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# How Judicial Accounting Law Fails Occupying Cotenants

Phil Rich\*

## ABSTRACT

*Few law students remember judicial accounting law from their property law course, and it's hard to blame them. This little-discussed body of law is formulaic and rarely addressed by appellate courts. Judicial accounting law, however, should not be ignored. The law, which allocates equity to cotenants (or, more colloquially, co-owners) of residential property upon partition of that property, guides homeowners' behavior and shifts wealth between them. This Note argues that state legislatures should reform judicial accounting law to better protect those cotenants living in their homes from partitions brought by cotenants living elsewhere.*

*The problem with judicial accounting law lies in its rigid approach to distributing property among cotenants. Current judicial accounting law considers only six monetary factors when allocating equity to cotenants, including housing payments and the fair market value of rent (credited to cotenants who are not living in the home). As this Note explains, this inflexible process ignores the unique nature of residential property, improperly pushing occupying cotenants—those who live on the property—away from their home. To prevent harm to occupying cotenants, judicial accounting law should incorporate some additional non-monetary factors to enable judges to shift more equity to the occupying cotenant in cases where (1) that cotenant has an established connection to their home and community, and (2) the non-occupying cotenant has induced the occupying cotenant to rely on stable housing. This modest change in law promotes utility while remaining grounded in analogous areas of law, such as the marital distribution of property.*

**Keywords:** judicial accounting, partition, partition by allotment, property, cotenants, equity, housing, tenants, reform, equitable considerations

## INTRODUCTION

Carolina Rivas and her partner purchased property and built a house together over the course of five years.<sup>1</sup> As cotenants, they both owned a one-half interest in the property, and they both contributed about one half of the payments to maintain and improve the

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<sup>1</sup> Rodriguez v. Rivas, 573 S.W.3d 447, 450 (Tex. App. 2019).

property.<sup>2</sup> In 2011, Ms. Rivas and her partner had a falling out, and the partner moved out of their home.<sup>3</sup> Ms. Rivas spent the next eight years living on the property, raising two children (including her partner's child) and paying all the necessary expenses to maintain the property.<sup>4</sup> Ms. Rivas, like many who invest eight years of their lives into their residence and community, wanted to remain in her home.<sup>5</sup> Unfortunately, in 2019, the Texas Court of Appeals forced her and her children to leave the property.<sup>6</sup> How could Ms. Rivas be driven from her home?

The Texas court resorted to such an extreme remedy because Ms. Rivas's cotenant—the ex-partner—filed a partition action to redeem his property rights.<sup>7</sup> The court, striking Ms. Rivas a devastating blow, forced the public sale of the property and the even distribution of the proceeds between Ms. Rivas and her ex-partner.<sup>8</sup> This court, acting consistently with U.S. partition law—law governing cotenants' rights to divide and/or sell their property interest—and judicial accounting law—law determining cotenants' ownership interests based on how much they contributed to and benefitted from the property—produced an unfair outcome for Ms. Rivas.<sup>9</sup> According to Texas partition and accounting law, the near-decade Ms. Rivas and her children spent in their home and local community were irrelevant to the determination of her rights to the residential property.<sup>10</sup> Her ex-partner, who had not touched or spent money on the property in eight years, got the same one-half interest he owned in 2011 before moving away.<sup>11</sup>

This undesirable outcome is not an anomaly. Indeed, courts can remove occupying cotenants from their homes in more favorable circumstances. Even if Ms. Rivas's ex-partner had never lived on the property, and even if Ms. Rivas was solely responsible for building equity in the property, Ms. Rivas's ex-partner could force the sale of the property and still retain one half of the sale's proceeds.<sup>12</sup> The problem does not lie with Texas; the problem lies with the principles of partition and judicial accounting law.

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* Technically, Rivas ousted her partner, which makes it more reasonable for the court to enable her partner to retain half the house in the judicial accounting. The court's ruling, however, would have been the same had there not been an ouster, and the Introduction proceeds in this hypothetical world. *See infra* Part I.C.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 455.

<sup>7</sup> *Id.* at 450.

<sup>8</sup> *Id.* at 449, 455. In theory, Ms. Rivas could have acquired her home through a public auction run by a court-appointed administrator. The case does not indicate whether Ms. Rivas retained her property. Regardless, occupying cotenants are often not in the position to make an auction purchase. *See infra* Part II and III.

<sup>9</sup> JOSEPH WILLIAM SINGER, BETHANY R. BERGER, NESTOR M. DAVIDSON & EDUARDO PENALVER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 662 (6th ed. 2014).

<sup>10</sup> *Id.* at 453–55. The exact formula the lower court used to conduct the judicial accounting is unavailable (a common pattern for judicial accounting law). Therefore, the prior sentence takes liberties in assuming the court's reasoning. These assumptions are grounded in the facts in this opinion and the courts' normal process for conducting a final accounting, as evidenced by treatises and the limited case law available.

<sup>11</sup> *Id.* at 449–50.

<sup>12</sup> 7 JOEL B. EISEN & ROBERT R. MERHIGE, JR., *POWELL ON REAL PROPERTY* § 50.07(6) (2021) (noting that occupying cotenants' housing payments should be offset by one half of the property's fair market rental value owed to non-occupying cotenants for not having utilized his right to occupy the property).

Judicial accounting law treats Ms. Rivas and those living in their home—occupying cotenants—the same as those not living on the property—non-occupying cotenants. A final judicial accounting simply inserts monetary factors (e.g., housing payments, maintenance expenses, rental income) into a formula to determine the cotenants’ ownership interests in the property.<sup>13</sup> In the final accounting, Ms. Rivas’s housing payments mattered, but the connection she felt toward the property did not. Whether Ms. Rivas rented out a room to make ends meet mattered, but her children’s friendships and connection to the public school did not. Whether Ms. Rivas’s maintenance expenses were “reasonable” mattered, but her neighbors’ opinions, who may have relied on Ms. Rivas for informal tutoring and childcare, did not. The message is clear: in judicial accounting law, monetary factors matter, and what makes residential property special is irrelevant.

This Note argues that the judicial accounting process should factor in the unique aspects of residential property. Instead of a purely monetary approach to balancing cotenants’ rights and obligations to property, judicial accounting law should balance the usual monetary factors with certain non-monetary residential factors, such as cotenants’ sentimental attachment to the property and the community’s interest in housing stability. Incorporating these non-monetary residential factors into the judicial accounting process will result in more just outcomes that better encapsulate what makes residential properties, or homes, special.

This Note is divided into three Parts. Part I provides an overview of cotenancy, partition, and judicial accounting law, focusing (where relevant) on how the law treats instances with occupying and non-occupying cotenants. Part II describes the problem with judicial accounting law, stressing why residential property deserves special consideration and illustrating how the current flaws in partition and judicial accounting law disproportionately impact low-income communities. Part III proposes and then evaluates this Note’s solution to the problem—incorporating non-monetary residential factors into the judicial accounting process. This final section surveys existing property law to show that this proposal reasonably applies property law concepts, scrutinizes this Note’s rationale for weakening the rights of non-occupying cotenants, and outlines the potential implementation of this proposal.

## I. THE LAW

The principles of cotenancy law dictate how Ms. Rivas and her ex-partner’s property should be divided. Cotenants’ rights and duties (i.e., cotenancy law) are critical to partition and judicial accounting law because they determine how property is distributed among cotenants. Likewise, the right to partition represents a key property right for cotenants. The bodies of law are inextricably connected. This Part first outlines the rights and duties of cotenants during the cotenancy. Next, this Part discusses one mechanism through which cotenancies can be terminated—partition law—and the process for distributing property among cotenants—judicial accounting.

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<sup>13</sup> *Id.*

### A. Cotenancy

Cotenancy is defined as a concurrent ownership interest in real property.<sup>14</sup> A common law doctrine, cotenancy law—not to be confused with landlord/tenant law—governs what are essentially partnerships in real property.<sup>15</sup> There are three main categories of concurrent tenancies: tenancy in common, joint tenancy, and tenancy by the entirety.<sup>16</sup> These interests differ in important ways,<sup>17</sup> but for the purpose of partition law, the only relevant distinction is that in tenancy by the entirety, property cannot be partitioned outside of a divorce.<sup>18</sup> By contrast, in joint tenancies and tenancies in common, property can be partitioned by any cotenants at any time.<sup>19</sup> Cotenants in joint tenancy and tenancies in common are treated identically by partition law, and this Note’s future references to cotenancy implicate these forms and not tenancy by the entirety.

During the cotenancy, cotenants owe one another certain rights and duties, encompassed by four principles. First, all cotenants, regardless of their fractional share in the property,<sup>20</sup> have the right to possess the entire property.<sup>21</sup> This right, however, is non-exclusive—cotenants cannot exclude other cotenants from any portion of the property.<sup>22</sup> Second, cotenants have the right to their share of profits derived from the property according to their fractional interests in the property.<sup>23</sup> Third, cotenants have a duty to pay their fractional share of expenses to maintain the property, including reasonable repairs and housing payments (e.g., mortgage, property taxes).<sup>24</sup> Fourth, cotenants have a fiduciary-like duty not to “waste” or spoil the property.<sup>25</sup> These four principles govern cotenancies, but they also guide partition law, or the process through which cotenants can end the cotenancy.<sup>26</sup> The principles are relatively straightforward, but the first principle—that cotenants have the non-exclusive right to possess the property—requires further discussion.

<sup>14</sup> EISEN & MERHIGE, *supra* note 12, § 49.01.

<sup>15</sup> *Id.*

<sup>16</sup> SINGER, *supra* note 9, at 662.

<sup>17</sup> *Id.* (noting the four main differences in these three forms of concurrent tenancies: their creation, whether there is an automatic right of survivorship, whether cotenants can sever or terminate their interest, and whether one tenant can “unilaterally encumber the property”).

<sup>18</sup> *Id.* Tenancy by the entirety is a property regime exclusive to married couples, and as will be outlined below, property shared between spouses is equitably distributed in a divorce proceeding—not a partition action.

<sup>19</sup> *Id.*

<sup>20</sup> EISEN & MERHIGE, *supra* note 12, § 50.01. Cotenants presumptively own an equal share of the property. Therefore, if there are two cotenants, they each presumptively own a 50% share, and if there are three cotenants, they each presumptively own a 33.33% share. However, cotenants can agree to own unequal shares of real property. For example, if there are two cotenants, one could own 75% of the property while the other owns 25% of the property. Under this latter arrangement, despite owning disproportionate shares of the property, both cotenants have the same non-exclusive right to occupy the entire property. The disproportionate share of ownership becomes relevant in the second and third principles.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at § 50.03.

<sup>23</sup> *Id.* at § 50.04.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at § 50.07.

<sup>26</sup> *Id.* at § 50.03.

Cotenants' non-exclusive right to possess the entire property can lead to conflict between the cotenants. If all the cotenants agree to occupy the property together or rent out the property, then all cotenants are equally obligated to pay expenses and entitled to collect profits.<sup>27</sup> Additionally, all cotenants may enforce their rights and obligations to pay expenses and collect profits against one another in an affirmative lawsuit.<sup>28</sup> On the other hand, if the cotenants agree that only one cotenant will remain on the property, the default rule is that occupying cotenants do not owe non-occupying cotenants rent. However, the non-occupying cotenants can use the fair market rental value of their fractional interests in the property to offset the occupying cotenants' demands for their shares of expenses.<sup>29</sup>

For example, assume Cotenants A and B own an equal share of a property which costs \$20,000 to maintain and has a fair market rental value of \$22,000. If Cotenant A lives alone on the property and pays all \$20,000 of the housing expenses, then Cotenants A and B owe each other nothing. Cotenant A does not owe anything to Cotenant B because the default rule indicates that the occupying Cotenant A does not owe the non-occupying Cotenant B rent. Additionally, the occupying Cotenant A cannot make any demands on Cotenant B for their share of the housing expenses, because one half of the property's rental value (\$11,000) fully offsets one half of the housing expenses (\$10,000).<sup>30</sup> Finally, in this scenario, Cotenant B cannot seek the remaining \$1,000 from Cotenant A because, as stated above, Cotenant B cannot collect rent from Cotenant A under the default rule.

