

**YOU CAN'T CHOOSE YOUR FAMILY,  
BUT YOU SHOULD CHOOSE YOUR  
CO-TENANTS: REFORMING THE UPC TO  
BENEFIT THE MODEST-MEANS FAMILY  
CABIN OWNER**

LISA C. WILLCOX\*

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## INTRODUCTION

Many families across the country enjoy vacations spent at a second home, often called a cottage or cabin.<sup>1</sup> Once the original owners of these houses die and pass the cabin to the next generation, problems often arise. The problems can be understood from the point of view of the current owners—how do we pass this house along? Can we? Should we? The problems can also be considered from the viewpoint of the potential future owners—how will we pay for the ongoing costs? What if I need cash instead? What if my sibling uses the house more, but pays in less?

This Comment explores some of the numerous issues that accompany owning and passing on a cabin and, in particular, focuses on the problems that arise from co-ownership among siblings in real property that has significant sentimental value. In order to address and help alleviate the problems co-owners face in this context, this Comment argues for two legislative actions states should implement to facilitate sibling co-ownership. First, this Comment proposes over-arching changes

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1. Although many terms are used to refer to a vacation home, this Comment uses “cabin” for consistency.

to the Uniform Probate Code (UPC). The proposed changes would ensure that those entering co-tenancies<sup>2</sup> do so with eyes open to the potential problems associated with co-tenancies. The changes would allow for those who want a co-tenancy to buy out any would-be co-tenant who does not wish to accept the responsibility and costs at the outset,<sup>3</sup> instead of waiting for future problems to prompt a partition proceeding.<sup>4</sup> Through knowledge of each co-tenant's rights and responsibilities from the beginning of the co-tenancy relationship, along with a procedure to "opt out" of the co-tenancy, family cabin owners will have a more stable relationship, and thus a more long-term one. Modifying the UPC as proposed would help effectuate the goal of most family cabin owners—to keep the cabin in the family—while promoting family harmony. Additionally, this change would help family cabin owners of modest means keep the cabin without the need for complex and expensive planning options.

Second, this Comment argues for the universal adoption of the Uniform Partition of Heirs Property Act (UPHPA). The enactment of the UPHPA would alleviate some of the hardships associated with partition for future cabin owners.<sup>5</sup> However, the UPHPA's protective procedures only apply during partition actions<sup>6</sup>—after problems have already arisen—and thus, this solution becomes a "second best" option for modest means family cabin owners.<sup>7</sup>

As a "third best" option, this Comment concludes with some insight as to what first-generation cabin owners can do under the current UPC scheme to avoid unwanted co-tenancies among their children, thereby preserving family harmony, the family cabin, and in some cases, both.

In order to understand the context of family cabin

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2. A tenancy is the possession of property by right or title. A co-tenancy is a tenancy with two or more co-owners who all have equal rights (i.e. unity) of possession of the property. *See Tenancy*, BLACK'S LAW DICTIONARY (10th ed. 2014). Co-tenancy can describe both tenancy in common and joint tenancy relationships. The differences between these two relationships and how they relate to cabin owners are explained in more detail *infra* Section II.A.

3. *See infra* text accompanying note 131.

4. *See infra* Section II.B.2.

5. *See infra* Section III.B.

6. *See infra* text accompanying note 211.

7. In addition, the UPHPA does not apply to the group of people this Comment calls the second-generation cabin owners—generally, the children of the first owners of the cabin. *See infra* note 209 and accompanying text.

ownership under American law, Part I introduces basic background information on real property<sup>8</sup> ownership, devise, and inheritance in the United States. Part II explains the main topic addressed in this Comment: problems that arise in co-ownership of real property, especially in the context of the family cabin. Part II continues with a description of the three potential scenarios in which siblings receiving a family cabin for the first time may find themselves: (1) inheriting from parents without a will through default intestacy<sup>9</sup> rules; (2) inheriting from a will with no additional cash or property of value; or (3) “inheriting”<sup>10</sup> from a will, trust, or limited liability company (LLC) with additional cash or other valuable property. Part III first argues for specific changes to the UPC in order to help families facing the first two scenarios, and then argues for the universal enactment of the UHPA. Part III addresses some of the concerns of the original owners, but overall this Comment focuses on the problems facing the family cabin’s second set of owners, who are, generally speaking, the children of the original owners, and thus, siblings.

## I. BACKGROUND

A brief introduction on the background of property law and its origins provides context for the proposed changes. In particular, Section A traces the history of transferring real property between generations in England and the United States. Section B next provides an overview of modern intestacy laws and introduces the UPC. First, some terminology clarification: while the phrase “decedent’s descendant” will appear in this Comment, this is not meant as a tongue twister nor to confuse. A *decedent* is the dead person whose estate is in question. A *descendant*, most simply put, is a person’s child, grandchild, great-grandchild, or so on.<sup>11</sup>

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8. “[R]eal property . . . [is] land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land. Real property can be either corporeal (soil and buildings) or incorporeal (easements).” *Property*, BLACK’S LAW DICTIONARY, *supra* note 2.

9. Intestacy laws govern the disposition of people’s estates if they die without a will or will substitute, or if their entire estate is not covered by one of these documents. *See Intestate*, BLACK’S LAW DICTIONARY, *supra* note 2.

10. Technically, a person does not inherit from a trust or LLC—one receives a beneficial interest in property through a trust document and receives a membership share in an LLC. *See infra* notes 81, 78, and accompanying text.

11. The UPC defines descendants as: “all of [an individual’s] descendants of

A. *A Quick Look at Devising and Inheriting Real Property in the United States—From Historic England to Modern Day America*

The complete set of property rights that an owner of an asset enjoys is the “right to derive value from the asset, to exclude others from using it, and to transfer the asset to others.”<sup>12</sup> When an individual privately owns real property and holds that real property until death, a need arises to transfer the ownership of that property upon the owner’s death.

In England, a legal system developed to fulfill this need.<sup>13</sup> Under the feudal system, 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, like military

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all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent contained in this [code].” UNIF. PROBATE CODE § 1-201(9) (UNIF. LAW COMM’N 1969) (amended 2010) (first alteration added). “Child’ includes an individual entitled to take as a child under this [code] by intestate succession from the parent whose relationship is involved and excludes a person who is only a stepchild, a foster child, a grandchild, or any more remote descendant.” *Id.* § 1-201(5). “Parent’ includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this [code] by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.” *Id.* § 1-201(32).

12. *Introduction: The Economic Approach to Property Rights, in PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW 1* (Terry L. Anderson & Fred S. McChesney eds., 2003). While real property by its nature does not require a system that recognizes individual ownership, such a system has been a staple in the now United States since European colonization. This of course severely understates and brushes aside the Native American property systems in place before European colonization of what is now the United States, systems which almost invariably held a very different view on individual ownership of real property. *See generally* Johnson v. M’Intosh, 21 U.S. 543 (1823) (holding that only the United States government, as the successor to the British claim of land by “discovery” in the United States, could transfer title to American land, even though that land was occupied by Native Americans). While a valuable and important topic, it is outside the scope of this Comment.

13. Both law and religion have historically addressed the transfer of property at death. MARK ACCETTURA, BLOOD & MONEY: WHY FAMILIES FIGHT OVER INHERITANCE AND WHAT TO DO ABOUT IT 221–22 (2011). For example, the Old Testament provides a mandatory inheritance scheme, where if a man dies with no son, then a daughter shall inherit, and if there is no daughter, the inheritance passes to his brothers, then his father’s brothers, and so on. *Id.* at 233–34 (citing *Numbers* 27:8–11) (indicating by implication that a man with a son would pass property to the son). This Comment focuses on the law, which includes equitable and legal concepts. English common law forms the basis for American law generally, and thus this Comment begins there. For a more complete overview of the history of inheritance, see *id.* at 221–51.

services or the payment of rent.<sup>14</sup> Although *subtenants* could transfer the land to others, as long as the original conditions of their subtenure were met, those highest in the chain needed permission from the king to convey the land.<sup>15</sup> On the death of the tenant, the interest in the land would pass through a system known as primogeniture<sup>16</sup> and fee tail male,<sup>17</sup> in which the eldest living son would inherit the whole estate.<sup>18</sup> Under primogeniture and fee tail male, males were always preferred over females of equal degree of kinship, and a distant male heir would inherit over daughters.<sup>19</sup>

Although forced disinheritance of all female and younger children in this way is harsh and untenable by modern standards, primogeniture had its upsides.<sup>20</sup> First,

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14. 1 TIFFANY REAL PROP. § 11 (3d ed. 2014).

15. *Id.* § 16.

16. Under primogeniture, the eldest child inherits an ancestor's estate, to the exclusion of younger siblings. See *Primogeniture*, BLACK'S LAW DICTIONARY, *supra* note 2.

17. A fee tail is "[a]n estate that is heritable only by specified descendants of the original grantee, and that endures until its current holder dies without issue." *Fee Tail*, BLACK'S LAW DICTIONARY, *supra* note 2. A fee tail male limits descent to male descendants. JESSE DUKEMINIER ET AL., PROPERTY 199 n.17 (7th ed. 2010).

18. Perhaps contrary to mainstream belief, primogeniture alone did not work to pass property exclusively to sons:

Primogeniture does not necessarily mean male in exclusion of female, but can be broad enough to encompass the eldest inheriting in favor of the younger, regardless of gender: "If by primogeniture we only mean that the male issue shall be admitted before the female, and that, when there are two or more males in equal degrees, the eldest only shall inherit, but the females "all together" [Blackstone's definition], then ancient records may indeed contain but scant references. But primogeniture embraces all the cases of single inheritance, and may indeed be defined as the prerogative enjoyed by an eldest son or occasionally an eldest daughter, through law or custom, to succeed to their ancestor's inheritance in preference to younger children. Nay, we might even make it more comprehensive, extending it to all cases of single succession depending upon priority in birth."

*Primogeniture*, BLACK'S LAW DICTIONARY, (9th ed. 2009) (quoting RADHABINOD PAL, THE HISTORY OF THE LAW OF PRIMOGENITURE 11 (1929)) (alteration in original).

19. DUKEMINIER, *supra* note 17 at 198–99; see also Karen Stakem Hornig & Craig J. Hornig, *Law and Literature Series: Austen on Estates and Trusts*, MD. B.J., Jan./Feb. 2010, at 50, 52. At least at some point in the feudal system of primogeniture, daughters could inherit as a group if there were no male heirs. See GEORGE CHARLES BRODRICK, THE LAW AND CUSTOM OF PRIMOGENITURE 6 (1872) (quoting WILLIAM BLACKSTONE, COMMENTARIES).

20. "From our modern perspective, primogeniture strikes us as harsh and unfair. Perhaps it was, but the practice served economic and social needs of the society that followed it." James Charles Smith, *Family Life and Moral Character*,

primogeniture allowed for land to be held and passed undivided in large parcels.<sup>21</sup> Full parcels were both more profitable and allowed the owner to fully support himself, unlike the alternative result of ever-smaller parcels from endless partition of the land.<sup>22</sup> Second, the cultural expectations of society during the times of primogeniture meant that children who were not provided for in inheritance were still provided for by the eldest, who would give them a place in the household, at least some of the time.<sup>23</sup>

Even with these advantages, primogeniture did not catch on in the United States.<sup>24</sup> In many original American colonies and subsequent states, a system similar to or equivalent to gavelkind<sup>25</sup> was the rule of land.<sup>26</sup> Under this system, male heirs shared in inheritance, and surviving wives were given one-third to one-half of the estate in a life estate.<sup>27</sup> Over time,

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12 TEX. WESLEYAN L. REV. 431, 433 n.30 (2005).

21. ACCETTURA, *supra* note 13, at 243.

22. *Id.*

23. *See id.* Other cultural norms that helped provide support for the other children during primogeniture times included military service and clergy work for younger sons, and marriage for daughters. *See* Smith, *supra* note 20, at 433 n.30 (citing FRANCES GIES & JOSEPH GIES, MARRIAGE AND THE FAMILY IN THE MIDDLE AGES 142–45 (1987)).

