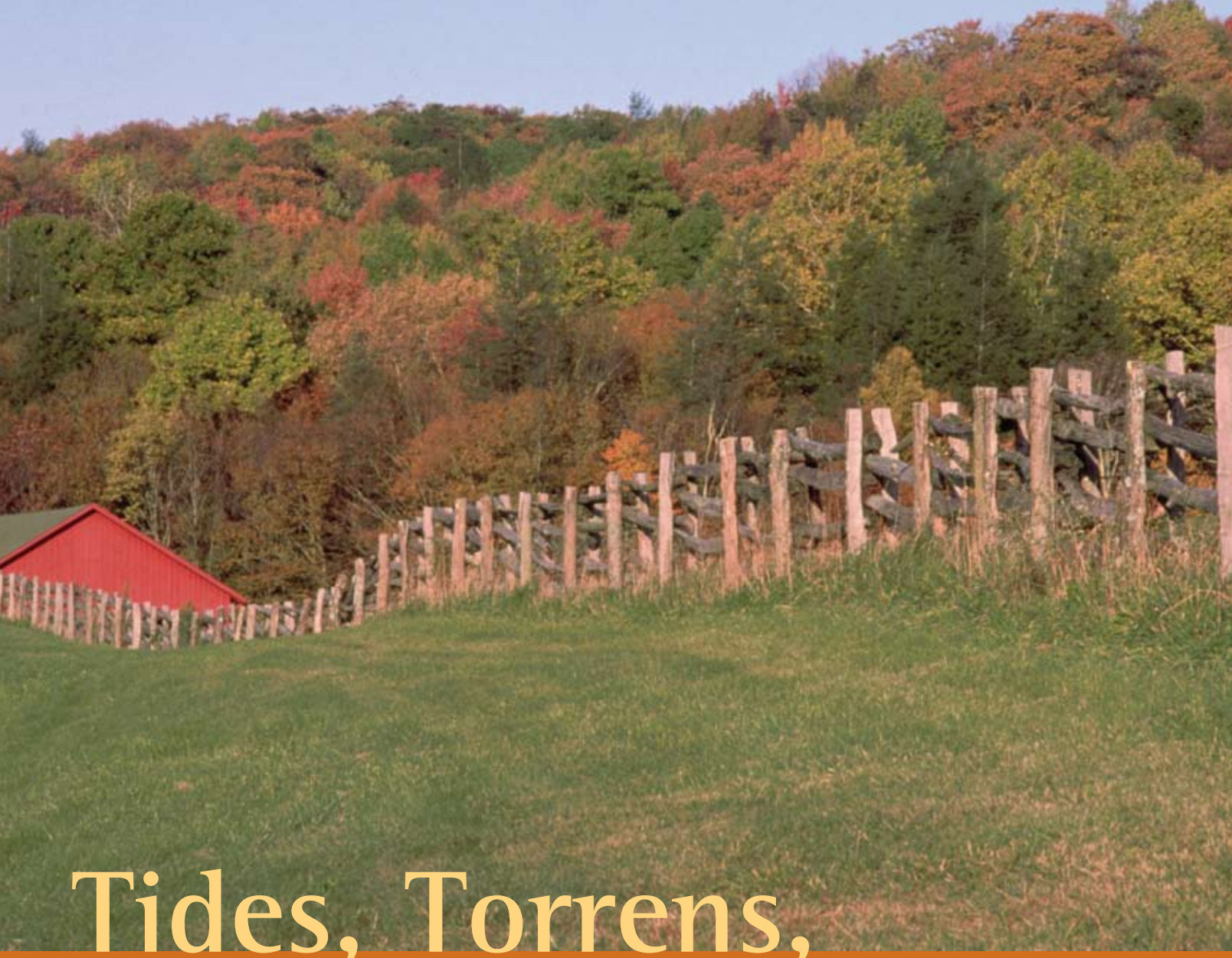

Tides, Torrens, and Family Trees

Heirs Property Preservation Challenges

By Meghan E. B. Pridemore

It was my second day on the job, and I found myself dodging bird-sized mosquitoes in a pine forest, jellyfish in the intercoastal waterway, and gators along a rural creek. Although this may sound like law practice "Indiana Jones" style, it was all in a day's work as a summer extern touring "heirs property" on the North Carolina coast.

Although most of my family roots are in North Carolina, I was relatively unfamiliar with the issue of heirs property before my externship with the Southern Coalition for Social Justice. "Heirs property" is a term used to describe land that has passed into the hands of numerous heirs through generations of intestate succession. Tenancy-in-common ownership among numerous tenants can itself be problematic, but the real difficulty with heirs property is that most owners are unaware of how fractionalized title can make the property vulnerable to loss. The sale of a small fractional interest by one owner to a developer can result in all the heirs' losing their land in a partition sale. One need only look at the high-end development on the beautiful tidal coastline of North and South Carolina to realize that this is not a hypothetical problem.

