several categories of correlative legal relationships that can be used to define this complete set. Two of these relationships are relevant for our purposes: rights-duties and liberties-exposures.

First, cotenant A may claim a *right* against B which imposes a correlative *duty* on B to behave in a particular way. A’s “right” in this context is a legal entitlement to undertake some activity while B’s “duty” is the correlative legal obligation to respect that entitlement—both of which will be enforced by the State. For example, A’s right to exclude B from certain uses of heirs’ land (such as cutting trees) imposes on B a correlative duty either to seek permission before engaging in those uses or otherwise to refrain from undertaking them. If B refuses to observe this duty, A can seek damages or an injunction in court.

Second, cotenant B may exercise a *liberty* which gives rise to A’s correlative *exposure* to the consequences of B’s actions. B’s “liberty” is the freedom to undertake some activity that, while legally permitted, does not create a correlative duty on the part of A—meaning that B cannot call upon a court to prevent A from interfering by, for example, engaging in a conflicting use. B’s liberty correlates with A’s “exposure” to the potential costs of B’s activity, against which A likewise has no legal recourse. For example, B may enjoy the liberty to engage in certain agricultural uses of heirs’ land, exposing A to any externalities of that use, such as odours or soil erosion. If B spreads manure on jointly owned farmland on the 4th of July, A will be deterred from having a picnic on the land at the same time. The opportunity costs of not being able to use land for competing purposes are costs for which A may be unable to seek compensation.

As Commons pointed out, A’s exposure to B’s use of heirs’ land for certain purposes is inversely correlated to the extent of A’s right to use the land for those purposes. In this sense, liberties and exposures arise in the absence of rights and duties⁷—but liberties-exposures relationships are nonetheless *legal* relationships, different in theory from situations in which parties choose not to enforce their existing rights because, for example, the costs of going to court are too high. Being legal relationships, liberties-exposures are themselves enforceable entitlements to a certain freedom of action, subject to the freedoms of others—although it may sometimes be impractical to seek protection for these entitlements through the courts. As Sherwin (2000) describes, nuisance law’s “live-and-let-live” rule is one example of liberties-exposures between neighbouring private owners: the “live-and-let-live” rule permits normal low-level annoyance among neighbors without liability. Because the activities in question are valuable, the interference is minimal, the negotiation is difficult, and a rough reciprocity exists among owners, all will gain from a mutual interference. The result is a forced exchange in that the live-and-let-live rule mandates reciprocal tolerance of acts” (Sherwin 200: 700). More

⁷ Commons (1959) preferred to use the term “limit” rather than “absence” because the former helps to clarify the nature of liberties and exposures as legal relations.

specific to the context of heirs' property, the common law principle that cotenants enjoy "unity of possession" over the whole of the co-owned property endows each cotenant with liberties, in some instances, to use the land even where those uses may conflict with the uses of other cotenants. Despite the central place that liberties-exposures appear to occupy in structuring heirs' property, these relationships remain understudied and are an important area for future research.

The prominent role of the liberty-exposure relationship in heirs' property situations marks a significance point of difference from sole ownership. For example, a sole property owner might feel reasonably assured that on any given day she could enjoy bird watching on her property (subject to minor interferences such as those permitted under the live-and-let-live rule). Such enjoyment may not be guaranteed among cotenants if one cotenant was a bird watcher but another, for example, wanted to engage at the same time in activities that made a great deal of noise and thereby precluded bird watching.

As a conceptual matter, distinguishing between the different rights-duties and liberties-exposures relationships that exist among cotenants helps us to see that the latter have generally been ignored in most discussions of the wealth and vulnerability concerns. While both concerns emphasize the costs of individuals asserting particular exclusionary rights and imposing correlative duties on their cotenants, the "internal life" of heirs' property—i.e., the routine experience of heirs on heirs' land—is also constituted by liberties and their associated exposures. Leaving these latter relationships out of our stories about heirs' property will necessarily lead to an incomplete assessment of key policy questions, such as how to support families to sustain heirs' property situations or, in some cases, dissolve them. For example, to the extent that the wealth concern raises the spectre of coordination failures and thereby supports the dissolution of heirs' property, greater attention to liberty-exposure relationships can help us to understand the opportunities and challenges for cotenants to overcome the full range of coordination problems in practice. In some cases, the exposed party's inability to go to law for recourse will inevitably produce a variety of *de facto* working rules to coordinate cotenants' uses of the land—for example, cotenants may informally agree to use the land on differing days during the week. Given the range of liberties afforded to cotenants, we might expect that these and other governance strategies for overcoming collective action problems are pervasive in heirs' property situations. Where these strategies are successful, partition actions are expected to be less prevalent. That said, forms of governance may be unstable because they are vulnerable to changing preferences among existing cotenants over time and to the preferences of new cotenants who enter the scene because of an

intestate death, a testamentary bequest by a deceased cotenant, or the sale of partial interest. Our point is not that governance strategies among cotenants will inevitably solve collective action problems, but that any normative debates about the persistence of heirs' property must surely consider the real possibilities for the successes or failures of these working rules over time.

