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Heirs Property in Georgia: Common Issues, Current State of the Law, and Further Solutions

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HEIRS PROPERTY IN GEORGIA: COMMON ISSUES, CURRENT STATE OF THE LAW, AND FURTHER SOLUTIONS

*Caitlin Henderson**

In Georgia, real property passes through an intestate estate in the form of heirs property. Under this system, heirs share ownership of the property as tenants in common. This form of ownership poses several obstacles to realizing the land's full potential and, in certain circumstances, courts will partition the property in forced sales or will physically divide the property among the heirs. Heirs property and its accompanying problems are particularly common in Georgia due to strict policies concerning will execution formalities. Georgia and the U.S. Congress have attempted to cure the problems associated with heirs property through the adoption of the Uniform Partition of Heirs Property Act and the Farm Bill of 2018. However, these remedies, while an admirable step toward addressing heirs property issues, fail to correct all of the problems associated with heirs property. This Note proposes several mitigating solutions for these problems and also suggests that Georgia facilitate the execution of wills to prevent heirs property from arising in the first place.

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TABLE OF CONTENTS

I. INTRODUCTION.....	877
II. PREVALENCE OF HEIRS PROPERTY IN GEORGIA	878
A. GENERAL PREVALENCE.....	878
B. RACIAL DISPARITY	880
C. CLASS DISPARITY	882
III. PROBLEMS WITH HEIRS PROPERTY	883
A. INABILITY TO REALIZE THE LAND'S FULL POTENTIAL	884
B. INJUSTICES WITH FORCED SALES.....	887
IV. PAST EFFORTS TO REMEDY.....	891
A. PRIOR LEGISLATION.....	891
B. UNIFORM PARTITION OF HEIRS PROPERTY ACT.....	892
C. FARM BILL OF 2018	897
D. OTHER PROPOSALS	897
1. <i>Legal Arrangements</i>	898
2. <i>Equitable Remedies</i>	900
3. <i>Procedural Remedies for Partitions</i>	902
V. FIXING THE PROBLEM	905
A. LINGERING PROBLEMS WITH PRIOR REFORMS	905
B. POTENTIAL FURTHER SOLUTIONS	906
VI. CONCLUSION	909

I. INTRODUCTION

John Smith, a forty-six-year-old man, owned a house with ten acres of land in Union County, Georgia. He had a wife and three children but died unexpectedly without executing a will. As a result, his estate passes through intestacy, under which his wife, Pam, gets an interest in one-third of his estate and each of his three children get two-ninths of his estate.¹ John's property thus becomes heirs property where one heir can disrupt the other tenants' plans for the property.² If a family disagreement erupts, one of John's children or his wife can sue for a sale of the property, forcing the rest of the family off of it—even if the family has been living in the home for the last fifty years.³ This becomes more complex if a cotenant also dies intestate, in which case their share gets further subdivided among their heirs.⁴ This hypothetical scenario offers one example of a common issue associated with heirs property—one heir can dictate or prevent the use of the property at the other tenants' expense—and illustrates the need for remedial measures.

When a person dies intestate or when an estate bypasses the probate system, if multiple heirs inherit the decedent's real property, the default system in Georgia is to create a tenancy in common among the decedent's heirs where each heir holds an undivided fractional interest in the property.⁵ This system gives rise

¹ See O.C.G.A. § 53-2-1 (West, Westlaw through 2020 Legis. Sess.) (outlining Georgia's intestacy distribution scheme); *id.* § 53-2-1(c)(1) ("If the decedent is . . . survived by any child or other descendant, the spouse shall share equally with the children . . . provided, however, that the spouse's portion shall not be less than a one-third share . . .").

² See GA. HEIRS PROP. LAW CTR., ANNUAL REPORT: FISCAL YEAR 2018, at 4 (2018), https://static1.squarespace.com/static/5994bdde197aea0c96b51664/t/5c5876daa4222fd9c243546a/1549301486788/GAHeirs_AnnualReport18.pdf ("For each piece of heirs property . . . there are multiple legal owners (usually descendants in a family), and no single owner can make major decisions for the property without everyone's agreement.").

³ See Rishi Batra, *Improving the Uniform Partition of Heirs Property Act*, 24 GEO. MASON L. REV. 743, 748 (2017) ("In some cases, however, familial disputes are the cause of a partition action, where an unrelated issue causes a rift between family members, and a lawyer for one party convinces the co-tenant to file a partition action.").

⁴ See *id.* at 746 (explaining further divisions of heirs property by subsequent passes through intestacy).

⁵ See GA. APPLESEED CTR. FOR LAW & JUSTICE, HEIR PROPERTY: IN GEORGIA 4–7 (2d ed. 2010), <https://gaappleseed.org/media/docs/heirproperty.pdf> (describing how heirs property arises in Georgia).

to heirs property (also known as heir property or heirs' property), which is property held in a tenancy in common by multiple heirs.⁶ As tenants in common, each heir has a right to use and possess all of the property, and no heir can be excluded by the other tenants.⁷ But difficulties arise under this form of ownership because no single tenant can make important decisions for the property without unanimous agreement.⁸ Although some advances have been made to mitigate these problems,⁹ more remedial action is necessary.

This Note examines the impact that the heirs property form of ownership has had on Georgia and offers potential remedies to common heirs property issues. Part II discusses the prevalence of heirs property in Georgia. Part III addresses the problems associated with heirs property, including the barriers to the property's best use and the injustices associated with partition suits. Part IV analyzes past efforts to solve these problems as well as proposals for future solutions. Finally, Part V recommends further remedies to heirs property in Georgia, particularly with respect to reforming will execution requirements.

II. PREVALENCE OF HEIRS PROPERTY IN GEORGIA

A. GENERAL PREVALENCE

Traditionally in Georgia, southern farmers and rural landowners verbally bequeathed their land—a practice that, although much less

⁶ See *id.* at 4 (defining heirs property as “land held in common by the descendants of someone who has died without a valid will, or whose estate was not offered for probate”); SCOTT PIPPIN & SHANA JONES, GEORGIA’S HEIRS PROPERTY: ASSESSING THE IMPACTS OF “LOCKED WEALTH” 4 (2017), https://www.fcs.uga.edu/docs/GICH_Heirs_Property_Presi_2.pdf (“Heirs property refers to a specific condition of the title (legal ownership) of land that limits its productive use.”).

⁷ See GA. APPLESEED CTR., HEIR PROPERTY, *supra* note 5, at 4 (“As a tenant in common, each qualified heir has the right to use and possess all of the property, and this right is limited only by the right of the next heir . . .”). *But see id.* at 5 (“[A]ll heirs have the simultaneous right to possess the property, but in reality, only one tenant can occupy any one portion of the land at once . . .”).

⁸ See GA. HEIRS PROP. LAW CTR., *supra* note 2, at 4 (noting that, for heirs property, “no single owner can make major decisions for the property without everyone’s agreement”).

⁹ See *infra* Part IV.

common, continues today.¹⁰ Georgia law, however, does not recognize verbal bequeaths as valid means of transfer in many instances, so the verbally bequeathed land is often converted into heirs property.¹¹ This tradition, along with the widespread use of land passing through intestacy in Georgia, has resulted in a large amount of heirs property.¹² The Georgia Appleseed Center for Law & Justice released a study attempting to gauge the prevalence of heirs property in Georgia.¹³ The study first identified over 4000 land parcels as potential heirs property land within twenty Georgia counties.¹⁴ The study discovered that nearly sixty million dollars in property was owned as heirs property in five counties alone.¹⁵ The results of this study suggest that hundreds of millions of dollars of heirs property may exist in Georgia; therefore, preventative and corrective solutions are needed to address potential heirs property issues.¹⁶ Another study of just ten counties in Georgia “identified 38,120 acres as probable heirs property representing a total tax

¹⁰ See GA. APPLESEED CTR., HEIR PROPERTY, *supra* note 5, at 4 (“A tradition of verbal bequests was commonplace among farmers and other rural landowners in the south, and it remains even today a common practice among a diverse group of landowners, even those not directly involved in the agricultural sector.”).

¹¹ See *id.* (“Verbal bequests of land are generally not legally recognized in Georgia, and thus, often result in the ownership of ‘heir property’ . . .”).

¹² See GA. HEIRS PROP. LAW CTR., *supra* note 2, at 4 (“[A]pproximately 10% to 25% of the properties in Georgia’s 159 counties are probable heirs property and thus impact the economy of the entire state.”).

¹³ See GA. APPLESEED CTR. FOR LAW & JUSTICE, UNLOCKING HEIR PROPERTY OWNERSHIP: ASSESSING THE IMPACT ON LOW AND MID-INCOME GEORGIANS AND THEIR COMMUNITIES 10–13 (2013), <https://gaappleseed.org/media/docs/unlocking-heir-property.pdf> (discussing the study’s research methodology and findings).

¹⁴ See *id.* at 12 (“Round One screening identified more than 4,000 land parcels as potentially being heir property. The more intensive round two effort identified 1,620 of these parcels as having a very high probability of being heir property.”).

¹⁵ See *id.* (“[T]he parcels identified [in Chatham, Chattooga, Dougherty, Evans, and McIntosh counties] as likely heir property are valued at \$58,649,195 in the aggregate.”); *id.* at 16–17 (describing each of the five counties and the studies round two processes). Georgia contains 159 counties, so the amount of heirs property could be much greater than was found in the five counties in the study. *About Counties*, ACCG, https://www.accg.org/about_counties_2.php (last visited Jan. 28, 2021).

¹⁶ See GA. APPLESEED CTR., UNLOCKING HEIR PROPERTY OWNERSHIP, *supra* note 13, at 14 (“As the tax data base research reveals, Georgia has hundreds of millions of dollars of heir property potentially at risk.”).

appraised value of over \$2 billion.”¹⁷ This study further estimated that “the total tax appraised value of probable heirs property undermining Georgia’s economy is over \$34 billion.”¹⁸ This amount of unrealized property is concerning—especially since racial minorities and lower income persons are often the owners of heirs property and experience many disadvantages from this form of ownership.