What if the cotenants cannot agree about who should live on the property? What if one occupying cotenant kicks the other occupying cotenant out of the home? The common law addresses these problems through the doctrine of ouster. An ouster takes place when one cotenant occupies the property while actively preventing another cotenant from occupying that property.<sup>31</sup> When an ouster occurs, non-occupying cotenants have the right to the fair market rental value of their fractional interest in the home, not merely the right to use that rental value to offset expenses.<sup>32</sup> This right, however, is offset by the non-occupying cotenant's unpaid fractional share of expenses.<sup>33</sup> For example, using the same facts in the hypothetical from the prior paragraph, if Cotenant A ousted Cotenant B, Cotenant A would owe Cotenant B \$1,000.

Courts balance the aforementioned property rights and duties through a process called judicial accounting, which distributes property to cotenants according to how cotenants have fulfilled these rights and duties during the cotenancy.<sup>34</sup> The following Part explains this judicial accounting process—known as partition law—after first discussing the termination of cotenancies (which automatically triggers the judicial accounting process).

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<sup>27</sup> *Id.* at § 50.03.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> In contrast, if one half of the property's rental value was less than one half of the housing expenses, then the occupying cotenant, Cotenant A, could demand that the non-occupying cotenant, Cotenant B, pay their remaining share of the housing expenses.

<sup>31</sup> *Id.* at § 50.03. If only one cotenant can feasibly occupy the property, that cotenant has committed constructive ouster. If one cotenant proactively excludes another cotenant (often by changing the locks), that cotenant has committed an actual ouster. The law treats both scenarios equally.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> 59A AM. JUR. 2d *Partition* § 133 (2021).

### B. Partition

Cotenancies, like many partnerships and relationships, can end. The partition process is an important mechanism through which cotenancies can be terminated, and judicial accounting law, discussed in Part C, determines how courts allocate property to cotenants upon a cotenancy's termination. This Part examines the law, logic, and issues of the partition process.

In a simpler and more efficient world, cotenants would always agree about when cotenancies should end and how to divide property when this occurs. In these circumstances, cotenants voluntarily partition their property and determine the allocation of property through a private agreement, raising few legal issues in the process.<sup>35</sup> But the world is rarely ideal. Cotenants frequently disagree about whether to partition property, how to allocate property when it is partitioned, or both. When cotenants disagree, partition law still provides a mechanism for cotenants to force a partition. An involuntary partition is a legal process through which one or more cotenants petition the court to divide or sell property against one or more of their fellow cotenants' wishes.<sup>36</sup> Courts then divide the property among cotenants according to their fractional ownership interests in the property.<sup>37</sup>

All fifty states have memorialized in statute the well-established (albeit severe) common law doctrine of involuntary partition because it protects cotenants' property rights.<sup>38</sup> If cotenants could not end their cotenancy through the forced sale or division of property, the cotenant hoping to terminate the relationship would be left with two options: selling their fractional interest on the market or selling to their fellow cotenants.<sup>39</sup> The problem for this cotenant is that their property interest is worth almost nothing on the market,<sup>40</sup> which leaves the cotenant without any bargaining power in their negotiations with the only remaining buyers: their fellow cotenants.<sup>41</sup> To prevent inefficient stalemates,<sup>42</sup> partition law creates another "buyer" to whom cotenants can sell their property interests by allowing cotenants to either (1) collect their portion of the proceeds from the forced sale of the entire property or (2) sell their new, physically smaller, exclusively owned portion of the property.<sup>43</sup> Therefore, the right to involuntary partition is necessary to give cotenants the right of alienation (i.e., the right to sell or give away

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<sup>35</sup> 4 SANDRA R. BULLINGTON & PATRICIA REYHAN, THOMPSON ON REAL PROPERTY, § 38.02 (Thomas ed. 2017) (outlining voluntary partitions and describing legal issues arising from said partitions as "relatively straightforward").

<sup>36</sup> EISEN & MERHIGE, *supra* note 12, § 50.07.

<sup>37</sup> *Id.*

<sup>38</sup> 59A AM. JUR. 2d *Partition* § 68 (2021).

<sup>39</sup> Sarah E. Waldeck, *Rethinking the Intersection of Inheritance and the Law of Tenancy in Common*, 87 NOTRE DAME L. REV. 737, 740 (2011).

<sup>40</sup> *See id.* at 742–43 (quoting Richard A. Posner for the proposition that cotenants are "in much the same position as the inhabitants of a society that does not recognize property rights"). *See also infra* Part II.A.

<sup>41</sup> *See* Waldeck, *supra* note 38, at 737.

<sup>42</sup> Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 58 (1987) (defining bilateral monopolies as markets containing only one buyer and one seller and noting that stalemates, which are inefficient due to the high transaction costs associated with endless bartering, are a major consequence of bilateral monopolies).

<sup>43</sup> 59A AM. JUR. 2d *Partition* § 68.

property), which is a central right in property law.<sup>44</sup> What remains unclear is whether partition law strikes the right balance between the rights of cotenants who want to keep their property and those who want to sell. This tension motivates partition law and surfaces throughout the three methods courts use to partition property: partition in kind, partition by sale, and partition by allotment.<sup>45</sup> Against the backdrop of all three methods is a massive incentive to avoid partitions altogether—all cotenants must share court costs and the plaintiff's attorneys' fees.<sup>46</sup> The partition process, therefore, should be seen as a last resort for cotenants.

A partition in kind occurs when a court physically divides property among cotenants according to their fractional interests.<sup>47</sup> After the property is partitioned in kind, cotenants become exclusive owners of small portions of property instead of owning non-exclusive rights to the property as a whole.<sup>48</sup> If property cannot be evenly divided, courts can use “owelty”—the required payment from the cotenant who receive a disproportionately large share of property to other cotenants who receive less—to even the scales.<sup>49</sup>

Partition in kind is the presumptive and preferred method of partition because it enables cotenants to retain some of their property.<sup>50</sup> Unfortunately, a partition in kind frequently presents an impractical solution for residential property owners because single family homes cannot be physically divided without incurring a substantial loss in economic value.<sup>51</sup> To address this problem, all U.S. jurisdictions have adopted a second type of involuntary partition that courts use at their discretion to preserve economic value: partition by sale.<sup>52</sup> Partition by sale forces the sale of the property and allocates the proceeds (after subtracting administrative costs and attorneys' fees) to the cotenants according to their fractional interests.<sup>53</sup> These sales, with the court's permission, are court-supervised private sales, which allow owners to sell the property on the private market.<sup>54</sup> More often, however, state law requires partition sales to be conducted through public auction.<sup>55</sup>

As many scholars have noted, these public auctions are costly and lead to discount sales.<sup>56</sup> Indeed, courts have approved auction sales at less than 50% of a property's appraisal value.<sup>57</sup> Even statutory minimum standards have not raised the bar, setting

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<sup>44</sup> SINGER, *supra* note 9, at 1247 (characterizing the right to alienate property as the right to sell property rights and identifying this right as one central to private property ownership and one potentially incapable of being restricted by the government).

<sup>45</sup> EISEN & MERHIGE, *supra* note 12, § 50.07.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* (“Most partitions today are indeed in the form of sale and division of proceeds.”).

<sup>52</sup> *Id.* (noting that residential property almost always meets the threshold and is thus allocated through a partition by sale instead of a partition in kind).

<sup>53</sup> *Id.*

<sup>54</sup> 59A AM. JUR. 2d *Partition* § 125 (2021).

<sup>55</sup> *Id.*; see also *Brannon v. Simpson*, 244 Ga. 58, 60–61 (1979) (remanding because of a failure to properly conduct a public auction).

<sup>56</sup> Thomas W. Mitchell, Stephen Malpezzi & Richard K. Green, *Forced Sale Risk: Class, Race, and the ‘Double Discount’*, 37 FLA. ST. U.L. REV. 589, 602–06 (2010) (outlining the reasons why forced public sales lead to a loss in fair market value).

<sup>57</sup> *Id.*

minimum auction sales prices as low as 66% of the property's appraisal value.<sup>58</sup> Further, the speed with which these auctions are conducted can prevent low-income cotenants from competing at an auction because of their limited access to financial institutions or credit.<sup>59</sup> These injustices have received a substantial amount of attention and have sparked some needed reform efforts, but problems still persist.<sup>60</sup>

The third and final type of partition—partition by allotment—presents a partial solution to costly auction sales. Alternatively called “appraisal and sale to one of the co-owners” or “equitable owelty partition,”<sup>61</sup> partitions by allotment allow courts to appraise property and then force the sale of one cotenant's interest to another cotenant.<sup>62</sup> Partition by allotment is analogous to owelty except that only one party receives any property. This partition option provides a key benefit to cotenants who want to keep their property with more certainty and often more time, making it easier for them to acquire funding and preventing outbidding by third parties.<sup>63</sup> Even though statute or common law authorizes this partition option in several states,<sup>64</sup> partition by allotment is a relatively rare doctrine that only a minority of courts recognize.<sup>65</sup>

These three doctrines illustrate the negative impact partition law has on cotenants, particularly cotenants who want to keep their property. Despite these consequences, the right to partition property remains “virtually unconditional.”<sup>66</sup> Cotenants who do not want their property to be partitioned are largely stuck with one option: buying out their cotenants' interests. That option is available only if those cotenants can win the public auction, convince the court to use partition by allotment, or get the other cotenants to voluntarily sell.

The handful of exceptions or defenses that a party can use to oppose a partition action are limited.<sup>67</sup> Under one important defense, courts can deny partition actions when the

<sup>58</sup> *Id.*; see also *Bechert v. Bechert*, 435 N.E.2d 573 (Ind. 1982).

<sup>59</sup> UNIF. PARTITION OF HEIRS PROP. ACT, 2 (UNIF. L. COMM'N, 2010).

<sup>60</sup> See *infra* Part II.B.

<sup>61</sup> *Rodriguez v. Rivas*, 573 S.W.3d 447, 450 (Tex. App. 2019).

<sup>62</sup> BULLINGTON & REYHAN, *supra* note 34, § 38.05(c).

<sup>63</sup> SINGER, *supra* note 9, at 662 (quoting *Butte Creek Island Ranch v. Crim*, 186 Cal. Rptr. 252, 256 (Ct. App. 1982) (describing partition law as “nothing short of the private condemnation of private land for private purposes, a result which is abhorrent to the rights of defendant as a freeholder”).

<sup>64</sup> *Libby v. Lorrain*, 430 A.2d 37 (Me. 1981); *Zimmerman v. Marsh*, 365 S.C. 383 (2005); ALA. CODE § 35-6-100 (LexisNexis 2021); CAL. CIV. PROC. CODE § 873.910 (Deering 2021); KAN. STAT. ANN. § 60-1003 (2021); OHIO REV. CODE ANN. § 5307.09 (LexisNexis 2021).

<sup>65</sup> EISEN & MERHIGE, *supra* note 12, § 38.05(c).

<sup>66</sup> *Id.*

<sup>67</sup> There are four exceptions to cotenants' right to partition. One exception is discussed in the text above, and the remaining three are:

**Contract/Waiver:** Cotenants can agree to waive their right to partition through a contract. While the agreement restricts the inalienability of land, almost all courts uphold them so long as they are not “unreasonable or extend for an indefinite period of time.” EISEN & MERHIGE, *supra* note 12, § 38.03(a)(2)(i)(B). These agreements can be implied, but only in very limited circumstances. *Id.* at § 38.03(a)(2)(i)(D).

**Wills and Trusts:** Testaments can place restrictions on partition if the restriction is reasonable. *Id.* at § 38.03(a)(2)(ii).

**Homestead Rights:** Homestead interests can trump partition actions in very limited circumstances. *Id.* at § 38.03(a)(2)(i)(B), n.22. This can occur when a surviving spouse is the occupying cotenant on the property and the spouse's cotenants (i.e., the widow's heirs) are trying to get the widow off the property. *Lockhart v. Collins*, 81 So. 3d 1050 (Miss. 2012); *Hixson v. Cook*, 379 P.2d 677 (Okla. 1962).

action would “work a fraud, hardship[,] or undue oppression on a party resisting the partition.”<sup>68</sup> Unfortunately, courts apply this exception only in limited circumstances, so it should not give cotenants much hope.<sup>69</sup> Occupying cotenants who want to remain on their property are not given any weight in the partition process—the partitioning cotenants’ rights prevail. However, this exception demonstrates a court’s theoretical power to depart from statutory procedures, a power that will be elaborated upon further in Part IV.<sup>70</sup>

A court’s authority to carve out such an exception for itself is rooted in the history of partition law. Traditionally, partition was a common law equitable doctrine “to which the principles of equity apply.”<sup>71</sup> While the partition process is now governed by statute in all fifty states, courts frequently have the freedom to reach beyond the statute.<sup>72</sup> In many states, the statutory process guides courts until “the remedy at law is insufficient or peculiar circumstances render the proceeding in equity more suitable and just.”<sup>73</sup> In this respect, many courts retain flexibility in how they conduct partitions and may invoke considerations of fairness to stretch or overrule statutory partitions.