This point leads to two further implications of a renewed focus on the complete set of legal relationships that characterize heirs' property. First, the distinction between rights-duties and liberties-exposures draws attention to important spatial or geographic dimensions of cotenancy. The exclusionary rights of cotenants can generally be exercised by those living at a distance from the land itself, underscoring the prominent role that may be played by absentee cotenants in this subset of claims. For example, both the wealth and vulnerability concerns have been connected to some degree to the role of absentee cotenants either in blocking certain productive land uses or in forcing a partition by sale (especially against the wishes of resident cotenants). But the exercise of competing liberties on heirs' property is presumably more likely to be undertaken by local cotenants who have physical access to, and direct interests in using, the land itself.

Second, cotenants' enforcement of their exclusionary rights necessarily implicates formal systems of dispute resolution in a way that the exercise of liberties and the development of associated governance strategies as a form of self-help does not, suggesting that access to lawyers and other legal resources may have different implications depending on the legal relationships at stake. For example, because cotenants will generally need to go to court to secure a partition order or acquire an injunction, the availability of these remedies will tend to be biased in favour of individuals who can afford to hire a lawyer or who have the necessary knowledge to self-represent. But cotenants engaged in exercising their liberties or in devising informal governance arrangements will be less affected by the distribution of these tangible and intangible resources—though of course, other inequalities such as greater willingness or capacity of one cotenant to intimidate another are potentially relevant considerations. Again, our aim here is not to describe or organize the specific governance strategies that might be used by heirs as forms of self-help to manage liberty-exposure relationships, but to emphasize that—as a matter of theory—these relationships and governance strategies have too often been ignored.

CONCLUSIONS

Our research on heirs' property has focused on two key concerns that emerge from heirs' property situations: wealth and vulnerability. These two concerns are primarily the results of the rights-duties relationships that are

structured by heirs' property or, more formally, tenancy-in-common. But as we point out in this essay, and as Hohfeld (1913) was quick to observe, talk of legal "rights" can too easily conflate other important legal relationships. Each heir not only holds a set of enforceable rights against her co-owners, she also enjoys a degree of liberty with respect to her property which will expose other cotenants to her actions. These liberty-exposure relationships are intimately tied up with cotenants' chosen—and sometimes conflicting—uses of the land. For this reason, both formal and informal familial practices and verbal agreements are likely to be significant: cotenants who live close to the land and use it regularly may have worked out certain ways of effectively governing the land amongst themselves. This is not to suggest that non-local or absentee cotenants living in other States are unimportant for the governance of heirs' property, but the extent to which they actually contribute to shaping these working rules remains an open question.

Broadly, our return to first principles holds two key lessons for future research, policy analysis, and law reform related to heirs' property. One lesson is that a full evaluation of partitioning or otherwise dissolving heirs' property should include an assessment of how that property is governed in practice. The "winners" and "losers" associated with dissolving heirs' property depend, in part, on the relations governing heirs' property. As we point out, these relations can be categorized as liberties and exposures as well as the conventional right-duty relationship. A second lesson follows: the need for more granular empirical research or case studies to better identify and assess these relationships. One way to orient these case studies is to evaluate the effectiveness of various efforts to govern these relationships. For example, these efforts might include monthly meetings among cotenants, and the regularity of these meetings, or their absence, may influence the extent to which expectations between heirs are effectively coordinated. Recognizing the liberties-exposures relationships, as well as the conventional rights-duties relationships, offers a starting point for this research. What follows is a list of specific questions:

- How are governance strategies over heirs' property and their working rules designed, and by whom?
- How are these relationships enforced, and what factors (e.g., size of the group, gender, age, spatial location) contribute to their success?
- What are the motivations of heirs who choose to partition, or "exit," these relationships? While some may seek financial gains, others may want to pursue land uses that are incommensurate with co-ownership. Diverse motivations may also be linked to the identity of the partitioning cotenant (e.g., a coal company seeking to mine the land versus a family member who feels disadvantaged by the existing governance).
- How do the rules of governance and exit interact in these contexts? Answering this question would help, for example, to predict outcomes associated with the Uniform Partition of Heirs Property Act. With respect to the Uniform Partition of Heirs Property Act, more empirical research and case studies are needed.

In this paper, we sought to broaden the theoretical framework used to understand heirs' property. We explicitly defined a portfolio of legal relations that constitute heirs' property: e.g., rights, duties, exposures, and liberties. Our novel contribution is drawing explicit attention to the liberty-exposure relationship. Cotenants exercise liberties and are exposed to the actions of other cotenants, giving rise to disputes that are often not subject to formal resolution in court. Nevertheless, these relationships are likely to meaningfully shape expectations about the future benefits and costs of being a cotenant. In this regard, particularly in scenarios where there are many co-owners who are differentiated spatially with respect to the property, asymmetric interests will parallel asymmetric information and complicate the challenge of harmonizing future expectations. In these settings, the experience of heirs on heirs' property depends on how liberty-exposure relationships are meaningfully worked out in practice. The theoretical framework we have mapped here brings these governance concerns into focus and suggests a route to unpacking their consequences for cotenants.

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