Partition actions are just one of many types of threats to the preservation of heirs property. Loss of heirs property also can be precipitated by bankruptcy proceedings, creditors' judgments, tax sales, foreclosures, and adverse possession. In many cases, the owners who use the land—often for subsistence farming and fishing—are unaware of the identity and number of the other tenants in common.

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Although the heirs property problem is not a uniquely Southern phenomenon, it has a special significance in the South because much of the affected land was purchased by or given to former slaves following the Civil War. Where such land continues to be used for subsistence activities by the intestate successors of former slaves, it represents not only a place to live and to make a living but also a connection to cultural heritage.

The Southern Coalition for Social Justice is one of a number of national partners, including the Section of Real Property, Trust and Estate Law, who constitute the Heirs Property Preservation Coalition. The goals of the Coalition include preventing the loss of land and cultural heritage, promoting long-term stable land ownership, and offering asset-building opportunities through effective legal representation and technical assistance. The following article describes the special legal and nonlegal challenges facing the Coalition and some of the potential solutions to the heirs property preservation problem.

Special Challenges of Heirs Property Preservation

Diverse Family Dynamics

Beyond ownership structure, the circumstances surrounding each parcel held as heirs property have little in common. Every family's story is distinct. The uniqueness of each heirs property scenario is perhaps the biggest challenge to fashioning legal solutions. There is no one-size-fits-all remedy.

During my time with the Southern Coalition for Social Justice, I met three families with heirs property issues. The first family discovered a letter penned by the original owner. The letter expressed the decedent's wish to keep the land within the family. The tenant who uncovered the letter was determined to fulfill her ancestor's wishes. After years of research, she identified and located all but one of the approximately 66 possible heirs. Together, the known heirs have formed a family limited liability company to protect their land. Although this family is well organized, that is unfortunately rare.

A second family owned not only beachfront property but also the beach itself. Popular among tourists for sunbathing, swimming, crabbing, bonfires, and camping, this land now is maintained by the city as a park. The city does not claim ownership of the land but charges an entrance fee of $10 per car. Having received none of this revenue, the family was concerned that, if something were not done to protect the land, it would eventually be lost to the city. Little action had been taken, however, because of a fragmented family tree that boasts one hundred or more heirs, including many whose identity and whereabouts are unknown.

The third family's struggle started from within. A father lost his land to back taxes. His son bought the land back on the courthouse steps. No longer the rightful owner, the father deeded the land to a second son. When the son who purchased the land died without a will, it passed to his children and became heirs property. Meanwhile, the second son sold the land to a development company that builds luxury waterfront homes. For nearly 30 years the heirs have been in litigation with the development company. The heirs live on the land and make their living by shrimping along the intercoastal waterway. As litigation continues, their way of life remains threatened.

Diverse Goals

Just as each family's story is unique, so too are each family's land use goals. Some families seek to keep the property as a homestead, maintaining their heritage and preserving the property for personal use. Others see economic potential and want to maximize the development value of what is often prime real estate. Then there are families that want to strike a balance. They desire to maintain ownership while using the land for profit-generating activities such as agriculture, selling timber, or selling permits for recreational use.

Goals also differ among tenants. Frequently, a few tenants have put down roots on the property. They may have a home on the land or perhaps use the land for subsistence activities.

Then there are tenants who live in other cities or states. These tenants may not know the property exists or that they hold an interest. If they know of the property, it is likely that distance has prevented regular—if any—visits. As a result, the levels of emotional attachment to the property of a tenant who calls the property home and one whose interest may be only financial are vastly different.

Although partition sales are most often thought of as arising after a developer makes a backdoor purchase of a small fractional interest, they are just as likely to evolve out of contentious family dynamics. For example, one tenant does not want to pay taxes on land he or she has never seen and is not likely to visit. A partition sale will bring that tenant some monetary return and eliminate any further financial obligations. For tenants living on the land, buying the other tenants' interests at a partition sale is often not feasible. Tenants in possession are usually land rich and cash poor.

Diverse Threats to Ownership

A partition sale initiated by a developer or family member, though a significant cause of heirs property land loss, is not the only threat. Owners of heirs property must be mindful of any action or inaction by the other tenants that could jeopardize title to and possession of the property. Court-ordered sales of fractional land interests can occur to satisfy a deceased tenant's debts, to provide maintenance and support to a deceased tenant's children, or to satisfy creditor and bankruptcy judgments. A lien on or sale of a fractional interest generally leads next to a partition action.

