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Sarah E. Waldeck

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# RETHINKING THE INTERSECTION OF INHERITANCE AND THE LAW OF TENANCY IN COMMON

Sarah E. Waldeck\*

*This Article is about “identity property,” which it defines as property that is strongly linked to one’s sense of self and family and is valued by its holder primarily for what it represents. Identity property is often jointly inherited by siblings or other relatives, who take as tenants in common. Standard doctrine relies on familial bonds and the unilateral right of partition to mitigate the problem of bilateral monopoly and to foster cooperation in the management of the tenants’ common resource. The Article argues that, in the context of identity property, this standard account is wrong. Rather, because the law favors partition by sale, the exit of one tenant often means that the remaining co-tenants will be forced to sell the identity property. Because the remaining tenants perceive the property as nonfungible, the threat of exit is powerful enough to exacerbate the bilateral monopoly and decrease the likelihood of cooperation. The Article relies on the example of the family cottage to elucidate the meaning of “identity property” and examines the formal agreements that relatives who jointly own cottages make when they decide to opt out of the tenancy in common default rules. These formal agreements reveal a willingness to sacrifice the right of exit in order to increase the odds that co-tenants will continue to own the identity property. The Article argues that the law should heed the message of these formal agreements and adopt a more flexible approach to the*

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*inheritance of identity property, including the possibilities of temporal partition and facilitated agreement.*

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## INTRODUCTION

Property textbooks are full of legal doctrines that were once important but now merit little more than an historical footnote—the fee tail, the Rule in Shelley’s Case, the destructibility of contingent remainders. This Article suggests that tenancy in common, while not yet passé, is no longer as robust as it once was. No one with legal sophistication who wishes to jointly own property opts for a co-tenancy. Instead they form limited liability corporations, limited partnerships, or trusts. Most modern tenancies in common, in contrast, occur accidentally through the confluence of default property rules and poor estate planning. Often the property that is the subject of these accidental tenancies is extraordinarily dear to both the testator and the heirs. The accidental nature of many tenancies in common, coupled with the kind of property involved, should prompt an overhaul of our approach to this ancient form of ownership.

Margaret Radin famously wrote that there is a relationship between property and personhood. That is, “[m]ost people possess certain objects they feel are almost part of themselves.”<sup>1</sup> In Radin’s formulation, such objects are “bound up with the holder”<sup>2</sup> and essential to the self; the loss of these objects harms the individual and interferes with the ability to flourish and develop. As Stephanie Stern has recently argued, emerging social science has called into doubt the extent to which any one piece of property can be essential to the self.<sup>3</sup>

1 Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982).

2 *Id.*

3 See Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1096–97 (2009) (reviewing literature).

As such, this Article does not rely on Radin's "personhood" terminology and instead refers to the inherited property with which it is concerned as "identity property."<sup>4</sup>

"Identity property" is Radin's personhood property ratcheted down. 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. As with Radin's "personhood property," identity property is nonfungible and thus cannot be replaced even by a mostly identical item with the same market value.<sup>5</sup> Unlike personhood property, however, identity property is not essential to human flourishing or self-development. Rather, identity property is cherished because of what it represents about one's family and own history. Identity property can emerge from a wide variety of experiences such as, for example, activities during a formative period in one's life or long-lasting relationships.

Often identity property is connected to familial history. For example, identity property might be the appropriate label for hunting rifles, or for recipes that are written in the hand of the original baker, or for a crystal lowball cocktail glass. All of these items are "heirlooms" in the sense that they can be passed on from one generation to the next. They are not, however, the only property that an individual might pass along, nor are they necessarily the most valuable or the objects that have been in the family the longest. But all of these objects can have a particular significance because of how they were used by the person who is bequeathing them and how an heir participated in that use. If, for example, Grandma always used a particular recipe on the first day of Christmas, and her granddaughter always spent Christmas with Grandma, then the recipe is both an essential element of the granddaughter's own Christmas and a means by which the granddaughter can maintain a sense of connectedness to her past. A certain cookie during the holidays, or a particular rifle on the opening day of deer season, or a crystal glass for a Friday evening gin and tonic—each can create a sense of continuity through one's own experiences and a sense of seamlessness with the past. Such objects can, however, also raise thorny inheritance questions.

Because of identity property's unique value, its owner is likely to keep the property throughout her life and pass it along at death. The property may be the subject of a specific devise or bequest to a single heir; in that case, others who also cherish the property may be chagrined, but the situation is straightforward and the named benefi-

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4 I thank Professor Marc Poirier for suggesting this term to me.

5 See Radin, *supra* note 1, at 959.

ciary will simply take the property. 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.

When personal property has been jointly inherited—particularly personal property with little market value—we expect heirs to swap their way out of joint ownership. One child will take the crystal cocktail glass, another will take the hunting rifle, and yet another will take the recipe holder. The heirs involved in the informal settlement may have lingering doubts about whether they struck the best possible deal, but joint ownership is fleeting and everyone eventually moves on.

If, however, the composition of property within the estate forecloses the possibility of an informal swap, matters become more difficult. This scenario is most common when an estate has a single piece of identity property with a high market value. Few heirs will be willing to swap a cocktail glass for a Monet, regardless of how much each reminds them of their father. While some estates, like the one with the Monet, will have *personal* property that both warrants the identity label and has a high market value, the more likely scenario is that an estate will have *real* property that both merits the identity label and has a high market value. Unless the heirs are willing to sell the property—and if it is identity property they likely are not—they will have to find a way to successfully share it.

The inheritance of identity property raises questions about how to best encourage cooperation among co-owners. Property that is held as a tenancy in common is a kind of "commons" or shared resource. One perennial question is what conditions foster cooperation between participants in a commons, so that each individual may harness the gains from the efficiencies that can accompany joint ownership. Much of the work on common resources, and particularly on tenancies in common, emphasizes that co-tenants are locked into a classic bilateral monopoly: with respect to many issues, they have no one to negotiate with except each other. Bilateral monopolies tend to raise transaction costs and encourage unproductive strategic behavior. When co-tenants are related, the law counts on familial bonds to encourage cooperation. The law further provides a strong right of exit in the form of a unilateral right of partition. According to the standard account, the threat of exit provides additional reason to cooperate and mitigates the problem of monopoly. No tenant is truly locked into the monopoly because she can choose to exit through partition.

This Article argues that, in the context of identity property, the standard account is wrong. Indeed, property law lacks a satisfactory default doctrine for situations in which identity property is inherited by more than one individual. Because the law of tenancy in common *de facto* favors partition by sale over partition in kind, the exit of one co-tenant often means that any tenant who values the property because of its identity characteristics will be forced to sell. As such, the exercise of the right to exit through partition is akin to a nuclear option. The mere threat of exit is powerful enough that it enables tenants to free ride or shirk obligation and thereby exacerbates many of the problems implicit in bilateral monopolies. In addition, the available information about formal agreements between co-tenants in identity property suggests that its holders willingly sacrifice exit and the opportunity for financial profit to increase the odds that they will continue to own the property. All of this suggests that the law of tenancy in common needs a more flexible and creative approach to co-ownership than standard doctrine currently embraces.

Part I reviews the default rules of a tenancy in common, the bilateral monopoly problem that such tenancies create, and how standard doctrine perceives the unilateral right of partition as mitigating the bilateral monopoly problem. It then uses the sociological literature on one kind of identity property—family cottages—to show how partition can compound the dynamics of the bilateral monopoly and make cooperation more difficult. Finally, Part I examines the choices that co-tenants make when they opt out of tenancy in common default rules, with particular emphasis on how they willingly sacrifice the right of exit. Part II explains the consequences for property law, particularly as applied to inherited identity property. Part III suggests reforms that will decrease strife among heirs to identity property and make co-tenants with competing interests more likely to successfully own and manage their identity property.

## I. A REPRISE OF TENANCY IN COMMON LAW

The default rules of a tenancy in common will be familiar to anyone who has taken an introductory Property course. Briefly summarized, each co-tenant is entitled to possess the whole property, regardless of the size of her ownership share.<sup>6</sup> Co-tenants receive a proportional share of all rents and profits earned by the property and must pay a proportional share of taxes, mortgages, and other neces-

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6 See ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 5.2 (2d ed. 1993).

sary carrying costs.<sup>7</sup> As for repairs, in most jurisdictions a co-tenant making or paying for them has no right to contribution, even when the repairs are necessary. A co-tenant who makes improvements similarly has no right to contribution.<sup>8</sup> Each tenant has a right to sell, gift, or devise her interest, and can terminate the tenancy altogether by seeking partition.<sup>9</sup> If the co-tenants cannot agree to the terms of partition, a court will order the property to be sold at fair market value (a partition by sale) or decree that it be physically divided and apportioned between the tenants (a partition in kind).<sup>10</sup>

Richard Posner has described these rules as placing tenants in common as “formally in much the same position as the inhabitants of a society that does not recognize property rights.”<sup>11</sup> This aptly describes the greatly diminished rights of the co-tenants with respect to each other, although not the rights that they have against everyone else. As between siblings who have inherited a house, for example, the brother cannot exclude the sister because both co-tenants have an equal right of possession.<sup>12</sup> As between the siblings and the rest of the world, however, the co-tenants’ property rights are entirely undiminished. If I am on the plot of land without an invitation, the siblings can eject me—just as they can eject any outsider. The tenancy in com-

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7 See CUNNINGHAM ET AL., *supra* note 6, § 5.9; JESSE DUKEMINIER ET AL., PROPERTY 309 (6th ed. 2006).

8 See 4 THOMPSON ON REAL PROPERTY §§ 32.07(b), 38.03(a)(1) (David A. Thomas ed., 2d Thomas ed. 2004). The harshness of these no-contribution rules is sometimes mitigated during an accounting or partition action, where a co-tenant likely will receive credit for reasonable repairs. During an accounting, the improving co-tenant is also credited with any rents and profits that are attributable to the improvement. Furthermore, if the property is partitioned in kind, the court will attempt to award the improvements to the co-tenant who made them. If the court is unable to do so and still partitions in kind, it may order the other co-tenants to compensate the improving tenant for any additional value that resulted from the improvement. If the property is partitioned by sale, the improving tenant will be awarded any proceeds that are attributable to the improvement. See *id.*; CUNNINGHAM ET AL., *supra* note 6, § 5.9; DUKEMINIER ET AL., *supra*, note 7, at 309.

9 See CUNNINGHAM ET AL., *supra* note 6; 4 THOMPSON ON REAL PROPERTY, *supra* note 8, § 32.08(b).

10 See CUNNINGHAM ET AL., *supra* note 6, § 5.11; 4 THOMPSON ON REAL PROPERTY, *supra* note 8, § 32.08(b).

11 RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 74 (6th ed. 2003).

12 See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (noting that “the land-owner’s right to exclude . . . [is] ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’” (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979))).

mon is, as Carol Rose has described, “commons on the inside, [private] on the outside.”<sup>13</sup>

With respect to what happens on the inside, the siblings are locked into a bilateral monopoly; that is, neither co-tenant has good alternatives to dealing with the other.<sup>14</sup> If both want exclusive possession of the house on a particular date, they will have to hash out a compromise among themselves. Neither can resolve the dispute through negotiation with a third party, because only the brother has the power to allow the sister exclusive possession and vice-versa. To paraphrase Posner, there is a range within which each party will prefer “working it out” over more drastic measures (here, a partition, discussed further *infra*). However, “[a]scertaining this range may be costly, and the parties may consume much time and resources in bargaining within the range. Indeed, each party may be so determined to engross the greater part of the potential profits from the transaction that they never succeed in coming to terms.”<sup>15</sup> While those caught in a bilateral monopoly usually “bargain to a mutually satisfactory price,”<sup>16</sup> the transaction costs incurred by both parties “are a social waste” because they “alter the relative wealth of the parties but do not increase the aggregate wealth of society.”<sup>17</sup> In the language of economists, bilateral monopolies create high transaction costs; in the language of laypeople, bilateral monopolies create frustration and inherently complex negotiations.

