



Lowenstein Sandler's Trusts & Estates Podcast: Splitting Heirs

Episode 14:
Death and Dirt: Addressing the Injustices of the Past in
Heirs Property

By [Warren K. Racusin](#), [Molefi McIntosh](#)

APRIL 2024

<music plays>

Kevin Iredell: Welcome to the Lowenstein Sandler podcast series. I'm Kevin Iredell, Chief Marketing Officer at Lowenstein Sandler. Before we begin, please take a moment to subscribe to our podcast series at lowenstein.com/podcasts. Or find us on Amazon Music, Apple Podcasts, Audible, iHeartRadio, Spotify, Soundcloud or YouTube. Now let's take a listen.

Warren Racusin: As I've said many times, we aim to be equal parts information and entertainment on this podcast. And in our first two seasons, we've had a few laughs as we've talked about the ins and outs of trust and estates, and that's been great. There's nothing amusing about today's episode, "Heirs' property," the story that has deep roots in American history, the legacy of this nation's original sin, the ironies of laws that end up warding the goals of other laws designed to help the formerly enslaved. But it's also the story of the efforts, halting at first, but now accelerating to use the law to right the wrongs and the injustices wrought by the legal system in the past. And finally, it's an object lesson to all of us to make sure we do the planning necessary to protect our property for our loved ones because the law may not do it for you.

From the law firm, Lowenstein Sandler, this is Splitting Heirs. I'm Warren Racusin. With us today are my colleague Molefi McIntosh, who teaches a course about heir's property at Howard University Law School, and our special guest, Mavis Gragg. Mavis is a self-described death and dirt lawyer, empowering families to use real estate as a source for intergenerational resiliency and wealth. She's currently a Loeb Fellow at the Harvard Graduate School of Design. And during this fellowship, Mavis has also sought to raise the visibility of numerous ways in which heirs' property is important to affordable housing, urban planning, climate resiliency in markets. Mavis, Molefi, thanks so much for being with us today.

Mavis Gragg: Thanks for having me.

Molefi McIntosh: Thanks, Warren.

Warren Racusin: Mavis, we always like to build each episode around a real story, so I understand that Hilton Head Island actually used to be mostly owned by former slaves. Now, as we all know, not so much. So using that as a

jumping-off point, explain to us what heirs' property is, and then we'll get into a discussion of how it contributed to this huge loss of property.

Mavis Gragg: I would love to. So heirs' property simply refers to real estate that is inherited within families. So the succession plan for the families is to pass the ownership of real estate by virtue of people passing away. And it's very common for families or for individuals to pass their real estate to their loved ones. But with maintaining that kind of ownership succession, you necessarily increase the number of owners and there's a lot of unpredictability as well as vulnerability to predatory behavior and land loss.

Warren Racusin: Right. And as we're going to see, that happened quite a bit starting in the post-Civil War era. So in one sense then, heirs' property and the consequences of heirs' property is the same if you're a landowning-former slaveholder holder on Hilton Head Island or you own a beach house in the Hamptons. If you don't plan properly for it, the ownership can get split up and fractalized generation after generation, right? In the simplest, the law's, it's the same problem.

So take a quick example. I have three children and I've got a home. If I don't do a will, and not doing a will is part of what's at the root of this set of problems, if I die and I didn't do a will, when I pass away each of my three children gets a third of the home. If each of them has three kids and they all die without a will, now each of my grandchildren owns one-ninth of the home and on and on.

And that happened a great deal over in the post-Civil War era and continues to happen in a lot of ways today. But Mavis, let's just cycle back for a second. We talked about Hilton Head. Talk to us about how former slaves acquired all that property in the first place because that's important to understand the historical perspective and the urgency of these issues. How did they get all this property in the first place?

Mavis Gragg: I will say that many former enslavers actually went inland after slavery ended. And so their land was either gifted or sold to the formerly enslaved families. And as you pointed out earlier, they maintained the family land through inheritance, meaning that people would simply pass away and the ownership would go to their kids. But this was not just in Hilton Head, it was along the whole coast of South Carolina and the Sea Islands as well as part of North Carolina and the northern part of Georgia. So there was a substantial amount of land transfer from former enslavers and white families to Black families either through purchases or gifts after slavery ended. And most of the land in those areas was Black-owned and family-owned.

