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***Felicia Burton--the wind beneath the wings of the* Fee Simple**

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FRIDAY, JANUARY 20, 2023, AT 1:00 PM

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LETTER FROM THE CHAIR

By Karen L. Cohen

Karen L. Cohen is a Partner in Gentry Locke's Richmond office and is a member of the firm's Real Estate, Land Use & Zoning, Solar & Renewable Energy, and Outdoor Advertising practice groups. Karen serves as Chair of the Virginia State Bar Real Property Section Board of Governors and Co-Chair of the Land Use & Environmental Committee. Karen received a B.S. degree in Architecture from the University of Virginia, M.S. in Real Estate Development from George Mason University, and J.D. magna cum laude from Georgetown University Law Center.

It is a great honor for me to serve as Chair of the Real Property Section, to follow a long line of outstanding former chairs, and to lead the Section for the 2022-2023 year, along with my terrific colleagues, Vice Chair Sarah Louppe-Petcher and Secretary-Treasurer Robert Hawthorne.

As I write this message for *The Fee Simple* Fall Issue, things are falling all around. Falling leaves. Falling stock prices. Falling home prices.

There's a consensus on Wall Street that this period of falling home prices we've entered "will be the second-sharpest home price decline since the Great Depression."[1] Morgan Stanley forecasts a 7% price drop, but that must be put into perspective – even if that forecast comes to fruition, this would only bring home prices back to where they were in January 2022, which is still 32% above where home prices were in March 2020.[2] And, while the Federal Reserve's interest rate increases to counter inflation have cooled the pandemic-driven, homebuying frenzy of 2021 and early 2022, home prices actually have not fallen everywhere.

Thus, putting things into perspective is key.

Keeping that perspective, we must acknowledge that despite fluctuations and uncertainties in our law practices and our lives, there are some steady and reliable features of fall. One is this publication, which happens only through the time and effort of its dedicated staff, and our members, who voluntarily contribute their knowledge for the betterment of the entire Section. Steve Gregory, Hayden-Anne Breedlove and Felicia Burton keep the presses rolling at *The Fee Simple*, and in this issue, we pay special tribute to Felicia's 25 years of remarkable service to this publication.

We also held our regular Fall Meeting of the Board of Governors and Area Representatives on September 9. I would like to extend a special thanks to Dolly Shaffner, our VSB Liaison, and Kim Villio of Virginia CLE, for assisting us in holding a successful meeting at the new Virginia Law Foundation-Virginia CLE facility at the Bobzien-Gaither Education Center in Glen Allen. It was great to see and hear colleagues in person and on the big screen.

Fall also is synonymous with the start of school, which is a time of excitement and optimism for learning new things. I am especially excited to be part of a team developing a lawyer training program on how to provide professionally and culturally competent representation to families with heirs property issues. As members of the Real Property Section, we are in a unique position to "answer the call" from our colleague, Karla Carter, who writes in this issue:

> The sad history of land loss in low-wealth communities in this country is one that has persisted long enough, and a new narrative is being written, one in which lawyers and

[1] Lambert, Lance, *Wall Street: U.S. housing market to see the second-biggest home price decline since the Great Depression*, Fortune.com, October 3, 2022.

[2] *Id.*

> judges seek justice for all and where low-wealth communities are able to preserve their family legacies through estate planning and other needed legal services. To close the wealth gap in America, attorneys are needed to stand in the gap by providing trusted, quality legal services to the low-wealth communities that need it most. Lawyers dedicated to the pursuit of cultural competence and professionalism in serving low-wealth communities are the key to closing the wealth gap in America and helping families create generational legacies.

Answering the Call to Serve: The Need for Cultural Competency in the Legal Profession, by Karla Carter, Esq. (article in this issue, page 10).

An important part of "answering the call" is ensuring that future generations of lawyers are prepared to do the same – and that requires truthful education about the past. It means acknowledging that the legal system that protects rights associated with real property ownership has enabled the generation of wealth and prosperity for some and stolen it from others.

Our Section sponsored a terrific CLE on heirs property at the Advanced Real Estate Seminar in 2020 (just as the pandemic was making news). Despite having gone to law school and obtained an undergraduate architecture education and a graduate business school degree, that 2020 CLE was my first exposure to heirs property and the stunning statistics on Black family land loss. A recent American Economic Association (AES) paper estimates that the present, compounded value of Black agricultural land loss from 1920 to 1997 is roughly $326 billion – nearly as much as the market capitalization of Ford Motor Company, Starbucks, and Target combined.[3]

One of our goals as a Section is to encourage more young lawyers to choose a career in real property law. One way to do that is to connect with law students to broaden their view of real estate and land use law, and to convey that pursuing this profession is a pathway to addressing issues they care about, such as economic inequality, racism, environmental justice and housing – property law is intertwined with all these issues. I have been working with a multi-disciplinary team of professors at University of Virginia (UVA Law, the School of Architecture, and the College of Arts and Sciences), to bring an heirs property presentation to the University, and to potentially develop clinical and internship opportunities with organizations dedicated to helping under-served families resolve heirs property issues, keep their land, and build generational wealth.

Our Section also is dedicated to educating and mentoring lawyers who have entered the practice of real estate law. Section members Rick Chess and Larry McIlwaine are directing a special mentorship project to pair our members with young lawyers and to create a video library of experienced members offering advice and practice tips. Programs Committee Chair Heather Steele has been working diligently to plan an incredible line-up for the Advanced Seminar, including courses on land trusts, historic preservation and conservations easements, consumer finance and dormant second mortgages, roads and streets, and the doctrine of merger.

Thus, I am enthusiastic and optimistic about the year ahead for our Section – not only for the continued camaraderie and professional support that has always been a hallmark of this group – but for the many opportunities we have to learn, to teach, to grow, to serve, and to better our profession and the lives of those in need of our professional services.

[3] Francis, Dania V., Darrick Hamilton, Thomas W. Mitchell, Nathan A. Rosenberg, and Bryce Wilson Stucki. 2022. "Black Land Loss: 1920–1997." *AEA Papers and Proceedings*, 112: 38-42.

THANK YOU TO THE *FEE SIMPLE*'S INDISPENSABLE HERMIONE GRANGER

By Stephen C. Gregory

When I became co-editor of the FEE SIMPLE over a decade ago, I admit I had no idea of how much and what work was required to put out a quality publication like the one you have in your hands (or on your monitor) right now. By the time the real property section appointed me to serve with Professor Lynda Butler, Felicia Burton had already been the administrative assistant since 1996. I quickly learned that "administrative assistant" didn't come close to doing justice to all of Felicia's contributions toward putting each issue to bed. Truth be told, she is Versace, Leonard Bernstein, and Ben Bradlee with a little Bill Belichick thrown in. She performs all those roles under the most extreme conditions—dealing with lawyers (and yours truly).

I considered listing all the things Felicia does to put this magazine together and out the door in a timely fashion, but:

a. the list would be too long, and

b. I undoubtedly would forget something—or multiple somethings.

Over the years, I have had to ask Felicia for help with some of the tasks that I as Editor perform; there hasn't been a single instance that she was unable to provide the assistance. Moreover, she accommodates the editors' needs promptly, efficiently, and with alacrity. Think of the one person with whom you work who is indispensable; to the FEE SIMPLE, that person is Felicia Burton.

I once told Felicia that if she ever retired, I'd be out the door right behind her. I wasn't sure I could do what I do without her help, nor was I sure I would want to. I'm going to try, however, but it won't be the same.

What Felicia Burton has meant to all the editors, authors, and readers over the years simply can't be quantified. On behalf of all of us, thank you. We will miss you more than you know. –SG

A CONVERSATION WITH FELICIA BURTON, THE WIZARD BEHIND THE *FEE SIMPLE*

By Hayden-Anne Breedlove

For 26 years, Felicia Burton has been a critical part of the creation and production of the *Fee Simple.* We are saddened to announce that this edition (Fall 2022) will be Ms. Burton's last; she is retiring from her role as Assistant to the Editors. I had the pleasure of speaking with her to learn about her years with the *Fee Simple*.

The *Fee Simple* first began in the 1980s as a way to try to reach more real estate attorneys and inform them about new cases and information. The *Fee Simple* began as an educational resource.

Ms. Burton began with the *Fee Simple* in 1996 while she was working at William & Mary Law School with Emerita Professor Lynda Butler, one of the former editors of the *magazine.* There was an In Box in her office where members of the faculty would place work that needed to be done. One day, Ms. Burton grabbed everything out of the box that needed to be worked on and unbeknownst to her, there was an article to be published in the *Fee Simple,* and so began her association with the publication!

The first issue that Ms. Burton worked on was a lot to take in. This was during a time when most everything was on paper, and everything had to be printed to create the publication. Ms. Burton recalls paper being everywhere! Ms. Burton offered Professor Butler assistance in reaching out to potential authors, confirming article submissions, and working on formatting and putting the publication together, which allowed Professor Butler more time to focus on the editing process of creating the publication. From then on, Ms. Burton and Professor Butler worked together extremely well and were a perfect match.

Over the years, Ms. Burton has assisted Professor Butler, Courtland Traver, Stephen Gregory, and the interviewer in their tasks as editors.

Ms. Burton recalls Professor Butler's impeccable editing abilities, stating that her eye was so keen, there wouldn't be any missing periods or extra spaces in anything she reviewed. Under Professor Butler's tutelage, Ms. Burton also gained a great deal of knowledge in Bluebook formatting of citations (which she still uses daily at William & Mary Law School).

Ms. Burton remembers Mr. Traver's kind and gentle demeanor, as well as the excellent stories he would tell. Specifically, Ms. Burton loved hearing the way Mr. Traver spoke about his wife, Jerri – she said his eyes would sparkle when he spoke of her.

Currently, Ms. Burton works with both Mr. Gregory and me. She said that Mr. Gregory always has new, bright ideas and is willing to support her and encourage her to get the job done.

Over the years, the editorial process has evolved, as well as the structure of the editorial staff. It started out with Professor Butler being the sole editor and then Mr. Traver became an editor as well. When Mr. Traver relinquished his role, Mr. Gregory became an editor with Professor Butler. Then when Professor Butler stepped down, the journal added a student editorial assistant, who was a law student from within the state. Now, the publication has two co-editors – Mr. Gregory and me.

The publication has also evolved from being an all-print publication to a combination of print and digital.

During the typical editorial process, Ms. Burton communicates with the editorial staff and provides them updates as to the status of the articles. She tries to get a general idea of what may have come to pass in between the previous issue and the upcoming issues, such as meetings or more ideas or

authors. She also updates the editorial staff on potential authors and articles that will be or have been submitted. After that point, Ms. Burton keeps editorial staff up-to-date about what is going on throughout the editorial process as to what articles she has received and if anything has changed. Once the articles come in, Ms. Burton formats them for Mr. Gregory to review first and then for me to add a second set of eyes. Once the publication is complete, it is sent to Ms. Kaylin Bowen and Ms. Dolly Shaffner at the Virginia State Bar for final approval. After review and approval, it can then be printed. An electronic version is sent out to those who have opted to receive it digitally.

In her spare time, Ms. Burton enjoys spending time with her family, reading, and going to the beach.

We will miss working with Ms. Burton. She has been a tremendous part of the *Fee Simple* over the years and has been critical to its success. We wish you much success in all your future endeavors.

FELICIA'S FINGERPRINTS

By Lynda L. Butler*

Felicia's fingerprints have left their mark all over the FEE SIMPLE. With each keystroke, each typo caught, each revised draft sent. When I asked Felicia to help with the publication of the FEE SIMPLE in the mid-1990s, I knew then that she had the eye for detail, the strong work ethic, and the dedication required to produce a high-quality product. What I didn't know then was how she would react to the busy attorneys who authored the articles. After all, no one likes having questions raised about their writing, especially not high-powered, successful attorneys. Though Felicia would be asking questions that I usually had raised in the editing process, authors sometimes blamed the messenger. How would she handle the author who answered questions with irritation or seemingly endless details? Who did not respond to emails because of their overbooked schedules? Who did not want to conform to bluebook rules for citations written by law students? I quickly learned that the same professionalism and thick skin that Felicia exhibited with faculty also worked well with practitioners.

Respectful, thorough, responsive, organized, unflappable, and endlessly patient are just a few of the qualities that Felicia exhibited in the publication process. Perhaps it was her prior military experience. Or her strong character. Or her respect for the publication being produced. Or her curious nature and constant drive to learn. It was not uncommon for her to ask me why I made a particular edit, once explaining that she wanted to learn – even from the editing process. How fitting that an academic institution would have such an employee. How fortunate that the Real Property Section could benefit from her years of dedication to the publication of the FEE SIMPLE. Because of her contributions, my job as Editor was made much easier. Thank you, Felicia!

* J.D. UVa; B.S. William & Mary. Professor Butler was Chancellor Professor of Law at William & Mary Law School until her retirement in 2021 and currently is the Director of the Property Rights Project at the Law School. She was the Editor of the FEE SIMPLE from 1986 to 2011.

CYBER SPIES SWAY LITIGATION BATTLES AND BREAK INTO ATTORNEY EMAILS

By Sharon D. Nelson, Esq., John W. Simek and Michael C. Maschke

Straight From the Headlines

Reuters reported in late June that thousands of email records it had uncovered showed Indian cyber spies hacking into parties and law firms involved in lawsuits around the world. Apparently, hired spies have become a weapon of litigants looking for an advantage.

As you might imagine larger firms are particularly at risk given how many high dollar litigation matters they handle.

Who in the Heck is Sumit Gupta?

We had never heard of him until we read the Reuters story. The answer to the question is that Sumit Gupta is a cybersecurity expert who worked with a group of Indian associates to build an underground hacking operation that became a center for private investigators who were looking to bring an advantage to clients in lawsuits.

As the article noted, Gupta was never apprehended by U.S. authorities. Reuters has not been able to reach him since 2020, when he told the news agency that while he did work for private investigators, "I have not done all these attacks." Recent attempts to speak with or locate him were unsuccessful.

Reuters identified 35 legal cases since 2013 in which Indian hackers attempted to obtain documents from one side or another of a courtroom contest by sending them password-stealing emails.

The messages often looked like innocuous communications from clients, colleagues, friends or family. Their purpose was to get the hackers access to targets' inboxes and then private or attorney-client privileged information. Examples are provided in the article of the initial emails from the hackers. Probably a good idea to take a look at those so you know how to instruct your employees on what those emails looked like – law firm cybersecurity training should always be top of mind for law firms.

At least 75 U.S. and European companies, three dozen advocacy and media groups and numerous Western business executives were the subjects of these hacking attempts that Reuters documented.

What Makes the Report Reliable?

The Reuters report was based on interviews with victims, researchers, investigators, former U.S. government officials, lawyers and hackers, plus a review of court records from seven countries. It drew on a unique database of more than 80,000 emails sent by Indian hackers to 13,000 targets over a seven-year period. The database is effectively the hackers' hit list, and it lets us see who the cyber spies sent phishing emails to between 2013 and 2020.

As much as we were surprised by the existence of these cyber mercenaries, we were even more surprised that this activity has been going on since 2013. We're not quite sure how this flew under the radar for so long.

The data supporting the report came from two providers of email services the spies used to carry out their espionage campaigns. Why would they cooperate? It seems the providers gave Reuters access to the material after it asked about the hackers' use of their services; they offered the sensitive data on condition of anonymity. We can see where that might have seemed a tempting deal.

Reuters vetted the authenticity of the email data with six sets of experts. Scylla Intel, a boutique cyber investigations firm, analyzed the emails, as did researchers from British defense contractor BAE, U.S. cybersecurity firm Mandiant, and technology companies LinkedIn, Microsoft and Google.

You've got to admit, that's an impressive roster.

Each firm independently confirmed the database showed Indian hacking-for-hire activity by comparing it against data they had previously gathered about the hackers' techniques. Three of the teams, at Mandiant, Google and LinkedIn, provided a closer analysis, finding the spying was linked to three Indian companies – one that Gupta founded, one that used to employ him and one he collaborated with.

Apparently, this was a "Gupta" kind of world.

"We assess with high confidence that this data set represents a good picture of the ongoing operations of Indian hack-for-hire firms," said Shane Huntley, head of Google's cyber threat analysis team.

Did Reuters Communicate with Every Person in the Database?

It sure did – sending requests for comment to each email address – and it spoke to more than 250 individuals. Most of the respondents said the attempted hacks revealed in the email database took place either before anticipated lawsuits or when litigation was ongoing.

The targets' lawyers were often targeted too. The Indian hackers tried to break into the inboxes of some 1,000 attorneys at 108 different law firms. Now that should catch the interest of litigators!

Among the law firms targeted were global practices, including U.S.-based Baker McKenzie, Cooley and Cleary Gottlieb. Major European firms, including London's Clyde & Co. and Geneva-based arbitration specialist LALIVE, were also hit.

Cleary declined comment. The five other law firms did not return messages. That, we are sure, surprises no one. Which is not to say that no action was taken – we suspect that defenses against such attacks were expeditiously fortified.

Who Were the Spies After?

The legal cases targeted varied in profile and importance. Some involved personal disputes. Others involved multinational companies with a lot of money at stake.

From London to Lagos, at least 11 separate groups of victims had their emails leaked publicly or entered into evidence mid-trial. In several cases, court records showed that stolen documents affected the verdict. Not surprising, but quite alarming.

"It is an open secret that there are some private investigators who use Indian hacker groups to target opposition in litigation battles," said Anthony Upward, managing director of Cognition Intelligence, a UK-based countersurveillance firm.

You'll want to check out Reuters' Hacker Hit List, which shows you how Indian mercenary hackers hunted lawyers' inboxes. The far left hand column shows when malicious emails were sent; the left hand column shows who the emails were sent to; the middle column shows the services – such as LinkedIn or YouPorn – that the hackers were imitating; the right hand column shows the subject lines the hackers used to entice their targets. All of this fascinating information may be found in the excellent (if long) Reuters article at https://www.reuters.com/investigates/special-report/usa-hackers-litigation/.

Techniques for breaking into attorneys' emails varied. Sometimes the hackers tried to rouse attorneys' interest in news about colleagues. Sometimes the hackers impersonated social media services. In other cases, the hackers posed as porn sites. Now there's a sure winner. Finally, there were weird or scandalous news subject lines to get the targeted lawyers to click.

Is There Good Money in Being a Cyber Spy?

Apparently so. Gupta could charge from a few thousand dollars per account to up to $20,000 for "priority" targets, said Chirag Goyal, a former BellTroX executive who split from Gupta in 2013 and has since started several tech startups in India.

Goyal said repeat customers comprised much of BellTroX's income. "In this industry, genuine work comes only from recommendations," Goyal said. Reuters was unable to determine the total annual revenue of Gupta's firm, but we're betting it was a tidy sum.

Parting Shot

Among the many stories contained in the article, there is one in which **a lawyer was alleged to have commissioned a hack**. Think THAT might interest a disciplinary board? We sure do.

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ANSWERING THE CALL TO SERVE: THE NEED FOR CULTURAL COMPETENCY IN THE LEGAL PROFESSION

By Karla Carter

Karla Carter is a frequent writer and speaker on issues involving heirs property and the need for access to legal services in low-wealth communities. For questions about future training opportunities as described in the article, contact Karla Carter by email at: karla.carter001@gmail.com

I was sitting in my Wills & Trusts class during my second year of law school when I learned something very important: my family needed an estate plan. I was a college-educated Black woman from a rural maritime community who was pursuing a professional degree in law and, up until that point, I had no idea that "estate planning" applied to my family and the parcel of land my dad owned in the Northern Neck region of Virginia. We came from humble beginnings. My dad made his living on the water as a commercial fisherman and cook. While we lived modestly, (my dad was frugal and a good steward of his modest income), I never felt like we were poor by any stretch of the imagination. Still, I didn't think we were the kind of people who had an "estate."

Over the years, I had seen movies like "Brewster's Millions" and "Rainman" which dealt with large inheritances, and I always associated wills and "estates" with a lot of money, mansions, and fine jewelry. I never thought that my childhood home and the land upon which it sat was also an estate that needed protection through proper estate planning.

Sadly, my story is not unique among the Black, Indigenous, and other communities of color where estate planning is not a mainstream practice. Many families in these communities hold their land through an unstable form of land ownership known as "heirs property," in which property passes from generation to generation without the benefit of a will. Heirs property is especially prevalent among low-wealth communities of Blacks who own land in the rural south, Whites in the Central Appalachian region of the country, Hispanics in the *colonias* communities of the southwestern United States, and Native American groups.[1]

While all populations, regardless of race, are impacted by heirs property, Black families have lost a disproportionate amount of land to heirs property issues. According to the USDA, heirs property is the leading cause of Black land loss in America, with millions of acres lost to this unstable form of ownership–which has translated into billions of dollars of lost generational wealth.[2] To understand this present problem requires one to first understand the historical and cultural framework that gave rise to this problem in the Black community.

DECADES OF SORROW

After Emancipation, freed Black people acquired millions of acres of land, owning roughly 16-19 million acres by 1910.[3] Often denied access to White-owned establishments to obtain legal services

[1] "Heirs Property and Land Fractionation: Fostering Stable Ownership to Prevent Land Loss and Abandonment," https://www.srs.fs.usda.gov/pubs/58543. The references to land owned by Native American groups in this article addresses privately owned land and not the land considered Indian Land set aside for reservations or held in trust by the U.S. Secretary of the Interior.

[2] *Id.*

[3] Gilbert, Jess & Wood, Spencer & Sharp, Gwen. (2002). Who Owns the Land? Current Agricultural Land Ownership by Race/Ethnicity. Rural America. 17(Winter). 55-62. Find at:

and financing, Black people began developing their own economic structure as a means of building wealth within the Black community. However, as Blacks began to establish thriving towns, to register to vote, to start businesses, and to engage in politics, opposition by Whites to a rise in Black prominence led to public lynchings and other atrocities that contributed to the Great Migration where millions of Blacks fled the South because of the violence and brutality they suffered in the South and the promise of opportunities for financial independence in the North.[4] Here was a population of Americans whose status had shifted from one of *being* property to actually *owning* property themselves, but because they lacked the external resources and support they needed to protect their property in the Jim Crow South, what could have been a triumphant story quickly became one of sadness, desperation, and loss. Many decades of sorrow form the backdrop of Black land loss in America and between 1910 and the present day, Black land ownership has dwindled to roughly 2.5 million acres.[5]

LAWYERS & LAND LOSS IN LOW-WEALTH COMMUNTIES

A common theme exists across all low-wealth communities where heirs property is prevalent, regardless of race: the lack of access to *trusted*, quality legal services. A lack of trust in government and the legal system by people in low-wealth communities has its roots in the past unethical practices of government officials, lawyers, and judges who preyed on this vulnerable population to defraud them of their land. [6] The partition process was a common vehicle for abuse and decades of legal chicanery and outright deception by government officials has resulted in a deep mistrust of the government and the legal system by people in low-wealth communities.[7] This scenario played out countless times: because heirs property owners hold the property as tenants in common, any one owner of the property has standing to file a partition suit in court. Often, a developer would purchase the interest of one of the heirs, which then gave the developer standing to bring the partition action.[8] Rather than ordering a division of the property, the courts regularly granted the requests of the developers, thus forcing families with strong connections and emotional attachments to the land to be separated from the family property. Land that had been in families for generations was lost forever. Often the land was sold far below market value, resulting in the heirs receiving little to no proceeds from the forced sale. These unjust outcomes were the rule, not the exception, resulting in

https://www.researchgate.net/publication/269275452_Who_Owns_the_Land_Current_Agricultural_Land_Ownership_by_RaceEthnicity

[4] *See "Tulsa Race Massacre"* *https://www.history.com/.amp/topics/roaring-twenties/tulsa-race-massacre;*

Also See "Racial Violence and the Red Summer" *https://www.archives.gov/research/african-americans/wwi/red-summer*

[5] Gilbert, Jess & Wood, Spencer & Sharp, Gwen. (2002). Who Owns the Land? Current Agricultural Land Ownership by Race/Ethnicity. Rural America. 17(Winter). 55-62. Find at: https://www.researchgate.net/publication/269275452_Who_Owns_the_Land_Current_Agricultural_Land_Ownership_by_RaceEthnicity

[6] Breland, Will. (2021). Acres of Distrust: Heirs Property, the Law's Role in Sowing Suspicion Among Americans and How Lawyers Can Help Curb Black Land Loss. Georgetown Journal on Poverty Law and Policy. Volume 28: No.3. Available at https://georgetown.edu/poverty-journal/wp-content/uploads/sites/25/2021/07/377-03-Breland-Acres-of-Distrust.pdf

[7] *Id.*

[8] *Id. Also see*, "African Americans Have Lost Untold Acres of Farmland Over The Last Century." https://thefern.org/2017/06/african-americans-lost-untold-acres-farmland-last-century/amp/

billions of dollars of lost family wealth[9], and not just in the Black community. Native Hawaiians have been impacted by forced partition sales; Hispanics in New Mexico lost more than 1.6 million acres of land in the late 19th and early 20th centuries because of forced partition sales.[10]

As a profession, our hands are unclean. However, there is a better way forward and our profession has taken meaningful steps to correct these past wrongs.

PARTITION REFORM IN THE UNITED STATES

In Virginia and a growing number of states, partition reform is on the rise with the expectation that we will see a decline in these types of forced sales of family land. In 2020, Virginia adopted provisions of the Uniform Partition of Heirs Property Act (UPHPA), which was enacted for the purpose of helping families preserve their family land and to protect their land from the vulnerabilities inherent in heirs property.[11] The law requires the court to consider partition in kind as well as the family's emotional attachment to the property. If a sale does occur, the court is required to appoint an outside appraiser to ensure that the family receives a commercially reasonable share of the proceeds. Virginia's approach to adopting the UPHPA was to incorporate the UPHPA provisions into its existing partition procedures set forth in Virginia Code §§8.01-81, *et seq*.

Lawyers and legal scholars were among the stakeholders instrumental in bringing about partition reform in this country,[12] but the real work begins with lawyers creating opportunities for low-wealth communities to have access to trusted, quality legal services. Providing quality legal services requires not only professional competence, but also cultural competence.

CULTURAL COMPETENCE IN THE LEGAL PROFESSION

Rule 1.1 of Virginia's Rules of Professional Conduct requires lawyers to provide "competent representation" which requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[13]

As lawyers, we are called upon to treat our clients with respect and courtesy,[14] something that can only be accomplished if we pursue cultural competency as a way of better serving our clients and the larger community. Being culturally competent is just as important as being professionally competent. We can't serve our clients effectively without being in tune with the culture, experiences, belief systems, and values of our client. In providing services to the low-wealth communities that need and deserve our service, we must pursue cultural competence in our service to this population. For example, to help a Black family stablilize their land ownership, a lawyer benefits from a knowledge

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[9] Song, Zijia, (2022). U.S. Black Farmers Lost Billions in Land Value, Study Shows. Find at: https://www.bloomberg.com/news/articles/2022-05-02/black-farmers-in-u-s-lost-326-billion-of-land-study-shows

[10] Pepoff, Reetu. (2021). The Intersection of Racial Inequities and Estate Planning. Actec Law Journal: Vol. 47: No.1, Article 11. Find at: https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1227&context=acteclj

[11] UPHPA: https://www.uniformlaws.org/committees/community-home?CommunityKey=50724584-e808-4255-bc5d-8ea4e588371d

[12] "Professor Thomas W. Mitchell, a Collaborator on the New Legal Realism Project, Receives MacArthur Fellowship." https://www.americanbarfoundation.org/news/15330

[13] Rule 1.1, Rules of Professional Conduct https://www.vsb.org/pro-guidelines/index.php/rules/client-lawyer-relationship/rule1-1/

[14] See Virginia's Principles of Professionalism. Find at: https://www.vsb.org/pro-guidelines/index.php/principles/

and understanding of the history that led to the widespread lack of estate planning in the Black community. Your background may be vastly different than the client you are serving, but to pursue cultural competence to better serve our community carries tremendous value. The need for legal services in low-wealth communities is vast and matters involving land are some of the most expensive to resolve.[15]

PREPARING LAWYERS TO ANSWER THE CALL

There is likely an attorney reading this article who has a desire to serve in this area, but who lacks the professional training and experience in the areas of real estate, land use, and estate planning needed to serve this population. Fortunately, programming is being developed to launch in 2023 to help willing lawyers who have a desire to increase both their cultural competence and their professional knowledge to equip them to serve this population.[16]

The sad history of land loss in low-wealth communities in this country is one that has persisted long enough, and a new narrative is being written, one in which lawyers and judges seek justice for all and where low-wealth communities are able to preserve their family legacies through estate planning and other needed legal services. To close the wealth gap in America, attorneys are needed to stand in the gap by providing trusted, quality legal services to the low-wealth communities that need it most. Lawyers dedicated to the pursuit of cultural competence and professionalism in serving low-wealth communities are the key to closing the wealth gap in America and helping families create generational legacies. To those lawyers willing to join me on this mission, I bid you Godspeed.

[15] Study of the Institute for the Advancement of the American Legal System (IAALS) (2021). Justice Needs and Satisfactions in the United States of America 2021. Report can be found at: https://iaals.du.edu/sites/default/files/documents/publications/justice-needs-and-satisfaction-us.pdf

[16] Contact the author at karla.carter001@gmail.com for more information about upcoming training opportunities.

IN LAND WE TRUST?

NAVIGATING ANGLO-AMERICAN BARRIERS TO NATIVE NATION HOUSING DEVELOPMENT

By Flannery E. O'Rourke

Flannery E. O'Rourke is an attorney based in Richmond, Virginia. The author wishes to thank Professor Carol N. Brown, Professor Tara L. Casey, Dr. David E. Wilkins (Lumbee Tribe of North Carolina), Professor Stacy L. Leeds (Cherokee Nation), Kris Beecher (Navajo Nation), Torey Dolan (Choctaw Nation), Dr. Sam Cook, and Dr. Timothy G. O'Rourke.

"My house is the red earth; it could be the center of the world. I've heard New York, Paris, or Tokyo called the center of the world, but I say it is magnificently humble. You could drive by and miss it. Radio waves can obscure it. Words cannot construct it, for there are some sounds left to sacred wordless form." -Joy Harjo[1]

Introduction

Seven Native Nations in Virginia are now in government-to-government relationships with the United States.[2] The U.S. recognition of these sovereign Nations is a relatively recent development, starting with the Bureau of Indian Affairs' recognition of the Pamunkey Indian Tribe in 2016.[3] Two years later, Congress recognized six more Nations: Chickahominy Indian Tribe, Chickahominy Indian Tribe - Eastern Division, Rappahannock Tribe, Upper Mattaponi Tribe, Nansemond Indian Tribe, and Monacan Indian Nation.[4] Most, if not all, of these Nations may now place land into federal trust for the benefit of the Nation.[5] The Upper Mattaponi Tribe did so in May,[6] and the Rappahannock Tribe

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[1] Joy Harjo, *My House is the Red Earth,* POETRY FOUNDATION, https://www.poetryfoundation.org/poems/51640/my-house-is-the-red-earth (last visited Oct. 12, 2022). Harjo is a citizen of Muscogee (Creek) Nation.

[2] Sarah Vogelsong, *House Republicans Torpedo Bills Giving Virginia Tribes State Consultation Rights,* VIRGINIA MERCURY (Mar. 7, 2022, 12:02 AM), https://www.virginiamercury.com/2022/03/07/house-republicans-torpedo-bills-giving-virginia-tribes-state-consultation-rights/.

[3] U.S. Dep't of the Interior Indian Affairs, *Petitioner #323: Pamunkey Indian Tribe, VA*, https://www.bia.gov/as-ia/ofa/323-pamunk-va (last visited Oct. 12, 2022).

[4] Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017, PL 115-121, January 29, 2019, 132 Stat 40.

[5] The Act of Congress recognizing the six Nations expressly authorizes the Secretary of the Interior to place land into trust for those Nations. *Id.* In contrast, the Pamunkey Tribe's placement of land into trust would rely on the Indian Reorganization Act (IRA), discussed *infra*. Indian Reorganization Act, 48 Stat. 984 (1934).

In *Carcieri v. Salazar*, the U.S. Supreme Court held that the IRA only authorizes the Secretary of the Interior to place land into trust for Nations under federal jurisdiction in 1934. 555 U.S. 379, 395 (2009). The Department of the Interior has changed the test for determining which Nations are covered several times since the *Carcieri* decision. *See* Flannery E. O'Rourke, *Rights in the Lands of the Nations Wronged: A Review of Property Rights in Native Nation Land Holdings,* FEE SIMPLE (Spring 2022).