B. RACIAL DISPARITY

Racial minorities are disproportionately affected by heirs property issues and often face the heaviest burdens from heirs property.¹⁹ Before the Civil War, African Americans in Georgia were unable to own or convey land in a will or intestacy since they were often considered property themselves.²⁰ After the Civil War, “many former slaves and their descendants in the rural south became land owners,” but they “often did not have wills.”²¹ After this brief period of land acquisition among former slaves, African American land ownership sharply declined in 1920 due to abandonment of their lands following boll weevil infestations and other natural disasters, African American migration out of the South, and forced sales.²² In

¹⁷ GA. HEIRS PROP. LAW CTR., *supra* note 2, at 4.

¹⁸ *Id.*

¹⁹ See Crystal Chastain Baker & Shunta Vincent McBride, *A Primer on Heirs Property and Georgia’s New Uniform Partition of Heirs Property Act: Protecting Owners of Heirs Property*, GA. B.J., Oct. 2013, at 16, 16 (noting that heirs property problems have “long impacted people of color in disproportionate numbers, especially African-American farmers”); see also Noah Goyke, Puneet Dwivedi & Marc Thomas, *Do Ownership Structures Effect Forest Management? An Analysis of African American Family Forest Landowners*, FOREST POL’Y & ECON., Sept. 2019, Article 101959, at 2 (“Southwide, it is estimated that 35.7% of African American family forestland is heirs’ property.”).

²⁰ See Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 75 (2009) (“In the pre-Civil War South, slaves were not only unable to pass property by will or intestacy, they *were* property that passed by will or intestacy.”).

²¹ GA. APPLESEED CTR., UNLOCKING HEIR PROPERTY OWNERSHIP, *supra* note 13, at 6.

²² See Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 509 (2001) (“After 1920, rural black ownership began a steep decline The ‘Great Migration’ of African Americans out of the South—spurred in part by the boll weevil and other natural disasters that caused widespread crop failures—led many blacks to abandon their land Furthermore, the USDA’s systemic and

addition, oral tradition among African Americans and the lack of literacy education led to a strong reliance among freed slaves on states' intestacy statutes to control the distribution of their estates.²³ The tendency of minorities to not execute wills continues today.²⁴ One study found that whites were more than twice as likely than non-whites to have executed a will.²⁵ Such a tendency to abstain from creating written wills is especially problematic in Georgia because dying without a will often converts the property into heirs property upon death.²⁶

The status of land as heirs property involves the danger that a court can order a forced sale of the property even over a tenant's objections.²⁷ Such partition sales of heirs property have stripped many minorities of their land, often breaking strong cultural ties as well.²⁸ Heirs property partition sales are still uprooting distinct subcultures in Georgia and contributing to the extinction of some subcultures.²⁹ Scholars have attributed the decline of African American ownership of agricultural land to partition sales.³⁰

persistent discrimination against black farmers . . . caused many black farmers to lose their land involuntarily through foreclosure and forced others to sell their land under distress conditions.”).

²³ See *id.* at 520–21 (examining African Americans' reliance on intestacy).

²⁴ See DiRusso, *supra* note 20, at 76 (noting that members of a non-dominant class, including racial minority members, are more likely to die intestate); Reid Singer, *A Turning Point for Family Forests: How Heirs-Property Reform is Empowering Georgia's Landowners*, GA. FORESTRY, Summer 2019, at 14, 17 (describing how minorities' misconception that intestate schemes create stable forms of land ownership are influencing them to not execute wills).

²⁵ See DiRusso, *supra* note 20, at 44 (“While over 35% of whites reported having a will, less than 16.4% of non-whites reported having a will.”).

²⁶ See GA. APPLESEED CTR., HEIR PROPERTY, *supra* note 5, at 4–7 (explaining how heirs property arises from intestacy).

²⁷ See *infra* Part III.B.

²⁸ See Batra, *supra* note 3, at 747 (“Partition sales of heirs property have been one of the leading causes of land loss within the African-American community.”); Mitchell, *supra* note 22, at 509 (“[M]inority landownership can promote dynamic community life and facilitate greater democratic participation for groups historically at the margins of American political life.”).

²⁹ See GA. APPLESEED CTR., UNLOCKING HEIR PROPERTY OWNERSHIP, *supra* note 13, at 9 (“Heir property also is playing a role in the potential demise of a distinct African-American subculture in Georgia and the coastal southeast, the Gullah/Geechee.”).

³⁰ See Batra, *supra* note 3, at 747 (discussing the decline of African-American agricultural land due to partition sales); Singer, *supra* note 24, at 16–17 (“In recent years, the U.S.

Partitions of heirs property not only disproportionately affect African Americans, but also Mexican Americans, Native Americans, and other racial minorities associated with lower incomes and higher rates of intestacy or tenancies in common.³¹ The presence of heirs property within racial minority groups “has been hypothesized to be correlated with, and a cause of, the persistence of [multi-generational] poverty.”³²

C. CLASS DISPARITY

Heirs property issues affect Georgians of all backgrounds and communities,³³ but descendants with lower incomes are disproportionately more likely to die without a will.³⁴ Georgia is a strict compliance state with respect to the execution of wills, meaning that it requires strict adherence to statutory will formalities.³⁵ Additionally, Georgia refuses to recognize holographic wills,³⁶ making it more difficult for a lay person to execute a valid will without the help of a lawyer.³⁷ Since lawyers often charge costly

Department of Agriculture . . . has declared heirs property to be the leading cause of involuntary land loss among African Americans.”)

³¹ See Batra, *supra* note 3, at 747–48 (discussing how heirs property partitions affect other racial minorities).

³² *Id.* at 748 (alteration in original) (quoting UNIF. PARTITION OF HEIRS PROP. ACT, at 6 (UNIF. LAW COMM’N 2010)).

³³ See Baker & McBride, *supra* note 19, at 16 (“[T]he heirs property problem impacts Georgians of all socioeconomic backgrounds, and affects rural and metropolitan communities alike.”).

³⁴ See DiRusso, *supra* note 20, at 51 (“Whereas those with an annual income of \$25,000 or lower had only an 18.5% rate of testacy, that rate increased to 33.5% for middle incomes (\$25,000–\$100,000) and to 40.4% for highest incomes (over \$100,000).”).

³⁵ See O.C.G.A. § 53-4-20 (West, Westlaw through 2020 Legis. Sess.) (listing will formality requirements in Georgia).

³⁶ 2 DANIEL F. HINKEL, GA. REAL ESTATE LAW & PROCEDURE § 16:15 (7th ed. 2020), Westlaw GAREALEST (defining “[a] holographic will [as] one entirely in the handwriting of the maker” but noting that “[t]he laws of [Georgia] contain no such provisions [permitting holographic wills], and while a will entirely in the testator’s handwriting may be valid, it must still” comply with Georgia’s strict formality requirements).

³⁷ See Kasey Libby & Duncan Adams, *Follow Georgia Will Execution Requirements to Ensure Your Will is Valid and Avoid Will Contest Litigation*, ATLANTA PROB. LAW. BLOG (May 2, 2010), https://www.atlantaprobatelawyerblog.com/follow_georgia_will_execution/ (noting that Georgia’s will statutes have “strict requirements” and explaining that many “probate

fees to draft wills and can be intimidating to deal with, lower income individuals are often unable to hire a lawyer to draft a will and therefore often die intestate.³⁸ The income disparity in intestacy is most pronounced at “very low income levels; the disparity between middle and high income is not as dramatic.”³⁹ In addition to higher rates of intestacy, heirs with lower incomes are also disproportionately affected by heirs property issues and often face the heaviest burdens from heirs property.⁴⁰ Remedying the issues associated with heirs property often requires paying court costs, hiring attorneys, and other costly measures that further complicate the situation for low-income tenants.⁴¹

The correlation between income and heirs property is evidenced in Atlanta and other urban areas in Georgia where “heir[s] property typically shows up as the abandoned ‘crack’ house in the low income neighborhood.”⁴² The high prevalence of low-income heirs property owners has created a need for pro bono programs to assist low-income tenants with heirs property issues.⁴³ Despite the widespread existence of heirs property in Georgia, “tenancy-in-common ownership under the default rules represents a particularly unstable form of ownership.”⁴⁴

III. PROBLEMS WITH HEIRS PROPERTY

The difficulties associated with heirs property often prevent the realization of the property’s full potential and can result in forced

issues . . . could have been avoided if proper will drafting and will execution practice had been strictly followed”).

³⁸ See DiRusso, *supra* note 20, at 51 (“The difference in testacy based on income is statistically significant.”).

³⁹ *Id.*

⁴⁰ See Baker & McBride, *supra* note 19, at 16 (noting that lower income communities routinely deal with common ownership issues).

⁴¹ Cf. GA. APPLESEED CTR., UNLOCKING HEIR PROPERTY OWNERSHIP, *supra* note 13, at 13 (explaining why pro bono programs are needed to resolve heirs property concerns for indigent tenants).

⁴² *Id.*

⁴³ Cf. GA. HEIRS PROP. LAW CTR., *supra* note 2, at 5 (noting that the average annual household income of clients who seek the assistance of the Georgia Heirs Property Law Center is \$32,500).

⁴⁴ Thomas W. Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1, 5 (2014).

ousters of residents from the property.⁴⁵ As a result, many heirs properties are abandoned and have become hotspots for crime.⁴⁶ This Part first discusses problems associated with the inability to realize the heirs property's full potential, and then analyzes the injustices from forced partitions of heirs property.

A. INABILITY TO REALIZE THE LAND'S FULL POTENTIAL

In revisiting the hypothetical from the Introduction, if John Smith's children and surviving spouse, Pam, wanted to obtain financing to remodel the house, they may struggle to find a creditor willing to finance the project. Heirs property poses a significant barrier to acquiring financing for improvements to the property.⁴⁷ Many tenants in common are "land rich but cash poor," meaning that their fractionalized interest in the heirs property is their main asset.⁴⁸ This makes acquiring loans to improve the heirs property difficult since many lenders refuse to accept such property as sufficient collateral given the lack of clear title associated with heirs property.⁴⁹ This in turn leads to underdevelopment of heirs property because the cotenants cannot obtain loans necessary to "realize the potential economic value of their tenancy-in-common ownership."⁵⁰ If a lender is willing to accept the heirs property as collateral, they will often require all of the heirs to accept personal liability for the

⁴⁵ See GA. APPLESEED CTR., UNLOCKING HEIR PROPERTY OWNERSHIP, *supra* note 13, at 8 ("[O]ne who has lived on and worked the land for perhaps nearly a lifetime, can be ousted by a legal action initiated by a person who has never had any connection with the land at all and who may own only a minute fractional interest in the property.").

