

AFRICAN-AMERICAN RURAL LAND RETENTION

a paper by

The Federation of Southern Cooperatives/Land Assistance Fund

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I. Introduction

The purpose of this paper is to highlight the history of rural land ownership among African-Americans in the South's "Black Belt" region,¹ and to discuss those factors that have contributed to the rapid loss of land ownership in this population from the early 20th century to the present. This paper will also highlight the outreach efforts of the Federation of Southern Cooperatives/Land Assistance Fund (the "Federation") which have been designed to not only preserve land ownership among this targeted population, but to increase awareness of the social, political, economic, and cultural significance of rural land ownership.

This paper will focus on African-American land tenure as it relates to both farm and non-farm rural landowners. Although this paper focuses on Georgia law, the Federation has found that the principles highlighted in this paper are applicable in other states.

A. African-American Land Tenure: Post-Civil War to present

There is documentation of isolated acquisition of land prior to the end of the Civil War. In addition to evidence of voluntary gifting of property to African-Americans, there is also evidence as early as 1862 of Union generals subdividing some plantations of Confederate leaders for small farm settlements by African-Americans (Reynolds 2). Freedmen and women desiring to become independent farmers, acquired land through a variety of means that ranged from tenant farming with an option to buy leased tracts to land redistribution efforts by the federal government (Reynolds 2,3). Through all these means of land acquisition, agricultural production was central. It is estimated that land ownership in the 19th century steadily increased from 3 million acres in 1875 to 12 million acres by the turn of the century (Aptheker, 105). The Census of Agriculture shows that land ownership by African-American farmers

¹ The largest concentration of African-American farmers is in the "Southern Black Belt." The term "Black Belt" refers to the color of the rich soil in counties that runs east and west through the several states in the south. The region stretches through parts of Virginia, the Carolinas, Georgia, Florida, Alabama, Mississippi, Tennessee, Louisiana, Arkansas, and Texas.

peaked in 1910 at 16-19 million acres (Gilbert 55).² By 1920, there were more than 925,000 Black farmers and 1 in 4 Black farmers owned the land they worked (Census of Agriculture).

From the 1920s to now, African-American land holdings have declined at a rate that far exceeds loss among other ethnic groups. There has been an actual rise in land ownership among Whites. According to the 1997 Agriculture Census reports, African-American farmers own 1.5 million acres (Gilbert55). Comparing the rate of African-American farmland loss to other groups, they have lost fifty-three percent (53%) compared to 28.8% for other ethnic groups, while their White counterparts have experienced steady growth. (Civil Rights Action Team). Further, the number of independent farmers has declined sharply, from 925,000 African-American farmers in 1920 to 18,625 in 1997, and this number continues to steadily decline (Census of Agriculture). In fact, non-farm operators own a majority of the rural land owned by African-Americans (Gilbert 61). The 1999 Agricultural Economics and Land Ownership Survey assessed rural land ownership among a number of ethnic groups, looking at both farmland and rural land owned by non-farm operators. This study found that there are 68,056 African-American landowners, of which two-thirds are non-farm operators (Gilbert 61). The survey also found that African-Americans - farm operators and non-operators - collectively own close to 7.8 million acres of rural land, which is less than 1% of all private rural land owned in the United States (Gilbert 56).

B. What is the Federation of Southern Cooperatives/Land Assistance Fund?

The Federation of Southern Cooperatives/Land Assistance Fund (“Federation”) was established in 1967. It is a non-profit organization that assists farmers and rural landowners on a grassroots level primarily in the Southeast region of the United States. The organization’s services are targeted towards small, limited resource farmers, and rural landowners, however, its membership is made up primarily of African-Americans. The organization’s vision is to create “sustainable rural communities that are supported by a network of farmers, cooperatives and credit unions, which are based on local control and leadership and are centered around advocacy, land-based economic development and wealth creation.”

The Federation has offices located in four states – Alabama, Georgia, Mississippi, and South Carolina – but its services extend beyond its primary target area to include Florida, Texas, Arkansas, Tennessee, and Kentucky, to name a few.

In furtherance of its vision, the Federation provides an array of comprehensive programs focused on cooperative economic development, sustainable agriculture, land retention and acquisition, marketing, business and credit union development, youth development, affordable housing, advocacy and policy development, and international cooperative development.

II. Causes of African-American Land Loss

African-American land loss can be attributed to several factors. The Emergency Land Fund, which merged with the Federation in 1984, was commissioned by the United States Senate to conduct an extensive study on African-American land loss entitled “ The Impact of Heir Property on Black Rural Land Tenure in the Southeastern Region of the United States.” Through this study, coupled with the Federation’s 35 year history of outreach to African-American rural populations throughout the Southeast, the Federation has identified partition sale and voluntary sale as the primary causes of African-American land loss – partition sale, voluntary sale – both of which stem from ownership of intestate property, or *heir property*.³

A. Dissolution of Interests Through Intestacy

Distribution of real property by intestate succession is often the common impetus behind rural land loss for African-Americans. Georgia’s laws on descent and distribution provide that intestate property to which there are multiple heirs-at-law, be held jointly in a tenancy in common ownership

³ See Emergency Land Fund. *The Impact of Heir Property on Black Rural Land Tenure in the Southeastern Region of the United States*. Submitted by the Emergency Land Fund, Inc./ submitted to The United States Department of Agriculture/Farmers Home Administration (1984). In a 1984 study conducted by the Emergency Land Fund, now the Land Assistance Fund component of the Federation, conducted a study on the impact of heir property on African-American land tenure. It ranked the frequency of occurrence of method by which parcels were conveyed in the following order: voluntary sales (51%), gift (15%), partition sale (12%), mortgage foreclosure (9%), adverse possession (8%), and tax sale (5%).

arrangement. See O.C.G.A. §44-6-120.⁴ A tenancy in common is created “whenever two or more persons are entitled to the simultaneous possession of any property.” See O.C.G.A. §44-6-120. Tenants in common each have an “undivided, fractional” interest in property. This means that while each tenant in common, or heir, technically has their own distinct and several title to the land, an element of unity in ownership exists because they do not have deeds to that portion of the land that corresponds to their fractional interest. See *Deal v. State*, 153 S.E. 537 (1914); *Glover v. Ware*, 510 S.E.2d 895 (1999)(“An undivided interest in real property may be created into as many fractional shares of the whole property as the grantor desires, because it is a fractional ownership interest in the whole and not a division of the land into discrete parts.”). Intestate real property that is perpetually passed down generation to generation by intestate succession is commonly referred to as *heir property*.

When intestate succession of prior interests in real property is perpetuated through multiple generations, it can result in a large number of descendants, or heirs, who are entitled to often miniscule interests in land as there is no survivorship component in a tenancy in common as there exists in a joint tenancy. Further, Georgia’s laws of descent and distribution do not provide for per capita distribution of interests in property regardless of degree of kinship to the deceased, thus, creating the potential for not only numerous, but also unequal interests in property. See *Anderson v. Lucky*, 89 S.E. 631 (1916) (“A tenancy in common is created wherever two or more persons . . . are entitled to the possession simultaneously of any property . . . [to which they may] have unequal shares of the property . . .”). Heir property that has numerous interest holders is commonly called *fractional heir property*.

What makes the impact of tenancies in common so devastating to African-Americans is the extent of fractional ownership interests in heir property. Because many African-American families have owned property since the late 19th and early 20th centuries, African-American rural properties can have hundreds

⁴ Unless otherwise stipulated, a tenancy in common is created when two or more individuals are entitled to the simultaneous possession of any property. Under Georgia’s rules of inheritance, O.C.G.A. §53-2-1, heirs to a decedent’s intestate estate are entitled to share in the estate; thus, heirs become tenants in common to real property in a decedent’s estate.

of co-owners sharing a miniscule interest in the land. When the number of fractional, undivided interests render land incapable of physical division (partition), it is called *highly fractional heir property*.

Fractional heir property creates obstacles to proper management of real property that can result in loss. With such property, many interest holders are dispersed across the country, creating the *unlocatable/unknown heir syndrome*.⁵ This syndrome is created when the descendants of the original owner of the subject properties are so dispersed, or for an array of reasons, do not know or communicate with each other, that collective management of heir property is difficult, if not impossible. This syndrome makes it difficult, if not impossible for interest holders to work together, leaving property management decisions in the hands of one heir, or a small number of heirs. This syndrome is also a major contributor to varying values attached to the land among the extended families of the original landowner. This can also create obstacles that further hinder the preservation of family heir property. In the Federation's experience working with landowners, there has been some correlation between the value placed on heir property and the proximity of heirs to the subject property. There have, however been no studies conducted to determine whether there is a direct correlation between proximity to land and the value attached to it by its interest holder(s), and how it relates to heirs' interests in retaining heir property ownership "in the family" or in self.

