Acknowledgements

Mahalo nui loa to Kamehameha Schools for supporting Ka Huli Ao’s Post-Juris Doctor Research Fellowship Program, which enables recent law graduates to conduct cutting-edge research and produce new scholarship on issues that impact Native Hawaiian law and the Native Hawaiian community. The Fellows’ papers are published as part of ‘Ohia: A Periodic Publication of Ka Huli Ao Center for Excellence in Native Hawaiian Law.

The name ‘Ohia was inspired by a line from a chant for Kalākaua: ‘ohia mai ā pau pono nā ‘ike kumu o Hawai‘i, gather up every bit of the basic knowledge of Hawai‘i.

Ka Huli Ao Center for Excellence in Native Hawaiian Law is an academic center that promotes education, scholarship, community outreach and collaboration on issues of law, culture and justice for Native Hawaiians and other Pacific and Indigenous peoples.

www.kahuliao.org

Copyright © 2012 Ka Huli Ao Center for Excellence in Native Hawaiian Law
All rights reserved

‘Ohia mai ā pau pono nā ‘ike kumu o Hawai‘i
Gather up every bit of the basic knowledge of Hawai‘i

RECYCLED PAPER ECO-FRIENDLY INKS PrintGreen
WHERE BLOOD RUNS WITH THE LAND:
PARTITION ACTIONS AND THE LOSS
OF NATIVE HAWAIIAN ANCESTRAL LAND

Stephanie Chen
WHERE BLOOD RUNS WITH THE LAND:
PARTITION ACTIONS AND THE LOSS
OF NATIVE HAWAIIAN ANCESTRAL LAND

Stephanie Chen

I. INTRODUCTION

II. ‘ĀINA, COLONIZATION, AND THE HISTORY OF THE ISLANDS POST-WESTERN CONTACT
   A. ‘Āina, the relative of all Kānaka Maoli
   B. The devastating, far-reaching, and long-lasting impacts of colonization
   C. A brief history of the Hawaiian Islands post-Western contact
   D. The inherent conflict between Western and traditional Native Hawaiian notions of land tenure
      and ownership
   E. The concept of cotenancy: the elephant in the room

III. IMPROPER NOTICE AND LOSS OF NATIVE HAWAIIAN ANCESTRAL LANDS
   A. Due diligence: required of all plaintiffs, but occasionally ignored
   B. Service by publication is an easy way out for plaintiffs and their attorneys
   C. The laws are not working in Hawai‘i due to the complexity of the statutory and case language, a
      shortage of legal representation, and the time and cost involved in pro se representation
   D. Many potential remedies are available to halt the loss of Native Hawaiian land
      1. Create an information clearinghouse
      2. Appoint a neutral third party to effectuate notice
      3. Strengthen the notice requirements
      4. Impose greater sanctions on attorneys who disregard their responsibilities to exercise due
         diligence in notifying defendants of actions against them
      5. Require a long search
      6. Create a land bank to be held in trust

1 Adjunct Professor, Environmental Law Clinic and Native Hawaiian Rights Clinic; Post-Juris Doctor, 2010–11,
Research Fellow, Ka Huli Ao Center for Excellence in Native Hawaiian Law. J.D., American Indian Law Certificate,
University of Colorado Law School, 2010; B.A., French Studies, University of Washington, 2006. Many thanks to
all the individuals that contributed their time and efforts to the production of this Article, including each inter-
viewee, Susan Serrano, Melody Kapilialoha MacKenzie, D. Kapua'ala Sproat, and Andrew Sprenger. A very special
thanks to the former Native Hawaiian Legal Corporation clients for sharing their incredible stories as well as to
NHLC for their assistance in producing this Article. Last, thank you to Nathaniel Noda, David Chen, Kathryn
Urbanowicz, and Arieh Levine for their help in editing. This Article is a product of my Fellowship at Ka Huli Ao
Center for Excellence in Native Hawaiian Law at the William S. Richardson School of Law, University of Hawai‘i
at Mānoa.
IV. PARTITION ACTIONS AND THE DIMINISHMENT OF NATIVE HAWAIIAN ANCESTRAL LANDS
   A. Partition actions in Hawai‘i
   B.Partition by sale has a disproportionate impact on Native Hawaiian cotenants due to socio-economic disparities and cultural differences
   C. County zoning ordinances often preclude partition in kind and contribute significantly to courts ordering partitions by sale
   D. Developers are often the only qualified bidders, allowing them to obtain the properties at below market values
   E. Family dynamics are inseparable from the discussion of partition actions contributing to the loss of Native Hawaiian ancestral land
   F. High property taxes effectively force many Native Hawaiian families off of their ancestral lands
   G. Many remedies exist to solve, or mitigate, the devastating impacts of partitions by sale on Native Hawaiian families trying to preserve ancestral lands
      1. Revise the current partition statute to state a clear preference for partition in kind and to allow courts to consider other equitable options
      2. Retain the current statute but adopt Chief Justice Richardson’s dissent in Chuck v. Gomes
      3. Create land trusts to preserve ancestral lands for future generations
      4. OHA, or another capable legal entity, could participate in partition auctions
      5. Amend legislation to make OHA an automatic defendant in partition cases where there is no other qualified taker and use current legislation to make OHA guardian ad litem to lumped shares of land
      6. Adopt the Uniform Partition of Heirs Property Act
      7. Start a community-driven grassroots effort to immediately counteract the negative impacts of partitions by sale
   H. Other Potential Solutions

V. CONCLUSION
To think that someday I would be on land that my grandfather owned is awesome to me...and I will never let this land go...land is the base for all of us. We can relate to that because this is where our blood runs.  

—Charleen Tinao, defendant in an ongoing partition action.

I. INTRODUCTION

In Hawai‘i, blood runs with the land. Āina, or land, the ancestor of all Kānaka Maoli, or Native Hawaiians, is slipping parcel by parcel from Native Hawaiian hands, its loss facilitated by the system of partition actions. Partition actions originated in courts of equity where monetary damages were considered insufficient relief. Indeed, it is the absolute right of a cotenant to sever his or her share of property from the whole. At common law, only partition in kind, or physical division of the land, was permitted. The equitable origins of the law of partition have evolved to include legal remedies such as partition by sale. Partition by sale is conducted through a judicial auction where the property goes to the highest bidder.

Partition by sale is problematic as the cotenant initiating the action is often the only qualified bidder and frequently is able to purchase the property at below market values. After the cotenant purchases the property, all other cotenants are forced to vacate their property and accept their share of proceeds, often below market value. Partition in kind is, in theory, preferred over partition by sale. However, in practice, it appears to be the reverse.

Though there are many problems with the statutes and case law concerning partition actions, each contributing to the diminishment of Native Hawaiian ancestral lands, this Article focuses on two of the major problems. First, despite detailed statutory requirements and case law, interested Native Hawaiian parties in partition actions are not receiving notice. Second, partition actions can be initiated by any stakeholder in the property, and often lead to judicial auctions.

Typically, in Hawai‘i, partition actions are filed along with actions to quiet broken title to the property in question. There are many commonalities in the notice procedures to ensure due process for landowners

2 Interview with Charleen Tinao, in Kahananui, Moloka‘i, Haw. (Dec. 11, 2010).
3 Courts of equity used to be separate from courts of law; a person could seek relief from a court of equity only if money damages would have been insufficient relief. For the definitions of “court of equity” and “court of law,” see BLACK’S LAW DICTIONARY 380 (8th ed. 2004).
4 Cotenancy refers to two or more people owning an interest in the same piece of property at the same time. See BLACK’S LAW DICTIONARY 1505 (8th ed. 2004). There are many reasons that a cotenant would want to file for partition such as: (1) a cotenant cannot proceed with his or her project without the consent of the other cotenants and would have to share the profits; (2) a cotenant often wants to develop the entire property and would not be able to do so if other cotenants were living there; and (3) cotenants would not be able to convince investors to invest in the project if other cotenants still had interests in the property. See id.
5 Common law, as opposed to statutory law, is developed by the courts. See BLACK’S LAW DICTIONARY 292 (8th ed. 2004) (“The body of judge-made law that developed during and after the United States’ colonial period, esp. since independence.”).
6 See NATIVE HAWAIIAN RIGHTS HANDBOOK (Chapter 7-2) (Melody Kapilialoha MacKenzie ed., 2d ed. forthcoming 2012) (footnote omitted). Hawai‘i’s quiet title statute is HAW. REV. STAT. § 669-1 (2011) which states: “Action may be brought by any person against another person who claims, or who may claim adversely to the plaintiff, an estate or interest in real property, for the purpose of determining the adverse claim.”
Where Blood Runs With the Land: Partition Actions and the Loss of Native Hawaiian Ancestral Land

in both quiet title and partition actions. This Article concentrates on notice in the context of partition actions.

In many partition actions, the parcel of land that a Native Hawaiian family might have an interest in is quite small. As a result, the loss of these small parcels through inadequate notice or a forced judicial sale may seem to be inconsequential. However, when considered in the aggregate, the acreage is substantial, and the loss of these lands to the particular Native Hawaiian families involved is incalculable. Indeed, the loss of Native Hawaiian ancestral lands through partition actions plays an unquantifiable role in the overall diminution of ancestral lands in Hawai‘i. It is impossible to know how many Native Hawaiians have failed to receive notice of the partition actions in which they had an interest. It is also impossible to know how many Native Hawaiian families had an interest in land that was partitioned by sale and reduced to cash proceeds to be held by the court and disposed of according to law. The unquantifiable nature of this topic however, makes it that much more important to address. Unless the problems surrounding partition actions are seriously addressed, the only endpoint will be the total depletion of Native Hawaiian-held ancestral lands.

The problems with partition actions discussed in this Article are relatively recent phenomena, really coming to the forefront over the past thirty years with the fall of the large agribusinesses that once dominated Hawai‘i both politically and economically. Starting in the early 1900s, agribusinesses in Hawai‘i acquired tracts of land from Native Hawaiian families either through lease or purchase of fractionated interests. Another method used by the agribusinesses to acquire land was the doctrine of adverse possession, under which companies would utilize tracts of land even without permission. At the same time, and as a direct result of Western colonization of the Hawaiian Islands, many Native Hawaiian families were leaving rural areas to find jobs and employment in urban centers. This facilitated the agribusinesses’ use of land without permission as they could easily absorb land that was left behind by those who moved to find work.

Many parcels of land in Hawai‘i have breaks in the chain of title or clouds on title. See Jocelyn B. Garavoy, “Ua Koe Ke Kaleana o Na Kanaka” (Reserving the rights of Native Tenants): Integrating Kaleana Rights and Land Trust Priorities in Hawaii, 29 HAw. EnvTL. L. Rev. 523, 553 (2005) (stating that breaks in the chain of title can occur for various reasons such as “an owner…dying without leaving a valid will or without clearly devising the parcel to his or her devisees, who later convey it to another party, assuming it was theirs to convey;” or when “someone inherits a fractional interest, i.e. one of several siblings, conveys a full interest in the title to a purchaser (e.g. a sugar plantation) at a later date without any record indicating that the other siblings had relinquished their interest(s)” – “[s]uch titles are considered clouded because those siblings and their heirs may still have a demonstrable valid interest in the land.”).

7 Interview with Andrew Sprenger, Staff Attorney, NHLC, in Honolulu, Haw. (Feb. 9, 2011) (transcript on file with author). Andrew Sprenger handles most of the quiet title and partition cases at the Native Hawaiian Legal Corporation (“NHLC”), the only law firm in the State that defends Native Hawaiian title to land as a matter of course.

8 Haw. Rev. Stat. § 668-9 (2011) (stating that an unknown owner’s shares should be “paid into court for the owner’s benefit, subject to disposition according to law”).

9 Interview with Andrew Sprenger, supra note 8. A fractionated interest occurs when many individuals, or cotenants, have an interest the same parcel of land.

10 Id.

11 Id.
Due to economic circumstances over the last thirty years, the agribusinesses of Hawai‘i no longer found it economically feasible to continue operations. As part of their closure, the agribusinesses had to dispose of, or address, their ownership interests in the land that they had been using for the last century. The uncertainty of ownership, now that the agribusinesses have ceased to function, has resulted in the need for quiet title and partition actions. Selling the land to a third party is the only way for these agribusinesses to get a return on their investment.

In order to sell the land to a third party, these businesses need a court order confirming that they are the superior owners, against all others, including Native Hawaiian families. The result of all this has been a dramatic rise in the number of quiet title and partition actions filed in the State of Hawai‘i, with a disproportionate impact on the descendants of the Native Hawaiian families that originally owned the land.

Michael Gibson is an attorney at Ashford & Wriston, who specializes in quiet title and partition actions. He has represented a number of large-scale agribusinesses in their efforts to quiet title and partition property after continuation of agriculture was no longer profitable:

One was Hamakua Sugar Co. Hamakua Sugar Co. was having financial difficulties and so…they went out and looked at their inventory of lands…what were lands that they could sell and generate income….So they met with the title company and went over a list of properties and then decided which ones they were going to initiate quiet title actions on.15

Gibson gives one more example of what occurs when a large-scale agribusiness folds:

Another scenario [is] Pioneer Mill Company, which also went out of the sugar business but they were able to hold on to the title to much of their lands. They are now in the process of quieting title to many of the parcels that had broken title.16

As the economy starts to recover from the recent recession, we can expect to see a tidal wave of actions to quiet title to and partition large tracts of land that will invariably involve Native Hawaiian defendants. The filing of quiet title and partition actions relates to the health of the real estate economy in two ways. First, the decreased economic viability of the continuation of large-scale agribusiness in Hawai‘i produces an increase in the number of quiet title and partition actions.