[6] Upper Mattaponi Indian Tribe, *Upper Mattaponi Places Land into Trust*, (May 4, 2022), https://umitribe.org/2022/05/04/upper-mattaponi-places-land-into-trust/.

intends to place land into trust, as well.[7] The remaining federally recognized Nations are likely to follow suit given both their recent re-acquisitions of ancestral lands[8] and the significant benefits that attach to federal trust land. Federal trust land relieves Nations of state property taxes and even state jurisdiction over some matters.[9] Trust land also facilitates recognition of that Nation's authority, as federal law ties Native Nation jurisdiction to legal and/or equitable land ownership.[10] Finally, and critically, federal trust land cannot be alienated, thereby preventing the further, often predatory, dispossession of Native Nation land by states, individuals, and even the federal government.[11]

But federal trust land has drawbacks, particularly for each Nation's provision of housing. In the Anglo-American system of property rights, where the fee simple absolute form of ownership reigns supreme, the restrictions on alienation inherent in trust land can complicate housing development.[12] Moreover, partitioning ownership of the land with the federal government as trustee limits the ability of Nations to use land freely.[13] Consequently, building a house on Native Nation homeland held in federal trust is complex. Thus, as Virginia Nations contemplate placing land in federal trust, it is critical to understand the potential challenges and solutions to provision of housing that await.

Placing housing on federal trust land is well considered, as at present housing problems abound on many Native Nations' land.[14] Nearly 16% of housing on Native land is overcrowded, versus only 2.2% of U.S. housing.[15] An estimated 11,000 households on Native lands are both severely overcrowded[16] and severely inadequate.[17] In Navajo Nation Reservation, a territory the size of Ireland that covers parts of Utah, New Mexico, and Arizona, one-third of homes lack electricity and 50% of homes lack

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[7] Press Release, Dep't of Interior*, Secretary Haaland Celebrates Rappahannock Tribe's Reacquisition of Ancestral Homelands* (Apr. 1, 2022), https://www.doi.gov/pressreleases/secretary-haaland-celebrates-rappahannock-tribes-reacquisition-ancestral-homelands.

[8] Kiara Alfonseca, *Sacred Land Returned to Native Tribe in Virginia,* ABC NEWS (April 1, 2022, 4:29 PM), https://abcnews.go.com/US/sacred-land-returned-native-tribe-virginia/story?id=83809078; Joseph Martin, *Chickahominy Tribe Reacquires Ancestral Lands,* INDIAN COUNTRY TODAY (Mar. 13, 2022), https://indiancountrytoday.com/news/chickahominy-tribe-reacquires-ancestral-lands; Emma North, *Northam Pledges Over $20 million for Tribal Land Reacquisition,* WAVY.COM (Dec. 15, 2021, 11:46 PM), https://www.wavy.com/news/virginia/northam-pledges-over-20-million-for-tribal-land-re-acquisition-and-cultural-site-conservation/.

[9] Jessica A. Shoemaker, *Transforming Property: Reclaiming Indigenous Land Tenures*, 107 CALIF. L. REV. 1531, 1537-38 (2019).

[10] *Id.* at 1538.

[11] *Id.*

[12] *Id.* at 1558-59.

[13] *Id.* at 1558.

[14] Nancy Pindus, et. al., *Housing Needs of American Indians and Alaska Natives in Tribal Areas: A Report From the Assessment of American Indian, Alaska Native, and Native Hawaiian Housing Needs,* HUD (Jan. 2017).

[15] *Id.* at 66.

[16] *Id.* at xviii.

[17] "Severely inadequate housing includes all occupied units that have condition deficiencies, plus all other units that have three out of the four possible systems deficiencies." *Id.* at 74.

broadband.[18] An estimated 15% of homes lack running water.[19] Similarly, in Pine Ridge Reservation in South Dakota, 4,000 homes are needed to house the Oglala Lakota Nation.[20] Nearly 20% of Oglala Lakota citizens are houseless.[21] Moreover, recently, 8,000 Oglala Lakota citizens were without potable water.[22] Thus, for some Nations, such as the Navajo and Oglala Lakota Nations, the problem of housing encapsulates more than a lack of homes.

Given not merely the insufficiency of housing, but the inadequacy of infrastructure on some Native Nations' lands, the preference for federal trust land may be puzzling. After all, Native Nation land held in trust should not be confused with land banks or community land trusts. Instead, this is the land of uniquely situated sovereign Nations placed in the trust of a self-proclaimed paternal Nation. But while that trust relationship alone is not a direct solution to housing or service development, designation of federal trust land prevents dispossession of the land itself, without which the inadequacy of improvements thereon would be moot.

To better understand the origins of the preference for federal trust land, as well as how Nations can build housing on federal trust land, I first review pertinent historical U.S.-Native Nation policies. Present fears of fee land are well-rooted in U.S.-Native Nation history. Then, I explain the difficulties of housing development on federal trust land, but why nevertheless the Anglo-American preference for fee land may not hold for Native Nations. Finally, I describe current federal legislation, as well as one Native legal scholar's proposal to address the challenges of federal trust land, so that all Native citizens who so desire can be housed on their respective Nation's land.

I. A Brief History of Federal-Native Nation Land Policies

The cause of the inadequacy of infrastructure and insufficiency of housing on many Native Nations' land is hardly a mystery; it is the direct result of U.S. actions. Aggressive U.S. policies regarding Native Nation land have led to dispossession, displacement, and forced assimilation and stripped Nations not only of their lands, but their livelihoods. Moreover, where Nations or citizens negotiated for, or were granted land in unrestricted fee, further aggressive land dispossession soon followed.

The methods utilized by the U.S. to dispossess Nations of their land changed over time. Initially, building on the legacy of Anglo-Europeans, the U.S. used treaties to divest Nations of their land.[23] The U.S. Supreme Court's holding in *Johnson v. McIntosh* in 1823,[24] only further emboldened the U.S.

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[18] Phone Interview with Torey Dolan, Indian Legal Clinic Native Vote Fellow, Arizona State University, (Oct. 21, 2021) [hereinafter Dolan Interview]. Dolan is a citizen of Choctaw Nation of Oklahoma.

[19] EPA, *Navajo Nation: Cleaning Up Abandoned Uranium Mines,* https://www.epa.gov/navajo-nation-uranium-cleanup/providing-safe-drinking-water-areas-abandoned-uranium-mines (last visited Oct. 12, 2022).

[20] Though federally recognized as the Oglala Sioux, Sioux is a French perversion of a Dakota term that means foreigner. WELCOME TO OGLALA NATION: A DOCUMENTARY READER IN OGLALA LAKOTA POLITICAL HISTORY 1 (Akim D. Reinhardt ed., 2015) [hereinafter OGLALA NATION]. The term Dakota is how members of "Sioux" Nations self-identify. *Id.* However, critically, Dakota language has two dialects, one of which uses a soft d (Dakota) and the other which uses the "L" sound (Lakota). *Id.* Thus, in this article, I will refer to the Nation whose land encompasses Pine Ridge as Oglala Lakota.

[21] Julian Brave NoiseCat, *This Community is Striving to Rebuild One of the Poorest Places in America*, HUFFINGTON POST (Jun. 10, 2019), https://www.huffpost.com/entry/pine-ridge-thunder-valley-housing-community-development_n_5cd47574e4b0796a95d8824f.

[22] *Id.*

[23] CHARLES WILKINSON, INDIAN TRIBES AS SOVEREIGN GOVERNMENTS 4 (2d ed. 2004).

[24] *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823).

There, in what amounted to an action for ejectment, the Court found that Native Nations lacked basic property rights, including the power to convey.[25] As Chief Justice Marshall wrote, "[the Illinois and Piankeshaw Nations] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished,[26] and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."[27]

In its most narrow construction, *Johnson* marked the Court's formal endorsement of the Doctrine of Discovery.[28] This would directly inform later U.S.-Native Nation policies.[29] Although in 1832, Chief Justice Marshall would assert in *Worcester v. Georgia* that Native Nation territory was outside the jurisdiction of the states,[30] his holding came too late. States and individuals pressured and intimidated Nations to cede their territories.[31] In Georgia, the discovery of gold on Cherokee Nation lands led to even more aggressive attempts by the state to encroach on Cherokee land and ultimately

[25] *Id.*

[26] Blake A. Watson argues that three doctrines follow from the Doctrine of Discovery: The doctrine of diminished sovereignty (under which Native Nation powers are diminished by the presence of Europeans and the later formation of the United States); the trust doctrine (under which the U.S. is the father and protector of Native Nations); and the plenary power doctrine, (discussed later in this article, under which Congress has plenary authority over Native matters). BLAKE A. WATSON, BUYING AMERICA FROM THE INDIANS: *JOHNSON V. MCINTOSH* AND THE HISTORY OF NATIVE LAND RIGHTS 334-37 (2012).

[27] *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823).

[28] Under the Doctrine of Discovery, the Europeans "discovered" America and that therefore gave the European discoverers the "exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest." *Id.* at 587. Because the U.S. obtained the land from the European discoverers, the U.S. now held title to the lands and could extinguish Native title to the land. *Id.* Inherent in this doctrine is that Native Nations were not recognized as sovereigns for the purpose of discovery. DAVID E. WILKINS & HEIDI KIIWETINEPINESIIK STARK, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM 295 (4th ed. 2018).

[29] WATSON, *supra* note 27, at 319.

[30] *Worcester v. Georgia* 31 U.S. (6 Pet.) 515, 561 (1832). Justice Kavanaugh's lead opinion in *Oklahoma v. Castro-Huerta* asserts *Worcester* is no longer good law. 142 S. Ct. 2486, 2493 (2022). That said, it is worth noting that in *Worcester,* Chief Justice Marshall separately discusses the Doctrine of Discovery. 31 U.S. 515, 544 (1832). He writes, "[the Doctrine of Discovery] gave the exclusive right to purchase but did not found that right on a denial of the right of the possessor to sell." *Id*. This means that Native Nations were not simply mere occupants of their lands upon the arrival of Europeans, but owners of the land. WATSON, *supra* note 27, at 326-327. As legal scholar Blake Watson explains, Justice Marshall's opinion means that colonists did not obtain title to Native Lands. *Id.* at 327. Instead, colonists acquired a preemptive right to purchase the lands from resident Nations, and only if the Nations agreed to sell. *Id.* This is a departure from Justice Marshall's holding in *Johnson* where he expressly states that absolute title is held by the discoverer – in this case, the U.S. – and cannot then be held by the Nation. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 588 (1823). Rather than the U.S. holding Native lands in fee simple absolute, instead Marshall is arguing that the Native Nations own the land "subject to the right of preemption." WATSON, *supra* note 27, at 327. Yet, Justice Marshall does not expressly overturn *Johnson. Id.* at 318.

[31] Ben O. Bridgers, *An Historical Analysis of the Legal Status of the North Carolina Cherokees*, 58 N.C. L. REV. 1075, 1078-79 (1980).

to remove the Nation.[32] Advocates of removal cited Chief Justice Marshall's assertion in *Johnson* that the U.S. held exclusive title to Native lands.[33] The Georgia Legislature even argued that Cherokee Nation's occupancy amounted to a tenancy at will,[34] or a type of leasehold from which the lessees could be excluded upon notice by the true owners.[35] In 1830, at the behest of President Andrew Jackson[36] and led by Georgia's representatives,[37] Congress passed the Indian Removal Act.[38] The Removal Act empowered the President to exchange existing Native Nation land[39] with land acquired through the 1803 Louisiana Purchase[40] in what is present day Oklahoma. An estimated 46,000 Native citizens were removed, generally under threat of force, and with significant loss of life, leaving behind 25 million acres of land.[41]

No sooner were Native Nations removed west than white persons began surrounding and encroaching on the newly formed Native settlements, yet again.[42] In 1853, the U.S. responded by further removing Native Nations, this time to confined territories called reservations.[43] Reservations served the dual purpose of further reducing Native Nation land holdings and of forcing Nations to adopt the American individualistic and patriarchal agricultural and educational systems.[44] The reservations were "at once a diminished homeland and a concentration camp."[45] The Office of Indian Affairs placed agents in reservations to further force the submission of Nations to federal rule.[46] Moreover, the reservation system impeded existing Native Nation economies by further removing Nations from their land, and by restricting the development and growth of their traditional uses of land, such as farming, hunting, and gathering.[47] This fracturing of Native economies foreshadowed the "mighty pulverizing engine" of allotment that would soon follow.[48]

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[32] *Id.* at 1082.

[33] WATSON, *supra* note 27, at 320.

[34] *Id.*

[35] 7A M.J. ESTATES § 30 (2021).

[36] WATSON, *supra* note 27, at 318.

[37] *Id.* at 321.

[38] 4 Stat. 411 (May 28, 1830).

[39] *Id.*

[40] Bridgers, *supra* note 32, at 1079.

[41] *May 28, 1830 CE: Indian Removal Act,* NAT'L GEOGRAPHIC, https://education.nationalgeographic.org/resource/indian-removal-act (last visited Oct. 12. 2022).

[42] 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.03 (2019) [hereinafter COHEN'S].

[43] JASON EDWARD BLACK, RHETORIC OF REMOVAL AND ALLOTMENT 81 (2015).

[44] COHEN'S, *supra* note 43, at §1.03.

[45] OGLALA NATION, *supra* note 21, at 16.

[46] *Id.*

[47] ROBERT J. MILLER, RESERVATION CAPITALISM: ECONOMIC DEVELOPMENT IN INDIAN COUNTRY, 42 (2013).

[48] President Roosevelt declared "the General Allotment Act is a mighty pulverizing engine to break up the tribal mass." President Theodore Roosevelt, *The President Defends the Dawes Act,* DIGITAL HISTORY (1901), https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtid=3&psid=720.

In 1887, Congress passed the General Allotment Act.[49] The goal of allotment was to eradicate Native Nations as separate and semi-independent sovereignties, and to fully assimilate Native persons into the American economic system.[50] Under the Act, reservations were split into parcels, with each Native Nation citizen receiving a plot of land.[51] Then, so-called surplus lands were to be bought from the Native Nations at an agreed upon price.[52] Both processes led to a gross reduction of land held by Native Nations and persons. [53] The U.S. divested Native Nations of 90 million acres of land through allotment.[54]

Under Section 5 of the Allotment Act, when federal agents divvied out parcels to Native Nation citizens, the U.S. then held the land in trust for the benefit of the individual for a period of twenty-five years.[55] Then the land would be converted to fee.[56] In 1906, Congress amended this scheme via the Burke Act.[57] The Act granted the Secretary of the Interior discretion to transfer land into fee earlier if the individual allottee was deemed "competent."[58] While fee simple absolute is the preferred form of property rights in the Anglo-American system, for Native persons this meant their land holdings were no longer under the protection of the federal government.[59]

Fee-holding Native citizens were ripe for exploitation. "Unscrupulous whites had infested the . . . reservation, plied the Indians with liquor, made false promises, and given them worthless securities in return for their land."[60] In the Omaha reservation, 95% of allotments converted to fee were subsequently owned by persons outside the Nation.[61] The cause was not simply predatory outsiders, but U.S. negligence. Native citizens were at heightened vulnerability for abuse because the U.S. prioritized hastened allotment and conversion of land to fee over ensuring allottees were prepared for land ownership in the Anglo-American system.[62]

Although assimilating Native persons into the agricultural economy was ostensibly central to the purpose of allotment, the allotment process was antithetical to that goal.[63] First, parcels allotted were not necessarily of a size or condition suitable for agricultural use.[64] Moreover, even when the parcels allotted were adequate in size and soil for farming, allottees lacked the tools and training to

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[49] Lands in severalty to Indians, 24 Stat. 388, 49 Cong. Ch. 119 (1887).

[50] Shoemaker, *supra* note 9, at 1544.

[51] FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 160 (2009).

[52] *Id.* at 125.

[53] *Id.*

[54] WILKINSON, *supra* note 24, at 10.

[55] 24 stat. 388 (1887).

[56] *Id.*

[57] Indians, citizenship privileges, etc., 34 stat. 182 (1906).

[58] *Id.* Competency was defined differently throughout the Allotment era. JANET A. MCDONNELL, THE DISPOSSESSION OF THE AMERICAN INDIAN 1887-1934, 89-90 (1991).

[59] MCDONNELL, *supra* note 59, at 87.

[60] *Id.* at 92-93.

[61] *Id.* at 90.

[62] *Id.* at 98.

[63] D.S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 124 (Francis Paul Prucha, ed., 1973).

[64] *Id.* at 107; MCDONNELL, *supra* note 59, at 19.

farm the land.[65] In response to this issue, Congress amended the Allotment Act in 1890 to allow for leasing of the land parcels so that the land could still be economically viable to allottees.[66]

Not only was leasing contrary to the Allotment Act's goal of teaching Native citizens the agricultural economy, but it also became another path to Native land dispossession. Many allottees had little choice but to lease. For example, Oglala Lakota citizens often lacked funds for tools and supplies necessary for farming.[67] However, federal law barred allottees from using the land as collateral for a loan.[68] Thus, often the only viable economic use of the land was leasing to persons outside the Nation.[69] When the Burke Act allowed the fee patents to be issued early to "competent" allottees, white persons then used this to induce Oglala Lakota citizens to obtain fee patents and then to sell their land.[70] The result was that by 1916, of Oglala Lakota Nation's 2.5 million acres prior to allotment, all but 150,000 acres were procured by persons outside the Nation.[71] Thus, allotment as implemented did not prepare citizens of Native Nations for the intricacies of the American agriculture economy, but instead made them casualties of it.

While some Nations were able to avoid allotment,[72] not even owning its land in fee could protect Cherokee Nation from the invidious purpose behind the general policy. Although land held in fee was not subject to the General Allotment Act,[73] the Nation was coerced to allot through a Commission created under President Grover Cleveland and led by Senator Henry Dawes.[74] Under the Indian Appropriation Act of 1896, the Dawes Commission prepared the rolls of Cherokee citizens to be granted allotments, separating citizens by ancestry.[75] The allotment agreement for Cherokee Nation was codified in 1902.[76] Congress subsequently terminated the Nation in 1907.[77] In total, 75% of Cherokee Nation's land holdings were taken through allotment.[78]

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[65] OTIS, *supra* note 64, at 101.

[66] *Id.* at 111.

[67] Carl G. Hakansson, *Allotment at Pine Ridge Reservation: Its Consequences and Alternative Remedies*, 73 N.D. L. REV. 231, 246 (1997).

[68] *Id.*

[69] *Id.*

[70] *Id.* at 247.

[71] Hakansson, *supra* note 68, at 248.

[72] Navajo Nation avoided allotment through lobbying. DAVID WILKINS, THE NAVAJO POLITICAL EXPERIENCE 99 (2013). The Eastern Band of Cherokee Nation was similarly pegged for allotment, Act of June 4, 1924, Pub. L. No. 68-191, ch. 253, 43 Stat. 376. The plan was subsequently abandoned. Bridgers, *supra* note 32, at 1100.

[73] DAVID E. WILKINS & SHELLY HULSE WILKINS, DISMEMBERED: NATIVE DISENROLLMENT AND THE BATTLE FOR HUMAN RIGHTS 131 (2017).

[74] ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 23 (1968).

[75] Cherokee by Blood, Cherokee by Intermarriage, and Cherokee Freedman. *Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 107 (D.D.C. 2017).

[76] Act to Provide for the Allotment of the Lands of the Cherokee Nation, for the Disposition of Town Sites Therein, & for Other Purposes §§ 11-23, 63, 32 Stat. 716, 717-19, 725 (1902).

[77] June 28, 1898 Pub. L. 55-517, 30 Stat. 495.

[78] Rebecca Nagle, *Half the Land in Oklahoma Could be Returned to Native Americans. It Should Be.* WASHINGTON POST (Nov. 28, 2018), https://www.washingtonpost.com/outlook/2018/11/28/half-

Even without Cherokee Nation's eventual (albeit coerced) consent, it still could have been subjected to allotment based on the U.S. Supreme Court's holding in *Cherokee Nation v. Hitchcock* in 1902. There, the Court considered the nature of Cherokee land held in fee under the 1835 treaty providing for removal,[79] and subsequent 1846 and 1866 treaties.[80] Under Section 13 of the Curtis Act, Congress granted the Secretary of the Interior exclusive power to enter into oil, mineral, coal, and asphalt leases.[81] Cherokee Nation argued that this encroached on their right to exclusive possession and control of the land under the 1835 treaty,[82] and amounted to a taking without just compensation.[83] The Court held that "neither these nor any previous treaties evinced any intention, upon the part of the government, to discharge [Cherokee Nation] from their condition of pupilage or dependency, and constitute them a separate, independent, sovereign people, with no superior within its limits."[84] Consequently, the Court found the federal actions could not constitute a taking, as the Cherokee lands held in fee were still subject to the administrative authority of the U.S. government.[85] Fee simple absolute, the highest form of property rights in the Anglo-American system, is still superseded by Congress's plenary and patriarchal power on Native-held land. Thus, perhaps rights hinge not on the type of landholding but the identity of the holder. It follows that although allotment theoretically afforded greater property rights, the policy's effect on Native Nations was devastating.

Allotment and other concurrent U.S.-Native Nation policies led to widespread substandard housing and depressed economic conditions in Indian Country.[86] In 1928, the Institute for Government Research (later the Brookings Institution) issued the so-called "Merriam Report."[87] The report methodically detailed the poverty,[88] lack of food,[89] substandard education,[90] and other deleterious conditions on Native Nation land. The report also sounded the alarm for substandard housing on Native land.[91] Native Nation housing was often overcrowded,[92] and lacked clean water supplies.[93] The report stated that "[Native persons] in general still [live] in primitive dwellings, in tents and shacks, and in small houses poorly constructed, ill kept and in bad repair."[94] The housing conditions

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land-oklahoma-could-be-returned-native-americans-it-should-be/. Nagle is a Cherokee Nation citizen and descendant of Major Ridge.

[79] Treaty with the Cherokees, 1835, 7 Stat. 478.

[80] *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 306 (1902).

[81] June 28, 1898 Pub. L. 55-517, 30 Stat. 495.

[82] *Cherokee Nation v. Hitchcock,* 187 U.S. at 305-306.

[83] *Id.* at 299.

[84] *Id.* at 306.

[85] *Id.* at 307-08.

[86] INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (1928).

[87] *Id.* The report is so named for the technical director of the survey staff, Lewis Merriam. *Id.*

[88] *Id.* at 430.

[89] *Id.* at 555.

[90] *Id.* at 346.

[91] *Id.* at 603.

[92] *Id.* at 4.

[93] *Id.* at 554.

[94] *Id.* at 443.

were so poor that they threatened Native persons' health,[95] and new homes built on reservations were often unventilated and unsafe.[96] The report called on the federal government to work directly with Native Nations to provide housing on a Native Nation-wide level.[97] So damning was the report that the U.S. briefly and ineptly attempted to answer that call.

In 1934, Congress passed the Indian Reorganization Act (IRA), declaring an end to allotment.[98] The IRA marked Congress's fleeting and limited support for Tribal self-determination. With a majority vote from their citizens, Nations could reject the Act.[99] Further, under the Act Nations were encouraged to adopt constitutions, albeit subject to the approval of the Bureau of Indian Affairs (BIA).[100] The IRA also authorized the Secretary of the Interior to place land in trust for the benefit of a Nation.[101] Although the Supreme Court's interpretation of the IRA's language in *Carcieri v. Salazar* in 2009 limits the specific Nations eligible to have land placed into trust,[102] the IRA remains the authority under which trust land is often established.[103]

In addition to authorizing creation of trust land for Native Nations, the IRA also ended the conversion of land from trust to fee.[104] This resulted in land held in trust for individual Native citizens.[105] As trust land, these parcels cannot be alienated or divided.[106] Thus, as allottees and their heirs have passed, the land has become highly fractionated, with hundreds of persons sometimes holding undivided interests.[107] While it is outside the scope of this article to address the full scale of remediation for fractionated land holdings, the prevailing goal is to consolidate the land holdings into federal trust

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[95] *Id.* at 4.

[96] *Id.* at 601.

[97] *Id.* at 603.

[98] Indian Reorganization Act, 48 Stat. 984 (1934).

[99] CAROLE GOLDBERG, MEMBERS ONLY: DESIGNING CITIZENSHIP REQUIREMENTS FOR INDIAN NATIONS, IN AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 114 (Eric D. Lemont ed. 2006). Navajo Nation rejected the IRA. Theodore H. Haas, *Ten Years of Tribal Government under I.R.A.* 14 U.S. INDIAN SERV. (1947), https://www.doi.gov/sites/doi.gov/files/migrated/library/internet/subject/upload/Haas-TenYears.pdf.

[100] GOLDBERG, *supra* note 100, at 113. The IRA was described as either "a colonizing document or an enlightened way to support tribal sovereignty." EZRA ROSSER, A NATION WITHIN: NAVAJO LAND AND ECONOMIC DEVELOPMENT 42 (2021). Since 1988, all Tribal constitutional amendments must be approved by the Bureau of Indian Affairs. Indian Reorganization Act Amendments, 1988 Enacted H.R. 2677, 100 Enacted H.R. 2677, 102 Stat. 2938 (1988).

[101] Indian Reorganization Act, 48 Stat. 984 (1934).

[102] *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009).

[103] *See* Flannery E. O'Rourke, *Rights in the Lands of the Nations Wronged: A Review of Property Rights in Native Nation Land Holdings,* FEE SIMPLE (Spring 2022).

[104] COHEN'S*, supra* note 43, at §16.03.

[105] *Id.*

[106] Hakansson, *supra* note 68, at 248-49.

[107] Federal Reserve Bank of Minneapolis & Enterprise Community Partners, *Tribal Leaders Handbook on Homeownership* (Patrice H. Kunesh, ed, 2018), https://www.minneapolisfed.org/~/media/files/community/indiancountry/resources-education/cicd-tribal-leaders-handbook-on-homeownership.pdf?la=en.

land held for the benefit of the affected Nations.[108] Thus, the IRA directly and indirectly brought federal trust land to the forefront.

The federal harms to Native Nations did not cease with the IRA. In 1953, Congress terminated more than one hundred Nations through passage of the Termination Acts.[109] As Nations were terminated,[110] so too were their land holdings, with the federal government selling off the land to third parties.[111] More than one million acres of land was taken out of trust under the Acts.[112] In a parallel effort, Congress passed the Urban Relocation Act of 1956.[113] Under the Act, the federal government induced Native persons residing on reservations to relocate to urban centers for jobs and housing.[114] The goal, like prior U.S. actions, was to remove Native persons from reservations, not only to force their assimilation but also to acquire their Nations' land.[115]

However, this time the U.S. land grab and Native erasure was short-lived. In a 1968 Special Message to Congress, President Lyndon Johnson announced an end to the termination policy.[116] In highlighting the egregious conditions in which Native persons were forced to live, he began with housing.[117] "Fifty thousand Indian families live in unsanitary, dilapidated dwellings: many in huts, shanties, even abandoned automobiles."[118] But more than fifty years since 1968, the housing on Native Nation land remains inadequate.[119] With the historical and persisting vulnerability of fee land, federal trust land is supported by both current federal policy and many Native Nations. Thus, I turn next to the relative merits of trust and fee lands.

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[108] There are numerous federal acts to consolidate fractionated Native land holdings. Land consolidation is addressed by the Indian Land Consolidation Act, 25 U.S.C. §§2201-2219 (2004), the Land Buy-Back Program under the *Cobell* Settlement, and the American Indian Probate Reform Act. 108 P.L. 374, 118 Stat. 1773 (2004).

[109] Indians, 67 Stat. 132, 67 Stat. B132 83 H Con. Res. 108 (Aug. 1, 1953). Nations from the states of California, Florida, New York, and Texas, as well as other specified Tribes were terminated under the Act.

[110] Termination imposed state jurisdiction on Native land and deprived 11,000 Native citizens of federal services. WILKINS & STARK, *supra* note 29, at 31. WILKINSON, *supra* note 24, at 11-12.

[111] WILKINSON, *supra* note 24, at 11-12. Many of the Nations terminated have subsequently regained federal recognition.

[112] University of Alaska Fairbanks, *Termination Era, the 1950s, Public Law 280,* https://www.uaf.edu/tribal/112/unit_2/terminationerathe1950spubliclaw280.php (last visited Oct. 12, 2022).

[113] Indian Relocation Act of 1956, Pub.L. No. 84-959, 70 Stat. 986.

[114] Max Nesterak, *Uprooted: The 1950s Plan to Erase Indian Country*, APM (Nov. 1, 2019), https://www.apmreports.org/episode/2019/11/01/uprooted-the-1950s-plan-to-erase-indian-country.

[115] *Id.*

[116] Lyndon B. Johnson, Special Message to the Congress on the Problems of the American Indian: "The Forgotten American." Online by Gerhard Peters and John T. Woolley, The American Presidency Project https://www.presidency.ucsb.edu/node/2374671978.

[117] *Id.*

[118] *Id.*

[119] Pindus, *supra* note 15.

II. The Complexities of Trust and Vulnerabilities of Fee

There are two principal challenges to provision of housing on trust land. First, the trustee-beneficiary relationship empowers the U.S. to continue to control and limit Native Nations' land use, thereby impeding Nations' self-determination.[120] Second, restrictions on alienation can complicate the home-ownership model prevalent outside of Indian Country. Below, I address both challenges as they arise in each step of the home building process, while also explaining why placing land in fee would be an inadequate remedy.

The Anglo-American system of property rights venerates the fee simple absolute. This form of freehold estate with full and perpetual property rights, including that of alienation, is central to the "American Dream" of homeownership.[121] In the United States, homeownership is a way to build equity and intergenerational wealth.[122] But the United States' model is a poor fit for provision of housing on Native Nation land held in federal trust. There, the United States as trustee, holds legal title to the land. Thus, even if the Nation, citizen, or housing developer owns the dwelling unit, the subsurface, surface, or air space are at best held as time-limited leaseholds, rather than perpetual freeholds.[123]

Leaseholds complicate housing development in two ways. First, leaseholds on Nation's land generally must be approved by the Secretary of the Interior and/or be consistent with federal law.[124] This is time-consuming and usurps the Nation's authority.[125] Second, leaseholds are a hindrance to lending. With fee land, persons seeking homeownership can use their real property as security for a mortgage loan; typically, the power to foreclose and to take possession of the property forms collateral for the mortgage.[126] In contrast, acquisition of mortgages to build homes on non-fee land can be complicated.[127] As noted, on trust lands, only the home structure (improvements) can be owned, as freeholds are not available because the federal government holds legal title to the land.[128]

Nations do have alternatives to leaseholds for temporary grants of land use rights to citizens, though these options do not address the financing issues inherent in non-fee land.[129] Many Nations use "tribal land assignments" to grant temporary land use rights to their citizens.[130] In comparison with leases, assignments are only subject to minimal control by the Department of the Interior (DOI); but

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[120] Shoemaker, *supra* note 9, at 1534.

[121] Lisa Johnson Mandell, *What Does 'Fee Simple' Mean? Having Absolute Power Over Your Domain* REALTOR.COM (May 25, 2017), https://www.realtor.com/advice/buy/what-is-fee-simple/.

[122] MILLER, *supra* note 48, at 146.

[123] Shoemaker, *supra* note 9, at 1560-61.

[124] *Id.* at 1565.

[125] *Id.*

[126] Naomi Schaefer Riley, *One Way to Help Native Americans: Property Rights*, ATLANTIC, (Jul. 30, 2016), https://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941/.

[127] Yair Listokin, *Confronting the Barriers to Native American Homeowners on Tribal Lands: The Case of the Navajo Partnership for Housing*, 33 URB. LAW. 433, 440 (2001).

[128] Pindus, *supra* note 15, at 90.

[129] Shoemaker, *supra* note 9, at 1560.

[130] *Id.*

fewer rights inhere in assignments.[131] Nations also use land permits to provide non-possessory time-limited use rights to their citizens.[132] However, as is the case outside of Indian Country, permits are revocable and include far more limited property rights than either a lease or fee.[133] Thus, while Nations do have alternatives to leaseholds that involve more limited DOI oversight, this comes at the cost of each Native citizen's property rights.

Owing to these challenges, some scholars advocate for Native land to be held in fee.[134] This would theoretically allow Nations and citizens to convey and lease land, and even pursue development of natural resources without the involvement of the federal government.[135] A study of privatization (conversion of trust land to fee) of Native Nation land in Canada found better housing quality in privatized lands.[136] A separate study in the United States examined satellite images of land held in fee and land held in trust.[137] The researchers found that land held in fee has 20% more development, and 35% more agricultural use.[138] Overall, the researchers found land held in fee increased the value of each acre of land by up to $4,765.[139] Thus, there are practical and economic advantages to fee land.

Notwithstanding these advantages, the legal complexities of Native homeownership are not necessarily alleviated by land being held in fee. First, most homes are bought using a mortgage, but many Native citizens face barriers to qualifying for mortgages, even for land held in fee.[140] For example, in Navajo Nation, many potential homebuyers are unfamiliar with and unqualified under traditional borrower mortgagor requirements.[141] Many Navajo citizens have poor or no credit and high debt to income ratios.[142] Citizens also are often not aware that credit is necessary for mortgage lending.[143] Moreover, even where citizens would otherwise qualify for a mortgage, banks may be less likely to loan to Native citizens out of underlying discrimination.[144] Further, when land is held in fee in a Native Nation reservation by a citizen of that Nation, the land is under the Nation's jurisdiction.[145]

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[131] *Id.*

[132] *Id.* at 1561.