1. The Nature of Heir Property: Georgia's Statute on Tenancies in Common.

Georgia law on tenancies in common, as many states' laws, is not structured to hold co-owners individually accountable for mismanagement, or lack of management, of their land. Nor is the law adequately designed to protect those co-owners who make investments in the management and preservation of heir property in their family.

a. Sale/Gift of Interest. Unlike property held under a joint tenancy, joint interests held by interest holders of heir property are separate and distinct. Therefore, public policy prohibiting

⁵ The term, *unlocatable/unknown heir syndrome*, is derived from the term *unlocatable heir syndrome* found in the 1984 Emergency Land Fund study entitled, "The Impact of Heir Property on Black Rural Land Tenure in the

restraints against alienation apply to tenants in common; thus, they may sell or gift their interest to whomever they choose without notifying the other co-owners, and without their consent. See O.C.G.A. §44-6-120.⁶ They can also determine the final disposition of their interest by creating a will. This can expose the property to loss for all interest holders, especially where the co-owner sells their interest to someone outside the family.

Many heirs, particularly those who pay the property taxes and expend money for other upkeep and land preservation tasks, erroneously believe that their investment gives them superior title, or superior rights, to the land. Further, they assume that all co-tenants, either under a legally imposed obligation or as a courtesy, will notify them of their desire to sell their fractional interest or greater to a third party. On the contrary, their efforts, while beneficial to maintain ownership of the land among family, immediate and extended, does not prevent co-tenants from selling their interests to those outside the family, such as land speculators, which may be an impetus for loss (See Section 1, “Partition Sale”).

b. Possession. One of the rights co-tenants have is the right to possess jointly owned property. In Georgia, as in most states, although every tenant in common may possess the property, they are limited to a portion of the property that reflects his/her fractional ownership interest. See GA Code § 44-6-121(a). In the event any co-tenant possesses a disproportionate share of the property, the remedy available to the other co-tenants is the option to apply for an accounting or partition. *Daniel v. Daniel*, 28 S.E. 167 (1897). Though these options are available to all co-tenants, the likelihood of enforcement is uncertain. Again, the characteristics of heir property open the property up to mismanagement, or lack thereof, which often includes the enforcement of co-tenant rights against other co-tenants.

Georgia law does provide some protection to distant heirs who are not in a position to periodically monitor the land and their interest thereof from a co-tenant(s) who wish to acquire sole

Southeaster Region of the United States.” The Emergency Land Fund is now the Land Assistance Fund component of the Federation of Southern Cooperatives.

⁶ See *Hasty v. Wilson*, 158 S.E.2d 915 (1967)(“Title held by tenants in common is technically several rather than joint.”).

possession. Generally, a co-tenant cannot claim sole ownership of the whole intestate property under adverse possession unless there has been acts constituting ouster, and he/she claims exclusive possession in addition to the usual elements of adverse possession. See *Carter v. Becton*, 300 S.E.2d 152 (1983). To constitute an ouster, the co-tenant must demonstrate “outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as by their own import to impart information and give notice to the co-tenants that an adverse possession and an actual disseizin are intended to be asserted against them. See *Hardin v. Council*, 38 S.E.2d 549 (1946). Often, there will not be overt acts of exclusive possession by interest holders, however, management of heir property (i.e. payment of taxes, utilization of land for farming and other improvements, etc.) will rest in the hands of one or a small number of heirs. Contrary to what many heir property interest holders believe, management of the property alone does not bestow upon them “superior title,” or sole title, in the whole, as those acts alone, are insufficient to constitute an ouster. See O.C.G.A. §44-6-123. Further, since ouster must be made against all co-tenants, nothing short of mailing an intent to exercise exclusive ownership to all heirs would be sufficient, regardless of investments made in the land. See *Wren v. Wren*, 36 S.E.2d 77 (1945). Further, the unlocatable/unknown heir syndrome renders it difficult, if not impossible, to put all interest holders on notice of an heir’s desire to adversely possess heir property.

c. Sharing of Rents & Profits Generated from the Property. If an interest holder in heir property chooses to put the land to some profitable use (e.g. rent, timber harvest & sale), or takes something of “essential value” from the property (e.g. timber, minerals), he/she must equitably divide those rents and profits with the other interest holders in the land. Further, he/she will be liable to the other co-tenants for any waste or damage to the property. See GA Code § 44-6-121(a).

Co-tenants do have rights to protect their interests, including their right to share in profits gained from land use initiated by themselves or another co-tenant. See *Slade v. Ridman Resources, Inc.*, 230 S.E.2d 284 (1976) (“Co-tenants have the right to share in the profits of the common property, according to their respective interests”); *Rugh v. Moore*, 62 S.E.2d 153 (1950) (“Co-tenant may rent the property so long as he does not receive more than his share of the rents and profits; otherwise, he will be liable to his

co-tenant.”). This right, however, is often not enforced by heirs, particularly non-resident heirs, either due to lack of education on their rights as co-tenants, or to unawareness of abusive practices exercised by other co-tenants or non-interest holders who seek to gain by retaining profits earned from rents, timber sales, and other activities on the subject property.

d. The “Freerider Problem”. Some co-tenants of heir property can be victims of the *freerider problem*. This is a problem that is not unique to African-American families. With many interest holders in heir property residing far from the land and each other, the expense of managing the land often rests in the hands of one, or a few of the heirs. Those heirs who are unable, or unwilling, to assist in the upkeep of the land (“*disinterested heirs*”) thereby benefit from the investment of time, money, and other resources made by those heirs seeking to preserve the land, otherwise known as the *freerider problem*.

As a remedy to the freerider problem, those who invest more than their pro rata share of the expense to manage the property (i.e. ad valorem tax payments) may file an accounting to recoup the excess, but this usually occurs after there has been a partition sale. See *Turnbull v. Forster*, 43 S.E. 42 (1902)(“In the event of partition, those co-tenants who make investments in the land for improvements that are in excess of the rents, they are entitled to an accounting from their co-tenants, and to be reimbursed the amount properly found to be due them.”). The challenge to exercising this right is determining who are all the interest holders and what fractional interest they have in the property to determine for what amount the interested heirs are filing an accounting. This challenge may be circumvented in the event of a partition sale of the property, whereby the interested heirs may obtain the monetary equivalent of the disproportionate share of the upkeep expenses of the property. See O.C.G.A. §44-6-168.⁷ Thus, often filing an accounting will either open a can of worms, including heirship determination petition(s), quiet title actions, disinterested heirs seeking the sale of the property (see “Partition Sale” section) that may serve to put the efforts of land retention by interested heirs at risk.

⁷ *Barker v. Baker*, 250 S.E.2d 436 (1978). “ In a suit for equitable partition, sale of property and satisfaction of all liens, each party is entitled to have his accounts and claims adjusted by the court after sale and before distribution of proceeds. In so doing, the court should consider expenditures of either party for improvements, taxes, or other expenses and income received by either party from . . . rental [of the property].”

The accounting remedy available to interested heirs, though it is designed to provide monetary retribution to those co-tenants who invest a disproportionate share of their resources in the land, it does not consider that those heirs may prefer to retain their fractional interest, or greater, in the land.

2. Partition Sale of Heir Property

Given the characteristics of intestate real property, the mismanagement and lack of management concerns inherent with heir property can expose its owners to the threat of loss. The option of partition is available to co-tenants where no provision is made in a will or other type of estate plan that outlines how land is to be divided among all co-owners, or where property is subject to intestate succession. See O.C.G.A. §44-6-160; *Billings v. Billings*, 250 S.E.2d 480 (1978); *Paris v. Clay*, 158 S.E.2d 377 (1967); *Hill v. McCandless*, 32 S.E.2d 774 (1945). There are two types of partition – partition-in-kind and partition sale. A partition-in-kind is the physical division of jointly held property. A partition sale is defined as the “forced sale of property.”

Tenants in common are entitled to petition for either statutory or equitable partition. See *Billings*, 250 S.E.2d 480 (1978). An equitable partition is invoked where title of one of the parties is called into question or where an accounting is sought. See *Mills v. Williams*, 67 S.E.2d 212 (1951).

Many of the land loss stories that are reported to the Federation are due to partition sales. There are several disadvantages to partition sales. First, it is often difficult for joint owners to outbid land speculators and developers who may bid at such a sale. Second, the property often will be sold at a partition sale for far less than it is worth. While the appraised value of the property is used for purposes of the non-petitioning heirs to “buy out” the applicant(s) who filed the partition action, there are no regulations in place to establish a minimum bid in the event the property is subject to partition sale. See O.C.G.A. §44-6-166.1 (b), and O.C.G.A. § 44-6-167.⁸ Based upon the Federation’s experience, a partition action is initiated typically in one of two ways:

⁸ See Mitchell, Thomas, footnote, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community through Partitions Sales of Tenancies in Common*. 95 NW. UL Rev. 505, 511 n. 28 (2001) (citing *McNeely v. Bone*, 698 S.W.2d 512, 513 (Ark. 1985), which held that partition sale of

- ◆ An heir may file a petition for partition; or
- ◆ An heir, or several heirs, may sell his/her/their fractional interest(s) to someone other than another heir (i.e. land speculator, land developer). The purchaser of the heir's interest will then petition the court for the partition of the property.

a. Sufficiency of Notice. The unlocatable heir syndrome inherent in heir property, presents obstacles to providing notice of a partition action to interest holders. Georgia's notice requirements present some issues as there are often interest holders who reside outside the county and state where the real property is located. Actual notice for out of state co-owners is dependent upon the amount of effort used to identify and locate heirs/interest holder. Section 44-6-160 of the Georgia Code requires that in addition to setting forth the petitioner's title and interest in the subject property, the petition must also set forth as defendants the names of all other interest holders, and the their respective interests. See O.C.G.A. §44-6-160. Prior to filing the petition, petitioner must provide all interested parties notice of his/her intent to file, which constitutes sufficient process. See O.C.G.A. §44-6-162. Service of process for non-residents, however, rests with the court, as the court may order service by publication to parties in interest who are non-residents. See *Bodrey v. Bodrey*, 176 S.E.2d 234 (1970); see also *Leggitt v. Allen*, 69 S.E.2d 106 (1952)(Since this proceeding is not an in rem proceeding, notice of intention to file a partition petition is equivalent to process under Georgia law).⁹ Since heirs, or parties in interest, often reside outside the state where the property is located, if addresses are not known or not accurate, publication of notice in a local, designated newspaper is deemed sufficient. See O.C.G.A. § 44-6-162. This may effectively prevent heirs from exercising certain protections they may have as interest holders in property that is subject to partition sale. See *Gammon v. Holloway-Smith Co.*, 103 S.E. 154

African-American owned property did not violate the Fifth and Fourteenth Amendments to the United States Constitution even if the sale of the land was below market price).