Second, increases in property values and large-scale development prospects correlate with an increase in filings of quiet title and partition actions. Gibson explains the effect that the boom and bust cycles of property values have on the frequency of the filing of quiet title actions, and the reasons behind it:

What we frequently see is as property values increase, properties that weren’t worth spending the time and money to clean up the title, all [of a] sudden become worth cleaning up the titles….In the first in-

---

12 Id.
13 Id.
14 Id.
16 Id.
Where Blood Runs With the Land: Partition Actions and the Loss of Native Hawaiian Ancestral Land

stance, all costs of the quiet title [and partition] action[s] have to be borne by the plaintiff....All of that comes out of their pockets before they recover anything. So there needs to be a financial incentive before people are willing to assume that burden and that usually follows these boom and bust cycles.17

Throughout this Article I will analyze and explain the legal issues, but Native Hawaiian individuals and scholars of Native Hawaiian law will provide the voices. I have conducted a series of interviews that will be included throughout this Article to give the reader a more accurate picture from those most affected by the current state of partition law in Hawai‘i. For example, we will see how the partition action system failed the Weber family, and how its members were ultimately accorded their rightful share of their ancestral lands through pure luck. We will hear from the inspiring Charleen Tinao who has fought, in court, for her land for over eight years. As another example, we will hear Guye Lee describe the devastating impact that a partition action had on his family and their ancestral land. The statutes and case law concerning partition actions can be dry and difficult to read. However, they greatly affect the health of Native Hawaiian individuals and Native Hawaiian culture. Personal stories and cases help to illustrate this.

This Article provides a necessary background, to give the reader context for the complex and sometimes paradoxical issues discussed. In Part II, the immense importance of ‘āina to the Native Hawaiian People will be explored. The devastating and long-lasting impacts of colonialism will also be discussed. Addressing American colonization of the Islands is crucial because it helps to explain the varying approaches that modern Native Hawaiians take to land tenure and ownership. For instance, some Native Hawaiian families end up selling the land that they fought for in court. Some cannot afford the property taxes while others are disconnected from the land and feel no obligation or attachment. This section provides a brief history of the Hawaiian Islands post-Western contact to give the reader a sense of what the Native Hawaiian People have experienced recently, ultimately seeking to illustrate the inherent conflict between Western and traditional Native Hawaiian notions of land tenure and ownership.

The concept of cotenancy is the elephant in the room: a cotenant’s responsibility to provide notice as well as a cotenant’s absolute right to partition both stem from this concept. Part II will address the duties of plaintiff cotenants, the remedies to which they are entitled by law, and the defenses of defendant cotenants. The partition action playing field is not level: Due to third party interests in land, heavily fractionated interests, and county zoning regulations, defendant cotenants are at a serious disadvantage. Because of the economic value of land in Hawai‘i, many of these cotenancy issues are unique and many have a disproportionately negative effect on Native Hawaiian families.

Part III identifies improper notice as a key component in the loss of Native Hawaiian ancestral lands. Despite seemingly strong statutory language and detailed case law on the matter, interested Native Hawaiian parties in partition cases are not receiving notice. This section also discusses how the laws in Hawai‘i regarding notice are not working due to the complexity of the statutory and case language, a shortage of legal representation, and the time and cost involved in representing oneself pro se. Also discussed are the reasons that faulty notice, or lack of notice, contributes so greatly to the diminishment of Native Hawaiian ancestral lands. Improper notice increases the probability that Native Hawaiian family members will not hear about the action, and will end up with a default judgment against them. This chips away at the already disintegrating pie of Native Hawaiian ancestral lands. The reasons for which improper notice disproportionately affects

17 Id.
Native Hawaiian families are also addressed. Finally, this section discusses seven potential solutions. Part IV identifies partition actions as the major player in the diminishment of Native Hawaiian ancestral lands. Partition actions by sale appear to be the rule rather than the exception despite a stated statutory preference for partition in kind. Native Hawaiian families are literally being forced off of their ancestral lands, and in some cases rendered homeless by court-ordered partition sales. This section demonstrates that partitions by sale have a disproportionate impact on Native Hawaiians due to socio-economic disparities and cultural differences that result in greater rates of fractionalization of land. Potential solutions to these problems are discussed at the end of this section.

Ultimately, through the use of interviews, cases, historical materials, and legal documents, this Article seeks to show that the laws in Hawai‘i regarding partition actions may be working in a Western-legal construct, but are doing so to the detriment of the Native Hawaiian community. This Article also seeks to show that despite the dire situation, there is ample room for improvement and a plethora of potential remedies for problems surrounding partition actions.
II. ‘ĀINA, COLONIZATION, AND THE HISTORY OF THE ISLANDS POST-WESTERN CONTACT

A. ‘Āina, the relative of all Kānaka Maoli

To the Native Hawaiian culture, and to many Native Hawaiian individuals, ‘āina is of incalculable importance. D. Kapua’ala Sproat, Assistant Professor of Law at the University of Hawai‘i at Mānoa, explains the importance of ‘āina to her and her family:

For us, land is an important kuleana, it’s a responsibility that we have to continue to maintain and take care of. It’s a physical connection that we have to our ‘ōhana because we believe that we have a familial relationship to the land, like all other Kānaka Maoli, that we are physically related to these islands.\(^\text{18}\)

Describing the different meanings of ‘āina, Melody Kapilialoha MacKenzie, Associate Professor of Law at the University of Hawai‘i at Mānoa states:

I think of land in a couple of different senses. There’s the small parcel of land that my family has and that I grew up on that I have a very close relationship to. I know that area where I was born and raised and then I think of land in that bigger sense, of even the town and the ahupua‘a where I lived, and grew up, and still live. Then you have land in that larger sense of what it means to us as a people, and I think that’s a very spiritual kind of relationship – it’s hard to define. I also think of land in that sense of one hānau, land of my birth, my homeland. And in that it’s almost like a kind of lāhui, the nation, the pride that you have from being from a particular nation and people. It’s all connected together, they can’t be separated. The kind of personal relationship I have with that specific area and parcel of land where I grew up, and the more general ahupua‘a, and then that larger, bigger idea, feeling, of being part of a people. So it’s very much interconnected.\(^\text{19}\)

The word “‘āina” actually does not have a direct translation into English as it is a concept that “embraces much more than simply land or real estate.”\(^\text{20}\) Hawaiian Studies Professor Carlos Andrade describes ‘āina as nourishment – both spiritual and mental – for the Hawaiian people:

Derived from the term ‘āi (food, to eat) or more broadly, “that which feeds or nourishes,” ‘āina goes far beyond the material feeding of the physical body…‘āina also refers to the nourishment of mind and spirit. The dual aspects of spirit and mind remain inseparable from Native understand-

---

18 Interview with D. Kapua’ala Sproat, Assistant Professor, Ka Huli Ao Center for Excellence in Native Hawaiian Law and the Environmental Law Program, University of Hawai‘i at Mānoa, in Honolulu, Haw. (Jan. 20, 2011) (transcript on file with author).
19 Interview with Melody Kapilialoha MacKenzie, Associate Professor and Director, Ka Huli Ao Center for Excellence in Native Hawaiian Law, University of Hawai‘i at Mānoa, in Honolulu, Haw. (Jan. 19, 2011) (transcript on file with author).
The Hawaiian Islands were born from the union of Papa, earth mother, and Wākea, sky father. Kalo, or the taro plant, is described in the Kumulipo, and is considered to be the elder sibling and ancestor of the Hawaiian people. Hawaiian scholar and historian Lilikalā Kameʻeleihiwa, explains that, “Hawaiian identity is, in fact, derived from the Kumulipo.” She elucidates the Kumulipo's message that all things are interconnected:

Its essential lesson is that every aspect of the Hawaiian conception of the world is related by birth, and as such, all parts of the Hawaiian world are one indivisible lineage. Conceived in this way, the genealogy of the Land, the Gods, Chiefs, and people intertwine with one another, and with all the myriad aspects of the universe.

Thus, the Kumulipo illustrates the inseverable connection between the Hawaiian people and the ‘āina from which they were born.

Prior to Western contact, the Ali‘i, or chiefs, played a dominant role in the community and supervised management of the ‘āina. The relationship was not one of ownership though, because the ‘āina was not a commodity subject to ownership. Law Professor Jon Van Dyke elaborates on traditional Native Hawaiian concepts of land tenure and the vertical structure through which land was managed:

In the traditional Hawaiian culture, ‘āina is itself a life force. It is not something that can be traded for profit, but it can be utilized respectfully to provide physical and mental sustenance. Individuals lived in reciprocity with the ‘āina, which would sustain them if properly respected and cared for. The makaʻainana [commoners] cultivated the ‘āina under the oversight of the Ali‘i, who in turn received guidance from Akua.

Traditionally, Native Hawaiians practiced Mālama ‘Āina, a concept that embodies nurturing and protecting the land “to produce the food and spiritual values necessary for subsistence and prosperity.” This

21 Id. at 76-77.
22 See id. at 4-5.
23 See id.
26 Id.
28 Id.
29 Id.
30 Id.
concept is very much alive today as Professor D. Kapua‘ala Sproat states, “[T]hat’s part of the kuleana too, the right and the responsibility – where we realize what a privilege it is to have this responsibility and so we take it very seriously.” 31 Lilikalā Kameʻeleihiwa explains Mālama ‘Āina as being borne of the same Native Hawaiian and Polynesian tradition as loving, honoring, and serving one’s elders. 32 She states that,

This is the pattern that defines the Hawaiian relationship to the ‘Āina and the kalo that together feed Ka Lāhui Hawai‘i….The Hawaiian does not desire to conquer his elder female sibling, the ‘Āina, but to take care of her, to cultivate her properly, and to make her beautiful with neat gardens and careful husbandry….So long as younger Hawaiians love, serve, and honor their elders, the elders will continue to do the same for them, as well as to provide for all their physical needs….It is the duty of Hawaiians to Mālama ‘Āina, and, as a result of this proper behavior, the ‘Āina will mālama Hawaiians. 33

B. The devastating, far-reaching, and long-lasting impacts of colonization

The chronic loss of Native Hawaiian ancestral lands cannot fully be addressed without discussing the impact that colonization had, and continues to have, upon the Hawaiian people. Susan Serrano, Director of Educational Development at the University of Hawai‘i at Mānoa describes the effects of colonization on the colonized:

...U.S. colonialism in Hawai‘i and also in other territorial regions that now are part of the U.S. has really had long-lasting impacts on the people of these places. Especially in the 1800s, European and American missionaries and businessmen…orchestrated not only a land grab but a kind of colonialism that really impacted people’s cultural practices, their language, dance, and music, and also their self-governance. 34

She explains that U.S. colonization of the Hawaiian Islands occurred around the same time as that of Puerto Rico, the Philippines, and Guam, and that similar strategies were used to subjugate the indigenous peoples of each of these areas:

Especially in the late 1800s at the time of the overthrow and the annexation of Hawai‘i, the U.S. was also colonizing places such as Puerto Rico, the Philippines, and Guam. Basically, part of their strategy, was that these U.S. and European businessmen and missionaries characterized the Native Peoples of these places as being childlike, uncivilized, incapable of self-governance…unable to take care of themselves and thus in need of American control. They used these characterizations of the people – which were clearly untrue – to justify this taking of land, the destruction of self-governance, and the destruction of culture and language….35

31 Interview with D. Kapua‘ala Sproat, supra note 18.
32 Kameʻeleihiwa, supra note 25, at 25.
33 Id.
34 Interview with Susan Serrano, Director of Educational Development, Ka Huli Ao Center for Excellence in Native Hawaiian Law, University of Hawai‘i at Mānoa, in Honolulu, Haw. (Jan. 20, 2011) (transcript on file with author).
35 Id.
Finally, Professor Serrano elaborates on how the impacts of colonization must be addressed if we are to seriously attempt to rectify the direct or indirect damage that it caused:

This kind of colonization...had long lasting emotional, physical, psychological impacts that have lasted through to today. [A]ny attempts today to really rectify some of this damage really has to look at some of this history of US colonization because that is such a huge part of what happened to Native Hawaiians and other peoples in the U.S. Territories. I think that you really can't ignore this history or [the]... 'collective memory of injustice' of these kinds of colonial harms.36

Colonization wrought havoc on Native Hawaiian traditional and customary life and effectively set the stage for the complex and paradoxical predicament that many Native Hawaiians find themselves in today. Today, Native Hawaiians are faced with the challenge of how to preserve their heritage when it seems to be directly at odds with our current system of government. As Tom Weber, a Native Hawaiian, and defendant in a partition action that is nearing an end after almost eight years, told me in a recent interview:

I would consider myself a displaced Hawaiian because I live actually between two worlds: the Western world and the ancient Hawaiian world....I do feel an ancestral connection to [the land], but, when juxtaposed against the realities of living in this Western economy...you just, you got to face it.37

Disease, loss of land, and destruction of culture, language, and self-governance are just some of the impacts that colonization has had on the indigenous people of Hawai‘i. These factors have lead to physical and psychological harms that continue to reverberate throughout the Native Hawaiian community today.