The common law principles and statutory processes outlined above are still good law, but a recent movement has successfully fought to reform partition law for “Heirs Property.” Led by Thomas Mitchell, a group of legal scholars began documenting how partition law disproportionately stripped the wealth of Native American and Black (especially rural) communities.<sup>74</sup> These scholars demonstrated how members of these communities more frequently die intestate, or without a will, which leads to an unwieldy number of heirs becoming cotenants, each owning a single piece of property.<sup>75</sup> The high volume of cotenants—each of whom has the right to seek partition—led to an increase in partition actions.<sup>76</sup> As discussed above, partition actions reduce the wealth of all cotenants because the cotenants share attorneys’ fees and court costs, and in partitions by sale, the property sells well below its fair market value. Motivated by this very specific problem, Mitchell helped create and advocate for the Partition of Heirs Property Act.<sup>77</sup>

The Partition of Heirs Property Act, which is currently the law in eighteen states, reflects the narrow goal of helping cotenants who own property with many fellow cotenants.<sup>78</sup> The Act contains some provisions, such as its “buyout provision” (i.e., partition

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<sup>68</sup> EISEN & MERHIGE, *supra* note 12, § 38.03(a)(2)(iii).

<sup>69</sup> *Id.* (noting how rarely courts choose to invoke this particular defense). See *Condrey v. Condrey*, 92 So. 2d 423, 427 (Fla. 1957) (refusing to grant a partition filed by a child against his parents because the parents had recently transferred title to the child in what the court characterized as an implied agreement that the parents could live in the house until their death).

<sup>70</sup> See *infra* Part IV.

<sup>71</sup> 59A AM. JUR. 2d *Partition* § 68 (2021).

<sup>72</sup> *Id.* at § 68; see, e.g., 735 ILCS 5/17 (LexisNexis 2021).

<sup>73</sup> *Id.* at § 68 (noting courts have given themselves the power to invoke equity and reach beyond statutes in certain circumstances).

<sup>74</sup> See, e.g., 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).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> See *Thomas Wilson Mitchell*, MACARTHUR FOUNDATION, <https://www.macfound.org/fellows/class-of-2020/thomas-wilson-mitchell> (last visited July 28, 2021).

<sup>78</sup> UNIF. PARTITION OF HEIRS PROP. ACT, 2 (UNIF. LAW COMM’N, 2010) (identifying eighteen states that have incorporated the Act as of July 4, 2021).

by allotment codification), that improve the partition process in all situations.<sup>79</sup> However, the Act applies only to properties acquired from a relative and only if at least twenty percent of the cotenants are relatives.<sup>80</sup> The Heirs Property Act does not apply to many cotenants, including (hypothetically) Ms. Rivas. This reform effort, while effective in achieving its goal, does not protect Ms. Rivas and other occupying cotenants who may not receive their property from a relative through involuntary partition.

### C. Judicial Accounting

Just as the law must provide a mechanism for cotenants to unilaterally terminate cotenancies, the law also must determine how to turn cotenants' shared property interests into a separate set of property rights. This latter determination, the process whereby courts decide how to allocate property or sales proceeds to cotenants, is called judicial accounting.<sup>81</sup>

#### 1. The Outline of Judicial Accounting Law

All partition actions are necessarily accompanied by a final judicial accounting.<sup>82</sup> The goal of judicial accounting is to balance and resolve all claims cotenants have against one another arising out of their shared property interest.<sup>83</sup> This commitment to resolving cotenants' claims makes the process more complicated than merely allocating property according to the cotenants' initial ownership interest. For example, if one cotenant neglects their duty to pay the mortgage or forgets to collect their fair share of rent, a judicial accounting must adjust their final payouts to accurately capture each cotenants' interest in the property.

Unlike partition law, the judicial accounting process is almost entirely governed by common law.<sup>84</sup> State statutes will generally require courts to conduct an accounting without providing any guidance,<sup>85</sup> and the little direction statutes do provide is too abstract to be helpful.<sup>86</sup> The common law, therefore, must fill sizeable gaps. Using their discretion, courts have chosen to adopt and apply a relatively strict set of economic considerations that attempt to encapsulate cotenants' rights and duties.<sup>87</sup>

The monetary value of these economic considerations, which arise out of cotenants' met and unmet rights and obligations under cotenancy law, are added and subtracted

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<sup>79</sup> *Id.* at § 7. This provision is especially important in combatting the egregious behavior of some developers. These developers buy a fractional interest of the property, partition the property, and then buy the entire property at the auction for a discount. This immoral (or, from a different perspective, opportunistic) technique amounted to a private taking without just compensation.

<sup>80</sup> *Id.* at § 2(5).

<sup>81</sup> 59A AM. JUR. 2d *Partition* § 133 (2021).

<sup>82</sup> EISEN & MERHIGE, *supra* note 12, § 50.07 (“Every partition action includes a final accounting.”).

<sup>83</sup> 59A AM. JUR. 2d *Partition* § 139 (2021).

<sup>84</sup> EISEN & MERHIGE, *supra* note 12, § 50.07.

<sup>85</sup> *See, e.g.*, 735 ILCS 5/17-126 (LexisNexis 2021) (providing for an “[a]djustment of rights after judgment”).

<sup>86</sup> OHIO REV. CODE ANN. § 5307.21 (LexisNexis 2021) (providing cotenants have a right to recover their “share of rents and profits . . . according to the justice and equity of the case”).

<sup>87</sup> *See infra* Part III.C.

against one another in the accounting calculation.<sup>88</sup> This balancing process, analogous to plugging numbers into a formula, is about adding and subtracting—not adjusting percentages.<sup>89</sup> The process courts use to balance these considerations is uniform across all types of partitions, but how the courts use the final accounting value, or balance, to allocate property differs slightly depending on the type of partition process.

In a partition in kind, courts begin with the value cotenants owe one another based on a complete judicial accounting, convert that value into an ownership percentage, and then adjust cotenants' ownership interests using the new percentage. For example, if Cotenant A owes Cotenant B \$100, the cotenants started with a 50% ownership interest, court costs and attorneys' fees are \$50, and the property is worth \$1,000, courts will note that \$100 is 10% of the property's value and then adjust the property interests to give Cotenant A 40% of the property and Cotenant B 60% of the property. After dividing the property according to these interests (and using owelty where necessary), courts then charge the cotenants with court costs and attorneys' fees according to their interests.<sup>90</sup> In the example, Cotenant A owes the court \$20, and Cotenant B owes the court \$30.

The same principles apply in a partition by sale, but the process is different. Courts begin with the sale's proceeds, subtract court costs and attorneys' fees from that value, multiply the cotenants' initial ownership interests to determine the presumptive allocation of property, and then add and subtract from this presumptive value based on judicial accounting.<sup>91</sup> Using the same example as above and assuming the property sold for \$1,000, courts would subtract \$50 (court costs and attorneys' fees) from \$1,000 to reach \$950, determine that the cotenants presumptively receive \$475, and then adjust that presumptive amount by \$100 to give Cotenant A \$375 and Cotenant B \$575.

This same process applies during a partition by allotment, except that the appraisal value substitutes for sales proceeds, and the cotenant purchasing the property must pay the non-purchasing cotenant the determined monetary value of the non-purchasing cotenant's ownership interest.<sup>92</sup> The processes above describe the start and end of the judicial accounting process, but what happens during the judicial accounting (e.g., how a court, in the example above, would arrive at the \$100 owed between cotenants) is how property rights are determined and is the most important aspect of judicial accounting law.

## 2. The Economic Considerations of Judicial Accounting Law

Judicial accounting law allocates property rights among cotenants by balancing the cotenants' economic contributions to the property. To best illustrate how these economic considerations are applied, the following discussion makes five assumptions.

First, the cotenancy has two cotenants, one of whom lives on the property—the occupying cotenant—and one of whom does not—the non-occupying cotenant. Second, these two cotenants each initially owned 50% of the property. Third, the cotenancy is being partitioned as a partition by sale. Fourth, the property is being partitioned by the non-occupying cotenant. Fifth, courts are conducting a final judicial accounting. This last

<sup>88</sup> 59A AM. JUR. 2d *Partition* § 139 (2021).

<sup>89</sup> *Id.*

<sup>90</sup> *See, e.g.,* *Deshommes v. Bazin*, 421 So. 2d 806, 807 (Fla. Dist. Ct. App. 1982) (identifying attorneys' fees and costs as adding to approximately \$11,000 in a dispute involving a property that sold for \$50,000).

<sup>91</sup> 59A AM. JUR. 2d *Partition* § 139 (2021).

<sup>92</sup> *See, e.g.,* *Libby v. Lorrain*, 430 A.2d 37 (Me. 1981).

assumption is especially important because not all considerations relevant for a final judicial accounting are relevant during an accounting action brought during a cotenancy.<sup>93</sup> Because this Note primarily assesses issues arising out of partition actions, the discussion of judicial accounting focuses on the final accounting process.<sup>94</sup> The final judicial accounting considers how cotenants have fulfilled their rights and obligations to one another throughout the entirety of the cotenancy relationship, which is now ending.

The first consideration relevant to judicial accounting is the cotenants' rights to their fractional shares of the rents and profits collected from third parties and derived from the property, regardless of who discovered and executed the profit-making opportunity.<sup>95</sup> Cotenants' rights are to a share of the profits, not revenue, meaning that cotenants can cover their expenses before being forced to share their earnings.<sup>96</sup> Cotenants cannot, however, factor in the fair market value of their personal services to the profit calculation.<sup>97</sup> So, if the occupying cotenant collected \$20,000 in rent from a third party over the course of seven years, spent \$2,000 on expenses in servicing this third party, and dedicated 500 hours to servicing the third party, the non-occupying cotenant would have the right to \$9,000, and the occupying cotenant would get \$11,000.<sup>98</sup> The personal service hours are irrelevant.

Second, the non-occupying cotenant has a right to their fractional interest in the fair market rental value of the property.<sup>99</sup> Importantly, this rental value is not automatically factored into an accounting. If the non-occupying cotenant voluntarily left the property (i.e., was not ousted), then the court may consider the fractional rental value only to the extent it offsets the non-occupying cotenant's share of housing expenses.<sup>100</sup> If, however, the non-occupying cotenant was ousted, then the court factors their entire fractional interest in the rental value into the accounting, regardless of other factors.<sup>101</sup>

Third, cotenants have a duty to pay their share of housing expenses, including payments for mortgage, interest, property tax, insurance, and reasonable maintenance and repairs.<sup>102</sup> This duty extends to both occupying and non-occupying cotenants (though the rental value will offset portions of the non-occupying cotenant's responsibility).<sup>103</sup> The issues within this consideration revolve around what counts as a reasonable housing expense.

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<sup>93</sup> *Id.*

<sup>94</sup> The differences between a final accounting and an accounting conducted during a cotenancy are not substantial. The key difference is that some considerations, such as improvements, cannot be considered until the cotenancy ends.

<sup>95</sup> 59A AM. JUR. 2d *Partition* § 138 (2021). Cotenants can earn rents and profits in different ways, including by leasing the property (or one room on the property) and farming the property.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> \$20,000 - \$2,000 = \$18,000 in profit. \$18,000 / 2 = \$9,000 per cotenant. The extra \$2,000 goes to the occupying cotenant to reimburse their expenses.

<sup>99</sup> 59A AM. JUR. 2d *Partition* § 139 (2021).

<sup>100</sup> *Id.*

<sup>101</sup> This fractional value is still, like all considerations, offset by the other considerations. That said, when an ouster occurs, the entire rental value is relevant to the calculation, whereas without ouster, the full rental value may not be considered. *Id.*

<sup>102</sup> See EISEN & MERHIGE, *supra* note 12, § 50.07; see also *Adkins v. Adkins*, 595 So. 2d 1032 (Fla. Dist. Ct. App. 1992).

