



KEEPING IT IN THE FAMILY

LEGAL STRATEGIES TO ADDRESS THE CHALLENGE
OF HEIRS PROPERTY AND PREVENT HOME LOSS



January 2024



National
Consumer Law
Center
*Fighting Together
for Economic Justice*

ABOUT THE NATIONAL CONSUMER LAW CENTER

Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services; and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state governments and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness.

NCLC.ORG

© Copyright 2024, National Consumer Law Center, Inc.
All rights reserved.

ABOUT THE AUTHORS

Nketiah “Ink” Berko is an Equal Justice Works Fellow, sponsored by the Rossotti Foundation, at the National Consumer Law Center. He works with legal services programs in the Washington, D.C., area to provide legal advocacy and representation to Black residents at risk of losing family homes because of unclear or encumbered titles. Ink is admitted to practice law in the District of Columbia. He received his B.A. in political economy and international relations from Tulane University and his J.D. from Yale Law School.

Sarah Bolling Mancini is Co-Director of Advocacy at the National Consumer Law Center focusing on foreclosures, mortgage lending, and credit reporting issues. Sarah previously worked in the Home Defense Program of Atlanta Legal Aid and has represented homeowners in litigation in state, federal district, and bankruptcy courts. She also clerked for the Honorable Amy Totenberg, U.S. District Court for the Northern District of Georgia. Sarah is a member of the Georgia Bar. She received her B.A. in public policy from Princeton University and her J.D. from Harvard Law School.

ACKNOWLEDGMENTS

The authors would like to thank Carolyn Carter, Alys Cohen, Odette Williamson, and Michelle Deakin for editorial contributions to this report; NCLC Legal Intern Myron Minn-Thu-Aye for legal research; and Ella Halpine for layout and design.

This research was funded by the Jacksonville, Florida, office of Local Initiatives Support Corporation, www.lisc.org, and by RRF Foundation for Aging, www.rrf.org. The views expressed in this report are solely those of NCLC and the authors.

LISC JACKSONVILLE



RRF | Foundation
for Aging

KEEPING IT IN THE FAMILY

LEGAL STRATEGIES TO ADDRESS THE CHALLENGE OF HEIRS PROPERTY AND PREVENT HOME LOSS

TABLE OF CONTENTS

EXECUTIVE SUMMARY	2
RECOMMENDATIONS	3
Protect heirs property from loss	3
Resolve heirs property	3
Prevent heirs property	3
I. INTRODUCTION	3
Background	3
Scope and Impact of the Problem	5
II. LEGAL INTERVENTIONS TO ADDRESS HEIRS PROPERTY	6
A. Protecting Heirs Property From Loss	6
1. <i>Laws and Policies Aimed at Preventing Property Tax Foreclosure</i>	6
2. <i>Laws and Policies to Protect Heirs from Mortgage Foreclosure</i>	7
3. <i>Disaster Relief Programs</i>	8
4. <i>The Uniform Partition of Heirs Property Act</i>	9
5. <i>Other Anti-Home Equity Theft Laws Protecting Heirs</i>	11
B. Resolving Heirs Property	12
1. <i>Heirship Affidavits</i>	12
2. <i>Adverse Possession</i>	13
3. <i>Forced Sale Statutes</i>	14
C. Preventing Heirs Property	14
1. <i>Transfer on Death and Enhanced Life Estate Deeds</i>	14
2. <i>Living Trusts</i>	16
3. <i>Simplified Probate Processes</i>	17
III. STATE-BY-STATE ANALYSIS	18
CONCLUSION	21

EXECUTIVE SUMMARY

Increasing home costs, economic crises, and persistent structural barriers to fair housing have each contributed to a widening homeownership gap between white and Black households. As a result, advocates and policymakers have devoted considerable attention to increasing access to homeownership for first time homebuyers of color. Comparatively less attention, however, has been paid to reducing the racial wealth gap by slowing the rate of home loss, and to one significant driver of land loss in communities of color: heirs property.

“Heirs property” describes a form of property ownership that arises when several heirs inherit a home but have not completed the probate process to clarify title.

“Heirs property” describes a form of property ownership that arises when several heirs inherit a home but have not completed the probate process to clarify title. Over successive generations of unclear title, this can lead to dozens of heirs with an increasingly fractional ownership interest in a home. Without a registered deed or legal proof of ownership, heirs property owners are limited in their ability to manage their home.

Heirs property is disproportionately experienced in communities of color. Due to both historical abuses from and present day lack of access to the legal system,

Black Americans are significantly less likely than their white counterparts to have a will. Consequently, some studies estimate that more than half the real property owned by Black Americans is owned as heirs property.

Heirs property status threatens both the physical and financial security of families. Unable to prove legal title, heirs property owners are often excluded from property tax relief programs, potentially increasing their tax bill by thousands of dollars. They may be ineligible for disaster relief funds, hampering their ability to recover from catastrophic weather events. Unclear title may also bar heirs property owners from obtaining homeowners insurance or receiving home repair grants and loans. This form of property ownership therefore renders residents housing-insecure, threatening them with displacement and their neighborhoods with blight.

Together, fractured ownership and exclusionary policies prevent many families from enjoying the full physical and financial security promised by homeownership. Protecting heirs property owners from losing their homes, while also increasing avenues for families to obtain clear title, is therefore an essential aspect of the fight to increase housing and economic security, protect marginalized communities, and reduce the racial wealth gap through homeownership preservation.

RECOMMENDATIONS

This report highlights a wide range of laws and policies adopted in jurisdictions across the country. Each of the following interventions tackle home loss by either protecting, resolving, or preventing heirs property:

Protect heirs property from loss

- Expanding heirs property owners' access to property tax relief programs
- Recognizing heirs as successors in interest for mortgage loans
- Ensuring heirs are eligible for disaster relief programs
- Passing the Uniform Partition of Heirs Property Act
- Passing Anti-Home Equity Theft laws to protect heirs from predatory investors

Resolve heirs property

- Promoting uniform acceptance of heirship affidavits
- Allowing occupant-heirs to consolidate ownership via adverse possession
- Permitting heirs to purchase the ownership interest of absentee heirs via a forced sale

Prevent heirs property

- Authorizing transfer on death deeds (TODDs) via statute or promoting utilization of enhanced life estate deeds
- Facilitating usage of living trusts
- Expanding access to simplified probate processes

In jurisdictions with these policies in place, legal practitioners should utilize them to protect heirs property owners. In places where these policies are not in place, advocates and policymakers should promote their adoption to stem home loss in marginalized communities.

I. INTRODUCTION

Background

Over the past several years, U.S. homeowners have experienced a number of setbacks, each of which has rendered homeownership more expensive, more precarious, and less stable. During the COVID-19 pandemic, millions of homeowners fell behind on their mortgage payments and were at risk of losing their homes to mortgage foreclosures.