#### A. *The Law as Applied to Inherited Identity Property*

Now let us take these rules and apply them to a concrete example of identity property: a family cottage. This is a useful example because of the substantial literature on the identity nature of this sort of property, as well as the frequency with which family cottages are passed on from one generation to the next. There is also some evidence about the preferences of cottage owners who ultimately abandon a tenancy in common in favor of some other form of ownership. Taken together, the available material exposes the shortcomings of the default rules of tenancies in common.

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13 Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 155 (1999).

14 They are not, however, locked into a bilateral monopoly on the outside. If the siblings wish to remodel their house, they can choose from many different contractors. Similarly, the contractors can choose other customers if they prefer not to deal with the siblings.

15 POSNER, *supra* note 11, at 61.

16 *Id.*

17 *Id.*



## 1. Family Cottages

First, an explanation of what “family cottage” means. The term refers to recreational property, not to a primary residence. In ordinary parlance, family cottages are also known as summer houses, or cabins, or are simply referred to by their location: the lake, the Cape, up north, the Shore. These are places whose owners intend them “to be used and enjoyed by successive generations to enhance family cohesion through a shared cultural experience, regardless of age or interest. . . . [They are] *the* location for extended family gatherings over several generations.”<sup>18</sup> These are places where grandparents play with grandchildren and cousins play with cousins.

Statistics about cottage ownership in the United States are hard to come by, and information about how many of these cottages qualify as identity property is harder still. But discrete pieces of information are suggestive. A 2007 survey of American housing reported 4,318,000 seasonal properties; of these, more than half of the owners identified “recreational purposes” as the reason they owned the property and about five percent of owners described their property as “inherited.”<sup>19</sup> Of those surveyed, eighty-nine percent of individuals who purchased “vacation homes” in 2009 reported that they would use the property as a “family retreat.”<sup>20</sup> As a percentage of housing stock, Maine, Vermont, and New Hampshire have the largest number of seasonal properties. Other states with large amounts, either in absolute number or as a percentage of housing units, include Florida, Michigan, Wisconsin, New York, and California.<sup>21</sup>

Lest the description in the previous paragraphs summon up only images of the Bush compound in Kennebunkport or the Kennedy estate in Hyannisport, the 2000 Census states that seasonal properties range from “big summer estates on Long Island, time-sharing condos in Fort Lauderdale, or simple fishing cabins in northern Michigan.”<sup>22</sup> In 2009, the median price of “vacation homes” was \$150,000 and the typical buyer had an annual household income of slightly more than \$97,000.<sup>23</sup> At death, the family cottage is often the decedent’s single most economically valuable asset.<sup>24</sup> The available sociological field

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18 JUDITH HUGGINS BALFE, *PASSING IT ON* ix (1999).

19 U.S. DEP’T OF HOUS. & URBAN DEV. & U.S. DEP’T OF COMMERCE, *AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2007*, at Table 1A-1 (2008).

20 *Research: Second-Home Market Snapshot*, REALTOR, May 2009.

21 See U.S. CENSUS BUREAU, *HOUSING CHARACTERISTICS: 2000* 4-5 (2001).

22 *Id.* at 5.

23 *Research: Second-Home Market Snapshot*, *supra* note 20.

24 See STUART J. HOLLANDER ET AL., *SAVING THE FAMILY COTTAGE* 8 (3d ed. 2009).

work further suggests that among those who have inherited family cottages, most owners would not be able to afford the property but for the fact that the property was jointly inherited and costs are split among multiple owners.<sup>25</sup> Those who own family cottages tend to be economically fortunate in relative terms, but they are not necessarily wealthy.

At their most basic level, family cottages are a kind of home plus. Many scholars have documented the centrality of homes. Homes are the primary site for family interactions and the setting for a variety of interpersonal relationships;<sup>26</sup> a place to establish and maintain everyday routines; and a place to present and project an image of oneself through design and décor.<sup>27</sup> For many individuals, however, the cottage goes beyond a usual dwelling or residential property. Family cottages (or cabins or summer homes or whatever you want to call them) are "the place of . . . strongest memories, childhood and adult."<sup>28</sup> One researcher has described the family cottage as particularly important because "[i]n a globalized world that many experience as placeless, the cottage may serve as a centre of meaning across the life course even as people relocate their so-called permanent residence."<sup>29</sup> In a survey of cottage owners in the Hayward Lakes area of Wisconsin, respondents verbalized this sense of continuity by contrasting the number of cottages their families had owned (one) with the number

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25 See BALFE, *supra* note 18, at xiii.

26 See Juliana Mansvelt, *Working at Leisure: Critical Geographies of Ageing*, 29 AREA 9, 289 (1997). For discussions of how these household routines and relationships are affected by constructions of masculinity and femininity and gender relations, see IRIS MARION YOUNG, INTERSECTING VOICES 134 (1997); Sophie Bowlby et al., "Doing Home": Patriarchy, Caring, and Space, 20 WOMEN'S STUD. INT'L F. 343 (1997); Jane Darke, *Women and the Meaning of Home*, in HOUSING WOMEN 11, 11–30 (Rose Gilroy & Roberta Woods eds., 1994); Craig M. Gurney, ". . . Half of Me Was Satisfied": Making Sense of Home Through Episodic Ethnographies, 20 WOMEN'S STUD. INT'L F. 373 (1997).

27 See Janna Jones, *The Distance From Home: The Domestication of Desire in Interior Design Manuals*, 31 J. SOC. HIST. 307 (1997); Lorraine I. Leonard et al., *Presenting and Creating Home: The Influence of Popular and Building Trade Print Media in the Construction of Home*, 21 HOUSING, THEORY & SOC'Y 97 (2004); Ruth Madigan & Moira Munro, "The More We Are Together": Domestic Space, Gender and Privacy, in IDEAL HOMES 61 (Tony Chapman & Jennifer Lorna Hockey eds., 1999); Grant McCracken, "Homeyness": A Cultural Account of One Constellation of Consumer Goods and Meanings, in INTERPRETIVE CONSUMER RESEARCH 168 (Elizabeth C. Hirschman ed., 1989); Louise Shaw & Barbara Brookes, *Constructing Homes: Gender and Advertising in Home and Building 1936–1970*, 33 N.Z. J. HIST. 200 (1999).

28 KEN HUGGINS & JUDITH HUGGINS BALFE, *HOW TO PASS IT ON* 26 (1999).

29 Daniel R. Williams & Susan R. Van Patten, *Home and Away? Creating Identities and Sustaining Places in a Multi-centred World* 32, 38, in MULTIPLE DWELLING AND TOURISM (Norman McIntyre et al. eds., 2006).

of year-round or primary homes they had owned (sometimes as many as eight or ten).<sup>30</sup> In a different survey of second-home owners in Colorado, respondents similarly emphasized this sense of continuity: "It's always just been a special kind of place to go and that didn't change . . . that was as you move, from place to place . . . that was always a constant place that you . . . knew that would be there."<sup>31</sup> Sociologist Judith Huggins Balfe, who surveyed 125 respondents across seventeen states to study the ownership and inheritance of summer houses, writes that such properties "provide a unique sense of stability."<sup>32</sup> Surveys suggest that even individuals who have had just one year-round residence during their adult lives tend to characterize their primary home as a "mere residence" and the cottage as "their emotional home."<sup>33</sup>

Many cottages are also heirlooms; that is, property that has been passed on from one generation to the next. Cottage owners often seek not just to maintain the property during their lifetime, but also to preserve it for the next generation. In one survey of cottage owners, more than eighty percent stated that they intended to give the property to their children at death.<sup>34</sup> In the representative words of one cabin owner from Colorado, "Our dream wasn't just that we would like a place to relax, but it'd be a place where our children and our children's children could . . . build family relationships as well."<sup>35</sup> Preserving the cottage is a means of influencing the next generation's personal history, status, and values. As Balfe explains, "the inheritance of summer houses . . . is among the mechanisms for transmitting the specifics of a family culture to the next generation, providing some of the 'glue' that gives meaning and cohesion to its collective identity."<sup>36</sup> Those who see multiple generations on the same land "experience a sense of timelessness . . . as they connect the present and anticipated future to the past."<sup>37</sup>

Balfe's invocation of the cottage as a mechanism for "transmitting the specifics of a family culture" to the next generation suggests that identity property can be situated within the burgeoning scholarship

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30 See *id.* at 39.

31 Norman McIntyre et al., *Home and Away: Revisiting 'Escape' in the Context of Second Homes*, in MULTIPLE DWELLING AND TOURISM, *supra* note 29, at 114, 124.

32 BALFE, *supra* note 18, at 6.

33 Richard C. Stedman, *Places of Escape: Second-home Meanings in Northern Wisconsin, USA*, in MULTIPLE DWELLING AND TOURISM, *supra* note 29, at 129, 132.

34 HOLLANDER ET AL., *supra* note 24, at xiii.

35 McIntyre et al., *supra* note 31, at 124.

36 BALFE, *supra* note 18, at 66-67.

37 *Id.* at 121.

about the ownership of cultural resources. Susan Scafidi has written about the ownership of what she calls “cultural products,” that is, the “cuisine, dress, music, dance, folklore, handicrafts, images, healing arts, rituals, performances, natural resources, or language” that emerge from particular groups.<sup>38</sup> Of course, the sort of cultural products that Scafidi discusses, such as the tango or American Sign Language, are much broader in their appeal than what tends to emerge from the typical family property. Yet a closer look at how “cultural products” develop suggests a real similarity to the sort of rituals associated with identity property.

Scafidi describes how cultural products often begin as “accidental” property, that is, “intangible creations,” for which neither “commodification nor reduction to ownership serves as the primary impetus for their development.”<sup>39</sup> Instead, “authentic cultural products are intrinsic to quotidian activities and celebratory occasions within the source community. As such, they instantiate the internal dynamics, shared experiences, and value systems that bind the community together.”<sup>40</sup> For many families, what Scafidi calls accidental property is one of the hallmarks of the family cottage.

Balfe describes this sort of accidental property as “ritual activity” and documents that family cottages are rife with it:

Such ritual activities of work and play start upon arrival and run until all have departed from the summer house. . . . Many families have specific phrases of greeting and farewell. Others practice particular behaviors such as running to greet the water, ringing the porch bell or raising the flag even before unpacking the car upon arrival, and comparably bidding farewell just before leaving. Each respondent with such rituals has started the story in the same way: “This is what we *always* do when we get there, and when we leave.”<sup>41</sup>

Some of the rituals that families describe can be appreciated by wider audiences, such as particular menus that are cooked year after year. Other will strike outsiders as at least faintly ridiculous: referring to plants by the names of the deceased family members who planted them, or throwing a birthday party for the house every five years, or keeping a house log in which each entry begins “Dear Grandma,” when Grandma has been dead for decades.<sup>42</sup> But all such rituals are significant to the people who engage in them. For our purposes, the

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38 SUSAN SCAFIDI, WHO OWNS CULTURE? ix (2005).