[133] Shoemaker, *supra* note 9, at 1561.

[134] Riley, *supra* note 126.

[135] *Id.*

[136] Fernando M. Aragon & Anke Kessler, *Property Rights on First Nations' Reserve Land*, (Department of Economics, Simon Fraser University, Discussion Papers dp17-14, 2017).

[137] Christian Dippel, et al., *Property Rights without Transfer Rights: A Study of Indian Land Allotment* (Nat'l Bureau Econ. Research, Working Paper No. 27479, 2020).

[138] *Id.* at 37.

[139] *Id.* at 38.

[140] *Id.* at 89.

[141] Listokin, *supra* note 127, at 447.

[142] *Id.*

[143] *Id.*

[144] Dolan Interview, *supra* note 18.

[145] Thomas M. Fitzpatrick, *Land Use Regulation on Reservation Fee Lands: Where do We Go From Here?* WASHINGTON ASSOC. OF PROSECUTING ATTORNEYS (Jun. 21, 2003), https://mrsc.org/getmedia/12B1A3A4-2B95-43A8-A5B9-815B97A2853A/La. If land is held in fee by a non-citizen then the land may be under state jurisdiction.

Thus, judicial foreclosure of the mortgage would take place in Tribal courts.[146] [147] Many mortgage lenders are unjustifiably wary of Native Nation courts and laws.[148] The lending situation is so dire that Chickasaw Nation formed its own bank to ensure its citizens have equal access to real estate financing.[149]

Even with financing and with land held in fee, new homebuilding can still be difficult in Indian Country. In Navajo Nation, contractors often must travel as far as 150 miles to a homesite at the homebuyer's expense.[150] This is more problematic with scattered site housing. [151] But more dense housing is disfavored by some Diné,[152] as they desire to live on their ancestral lands.[153] More clustered housing has been possible in Pine Ridge Reservation.[154] There, Alan Jealous, an Oglala Lakota citizen, builds homes in clusters of seven to mirror the group of tipis by *tiospaye* ("extended family") common in traditional Oglala Lakota settlements.[155] However both Navajo Nation Reservation and Pine Ridge Reservation face enormous infrastructure challenges, including the lack of electricity,[156] paved roads,[157] public transport for persons without cars,[158] potable water,[159] and phone service.[160] In sum, placing land in fee does not solve the numerous barriers to homeownership and home building on Native land.

Moreover, the benefits of land held in fee are not universal. There is a real risk that Native Nations and citizens will be divested of land not shielded by trust. In the Canadian study of the privatization of Native lands, contrary to the U.S. study, the authors did not find economic advantages to land held in fee.[161] The Canadian study did find, however, that the privatization of land led to an increase in

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[146] Listokin, *supra* note 127, at 441.

[147] After the *McGirt* decision, the American Land Title Association (ALTA) addressed tribal court jurisdiction in title matters with language that stated claims covered by its policies must only be brought in state or federal court. Unclear whether this alleviated or exacerbated lending.–Ed.

[148] *Id.*

[149] The Chickasaw Nation, *Chickasaw Community Bank,* https://www.chickasaw.net/Our-Nation/Locations/Chickasaw-Community-Bank.aspx (last visited Oct. 12, 2022); Dolan Interview, *supra* note 18.

[150] Listokin, *supra* note 127, at 443.

[151] *Id.*

[152] Diné is the proper term for the Navajo people. *Navajo Nation* Indian Health Service, https://www.ihs.gov/navajo/navajonation/ (last visited Oct. 12, 2022).

[153] Listokin, *supra* note 127, at 445.

[154] NoiseCat, *supra* note 21.

[155] *Id.*

[156] Dana Tell & Axton Betz, *Housing Issues and Solutions for the Residents of the Pine Ridge Reservation, South Dakota*, Faculty Research and Creative Activity Eastern Ill. University (2012), http://the keep.eiu.edu/fcs_fac/15; Dolan Interview, *supra* note 19.

[157] Dolan Interview, *supra* note 18.

[158] Tell & Betz, *supra* note 156.

[159] Dolan Interview, *supra* note 18. NoiseCat, *supra* note 21.

[160] Tell & Betz, *supra* note 156.

[161] Aragon & Kessler, *supra* note 136.

non-Native owners of once-Native-owned land.[162] When I asked Torey Dolan, Choctaw citizen and attorney, if fee or trust was preferred, she quoted Justice Miller's 1886 opinion in *U.S. v. Kagama*: "the States . . . are often [the Nations'] deadliest enemies."[163] Certainly, nothing in U.S.-Native Nation history shows that Native land will be secure once it can be freely conveyed.

Moreover, as legal scholar Jessica A. Shoemaker points out, "forced-fee proposals echo . . . termination policies, which exist as a scar on federal Indian policy."[164] Converting land from trust to fee without a Nation's consent erodes the Nation's sovereignty.[165] Further, even if only a fraction of fee land falls into the possession of a non-citizen of the Nation, it can cause the Nation to lose jurisdiction over that land.[166] Moreover, while the Anglo-European view of land is transactional and focuses on wealth-building,[167] for many Nations, land is central to identity.[168] Housing on Native land is about more than building equity or even shelter. Thus, notwithstanding the limitations of trust land, both federal law and many Native Nations prefer that Native land be held in trust for the benefit of the Nation.[169]

III. Current and Proposed Improvements in Trust

The preference for trust land should not be confused with complacency with its abundant limitations. Efforts are underway to mitigate the limitations of trust land. In the following section, I review current federal legislation aimed at simplifying and incentivizing housing and other economic development on Native land. Then, I review one Native legal scholar's proposal for navigating and mitigating the challenges of trust land.

Federal law promotes development on trust land.[170] First, developers can receive tax credits for developing on trust land. New Market Tax Credits incentivize investors to build on tribal trust or fee land in rural or low-income areas.[171] Indian Employee Tax Credits incentivize businesses to build on trust land and provide employment for citizens of Native Nations.[172] Nations can also issue tax-free bonds to entities that perform essential government functions on trust land.[173] Moreover, leasing on

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[162] *Id.*

[163] *United States v. Kagama*, 118 U.S. 375, 384 (1886) (wherein the Court uphold federal jurisdiction for certain Native on Native crimes in Indian Country under the Major Crimes Act).

[164] Shoemaker, *supra* note 9, at 1556.

[165] *Id.*

[166] *Id.* at 1538.

[167] Caroline LaPorte, *National Workgroup on Safe Housing for American Indian and Alaska Native Survivors of Gender-Based Violence: Lessons Learned,* NIWRC 32 (Jan. 2020), https://www.niwrc.org/sites/default/files/files/reports/ai-an-workgroup-report-interactive.pdf.

[168] Shoemaker, *supra* note 9, at 1536.

[169] Dep't of the Interior, *Converting Fee Land into Trust Land and the Associated Economic Benefits,* https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/pdf/Fee_to_Trust.pdf (last visited Oct. 12, 2022).

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

trust land is also free from state taxes.[174] Additionally, participants in the Historically Underutilized Business Zone (HUBZone) are eligible for federal contracting priority.[175]

Federal Law also provides unique incentives for private development on trust land in specific Nations. For example, in Navajo Nation, the Navajo Master Area Land Lease Act designates specific Master Land Lease Areas[176] with separate entities in charge of oversight for each leasing area.[177] This gives lenders collateral for housing development, though Navajo Nation retains the right of first refusal.[178] The Navajo Deed of Trust Act also provides federal backing for mortgages with Navajo members.[179]

Beyond the Navajo Nation-specific legislation, there also are three key federal acts specifically aimed at provision of housing in Indian Country. First, the Housing and Community Development Act of 1992 provides a federal guarantee for bank loans to individual Native persons or housing authorities for homes on land held by a Nation.[180] The purpose of the Act is to alleviate the challenges Native persons face in obtaining mortgages on leased trust land or that Native persons experience in obtaining mortgages generally. The Section 184 HUD Loan program provides a 100% guarantee for home loans made to qualifying members of Native Nations.[181] However, it is only available for one-to-four-unit single family homes on trust land, allotted land, or fee simple land in Indian Country.[182] In eighteen years, the Act supported $420 million in housing loans for lands held in trust and $3.4 billion for housing loans for land held in fee.[183] While a far greater sum of loans has been authorized for fee versus trust land, one scholar argues this owes to persistent discrimination against and distrust of Native Nations, rather than how the land is held.[184]

The next act in support of housing is the Native American Housing Assistance and Self Determination Act of 1996 (NAHASDA).[185] NAHASDA supports housing development in Native Nations through incentivizing private lenders and providing block grants directly to Nations.[186] Block grants can generally only be used to the benefit of persons with incomes less than 80% of the Area Median Income (AMI).[187] NAHASDA funds also can be used in combination with Section 184 HUD Loans. For

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[174] *Id.*

[175] *Id.*

[176] Master Land Lease Areas are distinct areas where a single entity manages sub-leases. Listokin, *supra* note 128, at 440.

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] Pub. L. No. 10-2550, 106 Stat. 3672.

[181] *Id.*

[182] *Id.*

[183] Kristen A. Carpenter & Angela R. Riley, *Privatizing the Reservation?* 71 STAN. L. REV. 791, 834 (Apr. 2019).

[184] *Id.* at 834-35.

[185] Pub. L. No. 104-330, 110 Stat. 4016 (2017). It subsequently was amended via the Omnibus Indian Advancement Act in 2000 Pub. L. No. 106-568, § 1003, 114 Stat. 2868, 2925-30 (2000), the Native American Housing Enhancement Act Pub. L. No. 109-136, 119 Stat. 2643 (2005), and Public Law 110-411, 122 Stat. 4319 (2008).

[186] Pub. L. No. 104-330, 110 Stat. 4016 (2017).

[187] *Id.*

instance, if the borrower's income is less than 80% AMI then NAHASDA funds can cover the required down payment of 1.25 to 2.25% depending on the home value.[188] Thus, NAHASDA provides housing supports targeted at low-income citizens of Native Nations.

The third act in support of homeownership is the Helping Expedite and Advance Responsible Tribal Home Ownership (HEARTH) Act of 2012.[189] The HEARTH Act furthers tribal self-determination through reducing the role of the BIA in Native Nation land leases.[190] Nations can establish their own land leasing regulations and then will no longer need BIA approval for each lease unless the BIA has a compelling reason for taking exception to a particular lease.[191] Nations first must pass a law, subject to approval by the BIA, to explain how they will lease their lands.[192] If the law is approved, the HEARTH Act allows Nations to issue 75-year leases for land set for residential use.[193] This is a vast improvement over the Long-Term Leasing Act of 1955, under which all leases on land held in trust had to be approved one by one by the federal government.[194] However, the BIA only grants approval to leasing laws that are "'consistent with' existing federal leasing regulations for the same properties."[195] Thus, as with other federal legislation, there are limitations to the HEARTH Act's improvements.

Recognizing the limitations of existing federal legislation, one Native legal scholar instead proposes using Tribal law to mitigate the challenges of federal trust land. Kris Beecher, Navajo citizen, and real estate attorney, argues for Navajo Nation to create its own property laws to facilitate housing development on its land held in trust.[196] Mr. Beecher's proposal is pressing, as housing development on Navajo Nation Reservation is especially challenging due to limited infrastructure in many areas.[197] Thus, home-building in the reservation requires not only a plan for financing an improvement on a leasehold, but also for extending vital basic services like water and electrical utilities to remote undeveloped areas.[198]

As Mr. Beecher explains, housing development on Navajo Nation Reservation is markedly different than in nearby boundary towns.[199] In boundary towns, localities can earn revenue from new housing development through the collection of property taxes.[200] This direct financial benefit from new development can induce localities to supplement the cost of extending municipal services to new

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[188] ***Id.***

[189] Pub. L. No. 112151, 126 Stat. 1150 (codified as amended at 25 U.S.C. § 415 (2017)).

[190] ***Id.***

[191] Pub. L. No. 112151, 126 Stat. 1150 (codified as amended at 25 U.S.C. § 415 (2017)).

[192] Phone Interview with Stacy Leeds, Professor, Arizona State University, (Nov. 16, 2021). Leeds is a citizen of the Cherokee Nation.

[193] Pub. L. No. 112151, 126 Stat. 1150 (codified as amended at 25 U.S.C. § 415 (2017)).

[194] HUD, *Obstacles, Solutions, and Self-Determination in Indian Housing Policy* Evidence Matters (2015), https://www.huduser.gov/portal/periodicals/em/spring15/highlight1.html.

[195] Shoemaker, *supra* note 9, at 1565.

[196] Zoom Interview with Kris Beecher, Attorney, (Nov. 12, 2021) [hereinafter Beecher Interview]. Beecher is a citizen of Navajo Nation.

[197] ***Id.***

[198] ***Id.***

[199] ***Id.***

[200] ***Id.***

areas.[201] In contrast, on the reservation, federal law limits the Nation's right to collect property taxes where land is held in trust.[202] Thus, the Nation does not economically benefit from new housing, and the individual homeowner or developer must pay the overhead for earth work, road building, and the extension of utility lines and other resources.[203] Consequently, building the same house in a boundary town can be done at a fraction of the cost as on the reservation.[204] But the equity in the boundary town home is higher, as an individual who builds on the reservation does not and cannot own the trust land.[205] Thus, building a home on the reservation comes at a huge cost, with intrinsic barriers to making a return on the investment.[206]

To address these barriers, Mr. Beecher proposes a dynamic system of Tribal property laws and protections to attenuate the financial burden and risk of developing in some areas, while preserving other areas for traditional use.[207] For instance, Mr. Beecher suggests establishing zones where each square mile of land is worth a set value.[208] The Nation then would commit to buying any improvements on the land if the individual or entity chose to sell.[209] The Nation also could establish a simple way for land improvements to be traded or, in some cases, moved.[210] In contrast, other zones could be designated for sheep grazing, a vital part of not only Navajo Nation's economy, but culture.[211] As Mr. Beecher explains, these changes are critical to ensuring that citizens of the Nation can afford to be at home in the Nation.[212] At present, with inadequate housing and astronomical home-building costs, many Diné have no choice but to leave.[213]

Both Mr. Beecher's proposed Navajo laws and existing federal legislation are important steps to navigate the complexity and mitigate the expense of building a house on federal trust land. In both cases, the basic system of Anglo-American property rights remains relatively unchallenged. At least one Native legal scholar envisions a reformed system, where Nations' laws protect land from alienation, and where Nations rather than the federal government act as trustees to their citizens.[214]

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[201] *Id.*

[202] *Id.* Shoemaker, *supra* note 9, at 1539.

[203] *Beecher Interview*, *supra* note 196.

[204] *Id.*

[205] *Id.*

[206] *Id.*, *supra* note 196.

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] Stacy Leeds, Cherokee citizen, legal scholar, and judge argues that both federal trust land and land held in restricted fee (alienable only with federal approval) maintain the paternalistic idea that Native persons need greater protection. Stacy L. Leeds, *Moving Toward Exclusive Tribal Autonomy over Lands and Natural Resources*, 46 NAT. RESOURCES J. 439, 453 (Spring 2006) [hereinafter *Tribal Autonomy*]. Instead, she proposes a series of property conveyances and legislative changes to ensure that Cherokee property law is the law of Cherokee land. *Id.* First, current land holdings held in trust or in restricted fee must be conveyed in fee simple absolute to Cherokee Nation or its citizens. *Id.* Then Professor Leeds proposes giving the Nation and citizens two options: (1) Place land in fee,

But in the meantime, federal trust land persists as a flawed, but marked improvement over historical U.S.-Native Nation policy. Even with the abundant complexities in home building, land held in trust is better than land not held at all.

Conclusion

As Virginia Nations may soon learn or are already discovering, building a house on federal trust land remains complicated. But with trust land, the Nations can forgo the jurisdictional and dispossessory risks of land held in fee. While many of the issues of infrastructure prevalent on the Navajo and Pine Ridge Reservations are unlikely to be as severe for Virginia Nations, federal control over trust land may still impinge on Virginia Nations' sovereignty. Further, while each Virginia Nation's history is distinct from that of long-federally recognized Nations, Virginia Nations endured centuries of erasure. Thus, I suspect it will come as little surprise or deterrent to the Pamunkey Indian Tribe, Chickahominy Indian Tribe, Chickahominy Indian Tribe - Eastern Division, Rappahannock Tribe, Upper Mattaponi Tribe, Nansemond Indian Tribe, or Monacan Indian Nation that coming home in the Anglo-American system is not easy, even beyond the complexities of an imperfect trust.

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but fully subject to Tribal law; or (2) Place land in trust for the benefit of the citizens of the Nation, but with Cherokee Nation, rather than the U.S., as trustee. *Tribal Autonomy*, at 456. There is some basis for Cherokee Nation to fill the trustee role. In *Cherokee Nation v. Hitchcock,* the Court quoted a Senate report declaring the same, although the report used it to justify the Secretary of the Interior leasing out Cherokee fee lands. 187 U.S. 294, 302 (1902) (quoting Sen. Rep. No. 377 (1894)). Whether, under Professor Leeds' proposal, Cherokee Nation ultimately replaced the U.S. as trustee or the land was instead held by in Cherokee-restricted fee, federal legislation would be necessary to ensure the same privileges of federal trust land apply. *Tribal Autonomy*, at 457. Professor Leeds recognizes that ensuring that the land, whether held in Cherokee trust or fee, is free from state taxation may be a more difficult matter. Stacy L. Leeds, *Keynote Address: Borrowing from Blackacre: Expanding Tribal Land Bases Through the Creation of Future Interests and Joint Tenancies*, 80 N.D. L. REV. 827, 847 (2004).

FAIR HOUSING LAWS AND VIRGINIA COMMUNITY ASSOCIATIONS

By Deborah M. Casey and Kathleen W. Panagis

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Virginia common interest communities (property owners' associations, condominium associations, cooperatives, and time-shares (individually "CIC", and collectively "CICs")), are subject to the federal Fair Housing Act ("FHA") and the Virginia Fair Housing Law ("VFHL") (FHA and VFHL collectively "Fair Housing Laws")[1]. While CICs generally do not sell or lease housing, CICs intersect Fair Housing Laws in the provision of services or facilities that prohibit CICs from discriminating against any person in the provision thereof because of an individual's status in a protected class[2]. CICs and their legal counsel need to be aware of the CICs' obligations under the Fair Housing Laws so that they do not knowingly or unknowingly engage in a discriminatory housing practice.

Protected Classes

The Fair Housing Laws prohibit discriminatory housing practices against individuals based on their race, color, religion, sex (including sexual orientation and gender identity), national origin, familial status, handicap, or disability, and the VFHL provides additional protection to individuals based on their elderliness, source of funds, or military status[3]. To better understand who falls into certain protected classes, the FHA and/or VFHL define these classes as follows:

[1] Fair Housing Laws are also applicable to other entities and persons, including, but not limited to, individuals, corporations, lenders, housing managers, real estate agents, and brokerage services. *See* Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations Under the Fair Housing Act, dated May 17, 2004 ("Joint Statement 1")

https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf

For purposes of this article, we address Fair Housing Laws as they relate only to CICs.

[2] 42 U.S.C. § 3604(b) and (f)(2); Va. Code § 36-96.3A(2) and (9).

[3] 42 U.S.C. §§ 3601-3619, 3631 and Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act dated February 11, 2021; Va. Code §§ 36-96.1-36-96.23.

- Disability[4]: Means a person who (i) has a physical or mental impairment which substantially limits one or more of the person's major life activities; (ii) has a record of having such an impairment; or (iii) is regarded as having such an impairment[5].
- Elderliness: Means a person who has attained their fifty-fifth birthday[6].
- Familial Status: Means one or more individuals who are under 18 years old and who live with (i) a parent or any other person who has legal custody of the individual(s) or (ii) any person whom the parent or the person with legal custody have designated in writing. The term familial status also includes any person who is pregnant or who is in the process of securing legal custody of an individual who is under 18 years old[7].
- Military Status: Means status as (i) a member of the uniformed forces, as defined in 10 U.S.C. § 101(a)(5), of the United States or a reserve component thereof named under 10 U.S.C. § 10101, (ii) a veteran as defined in 38 U.S.C. § 101(2), or (iii) a dependent as defined in 50 U.S.C. § 3911(4) except that the support provided by the service member to the individual shall have been provided 180 days immediately preceding an alleged action that if proven true would constitute unlawful discrimination under this section instead of 180 days immediately preceding an application for relief under 50 U.S.C. Chapter 50[8].
- Religion: Includes any outward expression of faith, including religious dressing and grooming practices and the carrying or display of religious items or symbols[9].
- Source of Funds: Means any source that lawfully provides funds to or on behalf of a renter or buyer of housing, including any assistance, benefit, or subsidy program, whether such program is administered by a governmental or nongovernmental entity[10].

Notably, in January 2020, the U.S. Department of Housing and Urban Development shared that as of that time, fair housing complaints pertaining to disability comprise almost sixty percent (60%) of all complaints[11]. The Virginia Fair Housing Office has disclosed that most of the complaints it receives involve disability and racial discrimination, but they have also seen an uptick in complaints involving familial status[12]. With this information in mind, alleged discrimination based on familial status and disability are discussed in more detail below.

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[4] VFHL uses the term "disability" instead of "handicap", and the FHA uses the term "handicap". Nonetheless, the term "disability" has similar meaning to the term "handicap". *See Bragdon v. Abbott*, 524 U.S. 624, 631 (1998); *See also* Joint Statement 1.

[5] *See* 42 U.S.C. § 3602(h); *See also* Va. Code § 36-96.1:1.

[6] *See* Va. Code § 36-96.1:1.

[7] *See* 42 U.S.C. §3602(k); *See* Va. Code § 36-96.1:1.

[8] *See* Va. Code § 36-96.1:1.

[9] *Id*.

[10] *See* Va. Code § 36-96.1:1.

[11] Assessing a Person's Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act, U.S. Department of Housing and Urban Development, January 28, 2020 (page 4).

[12] Virginia Fair Housing Office, https://www.dpor.virginia.gov/FairHousing (August 24, 2022).

Fair Housing Considerations Regarding Familial Status

As noted earlier, the Fair Housing Laws define the protected class of "familial status" as

> one or more individuals who are under 18 years old and who live with (i) a parent or any other person who has legal custody of the individual(s) or (ii) any person whom the parent or the person with legal custody have designated in writing. The term familial status also includes any person who is pregnant or who is in the process of securing legal custody of an individual who is under 18 years old[13].

Discrimination on the basis of familial status[14] typically occurs in one of two ways: disparate treatment or disparate impact. Disparate treatment is where a CIC has rules, policies, procedures, or practices that intentionally treat persons with familial status (and other protected classes) differently[15]. On the other hand, disparate impact is where a CIC has rules, policies, procedures or practices that appear neutral on their face; however, they actually cause persons with familial status (and others) to be treated differently.[16] Common examples of CIC rules or policies that may constitute impermissible discrimination against those with familial status include:

- "Adults-only" swim the last ten minutes of every hour;
- All non-toilet trained children are prohibited from using the pool;
- Children under 18 must be accompanied by an adult while using the CIC pool; and
- Minors must be supervised at all times by an adult while playing in the CIC's common areas.

CIC rules that are discriminatory against those with familial status are impermissible under the Fair Housing Laws. To the extent that CIC rules may treat individuals with familial status differently, such rules need to serve a legitimate interest and be narrowly tailored. CICs should consult with their legal counsel to review any existing or proposed rules and policies.

Fair Housing Considerations Regarding Disability

As mentioned earlier, the Fair Housing Laws define a person with a disability to include individuals (a) with a physical or mental impairment that substantially limits one or more of such person's major life activities; (b) with a record of having such an impairment; or (c) regarded as having such an impairment[17]. A "physical or mental impairment" may include any of the following:

> (i) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal;

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[13] *See* 42 U.S.C. §3602(k); *See* Va. Code § 36-96.1:1.

[14] Note that fair housing laws that prohibit unlawful discrimination because of familial status do not apply to "housing for older persons". Va. Code § 36-96.7. "Housing for older persons" means housing: (i) provided under any state or federal program that is specifically designed and operated to assist elderly persons, as defined in the state or federal program; or (ii) intended for, and solely occupied by, persons sixty-two years of age or older; or (iii) intended for, and solely occupied by, at least one person fifty-five years of age or older per unit. Va. Code § 36-96.7A.

[15] *See Matarese v. Archstone Pentagon City,* 761 F. Supp. 2d 346, 364 (E.D. Va. 2011).

[16] Id.

[17] *See* 24 C.F.R. § 100.201; Va. Code § 36-96.1:1.

> special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; or endocrine; or
>
> (ii) any mental or psychological disorder, such as an intellectual or developmental disability, organic brain syndrome, emotional or mental illness, or specific learning disability.
>
> "Physical or mental impairment" includes such diseases and conditions as orthopedic, visual, speech, and hearing impairments; cerebral palsy; autism; epilepsy; muscular dystrophy; multiple sclerosis; cancer; heart disease; diabetes; human immunodeficiency virus infection; intellectual and developmental disabilities; emotional illness; drug addiction other than addiction caused by current, illegal use of a controlled substance; and alcoholism.[18]

The term "substantially limits" "suggests that the limitation is 'significant' or 'to a large degree.'"[19] The term "major life activities" includes caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working[20].

The Fair Housing Laws not only provide protection to a person with a disability who resides or intends to reside in a dwelling, but also any person associated with an individual who has a disability.[21] Individuals who have disabilities may need to seek either reasonable accommodations or reasonable modifications from CICs if such requests are necessary to afford such individuals full enjoyment of their dwelling. A reasonable accommodation is a change, adjustment or exception to a CIC's rules, practices, policies, or services when the accommodation is necessary to afford that person an equal opportunity to use and enjoy a dwelling in a CIC[22]. There must be an identifiable relationship or nexus between the individual's disability and the requested accommodation to demonstrate that it is necessary[23]. Subjecting a person with a disability to the same rules or policies as others may have a discriminatory effect on such person, hence the need for the accommodation. Examples of reasonable accommodations include:

- Permitting an assistance animal in the CIC even though the CIC has a no pets rule;
- Allowing an assistance animal in the CIC despite such animal exceeding the CIC's animal weight limit;
- Permitting an assistance animal in addition to a pet already present in a unit despite the CIC's rule that permits only one pet per unit;
- Assigning a parking space in the common area parking lot because of a resident's mobility disability even though the CIC does not assign parking spaces; and
- Providing a sign language interpreter at a CIC due process hearing of a resident who is deaf.

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[18] Id.

[19] *See* Joint Statement 1, Q 3 and Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Modifications Under the Fair Housing Act, Q 4 (March 5, 2008) ("Joint Statement 2").

[20] *See* 24 C.F.R. § 100.201; Va. Code § 36-96.1:1.

[21] *See* 42 U.S.C. §3604(f)(2); Va. Code §36-96.3(A)(9); 18 VAC 135-50-200 (C) and (D).

[22] *See* Joint Statement 1, Q 6.

[23] Id.

A reasonable modification, on the other hand, is a "structural change made to existing premises, occupied or to be occupied by a person with a disability, in order to afford such a person full enjoyment of the premises[24]." Reasonable modifications may include changes made to the interior or exterior of dwellings as well as to common areas. Like a reasonable accommodation, a request for a reasonable modification must be necessary because of an identifiable nexus between the disability and the requested modification[25]. Examples of modifications include replacing doorknobs with levers because of a resident's arthritis that impairs use of their hands or installing a ramp at the entrance of a condominium building because of a resident's mobility disability.

CICs are obligated to promptly review and consider a person's reasonable accommodation or reasonable modification request[26]. A CIC is put on notice of a request when a person with a disability, his or her family member, or a person acting on behalf of such person requests an exception to a CIC's rules, policies or procedures or physical change to existing premises because of a disability[27]. A request can be verbal or in writing, and failure to respond timely to an accommodation or modification request may be deemed a denial of the request[28]. There is no magic language or required form that must be used if the request can reasonably be inferred.

There is no one-size-fits-all approach in reviewing such requests. Each request involves the specific facts and circumstances and must be determined on a case-by-case basis. CICs, however, are permitted to obtain certain information in order to determine whether reasonable accommodation or reasonable modification request is necessary because of a disability. The type and extent of information that a CIC may request depends in part on whether the requester's disability and/or disability-related need for an accommodation or modification request is known or readily apparent. In general, the types of inquiries a CIC may make to determine whether the accommodation or modification request is reasonable and necessary are as follows:

- Has the individual requested an accommodation or modification because of a disability? In other words, is the request because of a physical or mental impairment?
- Does the person have an observable disability or does the CIC already have information such that it has reason to know that the person has a disability?
- If the disability is not obvious or known, has the person requesting the accommodation or modification provided information that reasonably supports that the person seeking the accommodation or modification has a disability? *Note that CICs are not permitted to ask about the nature or extent of a person's disability or to know the person's diagnosis.*
- If the need for the accommodation or modification request is not readily apparent or known, has the person requesting the accommodation or modification provided information which reasonably supports that the accommodation or modification is necessary with respect to the individual's disability[29]?

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[24] Joint Statement 2 at Q 2.

https://www.hud.gov/sites/documents/reasonable_modifications_mar08.pdf.

[25] Id.

[26] *See generally* Joint Statement 1 and Joint Statement 2.

[27] *See* Joint Statement 1, Q12 and Joint Statement 2, Q15.

[28] Id.

[29] *See generally* Joint Statement 1 and Joint Statement 2.

As to the documentation that supports an accommodation or modification request, it may come from a health care professional or other third-party who has a professional or therapeutic relationship with the individual with a disability involving the provision of services related to the disability[30]. Since each request for an accommodation or modification is unique, the type of information and documentation that a CIC may seek depends on the circumstances.

Other Fair Housing Considerations: Quid Pro Quo and Hostile Environment Harassment

In 2016, federal regulations were adopted pursuant to the FHA that prohibit hostile environment harassment and quid pro quo harassment because of one's status in a protected class[31]. Quid pro quo harassment is defined as "an unwelcome request or demand to engage in conduct where submission to the request or demand, either explicitly or implicitly, is made a conditioned related to…the provision of services or facilities."[32] Even if a person acquiesces to the unwelcome request or demand, such request or demand may still constitute quid pro quo harassment[33]. An example of quid pro quo harassment is when a member of an association's board of directors or an association's property manager demands sexual favors in exchange for use of services or facilities in the association (i.e., access to and use of the pool, gym, and/or parking).

Hostile environment harassment refers to unwelcome conduct that is sufficiently severe or pervasive as to interfere with the use or enjoyment of a dwelling or the provision or enjoyment of services or facilities in connection with the dwelling[34]. Assessing whether a hostile environment harassment exists depends on the totality of circumstances, which can include (a) factors such as the nature of the conduct, the context in which the incident(s) occurred, severity, scope, frequency, duration, location of the conduct, and the relationships of the individuals involved[35]; (b) neither physical or psychological harm are required to be demonstrated but evidence of such may be relevant[36]; and (c) whether the unwelcome conduct is so severe will be evaluated from a reasonable person in the aggrieved person's position[37].

Both quid pro quo and hostile environment can involve written or verbal conduct, and neither require physical contact[38], and can involve a single incident of harassment if it is sufficiently severe or evidences a quid pro quo[39]. CICs can be either directly or vicariously liable for claims related to quid pro quo or hostile environment harassment[40]. Direct liability includes not only a person's own conduct and/or the conduct of a CIC's employees or agents, but also failing to promptly take action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct and such person has control over or has other legal

[30] Id. and Va. Code § 36-96.3:1.

[31] 24 CFR § 100.600.

[32] 24 CFR § 100.600(a)(1).

[33] Id.

[34] 24 CFR § 100.600(a)(2).

[35] 24 CFR § 100.600(a)(2)(i)(A).

[36] 24 CFR § 100.600(a)(2)(i)(B).

[37] 24 CFR § 100.600(a)(2)(i)(C).

[38] 24 CFR § 100.600(b).

[39] 24 CFR § 100.600(b) and (c).

[40] 24 CFR § 100.7.

responsibility for the third-party[41]. On the other hand, a person will be vicariously liable for a discriminatory housing practice by the person's agent or employee, regardless of whether such person knew or should have known of the problematic conduct[42].

Potential Actions for Alleged Violations of Fair Housing Laws

CICs and their legal counsels need to be aware that persons who believe they have been subject to a discriminatory housing practice have the following options:

a) file a complaint with the United States Department of Housing and Urban Development ("HUD") not later than one year after an alleged discriminatory housing practice has occurred or terminated[43];
b) file a complaint with Virginia Real Estate Board or the Fair Housing Board ("Board") within one year after the alleged discriminatory housing practice occurred or terminated[44]; and/or
c) file a lawsuit in federal or state court not later than two years after the occurrence or the termination of an alleged discriminatory housing practice[45].

Complaints filed with either HUD or the Board will be investigated to determine whether there is cause for the complaint, and if so, issue a charge[46]. Issuance of a charge subsequently leads to a civil action[47]. A civil action instituted by HUD may commence before an administrative law judge or in the applicable United States District Court[48], whereas a civil action instituted by the Virginia Attorney General will result in such action being filed in the applicable circuit court[49]. The type of relief that may be awarded against a CIC can include temporary or permanent injunctive relief, compensatory and punitive damages, and reasonable attorneys' fees[50].

