

Options for Countering the Faustian Bargain in the Judicial Partition of Heirs' Property and the Enduring Phenomena of Investor-Speculator "Fishing"

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A*h, those who plan iniquity and design evil on their beds. When morning dawns, they do it, for they have the power. They covet the fields, and seize them; houses, and they take them away. They defraud men of their homes and people of their lands. (The Israel Bible, Micah 2: 1–2)*

How many different ways can the inferiority of a group be cemented into the tapestry of society? Denying, impeding, and destroying people's abilities to build productive wealth are effective suppression tools. Whether through denial of the impact of wealth stripping or other intentional acts, the failure to adequately address the legal and cultural challenges of inheritance through heirs' property gives rise to a number of negative consequences. I propose the initiation of a novel concept to capture an equitable portion of the profits gained from the future sale of a former heirs' property after the ownership has been ruptured by investor-speculators.

Heirs' property scholars charge that African-American and other lower wealth families have been divested of large amounts of land in the South via taking schemes (Craig-Taylor 2000, Deaton 2005, Mitchell 2001, Rivers and Stephens 2009). These typically proceeded with an investor-speculator identifying a cotenant to approach and tendering an offer to purchase his or her interest in the cotenancy. Property law provides judicial partition as a remedy to prevent cotenants from being trapped in

an ownership model that is no longer desirable for any number of reasons, creating a back door for the quasi-taking of property.¹

Most judicial partition statutes operate in a manner similar to governmental takings by inverse condemnation but without providing assurance that just compensation will be paid. Although the law has created a presumption for division of property over the sale of the property, the rule has offered little relief because the decline in economic value of the entire tract when divided is often cited as the rationale for a partition by sale. At the sale, the highest bidder is vested with the title to the entire tract over the objection of the cotenant heirs who must accept the price generated by a judicial sale. While the partition by sale option allows any single co-owner to exit what he or she may deem an unworkable ownership structure, it inadvertently creates opportunities for an investor-speculator to divest ownership by purchasing just one cotenant's undivided share and then filing a petition to force the sale of the whole, thus threatening or perhaps rupturing the familial legacy. With the evolution of real estate software and programs that allow faster property searches, combined with the technology and growth of genealogical search tools, investor-speculators are now flush with resources to "fish" for heirs' property. They can search massive amounts of data to identify heirs' property and associated cotenants of specific properties with significantly greater success, increasing the numbers of partition sales in areas undergoing gentrification and

¹ Governmental regulation of private property in zoning regulations and in eminent domain are grounded in well-established case law. See, *Village of Euclid v. Amber*, 272 U.S. 365 (1926). When private property is divested, a recognized strand of property ownership is removed—the right to control alienation. The just compensation clause of the Fifth Amendment states, "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend V. Partition sales, also, operate to transfer title without the consent of the owner removing the right to control alienation.

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development as well as in communities undergoing post-disaster recovery efforts (Chemtob and Portillo 2019, Flocks et al. 2018). In States that have not adopted the Uniform Partition of Heirs Property Act, disparate wealth between other cotenants and the petitioning cotenant allows the new cotenant to outbid other interested parties and walk away with title to the entire tract at far less than market value. The fact that one cotenant can force the sale of the entire tract without any acquiescence from other cotenants is still unbelievable to many, especially the cotenants facing the loss of their land.

The ability of an investor-speculator to make concrete offers to family members who are often separated by time, space, absentee relationships to the land, and skepticism regarding the legal process may appear an economic gain to the individual cotenant who is possibly unaware of the larger implications for the other cotenants. It is a Faustian bargain: while the individual may achieve a gain from the resulting sale of his or her interest, the sale will trigger a cascading set of events leading to dispossession of the other heirs' property interests. In addition to the individual's economic gain, a moral dilemma is raised by the sale of the interest to an outsider causing a possible rift in the family.

Although the issue of heirs' property is described most often as a rural phenomenon, its effects manifest in urban areas as well. For instance, changes in the geographical distribution of new economic activity (e.g., agglomeration effects and the changing desire for housing and amenities by workforces attracted to these locations) have placed tremendous pressure on land prices and housing costs in some of the largest U.S. cities and metropolitan areas like Portland, OR, Denver, CO, and Atlanta, GA (Maciag 2015). Smaller cities and towns have also experienced these dynamics to a lesser extent. For example, areas of Durham, NC, have undergone extensive renovation in response to demand for in-town living by White, wealthier home buyers.² In these scenarios, older inner-city neighborhoods that have historically experienced disinvestment over generations or disruption by urban renewal and highway projects near downtown areas have once again become economically valued and relevant land, with investor-speculators seeking ways to acquire land, lots, and homes whose values have increased dramatically because of their special geospatial proximity to the urban areas. The existence of heirs' property in these neighborhoods provides a number of avenues for investor-speculators to pursue the acquisition of these

properties.³ Additionally, increasing catastrophic weather events that have spawned disasters in both urban and rural communities across the country have resulted in the disruption and destruction of thousands of properties in poor working-class areas and have thrown open questions of ownership/title that have lain dormant for years, thus affecting the shape, redesign, and rebuilding of these recovery communities. The inability to show clear title by a cotenant creates significant impediments to acquiring resources to rebuild (Craig-Taylor 2011, Georgia Applesed 2013).

