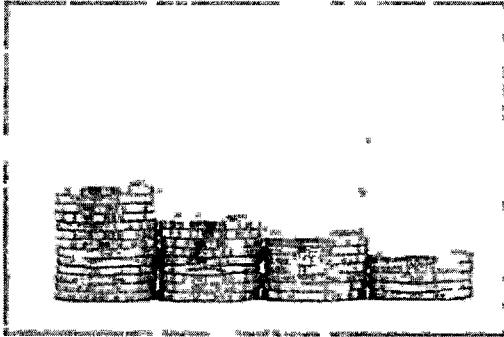


# Heirs Property and Generational Land Loss | The American College of Trust and Estate Counsel

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## Overview



In our last episode, [Black Farmers, Land Loss and the Racial Economic Gap](#), the series examined the historical and economic impact of discrimination on black farmers and the particular issues they've faced in dealing with the loss of their property. This video follows up on that topic to understand what heirs property is, how it has impacted people of color, and what has been done to correct the issue.

ACTEC Fellow [Terrence M. Franklin](#) moderates ACTEC Fellow [David J. Dietrich](#) and guest Professor [Thomas W. Mitchell](#), a 2020 MacArthur Fellow. Dietrich and Mitchell are experts in heirs property who helped draft the Uniform Partition of Heirs Property Act (UPHPA). Professor Mitchell co-directs the Program in Real Estate and Community Development Law at Texas A&M University School of Law.

## Related Videos from this Series

[Black Farmers, Land Loss and the Racial Economic Gap](#)

[Economic Inequality in America](#)

[How to Increase Diversity in the Legal Profession](#)

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[ACTEC Family Estate Planning Guide](#) - A library of answers to frequently asked estate planning questions for families and individuals.

[Common Ways to Title Your Home](#) ACTEC Fellows explain the options when titling your home: Tenancy by the Entirety (TBE), Joint Tenants with Rights of Survivorship (JTWROS), Tenancy in Common (TIC) and more.

[Owning Property and Titling Assets](#) ACTEC Fellows explain the ins and outs of how to title property - joint tenancy, tenancy in common, tenants by entirety, sole ownership, and community property.

[What is Joint Tenancy and When Should I Use It?](#) ACTEC Fellows offer professional information and insight regarding the topic of joint tenancy.

[Can I Change My Irrevocable Trust?](#) ACTEC Fellows explain what individuals need to know and the possible pitfalls when

considering modifying an irrevocable trust.

The Commons Law Center

Uniform Partition of Heirs Property Act (UPHPA)

Uniform Limited Liability Company Act

*Heirs' Property and the Uniform Partition of Heirs Property Act: Challenges, Solutions, and Historic Reform*, Edited by Thomas W. Mitchell and Erica Levine Powers

## Transcript

**ACTEC Fellow Terrence M. Franklin:** A recurring theme of this video series is the racial wealth inequality gap in this country. In our last episode, we talked about black farmers and the ways that American policies dating back to colonial times have favored whites and disadvantaged black farmers. In this episode we take up the issue of heirs property with two of the national leaders who have been working together for years to address how heirs property negatively affects African Americans and other people of color in this country.

With us our ACTEC Fellow, David Dietrich, a Montana lawyer who has served as chair of the Real Property, Probate, and Trust Law section of the American Bar Association, who headed its property preservation task force.

Also with us is Professor Thomas Mitchell, who teaches at Texas A&M University where he codirects the program on real estate and community development law. He was recently named a MacArthur Fellow, a genius fellow, for his work on the topic of heirs property.

Thank you both for joining us today, and I wonder if Professor Mitchell, you could give us a little bit of an understanding about just what heirs property is?