⁴⁶ See *id.* at 9 ("Many abandoned land parcels and structures are heir property These areas are often untended and dilapidated. At best, they are an eyesore; at worst, a haven for crime.").

⁴⁷ See Mitchell, *supra* note 44, at 60 ("[L]ending institutions typically refuse to accept heirs property as collateral for loans due to concerns that those who own heirs property lack clear title.").

⁴⁸ *Id.* at 30.

⁴⁹ See Batra, *supra* note 3, at 746 ("[Cotenants] are not able to access the value in this land through loans or lines of credit with the land as collateral, because the presence of multiple owners, some unknown, makes providing merchantable title to secure a loan impossible.").

⁵⁰ Mitchell, *supra* note 44, at 60.

loan.⁵¹ Due to the restrictions attendant to heirs property's tenancy in common form of ownership, "all the co-owners must join in signing and guaranteeing the security deed" if a bank does decide to grant a loan.⁵² This would become difficult or impossible if one cotenant refuses to cooperate or cannot be located, so obtaining a loan may be unrealistic even if a bank is willing to offer a loan.

In addition to hampering heirs' ability to obtain favorable bank loans, heirs property poses barriers to financial assistance from government programs.⁵³ If a fire burned down the house shared by Pam and her children, government relief provisions might be denied because the property is classified as heirs property. Many government programs require proof of merchantable title—that is, a title clear of defects—prior to providing financial assistance to property owners.⁵⁴ Since heirs property involves fractionalized interests with the potential for many tenants in common (and possibly unlocated tenants in common), heirs property cotenants have difficulty proving the requisite merchantable title—a problem that often requires legal representation to solve.⁵⁵ The government programs that could be denied to cotenants of heirs property are often those that would help realize the full potential of the land, including programs for housing, improvements, or agriculture production.⁵⁶ Additionally, in the aftermath of natural disasters like

⁵¹ See GA. APPLESEED CTR., HEIR PROPERTY, *supra* note 5, at 12 ("Successful use of the property as collateral generally requires that all heirs agree to be personally responsible for repaying the loan.").

⁵² *Id.* at 20.

⁵³ See Batra, *supra* note 3, at 746 ("The lack of access to resources for heirs property also extends to resources from government programs.").

⁵⁴ See *id.* at 747 ("Merchantable title problems arose that required resolution before the property owners could qualify for governmental programs because many of these poor property owners owned heirs property.").

⁵⁵ See *id.* ("Resolving these issues typically required an attorney, which most of these property owners could not afford.").

⁵⁶ See GA. APPLESEED CTR., HEIR PROPERTY, *supra* note 5, at 12 ("The property may not be eligible for federal or state funding programs for housing, repairs or agriculture."); GA. APPLESEED CTR., UNLOCKING HEIR PROPERTY OWNERSHIP, *supra* note 13, at 9–10 (noting that heirs property owners "face extra challenges in obtaining government assistance in the event of a future natural disaster").

Hurricane Katrina, affected Georgian tenants of heirs property lack access to government assistance programs to recover and rebuild.⁵⁷

If Pam and the children wanted to farm the heirs property land, they might encounter difficulties associated with the unmerchantable title. The clouded title on heirs property often prevents tenants from realizing the full potential of the land in agricultural production.⁵⁸ Government programs often deny agricultural funding grants to tenants who cannot prove clear title.⁵⁹ In addition, “[m]any timber and agricultural companies will not purchase timber or crops from people without a clear title.”⁶⁰ Such companies would be liable for paying one cotenant and not the others because they bear responsibility for ensuring that all cotenants of the property receive their share in the payment; if one cotenant withheld another’s share, the tenant could sue the purchasing company for the missing share.⁶¹

If Pam wanted to lease the house and land, she might have difficulty finding a lessee, and she would likely encounter further complications with leasing the property. Many potential lessees and buyers refuse to lease or buy heirs property with a clouded title; if they do lease or buy, they will often do so for a lower price.⁶² The multiple owners of heirs property make leasing especially challenging because “confusion may arise as to which heir is responsible for collecting rent and distributing it to co-owners.”⁶³

⁵⁷ See GA. APPLESEED CTR., UNLOCKING HEIR PROPERTY OWNERSHIP, *supra* note 13, at 9 (“Because heir property owners were not the only owners of their land and often lacked documentation of their ownership interest in the property in which they had lived before [Hurricane Katrina], they could not initially qualify for FEMA or other government grants to rebuild their homes.”).

⁵⁸ See GA. APPLESEED CTR., HEIR PROPERTY, *supra* note 5, at 12 (noting the restrictions on agricultural companies when dealing with heirs property).

⁵⁹ See Batra, *supra* note 3, at 746–47 (describing how heirs property owners in New Orleans “were not able to access governmental programs such as the Department of Housing and Urban Development’s ‘Road Home’ program, established after Hurricane Katrina to provide financial assistance to property owners who had been harmed”).

⁶⁰ GA. APPLESEED CTR., HEIR PROPERTY, *supra* note 5, at 12.

⁶¹ See *id.* at 20–21 (“[I]f they purchase timber from heir property, but pay only one co-owner, they are liable for failing to make sure all other co-owners are paid.”).

⁶² See *id.* at 12–13 (noting that “[l]easing the property for . . . purposes that require a clear title will be difficult and could result in a lower lease value” and that “property cannot be sold without a clear title”).

⁶³ *Id.* at 12.

When heirs property gets further divided among successive heirs, locating all potential heirs to distribute the proceeds of the sale or lease may pose additional difficulties.⁶⁴ Prior to leasing or selling the property, unanimous agreement by all heirs is required, so disagreements among the cotenants can make leasing or selling the property impossible.⁶⁵

B. INJUSTICES WITH FORCED SALES

Pam and her children could have issues with paying property taxes and may potentially lose the property in a tax sale if one child does not pay their portion of the taxes. Georgia law requires landowners to pay annual property taxes to the commissioner of the county where the property is located.⁶⁶ If just one cotenant neglects paying their portion of the property taxes, the taxes become delinquent and fees and interest are owed by all cotenants.⁶⁷ County tax commissioners can also levy an additional penalty.⁶⁸ In addition to these fees, the state can seize and sell the heirs property to recover the unpaid portion of the taxes.⁶⁹ In such a case, the heirs property will be sold publicly to the highest bidder through either a sheriff's sale or a foreclosure sale.⁷⁰ Even though the cotenants have

⁶⁴ See *id.* at 13 (“As the number of heirs increases, it . . . becomes more difficult to keep track of the heirs and where they all live.”).

⁶⁵ See *id.* (describing the necessities of unanimous agreement among heirs); Goyke et al., *supra* note 19, at 2 (“The result is a land use inefficiency called the ‘tragedy of the anti-commons,’ where a single individual can prohibit land use . . . regardless of the size of their interest.”).

⁶⁶ See O.C.G.A. § 48-5-11(1) (West, Westlaw through 2020 Legis. Sess.) (“Real property of a resident shall be returned for taxation to the tax commissioner or tax receiver of the county where the property is located.”); GA. APPLESEED CTR., HEIR PROPERTY, *supra* note 5, at 17 (“If there is more than one owner, all owners are responsible for making sure that the real property taxes are paid on time to the proper taxing authorities.”).

⁶⁷ See GA. APPLESEED CTR., HEIR PROPERTY, *supra* note 5, at 17 (“Once taxes become delinquent, additional penalties and interest are charged against the landowner for failure to pay taxes on time.”); *Penalty and Interest Rates*, DEP’T OF REVENUE, <https://dor.georgia.gov/penalty-and-interest-rates> (last visited Jan. 30, 2021) (“Interest that accrues beginning July 1, 2016 accrues at an annual rate equal to the Federal Reserve prime rate plus [three] percent.”).

⁶⁸ See GA. APPLESEED CTR., HEIR PROPERTY, *supra* note 5, at 17–18.

⁶⁹ See *id.* at 18 (outlining Georgia’s forced sale procedures).

⁷⁰ See *id.* (“If taxes are not paid, the land may be sold at a public tax sale to the highest bidder who is willing to pay the past due taxes.”).

a right of redemption where they can redeem the property by paying interest and back taxes, regaining ownership of the land is “very costly and timely,” and it is often difficult to coordinate with all cotenants to pay their shares of the taxes and fees.⁷¹

Pam and her children could lose ownership of the property against their wishes. Large corporations and investors have learned how to exploit the weaknesses inherent in heirs property by purchasing one cotenant’s interest and then filing for partition.⁷² In addition, disputes among cotenant family members can result in filings for partition.⁷³ Courts have discretion to order either a “partition in kind,” where the property is physically divided and distributed to each interest holder in accordance with their proportion of ownership, or a “partition by sale”—the forced sale of the property with the purchase price distributed to each interest owner in proportion to their fractional interest.⁷⁴ Although a partition in kind grants full title of a fraction of the property to each heir, under this distribution, each cotenant “loses the right to possess and use the larger tract of property.”⁷⁵ The former cotenant “may end up with a land interest that is less than the value of the larger tract [they] once owned as a tenant in common,” and “may have to move if the portion they acquire is not the portion of land upon which they live.”⁷⁶ If a partition by sale is ordered, low-income tenants who wish to keep possession of the heirs property are often

⁷¹ See *id.* at 18–19 (“Co-owners of the land may have trouble contacting one another and organizing to save the property from sale.”). To exercise this “right of redemption,” cotenants must pay the “sum of delinquent taxes plus accrued interest and subsequent taxes paid by the new owner” within twelve months after a sheriff’s sale or sixty days after a foreclosure sale. *Id.* at 18.

⁷² See Batra, *supra* note 3, at 751 (“The fact that any cotenant in a tenancy in common can force a sale of the property is often exploited by investors who wish to acquire the whole of the property.”); GA. APPLESEED CTR., UNLOCKING HEIR PROPERTY OWNERSHIP, *supra* note 13, at 8 (“[O]ften the person seeking the forced sale is not actually a distant relative but rather an unrelated third party developer who purchased a fractional interest and is using the partition process to acquire the property as part of an effort, for example, to convert rural homesteads to other land uses.”).

⁷³ See Batra, *supra* note 3, at 748 (noting that “familial disputes” can cause partition actions).

⁷⁴ *Id.* at 748–49.

⁷⁵ GA. APPLESEED CTR., HEIR PROPERTY, *supra* note 5, at 23.