39 *Id.* at 24.

40 *Id.*

41 BALFE, *supra* note 18, at 188.

42 *See id.* at 189, 191.

key point is that these family rituals are intertwined with the identity property. The real property itself is an integral part of the familial practice, such that the loss of the family cottage would also mean the loss of the ritual.

Finally, the owners of family cottages often perceive themselves as part of something larger than a piece of real property that is defined by metes and bounds. All of these cottages are situated within larger communities. One of the goals of place attachment<sup>43</sup> theorists has been to establish what this larger community means to second-home owners and seasonal residents. Place attachment researchers describe shared identification with neighbors and other property owners as an important component of the cottage experience. In the study of second-home owners in the Hayward Lakes area of Wisconsin, a number of respondents emphasized that they had “more friends and more social life” at their second home than at their year-round home.<sup>44</sup> A study of second-home owners in Vilas County, Wisconsin found that cottage owners who “spend time at their property are more involved with their lake politically and recreationally, and are no less involved socially than year-round residents.”<sup>45</sup> Surveys have also shown that long-time cottage owners take particular pride in the length of their tenure. As one respondent whose family had owned their cottage for more than seventy years explained:

We're old-timers up here for most people. Yeah, we're a little more stable [than] all those people from Illinois, and we're not just the typical tourist that come in and bought a place and come up for a few years and then it's on the market again. We clearly have been here for a long, long time.<sup>46</sup>

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43 In the place attachment literature, a “place is a spatial setting that has been given meaning based on human experience, social relationships, emotions and thoughts.” Stedman, *supra* note 33, at 133 (referencing Yi-Fu TUAN, *SPACE AND PLACE* 6 (1977)). Place attachment theorists study “the meanings and attachments that an individual or a group has for a setting.” *Id.* Much of the research in the area focuses on *what* a particular setting means to individuals, as well as on *how much* the setting means to the individual. *Id.*

44 See Williams & Van Patten, *supra* note 29, at 39.

45 See Stedman, *supra* note 33, at 138. Much of the empirical research on place attachment and second homes is conducted in the Upper Great Lakes States of Michigan, Wisconsin, and Minnesota. This is likely because the large number of inland lakes in these three states (more than 36,000 in total) have created ample opportunities for waterfront property development. See Bradley A. Shellito, *Second-home Distributions in the USA's Upper Great Lake States: Analysis and Implications*, in MULTIPLE DWELLING AND TOURISM, *supra* note 29, at 196–97.

46 Williams & Van Patten, *supra* note 29, at 39.

Place attachment theorists describe such respondents as having a “continuity and sense of rootedness made possible by a lifelong accumulation of experiences in a place.”<sup>47</sup> This attachment to the larger community is another reason that family cottages are integral to identity.

## 2. Tenancy in Common Law in Action

Now let us assume that a family cottage (or summer home, or cabin, or whatever you prefer) is owned by a woman we will call Kate, who has two adult children, Ann and Rob. Kate’s will makes a couple of specific bequests to friends and charities and passes the bulk of her property through an extremely common but legally unsophisticated residue clause that leaves “everything else to my two children.” Alternatively, Kate could die before she writes her will so that Ann and Rob take all her property under state intestacy laws. Regardless of whether Kate dies intestate or with a simple residue clause, Ann and Rob take the property as tenants in common, which is the default form of ownership for all jointly held property.

Let us also give Ann and Rob something to disagree about, perhaps perennially. There is plenty to choose from: whether to replace porch furniture or re-shingle the roof; what it means to “leave the place clean”; whether to pay someone to rake leaves or to do it themselves; who gets to use the cottage over the Fourth of July. Ann and Rob have to reach some resolution about each of these issues to successfully continue the co-tenancy. Moreover, because they are locked into a bilateral monopoly, they can only negotiate with each other.

According to standard doctrine, bilateral monopolies are less worrisome when the parties locked into the monopoly are relatives who have arrived at joint ownership because of inheritance. The bilateral monopoly is “mitigated” because we expect “more cooperation between persons united by bonds of affection.”<sup>48</sup> Robert Pollack, who studies families and marriage, has identified four reasons why familial bonds tend to encourage cooperation.<sup>49</sup> First, family members are well positioned to punish and deter noncooperative behavior, presumably because expulsion from the family network is particularly costly. Second, families are likely to have a great deal of information about a member’s character and history, which reduces the transaction costs associated with the informal interactions that yield coopera-

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47 *Id.*

48 RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 85 (5th ed. 1998).

49 See Robert Pollack, *A Transaction Cost Approach to Families and Households*, 23 J. ECON. LITERATURE 581, 585–88 (1965).

tion. Third, background social norms favor loyalty toward one's family. Fourth and finally, humans may have evolved to behave altruistically towards family, particularly those who share the same gene pool. The law relies on these familial ties to reduce the transaction costs associated with negotiation and to foster cooperation.<sup>50</sup>

Balfe's seventeen-state survey of cottage owners provides some support for the proposition that family members who jointly own property are more likely to cooperate than co-owners who are at arms length. For example, one of Balfe's respondents explained:

At Christmas, when the whole family was assembled, my grandfather distributed Monopoly money to everyone for a mock auction to get an idea of how to divide the estate in his will, according to what people valued most . . . . [P]resumably, spouses and their children could combine their money to bid on the same thing if they wanted to, which is the only way that just one family could get the summer house. Well, no family got together for such a bid . . . maybe because no one wanted to exclude their siblings and cousins from sharing it. So in one way the mock auction was inclusive, even if it was great fun. It was also very instructive: Grandfather's view was that you can only keep this going with creativity, not with law, and that legacy is going to help us settle the issues now that the younger generations are in charge.<sup>51</sup>

Here is a respondent who is clearly anticipating that familial bonds and a grandfather's legacy will foster cooperation.

Familial bonds are not always a panacea, however. Some of Balfe's respondents reveal substantial inability to cooperate with their co-owners: "[m]uch as I love my brother, this [place] is driving us apart";<sup>52</sup> or "[w]e got along fine until my parents died and my sister

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50 Sara Singleton and Michael Taylor have surveyed the empirical literature on what makes for a successful commons. They observe that the group who uses the commons is likely to have: (1) shared beliefs; (2) a stable set of members; (3) an expectation that they will continue to interact for some time; and (4) interactions that are multiplex and unmediated by third parties. See Sara Singleton & Michael Taylor, *Common Property, Collective Action, and Community*, 4 J. THEORETICAL POL. 309, 315 (1992). Singleton and Taylor emphasize that they are not seeking to describe "a group of people who are necessarily close or well disposed to one another, [or] whose relations are warm or even amicable." *Id.* Their description therefore embodies groups that are far broader than just families. Still, many families are likely to fit Singleton and Taylor's description of the kinds of groups that successfully manage commons.

51 BALFE, *supra* note 18, at 131-32.

52 *Id.* at 159.

and brother and I inherited the place. . . . Now we have disagreements all the time.”<sup>53</sup> One interviewee explained,

My mother is 85 and she can't deal with the rivalry my sister and I feel about the place . . . . She just says, “Can't you just love each other?” We do, of course, but that doesn't settle anything about different standards of maintenance or improvements and all that.”<sup>54</sup>

Estate planning guides recount similar cautionary tales, with siblings and cousins fighting over who will use the cottage when; how particular financial obligations should be shared; how the property should be maintained; and so forth.<sup>55</sup>

This is where partition—the standard doctrine's other solution to the bilateral monopoly problem—kicks in. In the event that the co-tenants either cannot cooperate or do not wish to, each co-tenant has the unilateral right to exit the tenancy. If, say, Ann files a partition action, a court will either order the property to be sold at fair market value (a partition by sale) or decree that it be physically divided between the tenants (a partition in kind). In theory at least, the unilateral right to partition eliminates the bilateral monopoly problem because Ann and Rob are not truly locked in. If negotiations over July 4 become unbearable, then one sibling can file for partition and altogether exit the tenancy. Moreover, in many cases exit will not even require the actual filing of a partition action. Even a sibling who prefers that a tenancy continue may capitulate to its end when formal court action seems inevitable. Once the tenancy ends, of course, Ann and Rob are “unlocked” and have no need to consult each other about July 4. Moreover, the partition makes the property private on both the inside and outside: each co-tenant is awarded either a discrete portion of the property or a proportional share of the property's fair market value.

Hornbook property doctrine states that most jurisdictions presume that physical division of the land is the appropriate remedy in partition actions; a court only orders a partition by sale if in-kind division would be inequitable to at least one co-tenant.<sup>56</sup> In practice, however, a partition in kind appears to be the exception rather than

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<sup>53</sup> *Id.* at 163–64.

<sup>54</sup> *Id.* at 133.

<sup>55</sup> See, e.g., HOLLANDER ET AL., *supra* note 24, at 16–22 (telling the “parable” of a threatened partition action between siblings and ending with the sentence, the “siblings are still not speaking”).

<sup>56</sup> See Phyllis Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 WASH. U. L.Q. 737, 753–54 nn.103–09 (2000); Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black*



the rule.<sup>57</sup> The de facto preference for a partition by sale is rooted in concerns about economic efficiency and individual wealth maximization. For the typical tenancy in common, undivided land will be worth more than the sum total of its aggregate parts.<sup>58</sup> Empirical investigation has further suggested that even when land appears to be a good candidate for partition in kind, physical division often works to the disadvantage of one co-tenant, at least in financial terms.<sup>59</sup> Moreover, applicable state statutes substantially ease the burden of those seeking a partition by sale by broadly defining what makes a partition in kind injurious to a co-tenant.<sup>60</sup> Phylliss Craig-Taylor has surveyed the reasons that courts commonly cite for ordering a sale instead of a physical division. They include “the existence of a dwelling,” “topographical features [which] would render the division substantially unequal in value,” and “unique resources, such as . . . water sources [or] hunting and fishing grounds.”<sup>61</sup> Courts also order a sale when physical partition would require “a division of property into so many pieces that the property’s economic value is diminished” or would result in one or more parcels being landlocked or removed from “accessible rights-of-way.”<sup>62</sup> Given this list of concerns, it is not difficult to imagine why a court would be inclined to order that a property be sold rather than physically divided.

When the property at issue is identity property, the de facto preference for partition in kind complicates the bilateral monopoly problem. In a partition in kind, Ann and Rob can exit the *tenancy* without having to exit all four corners of the *land*. If courts favor a sale of the property instead of physical division, however, then exit means *actually leaving* the land—i.e., losing the identity property. How this reality affects the dynamics of the bilateral monopoly will vary between co-tenancies.

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*Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 513 & n.40 (2001).

57 See Craig-Taylor, *supra* note 56, at 753–54; Mitchell, *supra* note 56, at 513–14 & n.41.

58 See Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 665 (1998).

59 See Manel Baucells & Steven A. Lippman, *Justice Delayed is Justice Denied: A Cooperative Game Theoretic Analysis of Hold-Up in Co-Ownership*, 22 CARDOZO L. REV. 1191, app. B (2001); see also Thomas J. Miceli & C.F. Sirmans, *Partition of Real Estate; or, Breaking Up is (Not) Hard to Do*, 29 J. LEGAL STUD. 783, 787–88, 795–96 (2000) (discussing the economic trade-offs in partition in kinds and partitions by sale).

60 See Craig-Taylor, *supra* note 56, at 753 (listing, among others, statutory reasons such as prejudice, inconvenience, practicality, justice, equity, and interest).

61 *Id.* at 755–56.