The costs of responding to an initial investigation, before a civil action is filed, coupled with the costs of defending such a civil action can be staggering. Therefore, with the guidance of legal counsel, CICs should take steps to prevent or minimize exposure to fair housing claims, including having board members and community managers attend regular fair housing trainings and/or educational seminars, adopt fair housing policies that include procedures for handling requests for reasonable accommodation and reasonable modification, and consulting with the CIC's insurance broker and/or agent to determine what, if any, insurance coverage is in place or available for potential fair housing claims.

Disclaimer: The information in this article is for general information and is not legal or tax advice. Nor does any exchange of information associated with this article in any way establish an attorney-client relationship.

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[41] 24 CFR § 100.7(a)(1).

[42] 24 CFR § 100.7(b).

[43] 42 U.S.C. § 3610(a)(1)(A)(i).

[44] Va. Code § 36-96.18A.

[45] *See* 42 U.S.C. § 3613; *See also* Va. Code § 36-96.18.

[46] *See* 42 U.S.C. § 42 U.S.C. 3610; *See also* Va. Code § 36-96.10.

[47] *See* 42 U.S.C. § 3612; *See also* Va. Code § 36-96.16.

[48] *See generally*, 42 U.S.C. § 3612.

[49] *See* Va. Code § 36-96.16.

[50] *See generally*, 42 U.S.C. § 3612; Va. Code §§ 36-96.16 and 96.18.

UNLAWFUL DETAINERS AND THE ANTI-RES-JUDICATA STATUTES*

By Heather R. Steele

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Since the Funny Guy decision in 2017, much has been written regarding the expansive scope of *res judicata* in Virginia. However, the General Assembly in 2018 quietly revised a code section applicable to unlawful detainers in order to carve out an exception to the applicability of *res judicata*. As most Virginia civil litigators are aware, the Funny Guy case discussed, at length, the broad applicability of res judicata:

> Virginia Rule 1:6 states in pertinent part as follows:
>
> A party whose claim for relief arising from identified conduct, a transaction, or an occurrence, is decided on the merits by a final judgment, shall be forever barred from prosecuting any second or subsequent civil action against the same opposing party or parties on any claim or cause of action that arises from that same conduct, transaction or occurrence, whether or not the legal theory or rights asserted in the second or subsequent action were raised in the prior lawsuit, and regardless of the legal elements or the evidence upon which any claims in the prior proceeding depended, or the particular remedies sought.

However, many practitioners may not be aware that there are certain statutory exceptions to the applicability of res judicata. One of the exceptions is a statutory carve-out for unlawful detainer actions. Friend's Virginia Pleading and Practice, §27.08 describes Virginia Code §8.01-130 as an "anti-res-judicata, anti-collateral-estoppel" provision. The General Assembly seems to agree; the 2018 amendment of Section 130 to add the words "unlawful detainer" made it clear that the General Assembly intended to confirm and clarify an exception to the applicability of any res judicata argument to unlawful detainer actions. It is worth noting that this change to the statutory language came a year after the Funny Guy decision, such that it is presumed the General Assembly was well aware of the Funny Guy ruling and was expressly revising the statute in light of that ruling.

During the height of COVID restrictions, attorneys representing landlords would often make efforts to seek out a non-monetary basis for eviction, since the hurdles to jump to obtain an eviction for nonpayment of rent became, in some cases, impossibly high. Unfortunately, as often happens in times of crisis, there were some individuals who took advantage of laws intended to help the deserving, squatting in properties often owned by individual landlords who needed the rents to pay the mortgage, and utilizing the delays inherent in the legal system to lengthen their rent-free stay in a property for as long as possible. I have often referred to these individuals as "professional tenants"; they know exactly how the process works and exactly how long it takes for the system to catch up to them. They will often disappear the day before they are being evicted, only to pop up again in some other property where they've convinced a well-meaning owner to take them on as a tenant without a background or credit check that would clearly show their extremely poor rental history.

In order to end this cycle of abuse of the judicial process, attorneys representing these landlords would proceed on a non-monetary eviction basis, which would be either a 21-30 for bad behavior, or

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more often, a 30-day notice of termination of a month to month tenancy (or in some cases, a cash-for-keys lease termination agreement with an agreed vacate date). The professional tenants, understanding the delays inherent in the system, would then cease to pay rent during the entire process, and would game the system by appealing repeatedly in order to draw out the process as long as possible. Since no appeal bond is required in non-monetary cases, the tenants were free to appeal liberally even on entirely untenable grounds, and landlords would be forced to wait out these appeals before obtaining an eviction. In order to discourage this behavior, the Virginia General Assembly added the words "unlawful detainer" to Va. Code 8.01-130 in 2018. The code section now reads:

"No judgment in an action brought under the provisions of this article shall bar any action of trespass, ejectment, or unlawful detainer between the same parties, nor shall any such judgment or verdict be conclusive, in any such future action, of the facts therein found."

Va. Code §8.01-130.

Relatedly, Section 8.01-126(C)(2)(b) states:

Nothing herein shall be construed to preclude a plaintiff from filing an unlawful detainer for a non-rent violation during the pendency of an unlawful detainer for nonpayment of rent.

And Section 8.01-128(C) states:

No verdict or judgment rendered under this section shall bar any separate concurrent or future action for any such damages or rent as may not be so claimed.

Taken together, these three code sections allow a unique circumstance in unlawful detainer actions, whereby a landlord may file one case for non-payment of rent, and during the pendency of that case, may separately and concurrently file an unlawful detainer on a non-monetary basis. This results in two separate cases for eviction pending at the same time, which, for a practitioner not regularly practicing in the area of landlord-tenant law, can cause some temptation to file motions to dismiss on the basis of res judicata. However, such motions are unlikely to be successful, on the basis of these several statutes. Although the Funny Guy case allows for broad applicability of the res judicata requirements of Rule 1:6, the Virginia Supreme Court, quoting the Virginia Constitution, has expressly held that "[a] rule of court cannot trump a statute; such rules cannot conflict with the law as enacted by the general assembly." Priority Imps. Battlefield, Inc. v. Reese, 91 Va. Cir. 63, 64 (Cir. Ct. 2015) (citing Va. Const. Art. VI, § 5; Helms v. Manspile, 277 Va. 1, 7, 671 S.E.2d 127 (2009)). Because statutes trump the rules, Section 8.01-130 trumps the requirements of Rule 1:6 and allows for multiple concurrent filings of unlawful detainers on both monetary and non-monetary bases.

There are restrictions on this behavior; a landlord cannot seek the same rents twice in two separate cases, nor can a landlord file more than one non-monetary action on the same "behavior." (Although if the behavior repeats itself afresh later, the Landlord can sue on the new episode of the same type of behavior.) Sections 8.01-126, 128, and 130 expressly permit the filing of both monetary and non-monetary actions simultaneously, and each unlawful detainer action must be treated as a separate and distinct case.

Unlawful detainer cases are also subject to different rules for appeals: The General Assembly has expressly indicated that the regular appeal bond requirements of Va. Code Ann. § 16.1-106 do not apply to the deadlines for appeal in unlawful detainer cases: "Notwithstanding the provisions of § 16.1-106 et seq., the bond shall be posted and the writ tax paid within 10 days of the date of the judgment." Va. Code Ann. § 8.01-129.

Virginia Code §16.1-107 further provides that "[i]n cases of unlawful detainer for a residential dwelling unit, notwithstanding the provisions of § 8.01-129, an appeal bond ***shall be posted*** by the

defendant with payment into the general district court in the amount of outstanding rent, late charges, attorney fees, and any other charges or damages due, as contracted for in the rental agreement, and as amended on the unlawful detainer by the court. If such amount is not so paid, any such appeal shall not be perfected as a matter of law." (Emphasis added.)

The General Assembly has also exempted unlawful detainer actions from the regular rules regarding indigency, noting that cases for unlawful detainer involving the recovering of rents are NOT subject to the statutes regarding indigency:

> In all civil cases, *except trespass, ejectment, unlawful detainer against a former owner based upon a foreclosure against that owner, or any action involving the recovering rents*, no indigent person shall be required to post an appeal bond. In cases of unlawful detainer against a former owner based upon a foreclosure against that owner, a person who has been determined to be indigent pursuant to the guidelines set forth in 19.2-159 shall post an appeal bond within 30 days from the date of judgment.
>
> Va. Code Ann. § 16.1-107 (emphasis added).

This rule makes sense in light of a non-payment of rent case; if a tenant truly believes they have a right to remain in possession of the premises, the tenant should be required to pay rent to landlord during the pendency of any appeal, and should not be permitted to utilize the legal system to avoid an obligation of rent owed to the landlord. Unfortunately, for non-monetary cases, there is no such requirement, and professional litigants have often demonstrated a pattern of pleading indigency to avoid paying court costs and appeal bonds in order to prolong their unlawful occupancy of the landlord's property.

The General Assembly has also provided clear guidance as to the amount of the appeal bond that a court shall require in unlawful detainer actions; namely, that "an appeal bond shall be posted by the defendant with payment into the general district court in the amount of outstanding rent, late charges, attorney fees, and any other charges or damages due, as contracted for in the rental agreement, and as amended on the unlawful detainer by the court." Va. Code Ann. § 16.1-107. As such, the court sets an appeal bond in the amount of the judgment for rents owed, and further orders that the tenant continue to pay rent in a timely fashion on the 5th of each month thereafter directly to landlord. These appeal rights are not often discussed but are an important method for obtaining relief for landlords in situations where certain tenants will seek to avoid their obligations by gaming the system.

It is regretful that there are some who would use the legal system's delays to their advantage; however, one need only be reminded of 1990's *Pacific Heights* (starring Melanie Griffith and Matthew Modine as young first-time landlords) to be reminded that being a landlord is often a scary proposition. For my landlord clients, I remind them that at least we aren't in California renting the lower level of our home to a menacing Michael Keaton. It could be a lot worse….

BACK FROM THE DEAD: ZOMBIE SECOND MORTGAGES

By Kristi Kelly and Casey Nash

"She takes – and wins – the cases others won't touch." That's how the legal community describes Kristi C. Kelly, a preeminent consumer law expert serving Virginia, Maryland and Washington, D.C.

Named a "Leader in the Law" by Virginia Lawyers Weekly in 2014, Kristi has successfully litigated hundreds of individual cases and class actions. She assists consumers with credit reporting and employment background check mistakes, mortgage servicing errors and abusive debt collection practices – unafraid to take on banks, brokers, debt collectors, credit card companies and scammers alike.

Kristi also speaks on credit reporting and mortgage servicing issues for legal organizations nationwide. She regularly volunteers to educate the community on consumer rights and train industry professionals at the local and state levels.

Casey S. Nash has represented consumers for her entire ten-year legal career. She has litigated a variety of issues, including credit reporting errors, inaccurate background reports, illegal debt collection, mortgage servicing errors, and payday loans, in more than 450 federal cases.

While she practices mostly in Virginia and Washington, D.C., she has a national practice and litigates both individual and class-action cases. Her exceptional performance in many complex consumer lawsuits have earned her numerous "Rising Star" and "Super Lawyers" recognitions from Super Lawyers in both Virginia and Washington, D.C.

Casey has trained fellow lawyers and legal aid organizations on consumer law. She contributed to the 10th edition of NCLC's Consumer Class Action Treatise, and she serves on the Legal Aid Justice Center's Advisory Committee.

During the pandemic, home values rose to unprecedented levels. While this has been beneficial for many homeowners, some homeowners, especially ones who purchased their homes during the early 2000 housing boom, are being contacted out of the blue by companies claiming that they owe tens of thousands of dollars for second mortgages that they haven't received statements for or heard from in years. Because these debts seemingly "rise from the dead," they are often referred to as "zombie" mortgages. Over the last year, there has been a steady increase in the attempted collection of these mortgages.

What are zombie mortgages?

In the early 2000s, many lenders pushed under-qualified homeowners to finance their homes using two mortgages (often called "80/20" mortgages[1]). During the 2007-08 mortgage crisis, many of these homeowners were underwater on their property or experienced financial difficulties and needed to modify their mortgages to stay in their homes. Most often, however, these modifications only covered a consumer's first mortgage, and left the second mortgage unresolved. Many of these second mortgages were charged off, meaning that the homeowners no longer received statements. At that time, second mortgage holders didn't have any incentive to try and collect these debts—because of their junior lien status and depressed home values, the debts were essentially uncollectable.

As a result, homeowners didn't hear anything about their second mortgages for years—in some cases even for a decade or more. Now, with the recent surge in home values, homeowners have significant

[1] The first mortgages being the traditional 80% of the sales price and the second for the remaining 20%–so the buyer only invested closing costs at settlement. –Ed.

equity in their homes, incentivizing lenders to collect or foreclose on second mortgages for the first time in years. To complicate matters further, the second mortgages have often been sold to debt buyers several times over, and now these unfamiliar companies are coming out of the woodwork to collect on loans, in most instances for far more than what a consumer actually owes. Many homeowners are confused by these collection attempts and assume that they are a scam because they have never heard of the company attempting to collect these debts, or they assume their second mortgages were included in modifications obtained from first mortgages since both loans originated at the same time.

How are companies collecting zombie mortgages?

Most homeowners facing a zombie mortgage debt will either start receiving monthly statements in the mail or get a notice from a trustee that their home is to be sold at foreclosure. These communications are confusing because many consumers do not understand that a second mortgage company can foreclose if they are current with their first mortgage company. Many homeowners will call their first mortgage servicer and ask if there is a scheduled foreclosure, not understanding that the first and second mortgage companies are completely separate and do not communicate with each other. Other homeowners have filed for bankruptcy, and erroneously believe that the second mortgage will stay dormant until they sell their home. To make matters worse, communications from the second mortgage company often contain an amount owed that is much higher than what the consumer borrowed on the mortgage or include interest and fees that were assessed when no monthly statements were provided. And consumers do not understand that failure to pay these inflated debts can lead to foreclosure even if they are current on their first mortgage.

Other homeowners may no longer live at the property, but that doesn't stop companies from seeking to collect the unpaid balance on the mortgage. In these cases, a consumer often receives a couple of collection letters in the mail and then is served with a lawsuit for the unpaid balance.

How to Defend Against Zombie Mortgages

If your client is facing a foreclosure or lawsuit stemming from one of these zombie mortgages, this should be taken very seriously, regardless of whether a homeowner is current on the first mortgage or had previously filed for bankruptcy. There are several potential defenses that you can raise:

- Statute of Limitations: If your client no longer lives in the home and is facing a collection action, check the statute of limitations. If the loan was accelerated more than six years ago, the statute of limitations may have passed. (Note: this is calculated from the original acceleration notice. A lender may not send a new acceleration notice to "refresh" the statute of limitations). However, if the consumer still lives in the home, a lender can still foreclose on the property under the deed of trust for ten years after the maturity date.

- Laches & Unclean Hands: If the second mortgage holder has not sought to collect the debt for many years, any collection of the debt may be barred under the equitable doctrines of laches or unclean hands.

- Foreclosure defenses: make sure that all of the conditions precedent in the deed of trust have been met. For example, was there a proper acceleration notice listing the correct outstanding balance? If the loan was previously charged off or monthly statements were not sent, then no interest or fees can be assessed for those months.

- Loss Mitigation: some lenders will allow borrowers to apply for a loan modification. Many of the government-sponsored plans do not apply to second mortgages, but some lenders will still offer these. Make sure that no improper fees or charges have been assessed to the loans before considering a loan modification, however, because you do not want your client to sign a contract agreeing to pay these improper amounts.

Your client may also have affirmative claims that you can bring against the collector:

- Fair Debt Collection Practices Act ("FDCPA"): If the company seeking to collect the second mortgage acquired the loan after it went into default, then the company is considered a "debt collector" under the FDCPA and must comply with all the FDCPA's requirements. This company is not allowed to collect any amounts not expressly provided for under the note or deed of trust (like retroactively assessed late fees and interest). The company also cannot foreclose or attempt to foreclose if there is no present right to possession of the property.

- Truth in Lending Act ("TILA"): Under TILA, new owners must inform borrowers of a transfer of loan ownership within 30 days of the loan being sold and provide them with certain information about the sale. TILA also requires loan servicers to keep borrowers informed about the status of a second mortgage (including whether it has been charged off or reactivated for collection), who owns the loan, and how to contact the appropriate entities for information about the loan. TILA also contains requirements for periodic statements of loans in arrears and bars collection of interest and fees once a loan has been charged off unless the loan is reactivated and the servicer resumes sending the borrower monthly statements.

- Real Estate Settlement Procedures Act ("RESPA"): Under RESPA, when a second mortgage is transferred to a new loan servicer, both the new servicer and the old servicer must provide timely notice to the borrower. The notice must contain the new servicer's contact information and the date on which it will start accepting payments. RESPA also allows borrowers to send Qualified Written Requests to loan servicers to obtain information about their loan and to dispute certain aspects of their loan's servicing.

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Homeowners are understandably alarmed when they are contacted by a zombie mortgage collector. But notices from a zombie second should not be ignored, and there are several state and federal claims that you can explore to help homeowners facing these predatory loans.

PFAS IS COMING: THE TIME TO PREPARE IS NOW

By Maxwell H. Wiegard and Jasdeep S. Khaira

Max Wiegard is a Partner in Gentry Locke's Environmental Law practice group. Max's practice is focused primarily on assisting clients in connection with environmental, real estate, land use and zoning, mergers, acquisitions, and business and commercial matters. Representing corporate and individual clients in environmental litigation and administrative proceedings, environmental compliance and permitting matters, contaminated site transactions, brownfield redevelopment and adaptive land reuse matters, real estate transactions and litigation, and zoning and land use administrative proceedings, Max is licensed to practice in Virginia, Maryland, and the District of Columbia.

Jasdeep Khaira works at Gentry Locke as an associate attorney where he focuses on environmental law, energy regulation, land use and environmental justice. His services include helping clients navigate Environmental Protection Agency and Virginia Department of Environmental Quality enforcement and regulatory matters, Virginia State Corporation Commission regulations and providing counsel to solar developers on local government matters. Prior to joining Gentry Locke, Jasdeep was a full-time legal extern for the U.S. Environmental Protection Agency and held a summer law clerk position with the Sierra Club's Environmental Law program. He also held a position as a clinician with the Vermont Law School Energy Clinic. Jasdeep is a resident of Richmond, Virginia and earned his Bachelor of Arts in Environmental Studies from Denison University and his Juris Doctor cum laude and Masters in Energy Regulation and Law from Vermont Law School.

Per-and polyfluoroalkyl substances (collectively, "PFAS") are a group of nearly 5,000 human-made chemicals that are resistant to heat, water, and oil. Due to these "resistance" properties, since the 1940s, PFAS have been used in a broad spectrum of industrial applications and commercial products, including everyday household items and packaging. Some examples of PFAS usage include carpeting, waterproof clothing, upholstery, food paper wrappings, cookware, personal care products, fire-fighting foams, and metal plating.

In the environment, PFAS move rapidly through groundwater. Thus, PFAS frequently are found in public and private water sources throughout the United States.

Unfortunately, the same resistance to water, heat and oil that lead to the use of PFAS in industrial applications and commercial products, also makes them slow to biodegrade naturally and difficult to remove from environmental media using the technologies traditionally used to remediate environmental conditions.

The United States Environmental Protection Agency ("EPA") has concluded that "most people in the United States have been exposed to PFAS… due to their wide-spread use and persistence in the environment."[1] Scientific studies have shown that regular exposure to even low concentrations—in the range of parts per trillion ("ppt")—of PFAS may cause certain adverse health effects, such as

a. Reproductive issues including decreased fertility or increased likelihood of high blood pressure in pregnant women;

[1] Lifetime Health Advisories and Heal Effects Support Document for POFA and PFOS, 81 Fed. Reg. 33250 (EPA May 25, 2016).

b. Developmental problems in children, including low birth weight, developmental delays, accelerated puberty, bone variations or behavioral changes;

c. increased risk of some cancers, including prostate, kidney, and testicular cancers;

d. reduced ability of the body's immune system to fight infections, including reduced vaccine response; interference with the body's natural hormones; and

e. increased cholesterol levels and/or risk of obesity.

In response to concerns over the potential adverse consequences of exposure to PFAS on human health, recently, the EPA has taken certain steps to regulate PFAS in several contexts. In one of its first actions in 2012, the EPA directed operators of public drinking water systems to begin testing for the presence of PFAS in their drinking water supplies. Then, in 2016, the EPA issued drinking water health advisories at 70 parts per trillion for Perfluorooctanoic acid ("PFOA") and perfluorooctane sulfonic acid (PFOS), two PFAS chemicals.[2] The purpose of such EPA health advisories is to provide technical information to state agencies and other public health officials on health effects, analytical methodologies, and treatment technologies associated with drinking water contamination by PFAS.

On June 15, 2022, the EPA released updated drinking water health advisories for PFOA and PFOS as well as new health advisories for hexafluoropropylene oxide-dimer acid ("GenX") and perfluorobutane sulfonate ("PFBS"). These updated 2022 health advisories significantly reduced the concentrations of PFOA and PFOS from 70 ppt to 0.004 ppt and 0.02 ppt respectively—about the equivalent of 4/1000th and 2/100th of a drop of water in an Olympic-sized pool. The 2022 drinking water health advisory set concentrations of 10 ppt and 2,000 ppt for GenX and PFBS.

In June 2020, the EPA added 172 PFAS chemicals to the Toxics Inventory Reporting ("TRI") requirements for 2020. Three other PFAS chemicals were added to TRI reporting requirements in 2021.

In early 2019, the EPA commenced two significant regulatory processes for PFOA and PFOS; (1) promulgating a Maximum Contaminant Level ("MCL") for PFOA and PFOS under the Safe Drinking Water Act and (2) adding the PFOA and PFOS to the list of chemicals identified as "hazardous substances" under CERCLA[3].

On October 18, 2021, the EPA issued a comprehensive plan for promulgating regulations governing PFAS under various environmental regulatory programs, titled "PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024" (the "Strategic Roadmap"). The Strategic Roadmap identifies goals and implementation strategies for addressing PFAS moving forward, such as holding "polluters accountable", placing "responsibility for limiting exposures and addressing hazards of PFAS on manufacturers, processors, distributors, importers, industrial and other significant users, discharges, and treatment and disposal facilities" and enhancing PFAS reporting.[4] Furthermore, the EPA identified the following industrial sectors as "priorities" for additional investigation and evaluation as suspected PFAS users: printing; chemical manufacturing and blending; plastics and resins; oil & gas; metal coating; mining and refining; electronics; aviation; waste management; treatment and disposal; and potable water management, treatment and distribution.

[2] The analogy frequently used to describe parts per trillion is drops of water in an Olympic-sized swimming pool;70 ppt would be equivalent to 70 droplets of water in an Olympic-sized pool.

[3] Comprehensive Environmental Response, Compensation, and Liability Act (1980).

[4] PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024 (Oct. 18, 2021).

The EPA is in the process of implementing the plan set forth in the Strategic Roadmap. As that plan is implemented, we anticipate that the entities that used PFAS and entities that own or operate property on which may be present PFAS in environmental media such as groundwater or soil, may be affected by the coming PFAS regulations. We foresee regulatory developments relating to PFAS under the following regulatory programs: CERCLA; TRI National Pollutant Discharge Elimination System permitting, Industrial Wastewater Discharge permitting, Solid and Hazardous Waste Management and Disposal, and Toxic Substances Control.

In preparation for the coming PFAS regulations, businesses—especially in the "priority" industrial sectors listed above—should conduct their own assessments of the nature, scope and extent of their potential exposure to PFAS-related risk. Such assessments should include careful review and analysis of current operations and anticipated future compliance obligations and the development of a plan to manage potential PFAS-related risk and comply with anticipated PFAS regulations that will likely affect their business.

PFAS is coming. The time to prepare is now.

So You Think You Know Property

By Stephen C. Gregory

In the dark recesses of the cavern that is my mind, I recall a saying something along the lines of "the cobbler's children have no shoes." Last issue, we posed a legal question and invited readers to respond with their answers. Unfortunately, your editor failed to "heal thyself."[1]

Here was the problem as published:

Alice, Bertrand, and Candace own property as joint tenants with rights of survivorship. (Alice ("A") and Bertrand ("B") are Candace's ("C") parents.) After A dies, B and C decide to restructure their ownership, intending to give fee simple to C with a life estate to B. However, when the deed is drafted, A and B convey a life estate to C with remainder to her heirs, reserving a life estate to B. Now B is deceased and C wants to sell the property. (The attorney who prepared the deed is also deceased.)

Clearly, this is a non-problem. It should have stated:

Alice, Bertrand, and Candace own property as joint tenants with rights of survivorship. (Alice ("A") and Bertrand ("B") are Candace's ("C") parents.) After A dies, B and C decide to restructure their ownership, intending to give fee simple to C with a life estate to B. However, when the deed is drafted, ***B and C*** convey a life estate to C with remainder to her heirs, reserving a life estate to B. Now B is deceased and C wants to sell the property. (The attorney who prepared the deed is also deceased.)

Q. What will it take for C to be able to convey the property?

So, again, send your responses to either of the editors (75cavalier@gmail.com or hbreedlove@oldrepublictitle.com); we will print them in the next issue. We still hope to make this a recurring article, notwithstanding our gaffe; please send any interesting situations you've encountered with multiple possible answers to the editors as well.

[1] Mixed metaphor alert.

PARTITION LAW REFORM IN THE WAKE OF THE UNIFORM PARTITION OF HEIRS PROPERTY ACT: HOW VIRGINIA GOT IT RIGHT

By Lisa Bradshaw

I. INTRODUCTION

Lisa Bradshaw grew up in Southern California. She received her B.A. in history and Classical languages from Sweet Briar College in 2004. After working as a workers' compensation claims adjuster for several years, she served in the U.S. Army as a paralegal. Lisa graduated from the University of Richmond School of Law in 2022, and is an associate attorney in the law firm of Hawthorne & Hawthorne, P. C.

"The plaintiff's cause has a bad aspect," begins the opinion in *Wiseley v. Findlay*, an early nineteenth-century suit for partition in Virginia.[1] Findlay, by his will, had devised his estate to his wife for "as long as she lived, or until his youngest child came to age," at which time it would pass to his nine children.[2] Six of Findlay's children, who were under the impression that their mother had a life estate, sold their interest in the property to Wiseley.[3] After the youngest child had come of age, Wiseley filed suit for partition in the Chancery Court of Wythe, "pray[ing] that a fair division of the estate might be decreed."[4] The Chancery Court dismissed the bill "so far as it sought to disturb the possession of the defendant *Mary,* the widow."[5] Wiseley appealed.[6] The opinion continues:

> I am very much inclined to believe, that [the plaintiff] has purchased from the children of *Findlay,* their interests in the land, under the idea that the old lady had a life estate, when he knew that she had not; and is now availing himself of his legal title, to turn her out, and thus break up the family understanding and arrangement.[7]

Nevertheless, the Supreme Court of Virginia held that the plaintiff was entitled to a partition of that property because he held legal title to part of it.[8] By the court's decree, the property would be divided "into nine shares of equal value" and allotted to the children or their assigns (*i.e.*, Wiseley).[9]

Historically, partition meant dividing the property among all the parties who held an ownership interest in it.[10] Consistent with Virginia's "strong tradition of protection for 'sacred' land rights,"[11] a court of equity could do nothing more than physically divide property. As partition law developed over the centuries, courts could do more than that: they could sell it. The Uniform Partition of Heirs Property Act (UPHPA), promulgated by the Uniform Law Commission (ULC) in 2010, permits partition

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[1] Wiseley v. Findlay, 24 Va. (3 Rand.) 361, 363 (1825) (Carr, J.).
[2] *Id.* at 361.
[3] *Id.* at 361–62.
[4] *Id.*
[5] *Id.* at 362.
[6] *Id.* at 363.
[7] *Id.*
[8] *Id.* at 372.
[9] *Id.* at 362–63, 372.
[10] *See* Gooden v. Dick, 27 Va. Cir. 446, 447 (1982) ("[T]he central feature of partition both at common law and under our partition statutes, . . . [is] the division of the land itself among the co-owners. Under this concept, to speak of 'partition in kind' is a redundancy.").
[11] DAVID J. GOGAL, REPORT TO THE 2019 BOYD-GRAVES CONFERENCE (Aug. 29, 2019). The right to private property is "fundamental." VA. CONST. art. I, § 11; *see also* Leake v. Casati, 234 Va. 646, 649–50, 363 S.E.2d 924, 926 (1988) (quoting Cauthorn v. Cauthorn, 196 Va. 614, 620, 85 S.E.2d 256, 259 (1955)) ("So sacred is the right of property, that to take it from one man and give it to another for private use is beyond the power of the state itself, even upon payment of full compensation.'").

by sale only as a last resort, provided that at least one of the parties has requested it.[12] In July 2020, Virginia amended its partition statutes to reflect many of the UPHPA's provisions.[13] If a court were to decide *Wiseley v. Findlay* today, the result would likely be the same as it was nearly two centuries ago: the property would be divided into parcels and distributed to each co-owner according to his or her interest. That result has nothing to do with the UPHPA and everything to do with Virginia's strong statutory preference for partition in kind, which never became "a de facto preference for partition by sale" as it did in other jurisdictions.[14]

This paper contains three main parts. The first part examines the history of partition in Virginia. The second part explains the changes that the UPHPA, if adopted as drafted by the ULC, would make to partition law. The third part discusses how Virginia's adaptation of the UPHPA will have a more meaningful impact on every property owner who is "compellable to make partition."[15]

II. What Is a Partition?

A partition is the "legal mechanism . . . [by which] those that own undivided, fractional interests in tenancy-in-common or joint tenancy properties . . . [can] exit such common ownership arrangements through litigation when the common owners do not come to a consensual agreement on the terms for exit."[16] Partition applies exclusively to properties owned by more than one person.