Warren Racusin: Right And so this was in effect a way of not maybe directly, although in some ways directly, of compensating former slaves. General Sherman issued his famous general Order 15 that talked about 40 acres and a mule, that the goal was to get this property to the formerly enslaved to get them a leg back up and try to formally or informally, as they say, compensate them for the horrible things that had been done to them. Right?

Mavis Gragg: Yeah. I think that had mixed results. And certainly there was a lot of violence after the fact that resulted in many families quickly losing their land because a lot of people didn't agree with that agenda. But yes, again, a lot of families that owned in the coastal area of South Carolina and parts of Georgia, North Carolina were Black families. And I would say that within a very short period across the South, a lot of Black families became real estate owners in an incredible way. We peaked in ownership in 1920. So if you think about when slavery ended in 1865 and 1920, we accrued approximately 20 million acres of land, and most of that was in the South where we saw the largest enslavement of African Americans in the US.

Warren Racusin: 20 million acres. And what are the estimates about how much land Black people own now?

Mavis Gragg: Less than half of that. So we owned more in 1920 when I think we could all agree the laws were much more challenging back then and circumstances were much more challenging during that time for lots of people. But we've lost so much land in the African American community since 1920.

Warren Racusin: It's obviously a profound loss and obviously, or maybe not so obviously that has had enormous consequences in terms of the economic inequalities between Blacks and whites. Having land or not having land or owning land or not owning land is the way that a lot of people acquire wealth. And to have been cut in half on that obviously has huge consequences.

Molefi, let's turn to you and talk about the technical, legal side of this. Again, heirs' property in effect involves the fractionalization of real estate down through multiple generations. Talk to us about the implications of that from a strictly legal point of view, the notions of joint tenancy or tenancy in common and its impact, the legal impact on what happens through heirs' property as a legal and as a practical matter.

Molefi McIntosh: Sure. So tenancy in common as contrasted with joint tenancy is a form of joint ownership of real property with two or more owners who are called tenants in common and each of them owns a specific share or percentage of the property. So those who own these fractional interests in tenancy in common property don't own a particular piece of the property where you could draw a line and say, "Hey, this tenant in common owns this piece and this owns another," but instead they own a fractional interest of the entire property.

So tenancy in common is often referred to as undivided ownership. And one way to think about how tenants in common own their property is if you think about how shareholders own shares in a corporation. And there's a law across states has made tenancy in common to default ownership structure for two or more family members who inherit real property. And the law presumes that where two or more people acquire undivided interest in real property, either by conveyance during life or by a devise upon someone's death, they take ownership as tenants in common by default, unless there's specific language in the conveyance that communicates the intention to create a joint tenancy as opposed to the tenancy in common.

So I wanted to just expound on that a little bit by saying we'll talk about the estate planning gap a little later, but by saying and making a point that even if you have a will, if the will leaves a piece of property to more than one co-owner and the will is not carefully drafted to avoid a tenancy in common, then even with the will you could create a tenancy in common, even though we usually see the creation of a tenancy in common through intestate succession.

Warren Racusin: Right. And while the numbers that I've seen indicate that anywhere from 50 to 70% of Americans die without a will and a far larger percentage of that poor or disadvantaged people die without a will, that's where tenancy in common automatically becomes an issue. You're saying, and it's an important point to underscore, is that even if you do have a will, if you don't do it the right way and if you don't pay attention to it, that property in the Hamptons that I talked about a little while ago can wind up with the same multiple fractionalized ownership that creates the heirs' property problems, right?

Molefi McIntosh: Yes. And once that tenancy in common is created, there's certain features of the tenancy in common form of ownership that create what we know as the heirs' property problem. One of those is that any one of the tenants in common, so if you own a one-ninth share in the property, or you own one-half or one-thirtieth, can alienate or sell his or her interest or gift it over to someone else, meaning that where in our example, we had the children and grandchildren of the let's call them original owner of the property owning. One of those grandchildren could sell it to a non-family member. And once that non-family member has acquired that piece of property, he or she, or it in the case of an entity, would then have the same rights to alienate that piece of property and further to petition a court to partition the property.