62 *Id.*

In some instances—particularly when no co-tenant is confident that she could outbid the others at a partition sale—the mere threat of having to exit may be powerful enough to compel cooperation. As an example, consider this story from one of Balfe’s respondents:

In my years as an estate lawyer in Boston, I saw so much acrimony over shared inheritance that in my own will only one of my children will get this place. . . . So in six months after I die, when my estate is probated, the four children will “duke it out” in lottery-fashion as to which one gets all of it. That may seem unfair, but it was the way we always used when dividing scarce desirables when there wasn’t enough to go around among the children, whether it was a single piece of candy or use of the family car on Friday night. They’ll accept it as fair. . . . Now of course, nothing need prevent them from getting together before the “duking” to make some other arrangement among themselves, so that all can use it in some fashion if they want.<sup>63</sup>

This family patriarch is counting on the threat of winner-take-all and the resulting forced exit by the others to provoke cooperation.

An equally plausible scenario, however, is that the threat of a forced exit will foster a *lack* of cooperation. If the filing of a partition action means the loss of the identity property, then partition becomes a nuclear option that needs to be avoided at all costs. This makes it easier for, say, Rob, to shirk obligation and engage in other uncooperative behavior, because Rob knows that he is likely to be let off the hook so that a fight does not culminate in a partition action. Here are the words of a Balfe respondent who is worried that a strapped-for-cash sibling might force a sale:

[My brother] . . . insists that the place be rented sufficiently to cover most of its expenses. Well, that means very little time for us to use it, to begin with, and because I have fewer family responsibilities and also live closer, I’m the one to go down at change-over day every couple of weeks to make sure the departing tenants have left it in good order. That isn’t always the case, so I have to deal with the mess, and then, even though I have come to resent the tenants, I also have to deal with the realtors to promote its rental as much as possible. Much as I love my brother, this business . . . makes me feel like I’m pimping the family property.<sup>64</sup>

Further complicating matters is that the cottage may be identity property for one sibling but not for the other. These differing subjec-

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63 BALFE, *supra* note 18, at 130–31.

64 *Id.* at 159.

tive values will influence the extent to which each co-tenant is willing to compromise and cooperate.<sup>65</sup>

If a partition in kind—not a partition by sale—were the likely outcome of a partition action, partition might be a reliable means of solving the bilateral monopoly problem. Co-tenants would suffer the loss of some portion of the identity property, but would not lose *all* of it. When “partition” means partition by sale, however, the co-tenants may perceive themselves as locked into the tenancy—and into an ongoing relationship with their co-tenants—because a sale is simply unthinkable. In this case, negotiations with co-tenants are likely to be complex and frustrating. In economic terms, the bilateral monopoly will be robust and transaction costs will be correspondingly high.

Hanoch Dagan and Michael Heller, who have written extensively about commons property, would describe the right of partition as serving a function that is larger than mitigating the bilateral monopoly problem. Instead, they describe the right to exit as reflecting crucial liberal values. As they see it, “exit enables individuals to determine their own group associations and remain in the groups they choose out of their free choice only.”<sup>66</sup> They write that such exit is particularly important when entry into the commons property is involuntary, such as when heirs inherit property.<sup>67</sup> For Dagan and Heller, the right of exit provides “the mobility that is a prerequisite for liberty.”<sup>68</sup>

### B. *Tenancy in Common Opt Out*

What is striking, however, is the extent to which heirs of identity property—real life Anns and Robs—appear willing to voluntarily restrict their own right of exit and to rewrite the other default rules of a tenancy in common. This section examines the available evidence about how owners of family cottages contract to modify the rules governing their property. Although we lack good empirical data on how many co-tenants enter the sort of agreements this section describes, there is enough interest in them to have spawned law firms that specialize in “cottage planning.”

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65 See, e.g., HOLLANDER ET AL., *supra* note 24, at 13, 18 (describing practice experiences where all but one child was interested in inheriting a share of the cottage).

66 Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L. J. 549, 570 (2001). Dagan and Heller, however, do not support an unfettered right to partition. Instead, they favor restrictions on partition that are cooperation-enhancing, such as cooling-off periods, exit taxes, and rights of first refusal. *Id.* at 597–601.

67 *Id.* at 597.

68 *Id.* at 570.

Co-tenants who seek legal advice about how to preserve the family cottage for themselves or future generations typically are advised to establish a trust, a limited partnership, or a limited liability company (LLC). Other co-tenants simply enter into formal contracts that govern their actions with respect to the property. Each of these forms substantially differs from the others, both in terms of what is necessary to establish the legal entity and how the entity functions once established.<sup>69</sup> This section draws heavily on what co-tenants tend to agree to when they use an LLC, a current “hot” vehicle among estate planners. For our purposes, however, the precise nature of the legal form is unimportant. Instead, what matters is how co-tenants choose to define their obligations to each other and their right of exit.

The law of tenancy in common mostly positions co-tenants to act as independent operators. Except for that which is essential to the preservation of the property—mortgages, taxes, and other carrying costs, to which all tenants must contribute—each tenant is free to make her own decisions and then see how the other tenants will respond. Will they contribute to a repair or improvement? Show up on July 4? Under the law of tenancy in common, each of these decisions is left to the individual, not to the group.

This “independent operator” model ignores that when heirs choose to hold on to real property with any kind of dwelling, they became members of an interdependent household. Robert Ellickson has written about the internal dynamics of households, which he defines as a “set of institutional arrangements, formal or informal, that governs relations among the owners and occupants of a dwelling space where occupants usually sleep and share meals.”<sup>70</sup> These institutional arrangements address two related issues: those involving ownership and those involving occupancy. These often overlapping issues are a source of considerable relational complexity, particularly when there are “multiple owners of the occupied real estate, and some or all of them may not be occupants.”<sup>71</sup> The individuals involved in these sorts of households have to manage relationships between co-occupants, co-owners, and between co-owners and occupants<sup>72</sup> (or, in the parlance of a tenancy in common, the co-tenants in and out of possession).

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69 For a good overview, see HOLLANDER ET AL., *supra* note 24, at 67–80.

70 Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L. J. 226, 230 (2006).

71 *Id.* at 234.

72 *See id.* at 234–35.

Household participants benefit from coordinating their efforts; in this way, each individual is able to extract the largest possible gains from the household.<sup>73</sup> Ellickson argues that household participants “can be expected to gravitate toward rules that serve to minimize the sum of (1) deadweight losses caused by failures to exploit potential gains from associating with each other, and (2) transaction costs.”<sup>74</sup> To accomplish this, household participants try to ensure that each will internalize the externalities caused by her own behavior; that those who are most skilled at a particular task are assigned that task; and that particular obligations are imposed on those with private information.<sup>75</sup> Thus a household might impose negative sanctions on a household member who dirties the kitchen and fails to clean it up or reward a member who cleans the front closet; assign the task of paying the bills to the member with the best accounting skills; or require a member who plans to make capital improvement to acquire the consent of others before proceeding. Ellickson further notes that as the size of the household grows, it becomes increasingly difficult to coordinate about such matters.<sup>76</sup> For this reason, participants in larger households tend to gravitate toward “hierarchically organized household relationships.”<sup>77</sup>

What Ellickson discusses is reflected in the formal arrangements that co-tenants make with respect to the use and management of family cottages. Most formal agreements appear to be aimed at establishing a management system that lowers transaction costs and prevents free riding. For example, a popular cottage planning guide advises that once the number of co-tenants surpasses three, any management system organized around direct democracy and majority rule becomes “unwieldy.”<sup>78</sup> As an alternative to direct democracy, these co-tenants are advised to opt for a representative democracy in which decisions are made by representatives of each family branch.<sup>79</sup> If the number of branches exceeds three—the number at which one co-tenant, one vote becomes unwieldy—the representatives of each branch are

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73 *See id.* at 297.

74 *Id.* at 298.

75 *See id.* at 298–99.

76 *See id.* at 308.

77 *Id.*

78 HOLLANDER ET AL., *supra* note 24, at 131. Of course, if a family cottage is passed along from one generation to the next, the number of co-tenants continues to multiply.

79 In estates and trusts parlance, a mother who devises her cottage to her four children has left the cottage to the four “branches” of her family. *See generally* Ellickson, *supra* note 70, at 309 (discussing how households with large numbers of members establish “centralized hierarchy to coordinate action.”).

advised to appoint a small “management committee” which has the authority to handle all the day-to-day operations of the property. Representatives are simultaneously advised to create a reserve list of particularly significant decisions that must be made by a vote of all representatives: for example, the decision to make a capital improvement or to rent the cottage.<sup>80</sup> Co-tenants might further calibrate the total vote requirement to the significance of the decision, so that some decisions require unanimity or a supermajority, while others require only a simple majority.<sup>81</sup>

The branch concept also influences the assignment of household tasks, scheduling, and the disciplining of members who fail to pay their share of costs. Representatives assign chores such as writing checks or arranging for repairs to the best-suited individual. With respect to use, the typical LLC operating agreement allots a specific amount of use time to each branch and leaves it to members of the branch to allocate the time among themselves.<sup>82</sup> To prevent free-riding, many operating agreements further provide that a branch’s right to use depends on the entire branch having fulfilled its financial obligations, so that branch members have incentive to police and make good on the obligations of their own.<sup>83</sup> In addition, some operating agreements reserve the right to force a defaulting household member to sell his or her share, usually at a price that is far below fair market value.<sup>84</sup>

In addition to creating management rules that recognize the interdependency of all involved in the household, co-tenants who opt for an alternate form of ownership appear willing to starkly reduce their opportunity to exit the property. With respect to exclusion, most operating agreements define who can be a member of the LLC. A typical membership clause might state: “No person who is not a descendant of [founder] may become a Member of this company.”<sup>85</sup> Or, in a slightly less restricted version: “No person who is not a descendant of [co-tenant] may become a Member of this company without the unanimous consent of the members.”<sup>86</sup> A more nuanced version of this sort of clause describes three categories of transfers: those that are automatically permitted (such as a transfer to descendants); those that are permitted only after obtaining the consent of other members

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80 See HOLLANDER ET AL., *supra* note 24, at 130–31.

81 See *id.* at 130–31.

82 See *id.* at 96.

83 See *id.* at 98.

84 See *id.* at 98–99.

85 *Id.* at 92.

86 *Id.*

(such as a transfer to stepchildren); and those that are prohibited (such as a transfer to an ex-spouse).<sup>87</sup> These clauses, in either their strong or weaker versions, seek to ensure that the family cottage remains exactly that: a cottage that is owned by either de jure or de facto family and no one else.

It is also customary for operating agreements to greatly reduce the opportunity of individuals to profit from their share of the cottage. To begin, the possibility of unilateral partition is completely off the table; the cottage may be sold only if either all or a majority of members consent. As suggested above, a member who wishes to sell her share may do so, but often only to other family members.<sup>88</sup> A typical operating agreement might further fix the sale price at twenty to fifty percent less than fair market value and allow the purchasers to make a small down payment and amortize the remaining balance.<sup>89</sup> Some agreements might also constrain the timing of sales to ensure that the LLC never has more than one outstanding debt at a single time. These constraints on the ability to recognize financial gain

“emphasize[ ] that the family’s interest in preserving the cottage is more important than the economic benefit the cottage confers upon a single heir . . . ; 2) discourage[ ] an heir from selling . . . [and] (3) compensate[ ] the rest of the family for the burden of finding the money to pay off the former owner through the advantageous price at which the company buys the interest.”<sup>90</sup>

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87 See *id.* at 93–96.