<sup>103</sup> 59A AM. JUR. 2d *Partition* § 139 (2021).

Reasonable housing expenses must be shared among cotenants, but what is “reasonable” is unclear and varies depending on the jurisdiction (if the jurisdiction has defined it at all).<sup>104</sup> Maintenance expenses, for example, generally count toward the final judicial accounting.<sup>105</sup> However, some reasonable maintenance expenses can alternatively be classified as improvements, which are treated differently in accounting (see the fifth consideration, below).<sup>106</sup> Utility expenses pose even more uncertainty. Utility expenses (and some types of maintenance expenses, such as carpet cleaning or wall painting) are hybrid housing and personal consumption expenses, forcing courts to draw a difficult line. For example, the non-occupying cotenant should *not* be responsible for one half of the gas used to cook the occupying cotenant’s food, but the non-occupying cotenant *should* be responsible for one half of the gas used to heat the house in the winter to prevent pipes from bursting. There is no obvious way to divide the gas bill between cooking and heating expenses, which perhaps explains why the (scarce) case law on this issue tends to hold that non-occupying cotenants are not responsible for utility expenses.<sup>107</sup>

Fourth, cotenants owe duties to each other not to waste or spoil the property.<sup>108</sup> If a cotenant meets this threshold, they are responsible for all damages (loss in fair market value) caused by the waste.<sup>109</sup>

Fifth, as noted above, cotenants who improve the property have a right to the increase in the property’s value that was caused by the improvement.<sup>110</sup> The line between reasonable maintenance expenses and improvements is blurry but meaningful. Cotenants owe one-half the value of maintenance expenses, but for improvements, cotenants owe one half of the increase in value caused by the improvement.<sup>111</sup> The cotenants’ preferences for whether an expense is classified as maintenance or improvement depends on the situation because the increase in fair market value will not always exceed one half of expenses. In a final accounting, the proceeds should be adjusted to fairly distribute the value of the improvements to the improving cotenant.<sup>112</sup>

Sixth, down payments fall into their own category (rather than the “housing expenses” category), perhaps because cotenants pay down payments before the cotenancy relationship begins.<sup>113</sup> The scarce case law on this issue creates a rebuttable presumption that the down payment was a gift and thus irrelevant to the judicial accounting

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> See *Brady v. Varrone*, 65 A.D.3d 600, 603 (N.Y. App. Div. 2009) (holding water and sewer expenses could not be credited against the non-occupying cotenant when that cotenant was not living on the property but crediting the non-occupying cotenant during the time the cotenants both received rental value); *Whippie v. O’Connor*, 2010 VT 32 ¶ 26, 996 A.2d 1154, 1166 (Vt. 2010) (finding children’s expenses, if not paid for in express agreement in exchange for housing expenses, were irrelevant to a partition action). See *contra* *Currie v. Jané*, 2014 VT 106, 109 A.3d 876, 879, n.5 (Vt. 2014) (noting but not deciding the ambiguity of utility expenses as both maintenance expenses and “day-to-day” personal expenses).

<sup>108</sup> EISEN & MERHIGE, *supra* note 12, § 50.07.

<sup>109</sup> *Id.*

<sup>110</sup> BULLINGTON & REYHAN, *supra* note 35, § 38.06.

<sup>111</sup> *Id.*

<sup>112</sup> EISEN & MERHIGE, *supra* note 12, § 50.07.

<sup>113</sup> See *O’Donnell v. Marks*, 823 So. 2d 197, 198–99 (Fla. Dist. Ct. App. 2002); *Felderman v. Swiefel*, 346 S.W.3d 386, 389 (Mo. Ct. App. 2011); *Gallagher v. Townsend*, 2019 WY 66, 443 P.3d 847 (Wyo. 2019).

calculation.<sup>114</sup> If one cotenant overcomes this presumption, the court treats the payment just like a housing expense—the non-paying cotenant is responsible for their fractional share of that payment.<sup>115</sup>

Courts add and subtract these six considerations against one another until they determine the cotenants' final interests in the property. The considerations listed above are exhaustive; nothing else determines how courts allocate property to cotenants. Notably, these permissible considerations focus only on those economic contributions made toward the property.<sup>116</sup> Any non-economic considerations—such as cotenants' interest in remaining on the property, the interests of children or non-owners, or other “unrelated matters” like “conversion of personal property, marital matters, or unpaid child support”<sup>117</sup>—are irrelevant to the accounting process. Such a narrow focus simplifies the accounting process and enhances its predictability, but as the following Part demonstrates, these benefits come at the expense of fairness to cotenants.

## II. THE PROBLEM WITH THE LAW

Partition law produces unjust outcomes for occupying cotenants, particularly those who have built strong personal connections to the property and surrounding community. The partition process enables non-occupying cotenants to force occupying cotenants from their homes, and the judicial accounting process, which elects to consider only a limited set of monetary factors in its determination of cotenants' ownership interests, leaves occupying cotenants with less equity than their interests demand.<sup>118</sup>

Instead of relying on purely monetary factors, non-monetary residential factors should be relevant to the division of property rights because the unique nature of residential property warrants legal protections beyond those that current partition and accounting law provide. These factors include the cotenants' subjective value in the property and the community's interest in housing stability. By incorporating non-monetary residential factors into the accounting process, occupying cotenants will gain more equity in their homes, allowing them to more easily buy out non-occupying cotenants' interests when faced with a partition or threatened partition.

The following Part is divided into two subsections. The first outlines the theoretical and empirical arguments that demonstrate what is special about residential property and why current judicial accounting law does not capture occupying cotenants' interests in residential property. The second explains how and why the law's shortcomings disproportionately affect low-income communities.

### *A. Partition and Judicial Accounting Laws are Unfair to Occupying Cotenants*

Partitions of residential property frequently involve one occupying and one non-occupying cotenant. The partition process impacts these cotenants differently because the occupying cotenants are often forced to leave their home, while the non-occupying

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> 59A AM. JUR 2d *Partition* § 138 (2021).

<sup>117</sup> *Id.* at § 137.

<sup>118</sup> *Id.*

cotenants wait for the property to be sold from the comfort of their home. In other words, occupying cotenants' interests are personal and economic, and non-occupying cotenants' interests are solely economic. Accounting law does not perceive this difference to be meaningful. Current law considers only monetary factors in its determination of cotenants' equities in the property. The following subsection first outlines why occupying cotenants value residential property before arguing that partition law does not accommodate that value.

### 1. The Value of Keeping Residents in their Homes

Humans feel a strong personal connection to their residential property and the community surrounding it. This sentiment provides the logical foundation for existing laws that protect people in residential property, such as homestead exemptions,<sup>119</sup> rent control,<sup>120</sup> and procedural protections for tenants in eviction proceedings,<sup>121</sup> and it has inspired a large body of scholarship calling for laws that offer homeowners and renters greater protection.<sup>122</sup> The following subpart uses this scholarship to argue that residential property is unique, and those living in residential property deserve the protection that could stem from considering non-monetary factors in judicial accountings.

#### a. Occupying Cotenants Have a Strong Interest to Stay in their Homes

##### i. *Residential Property Has Subjective Value*

Intuitively, occupying cotenants, like Ms. Rivas, should have stronger rights to their property relative to non-occupying cotenants because the occupying cotenants use the property as their home. In the comments of the Uniform Partition of Heirs Property Act, the writers recognize that owners who “pay property taxes, . . . live on the land, and . . . make productive use of the land” have a strong sense that their right to stay on that land is secure.<sup>123</sup> Of course, intuition is not particularly persuasive evidence, but when people's sense about what the law ought to be aligns with strong theoretical support in academic literature, the law should pay close attention.

Margaret Jane Radin's theory of property and personhood most strongly supports the idea that homeowners, like occupying cotenants, deserve more protection.<sup>124</sup> Radin argues that certain property—personhood property—becomes “bound up” with a person's liberty and how they see themselves in the world.<sup>125</sup> Residential property is frequently personhood property; for Radin, the home (whether a fully-owned house or leased apartment) is almost sacred and is “the scene of one's history and future, one's life and growth.”<sup>126</sup> Other

<sup>119</sup> See BULLINGTON & REYHAN, *supra* note 35, § 21.04.

<sup>120</sup> *E.g.*, 3A NY PRACTICE GUIDE: REAL ESTATE § 26.04.

<sup>121</sup> *E.g.*, 4 NY PRACTICE GUIDE: REAL ESTATE § 27.01.

<sup>122</sup> Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); Waldeck, *supra* note 39, at 739, 741.

<sup>123</sup> UNIF. PARTITION OF HEIRS PROP. ACT, 2 (UNIF. L. COMM'N, 2010) (noting “many [occupying cotenants] believe that their property ownership is secure because they pay property taxes, they live on the land, and they make productive use of the land”).

<sup>124</sup> Radin, *supra* note 122, at 957.

<sup>125</sup> *Id.* at 959.

<sup>126</sup> *Id.* at 992, 993–96.

scholars agree.<sup>127</sup> This perspective implies the law should do more to protect people's homes when they have a personal interest in the property. As Radin puts it: "Once we admit that a person can be bound up with an external 'thing' in some constitutive sense, we can argue that by virtue of this connection the person should be accorded broad liberty with respect to control over that 'thing.'"<sup>128</sup>

Radin's argument strikes a chord. Unsurprisingly, individuals forced from their home can suffer serious emotional loss. For example, Johnny Rivers, a man living around Charleston, South Carolina, experienced a forced relocation and land loss through a partition action.<sup>129</sup> When *The Post and Courier*, a Charleston newspaper, told his story, Rivers stated that he did not only feel economic loss, but that he also felt "the loss in [his] bones," as though "part of [his] body [was] gone."<sup>130</sup> Rivers's loss was personal. Residential property is special, and forcing someone to leave the property they call home can cause legitimate psychological harm.

Indeed, empirical evidence confirms that people value their own residential property above its economic value. In a survey conducted by Janice Nadler and Shari Seidman Diamond, which asked people about their willingness to part with their \$200,000 homes, over 80% of respondents refused to sell their property for fair market value.<sup>131</sup> Instead, 36% demanded at least a \$100,000 premium before they would sell their homes.<sup>132</sup> This empirical evidence confirms what the academic literature and intuition already tell us: residents subjectively value their homes.

## ii. *Staying in One's Home Reduces Costs*

Individuals want to remain on their residential properties because they derive happiness from their homes, often through a sentimental attachment to the property. People

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<sup>127</sup> Sarah E. Waldeck, with her theory of "identity property," touches on the same themes as Radin. Waldeck builds on Radin's insights to argue that partition law should adapt to better protect cotenants from partitions. Waldeck, *supra* note 39, at 739, 741. Waldeck's theory, however, is far more modest. Instead of arguing that residential property is central to human flourishing, Waldeck argues that only certain property—property which is "cherished because of what it represents about one's family and own history"—deserves a very limited legal protection from the threat of a partition by sale. *Id.* Her arguments are mostly specific to the unique situation of a family cottage. *Id.* But the theme of her article strongly supports the idea that the unique nature of residential property can demand more legal protections for cotenants.

<sup>128</sup> Radin, *supra* note 122, at 960.

<sup>129</sup> April B. Chandler, Note, *'The Loss in My Bones': Protecting African American Heirs' Property with the Public Use Doctrine*, 14 WM. & MARY BILL RTS. J. 387, 387–88 (2005) (quoting Johnny Rivers, whose story was told by Tony Bartelme, *Father Dreads Family's Eviction in Heirs' Property Dispute*, POST & COURIER (Charleston, S.C.), Sept. 27, 2001, at A1).

<sup>130</sup> *Id.*

<sup>131</sup> Janice Nadler & Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 J. EMPIRICAL LEGAL STUD. 713, 731 (2008).

<sup>132</sup> *Id.* (arguing partitions by sale should not apply to identity property, because the threat of the sale, which might result in the cotenants losing the property, is so powerful that it creates a bilateral monopoly. The law should instead facilitate agreements among cotenants and consider the implementation of temporal partition). The endowment effect, or the documented human tendency to more highly value objects we possess, may influence those numbers, but it surely does not alter the conclusion that people value their residential property beyond its economic value. See Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1134 (2009).

also want to stay in their homes because moving involves both financial and psychological costs, especially during a forced relocation.