**Professor Mitchell:** Sure Terry, I'd be happy to do so. Heirs property is family property that typically results from family members who don't make a will or estate plan so that their interests pass down to succeeding generation under the laws of intestacy. Essentially the rules that the state will give you if you don't make the rules yourself in terms of how your property will be transferred. Although I should note that sometimes unwittingly, wills, trust, and estate attorneys create heirs property by simple wills that essentially mimic the laws of intestacy, which is rather unfortunate. So, that's just in terms of what heirs property is. There is a substantial amount of heirs property in the United States among families of every race and ethnicity, although disproportionately African Americans tend to own more heirs property than others as a result of low rates of will making.

Heirs property, I often think of as second rate ownership because it has a number of problems associated with it. And let me just tick off four quickly. Among wills, trust, and estates attorneys, business attorneys, and business professionals, heirs property is known as being the most unstable form of common real property ownership in the United States. This is often because of an arcane property law called "partition law" which facilitates, or has facilitated, the forced sale of a huge number of family owned heirs properties across the country.

Second, heirs property has a characteristic of locking those families into this disfavored structure. I refer to it is gridlocked ownership. Because once a family has heirs property, it's almost impossible to get out of it because the law in every jurisdiction in the United States requires 100% of the common owners- technically the tenants in common- to agree to change their form of ownership. So essentially, one family member has a veto.

Third, heirs property owners typically lack what we call clear title. Essentially, there's no definitive legal statement about who are the common owners in the group. And unfortunately, lacking clear title renders families ineligible for loans from commercial lenders, from governmental agencies where the property should be used as the collateral. It also renders heirs property owners ineligible for a

wide range of other governmental programs at the local, county, state, and federal level.

Fourth, heirs property owners often are ineligible for a range of programs that provide a lot of assistance to homeowners. For example, for those who are owners and occupiers of a residential property, they're entitled to the homestead exemption which can save families a tremendous amount of money, especially in areas experiencing rapid real estate appreciation.

In almost every jurisdiction in the United States, de facto heirs property owners are not eligible for the homestead exemption which just adds thousands and thousands of dollars onto their annual property tax bills. So, those are just four examples of some of the problems associated with heirs property ownership that makes it substandard and that makes it unstable.

**ACTEC Fellow Terrence M. Franklin:** Thank you for that description of how heirs property works and how it can have economic disadvantages for people who own heirs property. Maybe you could tell us a little bit about some of the strategies that you have been working on to help address the issue?

**Professor Mitchell:** Because heirs property loss through partition sales, particularly, which has been one of the biggest sources of loss of property for African Americans, I worked with others to develop a model state statute, technically called a uniform act. The name of the act is the Uniform Partition of Heirs Property Act (UPHPA). The ABA (American Bar Association) played an incredible role, especially their Real Property, Trust, and Estate Law section. David co-chaired an incredibly important task force in the early 2000s called the Property Preservation Task Force that he then asked me to join. And we proposed that the Uniform Law Commission based in Chicago form a drafting committee to make fundamental changes to this law of partition which had been responsible for the loss of tens of billions of dollars of heirs property owned by African Americans, Latinos, and others.

**ACTEC Fellow Terrence M. Franklin:** How does the Uniform Act work?

**Professor Mitchell:** So, the Uniform Act is quite different from the general law of partition. Under the general law of partition, any one of the common owners, irrespective of the size of their fractional interest, can file an action called a "partition action," go into court, and ask for a forced sale of the entire property, even if the overwhelming percentage of the other common owners want to maintain ownership of the property. And these sales that courts began to routinely order in the 1940s and the 1950s have often been the source of a substantial depletion of assets because the sales typically return a price well below market value, and often a fire sale price representing pennies on the dollar.

So, the UHPA, although it has many bells and whistles, has three pillars. One, there's the buyout provision. So, if one of the common owners goes into court, requests the court to order forced sale of the property, the other common owners, co-tenants who want to maintain ownership, have a unilateral right to buy out that fractional interest, say, of the real estate speculator who acquired it, 2% interest from some distant family relative. No real estate speculator wants to buy out a family member only then to be bought out themselves. So, either they will be bought out or the speculator will be less inclined to try to use this legal strategy to acquire ownership in this coercive way.