Hawaiian activist and scholar Haunani-Kay Trask defines “neo-colonialism” as the “experience of oppression at a stage which is nominally identified as independent of autonomous.”38 As examples of “neo-colonialism,” she cites economic control of former territorial colonies by multi-national corporations; the “persistence of social and cultural practices imposed by colonial powers during the first stages of imperialism but which continue long after independence”; and “psychological injuries suffered by the colonized.”39 Trask states that neo-colonialism incorrectly assumes that decolonization has occurred: “Nothing could be more inaccurate. To begin with, indigenous peoples by definition lack autonomy and independence.... We are dependent and subjugated. Part of our subjugation is the unequal relationship to our numerous colonizers.”40

Similarly, Professor Jonathan Kay Kamakawiwo'ole Osorio illustrates the aftermath of U.S. colonization of Hawai‘i:

[U]ltimately this is a story of violence, in which [] colonialism literally and figuratively dismembered the lāhui (the people) from their traditions, their lands, and ultimately their government. The mu-
tilations were not physical only, but also psychological and spiritual. Death came not only through infection and disease, but through racial and legal discourse that crippled the will, confidence and trust of the Kānaka Maoli as surely as leprosy and smallpox claimed their lives and limbs.  

Despite the everlasting detrimental effects of colonization, ancient Hawaiian values, customs and traditions are undoubtedly vibrant and palpable throughout the Islands today. Yet the State has been unquestionably westernized. This Article does not suggest that all modern Native Hawaiians should live according to ancient custom and tradition. As Wade Davis describes:

Cultures are not museum pieces; they are communities of real people with real needs. The question... is not the traditional versus the modern, but the right of free peoples to choose the components of their lives. The point is not to deny access, but rather to ensure that all peoples are able to benefit from the genius of modernity on their own terms, and without the engagements demanding the death of their ethnicity.

Indeed, many modern Native Hawaiians find themselves struggling to find a balance between the practicalities of modern life and preserving their Native Hawaiian heritage. For instance, many Native Hawaiian families would like to preserve their ancestral lands but cannot afford to pay the property taxes imposed by our Western system of government. Many Native Hawaiian families need money immediately for basic necessities such as food and shelter, to pay off debt, or to send their children to school. These families are effectively forced to choose between caring for their immediate and future needs, and keeping their ancestral lands. American colonization of the Hawaiian Islands imposed a money-based system on what used to be a barter-based one. Today, the reality is that everyone in Hawai‘i needs money to survive. Effectively, modern Native Hawaiians are faced with the challenge of how to preserve their heritage when it appears to be at odds with our current system of government.

C. A brief history of the Hawaiian Islands post-Western contact

Disenfranchisement, disconnection from land and culture, poverty, and lack of education are all results of Western colonization of the Hawaiian Islands, and are all factors contributing to the current chronic loss of Native Hawaiian ancestral lands.

Though the people of Hawai‘i felt the effects of colonization long before, American colonization became an official policy of the United States in 1898 when the United States annexed Hawai‘i. Prior to formal annexation foreigners who came to Hawai‘i brought with them a host of bacteria, viruses, and disease. The isolation of the islands combined with the previous lack of interaction with foreigners, and the communal
lifestyle of the Hawaiian people, led to disastrous outbreaks of disease. These epidemics came in unremitting waves and lasted from the first contact with Westerners throughout the 1800s. Prior to European contact in 1778, the population of the Hawaiian Islands is estimated to have been between 400,000 and 800,000 people. An 1890 census counted only 34,436 pure Hawaiians and 6,186 Hawaiians of mixed ethnicity, illustrating the decimation of the Hawaiian population post-Western contact. The radical decline in population, combined with the dramatic increase of foreign individuals pushed the Hawaiian Kingdom into a state of disorder and confusion.

Traditional Native Hawaiian religion was also greatly affected by the outbreak of disease, the rising death toll, and the impact that the drastic decline in population had on the traditional economic system. Christian missionaries challenged Native Hawaiian religion that relied on spiritual heritage and depended upon Akua for guidance and protection. Missionaries and foreigners did not obey the kapu system, but nonetheless failed to suffer the punishment of Akua. This did not make sense to the Native Hawaiians who followed the traditional system of kapu yet continued to succumb to horrific maladies and death. Disillusioned and desperate, many Native Hawaiians abandoned their traditional religion in favor of Christianity.

The Māhele, the first partition of land in Hawai‘i, was next. During the Māhele, meaning “division,” land was divided and privatized. It took course over about a decade starting in 1846, and was King Kamehameha III’s response to the dire situation at hand. “With death consuming his people at a voracious rate, with foreigners demanding material goods and land, and with the missionaries pressuring the Hawaiians to conform to their Christian standards, [Kamehameha III] worked to secure his Kingdom for his people and to improve their conditions.” During the Māhele, the entire system of land tenure in Hawai‘i shifted from one of Monarchal ownership with communal right of occupancy, to fee simple. King Kamehameha III sought to divide the Kingdom’s lands into thirds: one-third for himself and the government (the Crown Lands and Government Lands); one-third for the Ali‘i (chiefs); and one-third for the maka‘āinana.

Under the circumstances, with a dying population, a collapsing economic system, and continued Western influence in the Islands, the King likely felt that it was better to adopt the Western system of land tenure than to have the land forcibly overtaken by colonials. By preempting the imposition of Western land tenure in Hawai‘i, the King guaranteed that the colonials could not claim that Hawaiians had an unrecognizable system. As noble as Kamehameha III’s intentions may have been, fee simple ownership of land, combined with the West’s increasing interest in land in Hawai‘i proved disastrous. Many Ali‘i found themselves land-rich and cash-poor, and land was sold to, or effectively taken, by foreigners at extremely low prices.

However, Donovan Preza, Ph.D. Student in Geography, cautions that the Māhele was not the major catalyst for the overall transfer of land from Native Hawaiians to foreigners:

45 See id.
46 Id.
47 Native Hawaiian Rights Handbook, supra note 6, at n.17 (citation omitted).
48 Id. at 12 (citing Table 1.12 in Robert Schmitt, Historical Statistics of Hawai‘i 25 (1977)).
49 Van Dyke, supra note 27, at 19.
50 Kame‘eleihiwa, supra note 25, at 140; Van Dyke, supra note 27, at 21.
51 Kame‘eleihiwa, supra note 25, at 67; Van Dyke, supra note 27, at 21-22.
52 See Kame‘eleihiwa, supra note 25, at 67, 140-43; see also Van Dyke, supra note 27, at 21-22.
53 Kame‘eleihiwa, supra note 25, at 142-43; see also Van Dyke, supra note 27, at 22-23.
54 Van Dyke, supra note 27, at 24.
55 Id. at 376.
Where Blood Runs With the Land: Partition Actions and the Loss of Native Hawaiian Ancestral Land

Whenever you are talking Māhele and Hawaiian history, a lot of times the sugar plantations get brought in and the reality of the purchase of lands or the Māhele allowing for fee simple acquisition of lands happening – a lot of that didn't happen until later, until the 1870s and 1880s. Immediately following the Māhele, the sugar plantations didn't purchase land because it was too much of a financial risk because there was no other game in town. If a sugar plantation bought 100,000 acres of land and that land was unproductive for sugar, there was no one else to sell that land to.56

Preza explains that leasing was the preferred mechanism for obtaining land for sugar cultivation and that the huge outflux of land from Native Hawaiian hands came later, with the Bayonet Constitution, the Overthrow of the Hawaiian Kingdom, and the Land Act of 1895:

[What the sugar planters did early on was lease lands, and in particular they were leasing lands from the Crown because after 1864 the Crown Lands were made inalienable, you could no longer buy in fee simple the Crown Lands. So what they ended up doing was a lot of the larger sugar plantations would lease from the Crown inventory. So there wasn't this firestorm if you will, or large outflux of lands...being purchased by large plantations at that time. It was a more gradual historical process, it happened later, happened in the 1870s, 1880s, 1890s. Especially coming to fruition in the 1890s, which is also the same time that you have the historical context of the Bayonet Constitution in 1887 and the Overthrow finally in 1893. So I think that's also an important part to realize, that there wasn't this wholesale flood of selling off lands.57

Nevertheless, three legal concepts critical to the discussion of problems with partition actions emerged from the privatization of land during the Māhele: the concept of cotenancy, the doctrine of adverse possession, and laws regarding intestacy. Cotenancy occurs when more than one person has an interest in real property at the same time.58 Adverse possession is a method of gaining legal title to real property by satisfying the requirements of actual, open, hostile, and continuous possession of the property to the exclusion of its true owner for the statutorily prescribed period of time.59 In other words, a person wishing to adversely possess someone else's land must physically occupy the land continuously for the statutory period, improve or maintain the land, and must not have the permission of the true owner. Intestacy laws are designed to distribute the property of those that pass away without a valid will.60

The concept of cotenancy, the doctrine of adverse possession, and the laws on intestacy, set the stage for fractionated interests in land, claims of title to property essentially through trespass, and inheritance issues. Andrew Sprenger is a staff attorney at the Native Hawaiian Legal Corporation (“NHLC”), and works primarily on Native Hawaiian property issues. In a recent interview, he discusses the detrimental ramifications of the implementation of these three legal concepts, which arose out of the Māhele, on the ability of Native Hawaiian families to hold onto their ancestral lands. First he discusses cotenancy and the fractionation, control and maintenance, and share-transferring issues that accompany the concept:

56 Interview with Donovan Preza, Ph.D. Student in Geography, University of Hawai‘i at Mānoa, in Honolulu, Haw. (Feb. 23, 2011) (transcript on file with author).
57 Id.
59 See id. at 59.
60 Id. at 840.
Stephanie Chen

The concept of cotenancy, which is really a Western concept of land ownership, really encourages a problem with land becoming fractionated over time, where you end up having more owners to a parcel of property, which actually dilutes the control and maintenance of it. It also weakens the ability to hold onto a tract of land, when there are multiple owners. This concept of cotenancy also encourages transferring shares of property to third parties, and transferring them out of family hands. So that’s one legal concept that really is detrimental to preservation of Native Hawaiian ancestral lands.

Second, Sprenger explains that the Western doctrine of adverse possession inherently conflicts with traditional Native Hawaiian concepts of land tenure:

Another legal concept is the notion of adverse possession, which is a concept that is totally alien to traditional notions of ownership and control of property. So by its very nature, the idea that ownership of property can be found superior in those who adversely possess it is another inherent conflict with trying to reconcile land ownership in terms of traditional concepts and Western ones.

Third, Sprenger elaborates on the impacts of the implementation of intestacy laws in Hawai`i that occurred as a result of the privatization of land during the Māhele:

Another big problem has to do with the laws of intestacy where the Western concept is that there’s a regime to determine who is going to be the owners of property after the owner has passed away. This process ends up causing a number of unexpected problems with Hawaiian families who don’t have a will. One of the big problems is that it actually creates, or promotes absent owners who may have an interest in the property but literally don’t know that they own it because of the laws of intestacy. Of course the intestate process also engenders more fractionated interests in the property over time.

The final part of the Māhele, the Kuleana Act, which allowed the makaʻainana to gain fee simple title to lands actually cultivated by them, did not achieve Kamehameha III’s intended result. First, many makaʻainana did not believe that anything would change with the new system of land tenure and thus refused to submit their claims. They believed that the Ali`i would continue to care for them if they continued to produce from the land. Second, the makaʻainana had to pay for a costly survey of the land that they were claiming and many could not afford it. Third, many makaʻainana who did obtain fee simple title through the Kuleana Act process ended up in debt, forcing them to sell their lands to Westerners, often for nominal

---

61 Interview with Andrew Sprenger, supra note 7.
62 Id.
63 Id.
66 Van Dyke, supra note 27, at 46.
67 Id.
68 Id.
fees.\textsuperscript{69} Statistics show that maka’āinana only received 28,000 acres of land as a result of the Kuleana Act, as compared to the total 4,112,000 acres on the eight main Hawaiian Islands.\textsuperscript{70}

It is important to remember, however, that many maka’āinana likely did receive land under the Kuleana Act, albeit through a different mechanism.\textsuperscript{71} Section 4 of the Kuleana Act allows for the fee simple sale of government land to such Natives as may not be otherwise furnished with land. Those lands are not accounted for in the Kuleana Land statistic of 28,000 acres.\textsuperscript{72} Rather, those lands are included in the statistic for the fee simple sale of government land.\textsuperscript{73}

Loss of land played an integral role in the destruction of Native Hawaiian culture. With the diminishment of land came the diminishment of self-governance of the Hawaiian people. As described earlier, ‘āina is of immeasurable importance to Native Hawaiian culture. Western colonization of the Hawaiian Islands separated Native Hawaiians from the ‘āina, thereby marring the health of the culture and depleting the land-base for Native Hawaiian self-governance.