Another real threat is a tax sale. Failing to pay property taxes, even for just one year, puts a lien against the land. Getting numerous heirs to pay their percentages of the tax due is difficult. The responsibility often falls on a few tenants who over the years are burdened by the increasing strain on their financial resources. Though paying tenants can sue for contribution, it is unlikely they will be reimbursed by unknown co-tenants or by known, but recalcitrant, family members. Depending on how aggressively the county tax collector does his or her job, the lien can lead to imminent land loss.

A less obvious threat to heirs property is the power of attorney. An undeniably useful legal document, a power of attorney can lead to land loss when restrictions are not placed on the agent's power to convey the principal's fractionalized share. Most principals do not realize that, without such restrictions, an agent can sell the principal's interest without first consulting with the principal. Failing to properly restrict an agent's authority can result in a sale that not only conflicts with the principal's individual goals for the property but also violates family agreements about how the land is to be managed.

The foregoing examples of threats to heirs property ownership are by no means exclusive. Other threats include the panoply of title challenges that can occur for any property, including adverse possession and foreclosure actions. What is important to recognize is that internal family dynamics are often as significant in the heirs property preservation challenge as the external pressure for land development by strangers to the land.

Achieving Heirs' Property Goals

Identifying Tenants in Common

Creating a family tree is a vital first step to protecting or developing heirs property. Before decisions can be made about a course of action, the number of potential heirs must be known. Options for moving heirs property into different ownership structures to satisfy family goals are available only after a thorough determination of family history and percentages of ownership.

Though creating a family tree sounds simple enough, it is often the most difficult step in addressing heirs property preservation. Over the generations, tenants have migrated from the

South to other regions, started new lives, and raised families away from the heirs property. As connections to the land diminish, so too do connections among fellow tenants. Herein lies the greatest difficulty of creating a family tree—the family members might not know one another. For those still living on the land, identifying and finding long lost family members is a challenge. The difficulty only increases as older generations die, taking with them information about family history.

Certifying Title

When finding obscure tenants is beyond the family's capabilities, North Carolina law may offer a unique way for known family members to obtain title certification so that they can move ahead with property preservation and, if desired, development. This system of title registration, known as torrens (N.C. Gen. Stat. §§ 43-1 to -64) still exists in 10 states and operates as a parallel system to the more common grantor/grantee indices under state recording acts. Named after Sir Robert Torrens, who developed the system in Australia in 1858, torrens provides for title registration through a judicial process that certifies the state of the title to land and forecloses competing claims that are not asserted within one year of the decree of registration.

The petitioner for title registration under the torrens system must identify the property, all known liens or encumbrances on the property, and all known interested parties. Process must be served on known parties, and notice by publication is required once a week for eight weeks in the county where the land is located. A court-appointed examiner of title reviews the petition and holds a hearing on the petition and any adverse claims submitted in answer to the petition. The title examiner reports to the court based on the petition, on answers to the petition, on documentary and parol evidence, and on an independent title examination.

The examiner's report details the state of the title, liens or encumbrances on the land, and those persons with ownership interests. If the court finds material issues of fact, those issues can be certified for trial by jury. Judgment by default is not permitted under the torrens system. If title is found to be held by the petitioner, the judge affirms the report and issues a decree that the land is entitled to registration. Once a decree of registration is entered and certificate of registration issued, it cannot be adjudged invalid or revoked unless the validity of the certificate is attacked within 12 months of the decree. A judgment uncontested within a year is forever binding and conclusive. Furthermore, title registered in the torrens system is not subject to any subsequent claims based on prescription or adverse possession.

Although potentially useful to owners of heirs property, torrens may be a double-edged sword. For example, if the title examination reveals tenancy-in-common interests held by persons whose whereabouts are unknown, a conservator may need to be appointed to represent their interests. In finalizing the state of the title, a torrens proceeding may also conclusively find that persons who are residing on and using the property actually have a smaller interest than thought or no ownership interest at all. Another possible negative outcome is that an action in torrens might instigate other family members to come forward for the first time to challenge the current use of the property. Nonetheless, given the likelihood that current possessors of heirs property will be unable to maintain the status quo indefinitely, torrens may offer one of the best routes to normalizing and protecting legitimate ownership interests.

Formalizing Consensus About Property Goals

Although reaching consensus about property goals among numerous tenants in common may take considerable effort, the good news is that tenants can protect the value and, if desired, possession of the land by a number of innovative methods. What option a family chooses depends on its needs and overall goals for the property.

One option is a community land trust. This arrangement is ideal for a family that no longer wants the responsibility of the property but desires to protect the land from commercial development. To create such a trust, the family gives or sells the land to a nonprofit entity of its choosing. Another community-oriented option is the conservation agreement or easement. Formed between the landowners and an organization, a conservation agreement or easement is different from the community land trust in that it allows the family to retain title. The development rights, however, are sold or donated to the chosen organization, generally, a nonprofit, land trust, or government agency. Additional benefits to the family may include federal and state tax deductions or credits.