88 See Dagan & Heller, *supra* note 66, at 571 (“[T]here are cases in which a limitation on entry so sweepingly restricts alienability that it is practically tantamount to a substantial limitation on exit. In these cases, the liberal commitment to free exit . . . condemns the limitation.”).

89 See HOLLANDER ET AL., *supra* note 24, at 125–26. If these discounts seem steep, compare them to another example. During the summer of 2008, I requested in a post on the legal blog *Concurring Opinions* that readers email their own tales of co-ownership and family cottages and detail any agreements they had made regarding use and management. One individual reported he and his relatives had agreed that anyone who wanted to exit the tenancy had to surrender his or her share to the other siblings; the tenant would receive no financial compensation. These terms were recorded in a formal contract between the co-tenants. Of course, there is a substantial possibility that a court would refuse to enforce such terms on the ground that they unreasonably restrain alienation. Yet the contract is still notable for the extent to which it elevates the family’s interest in retaining the property over the individual interests of each co-tenant. The co-tenant who brought the arrangement to my attention assured me that the group (comprised of siblings and first cousins) would not hesitate to hold each other to the terms of the contract. He also mentioned that, but for the agreement, one co-tenant would presently be interested in selling her share.

90 *Id.* at 124.

In sum, these constraints elevate the familial interest in retaining the identity property over the individual economic interest of any single member.

These operating agreements make it difficult for future generations to exit the property. In the absence of such an agreement, an individual might devise identity property to her children as co-tenants, who might then pass the property on to their children. Neither devise would represent an attempt to bind a future generation. The testators may hope that the descendants continue to hold the property, but each generation would be free to partition and engage in their own private ordering within the broad parameters of the tenancy in common default rules. In contrast, LLCs and the other alternatives to a tenancy in common are typically designed to extend beyond the current generation, sometimes into perpetuity.<sup>91</sup> Indeed, often the primary reason that individuals resort to such legal structures is to guard against the possibility of one heir forcing a partition.<sup>92</sup> Of course, trusts and the various corporate forms can be modified or terminated, depending on how the organizing documents are drafted. But through organizational alternatives to a tenancy in common, the dead hand operates to discourage or prohibit alienability and to preserve the identity property for future generations.

In addition to maximizing the odds of the identity property remaining in the family, restrictions on the right to exit are also aimed at fostering cooperation between co-owners. Elinor Ostrom has conducted extensive empirical studies of commons property, albeit commons property that is much larger in geography and group membership than what is contemplated in this Article.<sup>93</sup> Ostrom and others have documented many successful commons, with “success” meaning that individuals cooperate “to achieve a goal that is in both their collective and their individual interest to pursue, [even when] the costs to individuals . . . may exceed at least the short-term benefit of cooperating.”<sup>94</sup> In many of these success stories, the ability of the individual to exit from the commons property is sharply limited.<sup>95</sup> In some instances, the rights that individuals have to the commons are

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91 See *id.* at 72–73.

92 See *id.* at xii.

93 Ostrom’s work primarily examines what can be broadly described as natural resources, such as irrigation systems, groundwater basins, and inshore fisheries. See ELINOR OSTROM, *GOVERNING THE COMMONS* (1990).

94 Margaret A. McKean, *Success on the Commons: A Comparative Examination of Institutions for Common Property Resource Management*, 4 J. THEORETICAL POL. 247, 248 (1992).

95 See Dagan & Heller, *supra* note 66, at 566.



simply inalienable. In others, rights to the commons can only be sold to a limited number of eligible individuals.<sup>96</sup> Such restrictions on exit may “enhance [members’] interest in making the best possible use of such rights”<sup>97</sup> and “strengthen the bonds among co-owners and reinforce their rights in the commons, thus facilitating their cooperation.”<sup>98</sup>

One way to understand the ways in which these agreements modify the default rules of a tenancy in common is through the lens of property rules and liability rules. Under a liability rule, the holder of an entitlement is told how much she has to be paid to compel the loss of the entitlement.<sup>99</sup> Under a property rule, the holder of an entitlement continues to have the entitlement until she allows someone to purchase it.<sup>100</sup> Property rules allow the holder of a right to determine the value of that right; liability rules allow someone else (typically a court) to place a value on the right. Every tenancy in common potentially has two competing entitlements: the right to own the tenancy property and the right to exit the tenancy. The law of partition entitles a co-tenant to exit through partition and protects the other co-tenant’s interest in the tenancy property with a liability rule<sup>101</sup>: so long as the co-tenant is paid her proportional share of fair market value, she has to forfeit her right to the tenancy property. The typical formal operating agreement, however, both makes the terms of a sale unfavorable to the tenant who wishes to exit and narrows the number of individuals to whom the property can be sold. These agreements thus seek to tilt the scales in favor of those who wish to continue the joint ownership and to protect them with a property rule. Those who wish to continue joint ownership may decide to relent and allow a member to exit under terms that are more favorable than those specified in the agreement, but then they—not a court determining fair market value—will determine what price must be paid to bring joint ownership to an end.

Of course, co-tenants do not need an LLC, a trust, or other corporate form in order to reject partition and the other default rules of a tenancy in common. The default rules allow for substantial private ordering. For example, just because tenants in common have an

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96 See McKean, *supra* note 94, at 261.

97 *Id.*

98 Dagan & Heller, *supra* note 66, at 566.

99 See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

100 See *id.*

101 See ROBERT C. ELLICKSON ET AL., PERSPECTIVES ON PROPERTY LAW 247 (3d ed. 2002).

equal right to possession does not necessarily mean they will exercise that right. Instead, they are likely to negotiate about when each co-tenant will use the property. A tenant who wants to cash out may be willing to accept less than the fair market value of her share, either because she wants the property to stay in her family or because she is selling to her siblings or cousins, or for some other reason. A tenant also may feel compelled to contribute to an improvement that she would not have chosen to make, either because she recognizes that she will benefit from the improvement or because she feels some obligation to the family member. We can imagine hundreds of ways in which co-tenants might deviate from the rules of a tenancy in common; they do not need a legally-enforceable agreement to do so.

In a similar vein, we can question the practical effect of these legal forms. Assume that one of the LLC members has fallen on hard times and is unable to pay his fair share of the cottage expenses. Will the other members penalize his branch of the family by cutting off access to the property? Will they really force their brother or cousin to sell his share? As for the member who is determined to make an improvement, will the other members actually prevent him from doing so at his own expense? The legal agreement is relevant only to the extent that the would-be co-tenants choose to follow and enforce it. But, as already described, the mere existence of the agreement changes the background rules and tilts the legal entitlements in favor of those prefer to enforce its terms.

Finally, the content of such formal agreements may teach a larger lesson about what is actually necessary to foster cooperation among co-owners and the value that some co-tenants place on the liberal value of exit. Dagan and Heller have raised the question of whether a commons that substantially restricts exit is worth having.<sup>102</sup> Ellickson has further argued that the right of exit plays an important role in households, because individuals are more willing to enter a household relationship when they know they can later exit and because a participant's threat of exit helps deter others from denying her a "satisfactory share of household surplus."<sup>103</sup> As documented above, however, co-tenants in identity property agree to stark restrictions on exit. The possibility of a straightforward exit through partition is gone. The number of individuals to whom shares can be sold or transferred is severely limited.<sup>104</sup> The amount for which shares can be sold is sub-

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102 See Dagan & Heller, *supra* note 66, at 566.

103 Ellickson, *supra* note 70, at 271.

104 Estate planning guides tend to characterize these restrictions as barriers to entry, not exit. See HOLLANDER ET AL., *supra* note 24, at 92–93 (chapter subsection

stantially discounted. An individual may not be able to sell or exit on her preferred timetable; rather, the timing of her sale is dictated by how much debt the commons property has at any one time. The extent to which co-tenants who enter into these agreements voluntarily restrict exit suggests that their instincts tell them what Ostrom's work on the commons suggests: that restrictions on exit—rather than the knowledge that people can leave if they want to—is what fosters cooperation inside the commons.

## II. THE CONSEQUENCE FOR PROPERTY LAW

The legal system is not blind to the identity nature of property. Rather, the law has long recognized that some possessions cannot be reduced to their market value and that certain kinds of property have strong cultural or identity components. Contract law, for example, recognizes specific performance as the appropriate remedy for breach of an agreement about "heirlooms, family treasures and works of art that induce a strong sentimental attachment."<sup>105</sup> When an action for tortious acquisition or wrongful detention of property involves items of particular sentimental value, tort law similarly recognizes that the only adequate remedy is the award of possession of the personalty.<sup>106</sup> Both of these approaches to remedies reflect that money damages cannot always compensate for an item's subjective value.

In theory at least, property law makes allowances for the sentimental value of jointly owned property by favoring partitions in kind over partitions by sale and thereby allowing individuals to keep at least a portion of the property.<sup>107</sup> As already described, however, the pref-

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entitled "Who is in the Cottage Club?"). As Dagan and Heller have noted, however, "there are cases in which a limitation on entry so sweepingly restricts alienability that it is practically tantamount to a substantial limitation on exit." Dagan & Heller, *supra* note 66, at 571.

105 *Houseman v. Dare*, 966 A.2d 24, 27 (N.J. Super. Ct. App. Div. 2009) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. b (1981)). Specific performance in such a situation is particularly appropriate "because money damages cannot compensate the injured party for the special subjective benefits he or she derives from possession." *Id.*; RESTATEMENT (SECOND) OF CONTRACTS §§ 357, 358, 364, 365 (1981). "The special subjective value of personal property worthy of recognition by a court of equity is sentiment explained by facts and circumstances—such as the party's relationship with the donor or prior associations with the property—that give rise to the special affection." *Houseman*, 966 A.2d at 27 (citing *Burr v. Bloomsburg*, 101 N.J. Eq. 615, 621–25 (N.J. Super. Ct. 1927); JOHN NORTON POMEROY, A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS §§ 12, 34 (3d ed. 1926)).

106 RESTATEMENT (SECOND) OF TORTS § 946 (1979).

107 See *Delfino v. Vealencis*, 436 A.2d 27, 30 (Conn. 1980); *Houseman*, 966 A.2d at 27–28; 4 THOMPSON ON REAL PROPERTY, *supra* note 8, §§ 38.04–05.

erence for in kind partitions is de jure and not de facto.<sup>108</sup> Moreover, the on-the-ground judicial preference for a partition by sale is understandable. As a practical matter, much of what might be identified as “identity property” is unlikely to neatly lend itself to physical division. Courts may also find themselves torn between co-tenants who value property mostly because of its “identity” nature and co-tenants who value property mostly because of what it could fetch in the economic marketplace. In addition, the value that stems from the identity nature of property is highly subjective. As a matter of judicial efficiency, it is entirely unsurprising that a court would gravitate toward the concreteness of a relatively simple economic inquiry: will the property be worth less when it is divided into smaller parcels?<sup>109</sup> Empirical work further suggests that when physical division is viewed with the benefit of hindsight, one or more co-tenants are often awarded parcels of land that from a purely dollar-based perspective are worth substantially less than what was awarded to other co-tenants.<sup>110</sup> But while the de facto preference for partition by sale might be understandable, it also means that property law lacks a satisfactory default scheme for situations in which identity property is inherited by more than one individual.