⁹ Section 44-6-162 of the Georgia Code, which governs the statutory partition process, provides that petitioner must give all other parties in interest at least twenty (20) days notice of his/her intent to file a partition petition. This does not apply where petitioner seeks partition sale outright.

(1920)(If a defendant fails to appear following what qualifies as sufficient notice, he/she cannot have a partition order revoked.).

With advancements in technology, including the existence of on-line locator services, people finder search engines, and genealogy services, obtaining more accurate information on the identity and location of heirs is more possible. Thus, the notice requirements should reflect these advancements and establish minimum guidelines for identifying and locating potential interest holders, and provide for some measure of oversight of efforts made to identify interest holders.¹⁰ Further, there should be greater controls in place that provide some measure of uniform guidelines for identifying, locating, and notifying heirs that balance the often costly additional efforts made to do the same and the need to provide more adequate notice to heirs.

b. Partition Sale v. Partition-in-Kind. Under Georgia law, the issues of physical division of land and sale are both considered when a co-tenant files a petition for partition. The sufficiency of a petition for partition does not require prayer for a partition sale or a partition-in-kind, as this is an issue for determination by the court. See *Anderson v. Anderson*, 108 S.E. 97 (1921)(*cert denied*, 27 Ga. App. 835). In other words, if a co-tenant files a petition for partition with the intent of seeking the physical division, or “carving out,” of his/her interest from the collective whole, and the court determines that the division would be inequitable to the other co-tenants, then the court will order the sale of the property. One way for heirs to prevent the partition sale of their property is for the petitioner(s) to withdraw as petitioner. See O.C.G.A. § 44-6-166.1(d).¹¹ A petitioner may circumvent the partitioner process if he/she can prove that a fair and equitable division of the property cannot be made by partition-in-kind, the court will appoint three commissioners to conduct the sale. See O.C.G.A. §44-6-167.

¹⁰ This statement is made with the understanding that diligent efforts are often made by an heir(s)’ attorney to best represent him/her and prevent future claims from being brought by those claiming to have been excluded from a partition proceeding. However, some measure of uniformity of the level of effort made is needed.

¹¹ Section 44-6-166.1(d) of the Georgia Code provides that petitioners have fifteen (15) days following the appraisal of the subject property, to withdraw. If no petitioner remains after the 15th day, the proceeding/sale will be dismissed, and those who withdraw will be liable for the cost of the suit.

The general rule under Georgia law, however, is for a court to order a partition-in-kind unless “it cannot be conveniently made, or the interest of the parties will be promoted by a sale.” *Anderson v. Anderson*. However, courts have a tendency to order partition sale in many cases.¹² Section 166.1(b) of the Georgia Code provides that one of the reasons a court will order a partition sale is if the value of entire property will be depreciated by a partition-in-kind. Thus, those heirs who wish to retain ownership can either (1) attempt to competitively bid at the partition sale, (2) find the resources to “buy out” the petitioners (See subsection d), or (3) file an objection to the confirmation of sale, which will often take them back to options 1 and 2. See *Lankford v. Milhollin*, 37 S.E. 2d 197 (1946). The law, thus, assumes that monetary compensation, albeit often based on an amount that is less than the property’s actual value, is in the best interest of heirs who may not have the resources to take advantage of these two options, yet desire to retain land to which they have a rightful interest.

d. The “Buy Out”: Protection for Interested Heirs Under Georgia’s Partition Statute.

Georgia provides some measure of protection to those heirs who are interested in preventing the partition sale of their property in the event the court determines that a partition sale would be the most equitable and beneficial solution to all co-tenants (Appendix A). See O.C.G.A. §44-6-166.1(d).¹³ Under Georgia law, co-tenants may “buy out” a petitioner’s interest in land subject to their partition action. To buy out the petitioner(s), interested co-tenants must pay the petitioner(s) the monetary equivalent of their fractional share based on the appraised value of the land. See O.C.G.A. §44-6-166.1(e); See O.C.G.A. §44-6-166.1(e)(1). A completed buy-out satisfies the petitioner’s claims and interests in the subject property. See O.C.G.A. §44-6-166.1(d). The parties in interest have no later than 90 days from the day the appraised price is established to pay to the court the amount that will satisfy the remaining petitioners’ claims. See O.C.G.A. §44-6-166.1(e)(1). For each petitioners’ interests bought out by a co-tenant, or for

¹² See note 16, supra.

¹³ Alabama passed this level of protection in 1979, providing co-tenants the opportunity to buy out the interests of petitioners in a partition action. See AL §35-6-100, et. seq. Its purpose was to afford such protection to co-tenants to preserve family estates by preventing title from passing to a stranger. See *Scott Paper Co. v. Griffin*, 409 So. 2d 1375 (Ala. 1982). To date, no assessment of its impact on African-American land retention has been made.

the amount of money each interested co-tenant contributes to the buy out of petitioners' interests, the co-tenant's fractional interest in the land increases. See O.C.G.A. §44-6-166.1(e)(2).

Pooling resources to buy out petitioners' interests in a partition action can be challenging, if not impossible, for those heirs of limited means. Further, the sale will not be halted if interested co-tenants are able to pool money for a buy out, but are unable to purchase all petitioners' interests.¹⁴ Failure to remit payment to the court will subject the property to sale, and all parties will be liable for the cost of the three appraisals in proportion to their respective interests in the property. See O.C.G.A. §44-6-166.1(e)(1). Once the buy out is completed, the petitioners must execute title to the parties in interest within 95 days of the establishment of the appraised price. See O.C.G.A. §44-6-166.1(f).

3. "Voluntary" Sale of Heir Property

The Emergency Land Fund (ELF), which is now the Federation's Land Assistance Fund, identified voluntary sales as another cause of African-American land loss (ELF 89) in their 1984 U.S. Senate commissioned study on Heir Property and African American Land Tenure in the Southeast. Voluntary sale is considered a cause of land loss for two reasons:

- I. Real property sales are often made to those outside the family, which effectively transfers rural property ownership outside the African-American community; and,
- II. For many African-American rural landowners, their decision to consent to a private sale of land in which they share a joint interest is not always one that may be considered purely voluntary (ELF 89).¹⁵

¹⁴ See O.C.G.A. §44-6-166.1(e) provides that heirs must buy out all those petitioners who have not withdrawn their share of the appraised price, as determined by their respective shares in the property, or the property will be subject to partition sale pursuant to Code Section 44-6-167. See also, Mitchell, 95 NW. UL Rev. 505, 514 n. 41 (2001) (" . . . [P]artition sale is preferred over partition in kind because land sold as a unit often has a higher economic value than the aggregate value of subdivided parcels that result from a division in kind. . . [thus] courts now enable an individual co-tenant, no matter how small her interest in is the land, to force a sale of the entire property in order to maximize the amount of money she will receive in the distribution of the proceeds."). See O.C.G.A. §44-6-166.1(e) provides that heirs must buy out all those petitioners who have not withdrawn their share of the appraised price, as determined by their respective shares in the property, or the property will be subject to partition sale pursuant to Code Section 44-6-167.

¹⁵ In the ELF study, among those surveyed, some of the reasons cited for selling land were as follows: (1) prevention of mortgage foreclosure; (2) fear of "standing up to the white man"; and, (3) family pressure to sell the land.

The frequency of land sales between African-Americans is low. The ELF study found that when African-Americans sell their land to someone outside their family, they tend to sell it to non-minorities (ELF 88). Approximately 38% of those heir parcels surveyed were sold to family members, 21% to African-Americans outside the family, and 30% to Whites (ELF 88, Table 3), and these statistics have remained fairly constant.¹⁶ Currently, there is no definitive explanation for why voluntary land sales to those outside the African-American community occur, however, the Emergency Land Fund's 1980 study cited "economic stress; need to prevent foreclosures; family pressure; and, external pressures" as some of the reasons for this occurrence (ELF 90).