24. *See, e.g.*, Black v. Black, 92 A.3d 688, 703 (N.J. Super. Ct. Ch. Div. 2013) (“[Primogeniture] was never embraced as appropriate in the United States of America, and beginning with Georgia in 1777, was ultimately abolished on a state-by-state basis shortly after the nation’s formation.”). In the Restatement (First) of Property compiled in 1936, primogeniture only existed in a handful of states, and only as to estates in fee tail. RESTATEMENT (FIRST) OF PROP. § 85 spec. note (AM. LAW INST. 1936) (“In Massachusetts and perhaps also in Maine and Delaware primogeniture inheritance has been held to persist as to estates in fee tail although wholly abolished as to other types of inheritable estates. A like result was reached in Pennsylvania, but the question cannot arise in that state as to any estate created since 1855. These holdings have been due to a too strict interpretation of the applicable statutes and result in an undesirable survival of a form of inheritance not suited to present ideas.”). Now, the Restatement (Third) of Property states the black letter law that the fee tail estate is not recognized in American Law, and thus by implication primogeniture does not exist in American law today. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 24.4 (AM. LAW INST. 2011).

25. The gavelkind system consisted of tenures in land in exchange for non-military service by tenants, tenures which then descended equally to the tenant’s sons on his death. Gavelkind originated from the English county of Kent. *See Gavelkind*, BLACK’S LAW DICTIONARY, *supra* note 2.

26. There is debate over whether the system extended by charter in the colonies, or whether it was merely analogous to the customary scheme practiced in the colonies. *See* Richard B. Morris, *Primogeniture and Entailed Estates in America*, 27 COLUM. L. REV. 24, 37–44 (1927).

27. *See id.* at 39.

United States common law developed a system where male descendants inherited first, and the eldest male descendant of equal degree would inherit over the younger. Generally, then, the oldest son would inherit all.<sup>28</sup> Daughters could inherit if there were no sons, but all daughters would inherit together, rather than the oldest daughter taking all.<sup>29</sup> Today, statutes in all states modify the common law so that males are no longer favored, and all descendants of the same degree share equally in intestate inheritance.<sup>30</sup>

One fundamental aspect of modern inheritance law in America is the freedom of disposition, including the ability to disinherit.<sup>31</sup> Hardly any hard-and-fast restrictions on disinheritance exist. For example, parents have a legal right to disinherit children in every state except Louisiana.<sup>32</sup> In fact, except in Louisiana, a testator can disinherit even minor children.<sup>33</sup> As for spouses, some restrictions on disinheritance do exist. For example, the modern trend is to allow surviving spouses to elect to take a statutorily provided amount of an estate if he or she so chooses.<sup>34</sup> Other than these state-specific

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28. 4 TIFFANY REAL PROP., *supra* note 14, § 1116.

29. *Id.*

30. *Id.* This statement is actually not quite true. It is possible for descendants of the same degree to take unequal shares under the *per stirpes* system of intestacy, which some states still follow. See JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 81–83 (9th ed. 2013) (describing the three models of intestacy). The UPC follows the “[e]qually near, equally dear” maxim, and thus descendants of the same degree take equally. See *id.* at 83–84.

31. See ACCETTURA, *supra* note 13, at 36.

32. *Id.*

33. *Id.* at 39.

34. See THE ABA PRACTICAL GUIDE TO ESTATE PLANNING 489 (Jay A. Soled ed., 2011). Under the most recent version of the UPC, these spousal elections are designed to give more to the surviving spouse when assets were titled disproportionately in the decedent’s name in common-law states (in contrast to community property states), as well as more for long-term marriages than short-term ones. See UNIF. PROBATE CODE Part 2 gen. cmt. (UNIF. LAW COMM’N 1969) (amended 2010) (“The general effect of implementing the partnership theory in elective-share law is to increase the entitlement of a surviving spouse in a long-term marriage in cases in which the marital assets were disproportionately titled in the decedent’s name; and to decrease or even eliminate the entitlement of a surviving spouse in a long-term marriage in cases in which the marital assets were more or less equally titled or disproportionately titled in the surviving spouse’s name. A further general effect is to decrease or even eliminate the entitlement of a surviving spouse in a short-term, later-in-life marriage (typically a post-widowhood remarriage) in which neither spouse contributed much, if anything, to the acquisition of the other’s wealth, except that a special supplemental elective-share amount is provided in cases in which the surviving spouse would otherwise be left without sufficient funds for support.”). The

statutes, a testator can devise his property any way he wants.<sup>35</sup> In addition, some states allow a decedent to disinherit a person by will even if part of the decedent's estate passes via intestacy and the disinherited person is an intestate heir;<sup>36</sup> the disinherited heir's intestate share passes as if he had disclaimed his share.<sup>37</sup> While testamentary freedom is important in American law, it is not constitutionally protected.<sup>38</sup>

An especially important aspect of American inheritance law is state intestacy statutes. As half or more Americans die without a will,<sup>39</sup> intestacy laws govern the disposition of property after many deaths. Intestacy laws also inform the interpretation of will provisions<sup>40</sup> and give standing for will contests.<sup>41</sup> Section B gives an overview of modern intestacy laws, focusing on the UPC.

### *B. Modern Intestacy Laws—The Default Rules*

State statutes govern the laws of intestacy, or what happens to an estate when there is an incomplete or nonexistent will. This Comment focuses on the UPC,<sup>42</sup> which

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drafters of the UPC wanted to “bring elective-share law into line with the contemporary view of marriage as an economic partnership.” *Id.* The importance of the Uniform Probate Code will be explained below in Section I.B.

35. *Cf.* THE ABA PRACTICAL GUIDE TO ESTATE PLANNING, *supra* note 34, at 489 (stating that a decedent spouse in a community property state can devise his separate property “any way he likes”). Additionally, many later-in-life marriages are preceded by a pre-nuptial agreement that waives elective share rights for a surviving spouse. *See* DUKEMINIER & SITKOFF, *supra* note 30, at 536–37. Sometimes, courts will find will provisions void based on public policy concerns, but this is rare. *See id.* at 4, 12–15.

36. *See* DUKEMINIER & SITKOFF, *supra* note 30, at 91; UNIF. PROBATE CODE § 2-101(b).

37. *See* UNIF. PROBATE CODE § 2-101. Thus, the share would pass to the disinherited heir's descendants, who would partake equally in that share. *Id.* at cmt.

38. *See* ACCETTURA, *supra* note 13, at 38 (“The right to leave or receive an inheritance is not a constitutional right.”).

39. *See* DUKEMINIER & SITKOFF, *supra* note 30, at 64; *see also* THE ABA PRACTICAL GUIDE TO ESTATE PLANNING, *supra* note 34, at 41.

40. ACCETTURA, *supra* note 13, at 249.

41. *See* DUKEMINIER & SITKOFF, *supra* note 30, at 3–9.

42. The Uniform Law Commission created the UPC. The Uniform Law Commission is a volunteer organization that was established in 1892 to create non-partisan, thoughtful, and well-drafted legislation. *About the ULC*, UNIF. LAW COMM'N, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> [<http://perma.cc/9S95-24K9>]. The organization is comprised of lawyers appointed

has been enacted in full or with revisions by twenty states or territories.<sup>43</sup> The UPC has been approved by the American Bar Association, and provides the updated and streamlined views on probate law.<sup>44</sup> Thus, while only twenty states have adopted versions of the UPC, it represents the consensus of practicing attorneys from around the country, and thus reflects the reasoned view of what probate law should be.

Though riddled with complexities that are not within the scope of this Comment, the basic scheme of intestacy under the UPC follows. Under the UPC, the spouse is clearly the preferred beneficiary in intestate transfer.<sup>45</sup> If a decedent has no surviving parents, the surviving spouse receives the whole intestate estate if (1) all descendants of the decedent are also descendants of the surviving spouse, and (2) the surviving spouse does not have any additional surviving descendants who are not also descendants of the decedent.<sup>46</sup> When those conditions are not satisfied, the spouse still gets a specified amount first before other heirs<sup>47</sup> plus three-quarters or one-half of any remaining balance of the intestate estate.<sup>48</sup>

After applying the initial spousal share rules, or if there is no surviving spouse, other heirs inherit according to the order set out in UPC section 2-103. The first to take under this section are the decedent's descendants, next are the decedent's

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by states to research, draft, and promote uniform laws. *Id.* The Uniform Probate Code was first completed by the Uniform Law Commission in 1969, and has undergone twelve substantial revisions since its completion. *Legislative Fact Sheet – Probate Code*, UNIF. LAW COMM'N, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Probate%20Code> [<http://perma.cc/VLH2-D84J>].

43. These are: Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, South Carolina, South Dakota, U.S. Virgin Islands, and Utah. *Legislative Fact Sheet – Probate Code*, *supra* note 42. In addition, Pennsylvania and Wisconsin have enacted probate codes that are “substantially similar” to the UPC. *UPC Enactment Chart*, UNIF. LAW COMM'N, <http://www.uniformlaws.org/Shared/Docs/Probate%20Code/UPC%20Chart.pdf> [<http://perma.cc/H65D-PTHJ>].

44. *Legislative Fact Sheet – Probate Code*, *supra* note 42.

45. See UNIF. PROBATE CODE § 2-102 (UNIF. LAW COMM'N 1969) (amended 2010); see also ACCETTURA, *supra* note 13, at 41.

46. UNIF. PROBATE CODE § 2-102(1)(A). The alternative section 2-102A(a) for community property states provides similarly, but for the decedent's separate property, as opposed to the entire intestate estate. The decedent's one-half interest in community property passes to the surviving spouse under section 2-102A(b), unless a state chooses a different scheme. *Id.* § 2-102A cmt.

47. \$150,000–\$300,000, adjusted for cost-of-living under § 1-109. *Id.* § 2-102 cmt.

48. *Id.* § 2-102(2)–(4).

parents, then to descendants of the decedent's parents, and finally to decedent's grandparents or descendants of grandparents.<sup>49</sup> When part of an estate passes "by representation" under the previously named sections,<sup>50</sup> the UPC calls for a per-capita-at-each-generation system of representation.<sup>51</sup> Under this system, everyone at an equally related level inherits the same amount. For example, all grandchildren of a decedent, if they were to inherit, would inherit the same amount.<sup>52</sup>

As shown in this Part, the history of inheritance in England and America led to the modern intestacy scheme under the UPC, which often results in the disposition of an intestate decedent's estate to many heirs together. This can lead to co-ownership of real property and is one way that a family cabin can end up in co-ownership. Part II outlines the other ways that a family cabin ends up in co-ownership and the corresponding problems that result. First, Part II outlines the common co-ownership forms under American Law.

## II. SO WHO GETS THE FAMILY CABIN?

When first-generation owners<sup>53</sup> contemplate who should get the family cabin in the event of their death, their natural

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49. *Id.* § 2-103(a). Under § 2-103(b), if there is no taker under subsection (a), then descendants of a pre-deceased spouse can inherit.

50. An estate passes "by representation" when a younger generation receives a share that would have gone to their ancestors had they been alive to receive it. The younger generation "represents" the ancestor in the family tree. *See* DUKEMINIER & SITKOFF, *supra* note 30, at 81.

51. *See* UNIF. PROBATE CODE § 2-106 and accompanying comments. The per-capita-at-each-generation system differs from both the traditional *per stirpes* and *per capita* systems of representation. UNIF. PROBATE CODE § 2-106 cmt. Under *per stirpes*, each branch of a family receives an equal share of the inheritance that is then distributed to the living representatives of that branch, so that grandchildren who have siblings would receive a smaller share of inheritance than their only-child cousin. *See Per Stirpes*, BLACK'S LAW DICTIONARY, *supra* note 2. The traditional *per capita* system gives everyone who stands to inherit an equal share, regardless of the level of relatedness. *See Per Capita*, BLACK'S LAW DICTIONARY, *supra* note 2.