And in a partition action, you have one tenant in common going to the court and saying, "I and my other co-tenants don't agree as to what to do with this property. Can you please partition it?" And there are two ways that a court would generally partition land. One is a partition in kind, meaning if there's say one acre of land, and let's imagine that the land is all equal in terms of its features and accessibility to a roadway or whatever, other desirable features land might have, and there are four co-tenants, the court might say, "All right, we'll just divide it up into four equal pieces and each of you will own a quarter acre."

The second way other than the partition in kind is a partition by sale. And in a partition by sale, the court will order the entire parcel of land to be sold. So if you imagine that person bought the one-ninth interest from one of the grandchildren forcing a partition and the court deciding to partition the land by sale, you will have the other eight co-tenants, assuming they're not the ones who have bought the entire parcel, then disowned of the parcel of land.

Warren Racusin: So if even one minority small percentage piece owner wants out, the law allows them to go to court and force the sale of the entire property even if the other co-owners don't want to sell it. Right?

Molefi McIntosh: Generally. And there has historically been a preference and a statutory preference for partition in kind, where if the land can be equitably partitioned, then there's a statutory preference for partition in kind. But courts in many states began to just order partitions in sale by sale, often with a mind toward purely economic considerations. So even though there was that preference for a partition in kind, in practice many courts began to force partitions by sale. And of course, you think about it in the urban setting, some parcels of land cannot be equitably partitioned in kind. You think about a house, you can't just saw the second floor from the first floor. And that real property can be equitably partitioned in kind. So that's another instance where a partition by sale might actually be more equitable remedy.

Warren Racusin: So if you had a nine-acre parcel of property and nine owners, one way would be to partition it if this was doable into each of the nine people get an acre. And that was the original sort of intent of the tendency in common laws. But as you said, courts started doing it differently and started selling to break up. And Mavis, let's talk about the implications of that and how that affected the former slaveholders and other people too. This is just a problem for former slaves. It's a problem for white people in Appalachia. It's a problem for Hispanic and Latin people in the Southwest. This is a more general problem. But if a minority owner can go to court and force a sale, seems to me there's two bad things that happen to the property owners. Number one, they're not going to get that full fair market value for their property, right?

Mavis Gragg: Yeah. I think the bind of this bundle of ownership is that one, you can only make sound legal decisions by uniform consent. So if everyone listening imagines their cousins, and there's always the jerk. I think most families have more than one jerk. But first of all, you're becoming owners of real estate together involuntarily because it's an operation of law through inheritance. And then not only are you becoming involuntarily, you're owning with people that you wouldn't necessarily own real estate with. And each of you have the right to seek a partition action, as Molefi pointed out. And the court has to determine if it can be physically divided equitably proportional to everyone's share. And if it can't, then the court will sell the property. And the standard has been an auction, which of course there's been some changes more recently that we'll discuss later.

But if you think about families who are land rich, cash poor, meaning that this piece of real estate, this inherited real estate is the largest asset that they have between generations, and you have a complex mix of ownership shares, when I've done these title searches, the numbers are all over the place, it's very impracticable to physically divide the property. And so most often we see heirs' property partition actions result in a sell, which then means that those families that are reliant upon that asset as generational housing and generational wealth lose that because when it is sold at auction, it's sold for pennies on the dollar.

And so therefore, heirs' property is actually targeted by third-party speculators. We call them "heir hunters." They'll necessarily look at property records to identify property that likely has a complex mix of owners with varying shares, understanding that the probability that it'll be sold at auction through a partition action is quite high. And so they'll find those family members who aren't necessarily close to the land physically, maybe they're

up North or out West, and they'll buy their interest for a small amount and then force a partition action. And it happens all over.

And then I will say, looking at partitioning kind, there was a case in Montana, and I would describe Montana as a great state for family real estate ownership and very supportive of generational family businesses. Montana recently saw where a court-ordered physical partition resulted in about a hundred acres being split up into about 13 parcels. And the local government was frightened because that was infrastructure that they didn't have to be able to support those new resulting parcels. So the spirit of partition actions is really to allow co-owners to extract their ownership interest, but it's been leveraged in a very different way in present times.