The average cost of moving a three-bedroom house is \$500–\$1,000,<sup>133</sup> and that cost alone would decimate many Americans’ savings—especially because 29% of Americans have less than \$1,000 in savings.<sup>134</sup> Moreover, the \$500–\$1,000 estimate does not include the time and energy it takes to find a new place to live, which have nonquantifiable but real costs. These monetary and non-monetary moving costs disincentivize relocation and thus represent a factor in many residents’ desire to remain in their homes.

The risk of psychological harm also contributes to residents’ preference for stable housing. These costs are especially high for those forcefully removed from their communities.<sup>135</sup> Forcible removal frequently leads to “clear evidence of powerful and quite widespread grief and mourning among the displaced residents . . .”<sup>136</sup> Even scholars skeptical of relocation costs recognize that “[d]islocation entails short-term stress.”<sup>137</sup> Residents thus have reason to fear the psychological impact of leaving their communities.

The subjective value people derive from their homes is significant, and residents experience very real costs during a forced relocation. Together, these factors demonstrate how keeping people in their homes promotes societal good by allowing individuals to maximize their happiness. Residents’ individual happiness, however, is not the only justification for protecting homeownership. Communities also benefit from housing stability.

#### b. Communities Have an Interest in Housing Stability

##### i. *Residents’ Connection to Their Communities Benefits the Residents and Those Communities*

The law should protect residents from forced removal because long-term residents provide benefits, or positive externalities, to communities. Specifically, long-term residents build stronger social ties with community members,<sup>138</sup> engage more actively with the community’s local politics,<sup>139</sup> and obtain better education outcomes, both for their own

<sup>133</sup> See *How Much Does it Cost to Move?*, ZILLOW, <https://www.zillow.com/sellers-guide/how-much-does-it-cost-to-move/> (last visited May 1, 2021).

<sup>134</sup> See Kathleen Elkins, *Here’s How Much Money Americans Have in Savings at Every Income Level*, CNBC (Sept. 27, 2018), <https://www.cnbc.com/2018/09/27/heres-how-much-money-americans-have-in-savings-at-every-income-level.html>.

<sup>135</sup> Marc Fried, *Continuities and Discontinuities of Place*, 20 J. ENVTL. PSYCH. 193, 196 (2000) (finding patterns of depression among former members of Boston’s tight-knit West End community after they were forced to relocate).

<sup>136</sup> *Id.*

<sup>137</sup> Stern, *supra* note 132, at 1116 (admitting the short-term stress of relocation after arguing that forced relocation did not cause as severe stress as scholars let on).

<sup>138</sup> See Denise DiPasquale & Edward L. Glaeser, *Incentives and Social Capital: Are Homeowners Better Citizens?*, 45 J. URB. ECON. 354, 355–84 (1999).

<sup>139</sup> See Shigehiro Oishi, Alexander J. Rothman, Mark Snyder, Jenny Su, Keri Zehm, Andrew W. Hertel, Marti Hope Gonzales & Gary D. Sherman, *The Socioecological Model of Procommunity Action: The Benefits of Residential Stability*, 93 J. OF PERSONALITY & SOC. PSYCH. 831, 833–34 (2007).

children and those in their communities.<sup>140</sup> Thus, these three positive externalities support laws that promote housing stability from both the residents' and communities' perspective.

The first positive externality—stronger social ties—is demonstrated by a study testing the impact of homeownership that found that “longer community tenure . . . positively influenc[es] the formation of social capital.”<sup>141</sup> Longer community tenure increases the incentive for people to spend more time and invest in their communities, which leads to stronger relationships among neighbors.<sup>142</sup> While some commentators question the strength of neighborhood ties, such criticism concedes that strong ties do exist (just that they are more rare than proponents claim).<sup>143</sup> Furthermore, these critics fail to recognize that a change in property law might reverse a downward trend in social ties.<sup>144</sup> These social ties are worth protecting, especially because of their importance in low-income communities.<sup>145</sup> Therefore, because evidence indicates that housing stability increases social ties in the community, which benefits the community and individual residents, communities have a worthwhile interest in incentivizing people to remain in their homes.

The second positive externality is that housing stability leads to more active participation in local politics.<sup>146</sup> Increased political participation is not merely a result of homeownership's financial incentives; participation also stems from the length of community tenure.<sup>147</sup> Therefore, the community has an interest in promoting housing stability because a healthy democracy, which requires active participation, is worth pursuing.

The third and final positive externality that residential stability has on the community is better educational outcomes. Evidence shows that “residential stability . . . appears to be an important determinant of educational outcomes.”<sup>148</sup> As one might intuit, a boost in educational outcomes stems from avoidance of the “disruption effect” that students

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<sup>140</sup> See William Apgar, *Rethinking Rental Housing: Expanding the Ability of Rental Housing to Serve as a Pathway to Economic and Social Opportunity*, JOINT CTR. FOR HOUS. STUD. 1, 41 (2004); Eric A. Hanushek, John F. Kain, & Steven G. Rivkin, *Disruption Versus Tiebout Improvement: The Costs and Benefits of Switching Schools*, 99 J. PUB. ECON. 1721, 1743–44 (2004).

<sup>141</sup> See DiPasquale & Glaeser, *supra* note 138, at 357–58, 383 (defining social capital as a “connection to others which enables individuals to benefit from their neighbors' local amenity investment or to cooperate with their neighbors to improve local public goods”).

<sup>142</sup> See *id.* at 355; see Carol Coohy, *Social Networks, Informal Child Care, and Inadequate Supervision by Mothers*, 86 CHILD WELFARE 53, 63 (2007).

<sup>143</sup> See Stern, *supra* note 132, at 1122–23 (citing ROBERT PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 274 (2000) for a study revealing a one-third drop in evenings spent with neighbors from 1974 to 1998).

<sup>144</sup> See *id.*

<sup>145</sup> Monica C. Bell, *Safety, Friendship, and Dreams*, 54 HARV. C.R.-C.L. L. REV. 703, 722–31 (2019).

<sup>146</sup> Oishi, *supra* note 139, at 833–34 (finding that increased housing stability is positively correlated with investments in local environmental preservation causes).

<sup>147</sup> See Brian J. McCabe, *Are Homeowners Better Citizens? Homeownership and Community Participation in the United States*, 91 SOC. FORCES 929, 948–51 (2013) (finding residential stability explained much of the positive correlation between homeownership and political participation); Nadav Shoked, *The Community Aspect of Private Ownership*, 38 FLA. ST. U. L. REV. 759, 769–70 (2011) (citing CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 508 (1989) for the proposition that healthy and participation-filled local communities are necessary for the health of democracy).

<sup>148</sup> Apgar, *supra* note 140, at 41.

experience when a move forces them to switch schools.<sup>149</sup> Residential stability keeps students in the same schools, which improves these students' education and in turn positively impacts the community (in the long-run, at least).<sup>150</sup> There is also evidence that high turnover in schools has a direct negative impact on even those students in the community who remain in the same school.<sup>151</sup> The community, therefore, has an interest in promoting housing stability, because it boosts educational outcomes for residents' children. These benefits to educational outcomes, combined with improved political participation and stronger social ties (as discussed above), provide strong evidence that longer community tenures promote good for both the individual and the community.

*ii. The Community's Interest Should Affect Private Property Rights*

Laws that protect residential property not only benefit those living in the home, but also the surrounding community. Generally, the community's interest, framed as a public policy consideration, is relevant to common law determinations of private law. For example, contracts against public policy are unenforceable,<sup>152</sup> and a major purpose (if not the primary purpose) of tort law is utility maximization.<sup>153</sup> The community's interest arguably should play a bigger role in the context of residential property. Nadav Shoked argues that the community possesses a property right to people's private property, because actions taken on private property impact the values of neighboring properties.<sup>154</sup> This property right, if recognized, would not be as strong as the rights of cotenants, of course, but the community's interest could still justify modest restrictions on cotenants' property rights.<sup>155</sup> Because the community's interest affects private law and the community arguably has a property right in residential property, partition law must partially heed the community's preferences.

As will be discussed in more detail below, the idea that property owners can cede property rights to a community through a reliance interest is not revolutionary.<sup>156</sup> Therefore, the community's interest in keeping occupying cotenants in their home is a defensible consideration in the context of judicial accounting law.

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<sup>149</sup> Hanushek, *supra* note 140, at 1743–44.

<sup>150</sup> See Ling Hin Li, *Impacts of Homeownership and Residential Stability on Children's Academic Performance in Hong Kong*, 126 SOC. IND. RES. 595, 611 (2016) (“[H]igh stability of the childhood environment seems to be a common and significant factor affecting school performance irrespective of the schoolchild's parents' educational background and personal caliber of the child.”)

<sup>151</sup> Hanushek, *supra* note 140, at 1743–44.

<sup>152</sup> Restatement (Second) of Contracts § 8 (1981).

<sup>153</sup> See Richard W. Wright, *The New Old Efficiency Theories of Causation and Liability*, 7 J. TORT L. 65, 65–66 (“For the last 40 years, efficiency theorists have attempted to demonstrate that tort liability in general and negligence liability in particular can best/only be explained by the hypothesis that judges are trying to maximize aggregate social welfare.”).

<sup>154</sup> Shoked, *supra* note 147, at 764–66 (arguing communities have property rights that amount to a “junior partner” status, and these rights justify restrictions on property owners in the form of a modest tax on the capital gain of the sale of property in a gentrifying area to mitigate the cost of rising property taxes on long-term residents).

<sup>155</sup> *Id.*

<sup>156</sup> See generally Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988) [hereinafter *Reliance Interest*].

## 2. In its Current State, Partition Law Fails to Respect Occupying Cotenants

The problem with partition and judicial accounting law is simple: it ignores the reasons for protecting residents who want to stay in their homes. To courts applying judicial accounting law, the psychological harm of forced relocation does not matter. The occupying cotenants' children's interest in staying in school is immaterial. The community's interest in the health of its local democracy and social relationships is beyond the scope of judicial accounting. As a result, partition law allows non-occupying cotenants to kick occupying cotenants out of their homes, and judicial accounting law tells occupying cotenants that their connections to their homes and communities are irrelevant in determining how much equity they have in their properties. In an accounting, courts plug monetary factors (described in Part II) into a formula and out pops the final determination.

This formulaic approach to judicial accounting can produce unjust outcomes when non-occupying cotenants file partition actions.<sup>157</sup> The Texas case described in the introduction, for example, ignored Ms. Rivas and her children's interests in remaining on their property. Instead, the court held that even though Ms. Rivas (and her children) lived on and paid all the expenses for their property for several years, they did not have more equity or property rights than the non-occupying cotenant due to the purely economic-based accounting analysis.<sup>158</sup> In the court's view, "[n]either the property's character as Rivas's homestead nor the age of the parties' child alters the partition analysis."<sup>159</sup> Rather, all that mattered to the court was whether the non-occupying cotenant received their right to the property's rental value. This purely economic focus must change.

### *B. The Law Especially Harms Low-Income Individuals*

The unfairness of partition law is particularly concerning because it disproportionately impacts low-income communities. While direct empirical evidence does not yet prove that low-income homeowners utilize the partition process more frequently than others, there are three reasons why low-income homeowners are more likely to experience partition. First, as heirs property literature discusses, low-income individuals are more likely to die intestate, increasing the number of cotenants on title for the average residential property and in turn increasing the likelihood that partition actions

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<sup>157</sup> If occupying cotenants file the partition, the subjective value and community interest arguments do not work because they apply equally to the person filing a partition and other cotenants. And in the scenario where occupying cotenants file a partition against non-occupying cotenants, the subjective value and community interest arguments are again irrelevant because the occupying cotenants, by filing the partition, are signaling their desire to monetize their property interest.

<sup>158</sup> *Rodriguez v. Rivas*, 573 S.W.3d 447 (Tex. 2019).

<sup>159</sup> *Id.*

will be filed.<sup>160</sup> Second, marriage rates are lower in low-income communities,<sup>161</sup> which means that co-owned real property between low-income couples is less likely to be equitably distributed upon divorce. Because a higher proportion of low-income couples avoid equitable distribution when the couple splits, low-income couples who co-own property disproportionately utilize partition. Third, low-income communities are less likely to obtain legal advice and formalize their economic relationships due to the cost of legal services, which makes it less likely that the dissolution of a cotenancy held by low-income individuals will be governed by contract.<sup>162</sup> Again, these three factors do not demonstrate that the law applies differently to low-income people; rather, the law simply applies to low-income people more frequently. Because the law is unfair, judicial accounting disproportionately harms low-income communities.