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Another option for families who want to maintain ownership status as well as development rights is a tenancy-in-common agreement. These agreements are created among tenants to clarify how the benefits and burdens of ownership will be shared, including how decisions for land management are to be made. Most tenancy-in-common agreements also provide for rights of first refusal to purchase another cotenant's interest before a partition action can be commenced. Many heirs property owners mistakenly believe that rights of first refusal are inherent in the tenancy-in-common form of ownership. A tenancy-in-common agreement is essential to outline the

operating system for the family and to standardize expectations.

The most protective form of alternative ownership for heirs property is probably the family limited liability company (FLLC). Similar to starting a business, each tenant contributes his or her percentage of the land to the FLLC and becomes a member. The FLLC, as a separate entity, offers protection from creditors and debtors, provides the members with pass-through tax benefits, and simplifies structuring contracts with third parties such as developers. The FLLC form of operation also assures that the burdens and benefits of land ownership are shared by all tenants. The downside of this alternative is that the tenants will likely need legal and accounting assistance with the formation of the FLLC and ongoing tax reporting compliance.

Law Reform Initiatives

The foregoing steps and options for family management of heirs property are relevant only if action can be taken before the land is lost in a partition action. Awareness of the unique challenges of heirs property is growing, but, to date, few states have taken legislative measures to protect those citizens who have cotenancy interests in heirs property. One of the states that took legislative action is South Carolina. According to South Carolina law, when a partition action is commenced, the nonpetitioning tenants have a 45-day right of first refusal to purchase the land once consensus is reached about the value of the land. Nonpetitioning tenants must notify the court of their intent to purchase no later than 10 days before the partition hearing. If the nonpetitioning tenants fail to pay the purchase price within 45 days, the court may proceed according to traditional partition sale practices. S.C. Code Ann. § 15-61-25.

Although those states that have taken the initiative to protect cotenants against unwanted land loss are to be commended, the laws do not go far enough to address the many junctures in the partition process where vulnerable cotenants can be disadvantaged. Recognizing the need for better safeguards, the Uniform Law Commission appointed a drafting committee to create a Uniform Partition of Tenancy-In-Common Real Property Act. Currently still in draft form, the Act contains a number of provisions that would operate to give cotenants a fair opportunity to protect their interests.

One example is the requirement that petitioners for partition show due diligence in attempting to locate unknown or unlocatable tenants. Another is listing criteria the court must weigh when determining whether a property can be partitioned by division without prejudice to the parties. Listing standardized factors is an effort to ensure courts conduct a more thorough balance-of-party interests. Factors a court must consider would include non-economic as well as economic ones. Some non-economic factors to consider are sentimental links to the property, matters of historical significance, evidence of long-standing ownership, and special value. Currently many courts conduct only an economic analysis.

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If adopted, the Act, like the South Carolina statute, would offer tenants a buyout option. The wording of the draft Act, however, is an improvement, stating that either petitioning or nonpetitioning tenants must be given "at least" 45 days in which to purchase the shares of their fellow tenants. It would be left to the court's equitable discretion to determine which party is granted the buyout option. To whomever the buyout option is offered, the party must purchase the other interests at market value. Although this statutory improvement seeks to maximize wealth for interested parties, 45 days may be an insufficient time period for mid-to-lower income families to raise large sums of money.

When a partition by sale is necessary, the proposed Act favors public sale over public auction. The drafting committee's preference is in line with the custom of international courts and legislatures, which recognize that public sales are superior in terms of preserving the property owner's value. In contrast, public auctions often sell property for below market value. As state laws currently stand, public auctions occur in a majority of cases, thereby depriving families not only of land but also of fair compensation. Under the proposed Act, the public sale would replicate a normal arm's-length transaction. It would require the petitioning party to hire a real estate broker, list the property in a customary real estate listing, and have the property appraised by a state certified or licensed appraiser. If the property fails to sell within the average length of time in the market where the property is situated, as determined by the court, then a public auction can be pursued. Either a public sale or a public auction is subject to a minimum sales price, however. These are just a few of the positive innovations offered by the draft Uniform Partition of Tenancy-In-Common Real Property Act.

Conclusion

The theme of Inglis Fletcher's historical novels about the settlement of North Carolina is that *land is the foundation of freedom and life.* Nowhere is this more apparent than in heirs property preservation and land use issues. As an extern for the Southern Coalition for Social Justice, I had an opportunity to view this breathtakingly beautiful North Carolina land and to meet the families whose remarkable stories put a face on otherwise abstract property doctrines. This experience has served as a reminder of how innovative legal work and public interest law reform can still make a vital difference in the lives and livelihoods of the clients we serve. ■