⁷⁶ *Id.*

unable to do so.⁷⁷ Tenants in common also suffer further financial deprivations from partitions through the court costs and attorney fees.⁷⁸

Due to the potential for a wide disbursement of heirs holding interests in heirs property, any action taken involving the property comes with a risk that some of the cotenants will not receive notice of the partition suit.⁷⁹ In partition actions, “[t]hose owners that are known or speculated to exist but cannot be notified must have their shares reserved for them,”⁸⁰ but if they do not claim their interest within five years in Georgia, the state will take over their interests by escheat.⁸¹ In addition, even when owners of heirs property can be located, Georgia requires a minimal burden on the petitioner to notify out-of-state tenants of the partition and will often allow notice by publication.⁸² This type of notice only requires that the petitioner list the partition suit in a local newspaper,⁸³ which rarely results in notifying the other cotenants.⁸⁴

If Pam opposed the sale of the property, she could be liable for attorney’s fees from the forced sale. Case law in Georgia has

⁷⁷ See Mitchell, *supra* note 44, at 30–31 (“[M]any heirs property owners are ‘land rich but cash poor,’ in that they do not have other substantial liquid assets (or tangible assets for that matter) that they can use, including to secure a loan, to enable them to bid effectively at a partition sale.”).

⁷⁸ See Batra, *supra* note 3, at 753 (“A number of fees and costs must first be paid to others before the remaining proceeds of a sale are distributed to the tenants in common.”).

⁷⁹ See *id.* (“Notice by publication is typically used . . . because the petitioner for partition usually represents that they are unable to find many of the owners or they are too numerous to track down. This has resulted in cases where owners have not been given notice of a partition action even when they live in the same town as the land they own, or are known to the plaintiffs in the case.” (footnote omitted)).

⁸⁰ *Id.*

⁸¹ See O.C.G.A. § 53-2-50 (West, Westlaw through 2020 Legis. Sess.) (“[T]he term ‘escheat’ is the reversion of property to the state upon a failure of heirs of a decedent to appear and make claim for or against property owned by the decedent at death for which no other disposition was provided either by will or otherwise.”); *id.* § 44-12-193 (qualifying a property as abandoned when it “has remained unclaimed by the owner for more than five years”).

⁸² See *id.* § 44-6-162 (listing the notice requirements for out-of-state parties).

⁸³ See *id.* (“If any of the parties reside outside of this state, the court may order service by publication as in its judgment is right in each case.”).

⁸⁴ See Batra, *supra* note 3, at 761 (“In the case of heirs property, the typical notice given is ‘notice by publication.’ A ‘notice by publication’ is where a notice of the pending action is printed—typically in a local newspaper that is not widely distributed, and may exist specifically for this purpose.” (footnote omitted)).

established that partition actions at law may not take the plaintiff's attorney's fees out of the sale proceeds of the land.⁸⁵ But if the partition suit is conducted in equity, courts have discretion in awarding attorney's fees out of the common proceeds of the land sale, further lessening the profits to which opponents of the sale are entitled.⁸⁶ A common justification for withholding attorney's fees from the sale proceeds in equitable partition suits is that the sale was for the benefit of all parties.⁸⁷ The basis that all parties were benefited often stems from purely economic reasoning that disregards whether the sale actually benefitted the cotenants or whether the sale economically harmed the tenants.⁸⁸ Taking the petitioner's attorney's fees out of the sale proceeds forces cotenants to pay for the "deprivation of their property rights and their resulting loss of wealth" in addition to paying their separate individual attorney's fees for any unsuccessful resistance to the partition.⁸⁹ Because of the many issues associated with heirs property, Georgia has enacted legislation attempting to solve some of the problems.

⁸⁵ See, e.g., *Walker v. Walker*, 467 S.E.2d 583, 584 (Ga. 1996) ("Our research has revealed no basis for the award of fees and expenses in the context of a statutory partitioning proceeding, so we conclude that the award is not sustainable if this case is considered one at law."); *Nixon v. Nixon*, 29 S.E.2d 613, 615 (Ga. 1944) (holding that in partition sales independent of equity, "the parties who applied for the partition are not entitled to have fees awarded to their attorneys from the funds arising from such sale").

⁸⁶ See *Walker*, 467 S.E.2d at 584 ("An award of attorney fees from a common fund can be made under proper circumstances in equity cases . . .").

⁸⁷ See *id.* ("The trial court . . . specifically based the award of attorney fees on a finding that appellee initiated the action for the benefit of all the co-tenants."); *Mitchell*, *supra* note 44, at 24 ("[P]arties may have to pay a portion of another party's attorney's fees if the attorney for the other party provided legal services in the litigation that the court deems inured to the benefit of those to be charged as well as to the party who employed the attorney.").

⁸⁸ See *Mitchell*, *supra* note 44, at 25–26 (discussing the flaws of the common benefit doctrine).

⁸⁹ *Batra*, *supra* note 3, at 754.

IV. PAST EFFORTS TO REMEDY

A. PRIOR LEGISLATION

Prior to Georgia's adoption of the Uniform Partition of Heirs Property Act (the UHPHA),⁹⁰ partition law in the state had historical roots preceding the American Revolution.⁹¹ Although it was the early courts' policy to favor partition in kind, Georgia preferred to order partition by sale.⁹² Partition by sale was easier for courts to administer than partition in kind, which required figuring out equitable means of physically dividing the property among the tenants in proportion to their ownership; partition in kind often proved challenging as different parts of the property were frequently valued unequally.⁹³

Prior to adopting the UHPA, Georgia enacted some provisions to resolve common heirs property concerns in partition by sale actions.⁹⁴ One statute provides that "any petitioner may withdraw as petitioner in the partition action and become a party in interest and any party in interest may become a petitioner in the action."⁹⁵ Furthermore, if no petitioner remains in the case after fifteen days, the partition action "shall be dismissed, and the petitioners who have withdrawn shall be liable for the costs of the action."⁹⁶ Georgia law also limits the ability of non-petitioning tenants in common to buy out the interests of the petitioning cotenant; a non-petitioning tenant can only

pay toward the amount required to purchase any petitioners' shares of the appraised price an amount in proportion to that party's share of the total shares of

⁹⁰ O.C.G.A. §§ 44-6-180 to -189.1 (West, Westlaw through 2020 Legis. Sess.).

⁹¹ See Baker & McBride, *supra* note 19, at 18 ("Partition law in Georgia dates back to the Act of 1767 . . .").

⁹² See *id.* ("[E]arly case law evidenced courts' preferences to physically divide land in kind, [but] subsequent Georgia courts followed the trend in the majority of states over the past century in favor of court-ordered partition sales.").

⁹³ See *id.* (explaining the early preference for partition by sale).

⁹⁴ See O.C.G.A. § 44-6-166.1(d) (West, Westlaw through 2020 Legis. Sess.) (allowing parties in a partition suit to switch sides).

⁹⁵ *Id.*

⁹⁶ *Id.*

property of all parties in interest, unless one party in interest authorizes another party in interest to pay some or all of his proportionate share of the shares available for sale.⁹⁷

This loose buyout provision allows the buyout of the petitioning party to fail if only one non-petitioning tenant refuses to pay their share of the purchase price and does not give the purchasing party permission to buy their share.⁹⁸ If the parties opposing the partition could not buy out the petitioning party under Georgia's buyout provision, the family often lost the land to higher bidders at public sales.⁹⁹

B. UNIFORM PARTITION OF HEIRS PROPERTY ACT

Georgia's adoption of the UHPHA strengthened and expanded remedies for heirs property owners in the state.¹⁰⁰ The prevalence of heirs property and its many associated issues prompted a drafting committee to work for over three years to address the major problems associated with heirs property in the UHPHA.¹⁰¹

In 2010, the Uniform Law Commission approved the UHPHA, and in 2011, the American Bar Association approved the UHPHA for consideration by states.¹⁰² In 2012, Georgia—with unanimous approval by the Georgia legislature—was the second state to adopt the UHPHA.¹⁰³ Georgia's adoption of the UHPHA does not establish

⁹⁷ *Id.* § 44-6-166.1(e)(2).

⁹⁸ *See id.*

⁹⁹ *See* GA. APPLESEED CTR., HEIR PROPERTY, *supra* note 5, at 15 (“When a public sale results, family members are often unable to out-bid developers or real estate investors at public sales, and the family loses the land.”).

¹⁰⁰ O.C.G.A. §§ 44-6-180 to -189.1 (West, Westlaw through 2020 Legis. Sess.) (codifying the UHPHA into Georgia law).

¹⁰¹ *See* Mitchell, *supra* note 44, at 3–4 (“The drafting committee for the UHPHA, which included many leading attorneys with expertise in real property matters, litigation, and legislative affairs, spent more than three years drafting the Act.”).

¹⁰² *See id.* at 4–5 (explaining the early adoptions of the UHPHA).

¹⁰³ *See* Baker & McBride, *supra* note 19, at 16, 18 (“Introduced and unanimously approved in 2012 by the Georgia Legislature, the Uniform Partition of Heirs Property Act is codified in Title 44 of the Official Code of Georgia Annotated.”).

new partition laws for Georgia but instead serves as a controlling subpart to existing partition laws.¹⁰⁴

Similar to prior Georgia statutory provisions, the UPHPA offers an option of partition by allotment, which gives tenants opposing the partition the option to purchase the property from the party petitioning for the partition.¹⁰⁵ Because the UPHPA only allows non-petitioning tenants to purchase the property, it helps prevent investors from forcing partitions solely to purchase the property for profit since the petitioning party may lose to the other tenants in the first stages of the partition action.¹⁰⁶ At the public auction of the property, however, the petitioner for partition may bid for the property, but only after the non-partitioning cotenants have had the opportunity to purchase the petitioner's interest.¹⁰⁷ The UPHPA extends protections for non-partitioning cotenants further than the previous Georgia statute by permitting cotenants who

paid their apportioned purchase price to pay within a discrete period of time the entire purchase price for any interests that were not purchased in the first round of the buyout due to the fact that one or more other electing cotenants failed to pay their apportioned purchase price on time.¹⁰⁸

¹⁰⁴ See *id.* at 18 (“[The UPHPA] adds a subpart to . . . Georgia’s existing equitable and statutory partition statute in that it applies only to actions involving ‘heirs property’ as defined under the [UPHPA].”); see also *Faison v. Faison*, 811 S.E.2d 431, 434 (Ga. Ct. App. 2018) (holding that Georgia courts must follow the mandatory provisions of the UPHPA).

