Receivership: Another Option for Partition of Heirs Property

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RECEIVERSHIP: ANOTHER OPTION FOR PARTITION OF HEIRS PROPERTY

Jesse J. Richardson, Jr.*

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I. INTRODUCTION

The Appalachian landscape contains an inordinate amount of land owned as “heirs property.” Heirs property is highly correlated with poverty. This correlation results, at least in part, from the high incidence of neglect and abandonment of heirs property. This Article discusses the nature of heirs property and the negative consequences that arise in communities in Appalachia with significant amounts of land held as heirs property, including the significant role that this form of ownership plays in Appalachian poverty. A modified form of receivership is introduced as a possible solution of some of these properties.

The terms “heirs property,” “heir property,” and “property in heirs” describe a form of ownership where at least some of the owners have acquired the property through inheritance, usually without probate and with clouds on title from unknown heirs. Heirs most often hold property as tenants in common, given the acquisition by inheritance. Heirs property exists across the United States but pervades as a form of ownership in poor African American, Native American and Appalachian communities. Heirs property raises two primary concerns: the vulnerability (or displacement) concern and the wealth (or efficiency) concern. The vulnerability concern involves the risk of being involuntarily stripped of property rights through a partition suit filed by another cotenant. The wealth concern refers to the fact that cotenants find it difficult, if not impossible, to access or utilize their

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2 Deaton, supra note 1, at 615–16.


4 Deaton et al., supra note 3, at 2345; see also Deaton, supra note 1.

5 Deaton, supra note 1, at 617; Deaton et al., supra note 3, at 2345.
share of the value of the property—by building a home, borrowing money against the property, or even by monetizing their interest.6

Policy responses to heirs property have arguably focused on the vulnerability concern and the threat of partition suits. In particular, the Uniform Partition of Heirs Property Act (“UPHPA”), approved by the National Conference of Commissioners on Uniform State Laws in 2010, creates a separate partition process for heirs property.7 The UPHPA, however, has been criticized for creating barriers to the filing of partition suits and the subsequent consolidation of the interests in the property.8

Finding adequate solutions for the problems presented by heirs property provides benefits for the owners of the property and for communities. Due to the issues presented by the nature of heirs property (the wealth concern), heirs property is likely to become abandoned and/or neglected.9 Abandoned and neglected properties present a myriad of concerns for communities in the United States.

Dissatisfied with common responses to abandoned and neglected properties, mainly code enforcement and eminent domain, several communities have turned to an old tool with some new twists: receivership.10 In receivership, a disinterested third party takes control of the management of the property and, in the case of vacant properties, either rehabilitates the property or conveys title to the property to an individual or entity with the means and desire to rehabilitate the property.11

In addition to increased use of receivership, some states have developed other innovations to address heirs property and the issues arising from heirs property. Namely, some states have adopted adverse possession12 and forced sale13 provisions.

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6 Deaton et al., supra note 3, at 2346.
9 Id. at 558.
However, most of these efforts, and particularly receivership, focus on urban communities. Different solutions may be needed for rural Appalachia.\textsuperscript{14} Low population densities and “limited local economies” combine to “make it more difficult to put problem property to productive reuse.”\textsuperscript{15} In addition, “(1) limited resources and economic activity in rural areas, (2) rural cultural tendencies, (3) limited planning and legal frameworks, and (4) the variability of rural issues” suggest that rural solutions may differ greatly from urban solutions.\textsuperscript{16}

This Article briefly describes heirs property and the issues that arise with heirs property. The Article then describes the link between abandoned properties and heirs property. Receivership in the abandoned property context is described, using examples from a few sample jurisdictions. Finally, related innovations to address heirs property are discussed. The discussion focuses on whether particular urban tools are appropriate for Appalachia. The Author concludes with recommendations for state and local government action in Appalachia to allow easier rehabilitation of heirs property so that the properties can contribute to the economies of their communities and to Appalachia as a whole.

Although some suggest that receivership may not be appropriate for rural areas,\textsuperscript{17} a close examination reveals that receivership seems particularly well-suited to resolve heirs property barriers to economic development. Given the prevalence of heirs property in Appalachia, receivership, while not a panacea, may be an important part of an Appalachian revitalization strategy.

\section{II. Heirs Property}

Heirs property presents a number of difficulties for the owners of the properties and for the communities in which the properties lie. The difficulties mostly inhere due to the nature of tenancy in common property, exacerbated by the fact that heirs property usually involves large numbers of landowners, and sometimes complex relationships among owners as family members. The vulnerability concern and the economic concern encapsulate the main issues that cause negative consequences for both the owners of heirs property and for the communities within which the properties lie.

\subsection{A. The Vulnerability Concern: Partition}

The vulnerability concern refers to the particular susceptibility of heirs property to partition suits, either filed by disgruntled cotenants or by third parties

\textsuperscript{15} \textit{Id.} at 519.
\textsuperscript{16} \textit{Id.} at 518–31.
\textsuperscript{17} \textit{Id.} at 516.
who have purchased an interest in the property expressly to partition.\textsuperscript{18} When the property is sold, the third party may acquire the property for a bargain price.

Partition refers to "the division of the land held in cotenancy into the cotenants' respective fractional shares."\textsuperscript{19} At least three types of partition exist: partition in kind, partition by sale, and partition by allotment.\textsuperscript{20} Partition in kind consists of physical division of the property among the cotenants.\textsuperscript{21} Although most state statutes express a preference for partition in kind, partition by sale is much more common in practice.\textsuperscript{22} Finally, some states allow partition by allotment, which transfers the property to one or more of the parties, with payments from those parties to the other cotenants to ensure a pro-rata distribution of the fair market value of the property.\textsuperscript{23}

Partition of heirs property, particularly by sale, is viewed as particularly harsh given that the property often holds sentimental value for the heirs. Many heirs wish to retain the property for its sentimental value, but other heirs want to escape the cotenancy and take the cash for their share. In heirs property situations, however, few of the heirs possess the financial means to buy out other heirs.\textsuperscript{24} When regulating heirs property, local governments should balance the emotional attachment to the property with the need to remedy neglected properties and the need to make the property economically productive.\textsuperscript{25}

The vulnerability concern can impact communities as well. When families that have lived on the land for decades are forcibly removed, for example, to make way for new development, the community may be transformed. In Appalachia, the displacement more than likely makes way for exploitation of natural resources,\textsuperscript{26} which may dramatically transform communities in different ways.