A. Types of Concurrent Ownership

There are three main forms of concurrent ownership: (1) joint tenancy; (2) tenancy in common; and (3) coparcenary. Joint tenants are considered a "single owner" who "share undivided interests in the whole of a parcel of property."[17] To create a joint tenancy, the "joint tenants must enter into [it] at the same time, acquire title through the same title document, receive identical interests in the property, and have the same right of possession."[18] They may enjoy the right of survivorship,[19] in which case, upon the death of a joint tenant, his or her interest "extinguishes and the surviving joint tenant owns the property as a single owner."[20] Tenants in common are considered "multiple owners of a single piece of property."[21] A tenancy in common is created when "two or more persons hold the same land, with interests accruing under the same title, but at different times."[22] Unlike joint tenants, tenants in common cannot enjoy the right of survivorship.[23] When a cotenant dies, his or her fractional interest in the property passes to his or her heirs, either by will or through intestate

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[12] *See* UNIF. PARTITION OF HEIRS PROP. ACT § 8 (UNIF. LAW COMM'N 2010).
[13] *See Unanimous, Bipartisan Act Aims to Help Owners of Heirs' Property*, 69 VA. LAW. 37, 37 (2020).
[14] Thomas W. Mitchell, *Reforming Property Law to Address Devastating Loss*, 66 ALA. L. REV. 1, 55 (2014) [hereinafter Mitchell, *Reforming Property Law*].
[15] VA. CODE ANN. § 8.01-81 (Westlaw through 2020 Reg. Sess.).
[16] Thomas W. Mitchell, *Restoring Hope for Heirs Property Owners: The Uniform Partition of Heirs Property Act*, 40 ST. & LOC. L. NEWS, 2016, at 6, 8 [hereinafter Mitchell, *Restoring Hope*].
[17] Faith Rivers, *Inequity in Equity: The Tragedy of Tenancy in Common for Heirs' Property Owners Facing Partition in Equity*, 17 TEMP. POL. & C.R. L. REV. 1, 2 (2007).
[18] Lisa C. Willcox, Comment, *You Can't Choose Your Family, But You Should Choose Your Co-Tenants: Reforming the UPC to Benefit the Modest-Means Family Cabin Owner*, 87 U. COLO. L. REV. 307, 320 (2016
[19] *Id.* This right of survivorship is also known as *jus accrescendi*. *Jus Accrescendi*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[20] Willcox, *supra* note 18, at 320. A joint tenant's interest cannot pass through intestate succession. *Id.*
[21] Rivers, *supra* note 17, at 3.
[22] Carneal v. Lynch, 91 Va. 114, 117, 20 S.E. 959, 960 (1895).
[23] Willcox, *supra* note 18, at 320.

succession;[24] a creditor can also seize a cotenant's fractional interest.[25] Coparcenary "arises when two or more persons jointly inherit from one ancestor, the title and right of possession being shared equally by all."[26] Coparceners possess an interest in a distinct portion of the property.[27] "[T]here is no survivorship between them; for each part descends severally to their respective heirs. . . . [A]s long as the lands continue in a course of descent, and united in possession, so long are the tenants thereof, whether male or female, called parceners."[28]

Joint tenants, tenants in common, and coparceners have the statutory right to compel partition.[29] They also have the right to use the whole property, "and not merely a right to enter his proportionable part only," until partition is made.[30]

B. Partition and Its Procedure, Generally

A court may partition property in one of three ways: (1) partition in kind; (2) partition by sale; and (3) partition by allotment. Partition in kind involves physically dividing the property "into sub-parcels proportionately in value according to each cotenant's fractional interest and then distribut[ing] these parcels to the co-owners."[31] This method of partition transforms one property with multiple owners into multiple properties, each with a single owner.[32] Partition by sale, in contrast, leaves the property intact and changes only the owner. The property is sold at a judicial sale and the court "distributes the proceeds among the cotenants in proportion to their relative interests in the property."[33] A judicial sale can be either a public auction or a private sale;[34] however, it is not final until the court confirms it.[35] Partition by allotment is like partition by sale with one major exception: allotment guarantees that at least one of the co-owners will remain an owner of the property. The court may allot either the whole property or part of it "to any party who will accept it," provided that the party pays the other parties for their interest in the property.[36]

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[24] Rishi Batra, *Improving the Uniform Partition of Heirs Property Act*, 24 GEO. MASON L. REV. 743, 746 (2017).
[25] *See* Phillips v. Wells, 147 Va. 1030, 1042, 133 S.E. 581, 585 (1926).
[26] *Coparcenary*, BLACK'S LAW DICTIONARY (11th ed. 2019). A coparcenary is "created by common-law rules of descent upon intestacy when two or more persons together constituted the decedent's heirs." *Id.*
[27] L. A. GOODEVE, MODERN LAW OF Real PROPERTY 262–63 (4th ed. 1897).
[28] *Id.* (internal quotation omitted).
[29] *Id.* at 263.
[30] Read v. Read, 9 Va. (5 Call) 160, 186 (1804).
[31] Batra, *supra* note 24, at 748.
[32] *See* Lister v. Lister (1839) 160 Eng. Rep. 816, 818, 3 Y. & C. Ex. 540, 546; Story v. Johnson (1837) 160 Eng. Rep. 529, 529, 2 Y. & C. Ex. 586, 586.
[33] Batra, *supra* note 24, at 749.
[34] *See* Austin v. Dobbins, 219 Va. 930, 935, 252 S.E.2d 588, 591 (1979) (citing Conrad v. Fuller, 98 Va. 16, 21, 34 S.E. 893, 895 (1900)) ("[T]he court must decide whether the sale should be by public auction or private bid.").
[35] Payne v. Payne, 179 Va. 562, 569, 19 S.E.2d 690, 693 (1942); *see also* Carr v. Carr, 88 Va. 735, 740, 14 S.E. 368, 370 (1892) ("By sanctioning a sale, the courts make it their own. There is a difference between such [judicial] sales and ordinary auction sales and sales by private agreement."). The court's confirmation of a judicial sale is not a foregone conclusion. *See* Hansucker v. Walker, 76 Va. 753, 755–56 (1882) ("[The court] has repeatedly declared that no fixed rule can be laid down on the subject, and whether it will confirm or set aside a sale must depend upon the circumstances of each particular case.").
[36] Jackson v. Jackson, 110 Va. 393, 396, 66 S.E. 721, 722 (1909).

III. A History of Partition

A. Partition in England Prior to the American Revolution

In feudal England, "all land was granted from the crown, and subjects (tenants) only held land on the condition that they perform certain duties and services for the crown."[37] There was little need for partition because primogeniture ensured that the eldest living son inherited the whole estate upon the tenant's death.[38] Additionally, "[t]he English common law favored joint tenancies over tenancies in common."[39] This meant that, because joint tenants held their interests in that time with survivorship, in the event of a disagreement between joint tenants, one tenant simply had to outlive the other(s) to gain control of the entire property.[40]

In 1290, Parliament enacted the Statute Quia Emptores, which "established the principle of the free alienation of possessory estates and marked the beginning of the end of the feudal system."[41] Around the fourteenth century, tenancy in common emerged and, with it, a growing need for partition.[42]

At common law, only coparceners could compel a writ of partition, known as a writ *de partitione facienda*.[43] This writ "lay only between such as held lands together and undivided."[44] The plaintiff first had to prove his right to a writ of partition.[45] Then, the court would order the sheriff to conduct the partition by going "with a jury of twelve . . . upon the land, [making] a division of it and allot[ing] the shares . . . to the heirs respectively."[46] During Henry VIII's reign, Parliament granted the right to compel partition to other joint owners.[47] The Act Concerning Joint Tenants and Tenants in Common of 1539 and the Act Concerning Joint Tenants for Term of Life or Years of 1540 "allowed joint tenants and tenants in common . . . to bring a writ for partition in kind in the law courts."[48] Under Elizabeth I, courts of equity assumed concurrent jurisdiction over partition suits.[49] These courts "follow[ed] the law, . . . decree[ing] a partition in every case, in which a partition may be made at law."[50] Unlike a

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[37] Willcox, *supra* note 18, at 311.
[38] *Id.* at 312.
[39] Rivers, *supra* note 17, at 3; *see also* Carla Spivack, *Broken Links: A Critique of Formal Equality in Inheritance Law*, 2019 WIS. L. REV. 191, 205 (2019) ("Joint tenancy served medieval society quite well. . . . As feudalism gave way, this form of title became less socially useful.").
[40] *See* Willcox, *supra* note 18, at 320.
[41] Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 554 (2001) [hereinafter Mitchell, *From Reconstruction to Deconstruction*].
[42] Mitchell, *Reforming Property Law*, *supra* note 14, at 8. England abolished the tenancy in common form of ownership with the Law of Property Act 1925. *Id.*
[43] Otley v. M'Alpine, 43 Va. (2 Gratt.) 340, 341 (1845); *see* Horncastle v. Charleswoth (1840) 59 Eng. Rep. 895, 895, 11 Sim. 315, 315; Martha W. Gerald, *Writ of Partition*, 24 MISS. L.J. 100, 100 (1952).
[44] Read v. Read, 9 Va. (5 Call) 160, 181 (1804).
[45] Story v. Johnson (1837) 160 Eng. Rep. 529, 534, 2 Y. & C. EX. 586, 596.
[46] William H. Lloyd, *Partition*, 67 U. PA. L. REV. 162, 167 (1919); *see* Phillips v. Dulaney, 114 Va. 681, 685, 77 S.E. 449, 450 (1913).
[47] *Otley*, 43 Va. (2 Gratt.) at 341; *see Horncastle*, 59 Eng. Rep. at 895, 11 Sim. at 315.
[48] Candace Reid, Note, *Partitions in Kind: A Preference Without Favor*, 7 CARDOZO L. REV. 855, 858–59 (1986); *see* Thornton v. Thornton, 24 Va. (3 Rand.) 179, 183 (1825) (Carr, J.). The statutes of Henry VIII "only contemplate[d] the partition of things which [were] capable of division." Hanbury v. Hussey (1851) 51 Eng. Rep. 244, 245, 14 Beav. 152, 154.
[49] Robert Ludlow Fowler, *Novel Partition Procedure*, 3 COLUM. L. REV. 295, 296 (1903).
[50] *Hanbury*, 51 Eng. Rep. at 245, 14 Beav. at 152. In 1833, Parliament abolished the writ of partition at common law with the Real Property Limitation Act, leaving courts of equity with exclusive

common law court, a court of equity could order owelty payments to compensate a co-owner if it could not divide the property into parcels equal to each co-owner's share.[51]

The writ of partition was not particularly useful, however, "when the property did not lend itself to actual physical division."[52] Sometimes, it led to absurd results. In *Turner v. Morgan*, for instance, the court ordered the partition of a house; the plaintiff owned two-thirds of it and the defendant owned the rest.[53] The court gave the plaintiff "the whole stack of chimneys, all the fire-places, the only staircase in the house, and all the conveniences in the yard."[54] Overruling the defendant's exception to this division, the Lord Chancellor lamented that:

> [H]e did not know how to make a better partition for these parties; that he granted the Commission [of Partition] with great reluctance; but was bound by authority; and it must be a strong case to induce the Court to interpose: as the parties ought to agree to buy and sell.[55]

Only property owners could sell property; the English courts could do nothing more than divide it.[56] The same was true in Virginia up until the Civil War.

B. Partition in Virginia from Colonial Times to the Civil War

Like feudal England, all the land held in Virginia was "originally granted by the crown."[57] Virginia's early partition statutes mirrored those of the Acts of Henry VIII,[58] and partition remained synonymous with physical division or partition in kind.[59] After the Revolutionary War, Virginia abolished the right of survivorship of joint tenants[60] and primogeniture.[61] The Act of Descents of 1785 allowed both males and females to inherit property through intestate succession.[62]

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jurisdiction over partition. GOODEVE, *supra* note 27, at 259; *see Horncastle*, 59 Eng. Rep. at 896, 11 Sim. at 315–16.

[51] *Hanbury*, 51 Eng. Rep. at 246, 14 Beav. at 156. An owelty is "a "compensatory sum of money given after . . . an unequal partition of real property." *Owelty*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[52] Reid, *supra* note 48, at 859; *see also Hanbury*, 51 Eng. Rep. at 245, 14 Beav. at 152 ("The difficulty in making partition is no objection to the jurisdiction [of the court of equity].").

[53] Turner v. Morgan (1803) 32 Eng. Rep. 307, 307; 8 Ves. Jun. 143, 143.

[54] *Id.* at 308, 8 Ves. Jun. at 145.

[55] *Id.*

[56] *See* Fowler, *supra* note 49, at 301. It was not until the Partition Act of 1868 that a court of equity could sell the property if that would be more beneficial to the parties than a partition in kind. Reid, *supra* note 48, at 860.

[57] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 595 (1823).

[58] Reid, *supra* note 48, at 861; *see* Otley v. M'Alpine, 43 Va. (2 Gratt.) 340, 341 (1845); Elliott v. Lyell, 7 Va. (3 Call.) 268, 281 (1802) (Fleming, J.).

[59] *See* Fitchett v. Fitchett, 6 Va. App. 562, 564, 370 S.E.2d 318, 319 (1988) (citing Leonard v. Boswell, 197 Va. 713, 718, 90 S.E.2d 872, 875 (1956)) ("At common law courts of equity were empowered to partition land in kind.").

[60] *Elliott*, 7 Va. (3 Call.) at 281; *see also* Lockhart v. Vandyke, 97 Va. 356, 360, 33 S.E. 613, 613 (1899) ("Formerly joint tenancy was much favored, but for more than a century past the courts have laid hold of every available expression to construe estates given to a plurality of tenants as tenancies in common.").

[61] Lloyd, *supra* note 46, at 176; *see* Davis v. Rowe, 27 Va. (6 Rand.) 355, 363 (1828) (Carr, J.); Kennon v. M'Roberts, 1 Va. (1 Wash.) 96, 100 (1792).

[62] *Davis*, 27 Va. (6 Rand.) at 362.

Suits for partition were a common occurrence in Virginia.[63] The early partition statutes adopted the English common law procedure whereby the sheriff would make the partition; however, "[t]he more usual practice in suits for partition [was] for the court to appoint five commissioners (any three of whom may act) to make partition."[64] After examining the property,[65] these commissioners would report their findings and recommendations to the court.[66] The court issued the final decision on how to make the partition based "upon the law and the [commissioners'] evidence."[67]

Courts of equity exercised concurrent jurisdiction with law courts.[68] By the 1820s, "it [was] settled law, that where a plaintiff [came] into equity for partition, shewing a clear legal title, it [was a] matter of right and not of discretion."[69] If a party's title was questionable, then the parties had to resolve the title at law before a court of equity could entertain the bill for partition.[70] The statutes gave the courts broad discretion over how to accomplish the partition:

> [P]artition may be made of several parcels of land or other real estate to which the parties have title, though such title may be derived from different sources, by allotment of part in each parcel or of parts in one or more parcels, or of one or more individual parts, with or without the addition of a part or parts of other parcels, as shall be most for the interest of the parties in general.[71]

The general rule was that "partition of the whole subject [was] more likely to be equal and just than where a partial partition [was] made,"[72] and that "allotment of those parcels to the part owners [was required]."[73] Nevertheless, the court could order a partial partition when the nature of the property or the conditions of the parties made partition of the whole injurious to the parties' interests.[74] If division of the property into parcels equal to each co-owner's interest was not possible, the court could "correct the inequality by means of a charge of money on the more valuable in favor of the less valuable portion."[75] The court could not, however, order the property to be sold.

C. Partition in Virginia Since the Civil War

By the 1860s, Virginia's partition statutes authorized courts to sell the property.[76] The amended statute provided:

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[63] Chinn v. Murray, 45 Va. (4 Gratt.) 348, 403 (1848) (Allen, J.).
[64] Phillips v. Dulaney, 114 Va. 681, 684–85, 77 S.E. 449, 450 (1913).
[65] Griffin v. Tomlinson, 155 Va. 150, 153, 154 S.E. 483, 484 (1930) (citing *Phillips*, 114 Va. at 684–85, 77 S.E. at 450) ("[T]he . . . commissioners . . . may view the land to be partitioned, employ a competent surveyor to make a survey thereof, and examine witnesses as to value, ways and any other matters pertaining to an equitable partition.").
[66] *See Phillips*, 114 Va. at 684–85, 77 S.E. at 450.
[67] *Id.* at 686, 77 S.E. at 450; *see Griffin*, 155 Va. at 153, 154 S.E. at 484.
[68] *See* Grove v. Grove, 100 Va. 556, 559–61, 42 S.E. 312, 313 (1902).
[69] Wiseley v. Findlay, 24 Va. (3 Rand.) 361, 365 (1825) (Carr, J.); *see* Straughan v. Wright, 25 Va. (4 Rand.) 493, 495 (1826).
[70] Stuart v. Coalter, 25 Va. (4 Rand.) 74, 84 (1826) (Green, J.).
[71] Custis v. Snead, 53 Va. (12 Gratt.) 260, 264 (1855).
[72] *Id.* at 263.
[73] Cox v. McMullin, 55 Va. (14 Gratt.) 82, 92 (1857).
[74] *Custis*, 53 Va. (12 Gratt.) at 263.
[75] *Cox*, 55 Va. (14 Gratt.) at 91. Other options for compensating this inequality included imposing rent, servitude, or easement. *See* Martin v. Martin, 95 Va. 26, 30, 27 S.E. 810, 811 (1897).
[76] *See* Frazier v. Frazier, 67 Va. (26 Gratt.) 500, 507 (1875); Howery v. Helms, 61 Va. (20 Gratt.) 1, 8 (1870) ("[I]n a suit for the partition of land, it is the duty of the court, before making a decree for a

> In any case in which partition cannot be conveniently made, if the interests of those who are entitled to the subject or its proceeds will be promoted by a sale of the entire subject, or allotment of part and sale of the residue, the court, . . . may order such sale, or such sale and allotment, and make distribution of the proceeds of sale according to the respective rights of those entitled.[77]

Notwithstanding this clear statutory authority, "[t]he policy of [the partition] statute . . . [was] opposed to the sale of land."[78] It established a preference for partitions: (1) partition in kind of the entire property; (2) allotment of the entire property to a party; (3) sale of the entire property; or (4) allotment of part of the property and sale of the residue.[79] Courts, however, refused to allot part of the property and sell the residue in the absence of consent of the parties.[80]

When making a partition, the court performed a two-part test. First, it determined whether "partition of the entire subject could . . . be conveniently made."[81] If it could, then the court's inquiry was at an end.[82] If partition could not be "conveniently made," then the court had to determine whether "the interests of the parties entitled would be promoted by a sale."[83] "[A] court [had] no authority to decree a sale of land for partition *unless and until* it [was] made to appear by an inquiry before a commissioner in chancery . . . that partition in kind [could not] be made,"[84] *and* that the interests of the parties would be promoted by a sale.[85]

As long as the court faithfully applied this test, its decision to sell the property could not "be questioned in any collateral suit, except on the ground of fraud or surprise."[86] Two additional

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sale, to ascertain by an enquiry by a commissioner, . . . that partition cannot be made . . . without a sale."); Mitchell, *Restoring Hope*, *supra* note 16, at 8.

[77] Zirkle v. McCue, 67 Va. (26 Gratt.) 517, 532 (1875) (internal quotation marks omitted).

[78] Martin v. Martin, 95 Va. 26, 30, 27 S.E. 810, 811 (1897).

[79] Jackson v. Jackson, 110 Va. 393, 396, 66 S.E. 721, 722 (1909).

[80] *Id.* at 399, 66 S.E. at 723.

[81] *Frazier*, 67 Va. (26 Gratt.) at 508. The statute offered no guidance on how to determine whether partition could be "conveniently made"; this was left to the discretion of the court. Stevens v. McCormick, 90 Va. 735, 735, 19 S.E. 742, 742 (1894).

[82] *See* Leake v. Casati, 234 Va. 646, 652, 363 S.E.2d 924, 928 (1988) ("[I]f the primary question (whether the land can conveniently be divided in kind) is answered affirmatively, the court has no authority to order a sale.").

[83] *Frazier*, 67 Va. (26 Gratt.) at 508.

[84] Cunningham v. Johnson, 116 Va. 610, 612–13, 82 S.E. 690, 691 (1914) (emphasis added).

[85] Zirkle v. McCue, 67 Va. (26 Gratt.) 517, 532 (1875); *see also* Shannon v. Hall, 235 Va. 360, 364, 368 S.E.2d 695, 698 (1988) (citing Sensabaugh v. Sensabaugh, 232 Va. 250, 256, 349 S.E.2d 141, 144 (1986)) ("Partition by sale cannot be ordered unless two statutory prerequisites are met: (1) that partition in kind *cannot* be conveniently made and (2) that a sale will promote the interest of those entitled to the property."); Cauthorn v. Cauthorn, 196 Va. 614, 619, 85 S.E.2d 256, 259 (1955) ("The authority of the court to allot or to sell land in a partition suit is predicated upon its being judicially determined from the record that 'partition cannot be conveniently made'.").

[86] Wilson v. Smith, 63 Va. (22 Gratt.) 493, 502 (1872). In *Wilson v. Smith*, the plaintiff attacked a partition decree four years after the property had been sold, alleging fraud and surprise. *Id.* at 494–95. The plaintiff had consented to the sale of the property based on the commissioner's advice that "the yankees [would] come and burn [the property] down, and it [would] do [her] and no one else any good." *Id.* at 500. The bank, into which the purchase money had been deposited in 1863, later failed. *Id.* at 496–97. The court refused to set aside the decree of sale, finding no evidence of fraud or surprise:

> The property consisted of mills, which contributed to the sustenance of the Confederate army, and were in the line of the march of the enemy. It was, therefore, in imminent danger of being burned down by them. [The commissioner] properly

safeguards protected judicial sales of property from attack: (1) "[n]o person employed or concerned in selling at a judicial sale [was] permitted to become a purchaser, or even to act as agent of a purchaser";[87] and (2) the judicial sale remained under the control of the court, which had to confirm it.[88] While the partition statutes did not establish a minimum sales price or even require that the property be sold for fair market value,[89] "the object of . . . [the judicial] sale [was] to secure the best price for the property."[90] If the sale price was "grossly inadequate," the court would withhold confirmation and order another sale.[91] Once confirmed, however, the court would not later set aside the sale "for mere inadequacy of price."[92] Such a practice would have "establish[ed] a precedent . . . that judicial sales [were] not to be seriously taken."[93]

After the Civil War, partitions came under frequent attack because they had not promoted the parties' interests, in violation of the statute.[94] *Frazier v. Frazier* was one such case. The plaintiff sought to set aside an 1863 decree for partition by sale of property that he had owned as a cotenant.[95] The parties of the original partition suit had filed a bill for partition of only one of the two properties that they owned together; the court did not consider the second property when performing the two-part test.[96] The plaintiff argued that the sale had not promoted his interests "because the

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> assigned that danger as a reason for selling the property. . . . The sale was made on the 14th of August 1863. The mills were, in fact, burned down by the Federal army in 1864, in confirmation and verification of the opinion expressed by [the commissioner]. . . . There was then no ground of fraud on the part of [the commissioner], or any of the parties to the partition suit.

Id. at 508.

[87] Brock v. Rice, 68 Va. (27 Gratt.) 812, 816 (1876).
[88] Hudgins v. Lanier, Bros. & Co., 64 Va. (23 Gratt.) 494, 504 (1873).
[89] Virginia courts define fair market value as "'the price it will bring when offered for sale by one who desires, but is not obliged, to sell, and is bought by one who is under no necessity of having it.'" Lehigh Portland Cement Co. v. Commonwealth, 146 Va. 146, 150, 135 S.E. 669, 670 (1926) (quoting Seaboard Air Line Ry. v. Chamblin, 108 Va. 42, 46, 60 S.E. 727, 729 (1908)).
[90] E.A. Watkins & Bros. v. Jones, 107 Va. 6, 8–9, 57 S.E. 608, 609 (1907); *see also* Schweitzer v. Stroh, 182 Va. 842, 851–52, 30 S.E.2d 689, 689 (1944) ("Courts are not required to get the last dollar value out of property. They must see that it is sold for an adequate price."). For cases in which the public auction yielded a higher purchase price than what a private sale would have yielded, see Browder v. Mitchell, 187 Va. 781, 783, 48 S.E.2d 221, 222–23 (1948) (selling for $1,450 more at public auction); Spruill v. Shirley, 182 Va. 342, 344, 347, 28 S.E.2d 705, 706–07 (1944) (selling for $1,900 more at public auction).
[91] *Hudgins*, 64 Va. (23 Gratt.) at 504; *see* Shultz v. Hughson, 134 Va. 497, 500, 114 S.E. 591, 591 (1922) (quoting Withers v. Coles, 83 Va. 525, 531, 5 S.E. 673, 675 (1888)) ("'[This court] will always . . . [refuse a confirmation of a sale], where the inadequacy is so gross that a confirmation of the sale will result in a sacrifice of the property.'").
[92] Roudabush v. Miller, 73 Va. (32 Gratt.) 454, 464 (1879); *see* Dunn v. Silk, 155 Va. 504, 517, 155 S.E. 694, 698 (1930). Virginia courts followed the English practice of not regarding the accepted bidder of property as a purchaser until the court had confirmed the sale. *Brock*, 68 Va. (27 Gratt.) at 814–15. They diverged, however, from the English practice of re-exposing the property for sale upon receipt of *any* upset bid prior to the sale's confirmation. *E.A. Watkins*, 107 Va. at 7, 57 S.E. at 608.
[93] Howell v. Morien, 109 Va. 200, 202, 63 S.E. 1073, 1074 (1909).
[94] *See* Zirkle v. McCue, 67 Va. (26 Gratt.) 517, 535–36 (1875) ("[A]s subsequent events have transpired, it is easy to show that [their] interests . . . have not been promoted by a sale of their real estate during the war.").
[95] Frazier v. Frazier, 67 Va. (26 Gratt.) 500, 501 (1875).
[96] *Id.* at 508–10.

land was sold for a depreciated currency, and the investment made in Confederate bonds, which proved to be worthless."[97]

The Supreme Court of Virginia rejected this collateral attack. The determination of whether a sale would promote the interests of the parties was "based upon the evidence before the court *at the time* the decree was entered for a sale of the property."[98] Provided that the court had "strictly complied" with the statutory requirements for partition, the decree of sale was legal and binding.[99] Moreover, the court did not err in considering only one of the properties during the original partition suit as "[t]he parties . . . could not be compelled to sacrifice their interest in the [second] property lying in a different county and a different jurisdiction, in order to make a sale of the [first] property, which, by common consent, it was necessary to sell for partition."[100]

Frazier affirmed the sacredness of property rights. Although co-owners could be compelled to make partition, a court could not force them to partition property that was not properly before the court and that none of the co-owners had even requested to partition. Likewise, a court could not interfere with the property rights of *bona fide* purchasers who had "paid the full amount of the purchase money, . . . and [were] put in possession of the property."[101] Even if the court were to set aside these wartime partition sales, the original owners would not get their property back.[102]

By the end of the nineteenth century, courts of equity exercised "almost exclusive jurisdiction"[103] over partition suits and could, by statute, "decide all questions of law which [might] arise."[104] They had also created a new remedy: compensation for a cotenant who had made "improvements upon the common property," regardless if the other cotenants had agreed to those improvements.[105] "In the absence of consent, the amount of compensation [was] estimated by and limited to the amount by which the value of the common property [had] been enhanced [by the permanent improvements]."[106]

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[97] *Id.* at 501, 507–10.
[98] *Id.* at 507.
[99] *Id.* at 507–08. While the courts did not allow challenges to partition sales based on events that transpired years after the sale, they would permit an heir of the property, who had been an infant at the time of the partition sale, to challenge it "within six months after he arrive[d] at full age." *Zirkle*, 67 Va. (26 Gratt.) at 529.
[100] *Frazier*, 67 Va. (26 Gratt.) at 510.
[101] *Zirkle*, 67 Va. (26 Gratt.) at 527, 536.
[102] *See id.* at 527 ("[I]f the court has jurisdiction of the subject-matter, and the proper parties are before [it], rights acquired by third persons under authority of the decree will be sustained, notwithstanding a reversal of such decree.").
[103] Grove v. Grove, 100 Va. 556, 559–61, 42 S.E. 312, 313–14 (1902).
[104] Pillow v. Sw. Va. Improvement Co., 92 Va. 144, 148–49, 23 S.E. 32, 33 (1895); *see* Davis v. Tebbs, 81 Va. 600, 603, (1886). The expansion of the court of equity's jurisdiction streamlined partition suits and reduced the amount of litigation that parties would have had to pursue in the law courts. *See* Phillips v. Wells, 147 Va. 1030, 1046, 133 S.E. 581, 586 (1926).
[105] Ballou v. Ballou, 94 Va. 350, 353, 26 S.E. 840, 841 (1897). Improvements are distinct from repairs. *Id.* A cotenant cannot receive compensation for improvements until after a request for partition has been filed, and the amount of that compensation is limited in the absence of the other cotenants' express assent, whereas a cotenant may sue for compensation for repairs at any time and is entitled to the cotenants' pro rata share for the full cost of those repairs. *Id.*
[106] Dalgarno v. Baum, 182 Va. 806, 808, 30 S.E.2d 559, 560 (1944) (citing *Ballou*, 94 Va. at 352–53, 26 S.E. at 840–41). If more than one cotenant had made improvements to the property, "a cotenant in a partition suit [was] entitled to compensation for his improvements only to the extent that [the improvements might] exceed in value those made by his cotenant." Jones v. Jones, 214 Va. 452, 455, 201 S.E.2d 603, 605 (1974) (citing *Ballou*, 94 Va. at 351, 26 S.E. at 841).

A cotenant's right to this compensation came "purely from the desire of the court to do justice"[107] and to prevent unjust enrichment.[108] Improvements that increased the value of the property benefitted every cotenant, not just the one who had made them.

During the early twentieth century, the court revised its two-part test for partitions, thereby affording greater protection to the interests of co-owners. First, the court had to determine "whether or not a division in kind [was] convenient, practicable and for the best interest of the parties."[109] If it was not, then the court had to determine "whether [the parties'] interest [would] be promoted by a sale in whole or in part."[110] Co-owners had the right to a partition in kind "[i]f the property [were] divisible";[111] they did not, however, have the right to a partition by sale "against the will of any of their [co-owners]."[112] "The mere fact that some, or even a majority, of the [co-owners] prefer[red] a sale [would] not justify it."[113] The burden of proof "that the land could not be conveniently divided in kind without a sacrifice of the interests of the owners" lay with the party (or parties) requesting partition.[114]

Nearly seventy years after its decision in *Frazier*, the court reaffirmed that property owners could not be forced to sacrifice their interest in property that was not the subject of the partition suit.[115] The plaintiff in *Price v. Simpson* sought to partition a 111-acre tract of land.[116] This tract was one of three that had passed to Dwight Howland's ten heirs by intestate succession;[117] the other two tracts "consist[ed] of 35 acres and 40 acres respectively [that were] several miles distant from the 111-acre tract."[118] Eight of Howland's heirs conveyed their interest in the 111-acre tract to Simpson.[119] As a tenant in common with the remaining two heirs, Simpson "had the right conferred by statute to compel the partition of the 111-acre tract of land. . . . The question then [arose], was [Simpson] compelled to implead all the heirs of Howland and to include all the real estate, in the suit instituted by him?"[120] The short answer was no.[121] Under the common law rule, a court would have had to partition the entire estate (*i.e.*, all three tracts of land); however, the partition statutes "abrogate[d] the common law rule," giving a court of equity "ample power" to resolve a partition suit in the manner that was most advantageous to the parties.[122] Forcing the other eight heirs to partition land to which Simpson held no legal title would not have been advantageous for anyone.

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[107] *Ballou*, 94 Va. at 352, 26 S.E. at 840. Although considered a right, the cotenant first had to prove that he or she was entitled to the compensation. *See* Shotwell v. Shotwell, 202 Va. 613, 618, 119 S.E.2d 251, 255 (1961) ("There must be some burden on the person claiming such reimbursement to prove the actual construction of the improvements, and second, to show the amount by which the value of the common property is enhanced.").
[108] Butler v. Hayes, 254 Va. 38, 43, 487 S.E.2d 229, 232 (1997) (citing *Shotwell*, 202 Va. at 618, 119 S.E.2d at 255).
[109] Bridge v. Snead, 151 Va. 383, 90, 145 S.E. 338, 341 (1928).
[110] *Id.*
[111] *Id.* at 389–90, 145 S.E. at 340–41 (internal quotation marks omitted).
[112] *Id.* (internal quotation marks omitted).
[113] *Id.* at 392, 145 S.E. at 341 (1928) (citing Howery v. Helms, 61 Va. (20 Gratt.) 1, 8 (1870)).
[114] *Id.* at 395, 145 S.E. at 342.
[115] *See* Price v. Simpson, 182 Va. 530, 535, 29 S.E.2d 394, 396 (1944) ("It may be conceded that in a suit for partition instituted by a co-parcener, a joint tenant, or a tenant in common, the weight of authority is to the effect that all the lands of the original co-tenancy should be included. This rule does not prevail in Virginia.").
[116] *Id.* at 532–33, 29 S.E.2d at 394–95.
[117] *Id.*
[118] *Id.* at 533, 29 S.E.2d at 395.
[119] *Id.* at 532–33, 29 S.E.2d at 394.
[120] *Id.* at 535, 29 S.E.2d at 395.
[121] *Id.* at 535–36, 29 S.E.2d at 396.
[122] *Id.*

Throughout the modern era, the court's "broad authority to deal with . . . [partition] as the interest of the parties and the circumstances of the case may require"[123] endured. This discretion never turned into a preference for partition by sale.[124] The partition statutes mandated partition in kind if it could be "conveniently made."[125] A court's "[f]ailure to substantially comply" with this provision was "fatal to the proceedings";[126] it rendered the "decree ordering the sale . . . void and not merely voidable," unless the parties had consented to a sale.[127] Courts, therefore, exercised caution "in depriving a landowner of his freehold and converting it into money over his objection."[128] That the value of the property would decrease if the property were partitioned in kind did not justify selling it.[129] As one trial court put it, "[h]owever much the parties might derive from such a sale and however much such financial gain might otherwise be in their interest, those who for whatever reason do not wish to sell have a right not to sell so long as a partition may be conveniently made."[130]

IV. The Purpose of the UPHPA

In 2007, the ULC "agree[d] to address concerns regarding the loss of real property by poor and disadvantaged communities because of abusive use of partition action."[131] Three years later, it promulgated the UPHPA[132] to inhibit the widespread use of partition actions to force people "off their own land despite their familial, financial, or historical connection to it."[133] The UPHPA revamps partition law to give property owners a better chance of retaining their property while also "preserv[ing] land value if partition sales do happen."[134] However, the UPHPA is narrow in scope:[135]

[123] Stamps v. Williamson, 190 Va. 145, 152, 56 S.E.2d 71, 74 (1949).
[124] *See* Sensabaugh v. Sensabaugh, 232 Va. 250, 256, 349 S.E.2d 141, 145 (1986). ("We have repeatedly held that a court has no power to order the sale of property without first determining that partition in kind *cannot* be conveniently made and then determining that sale will be in the best interest of all the parties.").
[125] *Id.*
[126] Cauthorn v. Cauthorn, 196 Va. 614, 619, 85 S.E.2d 256, 259 (1955). Even a decree for a partition in kind—the preferred method for resolving a partition suit—was not immune from reversal on appeal. *See* Griffin v. Tomlinson, 155 Va. 150, 151–55, 154 S.E. 483, 483–85 (1930) (reversing decree for partition in kind of 300-acre property because it failed to designate a right of way so that "[the defendant] could have free access to the public road" and because of "serious allegations" of impropriety on the part of the commissioners).
[127] *Cauthorn*, 196 Va. at 624, 85 S.E.2d at 261.
[128] Leake v. Casati, 234 Va. 646, 650, 363 S.E.2d 924, 926 (1988).
[129] *Sensabaugh*, 232 Va. at 258, 349 S.E.2d at 146.
[130] Gooden v. Dick, 27 Va. Cir. 446, 451 (1982).
[131] DAVID J. GOGAL, REPORT TO THE 2019 BOYD-GRAVES CONFERENCE (Aug. 29, 2019). This problem was "particularly prevalent in poor African American and Native American communities, as well as low-income areas of Appalachia." Jesse J. Richardson, Jr., *Land Tenure and Sustainable Agriculture*, 3 TEX. A&M L. REV. 799, 808 (2016).
[132] Mitchell, *Restoring Hope*, *supra* note 16, at 6.
[133] Batra, *supra* note 24, at 744; *see also* Mitchell, *Reforming Property Law*, *supra* note 14, at 13 (describing other remedies such as owelty payments and partition by allotment).
[134] Batra, *supra* note 24, at 744.
[135] *See* Mitchell, *Reforming Property Law*, *supra* note 14, at 43 ("[T]he UPHPA would not apply to 'first generation' tenancy-in-common properties first established by volition by the current group of cotenants themselves under the default rules, even if all of the cotenants are related and even if there is no agreement in a record governing the partition of the property.").

it applies only to partition actions involving "heirs property"[136] for which "there is no agreement in a record binding all the cotenants."[137]

As defined by the UPHPA, heirs property is property that is held by tenants in common[138] where at least one cotenant "acquired title from a relative, whether living or deceased."[139] While tenancy in common is both the default and the most prevalent form of concurrent ownership in the United States,[140] it is "an unstable form of . . . ownership."[141] No single cotenant controls the property.[142] A cotenant may sell his or her interest in the property "without the consent of his or her fellow cotenants."[143] A deceased cotenant's fractional interest passes to his or her heirs;[144] if the decedent has more than one heir, then state intestacy laws will, by default, assign the heirs as tenants in common.[145] "In the case of heirs property, after several generations, any individual owner can have an incredibly small interest in the property."[146] Nevertheless, each cotenant possesses the right to file a partition action, regardless of "the magnitude of her ownership interest or the length of time she has owned her interest."[147] Such a right seems unfair when the cotenant seeking partition "has contributed nothing to paying the ongoing costs of maintaining the property."[148] Conflicts are more

[136] UNIF. PARTITION OF HEIRS PROP. ACT § 3 (UNIF. LAW COMM'N 2010); *see also* Hugo A. Pearce, III, Note, *"Heirs' Property": The Problem, Pitfalls, and Possible Solutions*, 25 S.C. L. REV. 151, 151 (1973) (describing heirs property as "a condition created by the intestate death of successive owners or part owners whose estates are never probated.").