Property tax burdens increased in many areas, particularly in fast-gentrifying neighborhoods, as county taxing authorities reassessed the home values that form the basis for the annual tax bill. Additionally, by September 2023 the United States had experienced a record 23 “billion dollar” weather disasters. Extreme wildfires, floods, hailstorms, and hurricanes, among other severe weather events, produced more than \$57.6 billion in damage and led to at least 253 direct and indirect fatalities.¹

These crises are particularly burdensome on heirs who inherited family property without a will or who have not yet gone through probate to establish ownership. The heirs of the deceased owner now own the home, but because their names are not on the deed, they are not the record owners of the property. When property is passed down through multiple generations in this way, the ownership may be fractured among many people, some of whom may not be in touch or reachable. This situation is known as heirs property or “tangled title.”

When property is passed down through multiple generations, the ownership may be fractured among many people, some of whom may not be in touch or reachable. This situation is known as heirs property or “tangled title.”

Heirs property owners may be excluded from a variety of benefits afforded homeowners of record.

Tangled titles have hampered the ability of many heirs property owners to access pandemic-era mortgage relief funds.² Heirs are not able to sell the home or refinance a mortgage without unanimous participation of all the joint owners - which can be difficult to obtain. Heirs may be unable to obtain loans or grants for home repairs or get homeowners insurance, sometimes leading to blighted properties and neighborhoods.³ Likewise, the inaccessibility of homeowners insurance or disaster relief funds to heirs property owners leaves both the physical home and the underlying home equity insecure.

Fractured ownership also puts family homes at greater risk of a property tax lien foreclosure. Heirs may not receive property tax bills because they are not the record owners of the property. It is not uncommon for years to pass after the death of the original owner of the home without the property taxes being paid. Heirs may not have the benefit of tax relief programs available to owner-occupants due to lack of information, inability to provide proof of ownership required by the county, or both. By the time heirs realize they are behind on property taxes, it is often soon before a tax foreclosure sale, or after the sale has happened, and options may be limited. The tax debt owed is usually too high to pay in one lump sum to stop the sale or redeem the property. Moreover, heirs may be unable or unwilling to pay the amounts due absent the contribution of all other heirs, which can be difficult to obtain. Even

for those heirs who are aware of their property tax burden, unclear title may bar access to state and local utility or property tax assistance programs.⁴

Many heirs property owners inherited a home subject to an existing mortgage, and they may struggle to deal with the mortgage secured by the home. Mortgage companies often refuse to accept payments from people who are not the borrower, refuse to provide information about how much is owed, and refuse to consider heirs for loan modifications or other foreclosure avoidance options. Yet when a mortgage loan gets sufficiently far behind, the heirs face the risk of losing the home and all of their equity through foreclosure.

The increased vulnerability of heirs to tax and mortgage foreclosures and the inability to access disaster relief renders family members susceptible to another risk: investors who offer to purchase the home or a partial interest in the home quickly for much less than its true value. Real estate speculators will often attempt to identify heirs property parcels to locate an heir with a small percentage of ownership who is not living in the home.⁵ A speculator who buys even a tiny fractional interest can file a partition action and force the sale of the home. Often the investor stands to gain a lot more than they paid for the fractional interest, while the other heirs lose home equity and, for some, the roof over their heads.

Scope and Impact of the Problem

Heirs property has garnered growing attention in recent years as community leaders and academics have shed light on the significant scope of this problem and the risks it creates. A lack of access to, as well as exploitation at the hands of, the legal system has discouraged generations of Black families from utilizing probate or estate planning services. As a result, Black adults are more likely than their white counterparts to own a home without clear legal title or to co-own the home with other relatives who inherited without a will. One survey indicates that 77 percent of Black households do not have a will.⁶

Although identifying parcels of heirs property can be challenging, some studies have estimated that roughly 497,000 parcels of land, valued at nearly \$42 billion, are held as heirs property throughout the American Southeast alone, where Jim Crow-era laws made the legal system particularly unfriendly to landowners of color.⁷ Similarly, the “fractionation” of tribal land ownership in the 19th and 20th centuries has stymied the ability of Indigenous communities to use their land.⁸ Heirs property is rightly framed as a racial justice issue and is a key driver of the racial wealth gap. An enormous amount of Black and Indigenous land has already been lost to vulnerabilities related to heirs property ownership - and the risk of further land loss remains.

These high rates of heirs property or tangled title ownership lead to disparities in mortgage foreclosure, property tax foreclosure, and disaster recovery aid. For instance, The Washington Post has found that Federal Emergency Management Agency (FEMA) applicants in majority-Black counties were “twice as likely to be rejected because they cannot prove that they own their homes.”⁹ After Hurricane Katrina, 20,000 heirs property owners were denied federal disaster relief funds; subsequent disasters such as Hurricane Maria in Puerto Rico have led to thousands of households denied access to federal assistance due to unclear title.¹⁰

This report highlights and evaluates the efficacy of various laws and policies aimed at helping owners of heirs property. We divide those legal interventions into three sections: laws aimed at preventing immediate land loss; laws aimed at resolving heirs property and clarifying ownership status; and laws aimed at preventing heirs property from occurring in the future. Addressing each of these three areas is essential to stem the tide of home loss and equity theft related to heirs property status.

II. LEGAL INTERVENTIONS TO ADDRESS HEIRS PROPERTY

A. Protecting Heirs Property From Loss

The first set of statutes and regulations discussed in this report are designed to protect families with fractured homeownership from the harmful effects of unclear title—specifically, a greater vulnerability to home loss. These include legal interventions to prevent tax foreclosure, mortgage foreclosure, disaster losses, and equity theft scams.

1. Laws and Policies Aimed at Preventing Property Tax Foreclosure

Heirs property owners are particularly vulnerable to property tax foreclosure. They typically lose the homestead exemption or any equivalent form of tax relief or abatement for owner-occupants when the prior owner dies. And in many states, heirs property owners cannot get the homestead exemption in their own name without completing the probate process.¹¹ Probate is expensive and time consuming in the best circumstances, and it may be impossible if all heirs cannot be located. Without the tax relief that is intended for owner-occupants, the tax bill can skyrocket, leading to a tax foreclosure. Therefore, state laws that give heirs property owners access to the homestead exemption and even make that exemption available retroactively are extremely important in alleviating this major risk of home loss.¹²

NCLC has recommended that states and local governments pursue the following reforms to protect heirs property owners from tax foreclosure:

- Recognize that heirs are the owners of an inherited property immediately upon death of the decedent and should be eligible for the property tax homestead exemption and other homeowner relief options. Allow heirs to apply for the homestead exemption upon the filing of an affidavit of heirship certifying their ownership of the property.
- Make it clear that penalties for failure to report a change regarding the property cannot be imposed on heirs who inherit a property intestate, or by will that is not yet probated, and intend to make the property their primary residence, and otherwise are eligible for the homestead exemption.
- Provide the homestead exemption retroactively for a certain period of time if the heir can attest to living in the property and otherwise qualifies for the exemption during that time period.
- Require that, upon the death of any homeowner as determined through death records, the tax authority shall provide notification to the heirs of the necessity to notify the tax assessor and the process by which they can and should apply for the homestead tax exemption.