\textsuperscript{19} 7 POWELL ON REAL PROPERTY § 50.07[1] (2017) [hereinafter POWELL].

\textsuperscript{20} See generally Richardson, supra note 8.

\textsuperscript{21} POWELL, supra note 19, § 50.07[4][a].

\textsuperscript{22} Richardson, supra note 8, at 522–23.

\textsuperscript{23} Id. at 524.

\textsuperscript{24} Id. at 537.


B. The Wealth Concern

The wealth concern, like the vulnerability concern, involves issues that affect both the landowner and the community. The wealth concern centers on the way that the nature of heirs property makes management of the property problematic. No well-facilitated means exist for the cotenants to make decisions.\(^\text{27}\) Cotenants must reach agreement on how to manage and divide expenses.\(^\text{28}\) If one cotenant makes payments on behalf of others, no entitlement to contribution from other cotenants for taxes, maintenance or improvements exists unless an agreement provides for contribution.\(^\text{29}\) Consequently, heirs property proves susceptible to loss through tax sales.\(^\text{30}\)

The lack of management protocols leads to the description of heirs property as "dead capital."\(^\text{31}\) Banks are unlikely to lend money unless all cotenants sign off on the loan.\(^\text{32}\) Consequently, heirs property often is not improved or developed and "frequently falls into disrepair."\(^\text{33}\)

Heirs property has also been called an example of the tragedy of the anti-commons.\(^\text{34}\) The tragedy of the anti-commons results when multiple owners hold the right to exclude others, which results in a situation where no one owner may effectively use the property.\(^\text{35}\) The property is likely to be subject to underuse, which is also referred to as the tragedy of the anti-commons.\(^\text{36}\)

All of these issues lead to large numbers of heirs property parcels being abandoned and neglected. When the heirs cannot agree on how to use the property, the property often remains unused.\(^\text{37}\) The link between heirs property and abandoned property is clear and strong. Holding property in the form of heirs property leads to abandonment. As the number of abandoned and neglected


\(^{28}\) *Id.*

\(^{29}\) *Id.*

\(^{30}\) *Id.* at 154.

\(^{31}\) *Id.* at 156–58.

\(^{32}\) *Id.* at 156.

\(^{33}\) *Id.*

\(^{34}\) See Richardson, *supra* note 8, at 512.


\(^{36}\) *Id.* at 674–77.

Another Option for Partition of Heirs Property

properties increase, communities decay and economic development grinds to a halt.\textsuperscript{38}

When communities begin to address abandoned and neglected properties, heirs property poses barriers. Heirs property often includes large numbers of cotenants, some known and some unknown.\textsuperscript{39} Consequently, title is often unclear. Some owners may be known but cannot be located. In addition, even if all owners can be ascertained and found, some owners may be out-of-state and unresponsive. These out-of-state owners prove difficult or impossible to be subjected to \textit{in personam} jurisdiction for court actions to address the issues with the property.\textsuperscript{40} Other owners may intentionally avoid process.

In addition to the costs imposed on the owners of abandoned properties, abandoned properties impose large costs on the community by reducing property values and increasing social and economic burdens.\textsuperscript{41} Clouds on title cause a "paralysis in the market" that leads to "property disinvestment, abandonment and blight."\textsuperscript{42} The owner cannot sell the property, cannot get a loan, and sometimes cannot live on the property.\textsuperscript{43} Lack of repairs leads to code enforcement liens.\textsuperscript{44} Heirs disagree on paying property taxes, leading to liens and foreclosure.\textsuperscript{45} Abandoned properties create health hazards, make communities less safe, encourage criminal behavior, and make redevelopment difficult.\textsuperscript{46} The problems are not limited to particular regions of the country. For example, St. Louis, Philadelphia, Houston, Camden, New Jersey, and Durham, North Carolina, have all experienced problems with abandoned properties.\textsuperscript{47} Although rural areas also contain large amounts of blighted property, urban blight receives much more attention in literature and by legislatures.\textsuperscript{48}

\textsuperscript{38} W. VA. UNIV. LAND USE & SUSTAINABLE DEV. L. CLINIC, \textit{From Liability to Viability: A Legal Toolkit to Address Neglected Properties in West Virginia} 3 (2015), https://wvleap.wvu.edu/files/d/cf7aade6-10ca-4df7-b154-6956dbad3b85/from-liability-to-viability.pdf.

\textsuperscript{39} See Richardson, \textit{supra} note 8, at 537.

\textsuperscript{40} Barlow et al., \textit{supra} note 25, at 370–71.


\textsuperscript{42} Way, \textit{supra} note 27, at 160.

\textsuperscript{43} \textit{Id.}

\textsuperscript{44} \textit{Id.}

\textsuperscript{45} \textit{Id.} at 160–61.

\textsuperscript{46} Samsa, \textit{supra} note 41, at 196.

\textsuperscript{47} Way, \textit{supra} note 27, at 161.

\textsuperscript{48} Eisenberg, \textit{supra} note 14, at 531.
Other costs to communities include reduced tax revenues due to the underdevelopment of the property.\(^49\) When abandoned and neglected properties begin to appear in a neighborhood, the neighborhood often declines rapidly. Not coincidentally, a prevalence of heirs property in a community strongly correlates with poverty.\(^50\)

C. Abandoned and Neglected Properties Held as Heirs Property

Heirs property raises unique issues when addressing abandoned and neglected properties. For all properties, where costs of consolidating ownership and paying liens exceed the value of property, "these properties enter the legal equivalent of a black hole, resulting in permanent disuse."\(^51\) On the other hand, for most properties, where the cost of rehabilitation is less than value of property and a profit may be made, the private sector can step in and rehabilitate the property.