The reigning monarch, Queen Lili‘uokalani, and her government were illegally overthrown in 1893 by “agents and citizens of the United States,”\textsuperscript{74} and in 1895, three years prior to annexation, the beloved Queen was imprisoned for “treason.”\textsuperscript{75} Hawaiian language was banned from the schools and plantations continued to divert water from traditional agrarian Hawaiian communities.\textsuperscript{76} Professor D. Kapua‘ala Sproat illustrates the effects of the agribusinesses’ increasing needs for water:

To establish and expand their businesses, plantation interests constructed massive irrigation systems to transport and use water in ways and locations that nature never intended. Instead of utilizing water within watersheds and allowing geology and hydrology to determine where and how water should flow, plantations radically redirected natural systems. To satisfy their thirsty crops, sugar planters constructed ditches that diverted streams from rainy Windward communities

\textsuperscript{69} See id. at 51.
\textsuperscript{70} Id. at 242 (“…[T]he maka‘āinana had received only 28,000 acres as of the one-third of the lands that had been set aside for them . . .”). See also id. at 216 (citation omitted).
\textsuperscript{72} “Section 4 of the 1850 Kuleana Act mandated that segments of the Government Land on each Mokopuni be available for Native Hawaiians who did not file, or did not otherwise qualify, for Kuleana Awards to purchase lots in fee simple (from 1 to 50 acres), ‘at a minimum price of fifty cents per acre.’ By May 1, 1850, the Government had sold about 2,700 parcels of government land on all of the islands of land under this program. Most of the individual purchasers were Hawaiians, but foreigners acquired almost two-thirds of the total land area.” See Van Dyke, supra note 27, at 51 (internal citations omitted).
\textsuperscript{73} See id.
\textsuperscript{75} Yamamoto & Betts, supra note 43.
\textsuperscript{76} “The first large irrigation canal, 11 miles long, was built at the Lihu‘e Plantation on Kaua‘i in 1856. A decade later there were three sugar plantations in the Lao Valley on Maui, each of them diverting irrigation water from the Wailuku River…In 1878 a group of cane planters, led by Alexander & Baldwin, constructed a 17-mile ditch from the high rainfall areas of eastern Maui to the plains of central Maui. The construction of several other great ditches followed, turning central Maui into one of the most productive sugar producing areas in the islands. In 1892, the Hawaiian Sugar Company completed a 13-mile system of tunnels, ditches, and flumes on Kaua‘i to divert water from the Hanapepe River to the sugar lands of Makaweli.” Native Hawaiian Rights Handbook 152 (Melody Kapilialoha MacKenzie ed., 1st ed. 1991).
Stephanie Chen

predominantly populated by Native Hawaiians to the drier Central and Leeward plains where sugar was cultivated. Wells also siphoned ground water.77

Professor Sproat explains that plantation owners rarely consulted with the communities that were drastically affected by the diversion and loss of water:

Plantation owners often undertook these measures with no consideration of or consultation with the communities that they drastically affected. Water was simply taken, and streams and springs dried up. Impacted communities, both natural and human, were left to live or die with the consequences.78

Detailing the enduring changes that spring and stream diversion wrought on Native Hawaiian health, culture, and the natural environment, Professor Sproat states:

This rapid change altered the natural environment and inflicted significant physical and cultural harms on Native Hawaiians, many of which endure to this day. Within a short period, plantations and their irrigation systems took root on each of the major Hawaiian Islands, fundamentally changing the sites and methods of water use for over a century.79

The Crown Lands, the private lands that King Kamehameha III reserved during the Māhele, were confiscated in the Republic's 1894 Constitution.80 The 1895 Land Act merged the once separate Crown and Government lands into one category called "public lands."81 The public lands were ceded to the United States at annexation through the 1898 Joint Resolution of Annexation.82 The confiscated lands are “estimated to have been between 1.75-1.8 million acres valued at least $5.5 million."83 The former Crown and Government lands became the property of the United States government and were used for military and other public purposes.84 Upon admission to the Union in 1959, the Federal government ceded these lands back to the State of Hawai'i, excepting military property and National Parks.85

Donovan Preza discusses the impact that the Overthrow of 1893 and subsequent Land Act of 1895 had on land law in Hawai'i:

I see the Overthrow of 1893 and, in particular, the 1895 Land Act as being the mechanisms which changed interpretation, which changed land law in Hawai'i. It seems to me in my research that it's more

78 Id.
79 Id.
80 NATIVE HAWAIIAN RIGHTS HANDBOOK, supra note 6, at 1-15 (citation omitted).
81 Id. (citation omitted).
82 Id. at 1-17.
83 Id. (citation omitted).
84 Id. (citation omitted).
85 Id. at 1-21, 22.
Where Blood Runs With the Land: Partition Actions and the Loss of Native Hawaiian Ancestral Land

Since 1895 that there’s been a loss of rights than prior to that. All of the Hawaiian Kingdom court cases that I read prior to 1895 are all talking about preservation of rights and the manaō, the ideas, the interpretations, are very different both pre and post-overthrow. What gets lost in the focus on loss of land, is that if you are not in control of governance, of making the laws, of interpreting the laws, then what good is any other right? You still fall subject to that sovereignty, subject to that overall structure.86

Colonization nearly decimated the indigenous Hawaiian population and way of life. “Today, Hawaiians in their homeland still suffer the worst socioeconomic outcomes of all Hawai‘i’s people – the highest rates of serious illness, prison incarceration, and homelessness, and the lowest rates of higher education attainment and family income.”87 Yet, despite colonialism’s dismal legacy in the Hawaiian Islands and as testament to the strength of the indigenous people of Hawai‘i, Native Hawaiians and Native Hawaiian culture survived and are indeed thriving in certain areas. “A Hawaiian renaissance in the last quarter of the twentieth century, rooted in cultural resurrection and political awakening, drew upon the international human rights principle of self-determination for indigenous peoples.”88 Many Native Hawaiians are working to preserve their ancestral lands. In fact, many are fighting for them in court as defendants to quiet title actions. Native Hawaiian culture is being restored through traditional and customary practices, education, and a resurgence of ‘Ōlelo Hawai‘i, the Native Hawaiian language. A form of Native Hawaiian self-governance could be a reality with passage of a bill like the Native Hawaiian Reorganization Act, informally known as the “Akaka Bill.”89 Some see the Akaka Bill as an effort to restore self-governance and promote self-determination by affording Native Hawaiians federal recognition similar to an Indian tribe. Different versions of the Akaka Bill have been circulating in Congress since 2000 and the latest version was recently introduced in early 2011. It is conceivable that the Akaka Bill, or a similar bill, will pass in the near future.90

In short, the physical and psychological harms of Western colonization upon the indigenous people of Hawai‘i are being dealt with, but they have not, and never will fully disappear: this is what Tom Weber is referring to when he says that he considers himself a “displaced Hawaiian.”91 It is important to acknowledge the harsh realities of colonialism because it is impossible to address the paradoxical topic of Native Hawaiian ancestral land loss without doing so. Not all Native Hawaiian families end

86 Interview with Donovan Preza, supra note 56.
87 Yamamoto & Betts, supra note 43 (citing Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, 416 F. 3d 1025, 1041 (9th Cir. 2005)).
88 Id. at 544 (Devon W. Carbado & Rachel F. Moran eds., 2008); see generally TRASK, supra note 38 (describing the Native Hawaiian self-determination/international human rights movement).
89 The Native Hawaiian Government Reorganization Act of 2011 (Akaka Bill), S. 675, 112th Cong. (2011). Under the Akaka Bill, an interim Native Hawaiian governing entity would be formed, subject to the approval of the Secretary of the Interior. That interim governing entity would then decide how the permanent Native Hawaiian governing entity would come into being. After the establishment of the permanent governing entity, negotiations for land, water, jurisdiction, etc. would take place between the Native Hawaiian governing entity, the United States Federal Government, and the State of Hawai‘i. There are many competing views on the Akaka Bill within the Native Hawaiian community.
90 Id.
91 Interview with Tom Weber, supra note 37.
Stephanie Chen

up preserving the ancestral lands that they fight for in court, some cannot afford the property taxes, while others are disconnected from the land and feel no obligation or attachment. There are also a number of Native Hawaiian families that do receive proper notice of partition actions but choose not to get involved. These outcomes can only be understood after one understands the devastating effects of colonialism. Disenfranchisement, disconnection from land and culture, poverty, and lack of education about the partition process are all factors contributing to the current chronic loss of Native Hawaiian ancestral lands.

D. The inherent conflict between Western and traditional Native Hawaiian notions of land tenure and ownership

The importance of 'āina, the impacts of American colonization, and Hawai‘i’s history post-Western contact, are necessary to understand the inherent conflict between Western versus traditional Hawaiian land tenure and ownership. This inherent conflict is critical to understanding the issues that arise when people use Western legal concepts to secure title to Native Hawaiian ancestral land. All of this background is crucial to understanding the divergent treatment of land amongst modern Native Hawaiians.

Andrew Sprenger of NHLC elaborates on this fundamental conflict between the modern Western sense of land ownership and control and traditional Native Hawaiian ways:

> Traditionally speaking, land was more about confirming identity, culture, tradition, family, and those kinds of concepts, while in the Western sense of land ownership, it was more about the need for free alienation of property, the requirement of documents and also the requirement of legal processes – which the traditional concepts of ownership really didn't have. [T]hat's what creates this inherent conflict.

Sprenger continues by pointing out the effect that the conflicting viewpoints have on courts today:

> [T]his is one of the main problems that the courts in Hawai‘i face when resolving quiet title and partition issues with people. Courts are faced with the challenge of making sure that there's a fairness between confirmation of ownership of ancestral Hawaiian land in the context of these Western concepts, which are now the way to resolve these issues.

As a way to deal with the conflicting notions of land tenure and ownership, Sprenger suggests that courts take Hawai‘i’s unique situation, as well as the immeasurable importance of land to Native Hawaiian culture, into account before rendering a judgment:

> It seems that the courts in today's times need to recognize these inherent conflicts before rendering judgments that would really be fair to everybody, and especially to preserve Native Hawaiian lands. Concepts like cotenancy, adverse possession, and intestacy laws are necessary legal concepts that the courts

92 Interview with Andrew Sprenger, supra note 7.
93 Id.
94 Id.
Where Blood Runs With the Land: Partition Actions and the Loss of Native Hawaiian Ancestral Land

have to deal with but I really think the court needs to be very sensitive to those legal matters when it comes to resolving issues of title or partition when it comes to ancestral lands.\footnote{Id.}

To be sure, Hawai‘i’s situation is unique, but as Sprenger suggests, this should not be a reality that courts avoid. The tensions from the impacts of colonization, the Māhele’s privatization of land, and the implementation of Western legal concepts and doctrines are evident today. The Western legal system is ultimately about achieving justice, and to do so, Hawai‘i’s history must be taken into account.

E. The concept of cotenancy: the elephant in the room

The underlying theme of this Article is the relationship that exists between cotenants. There are certain duties, remedies, and defenses that accompany the doctrine. For example, a cotenant has the duty not to commit waste or destruction\footnote{20 Am. Jur. 2d § 90 (2011).} as well as to contribute to the payment of taxes and upkeep.\footnote{Id. § 65.} Examples of remedies include the right to reimbursement for improvements made to the property as well as not to have his or her interest encumbered by the actions of another cotenant.\footnote{Id. §§ 65, 97.} Though different in many respects, the Western concept of cotenancy is not completely foreign to traditional notions of Hawaiian land tenure. The idea of cooperation, co-management, and certain rights and responsibilities pertaining to land certainly existed in Hawai‘i pre-Western contact. What the Western legal system added to the concept of cotenancy in Hawai‘i is a cotenant’s absolute right to separate his or her property from the otherwise communally held lot.

Cotenancy is similar to a marriage in that a court will not force a couple to remain married in the event that one person files for divorce. In the context of cotenancy, the divorce is a partition action. This is the ultimate remedy that a plaintiff cotenant has to sever his or her ties to the other cotenants. The right of a cotenant to partition is absolute, no matter how small the interest he or she possesses in the property.\footnote{Id.} Along with this right comes the responsibility of providing notice of the action to all other cotenants. The defenses available to defendant cotenants who oppose partition of the property are: (1) to argue for partition in kind; (2) to argue for an open market sale of the property; or (3) to argue for partition by appraisal, which is essentially a buy-out by one of the cotenants. For the historical reasons discussed above and because of the great economic and intangible value of land, there are many issues unique to Hawai‘i. These issues prevent a cotenant from successfully asserting the defenses just enumerated. The prevalence of land co-owned with third party strangers, the frequency of fractionalized interests, and county zoning regulations all place cotenant defendants at a disadvantage. Socio-economics and cultural differences place Native Hawaiians at an even greater disadvantage in partition actions.

The concept of cotenancy and the right to partition are deeply rooted in law and are not inherently detrimental to society. There are benefits that accompany cotenancy and there is nothing inherently wrong

\footnote{“It is generally recognized that the right of a cotenant to partition property is absolute and not to be defeated by the mere unwillingness of a party to have partitioned.” Kimura v. Kamalo, 107 P.3d 430, 437 (Haw. 2005) (citation omitted); see Henmi Apartments, Inc. v. Sawyer, 655 P.2d 881, 886 (Haw. Ct. App. 1982) (stating that “any person who holds property as a tenant-in-common with another person may seek partition.”).}
Stephanie Chen

with wanting to separate one's property from the whole. There is something inherently wrong, however, with a playing field that is tilted in favor of plaintiff cotenants. The purpose of this Article is to demonstrate the inequities favoring plaintiff cotenants and the potential remedies available to level the playing field. Relying on the background information discussed thus far, the next section identifies lack of notice as an important player in the loss of Native Hawaiian ancestral lands.
A defendant’s right to notice of an action stems from the Due Process Clause of the Fifth Amendment to the United States Constitution, which protects individuals from deprivation of life, liberty, and property without due process of law. This is to ensure that procedural and substantive safeguards are followed in situations that threaten a person’s life, liberty, and/or property. The judicial system seeks to accord finality to judgments, and to do so it must ensure that the process was fair and just. Therefore, due process of law includes the elementary right to notice of a partition action that might affect an interested defendant’s property. The requirement of notice is based on an effort to level the playing field by giving each cotenant an opportunity to protect his or her property interest. Without notice, a defendant will not be aware of the proceedings against him or her, and will fail to appear in court. Failing to appear in court is grounds for a court-ordered default judgment against an interested party. A defaulted party is “deemed to have consented” to the “partition or other disposition of the property.”