One of the problems with "voluntary" land transfers is evaluating a co-tenant's willingness to convey sell and their ability to freely negotiate the terms of sale (ELF 89). In December 2001, the Associated Press released a series of articles entitled "Torn From the Land" which documented the history of African-American land loss in the South. Investigators for this series interviewed more than 1,000 people and examined scores of public records, which provide an historical account of land takings through violence, exploitation and injustice suffered by African-Americans in the South. Specifically, their research found 107 documented land takings in 13 Southern and border states, from which more than 24,000 acres of farmland and timberland were taken, and smaller properties like stores and city lots. Further, over half (57) of those documented cases were violent land takings (Lewan). Therefore, it is unclear whether such sales are voluntary, and to what extent involuntary sales contributed to the decline of African-American rural land ownership, particularly in the South.

The ELF study found that the duration of heir property ownership is longer than that for property without title defects. This is due in large part to the unmarketable title and unalienable character of heir property (ELF 90). Insufficient property descriptions can create obstacles for heirs who desire to convey

¹⁶ Pennick, Edward "Jerry". Personal interview. 14 April 2003.

their property through a private sale. Insufficient property description contained in deeds are problematic because:

- (1) It is often difficult to obtain a survey of one's land because the cost of a survey may be more than one can afford. Surveyors may not be willing to survey property because the property descriptions may be so old and deficient that surveying the property may expose him/her to potential claims by adjoining landowners, or they may quote a landowner an exorbitant price for the survey of such property to compensate them for the potential risk they may assume; or,
- (2) In the event of a cash only private sale or an administrative sale of heir property, the purchaser may be unable to obtain owner's title insurance because he/she cannot obtain a survey of the property; or,
- (3) The purchaser of heir property may run the risk of obtaining title insurance with numerous exceptions that in effect render obtaining title insurance pointless because.

Georgia standards for executing real estate sales contracts require that a sufficient property description be provided. Determining the sufficiency of a property description is described as a test to see "whether or not it discloses with sufficient certainty what the intention of the grantor was with respect to quantity and location of the land therein referred to, so that its identification is practicable." See O.C.G.A. §44-5-30; *Haygood v. Duncan*, 50 S.E.2d 214 (1948). Thus, heir property that is sold is often done through involuntary public sale, like a partition sale or tax sale. Where voluntary sales are conducted among family members or with community members with whom heirs have a relationship, conveying property by quitclaim deed may be more likely to occur, especially where the purchaser resides in the same locale as the property and is familiar with its history. This, however, does not negate the need for the purchaser to take proactive measures to protect himself/herself.

4. Adverse Possession

The unlocatable/unknown heir syndrome, coupled with the fact that a majority of the interest holders in heir property typically may not reside in the county, or state where the land lies makes it difficult to monitor the land with the frequency with which it needs to be. Those out-of-state heirs who still have a connection to the community where their land is located may have a community resident periodically check up on the property and report any occurrences (i.e. trespass, timber theft, etc.). For those heirs who are so far removed from the local community base, unless they can afford to periodically travel to the property, the needed periodic monitoring does not occur.

Georgia Code, Section 44-5-173(a), provides some protection to heirs of an intestate estate by halting the run of a prescription period against an unrepresented estate until such has been provided within 5 years of the decedent's death. Many of the heirs, however, who call in to the Federation's office are heirs to a pre-existing fractional interest. In other words, they are one or more generations removed from the original landowner. Thus, this protection has no effect on the prescription period. See *Danielly v. Lowe*, 130 S.E. 687 (1925) ("If the estate remains unrepresented for more than five years, no deduction at all from the adverse possessor's term will be allowed in favor of the personal representative.").

One way an interested heir(s), who does not fall within the 5-year period described above, may benefit by obtaining clear title to heir property is to have all disinterested heirs to deed their interest to him/her. That designated grantee's deed then would be on file at the local courthouse for seven (7) years. Once the 7-year period has elapsed, the heir could file a quiet title action under the claim of adverse possession by color of title.¹⁷ Once title is perfected, alternatives may be available to those heirs who wish to reclaim ownership in the property. Such alternatives may include leaving title to the entire tract in the hands of the designated, grantee heir, or subdividing the entire tract to those interested heirs that have been identified.

B. Tax Sale

With no individual accountability system in place for heir property, it can be susceptible to loss by tax sale. Thus, when property taxes are delinquent, the entire property is often sold since each heir's interest, though separate, is indivisible. Further, with multiple interest holders in such property, the responsibility of paying property taxes is often not clearly assigned, thus, making it difficult to track who is paying property taxes on the land and who receives notices on a regular basis. In some cases, payment responsibility has shifted from one heir to another from year to year. Tax sale is not as prevalent a cause for African-American land loss as those previously mentioned (ELF 87 Table 2).¹⁸

1. Assumption of Property Tax Payment by Third-Parties. The mismanagement or lack of management problem inherent in ownership of highly fractionated heir property can lead to loss by tax sale. Currently, Georgia law provides for the sale of tax executions to private investors.¹⁹ Essentially a third-party who purchases a tax execution may initiate the tax foreclosure on such property. Coupled with the issues of notice to heirs, particularly non-resident heirs, a tax foreclosure may commence on the property without any heirs' knowledge, which can lead to loss, especially where out-of-state heirs are made aware of the sale after the expiration of the redemption period.

Problems may also arise where a non-interest holder has paid the property taxes for a period of time. The Federation has found that this often occurs in one of the following scenarios:

1. A non-resident heir and the non-interest holder enter into an agreement by which the non-interest holder agrees to pay the property taxes in exchange for something (i.e. unlimited hunting on the property); or,

¹⁷ See O.C.G.A. §§44-5-163, 44-5-164. One may claim title to property by adverse possession either under color of title, the statutory period of possession being 7 years, or under claim of right where the statutory period of possession is 20 years.

¹⁸ The ELF study found that among the heir property owners and former heir property owners surveyed, tax sale was ranked last as one of the causes of African-American rural land loss, contributing to 5% of all land lost that was subject to this study.

¹⁹ On May 21, 2002, Georgia repealed Code section 48-3-19, which provided for the transfer of tax executions by the county to private investors. That repeal, however, does not address the private agreement of one heir to have a non-interest holder pay their property's annual taxes. However, there was another code section on the books that was used as a means to sell tax executions to private parties. See O.C.G.A. §9-13-36. The current bill, HB 88,

2. A non-interest holder assumes responsibility for payment of taxes without notifying all or some of the interest holders.

Georgia law provides that a non-interest holder may attach a lien to property if he/she has paid off a tax execution against another's property. See O.C.G.A. § 9-13-36 (if "any person" may pay on a tax execution, he/she may then enforce the execution). In the event of the latter scenario, unless there is an agreement between an heir(s) and the non-interest holder, he/she does not have a right to place a lien on the heir's property to recoup the aggregate amount of the taxes he/she paid.²⁰

A non-interest holder may also attempt to claim title to the property. Although payment of another's property taxes alone does not provide sufficient grounds for asserting title under adverse possession, those heirs who are not educated on their rights as landowners will mistakenly believe that that third-party has superior rights to the property. See O.C.G.A. § 44-5-165.²¹

In some instances, those heirs who wish to re-establish ties to their family land will find out that a non-interest holder has been paying taxes on the property for some years. This can be resolved by informing the tax assessor's office of the situation and in their desire to have the tax bill sent to them. Further, it must be determined whether the third-party paid the property taxes in his/her name or in the estate's name to determine whether there may be a likelihood that the third-party will attempt to assert a claim for compensation for past tax payments.²²

2. Notification Requirements for Delinquency and Sale. In the event, the tax sale process is invoked, notice concerns similar to those raised in partition actions may surface. A delinquency notice and subsequent notices of sale are mailed to the last known receiver of the property

designed to amend this code section to prohibit the sale of tax executions passed the House on April 8, 2003 and has moved on to the Senate Finance Committee on April 8, 2003.

²⁰ See O.C.G.A. § 9-13-36, which allows a tax lien to be preserved through the payment and subsequent transfer of a tax execution to a third-party.

²¹ See *Chamblee v. Johnson*, 38 S.E.2d 721 (1946) ("Payment of taxes is not itself evidence of title, yet it is admissible as a circumstance tending to prove adverse possession.").

²² See O.C.G.A. §44-6-121. The right to seek an accounting is available only to interest holders in the subject property, thus the likelihood of a non-interest holder having a valid claim for recovery of past taxes paid on the property is highly unlikely. The Federation, however, has received calls from heir property owners where deeds have been conveyed to individuals who have assumed payment of their property taxes.

tax bill. See O.C.G.A. § 48-41.²³ In the event money is pooled for the purposes of property tax payment, it is important that the names of all contributors and their addresses are listed with the local tax assessor's office so that in the event one or more of those heirs relocate and fail to notify the tax collections office of such, there will be at least one interest holder who may receive notices.

3. Partial Payment of Property Taxes. There is no known state-sanctioned delinquent tax partial payment plan available for delinquent tax payers who do not have the resources to effectively exercise their right of redemption.