Warren Racusin: Right, a good idea has gotten turned on its head. And so in Hilton Head, I'm guessing, around at some point developers scrupulous or otherwise, and so we represented a lot of developers ourselves, so I'm not saying anything bad about developers in general by any means, but developers saw, "Oh, this could be really valuable resort property. We'll come in and buy these tiny little pieces that are out there now because of the fractionalization of the property at pennies on the dollar," as you said. Then force a sale. And guess what? They or somebody affiliated them will be the buyer. They end up getting a large parcel of the land for a song, and then they can go develop it and make a lot of money. And I'm guessing that's what happened in the Hilton Heads and the Sea Islands and the other places.

Mavis Gragg: Absolutely. Absolutely. In Georgia, there's a really beautiful island in Georgia called Sapelo Island, and it is a great example of how that's happened as well. So yeah, that happened along the coast, and this was in the mid 1900s to the late 1900s. And what we're seeing presently is a lot of this same kind of activity happening in more urban areas. So New York City, for example, and DC where you see these individual homes that are owned as heirs' property and third party, again, heir hunters are looking for property owned in this way as a way of getting those properties for a low price.

Warren Racusin: I had not realized that that's happening in major urban areas as well.

Mavis Gragg: Yeah, going back to Molefi's point, how can you divide up a brownstone or a row house? Yeah.

Warren Racusin: Now, the tide is starting to turn here a little bit legally, and this issue, in part because of folks like Mavis and Molefi and others, is starting to bubble up in the consciousness of people who have a say in these things. And Molefi, why don't you take a couple of minutes and talk about some of the changes in the law that have either been enacted or being considered in some states to address this problem?

Molefi McIntosh: Sure. So the big one that everyone in this space is seeing as a major change in the tide and seeing enacted in many states is a piece of uniform legislation called the Uniform Partition of Heirs' property Act. And while it's not a silver bullet for the issues that are created by heirs' property, it does a few things, and it has been enacted in DC and Maryland and New York in some iteration. But it does a few things that ease most of the concerns or some of the

concerns around heirs' property and the vulnerabilities of those who own property as tenants in common.

Warren Racusin: All right, take us through a couple of those.

Molefi McIntosh: So one is the buyout provision, and that simply allows... If you remember, we talked about the one person coming in, buying a one-night interest in that property, and forcing a partition sale, it allows those tenants in common who not seek the partition sale to instead buy out that one-night interest instead of the one-night interest being able to buy out everyone else or get anyone else to sell.

Warren Racusin: So like a right of first refusal, basically.

Molefi McIntosh: Basically, yes. And it seems so simple and so common sense that that would be a remedy, but it was not part of the law in any of the states before the enactment of the Uniform Partition of Heirs' property Act.

The second is that the act fortifies a preference for a partition in kind. Where we discussed the difference between a partition in kind and how certain courts had been more amenable to granting a partition in sale, even where it was not necessary, the Uniform Act creates a preference for partition in kind where it can be done equitably. So going back to the nine-acre parcel, if it could be done equitably to give each person an acre, it fortifies that preference again. And where courts could absent the act, go off and force a sale anyway, it has some provisions to reduce the likelihood that that would happen.

And the third big thing that the Uniform Partition of Heirs' property Act does is that it restructures the sales procedure where the most equitable method of partition would be partitioned by sale. The UPHPA provides that it'll be a fair market value sale. It won't be executed as sort of a quick closed auction, as was the case in years past. But instead it would be marketed by real estate professionals and appraised. And if it must be sold, it'll be sold at a fair market value such that the families can, if they can't keep the property, keep the wealth associated with that property.

Warren Racusin: And so I guess that incentivizes the broker to get the best deal possible, which is what a broker is always supposed to do, instead of trying to have it quickly go under the hammer at a fire sale price. This incentivizes everybody to try to maximize value on a sale, which is a practical matter, a very sensible part of the statute.

Molefi McIntosh: Absolutely.

Warren Racusin: All right.