In addition, state policies that prevent tax foreclosure of homeowner occupants will also help protect heir owners. Such policies include permitting payment plans, improving notice at all steps in the tax foreclosure process, and providing for a clear and accessible right of redemption.¹³

2. Laws and Policies to Protect Heirs from Mortgage Foreclosure

Although some heirs property parcels are not subject to a mortgage because the home has been in the family for so long and any mortgage was long since paid off, many heirs inherit a home that is still subject to an existing mortgage loan. Unfortunately, heirs attempting to deal with a mortgage on the family home face a number of challenges. Often the mortgage company refuses to communicate with the heir or heirs about the amounts due, refuses to accept or apply monthly payments, and fails to offer foreclosure avoidance options to heirs when the mortgage loan goes into default.

Certain legal protections have been put in place at the federal level to address these problems. In 2016, the Consumer Financial Protection Bureau (CFPB) issued a regulation giving “successors in interest” — homeowners who acquired their interest in a home through a death, divorce, or other intra-family transfer — the right to get information about, make payments on, and address problems with the mortgage secured by their home.¹⁴ This

federal rule also allows these successors to apply for a loan modification to catch up on missed payments and prevent foreclosure. Federal mortgage investors Fannie Mae, Freddie Mac, and the Federal Housing Administration (FHA) have also instituted policies to allow for loan modifications for heirs, although problems still arise.¹⁵

Certain states have foreclosure processes that are more protective of homeowners overall, and consequently provide greater protections to heirs. Because mortgage companies often fail to follow federal law and investor guidelines by refusing to recognize an heir as a successor in interest or failing to properly review a loan modification request, states that require judicial foreclosure or a pre-foreclosure mediation program give heirs significantly more opportunity to press their rights and avoid foreclosure.

3. Disaster Relief Programs

Another threat to stable homeownership for heirs property owners is the inability to access financial assistance to rebuild the home after a natural disaster. When natural disasters strike, many heirs property owners have historically found themselves unable to gain access to critical disaster relief funds. FEMA and some states, however, have taken steps to reduce barriers and open these programs to heirs property owners.

Since 2021, FEMA has allowed heirs property owners to provide a written self-declarative statement for proof of ownership to obtain Individual Assistance (IA) recovery funds.¹⁶ No such policy exists, however, for Community Development Block Grant Disaster Relief (CDBG-DR) funds. The CDBG-DR program, administered by the Department of Housing and Urban Development (HUD), provides state and local governments with block grants to fund home repair, replacement, or relocation for disaster survivors. The CDBG-DR program, however, has not been permanently authorized by Congress, resulting in a different set of federal statutory and regulatory requirements for each disaster.¹⁷ Though the federal guidelines do not require states to make CDBG-DR funds available to heirs, some states have done so. Texas, for instance, allows CDBG-DR applicants to access funds by certifying their ownership interest through an affidavit and alternative documentation indicating that they exercised ownership over the property when the disaster occurred.¹⁸ Louisiana's CDBG-DR program permits heirs to file an Affidavit of Death, Domicile and Heirship (ADDH) to establish their ownership; additionally, under state law public entities may presume that a co-owner who has possessed the property for more than a year has been appointed by the other co-owners to "manage, repair, reconstruct, and restore the property and to receive disaster recovery funds" in the absence of a written agreement between co-owners.¹⁹

4. *The Uniform Partition of Heirs Property Act*

The Uniform Partition of Heirs Property Act (UPHPA) protects owners of heirs properties from losing their home and home equity through a forced partition sale. Heirs properties in which multiple family members own a partial share of the property are susceptible to partition sale. A partition sale occurs when one fractional owner petitions a court to sell or divide a parcel of land that is owned by multiple owners. In the case of heirs property, real estate speculators frequently purchase the fractional interest of one co-owner at a deeply discounted price and then file a partition action. The forced sale of the entire home through a partition will typically yield a below-market value price, depriving the other heirs of both the home and a great deal of home equity wealth.²⁰

The UPHPA establishes various safeguards to protect heirs property owners from the adverse effects of forced partition sales. First, the Act requires the cotenant pursuing partition to give notice to all other co-owners. Next, courts must order an independent appraisal to determine the property's fair market value. The law allows cotenants to object to the appraised value, at which point the court must hold a hearing to consider other evidence of value. Additionally, the Act grants cotenants an opportunity to buy out the interest of the petitioning cotenant(s), with 45 days to exercise this right of first refusal and another 60 days to arrange for financing. Finally, if no cotenants choose to exercise this buyout option, courts are required to evaluate several economic and non-economic factors to determine whether to proceed with a partition-in-kind (subdividing the piece of land, if practicable) or a partition-by-sale (sale of the home and division of sale proceeds). If the court opts for a partition sale, the property must be sold on the open market for no less than the court-appraised value in a "commercially reasonable manner."²¹

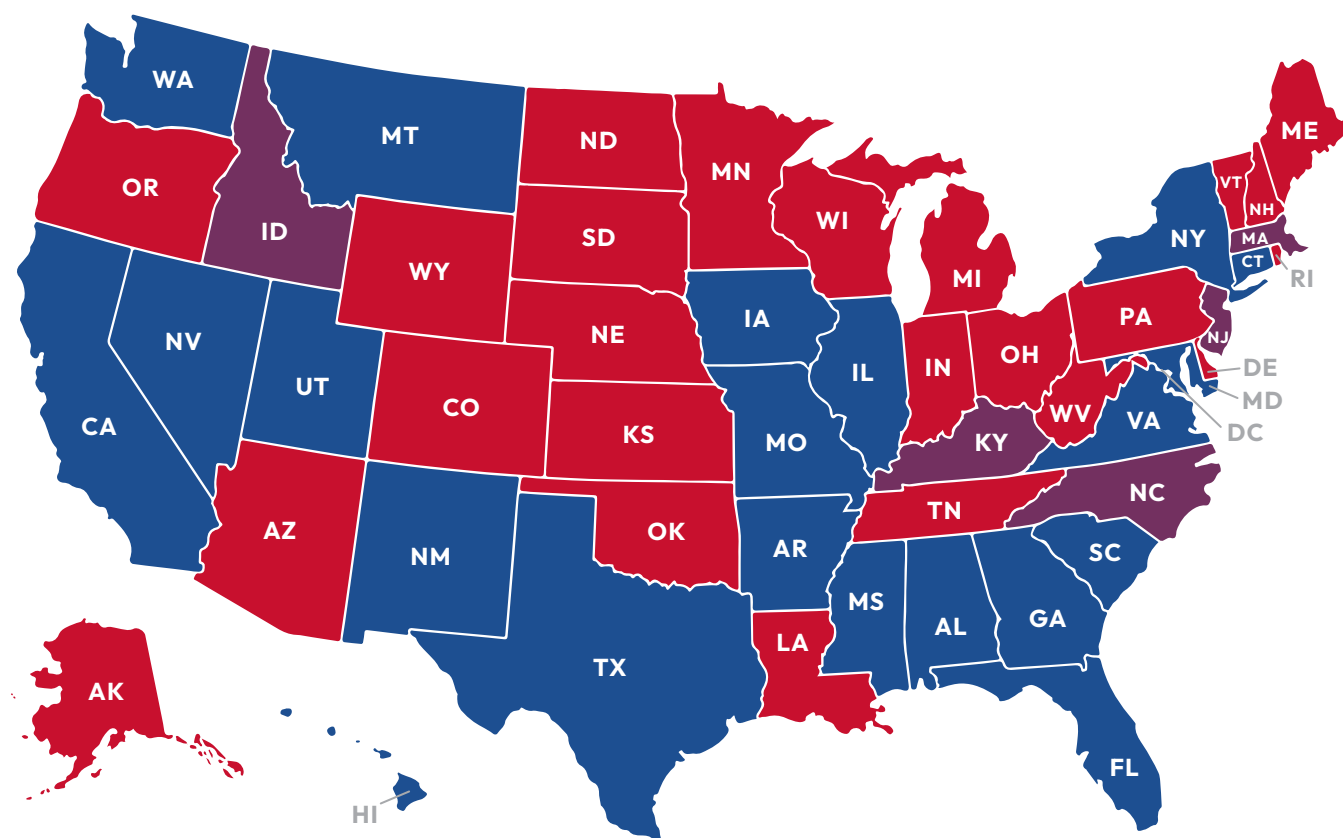
In the absence of the UPHPA, a speculator who acquired a fractional interest in the home could then force the sale of the home to a related entity at a discounted price. In states that have enacted the UPHPA, the court-supervised sale of the entire home must be for fair market value, reducing one source of potential windfall to speculators. For example, assume there are four heirs who each own one-fourth of a home that is worth \$100,000. A speculator might be able to acquire one-fourth of the home from one heir for \$1,000, even though that one-fourth interest was really worth \$25,000, because the heir is not concerned about the home or doesn't know its true value. In a state that has enacted the UPHPA, the court will require an appraisal and require that the home be sold for its fair market price of \$100,000. The speculator will still make \$24,000 in profit when the home is sold, but the other heirs (each of whom owns one-fourth of the home) will also receive \$25,000. Without the UPHPA,