With heirs property, however, the inability to reach agreement between all cotenants, or inability to locate all cotenants, may prevent rehabilitation. In both of these cases, property owners may have no choice but to abandon the property.\(^52\) Consequently, the private sector fails to address heirs property in some cases where the market dictates that the property be rehabilitated and entered back into commerce.

D. Major Floods Highlight the Drawbacks of Heirs Property Ownership

Natural disasters represent another instance where heirs property prevents redevelopment of property, in turn hindering community development. Most recently, large flood events highlight these barriers.\(^53\) When natural disasters occur, government assistance is often not available to owners of heirs property due to unclear title.\(^54\) The lack of access to governmental assistance


\(^{51}\) Way, * supra* note 27, at 161. Sometimes, if the cost to rehabilitate is less than the value of property, the rehabilitation does not happen because of disagreements between landowners or other factors.

\(^{52}\) *Id.*

\(^{53}\) *Id.* Floods are prevalent in West Virginia and across rural Appalachia, but no literature exists to document the issues raised by heirs property in these contexts. The catastrophic impacts of Hurricane Katrina brought these issues to the forefront. *See generally* Alexander, * supra* note 1.

\(^{54}\) *Id.* at 157.
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leads to an inability to rebuild and revitalize communities. The same issue arises in so-called “shrinking cities” like Detroit, which face declining populations due to loss of employment centers.

Heirs property was a significant hindrance to marketable and insurable title in New Orleans after Hurricane Katrina.

It is impossible to determine how many estates in Louisiana will need to be opened and how many titles will need to be cleared, but one effect of Hurricane Katrina has been to highlight the local custom of not opening estates (called “successions”) unless needed to clear title for a sale. Now, following Hurricanes Katrina and Rita, clearing title is necessary to negotiate insurance settlement checks made payable to “owners” who have been dead for years; to sell property that cannot be rebuilt or repaired, or simply to move to higher ground; to refinance homes needing repairs but with no or inadequate insurance coverage; and to take advantage of federally financed recovery programs designed to compensate “owners” for up to $150,000 in uninsured losses. To further complicate matters, ownership of the home often is divided among several co-owners in multiple generations, requiring the opening of several estates to clear title.

III. POLICY APPROACHES TO ADDRESS HEIRS PROPERTY CONCERNS

Commentators propose a number of policy changes to address the vulnerability concern and the economic concern inherent in heirs property. This Part summarizes these policy proposals.

A. The Uniform Partition of Heirs Property Act

Among policy proposals, the Uniform Partition of Heirs Property Act ("UPHPA") figures most prominently. The UPHPA, approved by the National Conference of Commissioners on Uniform State Laws in 2010, creates a separate partition process for heirs property. Five major innovations appear in the

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55 Id. at 161–62.
56 Id. at 162.
57 Alexander, supra note 1, at 732.
60 Id.
UPHPA: (1) a formal definition of the term heirs property; (2) a cotenant buyout provision where non-petitioning heirs may buy out the petitioning heir; (3) a formalization of the standard for deciding whether partition by sale should be ordered that arguably mandates partition in kind in more cases than the prevailing standard by considering emotional attachment to the land; (4) a preference for a private sale over partition by sale, and a process by which such sale is conducted; and (5) a process for determining the fair market value of the property.61

The UPHPA arguably disproportionately focuses on the vulnerability concern and prevents subsequent consolidation of the interests in heirs property in many cases.62 The focus on the vulnerability concern may exacerbate the harmful effects of continued ownership of property as heirs property, both for individuals and for communities.63

B. Consolidation of Ownership

Aside from the UPHPA, a number of other policies to remedy the hardships resulting from heirs property have been proposed. A significant number of these proposals focus on consolidation of ownership interests. The UPHPA addresses consolidation through the buyout provisions, but other provisions of the Act discourage consolidation.64 Professor Heather K. Way generally advocates for consolidation of ownership interests.65 Note that many of these consolidation proposals also address the vulnerability concern by limiting the application of the policy to cotenants.66

One of her proposals urges to reform statutes of limitations in adverse possession actions to allow cotenants occupying heirs property to acquire good title in a shorter time period.67 Texas has adopted a statute easing acquisition of title requirements through adverse possession for cotenants of heirs property.68

She also proposes to apply marketable title acts to cotenants of heirs property in possession of the property.69 Permitting forced sale of heirs property to heirs paying the expenses of the property also promotes consolidation of title.70

61  Id. Some state laws contain provisions similar to the UPHPA with respect to (3), (4) and (5).
62  See, e.g., Richardson, supra note 8.
63  Id. at 509, 543, 563.
64  Id. at 507.
65  Way, supra note 27, at 154, 179.
66  Id. Of course, an outside party could purchase an interest in the property and qualify under some of these proposals. However, the context lends these proposals mostly to heirs in possession.
67  Id. at 179–84.
69  Way, supra note 27, at 181–82.
70  Id. at 182.
Texas has adopted a statute allowing for such sales where one tenant has been paying the property taxes.\(^{71}\)

Some policies could utilize tax foreclosure and nuisance abatement actions.\(^{72}\) The statute could have an intermediary acquire the property and facilitate the transfer of the property to the homeowner or occupant.\(^{73}\)

Government assistance could be tailored to clear heirs property issues.\(^{74}\) For example, United States Department of Agriculture ("USDA") and United States Department of Housing and Urban Development ("HUD") grants could be used to consolidate and clear title.\(^{75}\)

Professor Way urges policies to facilitate transfer of title to heirs and prevent further proliferation of heirs property.\(^{76}\) States should conduct legal audits to determine how accessible the title transfer system is to low income residents.\(^{77}\) Reformation of intestacy and testamentary laws could facilitate small estate administration, allow for affidavits of heirship, allow for oral transfer of property in exchange for the provision of valuable services, and require compulsory administration of estates within two years of death.\(^{78}\) Finally, reform of property recordkeeping systems could allow clerks’ offices to determine the heirs of deceased property owners.\(^{79}\)