Mavis Gragg: What's been pretty incredible about this model legislation is that it's been adopted in 23 jurisdictions, very diverse jurisdictions too. We've seen it adopted in most of the states in the Southern US, which was actually a surprise to lots of people. Not my home state of North Carolina, unfortunately. But we've seen it adopted in New York and Texas, Montana,

California, Hawaii, and as you mentioned, DC. And I think that signals the interest of a bigger picture. Most of the coalitions that have supported passage of this legislation have been in the environmental sector and in the industry sector. Kimberly-Clark, for example, which is a huge paper company, has taken interest in heirs' property because they sourced timber heavily from the Southeast. And they saw that fractionization, like splitting up parcels of timberland actually impacted their accessibility to timber for their products. And so the passage of this legislation has been pretty substantial and impactful.

Warren Racusin: Can we tell yet or is it too early to tell whether the states that have adopted the Uniform Act, can we tell whether it's made a difference?

Mavis Gragg: I can tell you that there's a need for data and tracking data, and I think that's something that we're all hungry for. I would say the anecdotes that I've heard from attorneys practicing in these different states is that some decision-makers have not been willing to apply the legislation. And so you've had to act really as attorneys, you've had to be very zealous in getting them to use the correct legislation when doing a partition action. But it certainly has been a deterrent. So we've certainly seen the number of partition actions decrease when they're involving heirs' property. So I think that's the biggest part is that it's deterring partition actions, especially from third-party, non-family members.

But I would say in the actual process, there's a lot more room to grow. And I think the biggest thing that families need in a partition action is capital. I think it's wonderful that there's this first right of refusal, but if you don't have capital, then you can't buy out the other owner. And that begs the question of the real estate finance industry, what kind of mortgage products could be designed that would enable families to address not only the partition action, but then do some succession planning where they can create a better structure for ownership going forward?

Warren Racusin: Mavis, you've developed some software and some procedures and tools for helping to deal with this problem in a very practical way. You want to share that with us?

Mavis Gragg: Sure. Thanks for asking. Yeah. So HeirsShares, I created HeirShares to solve a problem that I experienced in my own law practice with the property passing through inheritance. We actually create cloudy title, meaning that the trail of ownership is not clear. So a lot of families who have heirs' property can't actually prove ownership, and the process of clearing title and making a legal opinion is quite expensive and arduous and takes a long time. And I kept thinking technology can make a difference in this. So we have an MVP, a minimal viable product of an app that will facilitate the process of tracing the ownership of inherited property using the family tree. So the attorneys will enter into the app data from the family tree descending from the original owners to the most recent generation, and then the app will make predictive analysis of how ownership has changed as well as calculate the shares, which is something lots of attorneys need who are doing this work.

Warren Racusin: And then presumably, you can take that information and if necessary, go to the county clerk or go to court if necessary to clear-cut and make title.

Mavis Gragg: Absolutely.

Warren Racusin: Make it clear who actually owns the property. That's fabulous technology.

Mavis Gragg: Yeah, thank you.

Warren Racusin: Heirs' property isn't just a racial issue. Anyone who owns a cherished piece of property, a vacation home that the family loves, a great work of art, anything, you got to plan for it because it can be fought over, broken up, and lost. I think it's most poignant when we talk about people losing, as we've talked about, losing 20 million acres of land that should have been theirs. Hopefully though through the work that folks like Mavis and Molefi and others are doing, while the arc of the moral universe is still long, maybe we're starting to nudge it just a little bit towards justice.

Mavis, Molefi, thank you so much for being with us today. Thanks to the folks at Lowenstein, Good2BSocial for all their hard work in putting this together. Thanks mostly to all of you for listening. We'll see you again for episode two to season three coming up soon. Until then, as we say in these parts, have a good one.

Kevin Iredell: Thank you for listening to today's episode. Please subscribe to our podcast series at lowenstein.com/podcast or find us on Amazon Music, Apple Podcasts, Audible, iHeartRadio, Spotify, Soundcloud or YouTube. Lowenstein Sandler Podcast series is presented by Lowenstein Sandler and cannot be copied or rebroadcast without consent. The information provided is intended for a general audience and is not legal advice or a substitute for the advice of counsel. Prior results do not guarantee a similar outcome. Content reflects the personal views and opinions of the participants. No attorney-client relationship is being created by this podcast and all rights are reserved.

<music plays>