In theory, the concept of notice as a fundamental requirement of due process is straightforward: a defendant receives notice of an action involving that defendant, and he or she chooses whether to go to court to defend himself or herself. In practice, however, the concept of notice is not that simple. Indeed, the statutes and case law on the matter offer little more than nebulous guidelines when defendants’ livelihoods and very existences hang in the balance. Despite any good intentions behind the rules regarding notice, the rules act as a means by which land can be taken more easily from vulnerable and unsuspecting cotenant defendants to partition actions.

Take for instance the comments of Doug Weber, brother of Tom Weber and defendant to the same partition action. Doug Weber lives on Maui and is the one who first found out about his family’s interest in the quiet title and partition action brought by Surety Kohala. In this case, Surety Kohala sought to sell property, including the Webers’ ancestral land, to a developer. Surety Kohala’s attorneys performed genealogical research that omitted the Webers’ family line. A cousin who had received notice as a result of Surety Kohala’s genealogical research, but who was found not to have an interest, contacted Doug Weber about the case. The only way that Doug Weber’s family was apprised of the action against them, and subsequently able to defend their claim to their ancestral land in court, was through the actions of a cousin whom they had never met.

This case is important because it demonstrates how the notice requirements can be distorted to essentially cheat a person out of his or her interest in a partition action. It also illustrates the great importance and meaning of ‘ohana, as that is the only reason that the Weber family now holds title to six acres of their ancestral lands in Hāwī, Hawai‘i. The rules and case law concerning notice failed in the Weber family’s case, and in a recent interview Doug Weber relays the story of how he received notice of the case against his mother – basically by chance and the goodwill of a cousin.

*It was February 13, 2003, and this lady out of the blue called me up. It was one of my cousins, cousin Monica. She said, ‘Are you related to Anita Beckley?’ I said, ‘Yeah that’s my mom.’ She said, ‘Well there’s some land on the Big Island that wasn’t designated to us…the judge ruled against us, we were not in*

100 U.S. Const. amend. V. The 5th Amendment applies to the several States through the 14th Amendment. U.S. Const. amend. XIV.
Stephanie Chen

the lineage. But we believe that your mom is part of the lineage…. You got ‘til tomorrow morning to get an attorney to extend the court case or get an extension or something.102

Doug Weber also speaks about the role that good fortune played in finding an attorney to represent his family in the matter with such short notice:

I started scrambling and I called like four or five attorneys and no one could do it because they said they were all busy and finally there was this attorney by the name of Leeloy [whom I thought I had gone to school with]…. I said, “Brother, help me out, we are from Kamehameha, we went to Kamehameha together and I know your family.” He said, “Okay, I’ll tell you what, I’ll see if I can find you an attorney…. ”103

The lawyer who opportunistically took the Webers’ case successfully obtained an extension despite Surety Kohala’s denial of any lack of diligence:

Sure enough he found someone to do it and he called me up after the court case and said, “You know, I got the extension for you but Surety Kohala said they had done their due diligence, they had advertised in the newspaper, you know you have to go through some procedures when you are doing a quiet title.”104

Doug Weber continues by relaying the argument his attorney made in obtaining the extension, essentially that Surety Kohala had not used due diligence to ascertain Mrs. Weber’s identity and provide her with proper notice:

“But I said you know Judge, I can appreciate what Surety Kohala did, but let me tell you what happened. Mrs. Weber lives on Kaua‘i, she has been living there for almost fifty years now. Now she doesn’t pick up the Hawa‘i Tribune, the Hilo newspaper, every morning looking for land. If they had done their due diligence, they would have looked up her name, ‘Weber,’ she has been in the phone book for almost fifty years, has resided on Kaua‘i for almost fifty years. We believe this is her genealogy. We want a thirty-day extension to prove it…. ”105

Doug Weber realizes that his case is an example of failure within the partition action system, and knows that serendipity played a major role in his family receiving title to six acres of ancestral land in Hāwī:

You know, we got lucky here, and I’m glad I had a cousin who was forthright and said, ‘You know what, this land belongs to our family somehow, someway, and I got a cousin or cousins out there that should be entitled to this land.’ And I mean, she did her part, she went through the phone books and called people and finally got a hold of me.106

103 Id.
104 Id.
105 Id.
106 Id.
Where Blood Runs With the Land: Partition Actions and the Loss of Native Hawaiian Ancestral Land

The fact that the Weber family members found out about their interest through pure luck is unacceptable when in Mullane v. Central Hanover Bank & Trust Company, the United States Supreme Court articulated the importance and fundamental requirements of due process.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably [sic] to convey the required information and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities of the case these conditions are reasonably met, the constitutional requirements are satisfied.107

Several things stand out from this statement: (1) notice and the opportunity to be heard are elementary and fundamental to due process; (2) the notice must “reasonably [] convey” information about the action and allow a “reasonable time” for a defendant to make his or her appearance; and (3) if these conditions are “reasonably met,” the constitutional requirements are satisfied.

This vague statement by the United States Supreme Court highlights the immeasurable importance of notice while giving courts room to maneuver as “[t]he requirements of due process frequently vary with the type of proceeding involved.”108 As it turns out, this is exactly what happened in the Weber family’s case: notice, a fundamental requirement of due process, was given lip service as the court took considerable leeway in granting the plaintiff’s request to publish by newspaper when Anita Weber’s identity and phone number were easily ascertainable from various public sources. The meaning of notice in its practical sense, along with its technicalities, is discussed below.

A. Due diligence: required of all plaintiffs, but occasionally ignored

A plaintiff’s attorney must exercise due diligence in notifying all defendants to the partition action, yet there is no clear definition of the doctrine. Despite seemingly strong case law on the matter, the statutes regarding due diligence are easily manipulable, resulting in many Native Hawaiian defendants not receiving notice. Indeed, in Hawai‘i, the laws that theoretically exist to protect individual rights and promote justice, such as the statutory and case law concerning notice, actually result in the diminution of Native Hawaiian ancestral lands.

A plaintiff wishing to file a partition action in Hawai‘i must join as a party every person that has, or claims to have, any interest in the property.109 All persons interested or who may claim an interest but are unidentifiable or whose names are unknown to the plaintiff must also be made parties to the action.110 Each person must be personally served with a summons.111 In the event that a known party does not reside within

109 Haw. Rev. Stat. § 668-2 (2011) (Each person joined in the action becomes a party and must be named in the complaint. The plaintiff is required to join those parties that have, or claim to have, any legal or equitable right, title, or interest in the property, as far as known to the plaintiff.).
110 Id. (referring to Haw. R. Civ. P. 17(d)(1) (2011) (discussed infra.).
Stephanie Chen

the State, he or she may be served by registered or certified mail, as ordered by the court. However, if a party is unknown or does not reside within the State or if, after due diligence, the party cannot be served with process within the State, and the facts appear by affidavit to the satisfaction of the court, the court may order that service be made by publication. This exception for unknown parties plays a pivotal role in the loss of Native Hawaiian ancestral lands through quiet title actions because the requirement of “due diligence” is a nebulous concept, “a relative term and each case must be determined upon its own circumstances.”

Doug Weber speculates as to why the plaintiff’s attorneys did not complete the genealogical research. Weber states that the judge was partly at fault for not requiring personal service on Anita Weber, an easily discoverable defendant, before allowing publication by newspaper:

*The judge and the courts can be at fault here because publishing by newspaper is the easiest way and the cheapest way and seems like they put forth some effort. Because like I said, here’s a lady living on Kaua’i, she ain’t reading the Hilo newspaper, she’s been on Kaua’i for fifty years, we’ve always had our names listed. It wasn’t hard to get a hold of us. They had seen the genealogy, Gladis Anita Beckley, they could have found her, but they didn’t.*

The test of whether notice by publication is authorized is not whether it was in fact possible to effect service in a given case, but whether the complainant reasonably employed knowledge at his or her command, made diligent inquiry, and exerted an honest and conscientious effort appropriate to the circumstances, to acquire the information necessary to enable him or her to effect personal service on the defendant.

This statement from the Hawai’i Supreme Court tells us only that a plaintiff must (1) “reasonably” use the available resources to (2) make a “diligent inquiry” and (3) exert an “honest and conscientious effort appropriate to the circumstances” to personally serve the defendants. It is extremely unclear what “reasonable,” “diligent,” and “honest and conscientious” mean in this context.

As a baseline, the Hawai’i Intermediate Court of Appeals has offered this information regarding notice: “Affidavits devoid of averments of facts showing that due diligence was exercised to make service have consistently been held to be insufficient.” “And it has been held that, even where the statute may be satisfied by the bare allegation of due diligence, the requirement of the exercise of diligence and good faith cannot be foregone.” Therefore, at a minimum, a plaintiff may not simply state that due diligence was exercised.

112 Id. (requiring compliance with Haw. Rev. Stat. §§ 634-23, -24, -26 (2011) in the case of known and unknown defendants who cannot be served within the State). In the case of known defendants residing outside the State, they may either be served personally or by “registered or certified mail with request for return receipt and marked deliver to addressee only, as ordered by the court.” A certified copy of the order, the summons and the complaint must be served. Haw. Rev. Stat. § 634-24.

113 Haw. Rev. Stat. § 634-23(2). The published notice must be “in the form of a summons, stating briefly the object of the action or proceeding with a brief description of the property involved, and calling upon the persons to whom it is addressed to plead on or before a return day stated in the notice.” Haw. Rev. Stat. § 634-26.


115 Interview with Doug Weber, supra note 102.

116 Murphy v. Murphy, 514 P.2d 865, 867 (Haw. 1973).

117 Id.

118 Hustace, 718 P.2d at 1114 (citing Batte v. Bandy, 332 P.2d 439, 443 (Cal. App. 2d 1958)).

119 Id. at 1114 (citing Campbell v. Doherty, 206 P. 2d 1145 (N.M. 1949)).
Rather, a plaintiff must state facts to show what measures were taken to effectuate notice. Further, even where a plaintiff satisfies the statutory requirements of due diligence, diligence must continue to be exercised in good faith.

To exercise due diligence, a plaintiff must research the addresses of the defendant(s) to the action. Some primary sources of information to locate the identity and address of a defendant are tax rolls, deed records, judicial and other official records. Secondary sources include telephone directories, city directories, or some other similar information base. It is unclear how many of these sources a plaintiff must exhaust before a court will determine that due diligence has been exercised. Indeed, adding to the nebulous nature of the concept of “due diligence,” where it appears that such sources have been exhausted, the trial court’s determination that due diligence was or was not exercised will be treated on appeal like any other factual determination. In other words, the appellate court will review the circuit court judge’s finding for an abuse of discretion. Under the abuse of discretion standard, unless there is abuse, a trial court’s discretion should not be disturbed. To meet this standard of review, a party must show that the trial court’s discretion “clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant.” Absent an abuse of discretion in the exercise of its powers, a trial court’s discretion should not be disturbed.

In the Weber family’s case, this means that, had cousin Monica not notified the family of the quiet title action, a default judgment would have been issued against them. After the default judgment, the Weber family members would have had to appeal the ruling, stating that due diligence was never exercised and proper notice was not effectuated, thus violating their due process rights guaranteed by the United States Constitution. The Weber family would then have to prove that the Circuit Court judge abused his or her discretion in accepting the plaintiff’s affidavit stating that due diligence had been exercised. This is a difficult, time consuming, and costly burden to bear.

Andrew Sprenger of NHLC has worked on cases to overturn final judgments based on principles of default. He explains that the current requirements for providing proper notice are minimal, and that a party is rarely able to overturn a final judgment on the basis of faulty notice:

The way the state of the law is now, I would argue that the requirements for proper notice are quite lax. As long as the moving party can show basically their good faith attempt to provide notice, which

120 Id. at 1115 (stating that the State library, Bishop Museum, churches, circuit and supreme courts, Mission House, Hawai’i Sugar Planter’s Association, Department of Health, Department of Immigration and Naturalization, and the State Archives are all sources of genealogical information in Hawai’i).
121 Hustace, 718 P.2d at 1114 (citing Bomford v. Socony Mobil Oil Co., 440 P.2d 713 (Okla. 1968)).
122 Id.
123 Id.
124 Since a partition action is an action in equity, the standard for review is abuse of discretion. See AIG Hawaii Ins. Co., Inc. v. Bateman, 923 P.2d 395, 399 (Haw. 1996).
125 Kimura, 107 P.3d at 435-36 (citing Sugarman v. Kapu, 85 P.3d 644, 649 (Haw. 2004)).
126 Id. at 436 (citation omitted).
127 Id. at 437 (citing Sugarman, 85 P.3d at 649).
128 Hustace, 718 P.2d at 1115-16 (citing Parker v. Ross, 217 P.2d 373, 379 (Utah 1950) (Wolfe, J., concurring)) (As a final example of the vagueness of the concept of “due diligence,” the Court in Hustace explains: “Due diligence must be tailored to fit the circumstances of each case. It is that diligence which is appropriate to accomplish the end sought and which is reasonably calculated to do so.”).
frankly is quite low, the court is free to render a default and subsequently a default judgment against that person. Short of any bad faith by the moving party, it’s likely that those default judgments will hold and the individual wanting to come forward will not be able to make that challenge. Because of the low threshold that courts impose upon moving parties to provide notice, I think really opens up the vulnerability or shows that once a default is rendered, it’s typically very difficult to overturn and then proceed with participating in the case.\footnote{129}

The lack of a clear definition of the doctrine of due diligence allows for plaintiffs’ attorneys to easily fulfill a court’s requirements before a court will accept an application for publication by notice. Once a court approves publication by notice, and a defendant does not appear in court, it is unlikely that he or she will be able to overturn a default judgment.