One important question is whether the substance of the formal agreements discussed in the previous Part should spark change in the default rules that govern tenancies in common, at least as applied to identity property. Perhaps, for example, we could modify the exit rules to give trump cards to those co-tenants who wished to continue to own the property or change the default rules to reflect what appear to be the popular preferences regarding use and management of the property. The content of these formal agreements, however, has an important empirical limitation: it only provides a snapshot of the varied preferences of those co-tenants who choose to enter written

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108 See *supra* notes 56–62. One writer has argued that a partition by sale also accounts for sentimental value because co-owners with emotional attachment to the property can “retain possession by outbidding all comers. Therefore, the market price . . . reflect[s] both the objective and subjective values of the property.” Candace Reid, Note, *Partitions in Kind: A Preference Without Favor*, 7 CARDOZO L. REV. 855, 878 (1986). This analysis might be sound if the property ultimately went to the person who bid the highest proportion of their total wealth for the property. But this is not how partition sales work; instead, whoever bids the highest absolute dollar amount wins the property. As such, a poor co-tenant stands little chance against a rich one.

109 See Miceli & Sirmans, *supra* note 59, at 784 (reviewing partition cases and concluding the trend of favoring sales over physical division does a good job of reflecting the trade off between “preserving the optimal scale of the parcel under forced sale and the protection of subjective value under partition in kind”).

110 See Baucells & Lippman, *supra* note 59, at 1191.

legal agreements. Many co-tenants will have arrived at their own arrangements without reducing them to writing.

The current default rules encourage and allow private ordering. The law simultaneously confers little benefit on co-owners and imposes scant obligation. Each co-tenant is entitled to possession, to her proportional share of all profits, and to unilaterally end the tenancy; each co-tenant also is obligated to pay her proportional share of the property's carrying costs.<sup>111</sup> The co-tenants themselves must agree, either formally or informally, to any additional benefits or obligations. While the content of written agreements may be indicative of the kind of bargaining among all co-tenants—including those who do not use a writing—such an assertion requires an empirical leap. In addition, the available data does not provide any information about the proportion of co-tenants who choose to opt out of the default rules, either through a written agreement or through something that is more like a gentleperson's agreement that neither party would ever contemplate trying to enforce in court.

Even if one were willing to make assumptions about all or a majority of co-tenants in identity property based on the content of the formal agreements discussed in the previous Part, there is a further complication. Although co-tenants in identity property appear to bargain about the same general subjects—use, management, and the right to alienate their shares—they reach radically different results. One group of co-tenants may agree that any individual who wishes to exit the tenancy must simply surrender her share to the remaining co-tenants;<sup>112</sup> this same group may also agree that a co-tenant who fails to pay her proportional share of the costs must similarly forfeit her interest in the tenancy.<sup>113</sup> Another group of co-tenants may agree that if one co-tenant is delinquent in paying her portion of costs, every person from that co-tenant's branch of the family is barred from using the property.<sup>114</sup> Yet another group may create an elaborate system for determining who is entitled to use the property when, but leave the default rules regarding partition and alienation intact.<sup>115</sup> No change to the default rules could accommodate these rich variations in co-tenant preferences.

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111 See discussion of the general rules that govern tenancies in common, *supra* notes 6–9 and accompanying text.

112 If this agreement were ever the subject of litigation, a court may strike these terms as an unreasonable restraint on alienation.

113 See *supra* note 89.

114 See HOLLANDER ET AL., *supra* note 24, at 144.

115 See BALFE, *supra* note 18, at 121.

There is one final consideration: the significance of a particular piece of property may vary from one co-tenant to the next. One co-tenant may covet the inherited property primarily because of what it embodies about self and family; while another may be much more interested in economic value. This of course also is true of Radin's personhood property: a landlord and tenant both will value an apartment, but the landlord's interest is more likely to reflect purely economic concerns. Personhood theory, however, is typically invoked to determine rights as between individuals with different legal interests in property, such as landlords and tenants, or creditors and debtors.<sup>116</sup> That co-tenants with identical legal interests will place different subjective values on the same piece of property is an additional complication.

This is not to suggest, however, that the law should do nothing more than what it already does for individuals who jointly inherit identity property. Property regimes often reflect relative judgments about a person's relationship to property. In a community property system, for example, property that is inherited or gifted is treated differently than property that is earned. A range of residential policies—from tenant protection laws to homestead exemptions—are rooted in the value judgments dictated by Radin's personhood theory. It is true, of course, that Radin is concerned about property whose loss actually harms the self or impairs self development or the ability to flourish, while the loss of identity property “only” causes particularized pain because of the extent to which the property is linked to one's sense of self and family. This difference between personhood property and identity property—and the reality that co-tenants with identical legal interests may have different relationships with the same piece of property—cautions against giving any one co-tenant the proverbial trump card. But these considerations should not prevent judges from approaching identity property differently than other devises and bequests.

Furthermore, while empirical evidence about the frequency with which co-tenants opt out of the default rules is incomplete, the market for planning guides advising them how to do so indicates genuine dissatisfaction with the rules.<sup>117</sup> Ever since Norman Dacey published

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116 See Radin, *supra* note 1, at 992–95 (discussing residential lease transactions); Stern, *supra* note 3, at 1142–43 (discussing homestead exemptions).

117 These planning guides include HOLLANDER ET AL., *supra* note 24; HUGGINS & BALFE, *supra* note 28; DOUGLAS HUNTER, *THE COTTAGE OWNERSHIP GUIDE* (2006); NIKKI KOSKI, *THE COTTAGE RULES* (2005); JOANNE PALMISANO, *CAMPS, COTTAGES AND CABINS* (2002).

*How to Avoid Probate!* in 1965,<sup>118</sup> estates and trusts reforms have been made with an eye towards reflecting how people prefer to manage their affairs and conduct business. Indeed, this has been one of the driving concerns behind the 1990 Uniform Probate Code and its subsequent amendments.<sup>119</sup> The modern trend in probate law is to respond to indications that traditional doctrine is failing some of those who are subject to its application.

The other reason why the law should do more for individuals who jointly inherit identity property has been highlighted already. Jointly-owned identity property provides fertile ground for arguments between co-tenants over how the property will be used and maintained and even whether the tenancy will continue.<sup>120</sup> These co-tenants are almost always related, either by blood or by adoption. As such, identity property—which is about family and a sense of one's history—can drive a wedge between family members. Margaret Brinig has written persuasively about the need for family law to encourage a “franchise model,” in which family members continue to care about each other, the family name, and even family property long after the legal bonds are broken by emancipation.<sup>121</sup> This sort of model, however, can only exist if our legal regime is willing to sacrifice some of its commitment to individualism and market-like behavior.<sup>122</sup> In this context, when there is evidence that default ownership rules contribute to strife between siblings and cousins and other relatives, the law should do what it can to ameliorate the discontent.

The next Part suggests responses to the special issues presented by identity property. The Part first recommends that, when identity property is the subject of a partition action, a court favor the ancient but now seldom-used remedy of a temporal partition over a partition by sale. Temporal partition may increase the length of time that tenants retain the property and tilt the dynamics of the tenancy in favor of those who do not wish to exit. The Part then suggests that probate courts encourage tenants in identity property to engage in a

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118 NORMAN F. DACEY, *HOW TO AVOID PROBATE!* (1965) (denouncing legal fees and other disadvantages of probate and urging individuals to place all of their assets in revocable trusts).

119 See DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 437 (8th ed. 2009) (discussing probate reform). For a concrete example of this responsiveness, see UNIF. PROBATE CODE § 2-502 (amended 1998) (allowing testators to have a will notarized instead of “signed by at least two individuals”).

120 See *supra* notes 52–55 and accompanying text.

121 See Margaret F. Brinig, *The Family Franchise: Elderly Parents and Adult Siblings*, 1996 UTAH L. REV. 393, 396.

122 See *id.* at 426.

process that would foster communication and consensus among them. This process would be aimed at heading off *future* disputes, as opposed to resolving a current dispute that would otherwise place the co-tenants in court. In some cases, the process would enable co-tenants with competing interests to successfully own and manage their identity property. Not all cases will have such happy endings, however; sometimes the process may result in a recognition that the tenancy should be terminated and the property sold to a third party. By encouraging communication and consensus, however, the process may prevent the family strife that can result from co-tenancies in identity property. The Part is not aimed at sketching out all the practical details of these two tools; rather, it suggests why the possibility of temporal partition and facilitated agreement are particularly useful in the context of inherited identity property.

### III. TREATING IDENTITY PROPERTY DIFFERENTLY

Return to the examples of siblings whose mother dies intestate or with a will that passes the identity property to her children though a class gift. If the law wants to foster cooperation between the siblings and increase their odds of retaining ownership of the identity property, one insight provides a blueprint for change: the law of tenancy in common treats co-tenants as independent operators, but co-tenants who enter alternative agreements seeking to perpetuate joint ownership emphasize their *interdependency*. The most effective legal reforms will explicitly acknowledge this interdependency, both during the probate process and in terms of the default rules that form the backdrop for any negotiations between the siblings.

#### A. *Temporal Partition*

As anyone who has puzzled over whether a remainder is vested or contingent knows, property has both physical and temporal dimensions. Whereas a partition in kind divides property according to its physical dimensions, a temporal partition grants someone the right to use the property for a particular period of time.<sup>123</sup> The remedy is an old one that has long been out of favor, primarily because of fears about inconvenience and potential inequities.<sup>124</sup> But when a co-tenancy in identity property deteriorates into an action for partition, a court that cannot partition the property should favor temporal parti-

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123 See Gillian Bean, Note, *Real Property*—Giulietti v. Giulietti—*Partition by Private Sale Absent Specific Statutory Authority*, 26 W. NEW ENGL. L. REV. 125, 136 (2004).

124 See William H. Loyd, *Partition*, 67 U. PA. L. REV. 162, 174 (1919).



tion over a partition by sale. A temporal partition may increase the length of time that tenants with an identity connection to the property are able to own it. Even more significantly, the possibility of a temporal partition may substantially alter the dynamics of the co-tenancy.

In the typical temporal partition, the co-tenant who wanted out would instead receive the lifetime rental value of her interest in the property, with the interest passing to the co-tenant's heirs or devisees at death. In the most optimistic telling, the temporal partition would allow the other co-tenants to retain the lifetime interest of the departing co-tenant. Depending on the age of the exiting co-tenant, the value of the lifetime interest may be substantially less than the value of the entire interest. Upon the exiting co-tenant's death, the property interest would pass to that co-tenant's heirs, who would have an interest in the identity that the property represents.

Of course it does not require much creativity to imagine how this rosy tale may go awry. If the co-tenants who want to keep the property cannot afford it outright, they also may not be able to afford a temporal slice. Depending on the nature of the property, the lifetime interest could be sold to a third party and the co-tenants may find the prospective of dealing with an outsider extremely unattractive. The exiting co-tenant also may devise the interest to someone who does not want it (or whom the remaining co-tenants do not wish to have it), which simply sets the stage for additional negotiations between co-tenants or a future partition action. If, however, the co-tenants who wish to keep the property are able to purchase the lifetime interest, a temporal partition quite literally offers the advantage of "buying time." At a minimum, those who care about the identity property will own it for longer than they otherwise would. Moreover, if the departing co-tenant's interest in the identity property is passed on to someone who wishes to sell it, the other co-tenants may have come into a position to be able to purchase the entire interest outright.