\section*{C. Other Policy Proposals}

A variety of other policy proposals focus on issues other than consolidating title. To facilitate management of property held in heirs, co-tenancy agreements and limited liability companies could be used.\(^{80}\) Legal assistance can be provided to owners of heirs property through law school clinics, legal aid or nonprofits to draft these management agreements, provide estate planning services and conduct activities to clear title.\(^{81}\) Statutory default rules that mimic common management agreements could also be used.\(^{82}\)

\footnotesize
\begin{itemize}
\item \(^{71}\) TEX. PROP. CODE §§ 29.001–29.004 (West 2017).
\item \(^{72}\) Way, \textit{supra} note 27, at 182–83.
\item \(^{73}\) \textit{Id.} at 183. Note that eminent domain could operate in a similar fashion, with the government entity acting as the intermediary. Richardson, \textit{supra} note 37, at 825.
\item \(^{74}\) Way, \textit{supra} note 27, at 184.
\item \(^{75}\) \textit{Id.}
\item \(^{76}\) \textit{Id.} at 176.
\item \(^{77}\) \textit{Id.} at 177.
\item \(^{78}\) \textit{Id.} at 177–78.
\item \(^{79}\) \textit{Id.} at 179.
\item \(^{80}\) \textit{Id.} at 185–88.
\item \(^{81}\) \textit{Id.} at 188–91; Richardson, \textit{supra} note 37, at 824.
\item \(^{82}\) Richardson, \textit{supra} note 37, at 825.
\end{itemize}
Additional government agency requirements could minimize the amount of property held as heirs property and mitigate the negative implications of property held in that manner. For example, government agencies could require wills for financing of affordable housing purchases.\textsuperscript{83} Government housing programs could create more flexible title requirements\textsuperscript{84} and allow alternative forms of proof of ownership.

One commentator proposes that a Probate Court process be developed to provide for sale of abandoned heirs property with clear title in the purchaser.\textsuperscript{85} In addition, retaining the status quo with respect to partition may provide better results than the UPHPA by providing relief to those owners that wish to exit the tenancy in common.\textsuperscript{86}

Above all else, policies should educate and disseminate information to owners of heirs property.\textsuperscript{87} The more information and knowledge that the owners possess, the better the cotenants can achieve their individual and collective goals. Education and information also facilitate implementation of other policies to address heirs property.

IV. RECEIVERSHIP

The policies outlined in Part III of this Article appear, for the most part, to be directed specifically at heirs property and to rural areas in Appalachia. The proposal here to add another policy reform to the toolbox draws upon a process that originated in urban centers and without aforethought to heirs property: receivership. Despite the origins and purposes of receivership, the Author argues that this tool fortuitously provides a way to consolidate and clear title to heirs property, allowing the property to add again to local economic development. In addition, with some tailoring, this model can minimize the vulnerability concern by preferring present owners of the property. In many cases, however, the property will have to be transferred to benefit the community as a whole. In these cases, receivership can maximize economic return to the heirs.

A. Addressing Vacant and Neglected Properties

Government regulation creates barriers to efficient resolution of issues related to vacant and neglected properties.\textsuperscript{88} However, “low-capacity owners, information costs, and property fragmentation” also impede actions to

\textsuperscript{83} Id.
\textsuperscript{84} Way, supra note 27, at 189–90.
\textsuperscript{85} Barlow et al., supra note 25, at 386.
\textsuperscript{86} Richardson, supra note 8, at 568–69.
\textsuperscript{87} Richardson, supra note 37, at 825.
rehabilitate or demolish buildings that may benefit the individuals undertaking the action and the community at large.\textsuperscript{89} Traditional approaches to vacant and neglected properties focus on forcing the owner to internalize the cost and on coordinating investments.\textsuperscript{90} At the opposite end of the spectrum and usually after much delay and as a last resort, communities use the “nuclear option” (eminent domain).\textsuperscript{91}

At present, property tax foreclosure and code enforcement are principal means of addressing vacant and neglected properties.\textsuperscript{92} These methods are often slow and ineffective.\textsuperscript{93} For example, foreclosure on property tax liens in West Virginia can take three years or more.\textsuperscript{94} During this time, the property can become further neglected, sometimes to the point of no return.\textsuperscript{95} Although title may be cleared by the end of the process, the property may not be able to be redeveloped and the community continues to suffer during the process. Based on dissatisfaction with these standard ways to address vacant properties, some communities have adapted receivership proceedings to fill the void.

In addition to long delays in resolving title, tax liens in West Virginia and elsewhere are often purchased by investors with no intention of rehabilitating the property. These investors seek the interest on tax liens and further delay redevelopment of the property.

\textbf{B. A Brief History of Receivership}

Beginning in the mid-1960s, cities used statutory receivership authority to gain control of apartment buildings that were not properly maintained.\textsuperscript{96} The receiver under these statutes could make repairs, collect rents, and often borrow money.\textsuperscript{97} Some of the statutes provided for a lien for the expenses of the receiver that took priority over preexisting mortgages.\textsuperscript{98} A “second generation” of

\textsuperscript{89} Id.
\textsuperscript{90} Id. at 120.
\textsuperscript{91} Id.
\textsuperscript{92} Samsa, supra note 41, at 191.
\textsuperscript{93} Id.
\textsuperscript{95} Id. at 39.
\textsuperscript{96} James J. Kelly, Jr., Refreshing the Heart of the City: Vacant Building Receivership as a Tool for Neighborhood Revitalization and Community Empowerment, 13 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 210, 216 (2004).
\textsuperscript{97} Id.
\textsuperscript{98} Id.
receivership statutes allowed tenants and community groups to initiate these traditional receivership actions.99