III. Inaccessibility to Legal Counsel

Studies have shown that the inequitable application of laws in the South, both historically and now, caused many African-Americans to shy away from using the legal system to resolve problems (ELF 322). There is also a shortage of attorneys in the rural South who are available to provide assistance to limited resource, rural landowners, including farmers (ELF 322). Accessibility of attorneys can be measured by a landowner's willingness and his/her ability to retain an attorney, as well as an attorney's willingness and ability to represent a minority landowner. (ELF 322). Many of the Federation's members who are low-income landowners encounter great obstacles to obtaining affordable legal assistance because their income is often too low to afford private legal representation, and too high to qualify for subsidized legal services. When landowners are able to retain an attorney, the economic status of the landowner can make it difficult for them to pay, which can encumber their title to land (ELF 323). An attorney's decision to represent a minority landowner is often "based on their responsiveness to the concerns of African-American landowners and the reasonableness of their fees." (ELF 322). Further, the low numbers of attorneys practicing in rural areas, coupled with many urban attorneys' inexperience with working on rural land issues and working with rural families to negotiate a myriad of issues associated with rural heir property ownership, also contribute to the inaccessibility of needed legal assistance.

²³ See O.C.G.A. §48-4-1(a)(1), (2)("In cases of executions issued by a county officer for ad valorem taxes, to the defendant's last known address as listed in the records of the tax commissioner of the county that issued the tax execution; or (2) In cases of executions issued by a state officer, to the defendant's last known address as listed in the records of the department headed by the issuing officer.").

When legal assistance is utilized, it has proven to be a primary deterrent to land loss among Southern, rural, African-American communities. The assistance needed in these communities is often a combination of legal and non-legal services designed to resolve title imperfections inherent in heir property; to implement strategies designed to prevent further fractionation of intestate property; and, to educate interest holders so that they may determine the manner in which to preserve ownership of the land among themselves. For example, direct legal assistance, in conjunction with the technical assistance provided by the Federation to its members, has significantly contributed to saving approximately 500,000 acres of land, which correlates to approximately \$250 million retained in the Southern, rural minority community.²⁴

IV. Strategies to Protect and Preserve African-American Rural Land

Historically, the Federation has provided landowners with extensive education on their rights and responsibilities, and has worked in conjunction with attorneys to assist interest holders in heir property. The following are some of the strategies currently utilized to resolve heir property issues and secure ownership for heirs-at-law. For a comprehensive list of the services the Federation's Land Retention Project provides, please refer to Appendix B.

A. Education Outreach

One of the focuses of the Federation of Southern Cooperatives/Land Assistance Fund's Land Retention Project is education on landowner rights and responsibilities. As part of its education initiative, the Land Retention Project has developed a series of materials designed to educate landowners, and to train service providers to conduct educational workshops and presentations to their target communities.

1. Land Loss Prevention Booklet for Landowners. This booklet is designed for landowners. The booklet covers the following topics: Tax Sale, Partition Sale, Estate Planning – Descent & Distribution and Will Preparation, Adverse Possession, Mineral Rights, and Eminent Domain and

²⁴See Federation of Southern Cooperatives/Land Assistance Fund's Annual Report, *25th Anniversary: Twenty-Five*

Condemnation. The booklets are state specific, covering Alabama, Georgia, Mississippi, South Carolina, and Texas.

2. Educational Pamphlets. These brochures are designed for landowners, and for service providers to distribute to their target communities. The brochures are topic specific, and cover the following topics: Adverse Possession, Basic Information on Real Property, Eminent Domain, How to Find A Deed, How to Select a Lawyer, Lawyer Fees, Mineral Rights, Tax Sales, and Wills.

3. Land Loss Prevention Training Manuals (See Appendix C). The state-specific training manuals are designed to train service providers to conduct educational workshops on basic landowner rights and responsibilities, heir property and African-American land tenure, and the importance of estate planning.

B. Assessing the Feasibility of Managing Heir Property

The most challenging aspects of assisting heirs and other interest holders in intestate property is determining what is owned and who owns it. There are instances where the Federation's intake of landowners has uncovered that attorneys are more inclined to advise them to seek a partition sale of their property. Land retention and economic sustainability are two major focuses of the Federation. Therefore, landowners are encouraged to determine whether they want to retain ownership, or if they want to simply sell the property. If they elect the former, then alternatives to partition sale are assessed. Again, although a partition sale is one way to expeditiously clear title problems inherent in highly fractionated heir property and receive a cash pay out, the expected benefits may not be in the best interest of many of the interest holders of such property. Thus, there are a series of preliminary steps that the Federation takes in assisting landowners.

1. "What is the Dirt?"

Years Of Self-Reliance, Self-Determination, Sustaining Communities, Cooperative Development, Land Retention, & Standing For Justice and Struggling for Social Change (1992).

Property that has been passed down from generation to generation pursuant to Georgia's laws of descent and distribution is wrought with issues that need to be investigated before the Federation can determine what specific service it can provide. The first inquiry is what is the property – its location, size, and, what has happened over time to the property (i.e. division, foreclosure, partial sale, etc.). These questions are often resolved by conducting a title examination on the property. Under Georgia's title standards, record title of conveyances must span back at least 50 years to constitute sufficiency to determine marketability of title. See Georgia Title Standard 2.1. With intestate real property, the "root", or start of the chain of ownership within a specific family typically spans back more than 50 years. Further, the root is often the only document of record title that can be found, thus necessitating that a genealogy report be completed on each property examined. In the case of multiple documents on record, there are often numerous gap periods to address. Such gaps include gaps in time between the signing and recordation of deeds, and gaps between conveyances. Often, there has been activity during the gap period as evidenced by differing property descriptions in the records found, which may reflect the outcome of an oral agreement entered into by heirs' ancestors that affected their property.

One problem is insufficient property descriptions contained in deeds. In some instances, there are old surveys and tax plat maps on file that allow one to see what has happened visibly to the land over time. In instances where the heirs cannot afford a survey, the filed maps and tax plat maps are the best documents to refer to when conducting a title examination. This is done to determine who is paying the tax bill, to obtain a reference to a tax plat map to obtain a basic idea of the shape of the property, and to obtain the most current property description, if available. Further, plat maps and recorded surveys, if any, are pulled to address discrepancies in property descriptions contained in deeds, and to obtain further information on the shape of the property and to whom it is adjoined. Researching the Tax Digests at the County Tax Assessor or Tax Commissioner's office is also a good way to identify additional interest holders in the property, especially where the responsibility of property tax payment has been periodically shifted from one heir to another.

2. Establishing Heirship and Other Means to Determine Title

a. Establishing a Chain of Title. Once the preliminary questions of where and what “the dirt” is are addressed, and the genealogy report (i.e. family tree) is completed, the next hurdle to encounter is the determination of interest holders in the property. This allows one to gain a sense of who may have an interest in the property, which is the foundation for future alternatives that may be implemented to assist the landowner.

Typically, there are multiple interest holders in African-American, rural land. To file the necessary affidavits to perfect the chain of title for interest holders and prospective purchasers of intestate property, Georgia’s title standards are utilized, which outline how marketable title may be conveyed for intestate property. The standards provide that for property that was owned by a decedent who died more than 3 years prior, leaving intestate property that has not been subject to administration, marketable title may be conveyed by:

1. Proof showing intestate death that identifies the decedent’s heirs at law and showing them to be of age of majority and of sound mind (via recordable affidavits under O.C.G.A. §44-2-20);
2. A conveyance from the identified heirs at law provided they are of age of majority and of sound mind;
3. Proof demonstrating all debts of the decedent’s estate have been fully paid; and,
4. Proof that federal estate taxes cannot result in a lien against the property.

Thus, Affidavits of Descent are filed to contribute to the perfection of the chain of title. Further, any conveyances made by one interest holder to another are accompanied by the same. Further, court appointment of administrators of intestate estates are sought in the event the interest holders seek to sell the property (See #2 above).²⁵ This not only provides an avenue through which heirs may sell their land, it also satisfies Requirement #3 as administrators are required to publish a Notice to Creditors and

Debtors. See O.C.G.A. §53-7-41. Georgia law provides that heirs will automatically receive title to their fractional interest in real property included in an intestate estate if that estate has not been administered within 5 years following the death of the decedent. See O.C.G.A. §53-2-7(b). A majority of the co-tenants of intestate property who seek assistance from the Federation of Southern Cooperatives/Land Assistance Fund are interest holders in real property of whom the decedent has been deceased for more than 5 years. Applying for administration of an intestate estate of one who has been deceased for 5 or more years, however, has been an effective way to coordinate management and/or settlement of the real property in the estate administered, including the sale of intestate property through private sale. Further, it has proven to be a useful tool to bring heirs together and to motivate heirs, particularly those who are non-residents, to take a vested interest in property they either never knew they had an ownership interest in, or they previously never desired to take responsibility for. Appointment of an administrator has also resulted in disinterested heirs coming forth to release their interest in the property, through donation or sale, to an interested heir.

b. Establishing Heirship. The unlocatable/unknown heir syndrome is an impediment to clearly establishing rightful interest holders in heir property. A petition for heirship is designed to allow a court to establish who has an ownership interest in real property by descent, and what each of their fractional interests are in the property. See O.C.G.A. §53-2-26. Jurisdiction for this proceeding lies with the probate court, or with the superior court of the county where the probate court is located. See O.C.G.A. §53-2-20.²⁶

Under Georgia law, an executor, administrator, guardian, conservator, committee, trustee, fiduciary, or other person who has an interest in the property may file a petition for heirship. See

²⁵ Administrator's deed conveys good and marketable title to real estate owned by the decedent. See O.C.G.A. §53-8-50; *Smith v. Realty Co. v. Hubbard*, 183 S.E.2d 506 (1971).