the property could be sold for any price, and the speculator might arrange for an affiliated company to buy the home for \$40,000. In that case each heir would only get \$10,000, and the speculator would get \$9,000 profit initially and \$60,000 when the affiliated company later sells the home for its actual value. The requirement that the home be sold for its fair market value reduces the profit motive for speculators.

The UHPA has been enacted in 23 states and territories — including Texas, Florida, Alabama, Georgia, and South Carolina.²² It has been introduced in another six states, including North Carolina and Michigan. The Act provides several procedural safeguards to protect the property interests of fractional owners; however, to effectively resist a partition sale, fractional owners must have the necessary resources to pursue a buyout of a cotenant's interest - which is often impossible.²³ Nonetheless, the Act has curbed predatory partition actions, with many attorneys characterizing the act as a “necessary first step” in protecting heirs property owners.²⁴

The New York legislature made modifications to the UHPA when it was enacted, which provide even greater protections to heirs property owners. These include an additional opportunity to answer if an owner defaults when first served with the lawsuit, the requirement of a court-supervised settlement conference, and authorization for the court to consider equitable factors during settlement negotiations, including how the non-heir acquired its ownership interest.²⁵

The following map shows the states that have enacted or introduced the UHPA.



- Enacted UHPA** (21 states and DC)
- Introduced UHPA** (5 states)
- Neither Enacted Nor Introduced UHPA** (24 states)

5. Other Anti-Home Equity Theft Laws Protecting Heirs

Heirs property owners are susceptible to a wide range of equity theft scams, not only ones carried out through a predatory partition action. In other schemes, investors may target heirs for high-pressure tactics attempting to get the heir or heirs to sell the home to the investor in a direct, off-market sale. These schemes are often described as “we buy houses” operations. Typically the business model involves convincing a vulnerable homeowner not to list the home publicly for sale, sometimes through misrepresentations of the downside of working with a realtor. Yet the “we buy houses” company’s goal is to pay a deeply discounted price for the home, preying on the lack of information an heir might have about what the home is worth and taking advantage of the absence of a competitive, open-market sale. The companies using these high-pressure tactics to force an undervalued sale of the home have in many instances targeted heirs property owners or other vulnerable homeowners who have experienced a life event that creates pressure to sell the home.²⁶

In some situations, equity thieves convince a group of heirs to transfer the entire home for less than market value. In other instances, they might acquire only a partial interest. After purchasing a partial interest the investor might file a partition action. However, some investors have attempted to skirt the partition process by instead filing a fraudulent probate court action, misrepresenting the facts and attempting to obtain a court order that deprives true heirs of their ownership interest in the property. Other scammers commit outright deed theft, forging a deed to a property they have no legal right to.

A small number of states have attempted to address the “we buy houses” business model, either by imposing licensing requirements or giving homeowners a right to cancel any purchase and sale contract if the investor did not comply with the licensing regime. These jurisdictions include Oklahoma, Illinois, Texas, and the city of Philadelphia.²⁷ New York enacted additional protections for victims of deed theft in 2023, including giving prosecutors the ability to flag properties that are impacted and halting any eviction when the property is involved in a deed theft investigation.²⁸ We have not identified any state that has yet attempted to enact legislation to stop the practice of investors filing false probate actions to steal title to heirs property.

B. Resolving Heirs Property

Once the risk of immediate home loss is addressed, the next most pressing goal is to attempt to consolidate title and clarify title so that heirs will be able to sell or mortgage the home in the future. The following types of laws and policies can help facilitate the proof of ownership and consolidation of ownership when title has become unclear or fractured over time.

1. Heirship Affidavits

An heirship affidavit is a sworn statement identifying the heirs who inherited a piece of real property. Heirship affidavits, also known as affidavits of descent, are often recorded in the real property records to document the new owners of the property. Heirship affidavits are most commonly accepted to prove the ownership status of land when the decedent died intestate, without a will. If there was a will, usually it must be admitted to probate and found valid by the probate court. For families who have inherited an interest in land without a will, an heirship affidavit can

An heirship affidavit is a sworn statement identifying the heirs who inherited a piece of real property. Heirship affidavits, also known as affidavits of descent, are often recorded in the real property records to document the new owners of the property.

be a way of documenting their ownership interest without the need to file a probate court action.

The use and acceptance of heirship affidavits varies and has not been closely studied. Texas and Louisiana provide for heirship affidavits in state statutes, and the State Bar of Georgia has promulgated state title standards setting an industry norm that heirship affidavits may result in insurable title for an intestate death at least three years in the past.²⁹ However, in the vast majority of states there is no uniform or clear rule regarding the use of heirship affidavits. In these states, whether an heirship affidavit will be deemed sufficient to provide future title insurance is a case-by-case decision made by title insurance underwriters. In some instances title companies may not be willing to provide title insurance based on an heirship affidavit. Factors such as the number of heirs, value of the property, and net worth of the person signing the affidavit are often considered. Of course, even when title insurance cannot be obtained, an heirship affidavit may provide sufficient proof of ownership to deal with a mortgage or apply for property tax relief or disaster aid. Greater uniformity and transparency regarding heirship affidavit practices is an important step to helping heirs property owners document their ownership interest and eventually consolidate that ownership in a smaller number of heirs.

2. Adverse Possession

An occupant-heir in some states might also cure fractional ownership by asserting full ownership of the property through the doctrine of adverse possession. Adverse possession is a legal doctrine whereby a person in possession of land can acquire clear title. Typically, an individual's possession of the land must be hostile (i.e., infringing on the rights of the actual owner), open, continuous, exclusive, actual, and notorious.