52. *See* UNIF. PROBATE CODE § 2-106 cmt.

53. Technically, the current owner does not need to be the first-generation owner for this problem to arise. For instance, if an only child inherited and kept full title to the cabin throughout his life, then perhaps the possibilities of co-ownership would only arise after this second-generation owner died. However, for simplicity, this Comment will use "first-generation owner" to refer to the person (or couple) passing down the family cabin.

instinct is probably to give it to all of their children, together. This reaction makes sense in the context of modern inheritance laws, which allow for equality among children of any order or gender, and intestacy laws, which provide for this by default.<sup>54</sup> Unfortunately, leaving property in co-ownership situations among unmarried individuals, even siblings, can have unexpected<sup>55</sup> and sometimes disastrous consequences.<sup>56</sup>

This Part defines the problems surrounding the inheritance of a family cabin. Section A describes the numerous ways in which groups of people can hold property together. Next, Section B sets out what makes co-ownership problematic and explains why the family cabin in particular causes tenuous co-ownership situations. Section C then sets forth the situations in which first-generation cabin owners may find themselves when planning, or in many cases, not planning, for death.

#### A. *Co-ownership in Real Property in American Law*

While primogeniture was not an ideal system, its primary virtue was keeping real property in individual ownership.<sup>57</sup> Under modern American property and inheritance laws, co-ownership in real property is both common and problematic. Before getting to the downfalls of co-ownership, a brief overview of the types of co-ownership possible for a group of family cabin owners will help set the stage for the discussion to follow.

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54. See *supra* note 30 and accompanying text.

55. Of course, some people would expect these consequences. Estate planning attorneys are well aware of the problems of co-ownership and use planning devices to help alleviate the problems. For example, estate planners tend to avoid straight co-tenancy as a consequence of their estate plans. See *infra* text accompanying note 63.

56. The problems that arise for co-owners can, of course, arise for married co-owners, but generally not to the same extent. Married individuals tend to share resources and will likely share preferences regarding the amount of use of the vacation home. In addition, they tend to have established norms in their primary home for standards of cleanliness, design and maintenance choices, etc. Therefore, the concerns addressed in Part II mostly arise in the second generation, where siblings (or siblings and cousins) inherit together.

57. See *supra* Section I.A.

### 1. Accidental Co-ownership: Tenancy in Common

Accidental co-ownership occurs when property owners die intestate or leave an unsophisticated will that devises property outright to a class of people.<sup>58</sup> Under the modern intestacy laws discussed above<sup>59</sup> or during the probate of a will, real property inherited by a group of people in varying percentages of ownership will be re-titled in their names, providing for the percentage of ownership and creating a tenancy in common among the heirs in the real property.<sup>60</sup> Tenants in common have separate, undivided interests in the property, which can be conveyed to others outside the current group of tenants (non-tenants) through deed or will.<sup>61</sup> Tenants in common thus do not have rights of survivorship.<sup>62</sup> Estate planners generally disfavor this method of ownership due to its instability.<sup>63</sup>

Not all tenancies in common are accidental. For reasons discussed further below,<sup>64</sup> co-tenants who knowingly enter into a tenancy in common are better positioned to handle the problems of co-ownership and can protect themselves through private agreements with their co-tenants in ways that accidental co-tenants may not think or know to do.<sup>65</sup>

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58. See 3 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 50.02 (“Consistent with other presumptions favoring tenancies in common, heirs and devisees of real property are presumed to take as tenants in common.”).

59. See *supra* Section I.B.

60. See POWELL, *supra* note 58, § 50.02; see also UNIF. PROBATE CODE §§ 3-906 to -907 (UNIF. LAW COMM’N 1969) (amended 2010) (indicating a preference for distribution in kind and authorizing a personal representative to execute a deed transferring the asset to the heir or devisee).

61. DUKEMINIER, *supra* note 17, at 319. An undivided interest means that each tenant has an equal right to possess the whole property. See *Tenancy*, BLACK’S LAW DICTIONARY, *supra* note 2.

62. DUKEMINIER, *supra* note 17, at 319. Rights of survivorship allow for the “transfer” of property from one co-owner to another on death by the operation of law and are a defining feature of joint tenancy. See *infra* notes 69–70 and accompanying text.

63. See UNIF. PARTITION OF HEIRS PROP. ACT prefatory note (UNIF. LAW COMM’N 2010), [http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/uphpa\\_final\\_10.pdf](http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/uphpa_final_10.pdf) [<http://perma.cc/FKE5-WUH2>].

64. See *infra* Section III.A.

65. Tenants in common can enter tenancy in common agreements, which set out the way conflicts will be resolved, how a property will be managed, and how maintenance of the property will be handled. See Wendy S. Goffe, Planning For Residences and Vacation Homes 35 (May 19, 2015) (unpublished manuscript) (on file with author). However, co-tenants would need to be aware this mechanism exists in order to enter into one before problems arise.

## 2. Other Types of “Co-ownership”

A tenancy in common relationship is not the only way for a group of people to hold property together. Other ways include joint tenancies, tenancies in the entirety, limited liability companies (LLCs), and trusts. Brief descriptions of each of these mechanisms follow.

A joint tenancy is similar to a tenancy in common, with one key difference: joint tenancy includes rights of survivorship for the joint tenants.<sup>66</sup> Upon one joint tenant’s death, the deceased joint tenant’s interest in the property extinguishes and the surviving joint tenant owns the property as a single owner.<sup>67</sup> Joint tenancy must be created with four unities: time, title, interest, and possession.<sup>68</sup> This means that joint tenants must enter into a joint tenancy at the same time, acquire title through the same title document, receive identical interests in the property, and have the same right of possession.<sup>69</sup> Due to the requirements of the unities, joint tenancy cannot arise through intestate succession, and it is hard to imagine a situation where one would accidentally enter into a joint tenancy.<sup>70</sup> Additionally, a joint tenancy can be severed by destroying one or more of the unities, like transferring title to another.<sup>71</sup>

Tenancy in the entirety adds a fifth unity requirement to joint tenancies: marriage.<sup>72</sup> Tenancies in the entirety could only be created at common law between husband and wife.<sup>73</sup> It is another type of co-ownership that may affect the passing of the family cabin before the death of both original spouse owners without restructuring the ownership. This type of co-ownership generally would not affect the next generation, who likely will not be one married couple, but a group of siblings.<sup>74</sup>

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66. DUKEMINIER, *supra* note 17, at 320.

67. *Id.*

68. *Id.*

69. *See id.*

70. *Id.*

71. *Id.*

72. *Id.* at 321.

73. *Id.*

74. Of course, parents of only one child may decide to leave a family cabin to their child and spouse together. In this case, the couple may choose to title the property as a tenancy in the entirety. However, this type of co-ownership has disappeared in most states, as concern for creditors has risen and the underlying rationale of husbands and wives being treated as one legal person has vanished.

Placing cabins in LLCs<sup>75</sup> is the “current ‘hot’ vehicle among estate planners.”<sup>76</sup> When families have sufficient resources and foresight, an LLC can help resolve the problems of co-ownership discussed below.<sup>77</sup> The LLC actually owns the cabin by title; in turn, the family owns membership interests in the LLC.<sup>78</sup> An LLC operating agreement governs the various responsibilities and rights of each of the members.<sup>79</sup>

A trust is another common mechanism used to transfer property like the family cabin.<sup>80</sup> First-generation owners can transfer title to a trust and then name their children as beneficiaries of the trust.<sup>81</sup> A trustee or group of trustees will then govern the decisions surrounding the property for the benefit of the beneficial owners—the children.<sup>82</sup> The trustee is guided by fiduciary duties, which require the trustee to make the best decisions about the property for the beneficiaries.<sup>83</sup> While a trust can resolve some of the problems discussed below,<sup>84</sup> resolution is limited without a well-funded trust.<sup>85</sup> In addition, trusts are falling out of favor with estate planners due to limitations of trust duration and the challenging

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*See id.* at 321, 359–61. *But see* Sawada v. Endo, 561 P.2d 1291, 1296 (Haw. 1977) (holding, somewhat inexplicably given the tort creditor context of the case, that creditors are not prejudiced by a tenancy in an entirety).

75. A limited liability partnership (LLP) could also be used, but LLC is a more common and recognizable abbreviation. Referring to LLCs only will suffice for this Comment’s purposes.

76. Sarah E. Waldeck, *Rethinking the Intersection of Inheritance and the Law of Tenancy in Common*, 87 NOTRE DAME L. REV. 737, 755 (2011).

77. *See infra* Section II.B.

78. *See* STUART HOLLANDER ET AL., *SAVING THE FAMILY COTTAGE: A GUIDE TO SUCCESSION PLANNING FOR YOUR COTTAGE, CABIN, CAMP, OR VACATION HOME* 85–93 (Nolo 4th ed. 2013). Hollander’s guide to planning for the family cabin succession is a great resource for those with foresight and resources, a topic discussed *infra* Section II.C.3.

79. *See* HOLLANDER, *supra* note 78 at 92.

80. *See* DUKEMINIER & SITKOFF, *supra* note 30, at 583 (“The most common use of a revocable trust today is as a will substitute for conveying property at death outside of probate.”). *But see* HOLLANDER, *supra* note 78 at 79 (stating that trusts are used by some cottage planners but these authors do not recommend them).

81. *See* DUKEMINIER & SITKOFF, *supra* note 30, at 385.

82. *See id.* at 394–96.

83. *See id.* at 395.

84. *See infra* Section II.B.2.

85. Because many of the conflicts family cabin owners face involve deciding who will pay for what, without cash in the trust to pay for cabin upkeep, a trust will not solve all the issues and may still lead to the sale of the family cabin. *See infra* Section II.C.3.

dynamic of trustee management.<sup>86</sup>

As shown, American law has well established ways for groups of people to own real property together, including the pervasive tenancy in common and trendy options sophisticated estate planners use. However, different types of co-ownership result in different problems, some of which are particularly acute in the context of a family cabin. The next Section explains why co-ownership is more difficult for the family cabin owner and defines the problems that co-owners could face.

*B. “Identity Property” Owners and Their Co-ownership Problems*

1. What is “Identity Property”?

Family cabins are particularly tricky to devise because they fall under a category of property that Professor Sarah E. Waldeck terms “identity property.”<sup>87</sup> “Identity property is closely linked to one’s sense of self and family and is valued primarily for what it signifies and embodies, not for its economic worth.”<sup>88</sup> Identity property is nonfungible, meaning that it cannot be replaced by mostly identical property with the same market value.<sup>89</sup> Because family cabins are often identity property for those inheriting them, many family members will want to keep them in the family, rather than sell them on the market after their parents’ death.<sup>90</sup> Family cabins are actually more likely to be identity property to their children than the parents’ primary home, especially if the parents moved their primary home several times throughout their lives, while maintaining the one family cabin.<sup>91</sup>

In comparison with non-identity real property, the way that identity property is legally held matters more to the owners because of the rights that correspond with the

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86. See HOLLANDER, *supra* note 78, at 79–80.

87. Waldeck, *supra* note 76, at 739. Professor Waldeck’s article is an excellent overview of the problems that surround ownership of identity property, and is highly recommended for anyone looking for more of the psychological reasons behind the creation of identity property, or who is looking for more potential solutions to the failure of common law to adequately address the needs of co-owners of identity property.

88. *Id.*

89. *Id.*

90. *Id.* at 772.

91. See *id.* at 745–46.

ownership form, as discussed below. Generally, co-owners will be able to sell an ordinary property for its market value if the co-ownership becomes untenable, fully compensating all the co-tenants for their part of the interest.<sup>92</sup> These co-tenants are then free to invest in other endeavors with whomever they would like to work—or perhaps even on their own. With identity property, the market likely will not adequately compensate co-owners because of the high subjective value placed on the property by one or more of its owners.<sup>93</sup> Instead, the co-owners will be locked into the co-ownership, with all of its downfalls, as discussed below.