¹⁰⁵ See *Batra*, *supra* note 3, at 755 (explaining that partition by allotment “gives the owners not seeking partition the right to buy the property from the owner seeking partition”).

¹⁰⁶ See *id.* (“[P]artition by allotment gives the petitioner the right to sell the property, but only gives the right to buy to other owners. In this way, the petitioning party, at least at this first stage, cannot use the partition action to buy the property themselves.” (footnote omitted)); UNIF. PARTITION OF HEIRS PROP. ACT § 7 cmt. 3 (UNIF. LAW COMM’N 2010) (“Only those cotenants that seek partition by sale are mandatorily subject to the buyout.”).

¹⁰⁷ See UNIF. PARTITION OF HEIRS PROP. ACT § 7 cmt. 3 (UNIF. LAW COMM’N 2010) (describing the bidding procedures for heirs property in partition sales).

¹⁰⁸ *Mitchell*, *supra* note 44, at 52–53; see also *Baker & McBride*, *supra* note 19, at 20–21 (discussing how the UPHPA gave non-petitioning cotenants more time in which to complete the buyout in comparison to the existing Georgia statute). The UPHPA attempts to make partition in kind more feasible by reducing the number of interest holders to allow “a second

However, even if non-petitioning cotenants purchased all of the interests held by petitioners for a partition by sale, “if there is at least one cotenant that still requests partition in kind at the conclusion of the buyout,” the property may not be safe from partition.¹⁰⁹

If partition by allotment is not practical, the UPHPA favors partition in kind rather than partition by sale.¹¹⁰ Under the UPHPA, partition in kind should be used unless the cotenants would be greatly or manifestly prejudiced.¹¹¹ In determining sufficient prejudice for a partition by sale, the court considers economic factors such as whether a partition in kind’s “aggregate fair market value of the parcels . . . would be materially less than the value of the property if it were sold as a whole.”¹¹² The court also considers non-economic factors under the UPHPA, including the following: whether dividing the property among cotenants is feasible; how long the property has stayed in the family; personal and sentimental value of the property; the current use of the property and the harm that would ensue if such a use could not continue; and the amount contributed in taxes, insurance, and other property expenses.¹¹³ These factors are not exhaustive in what the court shall consider in deciding whether prejudice will result from a partition by kind, and none of these factors are dispositive.¹¹⁴ By expressly considering non-economic factors and the interests held by non-appearing cotenants, the UPHPA’s test for partition in kind makes it harder for courts to justify ordering a partition by sale over a partition in kind and enforces Georgia’s statutory preference for

buyout of the interests of cotenants named as defendants who were served with the complaint but who did not appear in the action.” Batra, *supra* note 3, at 755.

¹⁰⁹ Mitchell, *supra* note 44, at 54.

¹¹⁰ See Batra, *supra* note 3, at 756 (noting that the UPHPA “encourages the choice of partition in kind over partition by sale” when “partition by allotment is not feasible”).

¹¹¹ UNIF. PARTITION OF HEIRS PROP. ACT § 8(a) (UNIF. LAW COMM’N 2010); see also Mitchell, *supra* note 44, at 54–55 (discussing the standard that must be met to shift from a partition in kind to a partition by sale).

¹¹² UNIF. PARTITION OF HEIRS PROP. ACT § 9(a)(2) (UNIF. LAW COMM’N 2010).

¹¹³ *Id.* § 9(a)(1)–(6); see also Baker & McBride, *supra* note 19, at 22 (“The Act requires, for the first time in Georgia history, that courts engage in a subjective analysis which encompasses non-economic factors prior to a court ordering a partition in kind.”).

¹¹⁴ UNIF. PARTITION OF HEIRS PROP. ACT § 9(a)(7), (b) (UNIF. LAW COMM’N 2010).

partition in kind.¹¹⁵ To make a partition in kind feasible, courts are also allowed to use owelty payments, “which require a cotenant who receives more than his pro rata share of the property to pay a cotenant who receives less than his pro rata share monetary compensation so that the partition is just.”¹¹⁶ The UPHPA additionally permits cotenants to aggregate their interests to facilitate physical division of the property for a partition in kind.¹¹⁷

If a partition by sale is ultimately required, the UPHPA protects the tenants in common and strives “to ensure that the wealth-maximization goal, which many courts invoke as a justification for ordering a forced partition sale, can be much better realized.”¹¹⁸ Prior to the UPHPA, partition sales often resulted in heirs property selling below market value because the properties were on the market for a limited time and were sold at private auctions with minimal public notice using cash sales with fewer buyers.¹¹⁹ Under the UPHPA, the court appoints a disinterested commissioner to divide the land for a partition in kind and appoints an appraiser to determine the property’s fair market value in a partition by sale.¹²⁰ However, the parties are allowed to prove the value of the property themselves or to agree on an alternate valuation process.¹²¹ The UPHPA also allows evidentiary hearings to set the value of the property if the cost of an appraisal would outweigh the benefits.¹²² In addition, partitions by sale must be conducted on the open market unless a court decides that a sealed bids or auction sale would yield a higher purchase price with a broker advertising the

¹¹⁵ See Mitchell, *supra* note 44, at 54–55 (noting how the UPHPA codifies a preference for partition in kind).

¹¹⁶ *Id.* at 13.

¹¹⁷ UNIF. PARTITION OF HEIRS PROP. ACT § 8(a) (UNIF. LAW COMM’N 2010).

¹¹⁸ Mitchell, *supra* note 44, at 6; see also UNIF. PARTITION OF HEIRS PROP. ACT § 6 (UNIF. LAW COMM’N 2010) (explaining the method of valuation for heirs property).

¹¹⁹ See Mitchell, *supra* note 44, at 18–20 (discussing common sale procedures prior to the UPHPA that failed to secure “fair market value” for the heirs property).

¹²⁰ UNIF. PARTITION OF HEIRS PROP. ACT § 6 (UNIF. LAW COMM’N 2010). Prior to Georgia’s adoption of the UPHPA, Georgia did not require property appraisers to be disinterested parties. See Baker & McBride, *supra* note 19, at 20 (discussing how the 2013 version of O.C.G.A. section 44-6-143 provided no such requirement).

¹²¹ See UNIF. PARTITION OF HEIRS PROP. ACT § 6(b) (UNIF. LAW COMM’N 2010) (“If all cotenants have agreed to the value of the property or to another method of valuation, the court shall adopt that value or the value produced by the agreed method of valuation.”).

¹²² O.C.G.A. § 44-6-184(e) (West, Westlaw through 2020 Legis. Sess.).

property “in a commercially reasonable manner at a price no lower than the determination of value and on the terms and conditions established by the court.”¹²³ Once the property is listed with a broker, the court may approve the highest offer, re-value the property, keep it listed on the market, or order an auction or sealed bids sale.¹²⁴

Despite the UHPHA’s reforms, tenants in common without the resources to hire legal counsel may “lack sufficient information to be able to invoke the UHPHA in those instances in which these owners were to become parties to a partition action.”¹²⁵ The UHPHA only governs heirs property disputes, and it defines heirs property as tenancy in common property that is sufficiently family-owned where either:

- (i) [twenty] percent or more of the interests are held by cotenants who are relatives;
- (ii) [twenty] percent or more of the interests 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.¹²⁶

The UHPHA also restricts the definition of heirs property to that which does not have a binding cotenant agreement as to the partition of the property and requires one or more cotenants to have received their interest in the property from a relative.¹²⁷ Prior to Georgia’s adoption of the UHPHA, Georgia’s statutes did not define heirs property.¹²⁸

¹²³ UNIF. PARTITION OF HEIRS PROP. ACT § 10(b) (UNIF. LAW COMM’N 2010).

¹²⁴ *See id.* § 10(d) (listing a court’s options in the event that no offer at the appraised value comes forward in a reasonable time).

¹²⁵ Mitchell, *supra* note 44, at 45–46.

¹²⁶ UNIF. PARTITION OF HEIRS PROP. ACT § 10(b) § 2(5)(C)(i)–(iii) (UNIF. LAW COMM’N 2010).

¹²⁷ *Id.* § 2(5)(A)–(B).

¹²⁸ *See Baker & McBride, supra* note 19, at 18 (highlighting the importance of the UHPHA’s definition of “heirs property” for Georgia).

C. FARM BILL OF 2018

At the federal level, Congress recently adopted the Agricultural Improvement Act of 2018 (the Farm Bill of 2018), which helps mitigate some heirs property issues.¹²⁹ The Farm Bill of 2018 allows the government to grant loans to creditors who can then “relend the funds to” socially disadvantaged ranchers and farmers.¹³⁰ It also explicitly grants preference to lending institutions in states that have adopted the UHPA.¹³¹ Since Georgia has adopted the UHPA, the Farm Bill of 2018 makes it much easier for tenants to prove the land’s status as heirs property¹³² and accordingly grants farm numbers to tenants in common of such property.¹³³ Farm numbers allow tenants of heirs property to access federal farm loans and other United States Department of Agriculture (USDA) programs.¹³⁴ USDA programs offer many opportunities for farmland owners to gain financial support in resolving heirs property issues and to engage in mediation through the Agricultural Mediation Program.¹³⁵ Despite the progress that legislation such as the Farm Bill of 2018 and the UHPA have made in mitigating heirs property issues in Georgia, further reforms are necessary to confront the continuing problems associated with heirs property.

D. OTHER PROPOSALS

Even though legislation such as the UHPA and the Farm Bill of 2018 have ameliorated some of the challenges stemming from

¹²⁹ See generally Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (providing protections to heirs property tenants of farmland).

¹³⁰ *Id.* at 4669–70.

¹³¹ *Id.* at 4670 (listing the terms of preference for loan recipients).

¹³² See *id.* at 5015 (requiring a court order to establish that the property meets the UHPA’s definition of “heirs property” or a certificate from the deed recorder stating that the recorded landowner died and at least one heir has started to retitle the land in their name).

¹³³ *Id.* at 5014–15; see also 7 C.F.R. § 718.2 (2020) (defining a “[f]arm number” as “a number assigned to a farm by the county committee for the purpose of identification”).

¹³⁴ See *Congress Recognizes the Benefits of a Uniform State Law to Help Owners of Heirs Property*, PROB. & PROP., May/June 2019, at 10, 11 (“A farm number is a prerequisite for a federal farm loan and for other United States Department of Agriculture (USDA) programs.”).