**B. Service by publication is an easy way out for plaintiffs and their attorneys**

Hawai’i Rules of Civil Procedure Rule 17(d)(1) addresses what occurs when a plaintiff cannot personally serve a defendant due to an inability to identify him or her. The plaintiff may set forth in a pleading the person’s interest in the action, so much of the identity as is known (and if unknown, a fictitious name will be used),\footnote{130} and must set forth with specificity all actions already undertaken in a diligent and good faith effort to ascertain the person’s full name and identity.\footnote{131} The defendant may then be considered a party to the action, as having been fully notified, and the action will proceed.\footnote{132} This is the statute that Surety Kohala relied on when it asked the court in Doug Weber’s case for permission to notify his mother, Anita Weber, through publication. By allowing notice through publication, the court essentially certified that Surety Kohala’s attorney made a diligent and good faith effort to ascertain Anita Weber’s identity. This begs the question as to how Surety Kohala’s attorney could possibly have put forth a good faith effort to locate Anita Weber’s name when it would have been easily ascertainable through diligent genealogical research.

**C. The laws are not working in Hawai’i due to the complexity of the statutory and case language, a shortage of legal representation, and the time and cost involved in pro se representation**

Imagine if Doug Weber had not received notice but later found out about the existence of the land through some other means. Now suppose that, after finding out about the land, Doug Weber was unable to find an attorney. This is not an unlikely scenario as NHLC is the only law firm in the state that defends Native Ha-

\footnote{129 Interview with Andrew Sprenger, \emph{supra} note 7.}
\footnote{130 John or Jane Doe is the fictitious name used in the event that a person’s identity is unknown.}
\footnote{131 \textit{Haw. R. Ciy. P.} 17(d)(1) (2011).}
\footnote{132 \textit{Id.}} Further, according to \textit{Haw. Rev. Stat.} § 634-23(3), service by publication must be made in at least one newspaper published in the State and having a general circulation in the circuit in which the action or proceeding has been instituted. Under \textit{Haw. Rev. Stat} § 669-3 (2011), if the action has been instituted in any circuit other than the first circuit, service by publication must also be made in an English language newspaper having a general circulation in the State. \textit{Haw. Rev. Stat} § 634-23(3) states that in actions concerning real property, the court shall also order additional notice by posting a copy of the summons on the property. According to \textit{Haw. Rev. Stat} § 634-23(3), personal service is preferred to constructive service by publication.
waiian title to land. The Weber family would have to first decide whether to even file a complaint. Representing oneself is a daunting task, especially in the instance where a default judgment has already been issued. The Weber family would have to petition the court to overturn its default judgment on the basis that proper notice was never effectuated. To do this, Doug Weber would have to decipher the meaning of “due diligence” by looking at Hawai‘i Revised Statutes § 634-23(2). He would then have to find, and read through the case law giving meaning to those statutes. At a minimum, he would need to travel from his home on Maui, to the law library at the William S. Richardson School of Law or Hawai‘i Supreme Court, to sift through the Law Reporters to find the case entitled, “Hustace v. Kapuni.”

Doug Weber would then have had to find the statutes regarding service by publication, or Hawai‘i Rule of Civil Procedure 17(d) and Hawai‘i Revised Statutes §§ 668-5, 634-23(2), and 634-26. He would then have to formulate an argument that the requirements of these statutes were not met, and that the judge abused his discretion in authorizing service by publication. This is not an impossible task, but for a person without a law degree, and with a full time job, it is an intimidating one. I asked Doug Weber if he thought there was any way that a person with a full time job could do this on his or her own without the help of an attorney. His unsurprising response was, “No.”

Lack of notice and the resulting default judgments against Native Hawaiian defendants chip away at the already disintegrating acreage of ancestral lands. All land in Hawai‘i is Native Hawaiian ancestral land, but today only a small percentage is actually held by Native Hawaiians. Each faulty notification increases the probability that family members will not hear about the action, and will end up with default judgments against them. In many of these cases, the percentage of land that a Native Hawaiian family has an interest in is rather small. Yet, looked at in the aggregate, the affected acreage is quite large. Notice is an “elementary and fundamental requirement of due process,” yet too often interested Native Hawaiian parties to partition actions are not receiving notice.

Initial lack of notice disproportionately prejudices interested Native Hawaiian parties to partition actions for a number of reasons. First, many Native Hawaiians are socioeconomically disadvantaged, making it less likely that they will be able to afford an attorney, or be financially able to take the time to represent themselves in court. A 2005 study published by Kamehameha Schools found that Native Hawaiians are among the “most socioeconomically disadvantaged ethnic groups, both within the state of Hawai‘i and at the national level….”

---

133 In Hustace, 718 P.2d 1109, the plaintiffs filed an action to quiet title and notified some of the defendants only through publication in a newspaper. The court held that an affidavit lacking specification as to the actions taken to personally serve all defendants was inconsistent with the applicable statutory language. The court held that notice by publication is only authorized if the plaintiff “reasonably employed knowledge at his command, made diligent inquiry, and exerted an honest and conscientious effort appropriate to the circumstances to acquire the information necessary to enable him to effect personal service on the defendant.” Id. at 1114. After due diligence to ascertain the identity and whereabouts of all possible defendants has been exercised, affidavits may be submitted to the court for an order allowing service by publication. Id. at 1115.
134 Interview with Doug Weber, supra note 102.
135 Interview with Andrew Sprenger, supra note 7.
136 Mullane, 339 U.S. at 314.
Second, many Native Hawaiian parties that can afford to hire a lawyer to overturn a default judgment issued against them will not be able to find a lawyer to represent them. As previously mentioned, NHLC is the only law firm in the state that defends Native Hawaiian title to land. NHLC is a non-profit, public interest law firm that focuses solely on Native Hawaiian rights issues. In recent years, the entity’s funding has been cut dramatically and as a consequence, so has its acceptance of cases. Illustrating this unfortunate situation, Michael Gibson, quiet title and partition action lawyer, referred to earlier, describes the environment of quiet title cases when he first started litigating versus now:

*I would say that it is not nearly as prevalent today for me to be in a quiet title case with a lawyer on the other side – it is much more common for me to be in a quiet title action with a pro se party on the other side.*

Third, if a Native Hawaiian party somehow does decide to represent themselves pro se, they will either have to chart out their own genealogy and title research or hire a professional to do it. Teri Gomes, Genealogist and Title Researcher at NHLC, enumerated her main frustrations with genealogical and title research in a recent interview. She details some of the difficulties in getting copies of genealogical and title documents. Her comments illustrate how difficult it would be for a non-professional to attempt the work that she does professionally.

*The problems I encounter are: first, wait periods [some statutory] to (1) edit or redact confidential information from state files; (2) process requests due to furloughs and staff shortages; (3) certify documents for court purposes; (4) obtain files from state storage facilities; and (5) similar things involving a wait period such as review and approval. The minimum time period is three to five days, but the 'standard' is ten days from the date of the request. Second, waiting for State and/or county personnel to locate the requested items, then being informed that the item is missing, in use by someone else, or only available at another State or county office, and that a statutory wait period is involved.*

Pro se parties that live on neighbor islands will likely have to make several trips to O‘ahu to obtain many of the records required to proceed with their actions. This adds the cost of flying, the cost of transportation once on O‘ahu, and the time commitment of leafing through documents at the State Archives, Bureau of Conveyances, and Circuit Court.

Michael Gibson, the quiet title and partition action attorney from Ashford & Wriston, shares his thoughts on the difficulties of representing oneself pro se:

*For the pro se defendant, you are really at the mercy of the court and the plaintiff’s attorney....I think it’s very difficult [to represent oneself pro se]. I’ve been in many cases where pro se defendants have done a very good job....But I’ve been in many many more cases where pro se defendants haven’t been able to establish that they have an ownership interest in the property – and if you put it on a scale and said...*
do pro se defendants normally prevail or do they normally lose, the scale would tell you they normally don’t prevail.\textsuperscript{140}

Finally, disenfranchisement may make some Native Hawaiians less likely to read the newspaper, thereby making them less likely to see a notice by publication. Feelings of inherent bias, or prejudice in the Western legal system, toward Native Hawaiian individuals may also make some Native Hawaiian parties less likely to get involved in a case even if notice is received. Andrew Sprenger of NHLC confirms that some Native Hawaiian families that do receive proper notice choose not to participate in the actions against them:

\textit{What we’ve experienced or seen...in these land title cases, especially with ancestral family lands, [is] that many family members have received sufficient notice and, for whatever reason, choose not to participate.} \textsuperscript{141}

Sprenger provides some insight into how disenfranchisement may play a role in this phenomenon:

\textit{In my experience, the reality is that a lot of people, especially Native Hawaiians, feel that the Western system is inherently unfair and is to the advantage of non-Native Hawaiians – especially when it comes to land ownership. [I] won’t argue with them on that, because it is unfair right now. But unfortunately, I think it does create a mindset for a lot of people who choose not to participate in asserting their interests in family land just because of the feeling that they have of the system being tipped against them.} \textsuperscript{142}

Continuing, Sprenger explains the domino effect of believing that the cards are stacked against a group from the beginning:

\textit{[W]hat I’ve found is that feeling sometimes is contagious and causes a lot of people and family members who do have an interest in land, choosing not to participate. It becomes almost a self-fulfilling prophecy that the system is against them, and so they won’t participate, and so the system bestows land ownership to the non-family members.} \textsuperscript{143}

From his experience in defending Native Hawaiian title to land, Sprenger sheds some light on how notions of inherent bias or unfairness within the Western legal system might play out in practice:

\textit{Actually I’ve seen this happen, where there is definitely a family that has an interest in land, and as it turns out, maybe only some of the family members feel the importance of coming forward. Granted, it’s a long difficult road because the system is stacked against them, but there are people in the community that want to fight for their family land.} \textsuperscript{144}

\textsuperscript{140} Interview with Michael Gibson, supra note 15.  
\textsuperscript{141} Interview with Andrew Sprenger, supra note 7.  
\textsuperscript{142} Id.  
\textsuperscript{143} Id.  
\textsuperscript{144} Id.
Sprenger elaborates as to why certain Native Hawaiian families or individuals may fight for their ancestral lands whereas others may not:

[These people] are willing to go through all the inequities and the hardships because they feel that it is necessary to do so out of respect for their ancestors, and also to reconfirm their identity and culture. Again, irrespective of all the hardships that they’ll face, both from financial [ones] to the amount of time it takes to get involved in a lawsuit, where most of these families are up against very wealthy corporations that can hire the best lawyers and provide all the legal maneuvers…. I would say that the people that are fighting for their land are basically few and far between the ones that could fight for it.145

This phenomenon ties the devastating impacts of colonization and Hawai’i’s history post-Western contact to the concept of notice. Those factors have created a distrust of the Western legal system amongst many Native Hawaiians. A self-fulfilling prophecy evolves where a Native Hawaiian defendant believes that the Western court system is inherently unfair, does not appear in court, and consequently does not obtain a just result.

D. Many potential remedies are available to halt the loss of Native Hawaiian land

Despite the imbalance of notice in the partition action system that acts to the detriment of defendants, many potential remedies can be implemented to level the otherwise uneven playing field. These potential solutions are consistent with the constitutional due process right to notice and are intended to diminish the inequities that Native Hawaiian partition action defendants currently face.

1. Create an information clearinghouse

First, as an immediate solution, an information clearinghouse sponsored by the Office of Hawaiian Affairs (“OHA”) or some other entity could be established to scan newspapers and re-publish notices in OHA’s Newspaper and online. OHA is a State agency that has the power to administer all government lands and funds set aside for the benefit of native Hawaiians and Hawaiians.146 An information clearinghouse sponsored by OHA could connect communities with legal support and advice similar to the pro se centers that the Legal Aid Society of Hawai’i has set up in the Kapolei Family Court.147 The clearinghouse could

---

145 Id.
146 At its creation, OHA was also given the power to set aside a pro-rata share of ceded land trust for Native Hawaiians. Nine elected individuals comprise OHA’s board of trustees. See OHA.org, OHA: A Celebration Of Ten Years, http://www.oha.org/pdf/OHA10yrHistory/KWO0491YR10PRT1.pdf (last visited July 6, 2011).
147 At the Kapolei Family Court, the Legal Aid Society of Hawai’i (“LASH”) has a space set up (the “CAP desk”) to assist the court staff in drafting orders for double pro se individuals (where both parties are representing themselves). LASH also offers clinics/classes to assist clients in representing themselves. LASH offers this for Divorce, Paternity/Custody cases, and Bankruptcy.

Pro se individuals receive assistance in drafting their court documents as well as instructions on filing them. Further, LASH instructs pro se individuals on serving the other parties involved, and invites them back should they have any questions. Participants in the clinic/classes often come back to have a counsel and advice session with a LASH attorney but when it comes to the hearing date, the client represents themselves. It is possible that LASH assists the pro se parties on the hearing date at the CAP desk, mentioned above. Email from K. Raina Whit-
potentially prevent default judgments from being issued against defendants who do not appear in court for lack of notice. Since NHLC is the only law firm that defends Native Hawaiian title to land, and because NHLC’s resources are limited, many Native Hawaiian defendants find themselves appearing pro se in court. As mentioned above, this can be a very stressful and frightening experience. A clearinghouse that connects pro se parties with various resources, or aids them in the procedural aspects of appearing in court, would alleviate the burden so many now bear on their own.