The Uniform Partition of Heirs Property Act (UPHPA) was a significant legislation proposal to provide a framework to protect generational wealth of cotenants holding heirs' property (see Thomas Mitchell's essay in these proceedings). Key provisions of the UPHPA enhanced service of process requirements in partition actions by mandating a posting of a conspicuous sign on the property subject to the action. Second, appointed commissioners must be impartial, and the court must ascertain the fair market value of the property by ordering an appraisal, unless all cotenants agree on a different method of valuation. A determination of market value protects the cotenants in a partition sale from a forced sale for far less than market value via a judicial sale on the courthouse steps. Most importantly, cotenants are provided buyout rights in the UPHPA. Although this option is viable for an heir or heirs with access to financial resources necessary to buy out the petitioning party within the requisite 60 days prescribed in the UPHPA, low-wealth heirs are left without a viable recourse to retain ownership or any wealth production from the property. Moreover, any heir interested in the buyout must purchase the petitioning party's interest at the determined market value, thus increasing the financial outlay of the heir or heirs and, in turn, decreasing the number of heirs who can exercise the buyout provided by the Act. Protections are needed for those heirs.

Researchers state that the failure of African Americans to engage in estate planning is attributable to several factors (Guthrie 2007). Distrust of government, lawyers, and the judicial system as well as lack of access to legal counsel chill preparation of a will or other estate planning documents. Many African-Americans property owners believe that their children will ultimately inherit title to the property, thus providing security for the family. Whether failure to engage in estate planning stems from a lack of knowledge, reluctance, or distrust, decedents

² De Marco, A.; Hunt, H. 2018. Racial inequality, poverty and gentrification in Durham, North Carolina. http://www.law.unc.edu/documents/poverty/publications/durham_report_final.pdf. [Date last accessed: May 24, 2019].

³ To be clear, these changes are not taking place uniformly across the country. There remain significant areas of the country, particularly cities in the older, industrial Midwest and Northeast like Flint, MI, and Youngstown, OH, where populations continue to decline (Kondo et al. 2016).

desire their heirs to benefit from any property they have accumulated rather than lose this cultural and financial asset to outsiders.

I submit that property law must be expanded even more, such that a new set of rights is created to protect the desire of the decedent, which is to see the benefit and use of real property inherited to the heirs. This is analogous to applying the doctrine of *cy pres* as an equitable remedy. My proposed remedies would honor this core intent to provide family members security and wealth creation opportunities into the future.

I propose two options. First, create an *ownership interest in the development profits*, designated for the heirs/former cotenants. If the land is changing primary usage, heirs who held an interest in the ruptured cotenancy should receive a percentage of the development profits from the redeveloped site. The share of the development profits can be placed in a trust, thus making each former cotenant a beneficiary who maintains the same rights to profits from the trust in proportion to their ownership interest in the cotenancy pre-rupturing. If investors-speculators choose compulsory partitions to acquire property, an equitable division of future profits is still accomplished. The equitable trust will follow established trust laws including payment for administering the trust paid from the trust proceeds.

Second, issue an *equitable license* to the former cotenants to create the right to receive a share of future profits. Although the current definition of a license is limited to the personal privilege to do one or more acts on the land of another, a statutory expansion of the rule could provide “a personal privilege to an individual to receive compensation generated by real property” (Craig-Taylor 2000). This expansion is similar to the “*au droit*” or moral rights doctrine found in the protection of creative art. Since the creative work is deemed an expression of the personality of the artist, it remains linked to the artist for a lifetime, and the artist’s interest is protected (California Civil Code § 987, Berne Convention for the Protection of Literary and Artist Works 1971). This would provide cotenants with the right to pursue a percentage of the increase in the value of the property or in the profits in perpetuity within a reasonable time period. Just as with easements, the right can be permanent or for a fixed period. If States chose the reasonable time period, I suggest following the same time period as set out for adverse possession in each State.⁴ Arguably, it is prudent to adopt the same statutory period as the minimum reasonable period of time for the heirs to maintain their equitable license. The licenses must be written and meet all recordation requirements of the State

in which the property is located. The recordation of the licenses would ensure the right of the heirs/cotenants to seek payment and to increase their wealth proportionate to the increase in the property value or profits of the investor-speculator measured by the resale price or value. The license should be reserved in the deed of the new owner. Attorney’s fees must be provided to allow access to proper legal representation to enforce the rights of the heirs/cotenants under the equitable license. This would be analogous to the fee allotment established in Social Security cases and Workers’ Compensation cases.