An occupant-heir will often not meet the traditional requirements of adverse possession because one heir's possession is generally assumed to not infringe upon the rights of other co-owners - it is not considered "hostile" for purposes of adverse possession. However, in some states, an occupant-heir can overcome this presumption. In Texas, for instance, a cotenant heir may make a claim of adverse possession against cotenant heirs after adequate notice, an affidavit of heirship and adverse possession, and a continuous 10-year period of possession.³⁰ Similarly, in New York, a cotenant's possession is presumed to be non-hostile until either "ten years of continuous exclusive occupancy" or ouster of the cotenant, at which point the period for adverse possession will start.³¹

3. Forced Sale Statutes

At least one state allows an occupant-heir to purchase another co-owner's interest, allowing for the consolidation of ownership. In Texas, for instance, an occupant-heir may petition a court to force the sale of another co-owner's interest, provided that 1) the petitioner has paid the defendant's share of the property taxes for any three years in a five-year period, 2) the petitioner has previously demanded reimbursement, and 3) the defendant has not reimbursed more than half the total amount paid by the petitioner on the defendant's behalf.³² For unknown defendants, the occupant-heir must demand reimbursement by publication once a week for four consecutive weeks, with the last petition occurring 30 days before the petitioner files for a forced sale.³³ The court can then order a sale of the defendant's interest at the fair market value (determined by a court-appointed independent appraiser) minus the amount owed to plaintiff for taxes. Although the statute does not specifically address what happens to the portion of sale proceeds that co-owner defendants are entitled to, most states have a process for depositing funds of this kind into the registry of the court and allowing parties a certain amount of time to claim them.

C. Preventing Heirs Property

Finally, addressing the problem of heirs property requires an emphasis on prevention. The following kinds of legal tools or statutes can help to prevent heirs property or tangled title situations from occurring in the first instance.

1. Transfer on Death and Enhanced Life Estate Deeds

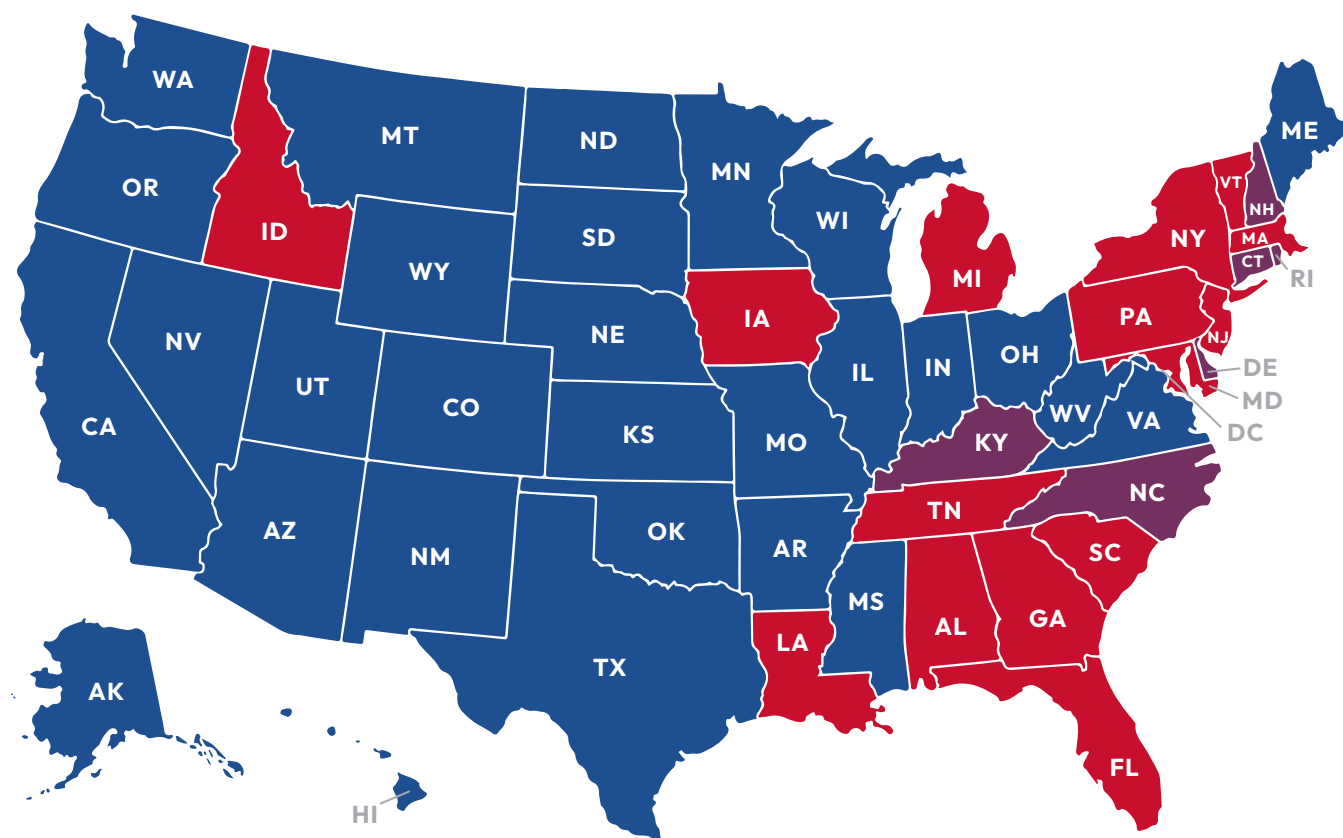
A transfer on death deed (TODD) transfers property to a specified beneficiary when the owner dies. Currently, 29 states and the District of Columbia have enacted a statute authorizing some form of TODD.³⁴ A TODD simplifies transfers because it is effective without a will or any probate court filing, which can be expensive and lengthy. Most jurisdictions allowing TODDs provide a simple TODD form. If a property owner records a TODD in the deed records and dies, the specified beneficiary becomes the record owner of the property. In contrast, if an owner dies intestate, without a TODD or a will, the default heirs at law inherit the property. This can lead to fractured ownership of the property, and typically requires a probate court filing to document the heirs' ownership interest.

When a decedent dies with a valid will, ownership passes to the heirs provided in the will. This usually results in less fracturing of ownership, assuming the decedent named one or a small number of heirs. However, the will still must be approved by the probate court, which typically requires hiring a lawyer, paying a filing fee, and providing notice to all of the

heirs at law. TODDs are therefore often a simpler, less expensive way of transferring home ownership and avoiding probate, particularly when the home is the primary asset in an estate.

In states without a statute authorizing TODDs, property owners sometimes utilize an enhanced life estate deed as another alternative for avoiding probate costs. Also called “Lady Bird deeds,” enhanced life estate deeds allow the current property owner to grant a remainder interest to a beneficiary, who then inherits the property upon the owner’s death. With an enhanced life estate deed, much like a TODD, the grantor maintains control over their property during their life, allowing them to lease, mortgage, sell, or otherwise manage the property without the remainder beneficiary’s consent. The grantor’s ability to divest the grantee by executing another conveyance during their life distinguishes an enhanced life estate deed from a traditional life estate deed. Lady Bird or enhanced life estate deeds are currently in use in Texas, Florida, Michigan, Vermont, and West Virginia.³⁵ However, as some legal scholars have noted, Lady Bird deeds give rise to some areas of uncertainty because they are not authorized by statute.³⁶ Some elder law and probate experts push for enactment of the Uniform Transfer on Death Deed statute to eliminate the ambiguities that may exist with a non-statutory Lady Bird deed.³⁷

The following map shows the states that have enacted or introduced a transfer on death deed statute.