## 2. Problems Faced by Tenants in Common of Identity Property

With the preceding basic understanding of the various types of co-ownership and identity property, this Subsection turns to the problems that often arise with co-ownership, including bilateral monopoly, absolute right of partition, and inefficiencies. These problems are particularly acute for tenants in common of identity property like a family cabin.

A bilateral monopoly arises between a monopsonist (single buyer) and monopolist (single seller).<sup>94</sup> Between co-tenants, a bilateral monopoly exists because neither co-tenant has anyone else with whom to bargain about internal decisions—each co-tenant must reach some sort of agreement with the other co-tenant.<sup>95</sup> With groups of co-tenants bigger than two, factions can form, creating a bilateral monopoly between two factions, each fighting for a specific course of action without an outside

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92. For non-identity property, the value of the property for each co-tenant will be in what that interest is worth in dollars and cents. *Cf. id.* at 739–40 (explaining the cherished nature of identity property and an owner's unwillingness to sell even an identity property item with a high market value). Hence, when the property is sold to a third party and a co-tenant receives his proportionate share of that amount, he has been fully compensated.

93. *Id.* at 776.

94. MARK HIRSCHHEY, *FUNDAMENTALS OF MANAGERIAL ECONOMICS* 479 (12th ed. 2009).

95. Waldeck, *supra* note 76, at 743. For example, both co-tenants have equal rights of possession—neither can exclude the other. *See supra* note 61 and accompanying text. And thus, if one wants to use the whole property for a certain period of time, there is nothing the other can really do to stop this, short of ending the co-ownership (partition). They will have to work out some compromise among themselves. *See* Waldeck, *supra* note 76, at 743.

person with whom to negotiate.<sup>96</sup> In this situation, tensions arise that can cause resentment among the co-tenants over time. Additionally, with no one else to bargain with, each co-tenant has the ability to exact higher costs from the other.<sup>97</sup>

One particularly problematic feature in the context of tenancy in common is the right for any co-tenant, no matter how small the co-tenant's interest, to petition a court for partition.<sup>98</sup> Theoretically, a court asked to partition a property will partition the property in kind—that is, divide the property into separate pieces for each co-tenant, with each piece proportionate in value to each co-tenant's interest.<sup>99</sup> However, currently a *de facto* preference for partition by sale exists in the courts.<sup>100</sup> For many properties, the market price for each smaller divided portion is worth less than the property as a whole.<sup>101</sup> Courts thus view a partition in kind as giving less value to each co-tenant than dividing the proceeds from a sale of the whole property amongst the co-tenants.<sup>102</sup> Consequently, a court often orders a sale even when a partition in kind would be easy.<sup>103</sup> By following this practice, courts do not take into account the noneconomic value owners place on property.<sup>104</sup> As

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96. See UNIF. PARTITION OF HEIRS PROP. ACT prefatory note (UNIF. LAW COMM'N 2010), [http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/uphpa\\_final\\_10.pdf](http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/uphpa_final_10.pdf) [<http://perma.cc/FKE5-WUH2>].

97. In normal negotiations, where neither party is a monopolist or monopsonist, if one person, Bill, does not like the terms that another is offering, he can walk away from the deal and find someone else who offers terms he finds more desirable. When Bill is forced instead to deal with only Adam, Adam can get Bill to agree to terms he finds less than desirable—perhaps even paying more money than he otherwise would, because the only other choice is to end the co-ownership completely, which for identity property owners is often untenable. See *supra* text accompanying notes 92–93. Not only can this lead to higher economic costs, but higher social costs as well—frustration, time, and energy Bill spent negotiating with Adam instead of enjoying his time at the cabin.

98. See UNIF. PARTITION OF HEIRS PROP. ACT prefatory note. It is possible for tenants in common to waive their right of partition through a tenancy-in-common agreement. See, e.g., Goffe, *supra* note 65, at 50. However, many tenants in common may not be aware of this possibility, and if they have not agreed to waive partition, the right for any co-tenant to seek partition can result in the dynamics described in this Subsection.

99. See UNIF. PARTITION OF HEIRS PROP. ACT prefatory note.

100. *Id.*

101. *See id.*

102. *See id.*

103. *See id.*

104. *Id.* For non-identity property, this may be completely proper, although an argument can be made that *no* real property can be adequately replaced by its cash value because an owner cannot go out and find identical real property for the

discussed above, identity property has significant noneconomic value for its owners, and thus a sale of the property in exchange for cash will not fully compensate those who view the family cabin as identity property.<sup>105</sup>

Other undesirable and inefficient behaviors, such as free riding and shirking, can develop in the co-tenant relationship.<sup>106</sup> This is largely because co-tenants only have each other to negotiate with on internal decisions, and the threat of partition by sale is always in the background of co-tenant interactions.<sup>107</sup> Free riding occurs when an individual uses a common resource but under-contributes to the cost of the resource by relying on the rest of the group to supply enough.<sup>108</sup> In the family cabin context, for example, one co-tenant, Adam, may use the cabin frequently but refuse to contribute to the cost of, say, a roof repair. Because any co-tenant has the power to force a sale at any time, the other co-tenants, Bill and Carol, may choose to ignore Adam's behavior, and thus incur higher costs than their proportional share. This forms an externality because the free-riding co-tenant, Adam, benefits from the actions of Bill and Carol, instead of fully incurring his own costs commensurate with his consumption.<sup>109</sup> This externality in turn creates inefficient over-consumption of the public good. If free-riding co-tenants had to instead pay their proportional share, they may use the resource less or treat it differently.

Similarly, shirking behavior also leads to inefficient use. Shirking is similar to free riding, but instead of contributing nothing to the common costs, a shirker does less than would be ideal because he can get away with it.<sup>110</sup> If a co-tenant can

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same cash amount. This argument is why statutes often require a preference for partition in kind, even though courts often find ways to avoid partition in kind by finding "manifest prejudice" or the like. *See, e.g.*, COLO. REV. STAT. § 38-28-107 (2015) ("If the commissioners report and the court finds that partition of the property cannot be made without manifest prejudice to the rights of any interested party, the court may direct the sale of such property at public sale upon such terms as the court may fix.").

105. *See supra* Section II.B.1.

106. *See* Waldeck, *supra* note 76, at 741.

107. *See id.*

108. *See* RICHARD CORNES, *THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS* 147 (1996).

109. *See* Zachary D. Kuperman, Note, *Cutting the Baby in Half: An Economic Critique of Indivisible Resource Partitions*, 77 *BROOK. L. REV.* 263, 273 (2011).

110. A common example is the shirking employee—someone who is less productive than he could be at his job because no one requires more.

plausibly threaten a sale of identity property, he will likely not be held to a high standard of productivity in his tasks because the others will want to appease him.<sup>111</sup> In the family cabin context, imagine that Adam always leaves the kitchen in disarray after cooking meals. Instead of requiring Adam to pull his weight, Bill and Carol will clean up behind him. This not only leads to less time enjoying the cabin by Bill and Carol, but also to Adam's over-consumption of the good—he gets to enjoy the cabin for more time than the others without incurring his full costs.

The problems faced by identity property owners in tenancy in common are well known to estate planners and legal scholars,<sup>112</sup> and yet tenancy-in-common ownership of identity property still exists. The next Section introduces three potential situations identity property owners face when transferring property between generations, demonstrating how and why an identity property ends up in a tenancy in common, with the associated problems set out above.

### *C. Three Potential Situations for Transfer of Identity Property Between Generations*

This Section outlines the three potential situations in which transfer of an identity property from the first-generation owners to the next may occur. Subsection 1 describes the worst way for identity property to transfer—through no estate plan at all. Subsection 2 conveys what happens when first-generation owners attempt to plan, but lack adequate resources to fully effectuate their plan. Lastly, Subsection 3 gives an overview of how estate planning can adequately address the identity property transfer problem if adequate resources are available.

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111. See Waldeck, *supra* note 76, at 753.

112. See *id.* at 741–42; see also UNIF. PARTITION OF HEIRS PROP. ACT prefatory note (UNIF. LAW COMM'N 2010), [http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/uphpa\\_final\\_10.pdf](http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/uphpa_final_10.pdf) [<http://perma.cc/FKE5-WUH2>].

### 1. No Estate Planning—Worst-Case Scenario<sup>113</sup>

Generally speaking, leaving any sort of real property with no plan in place will be a burden on heirs. It may taint their memory of the decedent and potentially ruin any legacy that the decedent hoped to create through passing on the family cabin.<sup>114</sup> Without planning, the cabin will pass through the laws of intestacy of the state where the property is located.<sup>115</sup> Thus, heirs will become co-tenants under tenancy in common.<sup>116</sup> If the heirs decide they want to keep the property because it is an identity property for them, they will be subject to the problems and inefficiencies highlighted above. Thus, even if they do not resent the decedent for not leaving a will, they may come to resent each other, destroying the memories and family unity the cabin was intended to foster.

### 2. Estate Planning Without Substantial Cash Assets—Reality Bites

Some amount of planning is better than none at all. A well-trained attorney or advisor will be able to explain the available options, the costs involved in each, and the consequences of choosing one over the other. Unfortunately, if the cabin is the only substantial asset in the family, the first-generation owners will have to make a tough choice. This choice may be between preserving family harmony or fulfilling their vision of a family legacy by passing on the identity property to their children.<sup>117</sup> Without the ability to fund a trust or LLC with

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113. It probably is not *the* worst-case scenario, as many experienced estate planners can probably think of something far worse. However, for simplification, this Comment assumes this is the worst way for family cabin owners to transfer their property.

114. See ACCETTURA, *supra* note 13, at 58–61.

115. DUKEMINIER & SITKOFF, *supra* note 30, at 45.

116. See *supra* notes 58, 60, and accompanying text.

117. While not every owner of a cabin may think of the cabin as an asset to treasure and keep in the family for as long as possible, for many owners of family cabins, it is the intention to create a space that becomes identity property for the family—a place they intend to keep in the family for as long as possible. See Waldeck, *supra* note 76, at 748 (explaining the rituals involved in family cabins that create identity property and how loss of such a property would mean the loss of the ritual). In fact, a whole cottage industry has developed around saving the family cottage. See, e.g., HOLLANDER, *supra* note 78. In addition, estate planning in general gives testators an opportunity to “strategically guide their legacy until the very last moment when they must loosen their grasp and let go.” ACCETTURA,

cash, first-generation owners will have to rely on their children to continue to pay for the cabin. Even if all the children would like to do this, some may not be able to afford the expense. It is even more difficult if some children do not wish to continue ownership, either because they live too far to participate in the use of the cabin and therefore do not want to pay for a benefit they will not receive, or because they would rather have the money from selling the cabin. Even if the children also view the cabin as an identity property, so that their subjective value is more than the cabin's economic value, their financial position may not afford them with the luxury of keeping the identity property if they have to pay for the continued maintenance of the cabin. It is also possible that some of the children do not view the cabin as identity property while others do. In these situations, the remaining children may not be able to afford the cabin without contributions from the others, or the parents may feel compelled to instead direct the executor of the estate to sell the cabin and split the proceeds amongst the children so that none of them are left holding nothing.

### 3. Planning and Money—More Money, Fewer Problems

When there are other assets in the estate, either multiple identity properties or plenty of cash, there are many more options for dealing with a family cabin. First, if the composition of the estate is such that multiple identity properties exist, the inheriting children may be able to “swap” out of co-ownership, and agree that each takes one property each instead.<sup>118</sup> It is perhaps a rare family that has multiple family cabins, but cash assets will also help alleviate much of the strife surrounding identity property.