Indeed, quiet title attorney Michael Gibson agrees that “setting up pro se self-help centers in the courts to try to assist pro se defendants in navigating through the judicial system” would make representing oneself easier.

The overall effects of an information clearinghouse are limitless as it is impossible to say how many Native Hawaiian defendants would defend themselves and their land in court if given the opportunity to do so.

2. Appoint a neutral third party to effectuate notice

A neutral third party, similar to an independent appraiser, could be hired or appointed by the court to conduct the necessary genealogical research and effectuate notice. It may be impossible for a lawyer to comply both with the Hawai’i Rules of Professional Conduct and his or her responsibility to duly notify all defendants. This is because under the Hawai’i Rules of Professional Conduct, a lawyer is charged with “zealously” representing his or her client. It is conceivable that a lawyer could justify effectuating faulty notice as “zealously” representing his or her client. Fewer defendants in a quiet title or partition action translate to a higher potential for a larger parcel of land for the plaintiff. Also, not spending the time to do a complete genealogical history and track down the names of all the defendants could mean a smaller legal bill for a client. While this logic is flawed in many respects, because a case can be overturned for lack of proper notice, and a client could end up paying much more in the end, it may be appealing to some lawyers. A neutral third party hired or appointed to perform the genealogical research and effectuate notice would solve this problem.

No court would ever ask a plaintiff’s lawyer to appraise the value of the land in question, so why should a court ask a plaintiff’s lawyer to duly and fairly provide notice to all potential defendants? Notice is elementary and fundamental to due process and it makes sense to take reasonable measures to guarantee that a person has a chance to defend his or her property interest. Leaving each lawyer to “reasonably” use the available resources to make a “diligent inquiry” and exert an “honest and conscientious effort appropriate to the circumstances” to personally serve the defendants, is too abstract of a mandate. Hustace provided more structured guidance on compliance with Hawai’i Revised Statutes § 634-23(2), stating that a plaintiff must show what measures were taken to effectuate notice, and that diligence must continue to be exercised in good faith even where a plaintiff satisfies the statutory requirements of due diligence. Yet,

151 See Murphy, 514 P.2d at 867.
152 See Hustace, 718 P.2d at 1114 (citing Batte, 332 P.2d at 443; see also Hustace, 718 P.2d at 1114 (citing Campbell, 206 P.2d 1145).
this Article demonstrates that the Hustace requirement that a plaintiff show what measures were taken to effectuate notice can be tweaked to fit the circumstances, often resulting in prejudice to interested Native Hawaiian parties to quiet title actions. The Weber family’s case and Mangalam Limited v. Heirs of Kalua, et. al., discussed below, are perfect examples of plaintiffs submitting affidavits stating the measures taken to effectuate notice, when in fact, due diligence was never exercised. In the Webers’ case, Anita Weber’s identity would have been easily ascertainable through genealogical research. Her contact information would also have been readily available through a quick glance at the Kaua’i phonebook. In Mangalam, the defendants were actually known because a genealogist had uncovered their identities through research. The plaintiff in that case simply chose to ignore this information, stating that their identities were unascertainable.

As demonstrated by the two cases mentioned above, the statutory requirements and case law fleshing out those requirements are not sufficient to protect a defendant’s constitutional right to due process. When a plaintiff has an adverse interest to that of a defendant, it does not make sense to put the plaintiff in charge of protecting the defendant’s constitutional rights. An independent third party, appointed by the court to effectuate notice, would add a level of protection. Similar to an independent appraiser for the value of land, the findings or actions of the third party charged with effectuating notice could be challenged by either party.

This potential solution would add an extra cost to litigation, and would therefore likely be unpopular with plaintiffs. However, it could be seen as paying an independent third party for hours that would otherwise be billable for the lawyer. Plaintiffs could also rest assured that a final judgment would be less likely to be challenged on the basis of improper notice because the conflict of interest that a plaintiff’s lawyer has between zealously advocating for his or her client, and protecting the constitutional rights of the defendant, would be removed. Therefore, a potential solution to improper notice in partition actions could be a neutral third party, hired or appointed by the court, to conduct the necessary genealogical research and effectuate notice.

3. Strengthen the notice requirements
The notice requirements should be strengthened. Right now, it is difficult to piece the statutes together and they require some effort to decipher. As discussed earlier, it would be extremely daunting for a pro se defendant in a partition action to attempt to make sense of the statutes and case law. There is no reason that the notice requirements should not be straightforward and easy to understand. After all, notice is an “elementary and fundamental requirement of due process.”

Defining the nebulous concept of “due diligence” is also necessary. Currently, case law is inconsistent, leaving lawyers, at best, with little concrete guidance. At worst, lawyers can use the lack of definition of “due diligence” to their tactical advantage. A lawyer can attempt to satisfy “due diligence” with the bare minimum, much like Surety Kohala’s lawyer did in the Weber family’s case. It is likely that a lawyer can slip through the cracks, so to speak, with his or her lack of “due diligence” going unnoticed. If one of these lawyers does get caught, he or she may receive a minor reprimand from the judge telling him or her to go back and effectuate notice properly. Time saving, cost-effective, and tactical incentives to forgo duly notifying all defendants are high. For these reasons, statutory changes to define due diligence would greatly improve the currently inconsistent application of the concept.

154 Mem. in Supp. of Mots. at 13-17, Mangalam Ltd., No. 06-1-0067(3), slip op.
155 Mullane, 339 U.S. at 314.
4. Impose greater sanctions on attorneys who disregard their responsibilities to exercise due diligence in notifying defendants of actions against them

Further compounding this conundrum is the fact that we have an adversarial system of justice in the United States. This means that a judge is not there to monitor a lawyer’s every move. Rather, a judge hears and looks at the evidence and arguments presented by both sides, and without looking into the matter any further, makes a ruling based solely on that. Unless something, like lack of “due diligence” or proper notice is brought to the judge’s attention by an adequately represented defendant, the judge will not necessarily know that the plaintiff’s lawyer erred. Take for example the case of Mangalam, referenced above. Here, the plaintiff’s lawyer paid a professional genealogist to research the names of the potential defendants. The lawyer thus actually knew the identities of the defendants in question but nevertheless submitted an affidavit stating that their identities were unattainable. The lawyer submitted the genealogical charts with the defendants’ names as an exhibit, along with an affidavit stating that, “Doe Defendants 1-100 were not ascertainable.” With the genealogical chart in front of him as an exhibit, the judge agreed that the defendants’ names in question were not ascertainable, and allowed the lawyer to effectuate notice through publication.

This case demonstrates the clear need for greater sanctions for lawyers that blatantly disregard their respective responsibilities. Without the risk of greater penalties, some lawyers will continue to effectuate faulty notice, and some judges will continue to accept nonsensical affidavits. A court could impose greater sanctions under the inherent power of the court as stated in the Hawai‘i Rules of Professional Conduct. Without greater sanctions and penalties, there will be no incentive to comply with due diligence requirements and accord defendants their constitutional right to notice. A court-appointed neutral third party charged with performing genealogical research and effectuating notice would negate the need for greater penalties and sanctions for lawyers. However, as the system currently stands, lawyers who ignore their respective responsibilities regarding notice need to face harsher consequences.

5. Require a long search

Requiring that a potential buyer pay for a long title search conducted by a disinterested third party would eliminate most of the confusion surrounding interests in land. Currently, a person buying property typically executes a promissory note, which is a binding contract that gives the bank a mortgage or lien over the property in exchange for a loan. In the event that the buyer defaults on mortgage payments, the bank will take the buyer’s interest in the property. As a result, the bank needs to be sure that the buyer holds clear and proper title to the property prior to executing the mortgage agreement. To do so, the bank requires a title search to be completed by a title agency. The title agency conducts a title report, usually only going back three or four transactions, and then offers insurance on that report. This process, as Donovan Preza, Ph.D. Student in Geography, states, “[e]ssentially ignores the history of that land back to the Māhele.”

Preza continues, “I think that what the title insurance industry has evolved to in Hawai‘i – which originally had very good intentions – is no longer about title, but is a matter of liability. Who has financial liability to

156 Mangalam Ltd., No. 06-1-0067(3), slip op.
157 Mem. in Supp. of Mots. at 15, Mangalam Ltd., No. 06-1-0067(3), slip op.
158 Mangalam Ltd., No. 06-1-0067(3), slip op.
159 HAW. RULES OF PROF’L CONDUCT pmbl. § 9.
160 Interview with Donovan Preza, supra note 56.
Stephanie Chen

defend title in court?" He explains that ignorance is fostered because potential clouds on title that occurred prior to those three or four researched transactions are effectively hidden and ignored:

_The ramifications...on a piece of property that was not legally obtained in 1900, or had some kind of potential cloud of title – those potential clouds aren't brought to the surface, instead they are hidden. It fosters ignorance, the ignorance of all the parties involved. It's more beneficial to not find the truth and find clear title, and the people who lose out on that are the people who had land in the 1900s._

This is extremely relevant to the topic of Native Hawaiian ancestral land loss, because as Preza details, Hawaiians are the people who possessed land prior to the period that title agencies research and insure:

_The people who had land in the 1900s, contrary to popular belief are the Hawaiians. It's because we had land since 1848 – [Native Hawaiians] were purchasing government land, and had land, that all of us today have a story in our family about a loss of land. The irony [is that] every Hawaiian I know has heard within their family, a story about a loss of land. Yet, there is this predominant idea that we didn't get land as a result of the Māhele, which is counterintuitive. Either we got land or we didn't, and if we are losing land it must mean that we had land. There are layers and layers we need to get through and I think the short title searching only helps to [foster] ignorance and [suppress the truth]._

A solution to this problem would be legislation requiring banks to require buyers to pay for a long search prior to obtaining a mortgage. As Preza states, “This would flush out the clouds in title [going] back to the 1900s and we wouldn't be hearing about them in the newspapers through quiet title actions – we wouldn't be hearing about them after the fact."

For Preza, it is disappointing that despite there being a mechanism to bring clouds on title, or breaks in the chain of title, to awareness prior to someone buying and selling land, the current system does not bring those kinds of issues to the forefront: “Do a title search. Either the guy you are buying land from has clear title or he doesn't. If he doesn't, there is a process to clear the title.” Preza explains how the title and insurance industries have coevolved to the detriment of accurate title reporting:

_With every single piece of property that is sold, and mortgage and promissory note that is offered, you are required by the bank to get a title search. The title industry and the insurance industry make $800.00 a crack, $1000.00 a pop, whatever it is. I believe it's around $800.00 for a short title search, and these are essentially on every single sale of land._

Continuing, Preza states that his frustration rests with title searching becoming more about liability than about title, and not with title and insurance industries making a profit:

---

161 Id.
162 Id.
163 Id.
164 Id.
165 Id.
166 Id.
Where Blood Runs With the Land: Partition Actions and the Loss of Native Hawaiian Ancestral Land

I have no problem with that except that it's no longer about title, it's about liability, and for me I think the process should be about title. We are getting a title search, either the person has clear title or doesn't. If the title search is not answering that question, what is it doing and why do we need it? Because of the complications of Hawaiian history, the Overthrow, and the Māhele, it can be very frustrating – especially for Hawaiians – because to speak generally, we are the ones losing out on this because we are the ones who had title to a lot of these lands from the Māhele up until 1900.167

The idea of legislation requiring banks to obtain a long title search prior to issuing a mortgage would be unpopular. Preza cautions that, "It would probably cost a lot to get the right answer...[and] no one is going to want to pay the extra money."168 However he states, "The flipside of that is we don't truly understand who owns title. All we really have is someone with an insurance policy that's going to warrant title if someone ever goes to court. That's why it's more about liability than about title."169

The title insurance industry only warrants the report for the three or four researched transactions and the buyer will be considered a bona fide purchaser170 if a title search is conducted. The bank's interest is also protected through the title search. Thus, the only people who lose are those that owned the land prior to the researched transactions. As Preza states, "The only people who lose are those that don't know they are an heir."171 A long title search would be beneficial because it would bring to the surface clouds on title or breaks in the chain of title going back to the Māhele. Currently, these issues are only brought to the forefront during a quiet title and partition actions where the problems regarding notice exist.

6. Create a land bank to be held in trust
A land bank held in trust by OHA, or some other entity capable of doing so, should be created so that the unclaimed lands in a quiet title action are not sold with the money left in court. Currently, shares of unclaimed land in a quiet title case are typically sold to the highest bidder. The proceeds sit in court for a period of time to be claimed by an interested party.172 Hawai‘i Revised Statutes § 669-2(e) already contemplates that OHA becomes an owner to an undivided interest in a kuleana parcel if there is no identified owner.173 The Hawai‘i State Legislature should expand OHA’s role in these actions by creating an administrative mechanism whereby OHA would hold those shares of undivided lands, both kuleana and regular parcels,

167 Id.
168 Id.
169 Id.
170 A bona fide purchaser is one who has no knowledge, actual or constructive, of any clouds on title or breaks in the chain of title. Actual knowledge exists where a buyer receives information informing the buyer of clouds on title or breaks in the chain of title. Constructive notice exists when a buyer should have known, based on the circumstances that there was a cloud on title or a break in the chain of title.
171 Interview with Donovan Preza, supra note 56.
173 See Haw. Rev. Stat. § 669-2(e) (OHA is joined as a defendant in any quiet title action when the land claimed by the plaintiff is kuleana land; and the plaintiff has reason to believe that an owner of an inheritable interest in the kuleana land died without a valid will and there is or was no qualified taker). See also HRS § 560:2-105.5 (2011) (If the owner of an inheritable interest in kuleana land dies without a valid will, and there is no other qualified taker, then the interest will pass to the Department of Land and Natural Resources (“DLNR”) to be held in trust until OHA develops a land management plan for the use and management of the kuleana property. Upon approval of the plan, DLNR will transfer the kuleana property to OHA.).
Stephanie Chen

of those individuals who are identified but for some reason have been defaulted by the quiet title process. OHA should hold those lands in trust rather than accepting the cash proceeds from the sale of the shares conducted by the court. This would benefit both the Native Hawaiian parties as well as OHA because the latter would end up with any unclaimed land after a certain period of time.