²⁶ This code section provides that "[t]he identify or interest of any heir may be resolved judicially upon application to the probate court that has jurisdiction by virtue of a pending administration . . . Alternatively, the petition may be filed in the superior court of the county where the probate court having jurisdiction, as defined in this Code section, is located."

O.C.G.A. §53-2-21. The requirements for filing a sufficient petition include submitting the names, addresses, ages, and relationship of the heirs that are known by the petitioner. It also requires the petitioner to state whether or not he/she has reason to believe there are others who are unknown, but may be entitled to participation in the proceeding, which may invoke further effort in identifying and locating those potential interest holders. See O.C.G.A. §53-2-21. Anyone other than the administrator of an estate who claims to be an heir may file such a petition against all interested parties, including one charged with settlement of the estate. See O.C.G.A. §53-2-22. After the petition is filed, the process from there on differs depending on which court's jurisdiction is invoked.²⁷ There also exists an opportunity for those not named in the petition to intervene to establish their right to participate in this determination. See O.C.G.A. §53-2-25. Although it does not resolve the title concerns inherent in heir property ownership, it is a means to obtain a binding conclusion as to who the interested parties are, which can, in turn, be used to implement strategies designed to protect and preserve the land in the family (e.g. negotiated heir "buy out"). See O.C.G.A. §53-2-26.

c. Filing a Quiet Title Action. The equitable determination of title is an alternative to address the title issues inherent in heir property. The purpose of a quiet title action is to remove clouds of title to land not between heirs, but between interest holders of heir property and others who are not rightful heirs to the subject property. As previously mentioned, one of the consequences of heir property is that it can be highly susceptible to encroachment by adjoining landowners, or squatters/trespassers, who may later seek to claim rightful title under adverse possession. A quiet title action may be an available remedy for heirs to prevent this from occurring. Thus, while an interest holder's purpose for filing a quiet title action may not fall under its traditional purpose,²⁸ it may be used as a means to protect heirs' ownership interests to the entire property.

²⁷ See O.C.G.A. §53-2-23 and 53-2-24. These code provisions provide for different proceeding procedures depending on which court's jurisdiction is invoked.

²⁸ See O.C.G.A. §23-6-60. The purpose of a quiet title action is "to create a procedure for removing any cloud upon the title to land . . . and for readily and conclusively establishing that certain named persons are the owners of all the

When all evidence is filed with the special master (see O.C.G.A. §23-6-62, -63, -64), those who are entitled to notice are determined by the special master. O.C.G.A. §23-6-62(a)(1). Service is effected on those known persons who are Georgia residents, and service by publication for non-residents and unknown and/or unlocatable interest holders.

3. Determining Who Seeks to Retain Ownership in Heir Property

Once it is known where and what “the dirt” is; the record chain of title has been determined; and, the interest holders have been identified, the next step is to determine what options are available to the client, who may be one or more heirs, for preserving the land. Although, the attorney on staff for the Federation may represent one of the heirs, attempts are made to include other interest holders in the process. The purpose of contacting other co-tenants is two-fold: (1) to educate the other heirs on African-American land loss and the options available to them to preserve the land in their family, and (2) to determine whether they still wish to retain interest. Including other heirs in the process serves as a means to facilitate any efforts made by the client to protect and preserve the land, and it also allows initially disinterested heirs the opportunity to establish, or re-establish, an attachment to their family land. Some alternatives currently being implemented by the Federation include the following:

a. “Buying Out” or Gifting of Disinterested Heirs’ Interests. One alternative utilized by the Federation is a negotiated “buy out” or gifting of one heir’s interest to another heir. This is an effective way to reduce the number of interest holders in heir property and, thereby, confer the land management decisions to a smaller number of heirs. Typically, the deeds generated from this type of transfer are accompanied by an Affidavit of Descent when filed so as to provide documentation supporting the grantor’s authority to convey his/her interest to the grantee.

When a disinterested heir seeks compensation for the transfer of his/her interest, a negotiated “buy out” will take place. The price is typically based on the monetary value assessed on the property for

interests in land defined by a decree entered in such proceeding, so there shall be no occasion for land in this state to

ad valorem tax payment purposes, however, the base price is subject to negotiation. Thus, the buy out price is based upon the fractional share of the seller's interest. In the event this cannot be ascertained, a petition for heirship will be filed prior to any negotiated buy out to obtain a court determination of the each heirs' interest in the property. Heirs may collectively contribute to the purchase of one or multiple disinterested heirs' interests, and receive an equitable division of the interest(s) purchased.

This is carried out often by first appointing an administrator who would be the central person through which information will flow from the attorney to the other heirs. The challenge in successfully carrying this out is the fact that (1) an administrator is often appointed following the tolling of the 5-year period²⁹, and (2) appointment of an administrator will not prevent an interest holder from filing a partition action. See *Evans v. Little*, 271 S.E.2d 138 (1980) ("Existence or nonexistence of administration of estate does not preclude bringing partition action by a tenant in common."). This authority conferred upon interest holders can effectively halt the efforts of those heirs who seek to implement measures to protect and preserve the land within the family.

b. Partition v. Friendly Partition. Heir property that is physically subdivided into smaller tracts does not fall within Georgia Code section 44-3-2 definition of "subdivided land," which addresses commercial property that is divided into lots for the purpose of developing subdivisions. See O.C.G.A. §44-3-2(12)(A). Therefore, neither a partition-in-kind nor a friendly partition are subject to the Georgia Land Sales Act.³⁰ Under Georgia law, one who files a partition action either files it seeking the sale of the property, or files it for the court to determine the issue of whether it would be feasible for the land to be subdivided or sold. Thus, in situations where there are a large number of heirs, and those wishing to retain ownership of the land have been identified, subjecting the property to

be unmarketable because of any uncertainty as to the owner of ever interest therein."

²⁹ See O.C.G.A. § 53-2-7 (a) (an administrator who is appointed within 5 years of decedent's death will hold title to the property until his/her duties have been carried out, after which, title will vest in the heirs according to their respective interests as determined by Georgia's laws of descent and distribution."

³⁰ See (amended 1995) - - Title 44, Chapter 3, Article 1 et. seq.

the possibility of being sold at a partition sale can be risky.³¹ Thus, another option has been proposed by the Federation – *friendly partition*. A friendly partition is conducted with little to no court intervention, and is a joint effort of the appointed administrator, his/her attorney, and the other interest holders in the property. A friendly partition’s function is two-fold:

- To garner how many of the heirs, if known and locatable, wish to convey their interest by gift or sale to another heir(s) who holds an interest in the subject property; and,
- To subdivide the land into equal portions if feasible, so that each remaining interest holder, following petition for heirship and conveyance of interest(s), receives their individual tract of land from the contiguous property.

The following are two examples where a friendly partition may occur:

Example 1. A landowner dies intestate, survived by his 10 children, leaving 40 acres.

One of the children is appointed administrator within 5 years of the decedent’s death.³² The administrator, as legal holder of title to the real property in the estate, coordinates the physical division of the property to the heirs, distributing deeds in equitable 4 acre tracts following the completion of a boundary survey that includes the proposed subdivision of the land.

Example 2. The heirs to a 40-acre tract are the grandchildren and great-grandchildren of the original landowner. These individuals do not reside where the property is located and they number approximately 60 heirs. Recognizing the difficulty of collectively managing the property, and the expressed disinterest in the land by 45 of the 60 heirs, an administrator is appointed nearly 20 years after the death of their ancestor who initially owned the property.³³ Some of the disinterested heirs,

³¹ See O.C.G.A. §44-6-166.1. Where a partition sale has been ordered, heirs may “buy out” the petitioners to partition action. The buy out price for each petitioner is based upon their fractional interest and the appraised price for the property. However, in the event of a partition sale, there is no minimum bid price provision, thus, there is the possibility that property subject to partition sale may be sold at below its actual value.

³² When an administrator is appointed within the five-year period, title is effectively held by the administrator until his/her responsibilities have been successfully carried out. See O.C.G.A. §53-2-7(a). After the 5-year period, title vests in the heirs with size of their respective shares determined by Georgia’s laws of descent and distribution. See O.C.G.A. § 53-2-7 (b). This, however, does not absolve the administrator of his/her duty “to sell, rent, lease, exchange, or otherwise dispose of property.” See O.C.G. A. §53-8-13(a).

³³ For a friendly partition to take place after the 5-year period in footnote 30 has tolled, the heirs must deed their interest to the administrator, who will then redistribute ownership to subdivided tracts to those heirs. Thus, the role

recognizing that their interest in the land is miniscule, decide to convey their interest to the administrator without compensation, while the other disinterested heirs who want compensation are paid for their interests under a series of negotiated buy outs. The remaining interested heirs, 15 total, then deed their interest to the administrator after they sign an agreement themselves and the administrator, whereby the administrator agrees to equitably redistribute the property to the interested heirs when he/she is conveyed all interests to the heir property.