C. Adapting Receivership to Abandoned and Neglected Properties: “Third-Generation” Receivership

Receivership has now entered a “third-generation,” as the tool is increasingly used to address vacant and neglected properties. “A receiver is a court appointed disinterested person charged with protecting property.”100 A receiver appointed in a vacant property case may also be charged with rehabilitating the property.101 Most statutes only allow local governments to file petitions to request a receiver.102 Allowing community groups or neighbors to file suit expands the potential for the tool by allowing other interested parties to assume some of the enforcement burden.103

Receivership proceedings focus on fixing the property as opposed to punishing the owner, and operate as in rem code enforcement.104 Although notice is required, the action may proceed without the presence of the owner.105 While owners can thwart in personam means of enforcement by making themselves difficult to find, in rem proceedings like receivership may move forward in those circumstances.106 Speculators intentionally avoid notice, and with heirs property, owners are difficult to identify and locate.107 Once identified, heirs property constitutes a barrier in addressing neglected properties.108 The owners of heirs property can be difficult to ascertain. If ascertained, the owners may be difficult to find. Receivership sales can also clear title to property.109

V. CASE STUDIES

In recent years, several states have passed enabling legislation to allow local governments to utilize receivership to address abandoned and neglected properties. At least one local government, the City of Baltimore, Maryland, has

99 Id.
100 Samsa, supra note 41, at 203.
101 Id.
102 Id.
103 Id.
104 Kelly, supra note 96, at 217.
105 Id. at 217–18.
106 Id. at 218.
107 Samsa, supra note 41, at 200.
108 Barlow et al., supra note 25, at 364.
109 Samsa, supra note 41, at 202.
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designed a receivership ordinance to address local abandoned properties.110 Baltimore possesses uniquely broad home rule authority allowing the city to pass such an ordinance without express permission from the state.111

Although these efforts most often expressly address “blighted,” “nuisance,” “abandoned” or “neglected” properties, a significant number of these properties are held as heirs property.112 In addition, receivership itself proves most useful to heirs property. Where properties can be profitably rehabilitated and ownership is clear, the private sector will rehabilitate the property.

However, the nature of heirs property, where unanimous consent of numerous owners, some unknown or unable to be found, is required, the private sector is unable to address the situation. Receivership removes the barriers presented. This Part examines the state provisions of Tennessee and Louisiana, along with the Baltimore ordinance.

A. Tennessee

The Tennessee Neighborhood Preservation Act113 ("TNPA") requires owners of residential property to maintain the exterior of the property and the lot “at a level which is no less than the community standards of the residential property in the area.”114 Any owner of residential property “affected” by a failure to maintain a property at community standards may bring an action for damages.115 In 2007, the Act was expanded to allow a “nonprofit corporation,” “interested party” or “neighbor” to bring a civil action under the Act to enforce any local building code, housing code, or health or safety code, inter alia.116

The plaintiff must show that the property constitutes a “public nuisance.”117 Public nuisance “means any building that is a menace to the public health, welfare, or safety; structurally unsafe, unsanitary, or not provided with adequate safe egress; that constitutes a fire hazard, dangerous to human life, or no longer fit and habitable; a nuisance as defined in [the Tennessee Code] . . . .”118

113 TENN. CODE ANN. §§ 13-6-101 to 13-6-107 (West 2017).
114 Id. § 13-6-103(a).
115 Id. § 13-6-104(a).
116 Id. § 13-6-106(a).
117 Id. § 13-6-106(e).
118 Id. § 13-6-102(9).
If the court finds a public nuisance, the owner must produce and carry out a development plan to abate the nuisance.119 If the owner fails to abate the nuisance, an “interested party” may carry out the development plan.120 Interested parties include an “owner, mortgagee, lien holder or person that possesses an interest of record” in the property.121

If all of these steps fail, the court may appoint a receiver to abate the nuisance.122 The receiver must be a municipal corporation or a nonprofit certified by the court.123 Nonprofit certification centers on the capacity of the nonprofit to carry out the duties of receiver.124 The receiver’s cost and reasonable compensation constitute a first lien on the property, superior even to state and local taxes so long as certain conditions are met.125 If the receiver’s lien is not satisfied within 180 days, the court may order the receiver to foreclose on the lien.126

The fact that the receiver must advance the money to rehabilitate the property and then may have to sell the property proves problematic.127 One commentator proposed to remedy this issue by amending the TNPA to allow the receiver to sell the property prior to making the property compliant.128 The receiver’s only duties would be to secure and maintain the property to prevent waste.129 This proposal also provides that purchasers must be vetted to ensure the purchaser has the will and the means to effectuate the remediation of the property.130

B. Louisiana

The Louisiana Housing Preservation Act131 (“LHPA”) was enacted in 2006 to provide a necessary “additional tool in order to access and invest funds

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119 Id. § 13-6-106(f).
120 Id. § 13-6-106(g).
121 Id. § 13-6-102(5).
122 Id. § 13-6-106(h).
123 Id. § 13-6-102(10)(A).
124 Id.
125 Id. § 13-6-106(k).
126 Id. § 13-6-106(l).
127 Barlow et al., supra note 25, at 374. The authors are proceeding to attempt such an amendment, which would make the statute similar to Baltimore’s ordinance. Telephone Interview with Daniel M. Schaffzin, Dir. of Experimental Learning and Assoc. Professor of Law, Univ. of Memphis (Jan. 16, 2018).
128 Barlow et al., supra note 25, at 374.
129 Id.
130 Id.
to renovate abandoned, blighted, and uninhabitable housing units within a judicially approved framework. . .

"Blighted housing property" means:

(a) any residential housing property for which environmental remediation is required by state law, rule, or regulation and the condition of which is found or declared by the public officer to be harmful to the health or welfare, including the economic welfare, of the residents of the local governmental subdivision wherein the residential property is located, (b) any residential housing property that, as of the effective date of this Chapter, had been determined to be a blighted property or an adjudicated property by the local governmental subdivision, (c) any residential housing property that (i) is offered by a party in interest for inclusion on a blighted housing properties list and (ii) the current condition of which is declared by the local governmental subdivision to be below minimum habitability standards and unfit for human habitation, occupancy, or use, or (d) any residential housing property that (i) has not been legally occupied for eighteen months prior to the time a public officer makes a determination that the property has been vacant for such eighteen-month period and (ii) has been determined to be a public nuisance by the local governmental subdivision, except no residential housing property in an area impacted by Hurricane Katrina or Hurricane Rita which was occupied as of August 28, 2005, shall be included if the owner is eligible for and receives assistance under the Road Home Housing Program.