Not only are low-income homeowners more likely to go through the partition process, but low-income individuals more deeply feel the costs of the partition process. Identical economic harm is more consequential to low-income individuals because of the declining marginal value of money and the relative importance of residential property as a mechanism for building wealth.<sup>163</sup> By making it too easy for occupying cotenants to lose their homes through partition, partition law strips low-income people of their most important asset.

The partition process also places low-income homeowners at a distinct disadvantage when navigating partition by sale at public auctions.<sup>164</sup> The disadvantage stems from low-income homeowners' lack of cash and access to credit compared to wealthier homeowners,

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<sup>160</sup> See Mitchell, *supra* note 74, at 519; Thomas W. Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, 2005 WIS. L. REV. 557, 582–83 (2005). Of course, The Heirs Property Act solves aspects of the heirs property problem, but it does not necessarily limit the number of partition actions filed; plus, the Heirs Property Act has been adopted in only eighteen states. See UNIF. PARTITION OF HEIRS PROP. ACT, 2 (UNIF. L. COMM'N, 2010) (advocating for changes in the partition process but not changes in the accounting process, specifically taking pains to protect the economic interest of the non-occupying cotenants).

<sup>161</sup> Shawn Fremstad, *Partnered But Poor*, CTR. FOR AM. PROGRESS (Mar. 11, 2016, 9:01 AM), <https://www.americanprogress.org/issues/poverty/reports/2016/03/11/131968/partnered-but-poor/> (finding 72% of children live in families with married couples while 55% of children in low-income families live in families with married couples); Elaine Maag & Gregory Acs, *The Financial Consequences of Marriage for Cohabiting Couples with Children*, URB. INST. (Sept. 2015), <https://www.urban.org/sites/default/files/publication/65776/2000366-The-Financial-Consequences-of-Marriage-for-Cohabiting-Couples-with-Children%20.pdf> (citing ISABEL V. SAWHILL, GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE (2014) for the proposition that low-income marriage rates were reducing at a faster rate than other marriages).

<sup>162</sup> Heather K. Way, *Informal Homeownership in the United States and the Law*, 29 ST. LOUIS U. PUB. L. REV. 113, 117 (2009); Pamela Cardullo Ortiz, *How a Civil Right to Counsel Can Help Dismantle Concentrated Poverty in America's Inner Cities*, 25 STAN. L. & POL'Y REV. 163, 173 (2014).

<sup>163</sup> Allison Wainer & Jeffrey Zabel, *Do Low-Income Families Build Wealth Through Homeownership?*, ECONOFACT (Apr. 9, 2019), <https://econofact.org/do-low-income-families-build-wealth-through-homeownership>.

<sup>164</sup> UNIF. PARTITION OF HEIRS PROP. ACT, *supra* note 160, at 8 (“Poorer families . . . are not able to bid competitively at the partition sale auction because they are unable to secure any financing to make an effective bid and because they are cash poor. Banks and other lending institutions will not accept a partial interest in tenancy-in-common property as collateral to secure a loan and most of these heirs property owners cannot otherwise obtain financing because they often have few other assets to offer as collateral to secure a loan.”).

which makes it more difficult for them to repurchase their homes at auction.<sup>165</sup> Notably, this problem is compounded for Black and Latinx homeowners because banks frequently discriminate against them.<sup>166</sup> This weakened ability to bid at auction reduces the likelihood that occupying cotenants can remain in their homes and diminishes cotenants' ability to drive up the auction price, causing them to lose even more money in the auction process if they do get outbid. A market solution, therefore, inadequately protects low-income homeowners.

Another way the partition process discriminatorily harms low-income homeowners is the difficulty these homeowners face in finding a new home within their original community after losing their homes at auction. The difficulty exists because low-income homeowners' more restricted buying capacity limits their housing choices.<sup>167</sup> Finally, low-income residents disproportionately rely on social ties within their communities, making forced relocation—which already has its costs<sup>168</sup>—even more harmful.<sup>169</sup> By severing important social ties, forcing relocation, and holding public auctions, partition law discriminates against low-income homeowners. This discrimination is exacerbated by the fact that low-income homeowners are more likely to go through the partition process because of their lower marriage rates, higher intestacy rates, and reduced access to legal services.

Low-income homeowners, of course, are not the only losers in partition law. As Section A illustrates, partition law hurts occupying cotenants by failing to adequately protect occupying cotenants' subjective value and the community's preference for housing stability. To be sure, the extent of partition law's impact remains unknown; empirical evidence, though difficult to gather,<sup>170</sup> is needed to determine the scope and urgency of the problem.<sup>171</sup> Nonetheless, the problem remains, and states can combat the problem by incorporating non-monetary considerations into the judicial accounting process.

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<sup>165</sup> *Id.*

<sup>166</sup> See Robert Barlett, Adair Morse, Richard Stanton, & Nancy Wallace, CONSUMER-LENDING DISCRIMINATION IN THE FINTECH ERA 1 (Nat'l Bureau of Econ. Res., Working Paper No. 25943, 2019), [https://www.nber.org/system/files/working\\_papers/w25943/w25943.pdf](https://www.nber.org/system/files/working_papers/w25943/w25943.pdf) (finding that lenders are discriminating against Black and Latinx mortgagees by \$765 million in increased interest charges per year, which is an average of about “7.9 basis points (bps) for purchase mortgages and 3.6 bps for refinance mortgages”).

<sup>167</sup> See U.S. DEP'T OF HOUS. AND URB. DEV., DISPLACEMENT OF LOWER-INCOME FAMILIES IN URBAN AREAS REPORT 6 (2018) (noting, in the context of gentrification, how housing choices for low-income individuals are limited by high costs).

<sup>168</sup> See *infra* Part III.A.

<sup>169</sup> See Bell, *supra* note 145, at 722–31; Coohy, *supra* note 142, at 63 (identifying weaker social ties in low-income mothers' neighborhoods as being a causal factor in the inadequate supervision of their children when inadequate supervision does occur).

<sup>170</sup> Studies researching partition law will quickly recognize the scarcity of case law. However, the lack of case law should not necessarily indicate the lack of a problem because the law (through attorney's fees and court costs) provides a massive incentive for cotenants to settle. The unfairness of the law is undoubtedly felt more in its shadows—guiding individual decisions and settlements—than in its direct application in court.

<sup>171</sup> See Mitchell, *supra* note 160, at 561 (arguing for the importance of grounding the solution to the Heirs Property problem in a solid empirical foundation).

### III. THE SOLUTION

Partition and accounting law leave occupying cotenants with property rights that do not sufficiently reflect their own special interests nor their community's special interests in residential property. State legislatures should respond by codifying the judicial accounting process and adding a set of non-monetary residential considerations—like the occupying cotenants' connection to the community—that courts must balance before distributing property to cotenants in an accounting. The balancing of cotenants' rights and obligations to a property would rightfully recognize that the cotenants living on the property, in certain circumstances, ought to have more rights to that property. This solution marks an important, but not dramatic, shift in property law, for laws governing divorce, partitions, and even accounting similarly ask courts to weigh non-monetary considerations in their decisions.

#### *A. Partition Law as a Partial Solution*

To prevent occupying cotenants from being forcefully removed from their homes, one might naturally look to reform partition law because the partition process enables the forced removal of those cotenants. However, eliminating cotenants' right to partition would be an overcorrection; stripping cotenants of their rights to alienate their property interests would bind cotenants against their will, creating a problem larger than the existing one.<sup>172</sup> And instituting other partition-law solutions, such as a notice requirement or mandatory waiting period, would only delay rather than prevent the harm.<sup>173</sup>

Partition law does, however, offer a partial solution: partition by allotment. Partition by allotment, which many jurisdictions have already adopted, gives occupying cotenants a better chance to keep their property by eliminating the possibility that they can be outbid at a public auction. Unfortunately, partition by allotment fails at protecting many low-income occupying cotenants who cannot afford to purchase their fellow cotenants' property interests. This failure is problematic because occupying cotenants frequently build a connection to the property and community that warrants an increase in equity.<sup>174</sup> This issue is compounded because low-income communities are more likely to experience a partition, and because their incomes are low, they will have an even more difficult time purchasing their fellow cotenants' property interests.<sup>175</sup> Partition by allotment thus plays an important, but insufficient, role in fully realizing the rights that occupying cotenants deserve. The more comprehensive solution lies in judicial accounting.

#### *B. The Solution: Incorporate Non-Monetary Residential Factors into Accounting Law*

To adequately protect occupying cotenants' property interests, states must statutorily require courts to consider non-monetary residential factors (in addition to the existing monetary factors) during the judicial accounting process. Courts should follow a two-step

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<sup>172</sup> See *supra* Part II.B for a discussion of the problem of bilateral monopolies and the necessity of partition law.

<sup>173</sup> UNIF. PARTITION OF HEIRS PROP. ACT, 2 (UNIF. L. COMM'N, 2010).

<sup>174</sup> See *infra* Part III.D.

<sup>175</sup> See *infra* Part III.B.

procedure. First, they should input numbers into the traditional accounting formula to create the presumptive allocation of property. Second, they should consider the non-monetary residential factors listed below and determine whether they should adjust the initial economic determination based on these factors to accommodate the occupying cotenants' interests. This latter step is the innovation, urging courts to tilt the scales in favor of occupying cotenants when the non-monetary residential factors point in their direction.

The beauty of this solution is its simplicity and directness. If the economic formula undervalues the occupying cotenants' property rights, courts can give those occupying cotenants more equity. This maneuver would be fairer to occupying cotenants and make it easier for them to remain on their property by purchasing the other cotenants' ownership interests (whether through partition by allotment or private agreement). Furthermore, this solution benefits from its flexibility, giving courts the power to tailor the magnitude of occupying cotenants' ownership interest to the particular facts of the case.

The solution, more specifically, is for courts to weigh six non-monetary residential factors when allocating property during a judicial accounting. The six factors are: (1) the length of the occupying cotenants' tenure after non-occupying cotenants leave, (2) whether the non-occupying cotenants were ousted, (3) occupying cotenants' unique sentimental attachment to the property, (4) occupying cotenants' connection to the community, (5) children living with occupying cotenants, and (6) other factors that are relevant to the occupying cotenants' desire to remain in the home and the non-occupying cotenants' role in promoting that desire. The remainder of this Section explains the relevance of these six factors, provides examples of their application, and discusses solutions to the problems that stem from monetizing non-monetary factors.

The first and most important factor is the length of occupying cotenants' tenure after non-occupying cotenants leave. This factor captures the three broader motivations underlying the proposed solution: the occupying cotenants' interest in the property, the community's interest in keeping occupying cotenants in their property, and the non-occupying cotenants' role in creating a reliance interest in occupying cotenants. Furthermore, this factor is quantifiable and not vulnerable to misleading testimony and manipulation, giving courts an objective fact to guide their decisions. For this factor, the longer occupying cotenants live alone on the property, the more equity occupying cotenants should receive.

The second factor (and second most important factor) is whether the non-occupying cotenants were ousted from the property. Ouster is relevant because when non-occupying cotenants are ousted (i.e., forced out by occupying cotenants), the non-occupying cotenants, by definition, do not give the occupying cotenants the impression that they can live on the property without interference. Under these circumstances, occupying cotenants are far less likely to have a reliance interest in the property, meaning the occupying cotenants deserve less equity. An ouster should, therefore, create a rebuttable presumption that occupying cotenants cannot acquire equity beyond that initially allocated by the monetary factors. Occupying cotenants can rebut this presumption if a long length of time has passed since the ouster. As more time passes, non-occupying cotenants impliedly create a reliance interest for the occupying cotenants to remain on the property.

The remaining four factors are important but should not dispositively determine whether a court should shift equity to occupying cotenants. Without the passage of time or creation of some type of reliance interest, occupying cotenants should not gain more equity

in the property, even if they have a strong connection to the home and community, because the justifications for stripping non-occupying cotenants' equity disappear. Still, these factors can play a major role in a court's decision because (1) they help justify the length of time passed factor, which serves as a proxy for many of the following factors, and (2) their presence is still relevant to equity determinations when enough time has passed and/or there has been no ouster.