The equitable license and development profits are the radical substitution for retaining ownership of the property and honoring the decedent’s core intent. Adoption of these new protections will be met with significant resistance, especially in States where property rights are fervently protected. However, both proposals actively protect the property rights of heirs divested by a statutory right to partition and diminish the impact of the wealth disparity of the parties. As more property owners resist the government’s use of eminent domain as a means to take private property owner, this same group of advocates and legislatures could potentially be organized to assist in this legislative reform to fight the quasi-taking of private property through judicial partition (Institute for Justice 2000, Somin 2011, Thompson Fullilove 2007). New partners are needed to win the necessary legislative support. In addition, the growing wealth gap between African Americans and Whites is a major concern. States should see heirs’ property as potential wealth and/or a source of income for the cotenants, thus creating a stable stream of income for these households and reducing the long-term need for public assistance for those who may land under the poverty threshold (Bouie 2019).

The backdoor option of judicial partition sales as a means to strip wealth must be countered with remedies to address quasi-takings in an equitable manner that preserves the sanctity of property ownership. I have proposed two strategies with roots in existing and long-standing property law to create a mechanism to protect generational wealth of heirs who lose their property interest through partition sales. Currently, the law provides a means to vest possessory rights with one owner and to extract profit from another. The proposed equitable license and development profit are expansions of the existing license and “*au droit*” laws. These expansions are essential to the protection of generational wealth in heirs’ property and provide remedies for those heirs unable to exercise the buyout option in the UHPA.

⁴The legislatures of each State have already established a time period that is reasonable for an adverse possessor to obtain full legal title to the land of another.

LITERATURE CITED

- Berne Convention for the Protection of Literary and Artistic Works. 1971. Reprinted in 4M. Nimmer, D. Nimmer on copyright. App. 27-5-6 9 (1985).
- Bouie, J. 2019. The widening wealth gap between African Americans and Whites. Washington Post. <https://slate.com/news-and-politics/2017/09/the-wealth-gap-between-whites-and-blacks>. [Date last accessed: May 27, 2019].
- California Civil Code § 987 (West 1998).
- Chemtob, D.; Portillo E. 2019. Investors bombard gentrifying areas in Charlotte with offers. But experts caution. The Charlotte Observer. Feb 20: Business Section.
- Craig-Taylor, P. 2000. Through a colored looking glass: a view of judicial partition, family land loss, and rule setting. Washington University Law Quarterly. 78(3): 737–788.
- Craig-Taylor, P. 2011. The sorcerer's apprentice: a potential misappropriation of power in the implementation of community block grants. Rutgers Race and Law Review. 12(1): 68–77.
- Deaton, B.J. 2005. Land "in heirs": building a hypothesis concerning tenancy in common and the persistence of poverty in central Appalachia. Journal of Appalachian Studies. 11(1/2): 83–94.
- Flocks, J.; Lynch II, S.; Szabo, A. 2018. The disproportionate impact of heirs property in Florida's low-income communities of color. Public Interest Law. 92(8): 57.
- Georgia Appleseed. 2013. Unlocking heir property ownership: assessing the impact on low and mid-income Georgians and their communities. Atlanta, GA: Georgia Appleseed Center for Law & Justice. 17 p. <https://gaappleseed.org/media/docs/unlocking-heir-property.pdf>. [Date last accessed: May 13, 2019].
- Guthrie, R. 2007. Heir property: legal and cultural dimensions of collective land ownership. Bulletin 667. Auburn, AL: Alabama Agricultural Experimentation Station.
- Institute for Justice. 2000. Kelo eminent domain. Eminent domain without limits?: U.S. Supreme Court asked to curb nationwide abuses. <https://ij.org/case/kelo/>. [Date last accessed: May 27, 2019].
- Kondo, M.; Hohl, B.; Han, S.H.; Branas. C. 2016. Effects of greening and community reuse of vacant lots on crime. Urban Studies. 53(15): 3279–3295.
- Maciag, M. 2015. Gentrification in America report. Governing: the States and localities. <http://www.Governing.com/gov-data/census/gentrification-in-cities-governing-report.html>. [Date accessed: April 15, 2019].
- Mitchell, T.W. 2001. From Reconstruction to deconstruction: undermining Black landownership, political independence, and community through partition sales of tenancies in common. Northwestern University Law Review. 95: 505–580.
- Rivers, F.; Stephens, J. 2009. Preserving heirs' property rights in coastal South Carolina. In: Pavel, P., ed. Breakthrough communities: sustainability and justice in the next American metropolis. Boston: MIT Press: 183. Chapter 17.
- Somin, I. 2011. The judicial reaction to Kelo. Albany Government Law Review. 4: 7–15.
- Thompson Fullilove, M. 2007. Eminent domain and African Americans: what is the price of the commons? In: Perspectives on eminent domain abuse. Vol. 1. Arlington, VA: Institute for Justice. <https://ij.org/wp-content/uploads/2015/03/Perspectives-Fullilove.pdf>. [Date last accessed: May 27, 2019].