¹³⁵ See generally MONICA A. RAINGE, A SUMMARY OF HEIRS PROPERTY LEGISLATION IN THE 2018 FARM BILL, <https://srmecc.uaex.edu/2.pdf> (last visited on Jan. 30, 2021) (examining the benefits of the Farm Bill of 2018 for tenants in common).

heirs property, some legal scholars have argued for further reform to mitigate remaining concerns.¹³⁶

1. *Legal Arrangements.* Another way to correct heirs property issues is by creating a family land trust that holds the property's title.¹³⁷ Under such a system, the trustee makes the decisions for the property while the cotenants serve as the beneficiaries.¹³⁸ The trustee retains the title of the heirs property, so the property's "title remains clear."¹³⁹ A family land trust can mitigate heirs property problems in large rural properties, but it might not be a practical solution for small lots of land or urban properties.¹⁴⁰ Even with the trustee holding title to the heirs property, the trust may still impose "restrictions on how the land is to be managed or developed" and an inexperienced trustee may make poor decisions regarding the heirs property to the detriment of the cotenants.¹⁴¹ Additionally, creating a family land trust often requires the expertise of an estate planning attorney, and many low-income holders of heirs property may not be able to afford the attorney's fees required to fund the trust.¹⁴²

If the holders of heirs property lack the resources or ability to create a family land trust, an alternative solution is to create a family agreement. The heirs can map out their family tree, find all potential tenants in common, and draft a written agreement concerning the property's future.¹⁴³ Since heirs property is often

¹³⁶ See, e.g., Batra, *supra* note 3, at 744 (explaining the weaknesses of the UHPA and proposing additional reforms).

¹³⁷ See GA. APPLESEED CTR., HEIR PROPERTY, *supra* note 5, at 24 ("Through a family land trust, co-owners form a trust that holds title to the property.").

¹³⁸ See *id.* ("A trustee, who may or may not be a family member, is designated to make decisions regarding the property on behalf of and for the benefit of the beneficiaries (the remaining family members).").

¹³⁹ *Id.*

¹⁴⁰ See Joan Flocks, Sean P. Lynch II & Andréa M. Szabo, *The Disproportionate Impact of Heirs' Property in Florida's Low-Income Communities of Color*, FLA. B.J., Sept./Oct. 2018, at 57, 58 ("Creating a family land trust may alleviate some issues with larger properties in rural settings but may not be practical for small acreages or urban homes.").

¹⁴¹ GA. APPLESEED CTR., HEIR PROPERTY, *supra* note 5, at 24.

¹⁴² See *supra* Part II.C.

¹⁴³ See GA. APPLESEED CTR., HEIR PROPERTY, *supra* note 5, at 22 (recommending that families implement "[l]egal documents, such as birth and death certificates and marriage licenses" in the heirs' family tree); GA. HEIRS PROP. L. CTR., HEIRS PROPERTY IN GEORGIA: ATTORNEY TRAINING MANUAL 27 (2016), <https://docplayer.net/18699177-Heirs-property-in-georgia.html> ("You need the client's family tree for two purposes: (1) to trace the chain of

conveyed to heirs without a formal deed recording—thus resulting in an unmarketable title—“heirs typically must ‘sign-off’ on agreements in order to effectively participate in transactions to rent, improve, encumber[,] and sell the land.”¹⁴⁴ Therefore, such agreements can enable property development by preventing future cotenant disagreements about the property’s use. These agreements can help avoid bitter family conflicts, save court costs, connect all tenants to a property, and ultimately serve the family better than what a court would have ordered.¹⁴⁵ If the family agreement expressly limits the rights of other cotenants to partition the property, courts tend to uphold such restrictions.¹⁴⁶ However, the UHPA fails to govern heirs property with a binding agreement concerning the partition of the property, so heirs property under such an agreement loses the protections that the UHPA affords to cotenants.¹⁴⁷ Even with family agreements, if issues arise or if the family chooses to make an arrangement requiring legal expertise, the heirs may still need to hire professionals or attorneys.¹⁴⁸

Holding heirs property in a limited liability company (LLC) also solves some of the problems associated with heirs property.¹⁴⁹ Cotenants can serve as LLC members and share in ownership of the

title . . . and (2) to identify the beneficiaries of the estate of a decedent who did not have a will.”); Flocks et al., *supra* note 140, at 58–59 (discussing family agreements as a solution to heirs property).

¹⁴⁴ Baker & McBride, *supra* note 19, at 17; *see also* Goyke et al., *supra* note 19, at 2 (“In a 2009 study, [seventy percent] of non-heirs’ vs. [thirty-one percent] of heirs’ properties were improved since 1970.”).

¹⁴⁵ *See* Flocks et al., *supra* note 140, at 58–59 (“Such agreements can disentangle interests and responsibilities, offer clarity, result in more equitable and flexible arrangements, preserve familial attachment to the property, avoid impersonal court solutions such as partition sales, and avoid costs associated with court-ordered partition by sale.”).

¹⁴⁶ *See* Mitchell, *supra* note 44, at 10–11 (noting that courts will permit limitations to partition actions “provided that the restriction only constitutes a partial restraint on alienation” for a reasonable period of time).

¹⁴⁷ UNIF. PARTITION OF HEIRS PROP. ACT § 2(5)(A) (UNIF. LAW COMM’N 2010) (noting that, under the UHPA, “[h]eirs property” cannot have an “agreement in a record binding all the cotenants which govern[] the partition of the property”).

¹⁴⁸ *See* Flocks et al., *supra* note 140, at 59 (“[H]eirs may need the assistance of professionals to accomplish [these family agreements].”).

¹⁴⁹ *See* GA. APPLESEED CTR., HEIR PROPERTY, *supra* note 5, at 25 (discussing LLCs as a solution to heirs property issues).

LLC while the LLC itself holds the title of the property.¹⁵⁰ The cotenants then form an agreement specifying how the LLC will manage the property and providing that each cotenant's interest in the LLC will be inheritable, while ownership of the property itself remains with the LLC.¹⁵¹ However, forming an LLC requires many formalities that often are too difficult for uneducated cotenants to perform, including filing documents with various governmental departments, updating those documents, and complying with local business regulations.¹⁵² Managing an LLC also requires a time commitment from at least some of the cotenants and possibly an additional financial commitment of hiring a professional manager.¹⁵³ Therefore, the solution of an LLC might not be feasible in many heirs property cases.

2. Equitable Remedies. Tenants in common often lack adequate education regarding how heirs property works.¹⁵⁴ It is a common myth among heirs property tenants that their ownership interests are “secure as long as they pay their property taxes and stay current on their mortgage obligations to the extent that they have any mortgage obligations at all.”¹⁵⁵ To fill this knowledge gap, some non-profit Georgia programs have emerged to educate and assist tenants of heirs property.¹⁵⁶

The Georgia Heirs Property Law Center is a non-profit organization that “helps remediate fractured title, increase equity, and transfer wealth to the next generation through title clearing,

¹⁵⁰ *See id.* (“The heirs convey the property to the LLC, which owns the land. The family owns the LLC so that it indirectly owns the property through the LLC.”).

¹⁵¹ *See id.* (“Family members should create an Operating Agreement, specifying how many votes each member is entitled to, how profits are to be distributed, and how the members choose to sell their interests. The LLC can then develop the property any way the members choose.”).

¹⁵² *See id.* (explaining that LLCs are “created by filing articles of organization with the Secretary of State” and that “many additional steps must be taken to effectively manage a LLC”).

¹⁵³ *See id.* (outlining the difficulties of managing an LLC).

¹⁵⁴ *See Mitchell, supra* note 44, at 30 (noting that a “significant percentage of families who own heirs property poorly understand many of the legal rules governing tenancy-in-common ownership”).

¹⁵⁵ *Id.*

¹⁵⁶ *See, e.g.,* GA. HEIRS PROP. LAW CTR., *supra* note 2, at 9 (“The Georgia Landowner Academy empowers landowners by educating them on how to manage the business, agricultural[,] and natural resource responsibilities of land ownership.”).

wills creation, estate planning, and facilitating access to government, private sector, and nonprofit land management/home improvement programs.”¹⁵⁷ This program educates heirs property landowners about their rights and teaches them how to manage their property to avoid risks associated with heirs property.¹⁵⁸

The Georgia Appleseed Center for Law & Justice created the Heir Property Project to assist “low and moderate income owners of heir property and . . . the communities impacted by vacant heir property.”¹⁵⁹ This program created the Heir Property Legal Clinic that provides pro bono services to equitably assist “poor and minority rural families [with] maintain[ing] ownership of their homes and farms despite barriers to title.”¹⁶⁰ The Georgia Appleseed organization hosts public presentations in local community groups to inform heirs property owners of how to protect their ownership status.¹⁶¹ Georgia Appleseed also conducts valuable research on the prevalence of heirs property in Georgia.¹⁶²

Another equitable remedy to heirs property issues is for tenants to use adverse possession¹⁶³ as a means of clearing title.¹⁶⁴ To clear title through adverse possession, the tenant seeking title must file a suit for quiet title and obtain a court order declaring that the tenant is a legal titleholder.¹⁶⁵ To obtain title through adverse possession in Georgia, a cotenant must “effect[] an actual ouster,

¹⁵⁷ *Id.* at 6. This program provides “targeted outreach in Atlanta and Southwest Georgia.” *Id.*

¹⁵⁸ *See id.* (discussing the educational goals of the Georgia Heirs Property Law Center).

¹⁵⁹ GA. APPLESEED CTR., UNLOCKING HEIR PROPERTY OWNERSHIP, *supra* note 13, at 2.

¹⁶⁰ *Id.* at 13.

¹⁶¹ *See id.* at 14 (discussing the public education initiatives undertaken by the Georgia Appleseed organization).

¹⁶² *See, e.g., supra* notes 13–16 and accompanying text.

¹⁶³ Adverse possession is also known as title “by prescription” in Georgia. O.C.G.A. § 44-5-161 (West, Westlaw through 2020 Legis. Sess.).

¹⁶⁴ *See* GA. HEIRS PROP. L. CTR., ATTORNEY TRAINING MANUAL, *supra* note 143, at 68 (explaining that a greater level of ouster is needed for adverse possession against cotenants, but once a cotenant meets all of the adverse possession requirements, they will gain “full and complete title”); Flocks et al., *supra* note 140, at 59 (“A suit for adverse possession is the last option for heirs who cannot get clear title.”).