The primary challenges to completing a successful friendly partition are the following:

1. Maintaining the support of those heirs who are not represented. A friendly partition can be a timely process, which can make it difficult for those unrepresented heirs to remain committed to the process, particularly those who are seeking instant results, in which case alternative strategies need to be implemented to meet their immediate needs (i.e. “buy out”).
2. Challenges to assigning subdivided tracts to interested heirs. Following a survey of the property, if the property is such that it differs in value in different areas, assigning parcels may thwart the friendly partition process, requiring creative negotiating.
3. Affordability of survey. A survey must be completed so that sufficient property descriptions are included with each deed conveyed so as to avoid future boundary disputes with adjacent landowners and each other.

C. Land Use

of administrator in this instance is simply to centralize this effort; no assent is required. See O.C.G.A. § 53-8-15 (a), (b); and, O.C.G.A. § 53-2-7 (d)(Following the settlement of the estate and distribution of property contained therein, the administrator must assent to the vesting of title in the heirs, which is evidenced by the issuance of their respective deeds.)

Once the title issues have been addressed, or, while working simultaneously on resolving title issues, a determination needs to be made as to whether the client(s) wishes to put the property to some use, preferably one that produces an economically viable outcome.

1. Participation in Federal Programs. There are programs available through the United States Department of Agriculture (USDA) that landowners can take advantage of to economically develop their land. For example, African-Americans own an “above-average” percentage of woodland. Approximately 43% of African-American landowners own woodland, which places them in a position to take advantage of available state and federal programs designed to assist them in exploring the world of agribusiness.³⁴ (See Appendix D).

2. Establishing a Family Business Entity. Another alternative for protecting heir property is to place the subject property in a business arrangement like a corporation or limited liability company that is operated by the family/interest holders. The interest holders deed over their property to the “family business” and then receive stock certificates in proportion to the size of their interest. A smaller number of family members are then elected by the larger group to serve as directors and officers to manage the affairs of the business. The benefits of this alternative include the following:

- (1) It is a means to establish a land management, decision-making system controlled by the interest holders;
- (2) Joint property ownership is nullified since the business will become the sole owner of the property;
- (3) The problems associated with owning heir property – partition sale, tax sale, unlocatable heirs, increasing number of interest holders in the property with successive generations, etc. – are removed as long as the business entity itself is functional and operating soundly.

³⁴ See *Who Owns the Land? Agricultural Land Ownership by Race/Ethnicity, Rural America*, Volume 17, Issue 4, Winter 2002.

This is an ideal way to hold land because the business entity's bylaws or operating agreement can be tailored to prevent an heir from selling his/her interest to someone outside the family, and/or to prevent an heir from initiating a partition sale. For example, the bylaws can include a "first right of refusal" for all shareholders (heirs), giving the shareholders an opportunity to purchase another's interest in the property before they can sell to someone outside the family. A business' bylaws or operating agreement may also be used to establish guidelines for what will happen when one member retires, dies, becomes disabled or leaves the business to pursue other interests.

c. Challenges to Obtaining Title Insurance. In the event, a client's land management and utilization plan requires start-up capital (i.e. building a home on the property, starting a farm, etc), and the only option is to use his/her interest in the land as collateral for purposes of obtaining a loan, the inherent title issues of heir property may prevent his/her ability to do so.³⁵ A title insurance policy typically insures against the following: title to the estate, any defect/lien/encumbrance on the title, unmarketability of title, and right of access to and from the land.³⁶ Since no one heir has title to the entire property, the probability of title-based litigation on heir property can be high, thus rendering it unmarketable, and unlikely to qualify for a policy that is adequate.³⁷

Although there are options available to heirs to address title concerns, they are primarily designed to protect and preserve heir property in the hands of heirs, not necessarily to secure marketable title. Marketable title is defined as "one which is not only valid in fact, but which can be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence." See *Atlanta Title & Trust Co. v. Erickson*, 21 S.E.2d 548 (1942). Further, implementing a strategy to render title marketable does not automatically ensure that a company will issue a policy. For example, it is the current trend for title insurance companies not to issue policies following a court determination in a quiet title action. Thus, there is a

³⁵ See NBI, Inc., comp. *Mastering Real Estate Titles and Title Insurance in Georgia*. Wisconsin, 2002.

³⁶ See i.d. at 65-66.

³⁷ See note 38 at 71.

strong likelihood that interest holders in heir property will be unable to secure financing as most lenders require title insurance.

V. CHALLENGES TO THE LAND RETENTION PROJECT

The primary challenges faced by the Federation's Land Retention Project in providing assistance to "land rich, cash poor" African-American rural landowners include the following:

A. Lack of Legal Assistance

There are few attorneys available and willing to work with landowners on such complex and time consuming heir property situations, yet the need for such assistance is critical in effectively addressing and curbing the crisis of African-American land loss in the United States. The Federation has a summer legal extern through the legal externship program sponsored by the Center for Minority and Community Security based out of Tuskegee University in Tuskegee, Alabama and coordinated by the Land Tenure Center based out of the University of Wisconsin-Madison. While these interns are a useful resource, this does not negate the need for attorneys to work on such areas as estate planning, title examinations, litigation (i.e. timber theft), and other matters that require legal representation.

B. Multiple Clients & the Potential for Conflict of Interests.

When working on heir property issues with families, the challenge is knowing whose interests you are representing – an heir, or a small group of heir property interest holders, or all interest holders in heir property. Unless you are seeking to partition one individual's fractional interest from a contiguous tract of land, there will be some interaction with one or more interest holders.

If one individual is represented this may thwart the process because non-represented heirs may feel some level of discomfort and distrust. Thus, in instances where there is one client, other, non-represented heirs need to have some participation in the representation, which raises issues of maintaining confidentiality that can be resolved by obtaining a clear understanding from the client as to what he/she

wants and does not want divulged to the other interest holders. In most cases, the Federation's attorney will inform heirs of the representation and assure them that the purpose of the representation in no way compromises their interest in the property. If the client consents to disclosure of the goals of the representation, the attorney may extend an offer to them to join in the representation, if the client consents and no future conflicts can be anticipated.

Though multiple representation may be necessary to facilitate the successful completion of any service rendered by the Federation's attorney, it also presents the risk of conflicting interests that can result in withdrawing from the representation. On the other end, representation of multiple interests in heir property can be costly because such representation may require numerous phone conversations and written correspondence that can add up. To avoid potential conflict of interests that can arise in representing multiple clients, and prevent the Federation's attorney from having to withdraw as counsel, an administrator is often appointed to centralize the land preservation efforts of a family. That administrator will be the client for purposes of resolving a family's heir property related problems. While this may pose discomfort among some interest holders, maintaining their involvement through periodic updates and phone calls alleviates any worries they may have.

VI. CONCLUSION

African-American rural land ownership has been in crisis for nearly a century. Land loss can be attributed to legal factors (e.g. partition action), albeit often carried forth unscrupulously, and non-legal factors through violence, and legal exploitation (See Appendix E). The Federation has estimated that African-Americans are losing rural land at a rate of 1000 acres/day. Yet even though this crisis has been in existence for nearly 100 years, there has not been sufficient national recognition and action taken to address it.

Currently, state laws do not adequately address the "land rich, cash poor" phenomenon of rural, African-American landowners. Further, the law does not take into consideration the passage of intestate

estates over multiple generations, which is prevalent among African-American rural landowners. Protections need to be in place for heirs who value land ownership, and make the necessary investments to retain the land. Unfortunately, these landowners are not protected under the laws as they currently exist, thus, effectively shutting them out of the possibility to derive benefits from land ownership.

The Federation utilizes innovative strategies to address those innate characteristics of heir property that make it a primary contributor to land loss in African-American rural communities, however, these strategies require attorneys in order to be more effective. The collaboration between attorneys and NGOs, such as the Federation, will be a useful tool to assist African-American landowners to reach their ultimate goal, which may simply be to have the land remain in the family and protect it from outside sources.

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APPENDIX A

44-6-166.1.

(a) As used in this Code section, the term:

- (1) "Party in interest" means any person, other than a petitioner, having an interest in property.
- (2) "Petitioner" means any person petitioning for partition of property.
- (3) "Property" means lands and tenements sought to be partitioned pursuant to this subpart.

(b) Whenever an application is made for the partition of property and any of the parties in interest convinces the court that a fair and equitable division of the property cannot be made by means of metes and bounds because of improvements made thereon, because the premises are valuable for mining purposes or for the erection of mills or other machinery, or because the value of the entire property will be depreciated by the partition applied for, the court shall proceed pursuant to this Code section.

(c) The court shall appoint three qualified persons to make appraisals of the property. The average of the three appraisals shall constitute the appraised price of the property for purposes of this Code section. Notice of the amount of the appraised price shall be served on the petitioners and all parties in interest within five days after the appraised price is established.