- Enacted TODDs (29 states and DC)
- Introduced TODDs (6 states)
- Neither Enacted Nor Introduced TODDs (15 states)

2. Living Trusts

Another method of avoiding fractured ownership is establishing a living trust or “inter vivos” trust. A living trust is a legal instrument that enables an individual to transfer ownership of their assets to a trust account.³⁸ An individual — the grantor — designates a trustee to manage the assets of the trust on behalf of the trust beneficiaries. The grantor may outline trustee duties, the trust purpose, the trust’s assets, and the designated beneficiaries in the trust agreement. A living trust may be revocable (meaning the grantor can maintain control over the trust) or irrevocable (meaning it cannot be changed or terminated by the grantor absent certain conditions).³⁹

Because the grantor transfers ownership of their assets to the trust, trust assets can be distributed to beneficiaries upon the grantor’s death without the need for probate court. Additionally, irrevocable trusts may protect assets from creditors and state and local estate taxes, though the extent of this benefit will vary by state.⁴⁰

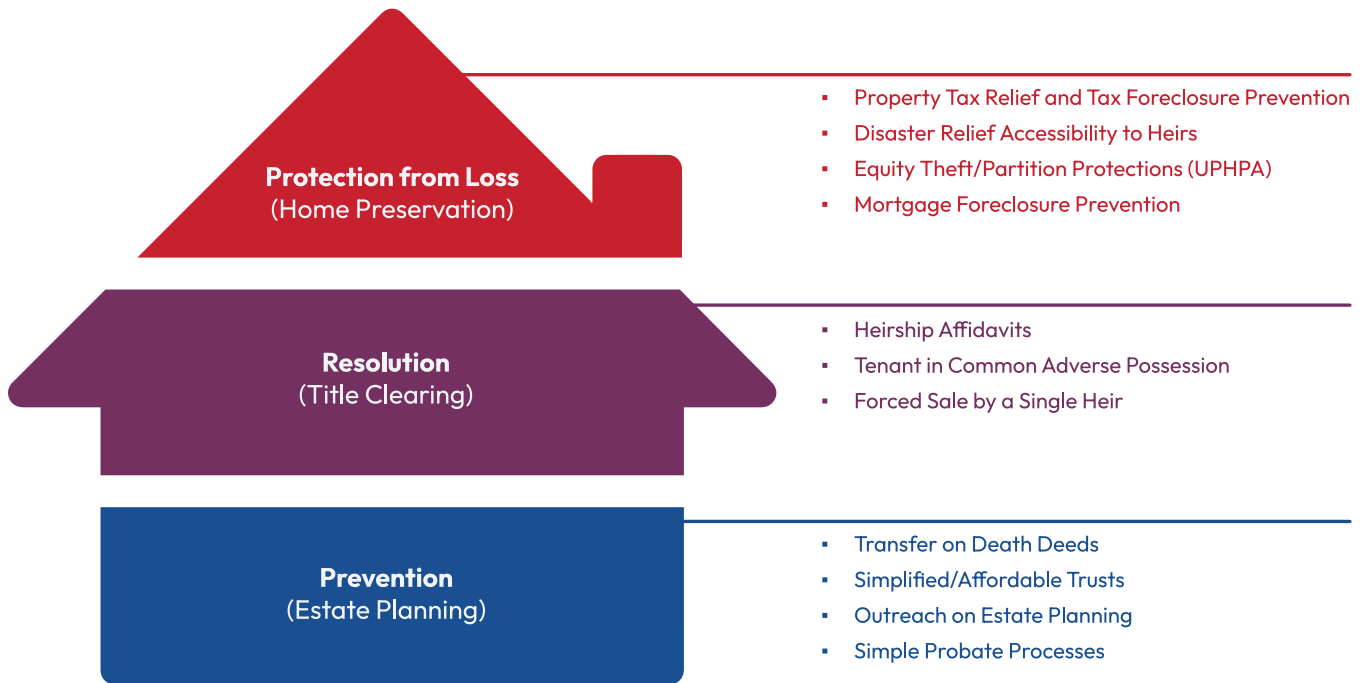
In situations where a family wishes to maintain communal ownership of a property, living trusts may be an attractive option. That said, establishing and maintaining such a trust is often expensive. Families looking to set up a trust will typically require the help of an attorney, and the National Council on Aging estimates that the cost will range from \$1,500 to \$3,000. There are also ongoing costs to maintain the trust after it is set up. Even with the help of an online service, which may run from \$139-\$440, maintenance costs can increase the lifetime cost of a trust to up to \$7,000.⁴¹ These maintenance costs include title transfer, trust registration, accounting, and trustee fees, as well as tax planning and appraisal costs. Consequently, a living trust may make more sense for people with a significant number of valuable assets. One area for further investigation is ways to streamline the trust creation and maintenance process to reduce costs.

3. Simplified Probate Processes

Finally, some states have implemented a variety of simplified probate processes to make probate more accessible to low- and middle-income families. This simplified, or summary, probate process is typically permitted so long as the estate's value does not exceed a specified amount. For instance, in Texas a small estate affidavit may be filed to avoid probate provided that the estate's value, excluding homestead and exempt property, does not exceed \$75,000.⁴²

Simplified probate processes, however, often have other restrictions. For instance, in some states the process is not available unless the heir is a surviving spouse.⁴³ Others, such as Alabama's summary distribution process, apply only to personal property and cannot be used to pass down real estate.⁴⁴ By contrast, in Georgia, any heir may petition for an order that no administration is necessary, provided the petition includes the signatures of all heirs.⁴⁵

Summary of Heirs Property Legal Interventions



III. STATE-BY-STATE ANALYSIS

These legal interventions, taken together, could make a significant dent in the problem of heirs property. Yet few if any states have provided the full slate of these possible protections. Below we describe the presence or absence of four important heirs property protections in a sampling of seven states.

Alabama

- Transfer on death deeds (TODDs): No
- Uniform Partition of Heirs Property Act: Yes
- Heirship affidavit: Not in statute; may be allowed depending on circumstances
- Simplified probate processes:
 - Called “summary distribution,” only applies to personal property, not real property⁴⁶
 - Value of entire decedent’s estate cannot exceed \$25,000, subject to adjustment based on Consumer Price Index (in 2023, this was \$34,611).