How a temporal partition might actually play out, however, is less important than how the *possibility* of a temporal partition may affect co-tenant behavior. Most disputes between co-tenants do not culminate in a partition action; instead, they are resolved through private bargaining, with each party knowing that the other has the right to exit through a partition action.<sup>125</sup> Part I previously discussed how the judicial preference for a partition by sale affects bargaining between co-tenants.<sup>126</sup> In one account, the threat of losing the property to a sale encourages co-tenants to cooperate so that no one

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125 See Ellickson, *supra* note 70, at 310.

126 See *supra* Part I.A.2.

chooses to end the tenancy. In the alternative account, co-tenants may be so anxious to avoid a sale that they allow a co-tenant to shirk obligation and generally tolerate behavior that they otherwise would not, but for the identity nature of the property at stake. The possibility that a judge may temporally partition property, rather than ordering that the whole be sold to the highest bidder, may alter these dynamics.

Specifically, the threat of partition—currently the nuclear option for those who wish to retain the identity property—becomes much muddier. At present co-tenants bargain against a backdrop in which complete exit from the property is assured; a co-tenant merely has to elect to do so. If judges would consider and sometimes actually order a temporal partition of identity property, the calculations of negotiating co-tenants become more complex. A co-tenant inclined to end a tenancy would have to account for the possibility that a judge would allow only partial exit (and partial financial gain) and that the remainder interest would be in the co-tenant's estate. This diminishment—although not abolition—of the right of exit may serve to foster cooperation within the commons.

### *B. Facilitated Agreement*

Members of a household—where interdependency is plain—routinely disagree about how to manage their affairs. In his work on households, Ellickson has written about how households of three or more prefer to resolve difficult issues. In the main, households have three choices: they can agree that their decisions will be dictated by majority rule, by unanimous vote, or by consensus, such as discussion of the issue until no member objects to a proposed outcome.<sup>127</sup> Ellickson reports that when “household participants are intimates and number no more than several dozen, a mountain of evidence indicates that they typically favor making decisions by consensus.”<sup>128</sup> Household members tend to prefer consensus because (1) debate over a proposal fully informs all participants about opponents' concerns and helps ensure that the outcome will enhance the overall welfare of individuals in the household; (2) a participant who “relents for the overall good of the group can later be informally compensated when other decisions come before the house”; and (3) a process that

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127 See Ellickson, *supra* note 70, at 304.

128 *Id.* at 301 (citing CHRISTOPHER BOEHM, *HIERARCHY IN THE FOREST* 113–17 (1999); Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1, 45 (2002)).

strives for consensus signals that participants are intimate and trustworthy.<sup>129</sup>

The work on successful commons similarly emphasizes the importance of group decision making. Margaret McKean has noted that commons which “pay some attention to the views of all eligible users . . . win adherence to the rules adopted.”<sup>130</sup> Collective decision making and an emphasis on consensus help guard against “disgruntled violators” of the rules, who may begin to free ride or to shirk their obligations if they believe the rules are unfair.<sup>131</sup> Dagan and Heller also emphasize that dialogue “helps refine the commoners’ values and inculcates collective commitments.”<sup>132</sup> They further write that decision making that promotes participation fosters cooperation and encourages commoners “to opt for voice first and to use exit only as a last resort.”<sup>133</sup>

Similarly, a common theme in the cultural property literature is that no single group will ever be entirely satisfied; there are simply too many interests at stake to be able to provide any one particular group precisely what it wants. The term “cultural property” has been invoked in a variety of contexts, ranging from disputes between governments and foreign museums over who is the rightful owner of a work of art; to battles between Native Americans, the United States governments and tourists over the use and management of particular pieces of land;<sup>134</sup> to discussions about which groups can march in the St. Patrick’s Day parade;<sup>135</sup> and even to the political fight over whether same-sex couples should be allowed into the institution of marriage.<sup>136</sup> Studies of each of these conflicts have shown that the

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129 See Ellickson, *supra* note 70, at 302–03.

130 McKean, *supra* note 94, at 260.

131 See *id.*

132 Dagan & Heller, *supra* note 66, at 591.

133 *Id.*

134 See MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 144–72 (2003) (describing disputes over land in Wyoming).

135 See SCAFIDI, *supra* note 38, at 70 (discussing disagreements within the Irish-Catholic community).

136 See Marc R. Poirier, *The Cultural Property Claim Within the Same-Sex Marriage Controversy*, 17 COLUM. J. GENDER & L. 343, 343–44 (2008) (“[T]he traditionalist claim that same-sex couples should be excluded from marriage is the same kind of claim as is often made by Native American, indigenous, and other culturally-subordinated groups to certain cultural resources.” (footnote omitted)); see also BROWN, *supra* note 134, at 4 (“[I]n promoting the concept of culture anthropologists inadvertently spawned a creature that now has a life of its own. In public discourse, culture and such related concepts as ‘tradition’ and ‘heritage’ have become resources that groups own and defend from competing interests.”).

best outcomes often result from processes in which the competing groups work together to hammer out a solution to whatever issue has presented itself. While no single group is entirely satisfied with the outcome, the negotiation process itself often creates buy-in and a sense of mutual understanding.<sup>137</sup>

Implicit in the cultural property literature, the case studies of successful commons, and Ellickson's work on households is the uncontroversial notion that groups or individuals with competing interests benefit from talking with one another. This is true when the number of competing groups and individuals is staggeringly large<sup>138</sup> or when the number is so small that all interested parties share the same household. It is also true when the contested issues involve family and the passing along of property, as with individuals who become co-tenants by virtue of inheritance. This is why practical estate planning guides emphasize the value of communication between family members. As one author describes, "communication can usually, though certainly not invariably, resolve potential estate planning difficulties with family."<sup>139</sup>

Probate courts can promote this sort of communication by encouraging facilitative agreement between individuals who fall into a co-tenancy because of inheritance. It is simple enough for a court to inquire (perhaps with the help of the executor or administrator) whether co-tenant heirs intend to continue joint ownership of the inherited property. If so, the court can provide a written explanation of tenancy in common law and make available a facilitative process

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137 For examples of work examining and recommending increased participation by all groups who are interested in a particular resource, see BROWN, *supra* note 134, at 144–51, 168–70 (describing the outcome of extended negotiations about the use of the federally-owned land in Wyoming on which Bighorn Medicine Wheel is located; the Bighorn Medicine Wheel is sacred to certain Native American tribes and the land on which the Wheel lies is valued by the public for its recreational purposes); SCAFIDI, *supra* note 38, at 89 (noting that co-ownership rules or dispute-resolution mechanisms are useful because they provide a means of facilitating relations between competing interests); James R. Rasband, *The Rise of Urban Archipelagoes in the American West: A New Reservation Policy?*, 31 ENVTL. L. 1, 62 (2001) (arguing for "authentic participation" by rural communities in the development of public lands policy).

138 See BROWN, *supra* note 134, at 148 (describing interactions between multiple government agencies, ranchers, loggers, mining executives, and various Native American organizations and advocacy groups).

139 DENIS CLIFFORD, *PLAN YOUR ESTATE* 35 (10th ed. 2010); see also, GERALD M. CONDON & JEFFREY L. CONDON, *BEYOND THE GRAVE* 350 (1995) ("I have convened hundreds of family inheritance meetings among my clients . . . . The overwhelming majority of them have been positive."); ROBERT M. DUNAWAY, *HOW TO PLAN YOUR ESTATE* 9 (2d ed. 1980) (emphasizing the importance of testators working with their families towards a plan "that will at least try to satisfy everyone").

that the heirs could then elect to use. If the heirs respond that they intend to continue joint ownership, one likely explanation for this choice is that the property has identity value. (Even if joint ownership is continuing for a different reason, the heirs will benefit from the summary of the law and the opportunity to arrive at a management arrangement that suits their needs.) The facilitative process made available to heirs would be aimed at enabling co-tenants with competing interests to successfully own and manage their property and preventing the strife that can accompany joint ownership.

Readers who are familiar with alternative forms of dispute resolution will recognize the connection between mediation and the facilitative process that this section contemplates.<sup>140</sup> Mediation is commonplace in a variety of family law contexts, primarily because it “has had substantial success . . . [when] the problems involve family and emotional issues and [when] the parties benefit from maintaining an ongoing relationship.”<sup>141</sup> While mediation is most common in the divorce context, some scholars have argued that mediation is well suited for probate disputes because it fosters family reconciliation and has the “potential for creating solutions uniquely suited to the problem at hand . . .”<sup>142</sup> They further note that mediators may be particularly well suited to handle the effects of sibling rivalry or other family dynamics.<sup>143</sup> Lela Porter Love has urged testators to insert dispute resolution provisions into their wills, such that heirs are required to mediate instead of litigate.<sup>144</sup> She favors mediation because of its abil-

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140 The term “facilitation” is drawn from Leonard Riskin’s description of the various styles of mediation. See Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 12–13, 30 (2003) (replacing the term “facilitative style” with the term “elictive style”). Another possibility would be to borrow the term “conciliation” from the alternative dispute resolution literature. In conciliation, “a third party brings the disputing parties together so that [they] can begin to discuss the issues. Conciliation may be used in the courts before trial with a view towards avoiding trial and in labor disputes before arbitration.” JAY E. GRENIG, *ALTERNATIVE DISPUTE RESOLUTION* § 2:11 (3d ed. 2005). As in mediation, however, the parties have a *present* dispute that is propelling them toward trial.

141 Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 398 (1997).

142 *Id.* at 424. For a discussion of family reconciliation, see Ronald Chester, *Less Law, But More Justice?: Jury Trials and Mediation as Means of Resolving Will Contests*, 37 DUQ. L. REV. 173 (1999).

143 Gary, *supra* note 141, at 426.

144 Lela Porter Love, *Mediation of Probate Matters: Leaving a Valuable Legacy*, 1 PEPP. DISP. RES. L.J. 255, 257 (2001); see also Lela P. Love & Stewart E. Sterk, *Leaving More Than Money: Mediation Clauses in Estate Planning Documents*, 65 WASH. & LEE L. REV. 539, 543 (2008) (explaining the effectiveness and advisability of mediation in probate disputes).

ity to address any “matter or practice that one party can control or change which is blocking or frustrating an interest of another party.”<sup>145</sup> As Love explains:

Imagine the last serious conflict you had in your own family. Would the “issue” qualify as a legal cause of action? A few examples of issues that can fuel family conflicts include: plans, hosting and cooking arrangements for family events, upkeep and use of family property, behavior towards spouses and in-laws, communication among various family members . . . and disposition and allocation of family property and memorabilia.<sup>146</sup>

She argues that the mediator’s ability to deal with this “rich mix of issues” is likely to lead to productive compromises that leave each party significantly better off.<sup>147</sup>

Co-tenants in identity property are likely to benefit from discussing their own rich mix of issues even in the absence of an actual legal dispute. One of the goals of a “facilitative”-style mediation is to promote an understanding between the parties that can serve as a foundation for developing agreements, even if no agreement is arrived at during the course of the mediation.<sup>148</sup> Indeed, the same qualities that make this sort of mediation an attractive alternative to litigation make a proceeding aimed at facilitation useful for co-tenants in identity property.

Mediation encourages the parties to speak freely about a range of issues, from “messy relationship issues”<sup>149</sup> to financial matters, all of which affect the co-tenants’ ability to jointly own and manage property. The ability to discuss emotional issues means that the process itself may have “a healing effect on participants” and provide co-tenants with a sense of greater control over the decisions that affect them.<sup>150</sup> Because one of the purposes of this kind of proceeding would be to create buy-in to whatever compromises emerge during the co-tenancy, this aspect of mediation is particularly valuable.

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145 Love, *supra* note 144, at 259.