The LHPA provides for the creation of a blighted housing property list. Local governments adopt ordinances directing a public office to establish the list of residential housing properties below minimum habitability standards. Owners of property added to the list are given notice and have the opportunity to challenge the listing.

Receivership may be established with or without the consent of the owner. If the owner consents, the local government serves notice on secured parties and a rehabilitation plan is prepared. Secured parties may request a copy of the rehabilitation plan and submit an alternate plan.

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132 Id. § 40:600:32(5).
133 Id. § 40:600:33(4).
134 Id. § 40:600:34.
135 Id. § 40:600:34.A.
136 Id. §§ 40:600:34.D–E.
137 Id. § 40:600:36.
138 Id. §§ 40:600:36.A(3)–(4).
A local government may also file an action to establish a receivership that transfers possession and control of the property to the local government or a "qualified rehabilitation entity." Local governments and the state housing agency designate qualified rehabilitation entities based on "demonstrated knowledge and substantial experience in the construction or rehabilitation of residential housing properties, the provision of affordable housing, the restoration of blighted properties . . . and is well qualified by virtue of its staff . . . and prior activities to carry out the rehabilitation of blighted residential housing properties." The Act provides a process for designation of qualified rehabilitation entities.

Supporting documents must be submitted with the filing and secured parties may object and submit alternate rehabilitation plans. If the court finds that the property is blighted and finds no acceptable alternate plan, the court shall authorize the receiver to take possession and implement the rehabilitation plan. The maximum receivership term is five years. Local governments first must pursue all possible grant opportunities, but then may borrow money, with the consent of the property owner. The court may grant a lien or security interest for the amount borrowed. The LHPA provides for a process by which the property owner may petition for reinstatement. The local government may petition for the sale of the property if the property owner fails to file for reinstatement.

C. Baltimore, Maryland

The City of Baltimore, Maryland, also provides for appointment of a receiver for "vacant structures." Vacant structure is defined as "an unoccupied structure that is: 1. unsafe or unfit for human habitation or other authorized use, or 2. a nuisance property." "Nuisance property" means:

139 Id. § 40:600:37.A.
140 Id. § 40:600:33(19).
141 Id. § 40:600:39.
142 Id. §§ 40:600:37.B–C.
143 Id. § 40:600:37.D(1).
144 Id. § 40:600:37.D(2).
145 Id. § 40:600:40.C.
146 Id.
147 Id. §§ 40:600:41–40:600:42.
148 Id. § 40:600:43.
150 Id. § 116.4.1.2.
Another Option for Partition of Heirs Property

1. an unoccupied structure for which 2 or more final, non-appellable Building Code, Fire Code, or Property Maintenance Code violations remained unabated for 10 days or more beyond the date by which the violation notice, citation, or order required the violation to be corrected; or 2. the exterior premises of an unoccupied structure for which, at any time within the preceding 12 months, on 6 or more separate occasions, final, no-longer appealable violation notices, citations, or orders were served to correct violations of Property Maintenance Code, § 305 {"Exterior Sanitary Maintenance – General"} or § 306 {"Exterior Sanitary Maintenance – Trash, Garbage, and Debris"}.151

The building official may petition for the appointment of a receiver to rehabilitate or demolish a vacant property, or to sell the property to a “qualified buyer.” In addition to the owner, judgment creditors and lienholders are given notice of the proceeding and may intervene.154

The court may appoint an owner or another party with an interest in the property to rehabilitate or demolish the building if the party demonstrates the ability to complete the task, agrees to comply with a specific schedule, and posts bond in an amount determined by the court. Lacking an appropriate person with an interest in the property, the court appoints a receiver. The receiver holds broad authority to borrow money, contract for labor and supplies, and undertake the necessary tasks to rehabilitate or demolish the property or to sell the property. However, the receiver may only sell to buyers “demonstrat[ing] the ability and experience to rehabilitate the property within a reasonable time.”

All costs and fees incurred by the receiver constitute a lien against the property and hold priority over all other liens except for taxes and other government liens. The receiver’s lien may be foreclosed at any time following notice to the public and interested parties. In lieu of foreclosure, and if the property has been rehabilitated, the owner may pay all of the receiver’s costs and

151 Id. § 116.4.1.3.
152 Id. § 121.2.
153 Id. § 121.6.
154 Id. § 121.6.1.
155 Id. § 121.7.
156 Id. § 121.8.
157 Id. § 121.9.
158 Id. § 121.10.
159 Id. § 121.10.2.
160 Id. § 121.13.
161 Id. § 121.13.1.
fees and retain ownership or may transfer ownership of the property to the receiver or a third party for fair market value.162

The Baltimore provision formerly allowed the city to designate a nonprofit organization to file a petition for a receiver.163 That provision no longer exists. The Baltimore receivership provisions are distinguished by the ability of the receiver to foreclose on its lien before any rehabilitation and to sell the property to a qualified buyer.164 This ability, along with other provisions in the receivership action, amounts to the creation of a “privatized nuisance abatement” option.165

Privatized nuisance abatement offers the promise of effectively addressing vacant properties, along with engaging the public.166 Community groups and private developers often take on the task of redevelopment, easing the financial and oversight burdens of local government.167

The criteria for the issuance of a violation notice “are readily observable by a passerby and can be documented easily by photographs.”168 The Baltimore provisions “provide[] . . . a clear and practical definition of the nuisance to be addressed, [so] a petitioner in a vacant building receivership case can prepare for trial with a confident ease.”169 Requiring qualified purchasers also makes the Baltimore provisions more effective in practice.170

VI. RECEIVERSHIP AS A SOLUTION TO ADDRESS HEIRS PROPERTY IN APPALACHIA

Since the characteristics of heirs property often result in the property being underutilized, heirs property makes up a significant portion of the property that becomes abandoned and neglected. Many abandoned and neglected properties cannot be rehabilitated cost effectively. For those properties that can be rehabilitated, the private sector often can step in and provide a solution. However, heirs property remains locked in a dysfunctional form of ownership that prevents rehabilitation.