Florida

- Transfer on death deeds (TODDs): No
- Uniform Partition of Heirs Property Act: Yes
- Heirship affidavit: Not in statute; may be allowed depending on circumstances
- Simplified probate processes:
 - Summary administration: requires court supervision but not appointment of a personal representative.
 - Decedent must be dead for more than two years, or the value of entire estate, minus property exempt from creditor claims, must be \$75,000 or less.
 - Petitioner, surviving spouse and all beneficiaries generally must sign to verify petition.⁴⁷

Georgia

- Transfer on death deeds (TODDs): No.
- Uniform Partition of Heirs Property Act: Yes.
- Heirship affidavit: Yes, in state title standards, promulgated by the Real Estate section of the bar; may result in insurable title for intestate heirs at least three years after the death occurred.
- Simplified probate processes:
 - Petition for order that no administration is necessary. Requires signature of all heirs. May be used for real estate.⁴⁸

Michigan

- Transfer on death deeds (TODDs): No
- Uniform Partition of Heirs Property Act: Introduced
- Heirship affidavit: Not in statute; may be allowed depending on circumstances
- Simplified probate processes:
 - Small estate proceeding: may petition for court to order that estate property be turned over to surviving spouse or decedent's heirs, if no surviving spouse, for estates valued at \$15,000 or less.⁴⁹

North Carolina

- Transfer on death deeds (TODDs): Introduced
- Uniform Partition of Heirs Property Act: Introduced
- Heirship affidavit: Not in statute; may be allowed depending on circumstances
- Simplified probate processes:
 - Petition for summary administration: if the surviving spouse is the decedent's sole heir, the surviving spouse may collect the decedent's property without undergoing certain probate requirements (submitting inventory, notice to creditors, etc.). However, the spouse must then assume all debts and claims of the decedent not discharged by the decedent's death.⁵⁰

South Carolina

- Transfer on death deeds (TODDs): No
- Uniform Partition of Heirs Property Act: Yes
- Heirship affidavit: Not in statute; may be allowed depending on circumstances
- Simplified probate processes:
 - Summary administration: the court-appointed personal representative can immediately distribute the assets of an estate, provided they are the sole heir or devisee or the estate valued at less than \$25,000.⁵¹

Texas

- Transfer on death deeds (TODDs): Yes
- Uniform Partition of Heirs Property Act: Yes
- Heirship affidavits: Yes, in statute. A court shall consider an heirship affidavit as prima facie evidence of heirship once it has been recorded in the real property records for at least five years.⁵²
- Simplified probate processes:
 - Small estate affidavit: may be filed as a way of bypassing probate if the value of the estate, excluding homestead and exempt property, does not exceed \$75,000, the decedent died intestate, thirty days have passed since decedent's death, and a statutorily-compliant affidavit is filed.⁵³

Summary Table

State Laws	Transfer On Death Deed Statute	Uniform Partition Of Heirs Property Act	Standardized Heirship Affidavits	Simplified Probate Processes For Real Property
Alabama	<i>no</i>	<i>enacted</i>	<i>no</i>	<i>enacted</i>
Florida	<i>no</i>	<i>enacted</i>	<i>no</i>	<i>enacted</i>
Georgia	<i>no</i>	<i>enacted</i>	<i>enacted</i>	<i>enacted</i>
Michigan	<i>no</i>	<i>introduced</i>	<i>no</i>	<i>limited</i>
North Carolina	<i>introduced</i>	<i>introduced</i>	<i>no</i>	<i>enacted</i>
South Carolina	<i>no</i>	<i>enacted</i>	<i>no</i>	<i>limited</i>
Texas	<i>enacted</i>	<i>enacted</i>	<i>enacted</i>	<i>enacted</i>

CONCLUSION

The challenges presented by heirs property are many and complex. In some instances, fractured ownership has developed over many generations. In others the heirs property status is more recent. But in any of these situations, the owners are at greater risk of losing the home and the accumulated home equity that could otherwise be passed down for generations.

This problem calls out for concerted action on multiple fronts: to protect heirs from home loss, resolve and clarify fractured ownership, and prevent future heirs property from developing. Enacting these kinds of laws at the state level is extremely important. In addition, local governments and community stakeholders can play a key role through enhanced outreach about property tax relief, mortgage assistance, and disaster aid for heirs; the risk of equity theft scams; and the need for proactive estate planning. These legal and policy strategies, deployed together, can make a meaningful difference. For advocates serious about eliminating the racial wealth gap, tackling the problem of heirs property is a necessary step.

ENDNOTES

1. Brady Dennis, *U.S. has seen a record number of weather disasters this year. It's only September*, Washington Post (Sept. 12, 2023), <https://www.washingtonpost.com/climate-environment/2023/09/12/us-weather-2023-record-hurricane-wildfire-flooding/>.
2. U.S. Department of the Treasury, *Expanding HAF Use of Funds*, <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/homeowner-assistance-fund/promising-practices/expanding-haf-use-of-funds> (last visited Oct. 12, 2023).
3. Amelia Winger, *Heirs to Black-owned homes face ramped-up foreclosures. Here's who's pushing back*, Bradenton Herald (June 29, 2023), <https://www.bradenton.com/news/business/real-estate-news/article276644691.html>.
4. See Andrea Bopp Stark and Odette Williamson, *Property Tax Foreclosures on Heirs Property: The Devastating Consequences and Recommendations for Prevention*, National Consumer Law Center (Aug. 2023), <https://www.nclc.org/resources/property-tax-foreclosures-on-heirs-property-the-devastating-consequences-and-recommendations-for-prevention/>.
5. Cornell Watson, "A House Divided: How a Band of Speculators Seized Deeds of Black-Owned Brooklyn Brownstones," *The City* (April 17, 2023), <https://www.thecity.nyc/2023/4/17/23685258/speculators-black-brown-homes-deeds>.
6. Althea Chang-Cook, *Why People of Color Are Less Likely to Have a Will*, Consumer Reports (Aug. 10, 2022), <https://www.consumerreports.org/money/estate-planning/why-people-of-color-are-less-likely-to-have-a-will-a6742820557/#:~:text=And%20while%2061%20percent%20of,t%20have%20one%2C%20CR%20found>.
7. Ryan Thomson and Conner Bailey, *Identifying Heirs' Property: Extent and Value Across the South and Appalachia*, *Journal of Rural Social Sciences* (2023), https://srdc.msstate.edu/sites/default/files/2023-06/thomson_bailey_pre-print-manuscript-5.19.23_0.pdf.
8. Housing Assistance Council, *A Methodological Approach to Estimate Residential Heirs' Property in the United States*, Fannie Mae (Dec. 2023), https://www.fanniemae.com/sites/g/files/koqyhd191/files/2023-12/heirs-property-research-report_0.pdf.
9. Hannah Dreier and Andrew Ba Tran, *'The real damage': Why FEMA is denying disaster aid to Black families that have lived for generations in the Deep South*, Washington Post (July 11, 2021), <https://www.washingtonpost.com/nation/2021/07/11/fema-black-owned-property/>.
10. *Id.*
11. National Consumer Law Center, *Home Foreclosures* (2d edition 2023), updated at www.nclc.org/library (see chapter 16 and Appendix F).
12. See Andrea Bopp Stark and Odette Williamson, *Property Tax Foreclosures on Heirs Property: The Devastating Consequences and Recommendations for Prevention*, National Consumer Law Center (Aug. 2023), <https://www.nclc.org/resources/property-tax-foreclosures-on-heirs-property-the-devastating-consequences-and-recommendations-for-prevention/>.
13. National Consumer Law Center, *What States Can Do to Reduce Tax Foreclosures* (2023), https://www.nclc.org/wp-content/uploads/2023/10/What-States-Can-Do_Property-Tax-Foreclosures.pdf.
14. 12 CFR §§ 1024.30, 1024.31; see also Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act