With cash, LLCs and trusts become viable options. A well-funded trust or LLC can provide for the costs of any mortgages, taxes, maintenance, and management.<sup>119</sup> Many problems with co-ownership arise out of concerns of who is paying for what

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*supra* note 13, at 59. This Comment assumes that the first generation and at least some of the second generation view the family cabin as an identity property, to be kept in the family for as long as possible.

118. See Waldeck, *supra* note 76, at 739.

119. See HOLLANDER, *supra* note 78, at 78–87.

and making sure each co-owner is doing their part.<sup>120</sup> A well-funded trust or a well-capitalized LLC takes care of this problem, and the co-owners can focus on splitting the use of the property amongst themselves.<sup>121</sup> While these use decisions can still lead to strife, some free riding and shirking problems are avoided, at least in the financial arena.<sup>122</sup> Additionally, LLC operating agreements often provide specific mechanisms for splitting the use of the property, and trusts have trustees to help manage the asset and its use.<sup>123</sup>

Even if the first-generation owners cannot fully fund a trust or capitalize an LLC, they may have enough resources to hire experts to create a trust, form an LLC, or draft a tenancy-in-common agreement.<sup>124</sup> But using these complex planning tools is an advantage that many do not have. Because most people are not among these lucky few, Part III proposes changes that would help the modest-means family cabin owner.

### III. A PROPOSED CHANGE IN INTESTACY RULES, A NEEDED ENACTMENT, AND PLANNING WITHOUT EXTRA RESOURCES

This Part proposes changes to current law in order to help identity property owners keep their property in the family, even without sophisticated planning tools. In particular, Section A introduces potential changes to the Uniform Probate Code (“UPC”) and analyzes the proposed changes’ successes and shortcomings at addressing the problems of identity property owners. Section B advocates for the widespread adoption of the Uniform Partition of Heirs Property Act (“UPHPA”). Section C makes recommendations for first-generation owners who are contemplating their options under the current state of the law.

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120. See Waldeck, *supra* note 76, at 755.

121. See *id.*

122. Obviously, not all shirking and free riding problems are financial ones. Adam could still leave the property a mess each time he uses it, causing Bill and Carol to spend time cleaning up after him. Still, taking care of the financial aspect of the family cabin goes a long way to solving the problems of co-ownership in the family cabin.

123. See HOLLANDER, *supra* note 78, at 78–87.

124. See *supra* note 65.

### A. Proposed Change to the UPC

This Section proposes changes to the UPC to help second-generation family cabin owners avoid the pitfalls of tenancy in common<sup>125</sup> and keep their cabin in the family. Subsection 1 introduces the specific proposal, and Subsection 2 evaluates the potential shortcomings of the proposal using a normative economic analysis. Then, Subsection 3 explains how these changes will lead to further changes outside the intestacy and class gift context.

#### 1. The Proposed Change to the UPC

While co-ownership can work, the absolute right of partition for any co-owner, which almost always leads to a sale of the property,<sup>126</sup> is a very steep price to pay for those who enter co-ownership unwillingly or unknowingly. This Section proposes a change in the UPC<sup>127</sup> that would disallow co-ownership in real property without informed consent from all potential co-tenants. The proposed changes are first outlined and then explained more fully below.

Under the current law, when someone dies intestate or devises real property to a class of people, such as siblings, property automatically transfers to heirs or devisees in tenancy in common.<sup>128</sup> The UPC should instead statutorily require that:

- (1) no heirs/devisees enter a tenancy in common without informed consent;
- (2) any heir(s)/devisee(s) who do not wish to form a co-tenancy would be able to reject the co-tenancy share(s);
- (3) the rejecting heir(s)/devisee(s) would set a sell price for the rejected share;
- (4) each non-rejecting heir(s)/devisee(s) would name a willing sell price<sup>129</sup> for his or her share; and

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125. See *supra* Section II.B.2.

126. See *supra* Section II.B.2.

127. For a discussion on why the changes should be made to the UPC, see *supra* Section I.B.

128. See Waldeck, *supra* note 76, at 740 (“What is just as likely, however, is that identity property will fall into a class gift (‘All of my property to my children,’ for example) or pass through intestate succession to multiple takers. In either case, the heirs will own the identity property as tenants in common.”).

129. Willing sell price means the price at which that person would be willing to sell his share.

(5) any heir(s)/devisee(s) who wish to form a co-tenancy would have a right of first refusal<sup>130</sup> of any rejected share(s).<sup>131</sup>

If no consenting heirs or devisees exercise the right of first refusal, either:

(1) the property must be placed on the market for a [ninety]<sup>132</sup> day period, after which an auction will be held, and any proceeds will be distributed proportionally based on the inherited share. If the court finds it to be fair and equitable under the facts and circumstances, the court may distribute values proportional to the heirs'/devisees' stated sell prices; or

(2) The court may award the property outright to the non-rejecting heirs/devisees, with a court-ordered cash payment to the rejecting heir(s)/devisee(s). This cash award may be based on the stated sell price of the rejecting heir(s)/devisee(s).<sup>133</sup>

Under this proposed statutory scheme, potential co-tenants would need to receive information about tenancy-in-common ownership and the potential pitfalls of tenancy in common outlined above before becoming tenants in common.<sup>134</sup> If one

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130. A right of first refusal gives those with the right the first chance at accepting or rejecting the offer at hand, before anyone without such right. *See Blessing or Curse: The Real Estate Right of First Refusal*, PROGRAM ON NEGOT. AT HARV. L. SCH.: DAILY BLOG, <http://www.pon.harvard.edu/daily/business-negotiations/blessing-or-curse-the-real-estate-right-of-first-refusal/> [<http://perma.cc/P2G4-SRPX>].

131. This right of first refusal stage could include a court-ordered negotiation among the parties, through a neutral facilitator. The benefit of this would likely be a more efficient outcome, see *infra* notes 157–167 and accompanying text, but the downside is additional legal costs. It may be impossible to know before the proposed changes are made how great the inefficiencies would be without negotiations and if correcting for those inefficiencies would outweigh the increased costs from an added negotiation process. This issue would likely need additional study and reform down the road, after the main changes are implemented.

132. The number does not need to be ninety. Each jurisdiction may want to provide its own timeframe.

133. Much of this proposed change is inspired by the UHPA, explained in more detail *infra* Section III.B. Also, this is not meant to be exact statutory language but rather broad points to be included in a statutory reform. Exact statutory language encompassing all these changes and potential contingencies (e.g., minor heirs/devisees, incapacitated heirs/devisees, etc.) would overwhelm this short Comment. The author hopes that this Comment might inspire a UPC revision drafting project in the future incorporating these changes.

134. *See supra* Section II.B.2. The information would allow the co-tenants to enter into a tenancy-in-common agreement to manage the use, maintenance, and conflicts involved in a tenancy in common of a property like the family cabin, or at least inform co-tenants of this possibility at the outset of the co-tenancy. *See supra* note 65 and accompanying text. Given that many families in this situation may be of limited means, the costs associated with receiving attorney counseling about co-

(or more) of the potential co-tenants does not want to enter the tenancy in common, the remaining potential co-tenants would have the right of first refusal to buy the rejected share at a price set by the rejecting co-tenant. Because the rejecting co-tenant sets the price, the co-tenant would be able to include the subjective value to the property,<sup>135</sup> which could not be done if the courts were to skip directly to sell-and-divide. To further ascertain the parties' preferences, a court would have each party set a price at which each of the parties would be willing to sell their respective shares of the property. This information could then be used in the event that a court chooses to act on its authority to distribute future sales proceeds in a way that better compensates for the subjective value each potential co-tenant places on the property.<sup>136</sup>

If no one exercises the right of first refusal, the court would place the property on the market for a period of time, and if not

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tenancy could be problematic. However, many courts and bar associations provide some information online about common probate questions, and, with a set, required process in place for every co-tenancy, the pre-co-tenancy process could be an area that lends itself to online, easily accessible information. That way, even if parties approach the hearing without an attorney, the court could direct them to information regarding co-tenancy. *See, e.g.*, COLO. BAR ASS'N, PROBATE IN COLORADO (June 2011), [http://www.cobar.org/repository/PLE%20Brochures/Probate%20in%20Colorado\\_web.pdf](http://www.cobar.org/repository/PLE%20Brochures/Probate%20in%20Colorado_web.pdf) [<http://perma.cc/B9SX-LKHV>]; *Denver Probate Court: FAQs*, COLO. JUDICIAL BRANCH, [https://www.courts.state.co.us/Courts/Denver\\_Probate/FAQs.cfm](https://www.courts.state.co.us/Courts/Denver_Probate/FAQs.cfm) [<http://perma.cc/C68X-XJ4G>]. Currently, people can enter a tenancy-in-common relationship without knowing anything about what it entails. Under the proposed scheme, although more cumbersome at the outset, people would know what they are getting up front.

135. The total scheme will hopefully avoid the potential for price gouging. More on this *infra* note 136.

136. *See generally* Kuperman, *supra* note 109 (advocating for courts to ascertain and take into account an individual's subjective value of indivisible property, including real property, when holding partition actions where sale is the only remedy based on indivisible nature of the asset). Of course, if a co-tenant sets the price unreasonably high, there is less likelihood the court will be able to use that price in distributing the proceeds from the sale. By allowing for judicial discretion, the scheme permits, but does not require, the would-be co-tenants' subjective values to come into play. Knowledge of the total scheme beforehand will help the parties set reasonable sale prices because otherwise the court will be more likely to simply use the proportional interest distribution method, and thus none of the subjective value will be taken into account. For identity property owners who truly view the property as priceless, this will not solve their problem of being under-compensated in a partition sale of their property. However, the overall scheme will hopefully give them a better opportunity than under the current partition process to purchase a rejecting co-tenant's share. In addition, it would precede much of the strife involved in an unhappy co-tenancy.

sold,<sup>137</sup> the court would auction the property and split the proceeds among all of the potential co-tenants. The court should make the rejecting co-tenants aware of the costs that would be incurred from this process (applied to their share of any sale), as well as the evidence suggesting auctions often lead to sales below market value.<sup>138</sup> This information ought to encourage the rejecting co-tenant to offer a reasonable price for the first refusal stage.

Alternatively, the court could order that the property be awarded in kind to the consenting co-tenants, with cash payment to the rejecting co-tenant. This would give the court an opportunity to take into account the subjective value of the rejecting co-tenant by utilizing the stated sell price of the rejecting co-tenant, if the court believed it could do so fairly.<sup>139</sup> Under this alternative route, the consenting co-tenants would be much better compensated, as they would keep the property itself.<sup>140</sup> Parties could avoid this court process by meeting beforehand and agreeing on a course of action. Probate courts are generally willing to follow Family Settlement Agreements.<sup>141</sup>

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137. There are many nuances that would need to be a part of this process, but those are beyond the scope of this Comment. Among the nuances would be the minimum sell price the court would need to accept from the market sale and how that number is determined.

138. See UNIF. PARTITION OF HEIRS PROP. ACT prefatory note (UNIF. LAW COMM'N 2010), [http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/uphpa\\_final\\_10.pdf](http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/uphpa_final_10.pdf) [<http://perma.cc/FKE5-WUH2>].

139. See *id.* § 8(c) cmt. 2. This Section assumes that a property in question would be impracticable to divide in kind in any meaningful way, so that this owelty would be a buyout of the rejecting co-tenants interest, as opposed to compensation for an unequal physical share of a partitioned property. Owelty is a compensatory sum of money paid to achieve equality “after an exchange of parcels of land having different values or after an unequal partition of real property.” *Owelty*, BLACK'S LAW DICTIONARY, *supra* note 2.

140. Real property is recognized as unique under the law insofar as monetary compensation is viewed as inadequate. This is evidenced by the practice of ordering specific performance on valid contracts for real property, as opposed to money expectation damages. See, e.g., *Colo. Dep't of Health v. The Mill*, 887 P.2d 993, 1014 (Colo. 1994) (“[S]pecific performance is generally directed in contracts concerning the sale of land but not in contracts concerning personal property.”) (citing *Atchison v. City of Englewood*, 568 P.2d 13 (Colo. 1977)).