[137] UNIF. PARTITION OF HEIRS PROP. ACT § 2(5)(A). The UPHPA does not apply to "tenancy-in-common property for which there is an express agreement governing the partition of the property even if the property otherwise would qualify as heirs property." Mitchell, *Restoring Hope*, *supra* note 16, at 9.

[138] UNIF. PARTITION OF HEIRS PROP. ACT § 2(5).

[139] *Id.* § 2(5)(B). A relative is "an ascendant, descendant, or collateral or an individual otherwise related to another individual by blood, marriage, adoption, or law of this state." *Id.* § 2(9). An ascendant is "an individual who precedes another individual in lineage." *Id.* § 2(1). A descendant is "an individual who follows another individual in lineage." *Id.* § 2(3). A collateral is "an individual who is related to another individual under the law of intestate succession of this state but who is not the other individual's ascendant or descendant." *Id.* § 2(2).

[140] Unless it expressly declares otherwise, "a conveyance or devise of real property to two or more people creates a tenancy in common." Mitchell, *Reforming Property Law*, *supra* note 14, at 9; *see also* VA. CODE ANN. § 55.1-135 (Westlaw through 2020 Reg. Sess.) (making tenancy in common the default form of concurrent ownership absent express language such as "with survivorship").

[141] Mitchell, *From Reconstruction to Deconstruction*, *supra* note 41, at 513.

[142] Richardson, *supra* note 131, at 800–01.

[143] Batra, *supra* note 24, at 746.

[144] *See* Willcox, *supra* note 18, at 320.

[145] Mitchell, *Reforming Property Law*, *supra* note 14, at 9; *see also* VA. CODE ANN. § 55.1-134(A) (abolishing survivorship between joint tenants); *see generally id.* § 64.2-200 (outlining intestate succession).

[146] Batra, *supra* note 24, at 746.

[147] Mitchell, *Reforming Property Law*, *supra* note 14, at 10. If the cotenants "cannot agree on how the property should be used, the appropriate legal remedy is partition." Bridget J. Crawford & Anthony C. Infanti, *A Critical Research Agenda for Wills, Trusts, and Estates*, 49 REAL PROP., TR., & EST. L.J. 317, 324 (2014).

[148] Thomas W. Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, 2005 WIS. L. REV. 557, 583 (2005). A cotenant's failure to pay his or "her proportional share of these ongoing expenses does not lose any interest in the property." Mitchell, *From Reconstruction to Deconstruction*, *supra* note 41, at 512.

likely to arise among multi-generational, fractional owners who "value the land differently" and "live in scattered locations."[149] The threat of partition looms over heirs property.[150]

To invoke the protections of the UPHPA, one of the following conditions must also be true of the heirs property: (1) "20 percent or more of the interests are held by cotenants who are relatives";[151] (2) "20 percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased";[152] or (3) "20 percent or more of the cotenants are relatives."[153] Heirs property often "passe[s] through intestacy for many generations, devise, and gift, [and] ownership is fractionalized among many tenants in common."[154] The problem with heirs property arises when "[o]ne co-tenant, looking to get an immediate economic gain from his or her fractional ownership, . . . sells his or her fractional share to an investor. . . . [who] may file, as any cotenant may, for partition."[155]

The UPHPA revises partition law in three significant ways:[156] (1) the cotenant buyout;[157] (2) the strong preference for partition in kind;[158] and (3) the open-market sale.[159] Before a court may proceed with a partition action under the UPHPA, it must give all of the other cotenants the opportunity to buy the interests of the cotenants who requested partition by sale.[160] The buyout option, also known as partition by allotment, helps to ensure that cotenants who oppose partition by sale may keep the property, provided that they have the means to buy out the other cotenants' interests.[161] Equally important, it gives the cotenants who requested partition by sale what they want: the money for their fractional interest in the property.[162] Partition by allotment preserves a cotenant's right to sell his or her interest in the property while limiting the pool of potential buyers to those who already hold an

[149] Mitchell, *From Reconstruction to Deconstruction*, *supra* note 41, at 518. Another problem facing heirs property is that subsequent generations of cotenants may not even realize that they have a "legal relationship with the land." C. Scott Graber, *Heirs Property: The Problems and Possible Solutions*, 12 CLEARINGHOUSE REV. 273, 280 (1978).

[150] The more heirs there are, the more likely it is that a court will sell the property because "the number of heirs . . . renders [partition in kind] impracticable since each heir would receive such a small allotment of land as to render their interest valueless." April B. Chandler, *"The Loss in My Bones": Protecting African American Heirs' Property with the Public Use Doctrine*, 14 WM. & MARY BILL RTS. J. 387, 396–97 (2005).

[151] UNIF. PARTITION OF HEIRS PROP. ACT § 2(5)(C)(i) (UNIF. LAW COMM'N 2010).

[152] *Id.* § 2(5)(C)(ii).

[153] *Id.* § 2(5)(C)(iii).

[154] Batra, *supra* note 24, at 748.

[155] *Id.*

[156] Batra, *supra* note 24, at 744.

[157] UNIF. PARTITION OF HEIRS PROP. ACT § 7.

[158] *Id.* § 8.

[159] *Id.* § 10.

[160] *Id.* § 7(a). The price of the cotenant's interests would be the court-determined fair market value of the property "multiplied by the cotenant's fractional ownership of the entire parcel." *Id.* § 8(c).

[161] *See id.* § 8(b). The cotenant buyout addresses the "vulnerability concern" that accompanies heirs property: "the fear of being forcibly dispossessed from the property through a partition sale initiated by another cotenant, whether a family member or third party." Richardson, *supra* note 131, at 808–09.

[162] *See* UNIF. PARTITION OF HEIRS PROP. ACT §§ 8(c), 8(e)(2)–(3), 8(f)(2); Richardson, *supra* note 131, at 921.

interest in the property.[163] This reduces the risk that cotenants will be forced off of their property by those who want to sell it.[164]

If the other cotenants cannot buy out the interests of the cotenants requesting partition by sale, "then a court may proceed to decide whether to order partition in kind or partition by sale."[165] The drafters of the UPHPA found that, "despite the statutory preference for partition in kind," courts across the United States would routinely order a partition by sale, even if none of the cotenants had requested a sale and the property could have been partitioned in kind.[166] The courts "ignored the sentimental, ancestral, cultural, or historical significance that owners place[d] on the property."[167] Under the UPHPA, the court must order partition in kind—a "division of the property into physically distinct and separately titled parcels"[168]—unless it "finds that partition in kind will result in [great] [manifest] prejudice to the cotenants as a group."[169] To make this determination, the court considers both economic and non-economic factors[170] and "weigh[s] the totality of all relevant factors and circumstances."[171] If the court determines that partition in kind will result in either great or manifest prejudice, then it has to order partition by sale. If, however, no cotenant requested partition by sale, then the court must dismiss the action.[172] A court cannot sell the property against every cotenant's wishes.[173]

The UPHPA recognizes that partition in kind is not always feasible.[174] A property consisting of 200 acres of farmland, for example, is more conducive to partition in kind than a small lot containing a single-family home.[175] Before the UPHPA, courts would order the property to be sold at auction where the highest bid was often "well below [the property's] fair market value."[176] If the property owners were "not in a financial position to make a competitive auction bid," then they had "almost no ability to prevent their property from being sold at a partition sale for a forced sale or a fire sale price."[177]

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[163] *See* Batra, *supra* note 24, at 755.
[164] Cotenants of heirs property incorrectly assume "that because they live on the land, or pay taxes, or because the land ownership is divided among many co-owners, no one can force them to leave." *Id.* at 743–44.
[165] Mitchell, *Restoring Hope*, *supra* note 16, at 9.
[166] Batra, *supra* note 24, at 749.
[167] *Id.*
[168] UNIF. PARTITION OF HEIRS PROP. ACT § 2(7) (UNIF. LAW COMM'N 2010).
[169] *Id.* § 8(a).
[170] Mitchell, *Restoring Hope*, *supra* note 16, at 9; *see* UNIF. PARTITION OF HEIRS PROP. ACT § 9; *see also* Batra, *supra* note 24, at 757 ("By explicitly including these non-economic factors, including sentimental attachment to the land, the [UPHPA] recognizes . . . [that] property . . . has value not only because of the economic benefits it can bring, but because of the attachment that people have to the property itself.").
[171] UNIF. PARTITION OF HEIRS PROP. ACT § 9(b); *see also* Thomas W. Mitchell, Stephen Malpezzi, Richard K. Green, *Forced Sale Risk: Class, Race and the "Double Discount"*, 37 FLA. ST. U. L. REV. 589, 610 (2010) [hereinafter Mitchell et al., *Forced Sale Risk*] ("[S]tate courts throughout the country have increasingly utilized an economic analysis which either completely or largely discounts any noneconomic values claimed by those who seek to resist a partition sale.").
[172] UNIF. PARTITION OF HEIRS PROP. ACT § 8(b).
[173] *Id.* § 8(b).
[174] *See id.* §§ 8(a)–(b), 10(a).
[175] *See* Mitchell, *Restoring Hope*, *supra* note 16, at 9.
[176] Batra, *supra* note 24, at 750. In fact, "one or more of the common owners often seek to acquire the property at the public auction specifically because they recognize a partition sale is a forced sale and the property will likely be sold below, often well below, its fair market value." Mitchell et al., *Forced Sale Risk*, *supra* note 171, at 612.
[177] Mitchell, *Reforming Property Law*, *supra* note 14, at 21.

In response to this concern, the UPHPA establishes the "open-market sale"[178] as "the preferred sale procedure."[179] If the cotenants do not "agree on a real estate broker[,] . . . the court shall appoint a disinterested real estate broker . . . [who] shall offer the property for sale in a commercially reasonable manner at a price no lower than the . . . [court-determined] value."[180] An open-market sale provides a greater opportunity for the property to reach a larger audience and fetch a higher price than an auction.[181] If the broker receives no "offer[s] to purchase the property for at least the . . . [court-determined] value,"[182] the court may keep the property on the market rather than forcing the cotenants to accept a below-value sales price.[183] In this way, the UPHPA seeks to maximize the cotenants' wealth.[184]

V. VIRGINIA'S MODIFIED VERSION OF THE UPHPA

On January 3, 2019, during the regular session of the Virginia General Assembly, the Senate introduced Senate Bill 1190 and referred it to the Committee for the Courts of Justice for consideration.[185] Senate Bill 1190 was a near-verbatim adoption of the UPHPA that would have added sections 8.01-93.1 through 8.01-93.11 to the Code of Virginia.[186] Although the committee effectively killed the bill,[187] the 2019 Boyd-Graves Conference revived it. The annual conference, which is "an invitation-only group of civil trial lawyers, judges, legal educators and legislators" that "studie[s] suggested changes to Virginia law,"[188] assigned an eight-member UPHPA Committee ("the Committee") to "study Senate Bill 1190 . . . and to make an appropriate recommendation."[189]

While the Committee agreed "that Virginia should adopt many of the reforms suggested by the UPHPA," it did not recommend passage of Senate Bill 1190 in its current form.[190] Its "fundamental concern" was that the UPHPA's reforms applied only to "heirs property," a term whose definition was "inherently arbitrary."[191] Instead, "the Committee believe[d] that many of the UPHPA reforms should be adopted for *all* partition actions."[192] It recommended that Virginia amend its existing partition statutes by adding "procedures for court-ordered appraisals, for open-market sales, and a three-step approach in which a Virginia court would first consider partition-in-kind, then allotment/buyout with enumerated factors, and only order a sale as a third step if there [was] 'imperious necessity' after exhausting the first two steps."[193]

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178 UNIF. PARTITION OF HEIRS PROP. ACT § 10(a).
179 Mitchell, *Restoring Hope*, *supra* note 16, at 9.
180 UNIF. PARTITION OF HEIRS PROP. ACT § 10(b).
181 *See also* Mitchell et al., *Forced Sale Risk*, *supra* note 171, at 602 ("In many areas of the law it is well accepted that an asset sold at a forced sale will likely sell for a price significantly below the asset's fair market value.").
182 UNIF. PARTITION OF HEIRS PROP. ACT § 10(d).
183 *Id.* § 10(d)(2).
184 *See* Mitchell, *Reforming Property Law*, *supra* note 14, at 6.
185 S.B. 1190, Va. Gen. Assembly (Reg. Sess. 2019).
186 *Compare* S.B. 1190, *with* UNIF. PARTITION OF HEIRS PROP. ACT §§ 2–4, 6–13.
187 On January 28, 2019, the committee voted 8-5 to pass by indefinitely and never took any further action on the bill. *SB 1190 Uniform Partition of Heirs Property Act*, VIRGINIA'S LEGISLATIVE INFO. SYS., https://lis.virginia.gov/cgi-bin/legp604.exe?ses=191&typ=bil&val=sb1190 (last visited Dec. 13, 2020).
188 Jody Taylor, *Careful Study*, 30 V.B.A. J., no. 1, 2013, at 33.
189 DAVID J. GOGAL, REPORT TO THE 2019 BOYD-GRAVES CONFERENCE (Aug. 29, 2019).
190 *Id.*
191 *Id.*
192 *Id.*
193 *Id.*

The General Assembly appears to have listened to just about all of the Committee's recommendations. On January 7, 2020, during the regular session of the Virginia General Assembly, the Senate introduced Senate Bill 553, which was identical to Senate Bill 1190.[194] The Senate referred the bill to the Committee on the Judiciary, which voted unanimously to report it back to the Senate with a substitute that would amend and reenact sections 8.01-81 and 8.01-83, add sections 8.01-81.1 and 8.01-83.1–83.3, and repeal section 8.01-82 of the Code of Virginia.[195] On March 6, 2020, the Governor approved Senate Bill 553; the amended partition statutes went into effect on July 1, 2020.[196]

A. Application

"Given the arbitrary nature of what is defined as 'heirs property,' [and] that a separate procedure for 'heirs property' . . . could be an additional unnecessary burden for [Virginia's] already overburdened courts," the Committee recommended that Virginia adopt legislation that applied to all partition actions.[197] The General Assembly did just that. Code section 8.01-81 gives "[t]enants in common, joint tenants, executors with the power to sell, and coparceners of real property" the right to compel partition.[198] The amended and added statutes apply to all partition actions, not just to partition of "heirs property" by tenants in common who do not have a binding agreement.[199]

B. Appraisals

While Virginia courts could order an appraisal of the property being partitioned, this was not their usual practice.[200] The Committee agreed with the UPHPA "that it would be preferable to have court-ordered appraisals" to determine the value of the property.[201] Such a provision would "encourage[] fairness and should decrease the expense of partition actions."[202] Code section 8.01-81.1(A) requires a court-ordered appraisal,[203] unless "all parties have agreed to the value of the property or to another method of valuation,"[204] or "the court determines that the evidentiary value of an appraisal is outweighed by the cost of the appraisal."[205] The Committee did not agree that the court should have to "serve such copies of the appraisal."[206] Code section 8.01-81.1(D) shifts this burden to the appraiser.[207]

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[194] *Compare* S.B. 553, Va. Gen. Assembly (Reg. Sess. 2020), *with* S.B. 1190, Va. Gen. Assembly (Reg. Sess. 2019).
[195] S.B. 553.
[196] *Id.*
[197] DAVID J. GOGAL, REPORT TO THE 2019 BOYD-GRAVES CONFERENCE (Aug. 29, 2019).
[198] VA. CODE ANN. § 8.01-81 (Westlaw through 2020 Reg. Sess.).
[199] *Compare id.* § 8.01-81 ("Tenants in common, joint tenants, executors with the power to sell, and coparceners of real property . . . shall be compellable to make partition and may compel partition."), *with* S.B. 1190 ("If the court determines that the property is heirs property, the property must be partitioned under this article unless all of the cotenants otherwise agree in a record.").
[200] *See* Stamps v. Williamson, 190 Va. 145, 148, 56 S.E.2d 71, 71 (1949) ("Commissioners were appointed to appraise the property and to report its fair market value."). For other partition suits in which the court relied on an appraisal, see Orgain v. Butler, 255 Va. 129, 131, 496 S.E.2d 433, 434 (1998); Austin v. Dobbins, 219 Va. 930, 933, 252 S.E.2d 588, 590 (1979).
[201] DAVID J. GOGAL, REPORT TO THE 2019 BOYD-GRAVES CONFERENCE (Aug. 29, 2019).
[202] *Id.*
[203] VA. CODE ANN. § 8.01-81(A).
[204] *Id.* § 8.01-81(B).
[205] *Id.* § 8.01-81(C).
[206] DAVID J. GOGAL, REPORT TO THE 2019 BOYD-GRAVES CONFERENCE (Aug. 29, 2019).
[207] *Compare* VA. CODE ANN. § 8.01-81.1(D) (requiring the appraiser to send notice of the appraisal "to all counsel of record" "within three business days" of filing the appraisal with the court), *with* S.B.

C. Cotenant Buyout

The Committee did not recommend the UPHPA's buyout provision, contained in section 8.01-93.5 of Senate Bill 1190, because Virginia courts already had "the discretion to order allotment, which essentially provides for such a buyout if the court deems it appropriate."[208] The UPHPA would have undermined the court's preference for partition in kind over partition by allotment, requiring a court to consider partition by allotment first. The Committee recommended that the statute indicate that a court may partition by allotment only if partition in kind is not possible.[209] It also recommended that Virginia adopt five of the seven factors listed in section 8.01-93.7(A) of Senate Bill 1190 for a court to consider when "deciding whether to order an allotment," not when deciding whether to order a partition in kind.[210] Additionally, the Committee opposed the automatic exclusion of a plaintiff from buying the interests of his or her cotenants merely because he or she had requested partition by sale.[211] A plaintiff, the Committee felt, could still "be an heir with strong attachment and financial commitment to the property."[212]

The General Assembly followed the Committee's recommendations. Code section 8.01-83(B) outlines the order of preference for partition actions: (1) partition in kind; (2) partition by allotment; and (3) partition by sale.[213] It also confirms that the court may order "an allotment of the entire subject property to *any* one or more of the parties who will accept it."[214] Code section 8.01-83(B)(2) adopts the five factors recommended by the Committee for the court to consider "[i]n the event that multiple parties seek allotment and disputes arise concerning such allotment."[215]

1190 (requiring the court to send notice of the appraisal to each party "not later than 10 days after the appraisal is filed.").

[208] DAVID J. GOGAL, REPORT TO THE 2019 BOYD-GRAVES CONFERENCE (Aug. 29, 2019); *see* Shotwell v. Shotwell, 202 Va. 613, 617–18, 119 S.E.2d 251, 254 (1961) (quoting Thrasher v. Thrasher, 202 Va. 594, 604, 118 S.E.2d 820, 826 (1961)) ("The language of the allotment provision is permissive and its exercise rests in the sound discretion of the court.'").

[209] DAVID J. GOGAL, REPORT TO THE 2019 BOYD-GRAVES CONFERENCE (Aug. 29, 2019).

[210] *Id.* Those five factors were: (1) "[e]vidence of the collective duration of ownership or possession of the property by a cotenant and one or more predecessors in title or predecessors in possession to the cotenant who are or were relatives of the cotenant or each other"; (2) "[a] cotenant's sentimental attachment to the property, including any attachment arising because the property has ancestral or other unique or special value to the cotenant"; (3) "[t]he lawful use being made of the property by a cotenant and the degree to which the cotenant would be harmed if the cotenant could not continue the same use of the property"; (4) [t]he degree to which the cotenants have contributed their pro rata share of the property taxes, insurance, and other expenses associated with maintaining ownership of the property or have contributed to the physical improvement, maintenance, or upkeep of the property"; and (5) "[a]ny other relevant factor." S.B. 1190.

[211] *Id.*

[212] *Id.*; *see also* Austin v. Dobbins, 219 Va. 930, 934, 252 S.E.2d 588, 590–91 (1979) (internal citation omitted) ("We find nothing irregular in the fact that the purchaser Dobbins is a co-owner of the property to be partitioned. Indeed, [the partition statute] expressly authorizes partition by allotment of the whole property to one or more coparceners, or to a tenant in common.").

[213] *Compare* VA. CODE ANN. § 8.01-83(B) (Westlaw through 2020 Reg. Sess.) (requiring partition in kind first, followed by partition by allotment), *with* S.B. 1190 (requiring cotenant buyout—partition by allotment—first, followed by partition in kind and then partition by sale).

[214] VA. CODE ANN. § 8.01-83(B) (emphasis added).

[215] *Id.* § 8.01-83(B)(2). *Compare id.* § 8.01-83(B)(2)(a)–(e), *with* S.B. 1190. These factors include the duration of ownership by a cotenant and his or her relatives and a cotenant's sentimental attachment to the property. VA. CODE ANN. § 8.01-83(B)(2)(a)–(b).

D. Preference for Partition in Kind

The Committee felt that, contrary to its intent, the UPHPA "would actually weaken Virginia's much stronger preference for partition in kind."[216] In particular, section 8.01-93.7(B) of Senate Bill 1190, which adopted a "totality of all relevant factors and circumstances"[217] approach, "would fundamentally weaken Virginia's strong preference for partition in kind . . . by making 'convenient' or 'practical' division just one of many factors, including whether more value could be obtained by a sale."[218] Virginia courts already applied some of these factors, such as duration of ownership and sentimental attachment, when determining whether partition in kind could be conveniently made.[219]

While the General Assembly retained this "totality of all relevant factors and circumstances" approach, it did so only in the context of the court's resolution of disputes concerning allotment.[220] Code section 8.01-83(B) modifies the requirement for when the court must order partition in kind by replacing the adverb "conveniently" with "practicably."[221] The court must, therefore, "order partition in kind if the real property in question is susceptible to a practicable division."[222]

E. The Open-Market Sale

The "Committee agree[d] that Virginia partition law would be improved by adoption of an open-market sales procedure,"[223] as contained in section 8.01-93.8 of Senate Bill 1190.[224] While "most Virginia courts currently have discretion to require use of a broker," the Committee felt that this requirement should be codified.[225] It also recommended replacing the time requirements contained

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[216] DAVID J. GOGAL, REPORT TO THE 2019 BOYD-GRAVES CONFERENCE (Aug. 29, 2019). The Supreme Court of Virginia will reverse a decree of sale in a suit for partition if it does not satisfy the requirements of the statute. *See* Shannon v. Hall, 235 Va. 360, 364, 368 S.E.2d 695, 698 (1988) (reversing decree of sale because the trial court did not find that partition in kind could not be conveniently made or that a sale would promote the interests of those entitled to the property); Leake v. Casati, 234 Va. 646, 652, 363 S.E.2d 924, 928 (1988) (reversing decree of sale because "a division in kind would be both convenient and practicable"); Sensabaugh v. Sensabaugh, 232 Va. 250, 260, 349 S.E.2d 141, 147 (1986) (reversing decree of sale because party failed to prove that the land could not be conveniently partitioned); Bridge v. Snead, 151 Va. 383, 395, 145 S.E. 338, 342 (1928) (reversing decree directing the sale of the entire property and entering a decree for partition in kind); Cunningham v. Johnson, 116 Va. 610, 611, 613, 82 S.E. 690, 691 (1914) (reversing decree of sale for lack of evidence that "partition in kind . . . [was] impracticable and would destroy the value of the land").

[217] S.B. 1190, Va. Gen. Assembly (Reg. Sess. 2019).

[218] DAVID J. GOGAL, REPORT TO THE 2019 BOYD-GRAVES CONFERENCE (Aug. 29, 2019).

[219] *See* Butler v. Hayes, 254 Va. 38, 44, 487 S.E.2d 229, 232 (1997) ("This property had been in the James family for many years. It was unimproved and . . . had been enjoyed, along with other adjacent family owned land, by various family members during their infrequent visits to Fauquier County."); Leake v. Casati, 234 Va. 646, 648, 363 S.E.2d 924, 925 (1988).
("Members of the Leake family have used the property for many years for hunting and fishing. Philip Leake . . . is buried on the property. . . . [Joe Leake] did not wish to sell at any price and . . . had sentimental attachment to the land.").

[220] *Compare* VA. CODE ANN. § 8.01-83(B)(2) ("[T]he court shall consider the following in making such allotment."), *with* S.B. 1190 ("In determining . . . whether partition in kind would result in manifest prejudice to the cotenants as a group, the court shall consider the following.").

[221] S.B. 553, Va. Gen. Assembly (2020 Reg. Sess.).

[222] VA. CODE ANN. § 8.01-81.

[223] DAVID J. GOGAL, REPORT TO THE 2019 BOYD-GRAVES CONFERENCE (Aug. 29, 2019).

[224] S.B. 1190.

[225] DAVID J. GOGAL, REPORT TO THE 2019 BOYD-GRAVES CONFERENCE (Aug. 29, 2019); *see also* Orgain v. Butler, 255 Va. 129, 133, 496 S.E.2d 433, 435 (1998) ("[C]hancellor abused his discretion because

in section 8.01-93.9 of Senate Bill 1190 with language giving judges "the discretion to set appropriate deadlines by court order, considering the circumstances of each case."[226]

The General Assembly complied with these recommendations: (1) Code section 8.01-83.1(A) establishes the preference for open-market sales should the court order partition by sale;[227] (2) Code section 8.01-83.1(B) requires the court to appoint a real estate broker to sell the property;[228] and (3) Code section 8.01-83.1(C)(1) modifies the time within which the broker must report "an offer to purchase the property for at least the . . . [court-determined] value."[229]

VI. CONCLUSION

The right to own private property has always been paramount in Virginia.[230] In rejecting the core tenet of the UPHPA—that it applies only to "heirs property"—and reforming the existing partition statutes to provide greater protections to all concurrent property owners, the General Assembly reaffirmed that right. The UPHPA provisions that the General Assembly did adopt—the appraisal, the preference for partition by allotment over partition by sale, and the open-market sale—will help ensure that co-owners do not automatically lose their property or their wealth when they are forced to make partition.

Some of the problems that the UPHPA seeks to address have already been addressed by Virginia courts. One such problem was the inability of co-owners "to improve their property in any significant way or to use their property to develop income-generating activities and wealth that [could] help them move beyond being merely 'land rich but cash poor.'"[231] For more than a century, Virginia courts have been compensating co-owners for improvements. Such a remedy has encouraged co-owners to use the property, take care of it, and improve it as they see fit. Another problem was that property was being sold against the wishes of every cotenant. Long before the ULC promulgated the UPHPA, this was both the rule and the practice in Virginia. A court will not order a partition of property unless a party has requested it nor will it sell property against the wishes of the co-owners.

The Supreme Court of Virginia has decided one particular partition suit since July 1, 2020, but it did so "under the provisions of the law that existed at the time this case was heard and decided in the circuit court."[232] The plaintiff in *Berry v. Fitzhugh* had requested the partition of "a five-bedroom, split foyer house" that she and her four siblings had inherited from their mother.[233] Two of the siblings, who lived in the house, opposed the partition.[234] "[T]he trial court found that a partition could not be 'conveniently made' and that 'the interest of the five siblings in the land or its proceeds [would] be

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he ordered a sale at public auction in the absence of any evidence that the parties' interests would be promoted by this method of sale, or that the parties were unable to agree on terms for listing the property through a licensed real estate broker.").

[226] DAVID J. GOGAL, REPORT TO THE 2019 BOYD-GRAVES CONFERENCE (Aug. 29, 2019).

[227] VA. CODE ANN. § 8.01-83/1(A).

[228] *Id.* § 8.01-83.1(B). The parties are given the opportunity to choose a real estate broker. *Id.* "If the parties do not agree on a broker, the court shall appoint a disinterested real estate broker licensed in the Commonwealth to offer the property for sale and shall establish a reasonable commission." *Id.*

[229] *Compare id.* § 8.01-83.1(C)(1) (requiring the broker to file a report "promptly" after receiving an offer to purchase the property for at least the court-determined value), *with* S.B. 1190 (requiring the broke to file a report "not later than seven days after receiving an offer to purchase the property for at least the [court-determined] value").

[230] *See* VA. CONST. art. I, § 11.

[231] Mitchell, *Reforming Property Law*, *supra* note 14, at 60.

[232] Berry v. Fitzhugh, 299 Va. 111, 115 846 S.E.2d 901, 903 n.3 (2020).

[233] *Id.* at 114, 846 S.E.2d at 902.

[234] *Id.*

promoted by the sale,'"[235] and the court affirmed.[236] Even under the amended statutes, a house is not "susceptible to a practicable division."[237] This leaves a court with two options: partition by allotment or partition by sale. Unless any of the siblings in *Berry* were willing to "accept [the house] for a price equal to the value determined [by the court] . . . and pay therefor to the other parties such sums of money as their interest therein may entitle them to receive,"[238] a court would have to order a partition by sale because one of the parties had requested it. While the impact that the amended statutes will have on partition suits remains to be seen, one thing is certain: property will remain a sacred right in Virginia.

[235] *Id.*
[236] *Id.* at 120, 846 S.E.2d at 906.
[237] VA. CODE ANN. § 8.01-81 (Westlaw through 2020 Reg. Sess.).
[238] *Id.* § 8.01-83(B).

REAL PROPERTY SECTION OF THE VIRGINIA STATE BAR

ANNUAL MEETING OF THE BOARD OF GOVERNORS & AREA REPRESENTATIVES

AGENDA

June 16, 2022 12:30 p.m.

I. WELCOME – Kathryn Byler, Chair – Please email Secretary Sarah Louppe Petcher at sarah@SandTLawGroup.com to let us know that you're attending.

II. ADOPTION OF MINUTES – Spring Meeting of the BOG and Section was held virtually via TEAMS on Friday March 11th at 11:00 AM – Sarah Louppe Petcher (Exhibit A)

III. FINANCIAL REPORT – Budget Update (Exhibit B) Sarah Louppe Petcher (Exhibit B)

IV. STANDING COMMITTEES

a. Membership—Pam Fairchild & Rick Chess

b. Fee Simple—Steve Gregory & Hayden Anne

c. Programs—Sarah Louppe Petcher & Heather Steele

V. SUBSTANTIVE COMMITTEE

a. Commercial Real Estate—John Hawthorne

b. Common Interest Community -- Sue Tarly

c. Creditor's Rights and Bankruptcy—Lewis Biggs

d. Eminent Domain—Chuck Lollar

e. Ethics—Ed Waugaman & Blake Hegeman

f. Land Use and Environment—Karen Cohen & Lori Schweller

g. Residential Real Estate—Benn Winn

h. Title Insurance—Cynthia Nahorney

VI. VBA UPDATE—Jeremy Root

VII. NEW BUSINESS

a. Nominations of area representatives
   i. Kay Creasman nominates Jim Windsor
   ii. Chuck Lollar nominates Christina Lollar Savage

b. Nominating Committee Report

c. Elections

VIII. ANNOUNCEMENTS—Steinhilber's Dinner Friday June 17th 7 PM BOG and Area Rep's

IX. NEXT MEETING—Fall Meeting _____, Charlottesville

X. ADJOURNMENT

REAL PROPERTY SECTION OF THE VIRGINIA STATE BAR

SPRING MEETING OF THE BOARD OF GOVERNORS & AREA REPRESENTATIVES

VIRTUAL MEETING

VIA TEAMS MINUTES

Friday March 11, 2022, 11:00 AM

Present:

Board of Governors: Kathryn Byler, Karen Cohen, Sarah Louppe Petcher; Stephen Gregory; Robert Hawthorne, Jr., Blake Hegeman, Mark W. Graybeal, Rick Chess, Whitney Levin, Heather Steele and Lori Schweller.