Receivership can unlock heirs property. The tool also resembles some of the other proposed policy solutions (forced sales) to address heirs property issues (consolidation of ownership) and addresses some of the issues inherent in the

162 Id.
163 Kelly, supra note 88, at 216.
164 Id. at 217.
165 Id. at 218–19.
166 Samsa, supra note 41, at 191–92.
167 Id. at 192.
168 BALT., MD., INT’L BUILDING CODE § 115.4.2 (2015); Kelly, supra note 96, at 219.
169 Kelly, supra note 96, at 219.
170 Kelly, supra note 88, at 133–34.
wealth concern (fractionated land ownership, clearing of title, maximizing returns to the property). Although receivership implicates the vulnerability concern in some cases by forcing some cotenants out of ownership, some cotenants would prefer to "escape" the "trap" of tenancy in common.\(^{171}\)

In addition, receivership statutes can be adapted to give the present owners every opportunity to retain the property. In the end, however, the vulnerability concern may have to yield to the greater good of community and allow the property to be utilized for productive purposes. In these cases, the owners would be compensated as closely to fair market value as possible, taking into account the costs to rehabilitate the property.

Receivership uniquely applies to heirs property. Although receivership can provide privatized nuisance abatement in many cases, that is not so with heirs property. For example, the University of Memphis Neighborhood Preservation Clinic has, as of 2017, litigated over 1,600 cases under the Act.\(^{172}\) A large number of properties in Memphis cannot be developed profitably.\(^{173}\) The vast majority of those properties that can be redeveloped profitably avoid appointment of a receiver when the owner either redevelops the property or sells the property to a developer who redevelops the property.\(^{174}\) Heirs property is the exception.\(^{175}\) Those properties often require the appointment of a receiver to break down the barriers to redevelopment by forcing sale of the property and consolidating title.\(^{176}\)

Even given these benefits, one may fairly question whether receivership, to this date used in urban areas, could operate effectively in rural Appalachia.\(^{177}\) While the lack of resources in Appalachia suggests that receivership may be difficult to implement,\(^{178}\) allowing the market and private actors to engage would broaden the asset base and increase the chances that properties could be rehabilitated. Receivership is distinguishable from land banks in that respect.\(^{179}\)

In addition, the nature of abandoned and neglected properties in Appalachia resemble that of major cities. While the properties will be more scattered in general, a large number cannot be economically redeveloped. Properties that can be economically developed will generally be redeveloped by the private sector. However, heirs property, prevalent in Appalachia, needs

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\(^{171}\) See, e.g., Richardson, supra note 8.

\(^{172}\) Barlow et al., supra note 25, at 354.

\(^{173}\) Telephone Interview with Daniel M. Schaffzin, supra note 127.

\(^{174}\) Id.

\(^{175}\) Id.

\(^{176}\) Id.

\(^{177}\) Eisenberg, supra note 14, at 529.

\(^{178}\) Id.

\(^{179}\) See Eisenberg, supra note 14, at 529–31 (discussion of land banks to address rural blight).
additional efforts to unlock the property from the form of ownership. Receivership can provide this key to unlock heirs property in Appalachia.

**VII. OTHER STATE PROVISIONS ADDRESSING HEIRS PROPERTY**

**A. Adverse Possession**

1. Louisiana

Louisiana also provides a process for adversely possessing blighted property after just three years. The statute also dispenses with the requirement that title or possession be in good faith. The 12 requirements include a mandate that any improvements on the property either be demolished or have certificates of occupancy issued within 270 calendar days from taking possession. However, no structure may be demolished unless the hearing officer finds the structure to be a public nuisance and all required permits are acquired.

If the possessor meets the requirements of the statute, the possessor is not liable for any tortious acts related to possession of the property, including trespass and demolition of improvements. If the owner successfully files suit to regain possession within the three-year adverse possession period, the owner must reimburse the possessor for all monies advanced by the possessor, including attorneys' fees and costs, filing fees, postage and photocopies, along with interest at the highest allowable rate.

Additionally, the monies advanced, including accrued interest, are automatically secured by a first lien on the property superior even to prior recorded mortgages, liens and security interests. If the possessor acquires title to the property after the three-year period, all liens, mortgages and encumbrances identified by the possessor at the outset become unenforceable and have no effect as to the property or the possessor.

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181 Id. § 9:5633.A.
182 Id. § 9:5633.A(12).
183 Id. § 9:5633.C.
184 Id. § 9:5633.D.
185 Id. § 9:5633.E.
186 Id. § 9:5633.F.
187 Id. § 9:5633.G.
2. Texas

Texas also has altered the adverse possession rules, but in order to specifically address heirs property.\(^{188}\) Adverse possession law generally does not allow tenants in common to acquire title by adverse possession against other tenants in common unless ouster occurs.\(^{189}\) The Texas statute, passed in 2017, alters this rule and allows adverse possession if the cotenant exclusively occupies the property, pays the real property taxes and meets other requirements.\(^{190}\)

B. Texas Forced Sale Provision

A Texas provision provides for a forced sale of property in certain circumstances where one co-owner has paid the property taxes on behalf of the other co-owners.\(^{191}\) The provisions apply only to property received as the result of the death of another person (including by will or intestacy) or property held in part by certain nonprofits that promote affordable or low income housing.\(^{192}\)

The petitioning co-owner must have paid the property tax share of the other co-owner(s) for at least three of the past five years (two of the last three years for nonprofit).\(^{193}\) In addition, the non-paying co-owner cannot have reimbursed the paying co-owner for more than one-half of the property taxes paid on their behalf.\(^{194}\) The paying co-owner must also make demand for reimbursement prior to filing the petition.\(^{195}\)

If the elements are proven at a hearing, the court orders sale of the property to the co-owner that paid the property taxes.\(^{196}\) The purchase price consists of the fair market value of the non-paying co-owner's share as determined by an appraiser, less the remaining amount of pro-rata property taxes owed by the non-paying co-owner.\(^{197}\)


\(^{189}\) See id.