The third factor, the occupying cotenants' unique sentimental attachment, is relevant because the more attached the occupying cotenants are to the property, the stronger the justification is for shifting equity to the occupying cotenants in the accounting process. Multi-generational family homes are the quintessential example of properties that engender sentimental attachment, and if the occupying cotenants are living in a family home, courts should make it easier on those cotenants to retain the property. Occupying cotenants might also demonstrate sentimental attachment through credible testimony about the specific reasons they are attached to the property.

The fourth factor, the occupying cotenants' connection to the community, is relevant because stronger community connections strengthen both the occupying cotenants' interests in staying in the home and the community's interest in keeping the occupying cotenants on the property.<sup>176</sup> Occupying cotenants can demonstrate specific neighborhood ties, a connection to a tight-knit immigrant community, or community-based public service projects (among other examples) to illustrate a strong community connection.

The fifth factor, children living with the occupying cotenant, is relevant for the same reasons that the occupying cotenants' connection to the community is relevant.

Finally, the sixth factor is a catch-all factor designed to preserve courts' flexibility to tailor just decisions to the specific facts of the cases before them. Facts that may fall under this category include communications between cotenants, the age or disability of the cotenants, and—to a very limited extent—the relative wealth of the cotenants.

These six factors all give rise to the same question: how can courts arrive at a number? Courts can use the principles outlined above to easily identify whether a factor weighs in favor of occupying cotenants, but courts can less easily determine whether that factor calls for a 1%, 10%, or 40% shift in equity to the occupying cotenants. To arrive at a number, courts must look to the principles from Part II and the discussion of the six considerations above to get a sense for how much utility will be gained by keeping occupying cotenants on the property and how culpable non-occupying cotenants are in creating a reliance interest on the property. The following examples should give courts a sense for how they might analyze and balance the six non-monetary considerations. These examples assume that there are one occupying and one non-occupying cotenant and that the initial economic calculation for accounting has resulted in a fifty-fifty split in property interests.

If an occupying cotenant has lived alone on a property for fifteen years, sends her three children to public schools, lives in a neighborhood with deep social ties, and did not oust the non-occupying cotenant, then the court should grant the occupying cotenant almost all the property—an additional 40% to 50%—because all signs point to the occupying cotenant highly valuing the property (partially due to the children), the community valuing the occupying cotenant as a neighbor, and the non-occupying cotenant creating a major reliance interest. If, however, the non-occupying cotenant was ousted, that number should

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<sup>176</sup> See *supra* subpart II.A.a.

drop significantly (depending on the behavior of the non-occupying cotenant during the fifteen years) because the ousting reduced, but did not eliminate, the reliance interest. If there was an ouster and the occupying cotenant has only lived on their own for a few years, then both their ownership interests should probably remain unchanged.

The prior discussion provides a level of guidance for courts' implementation of these non-monetary factors. While distilling non-monetary factors into specific numbers is somewhat problematic, courts can and do make these kinds of decisions every day (e.g., how much is a lost arm worth?). The principles in Part II, the discussion above, and reasonable judicial discretion provide outlines for the application of these non-monetary factors. As the equitable distribution of marital property illustrates below, sometimes these general guidelines are enough.<sup>177</sup>

Importantly, these imperfect decisions are better than the alternative. Giving courts the arbitrary choice between 1% and 2% is better than forcing courts to choose 0%, regardless of the facts before the court. Standards are often better than rules,<sup>178</sup> especially when there is no pressing need for predictability and certainty (compared to criminal law or food and drug regulations, for example), which is the case in partition and accounting law. With this in mind, the incorporation of the six non-monetary factors into the judicial accounting process provides the best—albeit imperfect—way for courts to capture the occupying cotenants' property interest. While the exact manner in which courts balance these considerations provides for flexibility and creates uncertainty, the utility gained from making it easier for occupying cotenants to remain on their property (or at least gain more value from the sale of the property) is worth that uncertainty.

### *C. The Solution is Workable: We Prioritize Similar, Non-Monetary, Fairness Concerns in the Law*

Courts use their discretion to balance non-monetary residential property considerations with monetary factors in other areas of the law. The following illustrations of divorce, partition, and accounting law make a clear case that this Note's proposal—to give courts the power to balance non-monetary residential considerations against the traditional accounting considerations—is realistic and consistent with property law.

#### 1. Divorce: The Equitable Distribution of Marital Property

Equitable distribution is a statutory doctrine that governs how property is distributed between spouses upon a divorce.<sup>179</sup> In the context of divorce, equitable distribution is “the authority of the courts to award property legally owned by one spouse to the other spouse” through the recognition of “a nonworking spouse's efforts [to] contribute to the acquisition of the marital estate.”<sup>180</sup> Much like the relationship of cotenancy, some courts view

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<sup>177</sup> See *infra* Part III.C.

<sup>178</sup> See Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 385 (1985) (noting that standards enable judges to make individualized judgments based on the facts of the case, which often produces fairer results).

<sup>179</sup> Lee R. Russ, Annotation, *Divorce: Equitable Distribution Doctrine*, 41 A.L.R. 4th 481, §5[a] (2021).

<sup>180</sup> *Id.* at § 1[a].

marriage as an economic partnership, and divorce is the final dissolution of that partnership.<sup>181</sup>

When courts dissolve the marital relationship and equitably distribute property, they consider a host of factors spelled out via statute.<sup>182</sup> Most of these factors relate to the spouses' contributions toward the economic value of the property, such as whose income paid for the property or who spent time with the family to enable the other spouse to earn income.<sup>183</sup> Some factors, however, relate to the parties' future needs, like the factor: "relevant economic circumstances of each spouse when the division of property is to become effective."<sup>184</sup> Other factors recognize the benefit of maximizing the aggregate value of the property by weighing tax considerations.<sup>185</sup> Finally, there is sometimes one catch-all factor that enables courts to consider "[a]ny other factor that the court expressly finds to be relevant and equitable."<sup>186</sup>

When courts weigh these factors, they do not use a formula.<sup>187</sup> They simply balance the considerations—a combination of economic and non-monetary concerns—and allocate the property in the best way they can.<sup>188</sup> Courts apply these non-monetary considerations and arrive at exact dollar amounts to distribute between the parties.

The equitable distribution doctrine is analogous to accounting law because they both serve as the final dissolution of what is essentially an economic partnership. The fact that the equitable distribution doctrine balances monetary considerations with non-monetary considerations, like age and future earning potential, mirrors this Note's proposal. Just because the community's interest in keeping the children in school cannot be quantified, for example, does not mean that the interest should not be considered. Furthermore, the equitable distribution doctrine provides helpful analogous precedent for this Note's proposal through its recognition that third parties, such as children, deserve to be considered when a marriage dissolves. Much like children's interests are considered in a marital dissolution, so too the community's interest should be considered in a final accounting.

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<sup>181</sup> *Id.* at § 3.

<sup>182</sup> *E.g.*, 750 ILCS 5/503(d) (LexisNexis 2021) (requiring the consideration of twelve factors); OHIO REV. CODE § 3105.171(F) (LexisNexis 2021) (requiring the consideration of ten factors).

<sup>183</sup> *Id.*

<sup>184</sup> 750 ILCS 5/503(d)(5) (LexisNexis 2021) ("[T]he relevant economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having the primary residence of the children."). *See also* 750 ILCS 5/503(d)(8) ("[T]he age, health, station, occupation, amount and sources of income, vocational skills, employability, estate liabilities, and needs of each of the parties."); 750 ILCS 5/503(d)(11) ("[T]he reasonable opportunity of each spouse for future acquisition of capital assets and income.").

<sup>185</sup> 750 ILCS 5/503(d)(12) (LexisNexis 2021) ("[T]he tax consequences of the property division upon the respective economic circumstances of the parties.").

<sup>186</sup> OHIO REV. CODE § 3105.171(F)(10) (LexisNexis 2021).

<sup>187</sup> *Matter of Geraghty*, 150 A.3d 386, 417 (N.H. 2016) ("[M]arital property is not to be divided by some mechanical formula but in a manner deemed just based upon the evidence presented and the equities of the case.") (citation omitted); *Woolridge v. Woolridge*, 915 S.W.2d 372, 376 (Mo. Ct. App. 1996) ("[T]he trial court is vested with great flexibility and far reaching power, and no specific formula exists respecting the weight to be given to the factors required to be considered . . .").

<sup>188</sup> *Id.*

## 2. Partition Law

Part II outlined the points in partition law where a court's sense of fairness, given the individual facts of the case, is relevant to a decision. To reiterate, there are two key decisions throughout the partition process that consider fairness: first, whether to grant partition at all, and second, whether to conduct a partition in kind, partition by sale, or partition by allotment.<sup>189</sup>

First, courts may deny cotenants' near-absolute right to partition property if allowing the partition "would be against principles of law or equity or against public policy."<sup>190</sup> For example, a court denied a partition action brought by a cotenant against his elderly parents because it would have been unfair to remove the longtime occupying cotenants (the parents) from their house.<sup>191</sup> While this exception may apply "only in rare circumstances,"<sup>192</sup> courts are still willing to move beyond the formal rule.

The second decision in partition law that incorporates fairness is a court's choice to conduct a partition in kind, partition by sale, or partition by allotment. In all jurisdictions, courts can elect to conduct a partition by sale instead of a partition in kind when the fair physical distribution of property is not possible.<sup>193</sup> Similarly, courts can adopt partition by allotment in lieu of partition by sale—often exceeding express statutory authority in the process—because a rigid application of the rules would produce unfair outcomes in certain situations.<sup>194</sup> For example, the Supreme Court of South Carolina applied the doctrine of partition by allotment for the first time to preserve a defendant's sentimental connection to a beach house.<sup>195</sup> The occupying cotenants' age and the family's unique sentimental attachment to the house can be relevant considerations in partition law.

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<sup>189</sup> BULLINGTON & REYHAN, *supra* note 35, § 38.03, 38.05 ("The rule that partition is a matter of right is qualified by the equitable principles that the right will not be recognized where to order partition will work a fraud, hardship or undue oppression on a party resisting the partition.").

<sup>190</sup> 59A AM. JUR 2d. *Partition* § 59 (2021).

<sup>191</sup> *Condrey v. Condrey*, 92 So. 2d 423, 427 (Fla. 1957) (characterizing transfer of title between the parents and child as having been in exchange for the implied agreement that the parents could live in the house until their death).

<sup>192</sup> BULLINGTON & REYHAN, *supra* note 35, § 38.03(a)(2)(iii). *E.g.*, *Heldt v. Heldt*, 29 Ill. 2d 61 (1963) (refusing to deny a partition action on the grounds that children were living on the property because the court rejects the idea "that the bonds of matrimony coupled with having children will deprive both parents of full rights and benefits in their property.").

<sup>193</sup> EISEN & MERHIGE, *supra* note 12, § 50.07 (citing *Kent v. Kent*, 108 Nev. 398, 401–02 (1992) for the proposition that during a partition in kind, courts will even weigh cotenants' sentimental attachment to portions of land when deciding both how to allocate the land and whether to utilize owelty to allocate land disproportionately).

<sup>194</sup> BULLINGTON & REYHAN, *supra* note 35, § 38.05(c). *See Libby v. Lorrain*, 430 A.2d 37 (Me. 1981) (holding that the equitable nature of partitions allowed courts to order a sale from one cotenant to another before ultimately rejecting the application of that power to the facts of the case because the party was not in the financial position to purchase the property outright). *Contra Rodriguez v. Rivas*, 573 S.W.3d 447 (Tex. 2019) (rejecting the trial court's decision to conduct a partition by allotment, or "equitable owelty partition," because it was an abuse of discretion that went beyond the language of the statute, even though the occupying cotenant and the cotenant's school-aged children had been living on the property for several years [three at the start of partition, eight at the time case was decided]).

<sup>195</sup> *Zimmerman v. Marsh*, 618 S.E.2d 898 (S.C. 2005) (holding that the protection of the defendant's sentimental attachment to the property outweighed the risk that the plaintiff's one-half interest would be inaccurate because of a faulty appraisal).

This latter decision stands for the proposition that the best method of property distribution changes based on non-monetary factors and the specific facts of a case. Consistent with this principle, courts and lawmakers have been increasingly receptive to the use of partition by allotment, a pattern which indicates an increased willingness to allow non-monetary residential considerations to guide partition decisions.<sup>196</sup> Of course, adopting these principles into the accounting formula would still depart from current partition law, but the departure looks less significant when stacked against the two partition-law decisions that already incorporate these non-monetary considerations.