141. See ACETTURA, *supra* note 13, at 213–14; see also, Guaranty Bank & Trust Wealth Mgmt. Grp., *A Brief Discussion Of Family Settlement Agreements*, <http://63.134.201.56/uploadfiles/files/FamilySettlementAgreements.pdf> [<http://perma.cc/ANS3-T4NV>] [hereinafter Guaranty Bank] (defining a Family Settlement Agreement as “the term used for an agreement reached by all of the heirs as to how an estate should be distributed.”). Generally, it is a good idea for

This proposal would certainly help protect unsuspecting co-tenants from entering an unstable and disfavored method of owning property, which could subject them to later strife with co-tenants. It would still allow for tenancy-in-common ownership, but only if all co-tenants enter the relationship knowingly.

## 2. Potential Problems with the Proposed Change

Of course, this proposed solution is not perfect. Because the solution would allow one sibling to force a sale upfront, it could prevent any siblings from enjoying the property for any amount of time in order to prevent what may be hypothetical problems.<sup>142</sup> However, if siblings believe they will get along, they can bypass the proposed system by consenting to the tenancy in common outright. If a sibling is willing to prevent the family from receiving the cabin out of spite, this is likely a co-tenant that will cause problems down the line, potentially after considerable strife and expense. Under the proposed approach, more families who will face the problems of tenancy in common<sup>143</sup> can deal with them immediately and move on, rather than being tethered together in unhappiness for years. This system fast-forwards the partition process that would occur if the tenancy in common formed and a sibling forced partition sometime in the future. Of course, time spent as unhappy co-tenants may give the siblings who want to keep the family cabin time to earn and save enough money to buy out the rejecting co-tenant, which they potentially could not do upon first inheriting the cabin. The fast-tracking would then be a significant downside for siblings who are not yet financially ready to purchase the cabin, but might be willing to do so in the future.

Also, the proposed solution calls for additional court proceedings that are not currently required. However, where real property passes via intestacy or through a will, some court

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each member of the family to have an attorney when creating a Family Settlement Agreement, but an attorney would not necessarily be required. *See id.*

142. The problems are hypothetical because it is of course possible that none of the problems outlined *supra* Section II.A arise in any given tenancy in common. Some families naturally get along well, and if all co-tenants are willing and able to pay their fair share, divide the domestic responsibilities and use, and agree to never force a sale, there would be no need to avoid co-tenancy.

143. *See supra* Section II.B.2.

process is already required, in the form of probate.<sup>144</sup> Under the UPC, the amount of proceedings currently required for probating a will vary depending on whether there is a contest.<sup>145</sup> Thus, where a Family Settlement Agreement is reached, the proposed solution would only slightly add to the current court process.<sup>146</sup> But, where there is a dissenting co-tenant, the proposed solution could add costs<sup>147</sup> to the probate process that would not have been incurred until later, if at all.<sup>148</sup>

The proposed statutory change outlined above is a way to reduce the frequency of problems associated with tenancies in common. However, as noted, the solution has potential negative effects. These upsides and downsides must be taken into account, and a decision must be made as to which system is the most desirable as a whole. The next Subsection applies an economic analysis to the proposed theory in order to address some of the potential concerns with the proposed changes and shows that, as a whole, the benefits of the proposed change outweigh the drawbacks.

### 3. A Response to the Potential Problems with the Proposed Change—A Normative Economic Analysis

The proposed changes to the UPC are not problem free. The proposed changes could be quite costly to implement,<sup>149</sup> and there is a question whether the proposed changes would lead to more, albeit different, problems than they aim to fix. In order to address these potential problems, an evaluation must be done of the proposed changes as compared to the status quo. One method of evaluating the proposed change is through a normative economic analysis, which looks to proportionality, envy-freeness, efficiency, administrability, equitability, and

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144. See DUKEMINIER & SITKOFF, *supra* note 30, at 48–49 (explaining that probate can be avoided with small estates with no real property or by transferring property to nonprobate modes of transfer).

145. See *id.* at 46–47.

146. See *id.*

147. If there is no one contesting the distribution of the property, probate can be relative simple and low in costs, but not always. See *id.* at 48.

148. Partition is always an option for a co-tenant, see *supra* notes 98–105 and accompanying text, but there is no guarantee co-tenants will use that option. Thus these could be costs that are merely shifted in time, or incurred where they otherwise would not be because no one in the future actually utilizes partition.

149. See *infra* notes 175–177 and accompanying text.

strategy-proofness.<sup>150</sup>

The proposed solution may or may not violate proportionality. Proportionality evaluates how division occurs according to the respective interests each owner holds in the property prior to division.<sup>151</sup> “[E]quals should be treated equally, and unequals unequally, in proportion to relevant similarities and differences.”<sup>152</sup> Depending on how one defines an interest in the family cabin, the proposed solution may violate proportionality. If we allow subjective value of a potential co-owner to be part of “the relevant similarities and differences,” then this will not be the case. However, if the relevant similarities and differences are purely the proportion of ownership in property, allocating a larger share to someone who subjectively values it more would violate the proportionality principle.

Looking next to envy-freeness, the proposed statutory change fares well. Envy-freeness asks: after division, does each party prefer his own allocation over the allocations of the others?<sup>153</sup> By definition, this test encourages inclusion of each party’s subjective value of the allocation.<sup>154</sup> This test would be particularly useful in the situation of equal co-owners, where one ends up with cash and the other the property itself. Would they trade? If yes, the allocation would fail the envy-free test and likely be an improper allocation.<sup>155</sup> If, however, someone had a smaller proportional interest in the property to begin with, he may of course be envious of a larger, but appropriately allocated share. Thus, perhaps a better test for co-owners with non-equal shares would be not *envy-free* but *envy-in-context*. Given my proportional interest, am I happy with my share? This of course makes this test much less simple and neat,<sup>156</sup>

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150. See Kuperman, *supra* note 109, at 272–77. This Comment uses the same categories and terms that Mr. Kuperman uses to evaluate partition actions in his Comment.

151. See *id.* at 272.

152. *Id.* (citing HERVÉ MOULIN, FAIR DIVISION AND COLLECTIVE WELFARE 1 (2003)).

153. *Id.* at 272–73.

154. See *id.*

155. See *id.*

156. One can no longer simply ask the question, “Do you prefer what you have over what they have?” and answer with, “No? Good.” With unequal interests, the person with the smaller interest will (almost certainly) prefer the result that corresponds with the bigger share to his own. But, with unequal interests, an envy-in-context test will have to suffice.

but ultimately more useful.

An outcome reached under the proposal may be inefficient, but the process could<sup>157</sup> be implemented in a way that leads to an efficient outcome if any final legislation or court rules allow negotiation among the parties.<sup>158</sup> Generally, efficiency is achieving a desired result without waste.<sup>159</sup> Pareto efficiency is a commonly used test to determine efficiency.<sup>160</sup> With Pareto efficiency, the question becomes: can anyone be made better off without making anyone else worse off?<sup>161</sup> If the answer is yes, then the allocation is inefficient.<sup>162</sup> If the answer is no, the allocation is Pareto-optimal and thus efficient.<sup>163</sup> When a family cabin is allocated to one sibling in exchange for a cash payment,<sup>164</sup> the result may be inefficient if the person who received the property values it more than the amount he had to pay or, conversely, if the person receiving cash valued his interest in the property less than the cash he received. In these instances, the cash could be redistributed without making the parties worse off than they were pre-division while making another better off.<sup>165</sup> Pareto efficiency is likely best achieved when parties negotiate the outcome, as each will come close to giving up only as much as he is willing for what he receives.<sup>166</sup> Thus, unless the statute and/or court allows for bargaining during the right-of-first-refusal stage, the proposed solution

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157. Whether the process *should* be implemented in this way depends on the relative efficiency of reaching an efficient outcome versus lowering transaction costs during the court proceeding.

158. See *supra* note 131.

159. See *Efficient*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

160. "Named after Vilfredo Pareto, [Pareto Improvement] and [Pareto Efficiency] are central to post 1945 high economic theory. After all, [Pareto Efficiency] makes an appearance in the two fundamental theorems of Welfare Economics." Ravi Kanbur, *Pareto's Revenge 2* (Dep't of Applied Econ. and Mgmt. Cornell Univ. Working Paper No. 2005-01, 2005), <http://www.arts.cornell.edu/poverty/kanbur/ParRev.pdf> [<http://perma.cc/BDN9-XVH5>].

161. See Kuperman, *supra* note 109, at 274; *Definition of 'Pareto's Efficiency'*, ECON. TIMES, <http://economictimes.indiatimes.com/definition/paretos-efficiency> [<http://perma.cc/NR43-7ZEY>].

162. See Kuperman, *supra* note 109, at 273–75.

163. *Id.*

164. This cash payment may originate during either the right-of-first-refusal stage or the partition in kind and with cash payment determined by the court.

165. See *id.* This is not to say that judges must figure out if the ordered payment is efficient, but rather a way to evaluate the efficiency of the order after-the-fact.

166. See ROSS M. STARR, *GENERAL EQUILIBRIUM THEORY: AN INTRODUCTION* 40 (2d ed. 2011).

may lead to inefficient outcomes.<sup>167</sup>

As outlined above, Pareto-inefficient outcomes are possible under the proposed change, but an additional aspect of efficiency is fit.<sup>168</sup> When a resource is allocated to the party who values it most, an outcome which should be achieved by the proposed change, a more efficient fit is generally realized.<sup>169</sup> Thus, if courts ascertain subjective values and allocate the cabin directly to the parties who want and value it most, a more efficient outcome could be reached.<sup>170</sup>

Even with potential inefficiencies in individual outcomes, the proposed statutory changes could still be more efficient than the status quo. This overall efficiency would be achieved by removing the bargaining costs encountered over time by cabin co-owners, which could be quite high.<sup>171</sup> In addition, by lessening the likelihood of ever-increasing division in ownership over generations,<sup>172</sup> the proposed solution could

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167. *But see* Elaine B. Hyder et al., *Getting to Best: Efficiency Versus Optimality in Negotiation*, 24 COGNITIVE SCI. 169, 177 (2000) (examining how arguing and justifying during negotiation interferes with discovery of Pareto optimal negotiation solutions).

168. Kuperman, *supra* note 109, at 275.

169. *Id.* at 275–76. Coase’s Theorem would theoretically say that the allocation of the rights do not matter for fit, because the parties can always trade. *See* STEVEN SHAVELL, *ECONOMIC ANALYSIS OF LAW* 16 n.1 (2004). However, given bargaining costs, the more efficient way is to allocate “correctly” for fit upfront.

170. Of course, this ignores the question of whether this is the most efficient use of the property for society. *See* Kuperman, *supra* note 109, at 275 n.100. However, once the property is in individual ownership or consented-to co-ownership, the owners will be able to negotiate with third parties, and this should lead to the most efficient use. Because the owners will have a property right vis-à-vis the rest of world—they set their own price before their ownership rights are removed—they will only sell at a price that leads to efficient use, as determined by how much the third party is willing to pay for the property. *See, e.g.*, Keith N. Hylton, *Property Rules and Liability Rules, Once Again*, 2 REV. L. & ECON. 137, 138 (2006). Property rules are in contrast with liability rules, where someone’s entitlement rights can be taken through the payment of damages set by an outside party, like a court. *Id.* If the third party’s use is a more efficient one, the third party will be able to purchase the property because the price they are willing to pay will be higher than the price the current owner will accept to part with the property.

171. *See supra* Section II.B.2. It would only be more efficient if the reduced bargaining costs over time outweigh the increased costs incurred in the process itself. These increased costs would be much less if the co-tenancy would eventually lead to a partition action, because many, if not most, of the costs incurred under the proposed solution would also be incurred in a traditional partition proceeding. *See infra* notes 175–176 and accompanying text. The costs would, however, shift in time. *See supra* note 148.