Second, the Uniform Partition Act restores the preference in a partition action for what was supposed to be the primary remedy, and that remedy is referred to as a "partition in kind," sometimes "partition by division." It's a remedy where the court will physically divide the property and allocate different parcels to the different respective cotenants. Beginning in the 40s or 50s, courts started routinely ordering a second remedy called a "partition by sale," sometimes a Partition Sale, which is a forced sale of the entire property where the court will then distribute the sale proceeds among the common owners based upon their individual percentage ownership interest.

The UHPA rejects a test that courts throughout this country began using, which I refer to as an "economics only test," where the court would say, does the property have economies in scale? Is it somehow, perhaps theoretically, worth more as a whole than the value of the parcels that would result from the physical division? So, the UHPA rejects that economics only test and replaces it with something I call a "totality of the circumstances test," which is a combination of economic and noneconomic factors. And the noneconomic factors include things such as a consideration of long standing ownership within a family, whether the property has any

historic or cultural value, and the impact a forced sale would have on one of the common owners who is using the property for a lawful purpose, whether commercial or residential, including if a forced sale would result in a substantial diminution in their quality of housing, perhaps even rendering one of the cotenants homeless.

Third, the UPHPA does recognize that there are a subset of partition actions where the appropriate remedy is the forced sale. As I indicated, a lot of heirs property is owned by families who live in cities, New York, New Orleans, Chicago, Los Angeles. And you can't physically divide a single-family home and allocate a parcel. So, in that situation, what the UPHPA has done is, it has a very innovative sales procedure that's referred to as the "open market" sales procedure. So instead of the typical sales procedures used on partition action, which is a forced sale that is well known among transactional attorneys for selling property well below its market value.

The UPHPA's open market sales procedure, the court appoints a licensed real estate broker who then lists the property for its fair market value appraisal. That broker then uses all commercially reasonable practices to market the property, very similar to how the market properties in their normal inventory. There's no artificial timeline on when the property can be sold. And unlike these sales, these auction sales at the courthouse, under the open market sales procedure, prospective buyers can make a bid that is contingent upon their later securing financing, which is not true with the auction sales under the general partition law. And predictable the open market sales will return or yield a sales price approximately market value, certainly substantially higher than the forced sale, these auction sales at the courthouse.

**ACTEC Fellow Terrence M. Franklin:** Wow, it sounds like the uniform act really revolutionized the issue of how we deal with heirs property in those states that have adopted the act, or that might adopt it. I wonder if there's also strategies that individual lawyers might be able to use, perhaps even recommend to a legal services agency or so forth, about how they can address the issues of heirs property. David, do you have any thoughts on that?

**ACTEC Fellow David Dietrich:** Yes. One of the key issues among estate and trust lawyers is forming business organizations to overcome these very serious issues that Thomas described with heirs property. The instability, the gridlocked ownership, and the lack of clear title. And most of us in land rich states such as Montana – but in really all states- have developed the use of various forms of trusts and limited liability company entities and tenancy in common agreements. So, in general, the organizations, the business organizations that we seek to use are limited partnerships, limited liability companies, irrevocable trusts, and tenancy in common agreements.

These usually have waivers of partition in them, provisions saying the parties who come together and join and fund their real estate into the trust or the limited liability company, waive partition. If you are successful in identifying the heirs and their objectives. If the heirs have access to legal resources in this connection, they can cure the instability issue and the gridlocked ownership or management issue with a well drafted limited liability company. I commend the revised Uniform Limited Liability Company Act, it's a uniform law commission act. I recommend the manager managed LLC, which is akin to having a kind of board of directors corporate form of governance.