### 3. Accounting—An Example

While the doctrine of judicial accounting usually sticks to a rigid formula, one accounting law decision demonstrates how courts can naturally integrate non-monetary factors into the judicial accounting process.

In *Baird v. Moore*, a sister and brother owned a house that their mother had gifted to them as tenants-in-common.<sup>197</sup> The sister lived in the house with the mother and cared for her for seven years until the mother died. During this time, the sister made all the mortgage and maintenance payments.<sup>198</sup> In an accounting instigated by the brother's partition action, the court unsurprisingly and correctly found that the brother—or the non-occupying cotenant—was liable to the sister for one half of her mortgage and maintenance payments.<sup>199</sup> However, the court deviated from the common law by rejecting the brother's attempt to offset those expenses with one half of the fair market value of rent.<sup>200</sup>

The court's refusal rested partially on the fact that the brother had not been ousted, but the court was careful not to establish a categorical rule that cotenants who are not ousted can never offset expenses with one half of the fair market rental value.<sup>201</sup> Rather, the court was clear that it was the brother's moral failing to not care for his mother—not an implied agreement with his sister, which did not exist—that drove its decision.<sup>202</sup> The court stressed that accounting rules are “peculiarly dependent upon the facts and equities of the particular case,” and the court used this principle to guide its decision.<sup>203</sup> The court prioritized “basic justice and fairness” when deciding how to distribute the various claims between the cotenants.<sup>204</sup> Applying these principles, the court integrated a non-monetary consideration into the accounting process to shift equity from the brother to the sister.

This case essentially adopts a slimmed down, less explicit version of the solution proposed in Section III.B.<sup>205</sup> This case, alongside the analogous use of non-monetary considerations in equitable distribution and the use of non-monetary considerations at two

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<sup>196</sup> BULLINGTON & REYHAN, *supra* note 35, § 38.05(c).

<sup>197</sup> 141 A.2d 324 (N.J. Super. Ct. App. Div. 1958)

<sup>198</sup> *Id.* at 161–62.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 173–74.

<sup>201</sup> *Id.* at 173.

<sup>202</sup> *Id.* The court could not permissibly consider the value of the sister's personal services because the value of cotenants' personal services is an impermissible consideration in judicial accounting law.

<sup>203</sup> *Id.* at 172.

<sup>204</sup> *Id.* at 173 (“[W]e think the dispositive consideration here controlling is the pervading principles in this kind of matter, particularly applicable where there is a partition in equity, that the allocation of charges and credits as between the cotenants be governed by the basic justice and fairness of the situation.”).

<sup>205</sup> *Id.*

points in the partition process, illustrates that the incorporation of such considerations into the judicial accounting process is a reasonable proposal with a solid foundation in property law.

*D. Addressing Concerns: The Benefits Outweigh the Costs*

The incorporation of non-monetary residential considerations into the accounting process promotes better overall outcomes for society. By tilting the scales toward occupying cotenants, non-monetary residential considerations enable more occupying cotenants to remain on their properties (or receive higher proceeds in a sale). When occupying cotenants remain on their properties, value is maximized because, as described in Part III.A, occupying cotenants subjectively value their properties, and the community also values the occupying cotenants staying on those properties.

One might argue that the problem identified does not exist because if occupying cotenants truly valued the property more than non-occupying cotenants, they would purchase the property on the market. The market, or simply allowing occupying cotenants to purchase the property, inadequately addresses the problem for two reasons. First, the occupying cotenants' preferences do not always capture the communities' preferences. In certain circumstances, even if occupying cotenants have the capacity to buy the property, the cotenants would not buy the property even though such a purchase would provide a net value gain for the cotenants and their communities.<sup>206</sup> Second, more obviously and importantly, perfect worlds do not exist. Occupying cotenants might not have the funds to successfully keep their properties at auctions. Moreover, the solution proposed here is tailored toward members of low-income communities, who experience partition actions more frequently and face serious obstacles to repurchasing their properties at auctions.<sup>207</sup> In the usual scenario, in which occupying cotenants do not have unlimited buying power,<sup>208</sup> the traditional accounting formula can result in inefficient outcomes, or wasted value.<sup>209</sup>

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<sup>206</sup> Hypothetical: The property's fair market value is \$100, the house is worth \$99 to the occupying cotenant, and the community benefits \$20 from the occupying cotenant remaining on the property. The problem is that even if the occupying cotenant has unlimited purchasing power, they will not purchase the house at auction (assuming that it goes for fair market value) because they derive only \$99 worth of value from the property. This is an inefficient outcome, however, because it prevents the \$19 net value gain (\$20 positive to community, \$1 negative to the cotenant) that would result from the occupying cotenant purchasing the property for \$100. Therefore, even if occupying cotenants have unlimited buying power, the law still has an interest in incentivizing occupying cotenants to remain on their property by providing them with a lower price.

<sup>207</sup> See *supra* Part III.B.

<sup>208</sup> More empirical evidence is needed to prove this assertion, though Part III.B provides enough evidence to make the hedged claim "probably more likely" an appropriate assertion.

<sup>209</sup> Hypothetical: The property's fair market value is \$100, the house is worth \$110 to the occupying cotenant, the community benefits \$20 from the occupying cotenant remaining on the property, and the occupying cotenant's buying power is \$40. If the traditional accounting formula results in the occupying cotenant receiving only 50%, or \$50, of the property upon distribution (assuming no court costs), then the occupying cotenant is likely to be outbid at auction because their initial buying power plus proceeds from the sale (\$40+\$50=\$90) is less than the fair market value of the property (\$100). In this scenario, the occupying cotenant and non-occupying cotenant would each receive \$50 in value, resulting in a total value of \$100.

Hypothetical: Using the same facts above but supplementing the traditional accounting formula with non-monetary residential considerations in which the occupying cotenant receives 65%, or \$65 upon

Incorporating non-monetary residential factors can shift equity toward occupying cotenants, enabling them to purchase the property, resulting in a gain of net utility, or total value, due to the cotenants' subjective value and their communities' preference for residential stability.

Alternatively, one might object to my proposed solution because they believe that non-occupying cotenants do not deserve to lose equity. As discussed above, this critique fails to recognize that the non-occupying cotenants are partially responsible for creating the problem by instilling a reliance interest in occupying cotenants. This critique also fails to appreciate one practical implication of my proposed solution: all cotenants are now incentivized to act at the moment occupying cotenants become non-occupying cotenants. In other words, the proposed solution incentivizes cotenants to enter into agreements earlier in the cotenancy because non-occupying cotenants will try to avoid the possibility of losing equity in the future. These agreements benefit cotenants because they reduce cotenants' reliance on partition law, which is expensive and therefore should be avoided whenever possible. To the extent that the proposed solution incentivizes cotenants to partition or sell their property earlier than they would under the old law, that outcome is not especially problematic because it merely expedites the harm of partition rather than creating the harm itself. An earlier partition could benefit occupying cotenants because, instead of spending years in a home that they might lose in a future partition, they can lose the property tomorrow and spend that time elsewhere. The incentive to reach private agreements or to partition the cotenancy as early as possible are the primary consequences of the proposed solution, but these consequences do not pose serious concerns.

The benefits of the proposed solution—increases in net value and positive settlement incentives—are worth the costs inflicted upon non-occupying cotenants. There are three primary justifications for infringing upon the non-occupying cotenants' ownership interest. First, the law frequently transfers rights from less productive to more productive users. A primary justification for adverse possession, for example, is that property is better off in the hands of those who are using the property productively.<sup>210</sup> In nuisance law, courts give the more productive user a "plus" in the balancing test that determines whether the activity constitutes a nuisance.<sup>211</sup> Likewise, partition law should provide benefits to more productive users (i.e., the occupying cotenants), even at the expense of others.

Second, Radin's theory of personhood and property, which rests on traditional theories of property rights, can also justify the proposed use of non-monetary residential factors in the accounting process.<sup>212</sup> Occupying cotenants, who have been living on the property independently from non-occupying cotenants, have bound their ownership of the property with their conception of self. By not living on the property, non-occupying

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distribution of the property, the occupying cotenant can purchase the property for up to \$105. If they do purchase the property for \$105, the occupying cotenant would receive \$70 in value (\$110 - \$40 of personal money), the non-occupying cotenant would receive \$35 in value, and the community would receive \$20 in value for a total of \$125 in value. The non-monetary residential considerations, therefore, cause a \$25 gain in total value. Notably, even if the community did not benefit from the result, the outcome would still lead to a \$5 gain. Of course, the loser in this scenario is the non-occupying cotenant, who loses \$15 when the new accounting rules are applied.

<sup>210</sup> SINGER, *supra* note 9, at 346 (citing RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW*, § 3.12, at 97–98 (8th ed. 2011)).

<sup>211</sup> *Id.* at 346–47.

<sup>212</sup> See Radin, *supra* note 122, at 957.

cotenants cannot build this same kind of connection and therefore have less of a right to the property than occupying cotenants.

Third, the solution considers non-occupying cotenants' rights to the property and only infringes upon those rights when non-occupying cotenants cause occupying cotenants and their communities to have a reliance interest in the property. Joseph William Singer argues that parties' actions can give other parties the impression of the status quo, which he characterizes as a reliance interest and a property right. For example, Singer argues that U.S. Steel, which owned and operated a factory in Youngstown, Ohio for decades, owed the community a duty to lessen the blow of its decision to leave Youngstown because the community had a property right created through a reliance interest.<sup>213</sup> *Rase v. Castle Mountain Ranch, Inc.* also reflects this idea. In this case, the court decided that licensees who built and used cabins on a piece of property had a right to remain on the property for a reasonable period of time because the original landowner created the impression that the cabin owners could stay on the property.<sup>214</sup> Property law thus provides a clear basis for gradually transferring away the rights of non-occupying cotenants as these cotenants increasingly instill a sense of reliance in occupying cotenants.

#### *E. Future Research*

The scope of this Note is limited to problems in the judicial accounting process that relate to the unfair treatment of occupying cotenants. Accounting law, however, might have other problems. Specifically, many non-monetary factors that do not relate to the occupying/non-occupying cotenant dichotomy could, for similar reasons, also factor into the accounting process. These factors include (1) power imbalances between the cotenants, (2) informal agreements between the cotenants in which only one side of the contract fits into the traditional judicial accounting formula (e.g., an agreement to clean the house in exchange for property taxes), and (3) care for vulnerable people related to both cotenants. This Note focused only on residential factors, but these other factors may be relevant.

This Note highlights the need for future empirical research. One of this Note's major limitations is its lack of empirical support. How frequently do non-occupying cotenants threaten partition actions against occupying cotenants? What percent of the time are occupying cotenants forced to forfeit their homes to partitions? How often would the proposed accounting law change that answer? To what extent does the unfairness in accounting law disproportionately impact low-income communities? These questions are important, but their answers are elusive and, in many cases, unavailable in current case law and academic literature. This inattention does not mean that accounting law is unimportant or rarely applied. Accounting law is applied constantly, but its impact lies in its shadow, or through how it guides informal negotiations and settlement agreements.<sup>215</sup> Therefore,

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<sup>213</sup> See *Reliance Interest*, *supra* note 156, at 611.

<sup>214</sup> 631 P.2d 680 (Mont. 1981) (holding that original landowner's deference to the cabin owners/licensees created the impression that they would not be forced from the property, and that this behavior conferred on the cabin owners/licensees a constructive trust in the property that could be enforced against the new landowner).

<sup>215</sup> See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979) (discussing divorce law's impact "on negotiations and bargaining that occur outside the courtroom" and characterizing that impact as the law's shadow).

future research should seek to conduct surveys and interviews to determine the terms of these settlement agreements.

#### CONCLUSION

Judicial accounting law has significant practical implications for homeowners and communities across the United States. As this Note demonstrates, courts apply the current law unfairly and thereby forcefully remove occupying cotenants from their homes.

To protect occupying cotenants, the law should require courts to consider non-monetary residential factors at the end of the judicial accounting process. By recognizing the value of occupying cotenants' personal connections to the properties and their communities' interests in the properties, courts will produce fairer outcomes. This solution aligns with property law principles, and the individual and societal benefits that allowing people to stay on their residential properties can have should encourage courts to adopt this policy. Indeed, if this proposal had been implemented in Texas, Ms. Rivas and her children could have remained in their home.