¹⁶⁵ *See* GA. HEIRS PROP. L. CTR., ATTORNEY TRAINING MANUAL, *supra* note 143, at 68 (“To establish title by adverse possession, the claimant would be required to obtain an order by a court of competent jurisdiction declaring the client the legal titleholder in a suit to quiet title.”).

retain[] exclusive possession after demand, or give[] his cotenant express notice of adverse possession.”¹⁶⁶ A cotenant’s abandonment of the property alone is insufficient to acquire title through adverse possession since courts are hesitant to sever a cotenant’s property rights.¹⁶⁷

Many formalities must be met prior to gaining clear title through adverse possession in Georgia.¹⁶⁸ Prior to gaining clear title, a cotenant must adversely possess the property for seven years if they had already acquired the deed.¹⁶⁹ If the cotenant did not previously have the deed, as is often the case with heirs property, the adverse possession must have lasted for twenty years.¹⁷⁰ Additional burdens exist if the ousted cotenant is disabled, a minor, imprisoned, or incompetent.¹⁷¹ Despite the many formalities for adverse possession in Georgia, for some heirs it represents the only solution to keeping the property and for acquiring loans for the property.¹⁷² Once the elements in the adverse possession statute have been met, the tenancy in common is terminated and title vests in the adverse possessor.¹⁷³

3. *Procedural Remedies for Partitions.* The UHPHA does not provide a remedy for “the land value that is lost through legal fees paid for from the sale of the proceeds” in partition actions.¹⁷⁴

¹⁶⁶ O.C.G.A. § 44-6-123 (West, Westlaw through 2020 Legis. Sess.).

¹⁶⁷ See GA. HEIRS PROP. L. CTR., ATTORNEY TRAINING MANUAL, *supra* note 143, at 68.

¹⁶⁸ See O.C.G.A. § 44-5-161 (West, Westlaw through 2020 Legis. Sess.) (listing the requirements for adverse possession to give rise to prescriptive title); *id.* § 44-5-165 (providing further requirements for actual possession to be met).

¹⁶⁹ See *id.* § 44-5-164 (explaining that adverse possession “for a period of seven years shall confer good title by prescription to the property” when the adverse possessor has written evidence of title); see also *Cooley v. McRae*, 569 S.E.2d 845, 846 (Ga. 2002) (applying the seven-year period for adverse possession when there is written evidence of title).

¹⁷⁰ See O.C.G.A. § 44-5-163 (West, Westlaw through 2020 Legis. Sess.) (discussing when adverse possession grants clear title after twenty years).

¹⁷¹ *Id.* § 44-5-170.

¹⁷² See *Flocks et al.*, *supra* note 140, at 59 (“For some heirs, . . . a claim for adverse possession may be the only alternative to losing or not being able to finance maintenance on the property.”). Since heirs property’s unmarketable title impedes a cotenant’s ability to acquire a loan, a cotenant may need to clear the title to get financing for the property. See *supra* notes 45–46 and accompanying text.

¹⁷³ See *Mitchell*, *supra* note 44, at 10 (“[A]dverse possession will terminate a tenancy in common.”).

¹⁷⁴ *Batra*, *supra* note 3, at 759.

Although the drafting committee recognized the need to protect non-petitioning tenants from the burden of attorney's fees in partition suits, the UHPA did not include such reforms, fearing that such a provision would deter states from adopting the UHPA into law.¹⁷⁵ Georgia should adopt further remedies to protect cotenants who oppose the partition. One such remedy is a requirement that the petitioner for the partition pay all of the legal fees independently from the proceeds of the sale, although this remedy comes with downsides.¹⁷⁶ Another proposed remedy would subtract attorney's fees from the sale of the property and "allow those parties who object to the sale to choose to not have their share reduced by the value of the attorney[s] fees."¹⁷⁷ This method of dividing attorney's fees "avoid[s] a 'free rider' problem" since it would require all cotenants benefiting from the sale and neutral cotenants to share the attorney's fees.¹⁷⁸

Another procedural remedy, in addition to reforming attorney's fees in partition suits, is facilitating mediation. Although the Farm Bill of 2018 provides heirs property tenants of farmland the opportunity to receive grants for mediation through the USDA,¹⁷⁹ Georgia should consider adopting a statutory mediation requirement before resorting to partition. In partition actions arising from family disputes, mediation may help to ease family tensions and to reach a mutually beneficial settlement without the need for a partition or further division of interests.¹⁸⁰ Mediations often result in resolutions that better fit the parties' interests as

¹⁷⁵ See Mitchell, *supra* note 44, at 58–59 (discussing the UHPA drafting committee's decision to not reform attorney's fees procedures in partition suits).

¹⁷⁶ Three downsides, in particular, exist: (1) non-petitioning cotenants who nevertheless want to sell the land could reap a "windfall"; (2) the property value would be siphoned off into paying the attorney's fees; and (3) attorneys in states with this practice "would most likely object to this solution." Batra, *supra* note 3, at 759–60.

¹⁷⁷ *Id.* at 760.

¹⁷⁸ *Id.*

¹⁷⁹ See Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490, 4674–75 (expanding the mediation grant funds for state agricultural mediation programs).

¹⁸⁰ See Batra, *supra* note 3, at 763–64 ("In a mediation session, families who are considering partition can potentially resolve the underlying disputes that may be causing the desire for partition, and even if that is not possible, may be able to agree on other solutions that preserve family land.").

opposed to a court order.¹⁸¹ However, despite the many benefits that mediation offers, mandatory mediation would present further expenses and may not be affordable for all cotenants.¹⁸²

Further, the UPHPA does not sufficiently resolve the problems associated with a lack of notice to tenants in a partition action. In cases involving notice by publication, the UPHPA requires a petitioner to publish a sign on the property stating “that the action has commenced and identify[ing] the name and address of the court and the common designation by which the property is known.”¹⁸³ Besides this requirement, Georgia law permits notice by publication which only requires the petitioner to print notice of the partition action in a local newspaper when there is an out-of-state tenant.¹⁸⁴ However these measures often fail to notify tenants in common of the partition action, especially since out-of-state tenants in common are less likely to visit the property regularly or read a local newspaper where the publication is printed.¹⁸⁵ Even the drafters of the UPHPA worried that the current methods of notice for cotenants were insufficient and potentially violated federal due process requirements.¹⁸⁶ However, the drafting committee ultimately decided not to include detailed notice requirements, fearing that they would stray into a much too procedural arena by doing so.¹⁸⁷ Consequently, Georgia should require petitioners to present evidence that they have taken reasonable actions to notify cotenants

¹⁸¹ See *id.* at 764 (“The family, through the process of mediation, may be able to consolidate ownership in one of these alternative forms to improve the way the property is managed and inherited in the future.”).

¹⁸² See *id.* at 765 (“If experienced mediators are required . . . this will add additional expense for parties who may not be able to afford their services.”).

¹⁸³ UNIF. PARTITION OF HEIRS PROP. ACT § 4(b) (UNIF. LAW COMM’N 2010).

¹⁸⁴ See *supra* note 79 and accompanying text.

¹⁸⁵ See Batra, *supra* note 3, at 761 (examining the insufficiencies with the notice requirements in partition suits).

¹⁸⁶ See Mitchell, *supra* note 44, at 46–47 (“The drafting committee was quite concerned that many cotenant defendants in partition actions do not participate . . . because insufficient . . . notice of these actions was provided to them. The drafting committee was even more concerned that permitting service by publication . . . may violate federal due process requirements.” (footnotes omitted)).

¹⁸⁷ See *id.* at 47 n.228 (noting that the UPHPA drafters have a “more general policy of refraining from developing specialized procedural rules for uniform acts that are primarily substantive in nature”).

and should require petitioners to send notice to each cotenant's last known address.¹⁸⁸

V. FIXING THE PROBLEM

A. LINGERING PROBLEMS WITH PRIOR REFORMS

The state and federal legislation implemented to mitigate issues of heirs property have been insufficient. Although the Farm Bill of 2018 provided some additional financial support for tenants of heirs property,¹⁸⁹ and although organizations like the Georgia Applesed and Georgia Heirs Property Law Center provide valuable services to Georgians dealing with heirs property concerns,¹⁹⁰ further reforms are needed along with measures to reduce the frequency of formation of heirs property from intestacy. These non-profit programs focus on corrective solutions to heirs property issues, but they do not provide as many solutions designed to prevent heirs property from coming into existence.¹⁹¹ Like the non-profit programs, the legislation implemented by Georgia, the UHPA, and the Farm Bill of 2018 serve as remedial measures to problems created by heirs property but fall short of preventing heirs property from arising in the first place.¹⁹² By focusing on solutions to issues created by heirs property instead of preventing the formation of heirs property, these legislative reforms fail to reach the root of the problem.

¹⁸⁸ See Batra, *supra* note 3, at 762 (advocating that “states should require a showing of what has been done to find all defendants” before allowing notice by publication).

¹⁸⁹ See *supra* notes 130–131 and accompanying text.

¹⁹⁰ See *supra* Part IV.D.2.

¹⁹¹ See GA. HEIRS PROP. LAW CTR., *supra* note 2, at 6, 20 (explaining what the Georgia Heirs Property Law Center does to “remediate fractured title, increase equity, and transfer wealth to the next generation”). While the Georgia Heirs Property Law Center does offer some assistance with preventing the formation of heirs property by offering “wills creation” and “estate planning,” the program is primarily geared towards remedial assistance with heirs property and a broader state-wide program is needed to expand this “wills creation” initiative. *Id.*

¹⁹² See *supra* Part IV.

B. POTENTIAL FURTHER SOLUTIONS

Since the current legislation fails to solve the lack of financing for tenants of heirs property, Georgia should consider providing creditors with an incentive or insurance system that encourages creditors to finance improvements on heirs property. For example, the Georgia legislature could offer financing plans for tenants that encourage the optimal full use of the property and dissuade tenants from abandoning the property, thereby preventing hot spots of crime.¹⁹³ If Georgia enacted a law requiring a simple majority or supermajority of cotenants' approval for significant uses of the land, the heirs property could still be put to its best use even when a cotenant cannot be located. However, this potential solution involves the risk that the majority of tenants can more easily overcome the wishes of the minority.