172. Starting from the assumption that a first-generation owner devises the cabin to all his children, second-generation owners devise the cabin to all their

decrease the amount of waste created by large groups attempting to manage a resource.<sup>173</sup>

Although the proposed solution may lead to overall efficiencies, it comes at a cost, which can be measured using the administrability analysis. Administrability looks to the efficiency of the method as well as the result.<sup>174</sup> This may be one of the weaker points of the proposed solution. The proposed solution calls for potential prolonged and intensive court involvement, which may often involve additional costs of appraisers, real estate agents, and auctioneers.<sup>175</sup> However, traditional partition actions also involve many, if not all, of these same outside resources.<sup>176</sup> In the sense that the proposed court process may take longer because of additional steps, the costs could be greater to parties in the end, causing inefficiency in the method of partition. It may appear that the proposed solution requires court involvement, whereas traditional cotenancy only leads to a hearing when a co-tenant seeks partition. However, a family can always come together in a Family Settlement Agreement and avoid almost all of the court involvement.<sup>177</sup>

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respective children, and so on, the eventual result is a very large pool of cousin cotenants. Because the proposed solution gives a would-be cotenant an out at the outset, the expectation would be that as time goes on, more cousins would choose out than in. One would expect “opt out” would be common among future generations because they might live far away and have less interest in incurring the costs necessary to visit and maintain a family cabin that may not be identity property to them like it was for their ancestors. Such unwelcome costs might include upkeep, renovations, vacation days, and travel expenses.

173. This waste would be from high transaction costs. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (PAPERS & PROC.) 347, 349, 354–55 (1967).

174. Kuperman, *supra* note 109, at 275.

175. *Id.* at 276.

176. See UNIF. PARTITION OF HEIRS PROP. ACT prefatory note (UNIF. LAW COMM’N 2010) (“[A] number of fees and costs must first be paid to others before the remaining proceeds of a sale are distributed to the tenants in common. These fees often include costs incurred in selling the property including the fees of court-appointed commissioners or referees (often five percent or more of the sales price), surveyor fees, and attorney’s fees which usually constitute ten percent of the sales price in the many states that permit such an attorney’s fee award in a partition action. At the time a court orders a partition by sale under an economics-only test, these fees and costs are not taken into account although they can in fact be quite substantial and undermine any hypothetical economic benefit a cotenant would receive from a partition sale.”).

177. The court’s involvement would be limited to approving the settlement agreement. See ACCETTURA, *supra* note 13, at 213–14. As mentioned above, some court involvement will already be required for probate of the will or intestate

Ideally, the proposed solution would lead most parties to settle privately or during the first-refusal stage, which would not only be a more efficient method, but also an administratively preferable outcome. It may be impossible to determine whether the incentives built into the process will lead to quicker results. Even with the possibility of higher administrative costs, the benefits to individuals in avoiding unwanted co-ownership without necessarily having to sell the family cabin may be worth it. Additionally, the status quo for the typical cabin focused on in this Comment is either partition by sale (because partition in kind will be impracticable), private negotiations, or remaining in co-ownership. The proposed solution gives additional court-facilitated options, so that at least in some cases a more efficient administrative method would result.

Another potential weakness of the proposed solution is the potential for inequitable results. Equitability is an inquiry into the *relative level* of happiness of each party if everyone is happy with his allocation.<sup>178</sup> If someone were much happier with his allocation, the allocation would not be equitable.<sup>179</sup> This result may occur if the rejecting co-tenant offers a price much higher than his subjective value of his interest, and the other co-tenant accepts and pays the price.<sup>180</sup> While both are happy in the result (otherwise they would not have selected it, and moved on to the next step in the proceedings), the rejecting co-tenant may be disproportionately happier.

The risk for inequitable results is mitigated by the fact that if the proceedings do move on past the right-of-first-refusal stage, the court costs and other fees will reduce the ultimate amount received by the rejecting co-tenant. This incentivizes a reasonable first offer.<sup>181</sup> The courts may choose to allow

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estate. *See supra* text accompanying note 144. While hiring lawyers to draft a Family Settlement Agreement may be costly, the overall costs saved by avoiding the court proceedings would likely make it worth it to a family facing a rejecting co-tenant. *See Guaranty Bank, supra* note 141. In addition, families who consent to the co-tenancy would likely need only a short settlement agreement, and may be able to use the same lawyer, further reducing the costs. *See MODEL RULES OF PROF'L CONDUCT* r. 1.7 (AM. BAR ASS'N 1980).

178. Kuperman, *supra* note 109, at 276.

179. *See id.*

180. *See id.*

181. An analogous set of incentives is found in baseball salary arbitration proceedings. In these proceedings, both the player and the team must submit salary numbers. The arbitration panel must pick one or the other; they may not

counter-offers to try to minimize the potential for an inequitable result. When the court also asks for all parties' willing sale prices, the court should be able to ascertain a high level of inequality between the relative parties and make adjustments to a right-of-first-refusal price it will approve under its equitable authority. Finally, especially in the family cabin situation, the parties may have attempted private negotiations before court proceedings. Thus, remaining co-tenants may have an idea of how close a first-refusal-stage offer is to the rejecting co-tenant's value of his interest. This would help prevent accepting an egregiously inequitable offer, or at least lead to the parties accepting the consequences of an inequitable offer if they choose to accept it.

In order for the final allocation to be fair, the "partition method must ensure that it is not in any [party's] best interest to lie."<sup>182</sup> This can occur either through the parties' knowledge of lying as disadvantageous, or through the parties' ignorance of whether setting a price high or low will be more advantageous.<sup>183</sup> In addition, it ought to be impossible for two parties to collude with one another to raise their positions against a third.<sup>184</sup> The proposed method clearly allows parties to know whether setting a low or high valuation is advantageous to them, at least in the general sense. A valuation set too high is disadvantageous if an offer is rejected and it leads to additional costs<sup>185</sup> that reduce the ultimate take-home amount. Additionally, too high a valuation could lead to the sale of the property if the non-rejecting party cannot agree to or is unable to compensate the rejecting party for his interest; traditionally, partition sales lead to below-market proceeds that would reduce the amount the rejecting co-tenant

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split the difference between the two prices. Thus, each side has an incentive to be more reasonable, hoping the arbitrator will pick its number, which will be more advantageous to that side. Each side must go in with their "final offers" and be bound by whatever the arbitrator decides. *See* PAUL C. WEILER ET AL., SPORTS AND THE LAW 375–76 (4th ed. 1993). In a similar manner, the rejecting co-tenant is hoping the non-rejecting co-tenants will "choose" his number and accept the deal, thus avoiding costs from the next steps reducing his ultimate take-home amount.

182. Kuperman, *supra* note 109, at 276.

183. *Id.* at 276–77.

184. *Id.*

185. Additional costs would come from the process proceeding to the next steps. These could include more attorney's fees, court fees, real estate agent fees, and fees for an auctioneer.

ultimately receives for his share.<sup>186</sup>

If multiple individuals want out of the co-tenancy, or conversely wish to stay in, there may be incentives to collude against the third. However, it will generally be disadvantageous to collude if the end result is a forced sale of the home or increased costs that reduce the take-home amount. Instead, cooperation among the non-rejecting parties, not to raise their position against the rejecting party but to buy out the rejecting party, may lead to the best solution—keeping the property. One party may be willing to put up more cash in exchange for a promise to repay, decreased maintenance responsibilities, or increased use of the property. Cooperation among the rejecting parties has less obvious positive effects, although one rejecting party may be able to convince another to put in the most reasonable offer at the first-refusal stage in order to decrease overall costs, and thus increase the take-home amount.

Overall, the potential benefits of the proposal appear to outweigh the risks. The changes in default intestacy laws would help re-shape dynamics for co-tenants and help change and manage the expectations of all future inheritors, even those that do not inherit through intestacy. This idea is explored in Subsection 4 below.

#### 4. How Proposed Changes to the UPC Could Affect Property Devised Through Wills and Other Devices

Although it may appear at first blush that the proposed changes to the default intestacy rules would only affect those who inherit through intestacy, intestacy statutes in fact serve other functions.<sup>187</sup> They inform what is deemed “normal” for inheritance, which can affect not only judicial interpretation of contested wills, but can also affect what children view as fair bequests from their parents.<sup>188</sup> A person’s expectations inform him how to feel about outcomes; unmet expectations have very real psychological effects.<sup>189</sup> A child expecting to share in an

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186. See *supra* text accompanying note 138.

187. See ACCETTURA, *supra* note 13, at 248.

188. See *id.* (“[I]ntestacy laws reflect the prevailing view of family and inheritance.”).

189. For example, an employee’s unmet expectations at work can cause frustration, stress, and burnout. See generally Jana Lait and Jean E. Wallace, *Stress at Work: A Study of Organizational-Professional Conflict and Unmet*

*equal* inheritance will likely feel especially hurt by receiving an unequal one in favor of a different sibling. If, instead, an expectation develops for an *unequal* yet subjectively better inheritance division—one with more fairness and efficiencies, along with less family strife—someone planning to pass on the family cabin could more easily deviate from the standard will phrase *to all my children, in equal shares*.<sup>190</sup>

### *B. Needed Enactment of the UPHPA*

Ideally, all states will adopt the proposed system so that heirs no longer become unknowing or unwilling tenants in common. But even if that were to happen, tenancies in common will still form based on consent, or as holdovers from before the statutory change. Therefore, a change to how partition sales operate in states, especially for tenants in common in a family cabin, would help effectuate better outcomes than those that exist today. One way states could accomplish these changes would be to enact the UPHPA. Widespread adoption of the UPHPA would help modest-means family cabin owners even if the previously suggested changes to the UPC are not made. This Section gives background information on the UPHPA, explains how the UPHPA could help in the family cabin situation, and discusses the shortcomings facing cabin owners even with the adoption of the UPHPA.

The UPHPA is a uniform act, like the UPC, drafted by the Uniform Law Commission.<sup>191</sup> The act was primarily formed to preserve family wealth for lower income individuals, who often are unaware that after generations of intestate succession, the land they occupy is owned in small tenancy-in-common shares by many (distant) relatives.<sup>192</sup> The “purpose of [the] act is to ameliorate, to the extent feasible, the adverse consequences of a partition action when there are some co-tenants who wish, for various reasons, to retain possession of some or all of the land,

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*Expectations*, 57 REL. INDUSTRIELLES 463 (2002).

190. See *infra* Section III.C.

191. See *Acts: Partition of Heirs Property Act*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/Act.aspx?title=Partition%20of%20Heirs%20Property%20Act> [<http://perma.cc/FY4D-L57Q>].

192. UNIF. PARTITION OF HEIRS PROP. ACT prefatory note (UNIF. LAW COMM’N 2010), [http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/uphpa\\_final\\_10.pdf](http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/uphpa_final_10.pdf) [<http://perma.cc/FKE5-WUH2>].

and other cotenants who would like the property to be sold.”<sup>193</sup>

One of the act’s main goals is to prevent real estate speculators from purchasing a small fractional co-tenancy interest and forcing partition of a family property, thus allowing such spectators to purchase the entire property at below-market rates at a partition sale.<sup>194</sup> The UHPA provides for due process protections for co-tenants facing a partition.<sup>195</sup> These include “notice, appraisal, right of first refusal, and if the other co-tenants choose not to exercise their right and a sale is required, a commercially reasonable sale supervised by the court to ensure all parties receive their fair share of the proceeds.”<sup>196</sup>

An important feature of the act is the requirement for a partition in kind unless partition in kind results in great prejudice to co-tenants *as a group*.<sup>197</sup> Despite most state statutes explicitly preferring partition in kind to partition by sale,<sup>198</sup> because of requirements like that in Colorado to use a sale whenever a partition in kind “cannot be made without manifest prejudice to the rights of *any* interested party,”<sup>199</sup> partition by sale has become the norm.<sup>200</sup> By focusing on prejudice of any interested party, no matter how small his respective interest, courts end up ordering partition by sale even when that course of action imparts a comparatively large injustice to the non-partitioning co-tenants.<sup>201</sup> Courts also currently refuse to take into account any potential noneconomic benefits,<sup>202</sup> which is particularly problematic for the identity property owner.<sup>203</sup>

Although perhaps designed to help families where many generations of intestacy has led to many co-tenants with small

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193. *Id.*

194. *Acts: Partition of Heirs Property Act*, *supra* note 191.