Area Representatives: Ross Greene; Alyssa Dangler, Ben Leigh, Bill Nusbaum, Brian Wesley, Chuck Lollar, Cynthia Nahorney, Douglass Dewing, , Eric V. Zimmerman; Harry R. Purkey, Jr Hayden-Anne Breedlove, Hope Payne, Howard E. Gordon, Jean Mumm, Jeremy Root, Kay Creasman, Larry McElwain, Max Wiegard, Michael Coughlin, Page Williams, Pam Faber, Pam Fairchild, Paul Melnick, Paula Caplinger, Ralph Kipp, Randy Howard, Rick Richmond, Richard Campbell, Stephen Romine, Susan Pesner, Theodora Stingham; Tom Lipscomb, Vanessa Carter, Will Homiller Mark N. Reed, Steven W. Blaine, Ray W. King, Rachel Hinson, Stephen Wood, Jon W. Brodegard, Benjamin Winn, George Hawkins, Rosa Tyler, Susan Tarley. Brooke Barden, Carol Brown, Michelle Rosati, Tara R. Boyd, Amanda Hayes Rudolph, Regina Neumann, Ann A. Gourdine, Barbara Goshorn, Jamie Mathes, Susan S. Walker K. Wayne Glass, Addison Barnhardt, Nana Yeboah, Ronald D. Wiley, Jr.

VSB Staff Liaison: Dolly Shaffner

VA CLE Staff Liaison: Kim Villo

Absent:

Board of Governors: None.

Area Representatives: Ed. Waugaman Ross Allen; F. Lewis Biggs; Charles Land, Connor J. Childress; Neil S. Kessler; Otto W. Konrad; Michele R. Freemyers; ollison F. Royer; Susan H. Siegfried; John W. Steele; Dianne Boyle; Sandra (Sandy) Buchko; Todd E. Condron; Henry Matson Coxe; Lawrence A. Daughtrey; David C. Hannah; Jack C. Hanssen Tracy Bryan Horstkamp; Andrew A. Painter; Jordan M. Samuel; David W. Stroh; Lawrence M. Schonberger, Lucia Anna Trigiani; Michael E. Barney; Brian O. Dolan; Alyssa C. Embree, Thomas Gladin, Joshua M. Johnson, Kristen R. Jurjevich, Naveed Kalantar, Christy L. Murphy, Cartwright R. "Cart" Reilly Allen C. Tanner, Jr. William W. Sleeth, III Benjamin P. Titter, Andrae J. Via, Mark D. Williamson,

James L. Johnson, David C. Helscher, DR Goodman, C. Cooper Youell, IV, Joseph M. Cochran, Edward B. Kidd, James B. (J.B.) Lonergan, Michael M. Mannix, R. Hunter Manson, G. Michael Pace, Jr., Joseph W. Richmond, Jr. Michael K. Smeltzer, James McCauley, J. Philip Hart, Justin Ritter, Michael Barney, Michael Lafayette, Robert Barclay, Timothy I. Kelsey.

I. CALL TO ORDER AND WELCOME – Kathryn Byler called the meeting to order at 11:01 am.

II. ADOPTION OF MINUTES – Winter Meeting of the BOG and Section was held virtually via TEAMS on Friday January 21st at 1:00 PM

A Motion was Made, Seconded and Carried to adopt the minutes of the January 21, 2022, meeting.

III. FINANCIAL REPORT – Budget Update (Exhibit B) Sarah Louppe Petcher

IV. STANDING COMMITTEES

a. Membership—Pam Fairchild & Rick Chess.
Report attached. The committee needs help with four specific areas for a program which would take about three years to complete:
Law Schools. Would appreciate Ron to reach out to Pam to assist with the creation of consistent outreach to the law schools.
New Lawyers. Mentoring Program for new lawyers (first 5 years) who do work in real property. Create short 10 mn vignettes of practice pointers for this group. Spearheaded by Rick Chess and Larry McElwain.
Area Representative. Create onboarding process for area reps.
Growing Section Membership. Look at new sources of membership among the other categories of VSB members. Looking for a person to spearhead.

b. Fee Simple—Steve Gregory & Hayden Anne Breedlove
Report attached. Ms. Breedlove described the articles for the upcoming publication. The chairs made a call for volunteers.

c. Programs—Sarah Louppe Petcher & Heather Steele
Reported on the number of attendees at the Advanced CLE and the upcoming annual seminar at the Kingsmill on May 19th. Kathryn reported that we are presenting a CLE at the VSB annual meeting in VA Beach, on Thursday June 16, 2022 at 3:30 pm.
'd. Advanced RE Seminar March 11th & 12th (virtual only)
ii. Annual RE Seminar May 19th (hybrid, Kingsmill live with virtual option)
iii. Black Family Land Trust CLE at VSB Annual Meeting, June 16th, 3:30 p.m.to 4:30 p.m.

V. SUBSTANTIVE COMMITTEE

a. Commercial Real Estate—John Hawthorne
No Report.

b. Common Interest Community – Will Sleeth and Debbie Casey have been named chair and vice chair. Committee has been reconstituted. 11 members. Focused on new legislative issues. and made a push for articles

c. Creditor's Rights and Bankruptcy—Lewis Biggs
No Report

d. Eminent Domain—Chuck Lollar
No Report.

e. Ethics—Ed Waugaman & Blake Hegeman
No Report.

f. Land Use and Environment—Karen Cohen & Lori Schweller
Report Attached which includes relevant bills. Committee discussed case law and are working on an article for the fee simple.

g. Residential Real Estate—Benn Winn
No Report.

h. Title Insurance—Cynthia Nahorney
No Report.

VI. VBA UPDATE—Jeremy Root
It has been a relatively quiet year in the general assembly on the real estate front. Most of the real estate bills did not advance. But the excitement came from the BOI letter which generated a flurry of activity and VAR introduced emergency legislation to address the letter. The bill was approved by both houses and is pending signature by the governor. The bill simply clarifies that sellers can retain attorneys to advise them through a real estate transaction. The bill does not really resolve the issues created/highlighted by the BOI letter. The VBA will study this and next fall will consider a modification or clarification.

VII. NEW BUSINESS –

a. Traver Award – Kay Creasman to announce award winner(s)
Kay Creasman announced two award winners this year! Our first recipient is Ron Wiley. Our second recipient is Rick Chess.

b. Nomination of an area rep - None.

c. Nominating Committee
Nominating Committee will provide a report at the June meeting. Dolly will run the roster

and determine openings and a list of officers.

VIII. ANNOUNCEMENTS—Steinhilber's Dinner Friday June 17th 7 PM BOG and Area Rep's

IX. NEXT MEETING—Annual Meeting Thursday June 16th, 12:30 p.m. to 1:30 p.m. – Oceanaire, Virginia Beach

X. ADJOURNMENT – Meeting was adjourned at 11:51.

Membership Committee Report
Virginia State Bar Real Property Section

The Membership Committee of the Real Property Section of the Virginia State Bar met on Monday, May 23rd at 1030 am.

Attending – Rick Chess, Chair, Kay Creasman, Larry McElwain, Harry Purkey

Not Attending – Pam Fairchild, Robert Hawthorne Jr., Lewis Biggs, Vanessa Carter

Leaving Committee – Randy Howard (retired), Ron Wiley, Phil Hart

The committee reviewed and approved a proposed game plan (see below) for the next 12 months.

On a high level, the goal of the Membership Committee of the Real Estate Section of the Virginia State Bar is to annually cultivate forty (40) real property attorneys to grow their practice and help improve the Real Property bar.

a. Goal of helping 10 law students / faculty become integrated into Virginia Real Property practice

b. Goal of mentoring 20 "early in practice" attorneys to attract clients and serve them well.

c. Goal of developing 10 attorneys, in their area representative role, into effective service and leadership within our section.

Hand Up – Ongoing Development of Virginia Real Property Attorneys

The Mission of the Real Property Section ("RPS") of the Virginia State Bar ("VSB") is to enhance and to sustain the highest quality of professionalism among members of the legal community as to matters pertaining to issues involving real property. Such professionalism includes not only a thorough knowledge of the statutory and case law, but also awareness of the evolution of the practice area.

The Membership Committee of the RPS, led by Rick Chess, has committed to help develop, on an ongoing basis, Virginia Real Property Attorneys dedicated to the highest quality of professionalism our section commits to in our Mission Statement.

To that end, we are focused on three (3) programs.

1. Law School Outreach and Advocacy (Leader – Pam Fairchild)

a. Seek out and connect on a personal level with the key real property interested leaders at the 10+ law schools which graduate most of the attorneys practicing in the Commonwealth.
b. Develop joint venture programs to inspire and educate these leaders and their students in the nuances of Virginia real property practice.
c. Connect self-selected law school students and faculty, with a demonstrated interest in Virginia real property law, with mentor practicing members of the RPS.

2. Launch and Support Lawyers New to Real Property Practice (Leader – Larry McElwain)

a. Seek out and connect on a personal level with 20+ lawyers throughout the Commonwealth, who are new to real property practice (ideally nominated by members of the RPS), diagnosis where they most need help to grow and improve their real property law adventure and enroll them in an ongoing (12 – 18 month) "boot camp" of monthly calls, introductions, and written / audio / video material.
b. Develop a "living library" of short (e.g., 10 minute) videos from Virginia real property leaders (attorneys and others) covering the practice challenges of growing clientele, improving their bottom line, and becoming the future leaders of the RPS. NOTE – 10 seasoned lawyers have committed to develop video lessons for the "living library".
c. Connect those in the "boot camp" with mentor practicing members of the RPS. NOTE – 15 experienced lawyers have committed to be mentors.

3. Develop RPS Area Representatives & Committee Chairs (Leader – Kay Creasman)

a. Quarterly (6+ weeks prior to a Section meeting), personally contact the Area Representatives ("ARs") and Committee Chairs ("Chairs) to suggest ways for them to be more effective in their roles.
b. Prior to the September meeting, with assistance of the RPS Secretary, to help support our committees. We will reach out to the Chairs to determine meetings held in prior year, which committee members participated, what topics is the committee focused on for the next year, and what are they looking for in new members.
c. Assure that new ARs are sent a list of all chairs and committees with a short discussion of what the committee selection means in terms of time commitment (and follow up to determine if they are meeting their attendance and participation requirements under the RPS handbook)
d. Develop local socials annually throughout the state (consider where RPS lacks active ARs) for the Section leaders to meet with members who may not otherwise feel they have a voice in the Section.

Minutes
Eminent Domain Committee, Real Property Section, Virginia State Bar
June 9, 2022

Chuck Lollar – called meeting to session at 10:05 a.m. and called roll, noting these attendees:
Nancy Auth
James Webb Jones
Paul Terpak
Jim Barnett
Henry Howell
Kelly Sheeran
Bruce Smith
Pat Piccolo
Sandy Cherry (*joined midway through*)

Chuck Lollar then gave summary of winter zoom meeting and noted desire to meet in person. May not need to meet four times a year, but did so

Chair Report
Chuck Lollar discussed:

- real property section large and flourishing, encouraged to get involved in the section writ large
- plug for Virginia State Bar Association involvement, including attending state bar annual meeting
- explained rule concerning ability to lobby – must be in the public interest, not favoring landowner or condemnor; this committee has a good balance of attorneys who represent both sides

the *Fee Simple*

- started as a newsletter and grown into a journal. Eminent Domain Committee asked to tackle issues by publishing in this journal; October deadline for submissions (generally soft deadline)
- Called for volunteers to write about a topic – suggested an article on unconstitutional exactions
- K. Sheeran noted working article on visibility issues related to compensation

Eminent Domain Law in Virginia

- Unconstitutional exactions as a topic – brief discussion of recent case from Albemarle
- P. Terpak called for other topics

Roundtable Discussion of ED Issues

- P. Terpak raised need for comprehensive re-working of jury instructions; general agreement from group (need approval from both condemnors and landowners on one set of new model instructions)
    - C. Lollar asked for P. Terpak to take lead on revising jury instructions
    - P. Terpak called for subcommittee to do so
    - J.W. Jones, due to experience on both sides, a great potential member for that committee
    - S. Cherry noted that lost profits instruction is wrong; need new instruction to cover existing cases and a new instruction to cover new statutes
    - N. Auth volunteered to serve on that subcommittee as well
    - C. Lollar will circulate email to work out members of subcommittee
- C. Lollar invites emails with more topics or issues for discussion
- H. Howell brought up *Kang* decision out of Prince William County and will circulate decision
- C. Lollar raised Federal case regarding determination of larger parcel based on timing of *delivery* of a deed after date of take (also raises issues of legal versus equitable title) – impacting value of property before the taking
    - General discussion followed
- C. Lollar raised issue of determining date of take in a Federal case – Judge Dillon ruled it was date of entry, not petition (Va. statute addresses this directly)
- Meeting *adjourned* at 10:51 a.m.

Eminent Domain Committee Meeting Report
Real Estate Section of Virginia State Bar
June 10, 2022

The Eminent Domain Committee of the Real Estate Section of the Virginia State Bar met via Zoom June 9, 2, 2022.

Participating: Chuck Lollar, Chair; Nancy Auth; James Webb Jones; Paul Terpak; Jim Barnett; Henry Howell; Kelly Sheeran; Bruce Smith; Pat Piccolo; and Sandy Cherry.

The VSB Real Property Section Eminent Domain Committee presently has over thirty members meeting three to four times a year to discuss their interest in the body of constitutional law guaranteeing that Virginia private property owners are justly compensated when their property is needed and acquired by agencies of the Commonwealth, public service companies or federal agencies for projects benefiting the general public. Committee members continue to author articles relating to this substantive practice area for publication in the Section's *Fee Simple* journal distributed to Section members.

- Committee members share information regarding new court rulings and statutory changes relating to eminent domain law and procedure. The June 2, 2022 Virginia Supreme Court opinion in *Bd. of Supervisors of the County of Albemarle v. Route 29, LLC,* Record No. 201523, on unconstitutional exactions was the subject at the June meeting; the Committee is looking for a member to address this in an article.
- Kelly Sheeran reported that she is working on an article addressing the compensability of loss of visibility in Virginia
- Michael Coughlin is finishing an article to be published in the next FS issue and although not attending due to a conflict he suggested the Committee et a member to prepare a FS article summarizing legislative changes since the last session of the Virginia General Assembly. This would include any amendments to Titles 1, 25.1, 15.2-1900, et seq. (Counties, Cities and Towns), 33.2-1000, et seq. (Highways, Transportation Systems), Title 56 (Public Service Companies) or others.
- It was announced that the next deadline of the *Fee Simple* is October 7, 2022.
- Paul Terpak, Editor of the State Bar publication *Eminent Domain Law In Virginia* requested topics and volunteers to author chapters in the 2023 new edition.
- Committee members discussed the need for model jury instructions addressing compensation issues such as lost profits, new statutes and existing case. Paul Terpak and Sandy Cherry commented that the model instructions have not kept up with the changes in Virginia law. Chuck Lollar suggested the Committee appoint a balanced task force to propose new model instructions to work with the Virginia Supreme Court's Committee.

- The Committee then discussed recent cases and issues such as the larger parcel doctrine and determination of the date of take in varying state and federal scenarios

The Committee plans to meet again possibly in September before the fall Section meeting and the October *Fee Simple* deadline.

Minutes of the Fee Simple Committee Telephone Conference

The Fee Simple Committee held a telephone conference on 4 August 2022 at 10:00 AM. On the call were the co-chairs Steve Gregory and Hayden-Anne Breedlove, and committee member Ed Waugaman. Felicia Burton and Tracy Byrd were also on the call. The Fall 2022 edition was the focus of the conversation.

Ms. Rosati, Mr. Seddiq, and Mr. Titter did not participate. Mr. Gregory will ask if they wish to continue on the committee. [NOTE: Ms. Rosati responded that she will continue.]

The committee discussed article ideas for the upcoming Fall 2022 edition. Topics that were discussed included:

1. Bureau of Insurance Letter on Split Settlements (Kevin Pagoda)
2. Ethics (Mr. Gregory will contact Jim McCauley)
3. Joint conference between VBA and VSB regarding potential legislation for the 2023 session might be a topic we could pursue
4. Cybersecurity
5. Publication of the LEO opinions—Kay Creasman in charge of the project.

Mr. Gregory will contact Christina Lollar regarding an article on heirs property and eminent domain. He will also ask John Cowherd if his article on solar will be ready for the fall. Mr. Gregory has an article that can be published in the event content runs short.

Ms. Breedlove will interview Felicia Burton on her 26 years as Fee Simple editorial assistant.

There were no further topics for discussion. The call was adjourned at 10:30 PM.

Respectfully submitted,

Hayden-Anne Breedlove

Co-chair

VSB REAL PROPERTY SECTION
Land Use & Environmental Committee
August 22, 2022

Attendees

Karen Cohen
Tyler Rosa
Max Wiegard
Steve Romine
Lori Schweller
Lindsey Rhoten
Scott Foster

New Member Introductions

Karen introduced Scott Foster and Lindsey Rhoten, both from Gentry Locke. Scott and Lindsey are new Section members and have joined the Land Use and Environmental Committee.

Land Use Case Law Discussion

1. SAS Associates 1, LLC v. City Council for City of Chesapeake, Virginia (2022 WL 1667050, E.D. Virginia, May 25, 2022)
   Tyler Rosa provided the group with a summary of this recent case regarding an equal protection claim. In this case, the proposed development received both staff and Planning Commission recommendations of approval and was denied at City Council. Shortly thereafter, City Council approved a similar development 1.3 miles away. The applicant refiled with reduced density, restructured proffers, and other revisions, which appeared to be compliant with the zoning ordinance, storm water standards, and school density goals; again, staff and Planning Commission recommended approval. Citizens expressed opposition, and the City Council denied 7-2, citing storm water standards were out of date, and citizens' concerns regarding storm water had to be considered. The developer filed an equal protection lawsuit, and the City filed a motion to dismiss, which was granted. The developer has appealed to the Fourth Circuit.

   Highlights: City Council not only can, but should, listen to constituents' land use concerns and is within its rights to deny an application even if compliant with ordinances. Only if public opposition were not for land use reasons but for some discriminatory reason would the applicant have an equal protection claim.

2. Karen mentioned briefly two Virginia Supreme Court standing cases distinguishing Friends of the Rappahannock that the Committee discussed at its last meeting:
   a. Seymour et al. v. Roanoke Co. Bd. of Supervisors, 873 S.E.2d 73 (2022)
   b. Anders Larsen Trust et al. v. Bd. of Supervisors of Fairfax Co. et al., 872 S.W.2d 449 (2022)

3. Bd. of Supervisors of the Co. of Albemarle v. Route 29, LLC, 872 S.E.2d 872 (2022)
   Developer received a notice of zoning violation for failing to pay amounts demanded by County pursuant to a transportation proffer associated with a rezoning in September 2007. Developer appealed to the BZA and lost and filed suit in Circuit Court, alleging

that the commuter service the County cited as the trigger for payment of the proffered funds was an unconstitutional application of the transit proffer. The County argued that the proffer was voluntary and that constitutional limitations did not apply. The Circuit Court agreed with the developer that "there must be some nexus roughly relatable to the thing you want to exercise the proffer for" and found for the developer. The County appealed to the Virginia Supreme Court and lost. The Court provides a history of U.S. Supreme Court conditional zoning law from Nollan, to Dolan, to Koontz. The Court summarizes as follows: "in order to be constitutional and enforceable, conditional proffers must bear an essential nexus and be roughly proportional to the impacts associated with the new development… 'rough proportionality,' while not requiring a mathematical formula to determine the degree of confluence, requires an 'individual determination' by the municipality that the conditional proffer targets and addresses specific impacts of the proposed development."

The group discussed the application of these principles outside of the proffer context, for example, to challenge ordinances that may amount to an exaction, in part because they fail to make any "individualized analysis" of the particular project, such as draconian setbacks or acreage caps that are intended to thwart solar development.

4. California Condominium Ass'n v. Peterson, 869 S.E.2d 893 (2022). This Virginia Supreme Court case originated with a condominium association's suit against a unit owner for special assessments and focuses on procedural questions, particularly the purpose of a plea in bar.

   This case provides a good analysis of both the differences between a plea in bar and a demurrer and how, in some cases, they overlap: "A plea in bar serves a unique function in our adversarial system. In one sense, it is wholly unlike a demurrer which merely 'tests the legal sufficiency of the allegations in a complaint.' . . . But in another sense, a plea in bar is partly like a demurrer. A plea in bar can raise an affirmative defense targeting solely the allegations of the complaint (assumed arguendo to be true), thus obviating any need for an evidentiary hearing."

DEQ Storm Water & HB 206 Updates

1. New rule-making comments period is open; comments are due by end of month
   a. Streamlined plan review and dual combined administrators
   b. How to calculate runoff
2. HB 206 Mitigation for solar projects, report to be finalized in October and submitted to the Governor and the agriculture and energy committees in November

Environmental

Max Wiegard informed the committee that the EPA has rolled out a plan for commencing the regulatory process for "forever chemicals," such as PFAS. These chemicals are used in consumer products and industrial products to make things heat and water resistant and have been found in water supplies across the country (and world). The scope of due diligence examinations of real property will include these chemicals going forward.

Also, given the US Supreme Court's recent pulling back of EPA's efforts to regulate under the Clean Air Act (West Virginia v. EPA), we may see similar limiting of authority under the Clean Water Act.

The Fee Simple

Lindsey and Max will discuss an article for *The Fee Simple* that will touch on the environmental topics above.

Real Property Section Initiatives

RPS put on a CLE at the annual meeting in Virginia Beach on heirs property, presented by Karla Carter. The Black Family Land Trust Legal Services Advisory Committee (Karen is a member) is developing programs to help connect section members who want to work on cases assisting families with clearing title and providing a stable form of ownership for land held as heirs property. Karla Carter, counsel at Dominion Energy, is putting together an "Heirs Property School" with Dominion's sponsorship, which will be in the Fall. Karen is working with professors at UVA Law School, School of Architecture and the College of Arts and Sciences to bring a panel presentation on heirs property to students. Interest has also been expressed by students in the real estate club at University of Richmond School of Law. Karen said she sees educating law students about an important topic like this is a good way to get them to think about choosing real property law for a career, and getting the next generation of leaders into the RPS. This would complement the mentorship program Rick Chess has reached out about for the Section, that will help to guide these new members in their careers.

Fall Section Meeting

Date: September 9th

Location: **The Bobzien-Gaither Education Center, 4801 Cox Road, Suite 108, Glen Allen, VA 23060**

The **Bobzien-Gaither Education Center,** which recently opened in April 2022, is a state-of-the-art teaching facility in the Innsbrook area of suburban Richmond. The BGEC offers a hybrid model of both live and online teaching where Virginia CLE®, the educational division of the Virginia Law Foundation, presents live-on-site programs and high-quality, simultaneous, live-interactive webcasts. While continuing education is its focus, the BGEC is also a place to gather with members of the community, celebrate the Foundation's philanthropic initiatives, and host a variety of events.

This Center is named in memory of two treasured members of the Virginia Law Foundation community: **David Bobzien** and **Marcus Gaither**. David was a past president of the Virginia State Bar and the Virginia Law Foundation, a longtime chair of the Foundation's CLE Committee, and an esteemed leader in the legal community. Marcus, who joined the Virginia Law Foundation staff after his professional basketball career, held several key positions, including Director of Outreach, Director of Digital Marketing, and Director of Information Technology, and was a dear friend to many during his tenure.

On behalf of the VBA, Jeremy Root and Shane Murphy are coordinating a social and CLE. Details TBD.

MEMBERSHP COMMITTEE REPORT
Real Property Section, Virginia State Bar
Committee Meeting - August 30, 2022

Attending: Rick Chess, Chair; Kay Creasman; Larry McElwain; Vanessa Carter; Harry Purkey; Robert Hawthorne JR
Absent: Lewis Biggs

RECOMMENDATIONS FROM THE COMMITTEE

Considering recent observations that many Area Representatives have not been fulfilling the minimal attendance requirements of an Area Representative, or getting involved in any Committees, and considering the numerous Committees that have failed to meet or submit any reports, our Membership Committee has the following recommendations:

1. Drop Treasurer – Update the Section Handbook, and confirm with the Bar, the elimination of the Treasurer position (as it has no value where the Bar controls our budget and expenditures). Reports on the status of the Section's finances can be delivered by the Section Chair.

2. Census – Require the new Secretary each year, in their initial 90 days in office, to determine Area Representatives ("ARs") meeting their participation requirements under the terms of the Section Handbook, and to publish within this 90-day period a list of those ARs qualified to continue to serve. In addition, passing a roster at each meeting, for edits and approval, and following up with those not in attendance, is a best practice suggestion.

3. Chairs – Require the new Chair to communicate, within 30 days of taking office, with then current Committee Chair of each

committee to help determine which committees are needed for the good of the Section. The Chair, in the fall FEE SIMPLE, will publish a list of the new Committee Chairs, Vice Chairs, and any adjustments to the written mandate of each committee / taskforce.

4. Listserv – Educate the Section members on the availability and benefits of subscribing to the national "DIRT ListServ" (http://dirt.umkc.edu) via an annual message from the Chair and reported in each edition of FEE SIMPLE, and work with the Bar to develop a similar service focused on Virginia real property law.

5. Living Library – Authorize an annual expense up to $10,000 to cover the costs associated with development of a video library of topics to assist those lawyers new to real property practice in business development, practice management, and Virginia real property law practice.

6. Third Term – A third term on the board is appropriate to allow someone to serve as an officer and continue the institutional memory.

Meeting Notes

a. The Membership committee (initially Kay Creasman) will organize and implement annually an outreach to Committee Chairs (see above) to determine their membership needs) and solicit short articles with a real estate theme for the VIRGINIA LAWYER magazine.

b. The Membership committee (initially Kay Creasman and Robert Hawthorne JR) will organize and implement annually the

recruitment of participating ARs (see above) to serve on Section committees / taskforces in need of additional members.

c. The Membership committee (initially Rick Chess) will reach out (at least once / quarter) to the respective deans and real property law professors at law schools in Virginia and Washington DC to determine and encourage ways the Section and said law schools can better develop student interest in Virginia Real Property law practice.

d. The Membership committee (initially Larry McElwain; Vanessa Carter; Harry Purkey) will oversee development, implementation, and oversight individually designed programs for volunteer mentors (15+ currently) and prospective mentees (4+ currently). The programs, the contents of which will be agreed upon in advance by all parties (mentors, mentees, and coordinator), are anticipated to consist of 18 successive monthly sessions. The initial programs will be designed to provide those Section Members relatively new to Virginia Real Property law practice guidance via one-on-two Zoom coaching session with access to the living library (see above). Each program will be evaluated in writing by all parties (Mentors, mentee, and coordinator). Once feedback from the initial sessions has been incorporated, the scope of the programs will be offered to other members of the Bar.

F. Impact Statement for New Programs/Projects

This statement should be completed, with the assistance of your liaison, whenever a new project is proposed.

1. Name of person or group proposing program/project:
2. Name of VSB staff person working with your group:
3. Name of program/project:
4. Proposed starting date:
5. What is the goal of this program/project?

6. Has any similar program/project been undertaken in the past by the VSB?

   Yes No (Circle One)

   If yes, what is the status of that program/project?

7. Is any other VSB committee or section currently working on a similar program/project?

   Yes No (Circle One)

   If yes, please name:

8. Does any other group in Virginia currently have or plan to have a similar program/project?

   Yes No (Circle one)

   If yes, please name:

9. On a separate sheet, please estimate the costs in VSB funds of the proposed program/project. Include all out-of-pocket (new) expenses (such as copying, telephone, postage and supplies). Estimate apportionments of all fixed (current) expenses (such as rent, staff salaries, computer time and office equipment).

10. Please estimate the costs in staff time (include by name the person who would be primarily responsible for implementing the program/project and all support staff needed; please estimate the total number of hours for each person to be devoted to this project/program within the next fiscal year):

11. Please estimate the time in which this program/project will be completed and any *special supply needs:*

12. Are the necessary funds in the current section budget?

    Yes No (Circle One)

    If not, how will it be funded?

When complete, please provide copies to your liaison, the VSB Executive Director, and the Finance Director (if there are any financial implications).

By Chair/President Date

By Staff Liaison Date

REAL PROPERTY SECTION OF THE VIRGINIA STATE BAR

SPRING MEETING OF THE BOARD OF GOVERNORS & AREA REPRESENTATIVES

VIRTUAL MEETING VIA TEAMS

AGENDA

Friday March 11, 2022 11:00 AM

I. WELCOME – Kathryn Byler, Chair – Please email Secretary Sarah Louppe Petcher at sarah@SandTLawGroup.com to let us know that you're attending.

II. ADOPTION OF MINUTES – Winter Meeting of the BOG and Section was held virtually via TEAMS on Friday January 21st at 1:00 PM – Sarah Louppe Petcher (Exhibit A)

III. FINANCIAL REPORT – Budget Update (Exhibit B) Sarah Louppe Petcher

IV. STANDING COMMITTEES

a. Membership—Pam Fairchild & Rick Chess

b. Fee Simple—Steve Gregory & Hayden Anne Breedlove

c. Programs—Sarah Louppe Petcher & Heather Steele

i. Advanced RE Seminar March 11th & 12th (virtual only)
ii. Annual RE Seminar May 19th (hybrid, Kingsmill live with virtual option)
iii. Black Family Land Trust CLE at VSB Annual Meeting, June 16th, 3:30 p.m.to 4:30 p.m.

V. SUBSTANTIVE COMMITTEE

a. Commercial Real Estate—John Hawthorne

b. Common Interest Community -- Sue Tarly

c. Creditor's Rights and Bankruptcy—Lewis Biggs

d. Eminent Domain—Chuck Lollar

e. Ethics—Ed Waugaman & Blake Hegeman

f. Land Use and Environment—Karen Cohen & Lori Schweller

g. Residential Real Estate—Benn Winn

h. Title Insurance—Cynthia Nahorney

VI. VBA UPDATE—Jeremy Root

VII. NEW BUSINESS –

a. Traver Award – Kay Creasman to announce award winner(s)

b. Nomination of an area rep -- Susan Pesner nominates Nana Yeboah nyeboah@pesner.com of Pesner Altmiller Melnick DeMers & Steele 703 506 9440 x245

c. Nominating Committee

VIII. ANNOUNCEMENTS—Steinhilber's Dinner Friday June 17th 7 PM BOG and Area Rep's

IX. NEXT MEETING—Annual Meeting Thursday June 16th, 12:30 p.m. to 1:30 p.m. – Oceanaire, Virginia Beach

X. ADJOURNMENT

REAL PROPERTY SECTION OF THE VIRGINIA STATE BAR

WINTER MEETING OF THE BOARD OF GOVERNORS and AREA REPRESENTATIVES

Meeting Minutes

Friday, January 21, 2022, 13:00

Via TEAMS

Present:

Board of Governors: Kathryn Byler, Karen Cohen, Sarah Louppe Petcher; Stephen Gregory; Robert Hawthorne, Jr., Blake Hegeman, Mark W. Graybeal, Rick Chess, Whitney Levin, Heather Steele and Lori Schweller.

Area Representatives: Alyssa Dangler, Ben Leigh, Bill Nusbaum, Brian Wesley, Chuck Lollar, Cynthia Nahorney, Douglass Dewing, Ed. Waugaman, Eric V. Zimmerman; Harry R. Purkey, Jr Hayden-Anne Breedlove, Hope Payne, Howard E. Gordon, Jean Mumm, Jeremy Root, Kay Creasman, Larry McElwain, Max Wiegard, Michael Coughlin, Page Williams, Pam Faber, Pam Fairchild, Paul Melnick, Paula Caplinger, Ralph Kipp, Randy Howard, Rick Richmond, Richard Campbell, Stephen Romine, Susan Pesner, Theodora Stingham; Tom Lipscomb, Vanessa Carter, Will Homiller Mark N. Reed, Steven W. Blaine, Ray W. King, Rachel Hinson, Stephen Wood, Jon W. Brodegard, Benjamin Winn, George Hawkins, Rosa Tyler, Susan Tarley. Brooke Barden, Carol Brown, Michelle Rosati, Tara R. Boyd, Amanda Hayes Rudolph, Regina Neumann, Ann A. Gourdine, Barbara Goshorn, Jamie Mathes, Susan S. Walker.