- (Regulation Z), 81 Fed. Reg. 72,160 (Oct. 19, 2016).
15. Comments of the National Consumer Law Center et al. to the Consumer Financial Protection Bureau regarding the Notice of Assessment of 2013 RESPA Servicing Rule at 41 (July 10, 2017), <https://www.nclc.org/wp-content/uploads/2022/11/comments-to-cfpb-servicing-assessment-respa.pdf>.
 16. *Verifying Home Ownership or Occupancy*, FEMA (June 30, 2023), <https://www.fema.gov/assistance/individual/after-applying/verifying-home-ownership-occupancy>.
 17. Heather K Way, Ruthie Goldstein, *Heir Property Owners and Federal Disaster Aid Programs: Opportunities for a More Equitable Recovery When Disaster Strikes*, 30(3) *Journal of Affordable Housing and Community Development Law* 467 (Winter 2022).
 18. *Id.* at 476.
 19. *Id.* at 478-479.
 20. *Restoring Hope for Heirs Property Owners: The Uniform Partition of Heirs Property Act*, American Bar Association (Oct. 1, 2016), https://www.americanbar.org/groups/state_local_government/publications/state_local_law_news/2016-17/fall/restoring_hope_heirs_property_owners_uniform_partition_heirs_property_act/.
 21. *Partition of Heirs Property Act*, Uniform Law Comm'n, <https://www.uniformlaws.org/committees/community-home?CommunityKey=50724584-e808-4255-bc5d-8ea4e588371d> (last visited Oct. 12, 2023).
 22. For an examination of the UPHPA's efficacy in states where it has been enacted, see Betsy Taylor et. al., *Examining the Efficacy of the Uniform Partition of Heirs' Property Act in Georgia, Alabama, and Kentucky: A Proof of Concept Investigation*, The Socially Disadvantaged Farmers and Ranchers Policy Research Center (Aug. 2, 2021), <https://likenknowledge.org/wp-content/uploads/2021/11/FINAL-REPORT.pdf>.
 23. Avanthi Cole, For the "*Wealthy and Legally Savvy*": *The Weaknesses of the Uniform Partition of Heirs Property Act As Applied to Low-Income Black Heirs Property Owners*, 11 *Colum. J. Race & L.* 343 (2021). Some states, despite the discretion afforded courts in the UPHPA, may have stronger preferences for partitions in kind. Virginia law for instance, strongly favors partitions-in-kind over partition sales, requiring courts to conclude "first...that that the partition cannot be conveniently made [and] [s]econd, ... that sale is in best interest of the parties." *Sensabaugh v. Sensabaugh*, 232 Va. 250, 258-59 (1986). Additionally, Virginia's UPHPA applies to all partition actions, rather than just those defined as "heirs property" under the Act. Va. Code Ann. § 8.01-81 (West).
 24. Taylor, *supra* note 19.
 25. New York Real Prop. Actions L. § 993.
 26. Anjeanette Damon, Byard Duncan and Mollie Simon, "The Ugly Truth Behind 'We Buy Ugly Houses,'" *Pro Publica* (May 11, 2023), <https://www.propublica.org/article/ugly-truth-behind-we-buy-ugly-houses>.
 27. Okla. HB 1148 (eff. Nov. 1, 2021); 225 ILCS 454/1-10 (effective Aug. 9, 2019); Tex. Occu. Code Ann. 1101.0045; and Philadelphia City Council, Bill No. 200544 (Signed by the Mayor Dec. 1, 2020), available at <https://phila.legistar.com/LegislationDetail.aspx?ID=4662611&GUID=6938C87C-76E9-409A-9F06-EC1A0871E841&Options=ID%7cText%7c&Search=&FullText=1>.

28. New York Senate Bill 6577, signed into law on Nov. 14, 2023, available at <https://www.nysenate.gov/legislation/bills/2023/S6577>.
29. See Tex. Est. Code Ann. §§ 203.001-.002 (West); La. Code. Civ. Proc. arts. 2821–2822; Georgia Title Standards, State Bar of Georgia, <https://gabarsections.org/title-standards-2018/>.
30. Tex. Civ. Prac. & Rem. Code Ann. § 16.0265 (West).
31. N.Y. Real Prop. Acts. Law § 541 (McKinney).
32. Tex. Prop. Code Ann. §§ 29.002-29.004 (West).
33. Tex. Prop. Code Ann. § 29.0035 (West).
34. Gerry W. Beyer, *Transfer on Death Deeds Survey*, American College of Trust and Estate Counsel (revised July 21, 2022), https://www.actec.org/wp-content/uploads/2023/08/Transfer_on_Death_Deeds_Survey.pdf.
35. Dalia Ramirez, What Is a Lady Bird Deed? Pros, Cons and How It Works, Nerd Wallet (Mar. 3, 2023), <https://www.nerdwallet.com/article/investing/estate-planning/lady-bird-deed>.
36. Stephanie Emrick, “Transfer on Death Deeds: It is Time to Establish the Rules of the Game,” 70 Fla. L. Rev. 469 (Mar. 2018).
37. *Id.*
38. Miranda Riva, *Living Trust vs. Will: Key Differences*, National Council on Aging (Nov. 9, 2023), <https://www.ncoa.org/adviser/estate-planning/living-trust-vs-will/>.
39. *Id.*
40. *Id.*
41. See, e.g., *How Much Do Trusts Cost? (7 Costs Of Setting Up A Trust)*, The Hive Law, <https://www.thehivelaw.com/blog/how-much-do-trusts-cost-of-setting-up-a-trust/> (last visited Dec. 11, 2023).
42. Tex. Est. Code Ann. § 205.001 (West).
43. See, e.g., N.C. Gen. Stat. Ann. § 28A-28-6.
44. Ala. Code § 43-2-692.
45. Ga. Code Ann. § 53-2-40 (West).
46. Ala. Code § 43-2-692; *Summary Distribution*, Probate Court of Jefferson County, Alabama, <https://jeffcoprobatecourt.com/judicial/summary-distribution/> (last visited Dec. 11, 2023).
47. Fla. Stat. Ann. § 735.201 (West); *Understanding Probate: Summary Estate Administration (FL)*, Practical Law Practice Note w-014-8967.
48. Ga. Code Ann. § 53-2-40 (West).
49. Mich. Comp. Laws Ann. § 700.3982 (West).
50. *Probate: North Carolina*, Practical Law State Q&A w-011-4620; N.C. Gen. Stat. Ann. § 28A-28-6.
51. S.C. Code Ann. §§ 62-3-1203 to 62-3-1204.
52. Tex. Est. Code Ann. §§ 203.001-.002 (West).
53. Tex. Est. Code Ann. § 205.001 (West).



**National
Consumer Law
Center**

NATIONAL HEADQUARTERS

7 Winthrop Square, Boston, MA 02110
(617) 542-8010

NCLC.ORG

WASHINGTON OFFICE

Spanogle Institute for Consumer Advocacy
1001 Connecticut Ave, NW, Suite 510
Washington, DC 20036
(202) 452-6252