146 *Id.* at 260.

147 *Id.* at 262.

148 See Riskin, *supra* note 140, at 11. Riskin also describes a “directive”-style mediation, in which a mediator acts more like a judge conducting a settlement conference. *Id.* at 33. In this sort of mediation, “[l]ittle attention might be given to the development of understanding or an agreement crafted to meet the parties’ interests.” Love & Sterk, *supra* note 144, at 546.

149 Gary, *supra* note 141, at 424.

150 See *id.* at 427.

Mediation also “can repair, maintain, or improve ongoing relationships.”<sup>151</sup> Siblings or other relatives who inherit identity property are in an ongoing relationship not just because of their familial bonds, but also because of the very nature of a tenancy in common. As Balfe’s interviews and accounts from estate planning guides demonstrate, co-tenancies in identity property can aggravate pre-existing family tensions or create new ones.<sup>152</sup> In the end, a mediation-like process could alleviate these familial harms.

Mediation further requires that participants work together to resolve actual or potential conflicts. This joint problem solving allows each co-tenant to understand how the others perceive the tenancy. Moreover, the mutual problem solving positions the co-tenants to better work together to resolve issues that develop down the road. Co-tenants are encouraged to craft unique solutions to the issues facing them, solutions that take into account the nonlegal interests of the co-tenants.<sup>153</sup> This flexibility makes it more likely that the co-tenants will construct a solution that all perceive as fair.<sup>154</sup> The involvement of a third party intermediary may make it easier for individuals to compromise or change positions without a loss of face.

Lastly, the comparatively formal process associated with facilitation may yield a greater sense of fairness than what might be hashed out over a dinner table or in a series of informal conversations. An individual is most likely to perceive that a process is fair when she has the opportunity to articulate her perspective and when she has been heard and considered.<sup>155</sup> Substantial research in procedural justice has indicated that the perception of fair process yields significant benefits. First, the belief a process is fair makes it more likely that an individual will be satisfied with a particular outcome, even when that outcome is contrary to the individual’s own preferences.<sup>156</sup> In addition, individuals who believe a process is fair are more likely to settle a dispute and abide by the agreement that results from settlement.<sup>157</sup> Finally, and perhaps most importantly for family members who are seeking to jointly manage property, research has demonstrated that

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151 *Id.* at 428.

152 *See supra* notes 52–55 and accompanying text.

153 JAY FOLBERG & ALISON TAYLOR, *MEDIATION* 10 (1984).

154 Mary F. Radford, *Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters*, 1 PEPP. DISP. RES. L.J. 241, 247 (2001).

155 *See* Keith G. Allred, *Relationship Dynamics in Disputes: Replacing Contention with Cooperation*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 83, 93 (Michael L. Moffitt & Robert C. Bordone eds., 2005).

156 *See id.*

157 *See id.* at 92.

the extent to which individuals feel they have been treated fairly has a “much more powerful effect on the degree of trust and loyalty” they feel towards others involved in the conflict “than does the favorability of the outcome . . .”<sup>158</sup>

None of this is to suggest that a facilitative proceeding would be a panacea for heirs to identity property. Mediation carries at least two risks when it is used to resolve probate disputes and the same concerns would be present if a probate court made a similar proceeding available to co-tenants. First, heirs and devisees may still be grieving at the time the proceeding takes place; this grief may affect their ability to craft solutions and discuss issues.<sup>159</sup> Second, heirs and devisees will have disparate negotiating skills and there are likely to be pre-existing power imbalances between them. These family dynamics may contribute to unequal bargaining power between the co-tenants.<sup>160</sup> A skilled mediator or facilitator, however, can balance the power between participants, at least during the course of the proceeding.<sup>161</sup> As such, the less powerful or skilled co-tenants are likely better off in a mediation-like proceeding than trying to negotiate the terms of the co-tenancy on their own. Moreover, the less powerful or skilled co-tenants may perceive a process that involves a third party as fairer than one that pits them directly against other family members.

Cost is an additional consideration. The literature that promotes mediation as an alternative to litigation in resolving probate disputes emphasizes the cost advantage of mediation.<sup>162</sup> The facilitation that this section suggests, however, would take place long before any co-tenants are even contemplating legal action. Indeed, a partition action is not the inevitable consequence when co-tenants find themselves unable to jointly manage and own the identity property. When faced with the possibility of a formal partition, even co-tenants who would prefer to retain ownership may simply agree to sell the property. Thus co-tenants in identity property always have a means of avoiding litigation costs, even when the tenancy takes a turn for the

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158 *Id.*

159 See Dominic J. Campisi, *Using ADR in Property and Probate Disputes*, 9 PROB. & PROP. 48, 52 (1995) (“The grieving process often dictates when settlement is possible. . . . Forcing parties into mediation too early is often a waste of time. They may not be psychologically able to deal with financial or other issues before reaching a point of acceptance in the grieving process.”).

160 See Gary, *supra* note 141, at 433.

161 See FOLBERG & TAYLOR, *supra* note 153, at 184–86 (discussing the methods mediators use to address power imbalances and noting that mediators will suspend proceedings if they cannot effectively address the problem).

162 See, e.g., Gary, *supra* note 141, at 431; Radford, *supra* note 154, at 249.



worst. As such, co-tenants are different than the parties often discussed in the mediation literature, who would have to pay the costs of litigation if they were not paying the (lower) costs of mediation. Many co-tenants will be unable or unwilling to spend money on a facilitator. But the mere availability of the proceeding may nonetheless be useful to them. That is, co-tenants may benefit when a court highlights, very early on in the tenancy, that they are embarking on something that can be complex enough that others are motivated to seek professional assistance.

When the inherited property can also be described as a household, as with the family cottages discussed in Part I, another possible result of the facilitation process may be seen as disadvantageous: facilitation may produce a legally enforceable agreement. Ellickson has described households as governed by first, second, and third party rules.<sup>163</sup> First party rules are internalized norms and ethics that are specific to each individual and are self-enforced. Second party rules are generated by participants in a particular household and range from norms that evolve over time to legal contracts. Third party rules are produced by those outside the household, such as a law decreed by government.<sup>164</sup> Ellickson argues that, as a general matter, the most efficient households are governed by norms and informal gift exchanges, rather than by bargained-for results. He states:

When the participants are intimates enmeshed in what is likely to be a long-lived relationship . . . formalization [of rights and obligations] usually is a mistake. Attorneys who contribute to the legalization of home relations typically not only waste the fees that their clients pay them, but also debase the quality of life around the hearth.<sup>165</sup>

If the facilitation results in an agreement between co-tenants, the co-tenants will have opted for the formal second party rules that Ellickson appears to disavow.

A close reading of Ellickson's work, however, supports the use of formal agreements when property, particularly identity property, is jointly owned because of inheritance. As an initial matter, Ellickson assumes that individuals manage the dynamics of a household by "when feasible . . . consort[ing] with intimates."<sup>166</sup> His households are

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163 See Ellickson, *supra* note 70, at 303.

164 See *id.* at 303-04.

165 *Id.* at 328. Of course, that the co-tenants opted to create a formal agreement does not necessarily mean that they will choose to follow it. On this point, see *supra* Part I.B.

166 Ellickson, *supra* note 70, at 248 (emphasis omitted).

characterized by voluntariness; the participants in a household choose to be part of it. While co-tenants in inherited property may choose to continue the tenancy, they do not choose to establish the tenancy in the first instance. Indeed, Ellickson describes intestacy law that “confer[s] co-ownership of a house on several surviving heirs who never would have chosen that arrangement on their own” as a “small-bore public law polic[y] that distort[s] individuals’ choices of household forms.”<sup>167</sup> He further assumes that those who inherit will solve the joint ownership problem by arranging for one co-tenant to buy out the others or by selling to a third party.<sup>168</sup> As previously discussed, however, co-tenants in identity property are unlikely to have the option of easy exit because of their strong attachments to the property itself. Ellickson also writes that contracts can be particularly useful when participants in a household anticipate that they may disagree.<sup>169</sup> In addition, in households with large numbers of participants, intimacy and trust “tend[ ] to erode,”<sup>170</sup> thereby making it more difficult to rely on norms and informal gift exchange to spur cooperation. Moreover, as the number of household participants rises, the administrative costs of inducing cooperation increase dramatically.<sup>171</sup> All of this suggests that co-tenancies that result from inheritance, particularly co-tenancies in identity property, would benefit from the signed agreements that may emerge from facilitation.

Another possible objection is that the facilitative process might result in co-tenants agreeing to substantially restrict the right of exit. As a general matter, liberalism is “committed to favoring contractual freedom to craft whatever restraints by which people agree to abide.”<sup>172</sup> Dagan and Heller, however, distinguish ordinary contracts from “property arrangements that encompass much more of an individual’s resources and social life.”<sup>173</sup> With respect to property arrangements, Dagan and Heller argue that limiting the ability to waive exit rights reflects a commitment to individual liberty and compensates for co-tenants’ rational deficiencies, such as excessive opti-

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167 *Id.* at 269. Here, however, Ellickson may have in mind only intestate succession that creates joint ownership between parties with little or no contact. *See id.* at 269 n.162 (citing Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505 (2001) (explaining how intestate succession caused excessive fractionalization of African-American owned farmland)).

168 *See id.*

169 *See id.* at 305–06.

170 *Id.* at 309.

171 *See id.* at 308–09.

172 Dagan & Heller, *supra* note 66, at 569.

173 *Id.*

mism about the likely course of the co-tenancy and their own lives.<sup>174</sup> The rejoinder, however, is that co-tenants in identity property are attempting to manage a resource that is distinct from the fungible property that is usually assumed in property textbooks and in the law and economics literature in particular. The holders of identity property value it because of what the property represents and embodies about one's self and family. As such, holders of identity property may simply value the property more than they value the liberal right of exit.

None of this is to suggest, of course, that the agreements that emerge from the facilitative process will necessarily allow a family to keep the identity property in perpetuity. But they are likely to extend the amount of time that the property can function as a successful commons. Balfe reports that without formal agreements governing ownership, families rarely manage to keep the property beyond the second generation; in families with formal agreements, however, she saw successful property management through the fourth generation and sometimes beyond.<sup>175</sup> Moreover, it is not necessarily clear that such agreements *need* to preserve the identity property for generations that are quite remote from the property's founders. As property is passed along through the generations, ownership typically becomes increasingly fractionalized. As the number of owners increases exponentially, individual use may decrease exponentially. The "identity" characteristics of property thereby may become sufficiently diluted so that later generations do not value the property in the same way the previous generations did. At this point, identity property becomes ordinary again because its holders no longer value the property primarily for what it represents about self and family.

#### CONCLUSION

The recommendation by a probate judge that heirs engage in a process designed to facilitate agreement reflects a normative judgment about the interests involved, as would the decision to favor temporal partition over a partition by sale in actions involving identity property. By its very nature, however, identity property warrants this kind of treatment. If readers of this Article categorized the property in their own lives, the list of that which is nonfungible and closely linked to one's sense of self and family would likely be very short. The property on that list, however, might matter more than the sum total of all the other categories. A close examination of the formal agree-

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<sup>174</sup> See *id.*

<sup>175</sup> See BALFE, *supra* note 18, at 24.

ments of co-tenants who opt out of default rules reveals much about the extent to which they value identity property and how restricting exit can foster cooperation among the owners and users of a common resource. The law cannot ensure that co-tenants will continue to own their identity property, but it can take steps to encourage their net good instead of elevating the interest of those who wish to exit.