195. *Id.*

196. *Id.*

197. *Partition of Heirs Property Act Summary*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/ActSummary.aspx?title=Partition%20of%20Heirs%20Property%20Act> [<http://perma.cc/FY4D-L57Q>].

198. *See* UNIF. PARTITION OF HEIRS PROP. ACT prefatory note (UNIF. LAW COMM’N 2010), [http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/uphpa\\_final\\_10.pdf](http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/uphpa_final_10.pdf) [<http://perma.cc/FKE5-WUH2>].

199. COLO. REV. STAT. § 38-28-107 (2015) (emphasis added).

200. *See* UNIF. PARTITION OF HEIRS PROP. ACT prefatory note.

201. *See id.*

202. *See id.*

203. *See supra* text accompanying note 93.

fractional interests in property, the definition of “heirs property” can also apply to third-generation family cabin owners:

“Heirs property” means real property held in tenancy in common which satisfies all of the following requirements as of the filing of a partition action: (A) there is no agreement in a record binding all the cotenants which governs the partition of the property; (B) one or more of the cotenants acquired title from a relative, whether living or deceased; and (C) [a]ny of the following applies: (i) 20 percent or more of the interests are held by cotenants who are relatives; (ii) 20 percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased; or (iii) 20 percent or more of the cotenants are relatives.<sup>204</sup>

The UPHPA does not apply to “first generation” tenancy-in-common property.<sup>205</sup> However, if one of the original cotenants in the first generation transfers his interest to a family member, the UPHPA would apply (provided that the other criteria in the definition are met).<sup>206</sup>

The UPHPA would certainly go a long way towards preventing unwanted partition sales for tenants in common of heirs property. This includes family cabin owners past the first generation of tenancy-in-common ownership. The UPHPA contains many of the procedures outlined in the proposed solution above.<sup>207</sup> Unfortunately, as of this writing, only six states have adopted the UPHPA: Alabama, Arkansas, Connecticut, Georgia, Montana, and Nevada.<sup>208</sup>

Because the UPHPA does not apply to what this Comment

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204. UNIF. PARTITION OF HEIRS PROP. ACT § 2(5).

205. *Id.* § 2, cmt. 3 (“[T]he Act does not apply to ‘first generation’ tenancy-in-common property established under the default rules and still owned exclusively by the original cotenants even if there is no agreement in a record among the cotenants governing the partition of the property.”).

206. *Id.* (“First generation’ tenancy-in-common property, however, may be converted into heirs property if a cotenant with an interest in such ‘first generation’ tenancy-in-common property transfers all or a part of his or her interest to a relative provided that the other criteria for classifying property as heirs property are satisfied.”).

207. *See supra* Section III.A.

208. *Acts: Partition of Heirs Property Act*, *supra* note 191. It has been introduced in Hawaii and South Carolina. *Id.*

has called second-generation family cabin owners,<sup>209</sup> enactment of the UHPA would not change the dynamics of the tenancy-in-common relationship for a large number of family cabin owners. These owners would still be subject to the regular partition proceedings with the de facto rule of partition by sale.<sup>210</sup> And, while enactment of the UHPA would certainly help third-generation family cabin owners, the terms of the Act only apply once a partition action has already been filed.<sup>211</sup> In this sense, the UHPA does not fully prevent co-tenancy problems, but rather only lessens the sting of their results. In order to truly address co-tenancy problems, a greater awareness of these problems must be brought to co-tenants attention *before* entering a tenancy in common. Thus, while certainly an important Act that should be widely adopted, the UHPA does not adequately address the full problem.

Even absent the adoption of the UPC changes proposed in the first Section or the wide-spread adopting of the UHPA introduced in this Section, there are steps that current family cabin owners can take to lessen the impact of co-tenancy. The following Section makes some recommendations for those first-generation owners who wish to make a plan for their family cabin under existing laws, but who do not have additional liquid assets to facilitate the transition for their family.

*C. If Nothing Else—Recommendations to Those Planning Without Substantial Additional Cash*

Instead of asking how to keep the cabin in the family, some families may need to ask: should we? Before the will is drawn up, an LLC created, or a trust formed and funded, families with sentimental vacation homes should have discussions about what each member wants and expects. Although it is difficult to have discussions surrounding our own mortality,<sup>212</sup> the only way to truly manage expectations is to know what those baseline expectations are. While it may be “unthinkable” to sell the cabin that has brought the family so much joy and so

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209. The UHPA uses the term “‘first generation’ tenancy-in-common property.” UNIF. PARTITION OF HEIRS PROP. ACT § 2, cmt. 3.

210. See *supra* text accompanying notes 98–100.

211. See UNIF. PARTITION OF HEIRS PROP. ACT. § 3(a).

212. See ACCETTURA, *supra* note 13, at 49–62.

many memories,<sup>213</sup> in the end, many families may prefer family harmony over keeping the cabin at any cost and would choose to sell the cabin after hearing the expectations and desires of the younger generation. If parents want the cabin to stay in the family in order to foster family unity, having co-tenants who constantly fight over the management and share of the home will be counter-productive to that goal. And, of course, there may be concerns that preclude a family from even considering keeping the cabin past the first-generation owners' deaths, such as children in dire financial need.

The reality for some families may be that keeping the cabin requires disinheriting children who do not have the desire or resources to contribute to the cabin. Typically, parents want to bequeath each child an equal share of their wealth after both of their deaths. Selling the cabin would allow an executor to split the proceeds equally among all of the children. However, if expectations of each child can be managed in a way that does not leave the child feeling psychologically abandoned after his parents' deaths, true equality may not need to occur.<sup>214</sup>

For example, if a family had three children and only two wanted to keep the family cabin and are willing to commit the time and resources necessary to do so, then the family may be able to come to an agreement where the third child does not feel the sting of being excluded or disinherited, even if his share of the inheritance is less than that of his siblings.<sup>215</sup> Alternatively, the two "in" children may agree to slowly pay the third over time, in a way that the estate simply does not have enough assets to do. If the children are not willing to agree to this, the parents may decide that the best course is to direct their executor to sell the home and split the proceeds.

Each family will likely come up with a different solution for its own specific situation. In the end, if the family is functioning well, and children have felt loved during their lifetimes, they will be better able to accept the inheritance the parents choose, especially if it does not go against pre-existing expectations.<sup>216</sup> Managing everyone's expectations thus

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213. See Waldeck, *supra* note 76, at 745, 754.

214. See ACCETTURA, *supra* note 13, at 226–27.

215. See *id.* at 73.

216. Cf. *id.* (explaining how "children from toxic families" are likely to resist the estate plan of parents because they fear being "snubbed and rejected").

becomes key in this setting.

One step that first-generation owners can take to help facilitate family harmony while keeping the family cabin is to create rules for the use, management, and maintenance of the cabin that continue after their death, memorialized in a tenancy-in-common agreement that will govern any successors in interest as well.<sup>217</sup> The most successful agreements are created and implemented during the first generation's lifetime with guidance and input from the second generation.<sup>218</sup> In this way, everyone becomes accustomed to the agreement and the transition to the second-generation owners is a smooth one.<sup>219</sup> Creating the agreement with everyone's input also gives an opportunity for the first-generation owners to ascertain the wishes of the second generation and act accordingly.<sup>220</sup>

Some commentators have recognized the utility of facilitative mediation to help solve or avoid inheritance conflicts.<sup>221</sup> Facilitative mediation involves a neutral mediator who helps parties communicate and work towards solving differences.<sup>222</sup> As opposed to legal conflict, where lawyers prevent full communication, a facilitative mediation encourages and facilitates communication.<sup>223</sup> This, hopefully, leads to a decision made by the parties themselves, as opposed to a mediator or judge.<sup>224</sup> A facilitative mediator could be used to help draft a tenancy-in-common agreement that includes the input of all generations, as discussed above.<sup>225</sup>

Families who wish to keep the family cabin struggle

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217. See Patrick J. Green, *Keeping the Vacation Property in the Family* 2-13, [http://www.dwt.com/files/Publication/d003cbc3-eaea-42f5-9f9b-c279a1dc3025/Presentation/PublicationAttachment/15f80ef3-c8eb-4866-a0c1-c3e8af044305/pubs\\_Green\\_VacationProperty.pdf](http://www.dwt.com/files/Publication/d003cbc3-eaea-42f5-9f9b-c279a1dc3025/Presentation/PublicationAttachment/15f80ef3-c8eb-4866-a0c1-c3e8af044305/pubs_Green_VacationProperty.pdf) [<http://perma.cc/BH4L-4BK2>].

218. See *id.*

219. See *id.*

220. Cf. Goffe, *supra* note 65, at 4 (explaining the role of a survey or facilitator in giving first-generation owners insight into the "wishes and apprehensions of the next generation" in creating a master plan to govern the passing of the family cabin to the next generation, insights which can then be used to resolve issues "before the cabin becomes a battleground").

221. See, e.g., ACCETTURA, *supra* note 13, at 214-16. Facilitative mediation may prove to be too expensive for some families, but for others the costs may be worth the benefits of knowing that the family cabin will remain happily in the family.

222. *Id.*

223. *Id.*

224. *Id.*

225. See Goffe, *supra* note 65, at 3-4.

between the desire to continue a family legacy the parents started by maintaining the cabin for as long as possible and the desire to leave each child equally and individually in a financially stable place. Shifting cultural norms may make the possibility of disinheriting one or more children in favor of keeping the family cabin in family ownership more palpable over time. As parents live to older ages, many children are able to reach ages before their parents' deaths where their financial security does not depend on any inheritance.<sup>226</sup> They may even agree to forgo any cash in favor of the cabin staying in the family and receiving adequate funding.

While the choice is in the hands of each family cabin owner, the choice will most acutely affect those left behind. If parents try to leave a legacy that violates the expectations and wishes of their children, they may end up leaving the opposite legacy than the one they were attempting. While freedom of testation is a deeply held value in American society, family members will more fondly remember a testator if he takes their choices into account when making his will. Additionally, a testator can avoid family strife caused by his death and will by keeping that will in line with everyone's expectations.

#### CONCLUSION

While a family cabin is often obtained to create a place for families to come together, this Comment has shown that in many cases the problems surrounding tenancy-in-common ownership of a family cabin can push families apart. The tenancy-in-common relationship causes problems that may lead to the sale of the family cabin, resulting in a real loss to those who view the cabin as identity property. In order to address this problem, this Comment proposes changes to the UPC, such as required consent to co-tenancy and the right for a non-rejecting co-tenant to purchase the rejecting co-tenant's interest before a court-ordered sale. The proposed UPC changes would prevent accidental co-ownership and allow courts to incorporate both the economic value and the more subjective emotional and psychological value of a family cabin when resolving an unwanted co-tenancy. As this Comment has shown, subjective values are particularly high for family cabin

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226. See ACCETTURA, *supra* note 13, at 41.

owners, and thus this solution is especially useful in this context.

Furthermore, this Comment argued for widespread adoption of the UPHPA, which would provide protections for future generations of co-tenants and avoid one distant and perhaps unrelated co-tenant from displacing those living in identity property through a court-ordered partition sale. Even without the proposed changes to the UPC or universal enactment of the UPHPA, families should engage in serious discussions before the death of the first-generation family cabin owners so that expectations can be known and managed from the beginning. In the end, the solution to the family cabin problem is to get information to family cabin owners, present and future, so that they are able to make informed decisions about the family cabin—with an emphasis on family.