I also recommend, because of the changes in the Uniform Trust Code, an irrevocable trust that has modification capabilities in the future, under the so called section 411(a) Trust Modification Provision, which has revolutionized the flexibility of an otherwise irrevocable trust. Then of course if the parties want to retain the pure – how should I say, real estate character of what is being contributed, they can use the tenants in common agreement. So, that's a general overview. The beauty of these kinds of documents is that they can deal with the concept of an heir wanting to leave, and whether they get a so-called distribution in kind of a specific tract of real estate. Or if they don't want that, upon dissociation under the LLC act, how they might be bought out and what the terms and interest rates. It is a complete replacement for the provisions that the UPHPA so elegantly deals with. Because effectively what you've done is, you've replaced a real estate ownership for a personal property ownership in all but the tenants in common agreements. They do, however, require an identification of the goals and objectives of the individual landowners, and more fundamentally they require access to legal services because you can't buy one of these off of Legal Zoom, or some other – you can

buy it, but the point is these kinds of organizations, if done at home without appropriate counsel, can be worse, actually, than your remedies under the UHPA.

**ACTEC Fellow Terrence M. Franklin:** Professor Mitchell, I understand you've been working on a book that deals with some of these issues. Could you tell us a little bit about that?

**Professor Mitchell:** Yes. I'm the co-lead editor of a book that the American Bar Association will be publishing that's scheduled to be published in the Spring of 2022. And it's a book that addresses heirs property issues overall, with a subset of the book addressing the Uniform Partition of Heirs Property Act. An incredible number of stakeholders, including David Dietrich, myself, some of the community organizers and grassroots organizations that participated in the drafting of the act itself. It's going to be an incredibly important resource, I think.

**ACTEC Fellow Terrence M. Franklin:** Sounds like a great resource. I can't wait to see it. It seems like it's good that we have a UHPA act available for us, and it looks like there's some thoughts and theories about ways that lawyers might be able to help people deal with this issue. But it really also comes down to an issue of access. Professor Mitchell, do you have some thoughts about the challenges of who is actually providing legal services to the communities that are most in need?

**Professor Mitchell:** Yes. So, heirs property owners who are most at risk are ones who are low income, low wealth, have low rates of estate planning, and who are in areas that are experiencing a rapid appreciation of real estate values. One of the problems in terms of the lack of access of attorneys is often times clients of color have a preference to have representation from lawyers who are from their particular racial and ethnic group.

We all know that African Americans are underrepresented in the legal profession. Fourteen percent of the population overall is African American, only 5% of attorneys in the United States. But fewer people know that among attorneys in the United States, African American attorneys, there is a severe underrepresentation of transactional attorneys- attorneys with expertise in real estate, business organizations, tax, and wills, trust, and estates. I just found out just last week that in the entire state of Oregon, there are only five African American attorneys who have any significant practice in estate planning and administration. So, we do have a pipeline issue. And I think that we just have to think about ways of encouraging, incentivizing, cajoling, law students of color, maybe even before then in terms of the high school or college level, to think about a legal career that in some significant way is in the area of wills, trust, and estates.

**ACTEC Fellow Terrence M. Franklin:** This really is kind of a call to action for people to really try to do what they can to open the pipeline. In fact, the ACTEC Foundation helps fund the Commons Law Program in Oregon that provides training for an African American attorney who's trying to provide the kind of services that are needed for these underrepresented communities. So, we all have work to do, and I really appreciate the time that both of you have taken to talk to us about the issue of heirs property and what we can do both from a statutory basis and from a lawyer by lawyer basis and what we can do to try to encourage other people of color to join our practice and to join our practice area.

Thanks so much for the time you've taken and given us today. I'm sure that this is going to inspire a lot of people and the resources that we'll provide will help to address the issue of heirs property. Thank you both.

**ACTEC Fellow Terrence M. Franklin:** Professor Mitchell and David Dietrich gave us some great insights into the issue of heirs property and what can be done about it. ACTEC past president, the late Dennis Belcher, was a leader in that area and in widening the pipeline of diverse lawyers. His inspiration is reflected in the work that our guests continue to champion.

Please visit ACTEC, [actec.org/diversity](https://www.actec.org/diversity) for more information on this topic and some of the references they used in their research. And make sure you subscribe to ACTEC's YouTube channel to be informed of new videos as they become available.