\(^{192}\) Id. § 29.001.

\(^{193}\) Id. § 29.002(a).

\(^{194}\) Id.

\(^{195}\) Id. § 29.003(1).

\(^{196}\) Id. § 29.004.

\(^{197}\) Id.
Communities have traditionally relied on code enforcement to address vacant properties. If code enforcement fails, the drastic alternative is eminent domain. *In rem* foreclosure proceedings, in this case through receivership proceedings, represent a middle ground between these two options.\(^ {198}\) Instead of punishing the owner, these tools amount to a "price-based approach that reveals the property’s potential value and the costs of realizing" the value.\(^ {199}\) "By putting delinquent owners in competition with other potential rehabilitators, this code-based foreclosure method makes sure that those properties that can be fixed up are."\(^ {200}\)

As an *in rem* proceeding, receiverships address the difficulty of serving process on the owners of abandoned properties.\(^ {201}\) The focus of *in rem* proceedings centers on addressing the neglect and transferring ownership, instead of the owner’s culpability in neglecting the property.\(^ {202}\)

Employed to address vacant properties, receivership incidentally addresses heirs property, since heirs property make up a substantial proportion of vacant properties. Several states and at least one local government have adopted receivership provisions both to enhance local government options and to allow private actors to supplement governmental actions.\(^ {203}\) A review of these statutes reveals common elements, including definitions (usually broad) of eligible properties, broad standing to sue, the ability to limit purchasers to those that have the ability and motivation to redevelop the property, the ability of the receiver to sell the property before rehabilitation, the ability to appoint nontraditional receivers, such as nonprofits, that are qualified to rehabilitate the property, super-priority receiver liens for expenses and charges, and foreclosure sales on the liens that clear title.

To be effective, the liens foreclosed upon must be superior to all other liens (a so-called "super-priority lien").\(^ {204}\) Vacant property receivership sales and property tax foreclosure sales generally use super-priority liens.\(^ {205}\)

Property tax foreclosure sales, however, often involve long redemption periods, a process that must allow speculators and others to bid on the property or lien, and periods of time where the public and involved parties may be unsure of ownership and control over the property. Receiverships avoid these issues and

\(^{198}\) Kelly, *supra* note 88, at 123.

\(^{199}\) *Id.*

\(^{200}\) *Id.*

\(^{201}\) Samsa, *supra* note 41, at 205.

\(^{202}\) *Id.*

\(^{203}\) *Id.*

\(^{204}\) *Id.*

\(^{205}\) *Id.*
allow state legislatures (and local governments in some cases) to tailor remedies that more efficiently and effectively remedy the problems.

In addition, where a neighborhood contains multiple vacant and/or neglected properties, rehabilitating one or two of the properties provides little help to the neighborhood and likely fails to be profitable for the rehabilitator. For significant neighborhood improvement, and to make rehabilitation of properties profitable, a number of properties must be involved. Eminent domain has been used to effect large scale redevelopment in the past, but tax or receivership foreclosure offers more benefits.

The Baltimore process may offer the most promise. That process allows sale of the property before the rehabilitation. The sale to a purchaser with the means and desire to rehabilitate becomes part of the remediation strategy. Unless the property needs no rehabilitation, the sale to qualified buyers only proves important. Property tax sales often include bidders that lack the desire and ability to remedy the issues and are often merely speculators. Limiting sales to qualified buyers also serves to have an independent assessment of which properties can realistically and profitably be rehabilitated.

To be most effective, receivership statutes should include “a broad definition of abandonment as nuisance per se and allow for in rem jurisdiction over the property.” The receiver’s lien must be given super-priority. The receiver’s sale must clear title. In addition, community involvement, through Community Development Corporations or otherwise, can augment local government resources and allow for broader enforcement. Note, however, that, like eminent domain, this tool may be used to exploit vulnerable communities. Steps must be taken to protect vulnerable communities from abuse of broad enforcement.

Tailoring these statutes to allow broader application to heirs property would entail a definition that would include property with unclear title. The known owners could submit to receiver authority by majority vote, as opposed to the present requirement of unanimity.

206 Kelly, supra note 88, at 128.
207 Id. at 129.
208 Id.
209 Abello, supra note 112.
210 Id. at 133.
211 Id.
212 Id. at 133–34.
213 Id. at 134.
214 Samsa, supra note 41, at 203.
215 Id. at 207–08.
216 Id. at 210.
217 Id. at 210–13.
Receiver authority could include the authority to sell the property to a governmental or nonprofit agency to clear title and then return the property to one or more of the heirs. This provision would resemble the forced sale provisions in Texas.

In addition, where the heirs property is potentially income producing, like forestal property or oil and gas property, a receiver, upon a majority vote of the heirs, could be appointed by the court to manage the property. The receiver maximizes the income from the property and holds the net receipts in trust for the heirs. Heirs that wish to retain the property can use their shares of the receipts to buy out other heirs. This option offers the potential to give all heirs what they wish from the property, whether the heirs want to retain the property or cash out.

Alternatively, partition statutes could be reformed to allow the commissioner in partition actions to act in essence as a receiver, carrying out many of these same functions. A majority vote of the heirs would be required to allow the commissioner to manage the property substantively. For oil and gas properties, receivership or expanded commissioner responsibilities could serve as alternatives to forced pooling provisions.

Legislatures in Appalachia should enact broad receivership statutes as well as other provisions to allow owners of heirs property to clear title and consolidate ownership. Removing these barriers facilitate economic development and allow non-governmental actors to augment governmental efforts to strengthen communities.