(d) Within 15 days after the appraised price is established, upon request to the court and grant thereof, any petitioner may withdraw as petitioner in the partition action and become a party in interest and any party in interest may become a petitioner in the action. Any petitioner remaining as such after the fifteenth day may be paid, pursuant to this Code section, his respective share of the appraised price corresponding to his respective share of the property. This payment shall constitute complete satisfaction of all of that petitioner's claims to and interest in that property. If no petitioner remains in the partition action after that fifteenth day, the proceeding shall be dismissed, and the petitioners who have withdrawn shall be liable for the costs of the action, including but not limited to the appraisal costs.

(e) (1) No sooner than 16 days and no later than 90 days after the appraised price is established, the parties in interest shall tender to the court sufficient sums to pay to petitioners their shares of the appraised price, as determined by their respective shares in the property, or the property shall be subject to public sale pursuant to Code Section 44-6-167. If the property is subject to such public sale, the petitioner and the parties in interest shall be liable for appraisal costs under this Code section in proportion to their respective interests in the property.

(2) Each party in interest may pay toward the amount required to purchase any petitioners' shares of the appraised price an amount in proportion to that party's share of the total shares of property of all parties in interest, unless one party in interest authorizes another party in interest to pay some or all of his proportionate share of the shares available for sale. The share of each party in interest in the property

shall be increased by the share that party pays toward the purchase of petitioners' shares in the property.

(f) Within 95 days after the appraised price is established, unless the property becomes subject to public sale pursuant to paragraph (1) of subsection (e) of this Code section, the petitioners shall execute title to the parties in interest for the property in return for payment to the petitioners, from sums tendered to court under subsection (e) of this Code section, of their respective shares of the appraised price. Petitioners and parties in interest shall be liable for costs of the sale and proceedings relating thereto under this Code section in proportion to their respective shares in the property prior to that sale.

The Code of Alabama 1975
Title 35 PROPERTY, Chapter 6 PARTITION.
Article 4A Purchase of Interest of Joint Owner Filing for Partition.

Section 35-6-100

Court to provide for purchase of filing joint owners' interests; notice by prospective purchasers.

Upon the filing of any petition for a sale for division of any property, real or personal, held by joint owners or tenants in common, the court shall provide for the purchase of the interests of the joint owners or tenants in common filing for the petition or any others named therein who agree to the sale by the other joint owners or tenants in common or any one of them. Provided that the joint owners or tenants in common interested in purchasing such interests shall notify the court of same not later than 10 days prior to the date set for trial of the case and shall be allowed to purchase whether default has been entered against them or not.

Section 35-6-101

Appointment of appraisers; report.

In such circumstances as described in section 35-6-100, and in the event the parties cannot reach agreement as to the price, the value of the interest or interests to be sold shall be determined by one or more competent real estate appraisers or commissioners, as the court shall approve, appointed for such purpose by the court. The appraisers or commissioners appointed under this section shall make their report in writing to the court within 30 days after their appointment.

Section 35-6-102

Payment of appraised value into court; time period; transfer of title.

After the report of the appraisers or commissioners, the tenants in common or joint owners seeking to purchase the interests of those filing the petition shall have 30 days to pay into the court the price set as the value of those interests to be purchased. Upon such payment and approval of same by the court, the clerk shall execute and deliver or cause to be executed and delivered the proper instruments transferring title to the purchasers.

Section 35-6-103

Effect of failure to pay purchase price.

Should the joint owners or tenants in common fail to pay the purchase price as provided in section 35-6-102, the court shall proceed according to its traditional practices in such cases as described in section 35-6-100.

Section 35-6-104

Costs of appraisal.

The costs of the appraisers or commissioners shall be taxed as a part of the cost of court to those seeking to or purchasing the interests.

North Carolina General Statutes
Chapter 46 Partition.
Article 2. Partition Sales of Real Property.

§ 46-22. Sale in lieu of partition.

(a) The court shall order a sale of the property described in the petition, or of any part, only if it finds, by a preponderance of the evidence, that an actual partition of the lands cannot be made without substantial injury to any of the interested parties.

(b) "Substantial injury" means the fair market value of each share in an in-kind partition would be materially less than the share of each cotenant in the money equivalent that would be obtained from the sale of the whole, and if an in-kind division would result in material impairment of the cotenant's rights.

(c) The court shall specifically find the facts supporting an order of sale of the property.

(d) The party seeking a sale of the property shall have the burden of proving substantial injury under the provisions of this section. (1868-9, c. 122, ss. 13, 31; Code, ss. 1904, 1921; Rev., s. 2512; C.S., s. 3233; 1985, c. 626, s. 1.)

§ 46-28.1. Petition for revocation of confirmation order.

(a) Notwithstanding G.S. 46-28 or any other provision of law, an order confirming the partition sale of real property shall not become final and effective until 15 days after entered. At any time before the confirmation order becomes final and effective, any party to the partition proceeding or the purchaser may petition the court to revoke its order of confirmation and to order the withdrawal of the purchaser's offer to purchase the property upon the following grounds:

- (1) In the case of a purchaser, a lien remains unsatisfied on the property to be conveyed.
- (2) In the case of any party to the partition proceeding: a. Notice of the partition was not served on the petitioner for revocation as required by Rule 4 of the Rules of Civil Procedure; or b. Notice of the sale was not mailed to the petitioner for revocation as required by G.S. 46-28(b); or c. The amount bid or price offered is inadequate and inequitable and will result in irreparable damage to the owners of the real property. In no event shall the confirmation order become final or effective during the pendency of a petition under this section. No upset bid shall be permitted after the entry of the confirmation order.

(b) The party petitioning for revocation shall deliver a copy of the petition to all parties required to be served under Rule 5 of G.S. 1A-1, and the officer or person designated to make such sale in the manner provided for service of process in Rule 4(j) of G.S. 1A-1. The court shall schedule a hearing on the

petition within a reasonable time and shall cause a notice of the hearing to be served on the petitioner, the officer or person designated to make such a sale and all parties required to be served under Rule 5 of G.S. 1A-1.

(c) In the case of a petition brought under this section by a purchaser claiming the existence of an unsatisfied lien on the property to be conveyed, if the purchaser proves by a preponderance of the evidence that:

- (1) A lien remains unsatisfied on the property to be conveyed; and,
- (2) The purchaser has not agreed in writing to assume the lien; and
- (3) The lien will not be satisfied out of the proceeds of the sale; and
- (4) The existence of the lien was not disclosed in the notice of sale of the property, the court may revoke the order confirming the sale, order the withdrawal of the purchaser's offer, and order the return of any money or security to the purchaser tendered pursuant to the offer. The order of the court in revoking an order of confirmation under this section may not be introduced in any other proceeding to establish or deny the existence of a lien.

(d) In the case of a petition brought pursuant to this section by a party to the partition proceeding, if the court finds by a preponderance of the evidence that petitioner has proven a case pursuant to a., b., or c. of subsection (a)(2), the court may revoke the order confirming the sale, order the withdrawal of the purchaser's offer, and order the return of any money or security to the purchaser tendered pursuant to the offer. (e) If the court revokes its order of confirmation under this section, the court shall order a resale. The procedure for a resale is the same as is provided for an original public sale under Article 29A of Chapter 1 of the General Statutes. (1977, c. 833, s. 1; 1985, c. 626, ss. 3-7; 2001-271, s. 19.)

APPENDIX B



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List of Services offered through the Land Retention Project

The Federation of Southern Cooperative's Land Assistance Fund's Land Retention Project (LRP) currently provides the following services:

1. **Intake.** Individuals may call the Federation during the hours of 9:00 a.m. to 4:30 p.m. on any land-related concern they may have. The Federation will complete an intake form to document their problem or concern.
2. **Lawyer Referral.** Following intake, the Federation staff will review the completed intake form to determine if the caller is eligible to receive a lawyer referral. If determined eligible, the caller will receive the name(s) of a lawyer in their state who is affiliated, or has been affiliated, with the Federation. A referral does not guarantee legal representation; this decision rests solely with the referred lawyer(s). This service is under construction.
3. **Direct Legal Representation.** This service is currently available to Georgia residents or non-residents who have property in Georgia through our lawyer on staff. Following intake, the lawyer on staff will determine if the caller is eligible for direct legal representation. If it is determined that the individual is not eligible for direct legal representation, he or she will either be given a lawyer referral, unless it is determined that the individual does not have an issue that can be effectively resolved through the legal system.
4. **Education.** The Federation has updated its educational materials. They are available to individual landowners and service providers and other land-based non-governmental organizations (NGOs). These materials include:
 - a. Educational Brochures. Brochures are available to landowners and service providers on Adverse Possession, Basic Information on Real Property, How to Find a Deed, How to Select a Lawyer, Lawyer Fees, Mineral Rights, Tax Sales, and Wills & Estate Planning
 - b. Educational Booklets. Booklets on Landowners' Rights and Responsibilities are available for Alabama, Georgia, Mississippi, South Carolina, and Texas.
 - c. Training Manual. This manual provides materials for service providers, community land specialists and NGOs to train their staff and volunteers to conduct education outreach workshops.

5. **Workshops and Seminars on Landowner Rights and Responsibilities, and on Heir Property, Estate Planning, and Land Retention Strategies.** The Federation's Land Assistance Fund also coordinates and conducts trainings, workshops and presentations. The specific terms of this service need to be discussed on a case by case basis.