Since heirs property mostly arises from intestacy,¹⁹⁴ a landowner can eliminate heirs property and its issues by executing a valid will.¹⁹⁵ Leaving property to beneficiaries in a will prevents "further division of heir property."¹⁹⁶ However, studies indicate that most American adults do not have a will, and failing to execute a will is a cause of the problem.¹⁹⁷ Since drafting wills consumes time and money and requires numerous formalities,¹⁹⁸ many people, unsurprisingly, neglect to execute a will. This tendency is exacerbated since heirs property often affects low-income individuals who may not have the means to hire a lawyer to execute a will or the means to understand all of the formalities that must be met for a valid will.¹⁹⁹ Even though a few non-profit organizations in Georgia attempt to prevent heirs property formation by offering

¹⁹³ See *supra* note 46 and accompanying text.

¹⁹⁴ See *supra* notes 1, 6 and accompanying text.

¹⁹⁵ See Flocks et al., *supra* note 140, at 58 ("The best way to avoid heirs' property issues is to create a valid will, leaving beneficiaries with clear, merchantable titles.").

¹⁹⁶ GA. APPLESEED CTR., HEIR PROPERTY, *supra* note 5, at 22.

¹⁹⁷ See Flocks et al., *supra* note 140, at 58 (noting that "six out of [ten] American adults do not have wills").

¹⁹⁸ See O.C.G.A. § 53-4-20 (West, Westlaw through 2020 Legis. Sess.) (listing the "[f]ormalities of signing and witnessing will[s]").

¹⁹⁹ See DiRusso, *supra* note 20, at 78 ("[G]iven the connection between income and testacy, efforts to make wills more affordable should result in higher testacy rates among the underserved."); see also *supra* Part II.C.

financial and estate planning services, a wider state-sponsored initiative could significantly reduce the prevalence of heirs property in the state.²⁰⁰

Another solution to prevent heirs property formation is for Georgia to validate wills even when they do not strictly comply with the state's will formality requirements.²⁰¹ Georgia requires either the testator to sign their will or someone who is expressly authorized to sign for the testator to sign the will in the testator's presence and line of vision.²⁰² Georgia also requires at least two competent witnesses, who are fourteen years of age or older, to attest and subscribe the will.²⁰³ The testator must then tell the witnesses that the document is the testator's will, and the witnesses must sign the will in the presence of the testator.²⁰⁴ Furthermore, if a witness is also a beneficiary of the will, their interest will be purged unless there are two other disinterested, competent witnesses.²⁰⁵

Georgia is a strict compliance state regarding will formalities and invalidates any will that fails to meet one of the many formalities required.²⁰⁶ When a will is invalidated, the decedent's estate passes through intestacy and, in some instances, ends up as heirs property.²⁰⁷ For example, if John Smith went into a neighboring room while one of the witnesses signed the will,²⁰⁸ had only one witness sign the will,²⁰⁹ or did not announce to the

²⁰⁰ Georgia's Heirs Property Law Center is an example of such a non-profit organization. *See supra* Part IV.D.2.

²⁰¹ *Cf.* Flocks et al., *supra* note 140, at 58 ("The best way to avoid heirs' property issues is to create a valid will, leaving beneficiaries with clear . . . titles.").

²⁰² *See* O.C.G.A. § 53-4-20 (West, Westlaw through 2020 Legis. Sess.).

²⁰³ *Id.* § 53-4-22.

²⁰⁴ *Id.* § 53-4-20(a).

²⁰⁵ *Id.* § 53-4-23(a).

²⁰⁶ *See id.* § 53-4-20 (stating the formality requirements that a valid will must meet in Georgia); *see e.g.*, *McCormick v. Jeffers*, 637 S.E.2d 666, 669–70 (Ga. 2006) (invalidating the will when the witness's signing of it did not strictly comply with the formality requirements).

²⁰⁷ *See* GA. APPLESEED CTR., HEIR PROPERTY, *supra* note 5, at 4–7 (explaining how heirs property arises when a landowner dies without a valid will).

²⁰⁸ *See e.g.*, *McCormick*, 637 S.E.2d at 669–70 (holding that will formalities were not met when a testator went into a bathroom while the witnesses signed the will).

²⁰⁹ *See* *Waldrep v. Goodwin*, 195 S.E.2d 432, 432–36 (Ga. 1973) (explaining that two or more witnesses are required to attest and subscribe a will for a valid execution).

witnesses that the document was his will,²¹⁰ the will at issue would be invalid. Despite Mr. Smith's efforts to leave a valid will, his house and land would pass through intestacy and become heirs property.²¹¹

If Georgia were to lessen such restrictions or reduce the burdens for decedents to create valid wills, fewer estates would pass through intestacy, thus resulting in less heirs property.²¹² Georgia allows nuncupative wills in a few restricted circumstances to permit testators facing imminent death to have control over the disposition of their estate.²¹³ However, Georgia rarely permits oral wills and only validates such wills when the decedent is on his death bed,²¹⁴ when there is no opportunity to convert the will into writing,²¹⁵ and if at least three competent witnesses were present to the oral will utterance.²¹⁶ Georgia should follow states like Kansas that permit nuncupative wills in broader cases.²¹⁷ States with less restrictions on nuncupative wills argue that limiting such wills, as Georgia does,

²¹⁰ See *Parker v. Melican*, 684 S.E.2d 654, 656–57 (Ga. 2009) (holding that a codicil failed for lack of attestation when witnesses signed the codicil without the testator's signature on it and without the testator stating the document was his will). A codicil is “[a] supplement or addition to a will.” *Codicil*, BLACK'S LAW DICTIONARY (11th ed. 2019).

²¹¹ See *supra* notes 202–04 and accompanying text.

²¹² See *supra* note 201. For example, Georgia could validate holographic wills and relax the will execution formalities for them. See, e.g., N.C. GEN. STAT. ANN. § 31-3.4 (West, Westlaw through 2020 Reg. Sess.) (showing that North Carolina allows for holographic wills to bypass the attestation requirement in will formalities). Georgia could also reduce the restrictions on oral wills, also known as nuncupative wills, which involve fewer formalities and are easier to create without having to hire an attorney. Cf. *Baird v. Baird*, 79 P. 163, 166–68 (Kan. 1905) (providing that oral wills in Kansas are permitted even when the decedent is not *in extremis*, unlike Georgia).

²¹³ See *Jones v. Robinson*, 151 S.E. 8, 9–10 (Ga. 1929) (discussing the nuncupative will requirement of *rogatio testium*—the calling of persons to bear witness of the testator's will); *Ellington v. Dillard*, 42 Ga. 361, 380 (1871) (“A nuncupative will, as defined by the law, is one which depends merely upon oral evidence, being declared by the testatrix *in extremis*, before at least three competent witnesses, and afterwards reduced to writing, within thirty days, under the provisions of our Code, after the speaking of the same.”).

²¹⁴ See *Brown v. Butts*, 182 S.E.2d 99, 100 (Ga. 1971) (noting that nuncupative wills are disfavored and are only allowed when the decedent utters them *in extremis*, on his deathbed).

²¹⁵ See *id.* (“[A]n oral will is invalid if time and opportunity exists thereafter to reduce it to writing.”).

²¹⁶ See *Jones v. Robinson*, 151 S.E. at 9 (“No nuncupative will shall be good that is not proved by the oaths of at least three competent witnesses that were present at the making thereof . . .”).

²¹⁷ See *supra* note 212.

to only *in extremis* or *articulo mortis* cases, whereby the decedent is on his deathbed, “practically den[ies] the right to make a verbal will; for if a testator must wait until he is in *articulo mortis*, then he may have lost testamentary capacity, and when he has lost testamentary capacity he cannot make a will.”²¹⁸

Upholding nuncupative wills is valuable in the context of heirs property in Georgia as lands were traditionally bequeathed orally.²¹⁹ Although this tradition has diminished in frequency due to a heightened literacy rate,²²⁰ such a statutory alteration can reduce heirs property from arising. Fewer statutory restrictions would make it easier for people to form wills, which would lower the rate of intestacy and provide poor and illiterate persons the means of executing a will without the need to hire an attorney to draft a written will.²²¹

Promoting public awareness of the will formalities and enhancing the public’s education regarding heirs property issues can both resolve problems stemming from heirs property and prevent heirs property from forming.²²² For example, Georgia courts should distribute forms for parties to sign for an efficient sale of the property without the need to file a partition action. Additionally, handing out standard will forms with instructions on how to properly execute a will would help further prevent heirs property formation through intestacy.

VI. CONCLUSION

With studies estimating a potential of \$34 billion of heirs property in Georgia, more action must be taken to help realize the

²¹⁸ Baird v. Baird, 79 P. 163, 166 (Kan. 1905) (emphasis added).

²¹⁹ See GA. APPEASED CTR., HEIR PROPERTY, *supra* note 5, at 4 (discussing the southern tradition of verbal bequeaths).

²²⁰ See Gerry W. Beyer & Claire G. Hargrove, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U. L. REV. 865, 868 n.23 (2007) (noting the diminishing need for nuncupative wills as the literacy rate grows).

²²¹ Cf. Flocks et al., *supra* note 140, at 58 (arguing that valid will formation can reduce heirs property).

²²² See *id.* (“[C]reating a will is important to avoid intestacy and promoting the importance of wills in vulnerable communities can raise awareness to the issues inherent to heirs’ property.”).

potential that such a large amount of property has.²²³ It is in Georgia's best interest to remedy the land use restrictions posed by heirs property and transform these properties from abandoned crime hotspots into productive properties. Georgia has slowly assisted tenants of heirs property with some of the burdens that such ownership entails, but more preventative remedies are necessary.²²⁴ Georgia should adopt further measures, such as expanding pro bono programs, re-ordering the disbursement of attorney's fees, mandating mediations, requiring further notice requirements for partitions, facilitating access to financial loans, and adopting statutory reforms.²²⁵ Most importantly, Georgia should also facilitate the execution of wills in order to eliminate heirs property from arising.²²⁶ These solutions will prevent heirs property formation and resolve some of the heaviest burdens that heirs property owners face. Additionally, such remedies can strengthen Georgia's economy, institute procedural justice in partition suits, and allow Georgians to maintain and grow their homes.

²²³ See *supra* notes 14–18 and accompanying text.

²²⁴ See *supra* Part IV.

²²⁵ See *supra* Part IV.D.

²²⁶ See *supra* Part V.