VSB Staff Liaison: Dolly Shaffner

VA CLE Staff Liaison: Kim Villo

Absent:

Board of Governors: None.

Area Representatives: Ross Allen; F. Lewis Biggs; Charles Land, Connor J. Childress; Neil S. Kessler; Otto W. Konrad; Michele R. Freemyers; ollison F. Royer; Susan H. Siegfried; John W. Steele; Dianne Boyle; Sandra (Sandy) Buchko; Todd E. Condron; Henry Matson Coxe; Lawrence A. Daughtrey; David C. Hannah; Jack C. Hanssen Tracy Bryan Horstkamp; Andrew A. Painter; Jordan M. Samuel; David W. Stroh; Lawrence M. Schonberger, Lucia Anna Trigiani; Michael E. Barney; Brian O. Dolan; Alyssa C. Embree, Thomas Gladin, Joshua M. Johnson, Kristen R. Jurjevich, Naveed Kalantar, Christy L. Murphy,. Cartwright R. "Cart" Reilly Allen C. Tanner, Jr. William W. Sleeth, III Benjamin P. Titter, Andrae J. Via, Mark D. Williamson, K. Wayne Glass, James L. Johnson, David C. Helscher, DR Goodman, C. Cooper Youell, IV, Joseph M. Cochran, Edward B. Kidd, James B. (J.B.) Lonergan, Michael M. Mannix, R. Hunter

Manson, G. Michael Pace, Jr., Joseph W. Richmond, Jr. Michael K. Smeltzer, James McCauley, J. Philip Hart, Justin Ritter, Michael Barney, Michael Lafayette, Robert Barclay, Ronald D. Wiley, Jr., Timothy I. Kelsey.

I. CALL TO ORDER AND WELCOME —**Kathryn Byler** called the meeting to order at 13:01 and made a few welcome remarks.

II. ADOPTION OF MINUTES — Fall Meeting of the BOG and Section was held virtually via conference call and in person on September 17, 2021, at 11:00 AM

A Motion was Made, Seconded and Carried to adopt the minutes of the September 17th, 2021, meeting.

III. FINANCIAL REPORT — Ms. Petcher presented the budget which begins at Page 9 of the agenda.

IV. STANDING COMMITTEES

Ms. Byler reminded everyone to schedule their committee meetings no less than one week before the Board's meeting to ensure that we can send a finalize agenda with attachments ahead of the meeting.

1. Membership – Pam Fairchild/Rick Chess

No formal report. Rick Chess provided a summary of the membership members and a report on the composition of the membership. Carol Brown reported that U of R is re-instating their real estate law association for students amidst a reduction in credits for the foundational real property law class for 1L. The U of R reduced the number of credits associated to real estate.

Nomination of new Area Representatives: Ross Green nominated by Kathryn Byler. Addison Barnhardt nominated by Hope Payne and Nana Yeboah was nominated by Susan Pesner.

A motion was made, seconded and carried to approve the nomination of the three nominees as Area Representatives.

Kathryn Byler reminded the attendees of the procedure for updating the BOG, Area Reps and Committee Chairs roster for The Fee Simple and our email communications. The changes are automatically saved. Please take a moment to see if your info is correct and if not, please update it.
https://docs.google.com/document/d/1Z0BYWAKfrhj0CVX4oSXl8zdQP9btG7VX/edit?usp=sharing&ouid=117844011034303536972&rtpof=true&sd=true

2. Fee Simple

Written report is attached in the form of meeting minutes. Ms. Breedlove is seeking articles on federal court closures, solar panels in condos, issues on public records SEE MINUTES. Deadline for Spring Issue is April 1, 2022. The Spring Issue is low on topics. Seeking additional input.

3. Programs

Heather Steele presented the report on the Advanced Real Estate Seminar 2022. The Advanced Real Estate Seminar will be held virtually this year. Departure of Tracy Winn Banks

4. Technology

No Report. Additionally, Matson Coxe, the current chair is moving out of state. A new chair is needed for this Committee.

V. SUBSTANTIVE COMMITTEES – *Reminder: if you are an Area Representative and are not on at least one committee, please choose one to join and contact the committee chair(s). Area Representatives who are not active in Section meetings and at least one committee may be removed from the A/R roster. Committee Chairs please report to an officer if you have members who have not attended the past three meetings (or more).*

a. Commercial Real Estate — John Hawthorne – Report Attached. First meeting later next month.

b. Common Interest Community — Josh Johnson & Sue Tarley - No Report. Josh Johnson has resigned as he is going to work for as a city attorney. Ms. Tarley needs a new co-chair.

c. Creditor's Rights and Bankruptcy – Lewis Biggs - No Report.

d. Eminent Domain — Chuck Lollar provided a report to the group. Good turnout. Robust discussion about Eminent Domain issues focused on submission of articles to the fee simple. Chuck and the Committee are working towards growing the committee.

e. Ethics — Ed Waugaman and Blake Hegeman – Report attached. Through the yeoman's efforts of Kay Creasman, the project of reviewing LEOs and organizing the LEOs according to real estate topics, has been concluded. The VSB is getting a new database in the spring. We may be able to use some of their contractors to assist us.

f. Land Use and Environmental — Karen Cohen & Lori Schweller – Report attached. The committee reviewed eight land use cases from 2021. The Committee also focused on solar development and the proposed legislation pertaining to this topic. The Committee report includes a selection of legislative summaries for pending bills for 2022.

g. Residential Real Estate — Susan Walker & Benn Winn - Report Attached. The

Committee reviewed two cases and discussion centered around those cases. The Committee also discussed the significant delays in recordings in several localities due to COVID.

h. Title Insurance — Cynthia Nahorney – Report Attached. The Committee will be meeting on February 2, 2022. Will address the 2021 ALTA policies with effective date of February 2, 2022.

VI. VBA UPDATE — Jeremy Root presented an update on the VBA's activities. Thank you to those who attended the fall social. One of the main responsibilities of the VBA is lobbying activities. Jeremy provided a summary of the pending bills that the VBA's real estate section is reviewing. Jeremy asked for volunteers for specific area experts who would be willing to review specific bills.

VII. NEW BUSINESS –

Traver Award: Kay Creasman presented the proposed revised guidelines to select Traver Award recipients each year. The changes seek to relax some of the requirements to ensure that the section is able to select a recipient when appropriate. This would make the Award selection committee, a committee of this Board.

A motion was made, seconded and carried to approve the revised Traver Award criteria.

VIII. NEXT MEETING — The Spring meeting will be held on Friday March 11, 2022.

IX. ADJOURNMENT – Meeting was adjourned at 14:10.

IBIS MEMBERSHIP REPORT
SECTION COUNT REPORT 03/09/2022

Section	Act/Aso	Judicial	Non-Bar	Other	Total
Administrative Law	574	63	0	6	643
Antitrust Law	213	4	0	4	221
Bankruptcy Law	654	25	0	5	684
Business Law	1,897	49	0	17	1,963
Construction Law	787	26	0	5	818
Corporate Counsel	1,590	8	0	73	1,671
Criminal Law	2,047	363	0	11	2,421
Education of Lawyers	250	44	91	11	396
Environmental Law	394	13	0	2	409
Family Law	1,739	236	1	15	1,991
General Practice	734	105	0	6	845
Health Law	637	22	0	13	672
Intellectual Property	1,441	53	0	12	1,506
International Practice	432	7	0	9	448
Litigation	3,322	194	0	18	3,534
Local Government Lav	740	45	0	0	785
Military Law	250	15	0	4	269
Real Property	2,015	46	0	14	2,075
Taxation	730	17	0	7	754
Trusts & Estates	2,044	54	0	16	2,114
TOTAL	22,490	1,389	92	248	24,219

Minutes of the Fee Simple Committee Telephone Conference

The Fee Simple Committee held a telephone conference on 8 March 2022 at 11:30 AM. On the call were the co-chairs Steve Gregory and Hayden-Anne Breedlove, and committee member Michelle Rosati. The Spring 2022 edition was the focus of the conversation.

The committee discussed confirmed article topics ideas for the upcoming Spring 2022 edition. Topics that were discussed included:

1. Chair Message
2. BOG Roster
3. VSB RPS Winter Minutes
4. Virginia statutes that address the installation of solar collection devices and panels in HOA or condo neighborhoods
5. Eminent Domain: 10 Things Every Real Estate Lawyer Needs To Know
6. Federal Foreclosures
7. Bureau of Insurance Letter on Split Settlements
8. Real Property and Native American Lands
9. The legislative and case law updates

Ms. Rosati mentioned a trend toward battery storage installations on real property; she was interested in the solar collectors article and how it might impact battery areas. Mr. Gregory suggested EV charging stations as a possible adjunct to those articles. The committee agreed to discuss the topics for possible inclusion in the fall issue.

There were no further topics for discussion. The call was adjourned at 11:45 PM.

Respectfully submitted,

Hayden-Anne Breedlove

Co-chair

Virginia State Bar
Real Property Section
Land Use & Environmental Committee
Meeting via Video Conference
March 8, 2022, 3 p.m.
COMMITTEE REPORT

Attending:
Karen Cohen
Tyler Rosa
Steve Romine
Lori Schweller

1. Legislative Update. Karen and Lori updated the committee regarding select legislation of interest to land use and real estate practitioners:

HB 206 – Mitigation Plan for solar facilities; passed the House; substitution in Senate passed; House needs to accept substitute before sending to Governor to approve

HB 448 -- Review of local authority regarding disturbances for storm water disturbances; tabled in committee

HB 626 – disclosures in land use applications; defeated in committee

SB 537—trees conservation and replacement during development process; passed committee

HB 855 -- Comprehensive plan approval; allows planning commission to extend 60-day period if applicant agrees. This bill was stricken, meaning the patron chose to remove it from consideration. It does have a companion, SB35. SB35 is still alive and was reported from the House Counties, Cities, and Towns committee 18-4. Now it's up to the full House to pass it.

HB1016 – Local land use approvals; extensions of approvals to address the COVID-19 pandemic. This bill was stricken in favor of HB272 (the same bill) that has passed and is on its way to the Governor to be approved. Its companion, SB501, has also passed and is also on its way to the Governor.

HB 167—allows a land use matter to move forward if a locality submitted an ad that wasn't run or was run with errors as long as the correct ad is run in the next edition of the newspaper; passed House and Senate

HB 281/SB 311—among other things, requires an owner of a residential dwelling unit to disclose actual knowledge of a *lis pendens* to a prospective purchaser on a written disclosure on a form provided by the Real Estate Board; passed House and Senate

HB 702-- Provides that the owner of residential real property must include in the residential property disclosure statement provided to a potential purchaser of such residential real property a statement that the owner makes no representations with respect to current lot lines or the ability to expand, improve, or add any structures on the property, and that advises the potential purchaser to exercise necessary due diligence, including obtaining a property survey and

contacting the locality to determine zoning ordinances or lot coverage, height, or setback requirements on the property; passed House and Senate" (LIS); passed House and Senate

2. The committee discussed how certain localities treat conditional use permits and zoning map amendments as ordinances or zoning ordinance amendments.

3. Tyler gave the Committee a summary of the plaintiff's case and developer's brief in the pending 4th Circuit case of Scratch Golf LLC v. Beaufort Co., case number 21-2284. The case has to do with a denial of South Carolina golf course redevelopment project. The developer worked closely with the locality for years to attempt to rezone the golf course property, even withdrawing its initial application in 2013 to wait for the City Council to adopt new zoning regulations and refile under the new regulations. Following a recommendation of approval from the planning commission, the city council denied the application. The developer filed suit under various theories, including equal protection, due process, and regulatory taking. The case is a good reminder to land use practitioners of the discretion of local government in deciding land use matters and we look forward to discussing this case further as it progresses.

4. The committee discussed submitting an article on a land use topic to The Fee Simple. Tyler will consider developing the results in the above case or other issue into an article for submission.

5. Open Discussion – Lori raised the issue of including the gen-tie line in the description of a solar facility. The committee discussed this issue and the definition of public utility under state and local law.

6. Karen announced meeting reminders for the Board of Governors/Section meeting and Advanced Real Estate Seminar on March 11, 2022.

The committee adjourned at 4 p.m.

REAL PROPERTY SECTION OF THE VIRGINIA STATE BAR

WINTER-MEETING OF THE BOARD OF GOVERNORS, & AREA REPRESENTATIVES

VIRTUAL MEETING VIA TEAMS

AGENDA

Friday, January 21, 2022, 1:00 PM

I. WELCOME — **Karen Cohen**, Vice-Chair — Please email Secretary Sarah Petcher sarah@SandTLawGroup.com to let us know that you are attending.

II. ADOPTION OF MINUTES — Fall Meeting of the BOG and Section was held in person in Charlottesville and conference call on September 17, 2021 — **Sarah Petcher** (Exhibit A).

III. FINANCIAL REPORT — **Sarah Petcher**

1. Budget Update (Exhibit B)
2. Expense Vouchers

IV. STANDING COMMITTEES

1. Membership — **Pam Fairchild and Rick Chess**

    a. Nomination of new Area Representatives:

        i. Ross Green, Pender & Coward, PC nominated by Kathryn Byler

2. Fee Simple – **Steve Gregory & Hayden Anne**

    a. Spring Fee Simple
    b. Other topics of note

3. Programs – **Sarah Petcher & Heather Steele**

    a. Annual Meeting CLE June 16, 2022 3:30 – 4:30 PM "Unstable Real Property Ownership
    b. Report on the Advanced Real Estate Seminar 2022

4. Technology — **Matson Coxe**

    a. LinkedIn
    b. Searchable Fee Simple Articles

V. SUBSTANTIVE COMMITTEES – *Reminder: if you are an Area Representative and are not on at least one committee, please choose one to join and contact the committee chair(s). Area Representatives who are not active in Section meetings and at least one committee may be removed from the A/R roster. Committee Chairs please report to an officer if you have members who have not attended the past three meetings (or more).*

a. Commercial Real Estate — **John Hawthorne**

b. Common Interest Community — **Josh Johnson & Sue Tarley**

c. Creditor's Rights and Bankruptcy – **Lewis Biggs**

d. Eminent Domain — **Chuck Lollar**

e. Ethics — **Ed Waugaman and Blake Hegeman** – [no formal report]

The LEO team is continuing to review LEOs and hopes to have a useable data base for our members by 2022.

f. Land Use and Environmental — **Karen Cohen & Lori Schweller** (Report Exhibit G)

g. Residential Real Estate — **Susan Walker & Benn Winn** (meeting not held due to medical leave)

(i) VAR Summary of Statutes (Exhibit H) – **Sarah Louppe Petcher**

h. Title Insurance — **Cynthia Nahorney**

VI. VBA UPDATE — **Jeremy Root**

VII. NEW BUSINESS –Proposed revised guidelines to select Traver Award recipients each year. The first section has "Section members" highlighted as the goal was to have this only apply to Real Property Section members. This can be amended if the Board choose to open it up to any person or to any attorney.(The other highlighted portions are just FYI. Not really a change, just a focus point.)

VIII. ANNOUNCEMENTS –

IX. NEXT MEETING — Friday, March 11, 2022 Williamsburg 1:00 PM

X. ADJOURNMENT

REAL PROPERTY SECTION OF THE VIRGINIA STATE BAR

AUTUMN MEETING OF THE BOARD OF GOVERNORS and AREA REPRESENTATIVES

Meeting Minutes

Friday, September 17, 2021, 11:00 a.m.

Hillsdale Conference Center
550 Hillsdale Drive
Charlottesville, VA 22911

Conference Call#: 866-845-1266
Participant Passcode: 7907-7438

Present:

Board of Governors: Kathryn Byler, Karen Cohen, Sarah Louppe Petcher; Stephen Gregory; Robert Hawthorne, Jr., Blake Hegeman, Mark W. Graybeal, Rick Chess, Whitney Levin Heather Steele and Lori Schweller.

Area Representatives: Alyssa Dangler, Ben Leigh, Bill Nusbaum, Brian Wesley, Chuck Lollar, Cynthia Nahorney, Douglass Dewing, Ed. Waugaman, Eric V. Zimmerman; Harry R. Purkey, Jr Hayden-Anne Breedlove, Hope Payne, Howard E. Gordon, Jean Mumm, Jeremy Root, Kay Creasman, Larry McElwain, Max Wiegard, Michael Coughlin, Page Williams, Pam Faber, Pam Fairchild, Paul Melnick, Paula Caplinger, Ralph Kipp, Randy Howard, Rick Richmond, Richard Campbell, Sandy Buchko, Stephen Romine, Susan Pesner, Theodora Stingham; Tom Lipscomb, Vanessa Carter, Will Homiller

VSB Staff Liaison: Maureen Stengel

Absent:

Board of Governors: None.

Area Representatives: Barbara Goshorn, Benjamin Winn, Brooke Barden, Ross Allen; Brooke S. Barden; F. Lewis Biggs; Steven W. Blaine; Charles Land, Tara R. Boyd; Connor J. Childress; Neil S. Kessler; Otto W. Konrad; Michele R. Freemyers; Collison F. Royer; Susan H. Siegfried; John W. Steele; Stephen Bryce Wood; Dianne Boyle; Sandra (Sandy) Buchko; Todd E. Condron; Henry Matson Coxe; Lawrence A. Daughtrey; David C. Hannah; Jack C. Hanssen Tracy Bryan Horstkamp; Ralph E. Kipp; Andrew A. Painter; Jordan M. Samuel; David W. Stroh; Lawrence M. Schonberger, Lucia Anna Trigiani; Michael E. Barney; Jon W. Brodegard; Brian O. Dolan; Alyssa C. Embree, Thomas Gladin, , Ann A. Gourdine, Joshua M. Johnson, Kristen R. Jurjevich, Naveed Kalantar, Christy L. Murphy, Cartwright R. "Cart" Reilly Allen C. Tanner, Jr. William W. Sleeth, III Benjamin P. Titter Susan S. Walker, Andrae J. Via, Mark D. Williamson, K. Wayne Glass, James L. Johnson, Mark N. Reed, David C. Helscher, DR Goodman, C. Cooper Youell, IV, Joseph M. Cochran, Edward B. Kidd, James B. (J.B.) Lonergan, Michael M. Mannix,

R. Hunter Manson, G. Michael Pace, Jr., Joseph W. Richmond, Jr. Michael K. Smeltzer, James McCauley, J. Philip Hart, Jon Brodegard, Justin Ritter, Michael Barney, Michael Lafayette, Michelle Rosati, Ray W. King, Regina Petruzzi Neumann, Robert Barclay, Ronald D. Wiley, Jr., Timothy I. Kelsey, Tyler Rosa.

I. CALL TO ORDER AND WELCOME — **Kathryn Byler** called the meeting to order at 11:05 and made a few welcome remarks.

II. ADOPTION OF MINUTES — Annual Meeting of the BOG and Section was held virtually via Microsoft Teams and conference call on June 17, 2021, at 11:00 AM

The minutes as drafted indicated the wrong dates for the annual advanced real estate seminar.

A Motion was Made, Seconded and Carried to adopt the minutes as amended of the June 17th, 2021 meeting.

III. FINANCIAL REPORT — Ms. Petcher presented the budget which begins at Page 13 of the agenda. Ms. Byler reminded all those in attendance in Charlottesville that all vouchers have to be completed and returned to Kathryn within 30 days of the event with all attachments. For the first one of the year, make sure to attach a W9.

IV. STANDING COMMITTEES

1. Membership

No formal report. Nomination of new Area Representatives: Pam Fairchild introduced Rachel Hinson, nominated by Kathryn Byler. Ms. Hinson introduced herself to the group. The committee is seeking for a new chair.

A motion was made, seconded and carried to approve the nomination of Rachel Hinson as Area Representative.

Kathryn Byler shared a new procedure for updating the BOG, Area Reps and Committee Chairs roster for The Fee Simple and our email communications. The changes are automatically saved. Please take a moment to see if your info is correct and if not, please update it.
https://docs.google.com/document/d/1Z0BYWAKfrbj0CVX4oSXl8zdQP9btG7VX/edit?usp=sharing&ouid=117844011034303536972&rtpof=true&sd=true

2. Fee Simple

Written report is attached. Rich Chess resigned from his position as co-chair of the Fee Simple Committee. Ms. Hayden Breedlove will now take on some of the responsibilities associated with the publication. Steve Gregory reminded the attendees of the publication deadline of October 1st. Ms. Breedlove reminded the group to submit article ideas for upcoming publications.

3. Programs

Heather Steele presented the report on the Advanced Real Estate Seminar 2022. Three confirmed topics/speakers: Opportunity zones and other tax matters, Eminent Domain and Condo Associations and Maintenance Responsibilities. Looking for speakers on the topics of address and naming rights and co-housing; ethics speakers and alternative housing arrangements and co-housing agreements. Suggestion of topic: New ALTA title insurance policies.

4. Technology

No Report.

V. SUBSTANTIVE COMMITTEES – *Reminder: if you are an Area Representative and are not on at least one committee, please choose one to join and contact the committee chair(s). Area Representatives who are not active in Section meetings and at least one committee may be removed from the A/R roster. Committee Chairs please report to an officer if you have members who have not attended the past three meetings (or more).*

a. Commercial Real Estate — John Hawthorne - No Report

b. Common Interest Community — Josh Johnson & Sue Tarley - No Report.

c. Creditor's Rights and Bankruptcy – Lewis Biggs - No Report.

d. Eminent Domain — Chuck Lollar provided a report to the group. 28 members on the committee. It has been very productive committee submitting a number of articles to the Fee Simple. The committee has been active in discussing issues which maybe of interest to the VBA for potential statutory update including issues related to compensation, loss of access, issues related to future money disbursements and corrections to the model jury instructions for related cases. Please remember that much of the work each committee does may have overlap with the work of other committees and Ms. Byler encouraged cross-pollination.

e. Ethics — Ed Waugaman and Blake Hegeman – No Formal Report. The committee is continuing to work on the LEO reports. They have done their preliminary reviews and are expecting to provide a final product to the Board soon. A recommendation was made that this committee be more pro-active and consider adding a CLE topic/Fee Simple article addressing issues related to common drafting errors.

f. Land Use and Environmental — Karen Cohen & Lori Schweller – No Formal Report. The committee will focus on the following topics for future meetings: middle density, inclusionary zoning. Looking to recruit environmental lawyers.

g. Residential Real Estate — Susan Walker & Benn Winn - No Report

h. Title Insurance — Cynthia Nahorney – No Report. The Committee will meet in October to review the ALTA new title commitment and policy forms with the goal of drafting an article of the Fee Simple.

VI. VBA UPDATE — Jeremy Root presented an update on the VBA's activities. One of the main responsibilities of the VBA is lobbying activities. They have put more manpower in the legislative committee. One of their focus this year is looking at how the recent supreme court case on fair market value of a property should be addressed in the legislative context, including the possibility of defining the term. They are seeking input. The VBA is hosting a social event today in Charlottesville, Virginia. Members of the VSB's Board of Governors and Area Reps are cordially invited to join us.

VII. NEW BUSINESS – A suggestion was made that we appoint a historian,

VIII. NEXT MEETING — The Winter meeting will be held on Friday, January 21, 2022 at the Williamsburg Lodge.

IX. ADJOURNMENT – Meeting was adjourned at 12:18.

IBIS MEMBERSHIP REPORT
SECTION COUNT REPORT 01/14/2022

Section	Act/Aso	Judicial	Non-Bar	Other	Total
Administrative Law	567	63	0	6	636
Antitrust Law	213	4	0	4	221
Bankruptcy Law	653	25	0	4	682
Business Law	1,890	49	0	17	1,956
Construction Law	779	26	0	4	809
Corporate Counsel	1,580	8	0	69	1,657
Criminal Law	2,036	362	0	11	2,409
Education of Lawyers	246	44	91	11	392
Environmental Law	391	14	0	1	406
Family Law	1,738	235	1	13	1,987
General Practice	729	105	0	7	841
Health Law	634	23	0	13	670
Intellectual Property	1,437	52	0	12	1,501
International Practice	430	7	0	9	446
Litigation	3,308	194	0	20	3,522
Local Government Law	737	47	0	0	784
Military Law	248	15	0	4	267
Real Property	2,005	48	0	13	2,066
Taxation	729	17	0	7	753
Trusts & Estates	2,038	55	0	14	2,107
TOTAL	22,388	1,393	92	239	24,112

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EXPERIENCE

PENDER & COWARD, P.C., Suffolk, VA (July 2007-Present)
Partner

- Chairman of the Eminent Domain / Right of Way Practice Group;
- Represents condemning authorities with regard to right-of-way projects, with clients including state government agencies, utilities, municipalities, and right-of-way consultants;
- Right-of-way practice includes the following:
    - Litigation in state and federal courts regarding eminent domain / condemnation and inverse condemnation cases;
    - Negotiation and settlement of property acquisitions;
    - Title reviews/searches and providing title services;
    - Real estate closings for voluntary acquisitions;
    - Addressing issues with estates, trusts, churches, and non-profits either in the chain of title or as landowners; and
    - Advising clients regarding relocation issues and compliance with federal and state Uniform Relocation Acts;
- Represents and advises clients in real estate matters including residential and commercial transactions and related litigation;
- Represents banks and other lenders and serves as lender's counsel;
- Represents and advises clients with regard to wills, trusts, powers of attorney, other estate planning opportunities, estate administration, and related litigation.

PENDER & COWARD, P.C., Virginia Beach, VA (May 2006-August 2006)
Law Clerk

OFFICE OF THE ATTORNEY GENERAL, Richmond, VA (May 2005-June 2005)
Law Clerk

- Assisted attorneys in the Contracts and Transportation divisions with legal research and writing in areas such as procurement contracts and grants.

VIRGINIA PORT AUTHORITY, Norfolk, VA / Brussels, Belgium (Summer 2001, Summer 2002)
Intern

- Researched and edited a manual of Code of Virginia statutes relevant to the work of the VPA for use by VPA's General Counsel;
- Assisted the Director of the Brussels office with marketing and database management.

HONORS AND AWARDS

- A/V Rated ("Preeminent") in Eminent Domain, Litigation, and Real Estate, Martindale-Hubbell Peer Review Ratings System;
- Super Lawyers 2016, 2017, 2018, 2019, 2020 – Virginia Rising Stars (Under 40);
- Virginia's Legal Elite 2013, 2014, 2015, 2016 – Rising Stars (Under 40).

EDUCATION

UNIVERSITY OF RICHMOND SCHOOL OF LAW, Richmond, VA
Juris Doctor, *magna cum laude*, May 2007
Cumulative GPA: 3.6

- **University of Richmond Law Review**, *Articles & Comments Editor*

HAMPDEN-SYDNEY COLLEGE, Hampden-Sydney, VA
Bachelor of Arts, Political Science, *summa cum laude*, May 2003
Cumulative GPA: 3.8

- **Phi Beta Kappa**, *Member*
- **Omicron Delta Kappa**, *Member*
- **The Union-Philanthropic Literary Society**, *President*
- **The Madisonian Society**, *President*
- **Honors Program**, *James Madison Merit Scholar*

OTHER ACTIVITIES

- Vice Chairman, Region 4, International Right of Way Association;
- Legal Committee Chair, Newsletter Editor, Past President, Chapter 52, International Right of Way Association;
- Lecturer, "Commissioners: Who Can Serve," Virginia Eminent Domain, CLE International, 2021;
- Lecturer, "Ethically Trying Condemnation Cases in Virginia," Virginia Eminent Domain, CLE International, May 2019;
- Lecturer, "A Peak Around the Bend: Emerging Landowner Tactics to Maximize Just Compensation," IRWA International Education Conference, Edmonton, Canada, June, 2018;
- Lecturer, "Relocation Benefits and Pitfalls: Understanding the Uniform Relocation Act," Virginia Eminent Domain, CLE International, May 2017;
- Lecturer, "Trends in Eminent Domain Law", S.E.E. Annual Conference and Trade Show, June 2016;
- Lecturer, "A Condemnor's Minefield", Virginia Eminent Domain, CLE International, May 2016;
- Lecturer, "Relocation of Graveyards and Cemeteries", IRWA Fall Forum, October 2015.
- Lecturer, "What You Need to Know Now", Advanced Eminent Domain and Condemnation CLE, NBI, October 2015;
- Lecturer, "Eminent Domain, Legal Issues for Virginia Civil Engineers and Surveyors CE," August 2015;
- Lecturer, Eminent Domain from Start to Finish CLE, NBI, September 2013;
- Past President, Suffolk Bar Association;
- Member, Virginia Bar Association;
- Graduate, Class of 2012, Leadership Hampton Roads;
- Graduate, Class of 2008, Suffolk Leadership Academy;
- Area Chairman, Suffolk Ducks Unlimited.

CERTIFICATIONS

- Senior Right of Way Agent, International Right of Way Association;
- CLIMB Certified Instructor, International Right of Way Association.

LICENSURE

- Virginia State Bar, admitted 2007;
- North Carolina State Bar, admitted 2019.

COURT ADMISSIONS

- Supreme Court of Virginia (2007);
- United States District Court for the Eastern District of Virginia (2007);
- United States Court of Appeals for the Fourth Circuit (2010).

REPORTED CASES

- Johnson v. City of Suffolk, 851 S.E.2d 478, 2020 Va. LEXIS 142, 2020 WL 7251969 (Va. 2020);
- Michael Fernandez, D.D.S., Ltd. v. Comm'r of Highways, 298 Va. 616, 842 S.E.2d 200, 2020 Va. LEXIS 57, 2020 WL 2761282 (Va. 2020);
- City of Chesapeake v. Clear Sky Car Wash, L.L.C., 89 Va. Cir. 27, 2014 Va. Cir. LEXIS 145 (Chesapeake Cir. Ct. March 11, 2014);
- City of Chesapeake v. Clear Sky Car Wash LLC, 2012 U.S. Dist. LEXIS 126265, 2012 WL 3866508 (E.D. Va. 2012);
- Commonwealth DOT v. Burton, 2012 AMC 2230, 2012 U.S. Dist. LEXIS 94015, 2012 WL 2785900 (E.D. Va. 2012);
- Davis v. Smith, 2010 U.S. Dist. LEXIS 103208, 2010 WL 3835026 (E.D. Va. 2010) (affirmed Davis v. Smith, 415 Fed. Appx. 483, 2011 U.S. App. LEXIS 4865 (4th Cir. Va. 2011);
- Gray v. Wages, 2010 U.S. Dist. LEXIS 82412, 2010 WL 3187045 (E.D. Va. 2010);
- Holloway v. City of Suffolk, 660 F. Supp. 2d 693, 2009 U.S. Dist. LEXIS 92596 (E.D. Va. 2009);
- Ricky B's, Inc. v. Smith, 2008 Va. App. LEXIS 123, 2008 WL 630474 (Va. Ct. App. Mar. 11, 2008).

Minutes of the Fee Simple Committee Telephone Conference

The Fee Simple Committee held a telephone conference on 13 January 2022 at 10:00 AM. On the call were the co-chairs Steve Gregory and Hayden-Anne Breedlove. The Spring 2022 edition was the focus of the conversation.

Mr. Gregory and Ms. Breedlove discussed possible article topic ideas for the upcoming Spring 2022 edition. Topics that were discussed included:

1. Federal foreclosures—Ms. Breedlove has a prospective author whom she will contact.
2. The installation of solar collection devices and panels in HOA/Condominium Associations—John Cowherd had previously expressed an interest in such an article, and Mr. Gregory will contact him for confirmation.
3. Balancing redaction concerns and issues relating to what is in the public record—Mr. Gregory mentioned the experience of Florida in trying to enact such protections. Mr. Gregory will attempt to find an author.
4. *Taylor v. Northam*, -- suggested by Susan Pesner. Ms. Breedlove will ask Ms. Pesner if she has a suggestion for an author.
5. The legislative and case law updates – assumption is these will be provided by Mr. Moss and Mr. Derdeyn, as in prior years. The committee will get confirmation.

Ms. Breedlove mentioned a possible topic of real estate and blockchain; it was tabled because articles have recently been published in the *Fee Simple* on this topic.

Another topic that was mentioned but was tabled related to "one stop shops" for real estate transactions. It was tabled because of lack of broad application.

Mr. Gregory and Ms. Breedlove discussed the upcoming real property section meeting, and that Ms. Breedlove will be providing the report of the Fee Simple Committee.

There were no further topics for discussion. The call was adjourned at 10:38 AM.

Respectfully submitted,

Hayden-Anne Breedlove

Co-chair

BOARD OF GOVERNORS
REAL PROPERTY SECTION
VIRGINIA STATE BAR
(2022-2023)

[Note: as used herein, a Nathan[1] (*) denotes a past Chair of the Section, and a dagger (†) denotes a past recipient of the Courtland Traver Scholar Award]

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[1] Named after Nathan Hale, who said "I only regret that I have but one asterisk for my country." –Ed.

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