The logic behind this potential solution is that all land in Hawai‘i is Native Hawaiian ancestral land. However, the Kuleana Act recorded a mere 28,000 acres of land as becoming the kuleana parcels of the maka‘āinana. As Donovan Preza illustrated earlier, many maka‘āinana bought land from the government through Section 4 of the Kuleana Act, which was accounted for in the fee simple sale of government land, and not in the 28,000 acre figure. For all intents and purposes, the land purchased directly from the government was essentially the equivalent of kuleana parcels. Similarly, land acquired by Native Hawaiian families through other means should be treated similarly to kuleana lands. OHA, or some other entity capable of taking unclaimed shares of land into trust for the benefit of Native Hawaiians makes sense when OHA is already automatically named as a defendant in quiet title and partition actions involving kuleana parcels when there is no other qualified taker.

To preserve Native Hawaiian ancestral lands, and to increase the land base that OHA holds for the benefit of Native Hawaiians, the shares of land to which OHA is accorded an interest should be held in trust rather than reduced to monetary proceeds. The importance of land to Native Hawaiian culture is invaluable and the monetary proceeds from the sale of unclaimed shares are often below market value. Therefore, it makes little sense for a court to reduce OHA’s shares to the cash proceeds of the sale of Native Hawaiian ancestral land. For these reasons, the Hawai‘i State Legislature should expand OHA’s role in quiet title and partition actions by requiring that OHA be named as a defendant in all actions involving ancestral lands, and should OHA gain an interest in the property, its shares should be held in trust for the benefit of Native Hawaiians rather than reduced to cash proceeds.

174 Interview with Donovan Preza, supra note 56.
IV. PARTITION ACTIONS AND THE DIMINISHMENT OF NATIVE HAWAIIAN ANCESTRAL LANDS

But let us recognize that such preference for partition in kind should not be so easily disregarded. “Mindful of our Hawaiian heritage,” we must not lose sight of the cultural traditions which attach fundamental importance to keeping ancestral land in a particular family line.175

—Chief Justice William S. Richardson quoting the Hawai‘i Constitution Preamble

Partition actions originated in equity but have become a creature of statute whereby any cotenant with a share in a piece of property may file suit to divide the land according to each cotenant’s share.176 At common law the action for partition of land was designed to allow cotenants to divide land held jointly.177 A cotenant’s right to partition is absolute regardless of his or her percentage interest in the property.178 There are two primary types of partitions: partition in kind and partition by sale.179 Partition in kind refers to a court ordering physical division of the land according to each cotenant’s interest. Originally, partition in kind was the only division allowed by law.180 However, statutes have been enacted in almost every jurisdiction, including the State of Hawai‘i, to allow courts to effect partition by sale of the property when it would be impracticable or injurious for the land to be partitioned in kind.181 In a partition by sale, a judge will order a partition auction where qualified bidders will have the opportunity to bid on the entire piece of property. The entire piece of property is then sold and the proceeds from the sale are divided amongst the cotenants according to each person’s interest.182

Despite the codification of partition actions and due to the equitable origins of the remedy of partition, judicial discretion is given great weight. In a partition action, the judge is charged with balancing the equities of all the cotenants. Equity would seem to favor partition in kind, but a judge must also consider

176 “It is generally recognized that the right of a cotenant to partition property is absolute and not to be defeated by the mere unwillingness of a party to have partitioned.” Kimura, 107 P.3d at 437 (citation omitted).
177 Chuck, 532 P.2d at 661 (Richardson, C.J., dissenting) (citing 1967 Wis. L. Rev. 988 (…[T]o provide a means by which people, finding themselves in an unwanted common ownership, can free themselves from the relationships incidental to such common ownership) (citation omitted).
178 “It is generally recognized that the right of a cotenant to partition property is absolute and not to be defeated by the mere unwillingness of a party to have partitioned.” Kimura, 107 P.3d at 437 (citation omitted); see Henmi Apartments, Inc. v. Sawyer, 655 P.2d 881, 886 (Haw. Ct. App. 1982) (stating that “any person who holds property as a tenant-in-common with another person may seek partition.”).
179 Because partition is an equitable remedy, judges are given great discretion. A third type of partition in Hawai‘i is partition by appraisal. Partition by appraisal, though not enumerated in the partition statute, has been ordered. The fact that judges may consider this as a remedy demonstrates the enormous weight given to judicial discretion in actions originating in equity. In partition by appraisal, the plaintiff buys-out the other cotenants for fair market value. It is uncommon that a plaintiff will ask a judge for this remedy however, as he or she will have to pay fair market value. For this reason, plaintiffs wishing to purchase the entire property will argue for partition by sale where there is a good chance that the property can be acquired at below market values.
180 Chuck, 532 P.2d at 661 (Richardson, C.J., dissenting) (citation omitted).
181 Id. at 661-62 (Richardson, C.J., dissenting) (citation omitted).
impracticability or prejudice to any of the interested parties.

In practice, the burden of demonstrating impracticability or prejudice has proven so easy to meet that partition sales are the rule rather than the exception.183 The National Conference of Commissioners on Uniform State Laws, in its draft Uniform Partition of Heirs Property Act, also recognizes the tendency courts have to order partition by sale over partition in kind:

Despite the general statutory preference for partition in kind, courts in a large number of states typically resolve partition actions by ordering partition by sale…. This occurs even in cases in which the property could easily have been divided in kind or when an overwhelming majority of the cotenants or interest holders had opposed partition by sale or even in some cases when the only remedy any cotenant petitioned the court to order was partition in kind and not partition by sale.184

One frequent argument for ordering a partition by sale is the difficulty in dividing property due to its unique topographical features.185 Another commonly cited reason is the existence of too many interests in the commonly held property.186 “Courts find partition in kind impracticable if it requires a division of property into so many pieces that the property’s economic value is diminished.”187

The element of injury required under most partition statutes to force a sale of the property is met whenever the sale’s proponent can prove that partition in kind would result in pecuniary loss to some or all of the owners.188 This “pecuniary loss standard adopted by all of the states has reduced the presumption of partition in kind to a procedural barrier, easily overcome by a mere showing of the loss of any pecuniary value.”189 Indeed, “the many courts that utilize this approach do not place much value on upholding basic property rights and do not take account of the non-economic value that many owners place upon their property,” such as ancestral significance.190

183 Phyliss Craig-Taylor, Through a Colored Looking Glass: A View of Judicial Partition, Family Land, and Rule Setting, 78 Wash. U.L.Q. 737, 753-54 (2000); see Faith Rivers, Inequity in Equity: The Tragedy of Tenancy in Common for Heirs’ Property Owners Facing Partition in Equity, 17 Temp. Pol. & Civ. Rts. L. Rev. 1, 58 (Fall 2007) (“According to The Emergency Land Fund, ‘a sale for partition and division is the most widely used legal method of facilitating the loss of heir property’ within the African-American communities served by the organization. This finding has been supported by stories of both partition-seeking developers and land loss victims.”) (internal citations omitted).

184 Uniform Partition of Heirs Property Act, Executive Summary and Overview of How the Act Works (2010); see Richard R. Powell & Patrick J. Rohan, Powell on Real Property ¶ 601, 607 (one vol. ed., abr. from Powell on the Law of Property in seven vols., reprint 1973) (citations omitted) (“It is the author’s considered judgment, unsupported by any actual statistical data, but amply supported by long years of practice, that division in kind has become actually infrequent of occurrence. Lip service is still given to the historical preference for physical division of the affected land, but sale normally is the product of a partition proceeding, either because the parties all wish for it or because courts are easily convinced that sale is necessary for the fair treatment of the parties.”).

185 Craig-Taylor, supra note 184, at 737, 55 (citing Williams v. McIntyre, 632 So. 2d 446, 448-49 (Ala. 1993); Black v. Stimpson, 602 So. 2d 368, 369 (Ala. 1992); Hegewald v. Neal, 582 P.2d 529, 532 (Wash. Ct. App. 1978)).


187 Id. at 753-54.


189 Id. at 757-58.

190 Uniform Partition of Heirs Property Act, Executive Summary and Overview of How the Act Works.
To many, it is shocking that a cotenant with a one-percent interest in a parcel of property has the right to force a partition on all other cotenants. Take for example the story of Guye Lee, which will be discussed in more detail later. Lee was a party in a partition action initiated by a holder of a minority interest in the property. The property involved in the case was a large plot of ancestral land located in Kona on the Island of Hawai‘i. Lee describes his reaction to receiving notice of the partition action against his family:

*It was such a shock to us because here, everybody was going on with their lives, and next thing you know, we are getting a knock on our doors from the sheriff and he's serving us with a notice. The complaint is that one of the parties has said they are going to take us to court because they want to sell off the land. It was such a shock to us, such a shock to me, to my father, to everyone. We just didn't know what to do. Honestly, we just didn't know what to do.*

Similarly, Charleen Tinao, longtime resident of Moloka‘i, defendant in a partition action, and advocate for the preservation of Native Hawaiian ancestral lands, surmises that, "Everybody's selling the land because it is the easy way out." In fact, there have been cases in Hawai‘i in which a fractional interest of family land was acquired only to be quickly followed by an action for partition by sale. From the speedy course of events in these cases, it can be assumed that the buyers acquired the fractional shares with the intent to initiate partitions by sale. There are also examples from other jurisdictions of outside parties acquiring fractional shares in property for the specific purpose of forcing a sale in order to acquire the entire property. In these cases, the property was otherwise held by family members, and the shares acquired by the outside parties were sometimes very small. The National Conference of Commissioners on State Laws confirms this:

...[T]here have been a number of unscrupulous real estate speculators who have purchased very small interests in family-owned tenancy in common property with the sole purpose of seeking a court-ordered partition by sale. Often these speculators have been the winning bidder in the subsequent sale of the property even though their winning bid constituted just a fraction of the property's market value.

### A. Partition actions in Hawai‘i

In Hawai‘i, all co-owners of a particular piece of land have an undivided interest in the entire property. Accordingly, any joint tenant, or tenant in common to a piece of property, may bring an action to partition the land in kind, or by sale, if a partition in kind would cause great prejudice to the owners. A court has the power to: (1) equitably divide the property between the parties according to their respective proportionate

192 Interview with Charleen Tinao, supra note 2.
194 See e.g., Black, 602 So. 2d at 369; Gilmore v. Robertson, 139 So. 2nd 604, 605-06 (Ala. 1962); see also Watson v. Durr, 379 So. 2nd 1243, 1243-44 (Ala. 1980).
195 Id.
196 Uniform Partition of Heirs Property Act, Executive Summary and Overview of How the Act Works.
interests; (2) divide portions of the premises to some or all of the parties and order a sale of the remainder; and (3) sell the whole property if partition in kind would be impracticable “in whole or in part” or be greatly prejudicial to the parties interested.\(^\text{198}\)

In the case of kuleana lands, OHA is named as a defendant in any action to quiet title where: (1) the land claimed by the plaintiff is kuleana land; (2) there is reason to believe that an owner of an inheritable interest died without a valid will; and (3) there is no other qualified taker.\(^\text{199}\) Though this statutory provision is referring to quiet title actions, it is relevant to partition actions because if an owner of the kuleana parcel dies without a valid will and there is no other qualified taker, OHA receives that person’s share in the event of a partition action.\(^\text{200}\)

In Hawai‘i, “[t]he law requires that real property be partitioned in kind when possible. In a partition in kind, an appraiser…may provide evidence of the values of the various parcels, so that each owner receives land of a value equal to that owner’s individual interest.”\(^\text{201}\) However, in practice, it appears that courts often favor partition by sale over partition in kind. In *Chuck v. Gomes*, three tenants in common, who each owned an undivided one-ninth interest in a large tract of land, brought an action for partition of the land.\(^\text{202}\) Despite the recommendations of a court-appointed Commissioner\(^\text{203}\) charged with determining the feasibility of partition in kind, the Hawai‘i Supreme Court upheld the Circuit Court’s finding that a partition into nine individual parcels was not feasible.\(^\text{204}\) The Supreme Court of Hawai‘i held that the Circuit Court’s statement that partition in kind was “not feasible” implicitly indicated that great prejudice to the owners would result if such a partition was ordered.\(^\text{205}\)

However, in *Gomes*, Chief Justice Richardson issued a powerful dissent, pointing out that a partition in kind was feasible, as evidenced by the Commissioner in partition’s report. The report stated that, “Based upon my investigation and experience as a licensed surveyor in the State of Hawai‘i, it is both feasible and practical to partition in kind the Property….”\(^\text{206}\) Chief Justice Richardson explained that according to Hawai‘i Revised Statutes § 668-7(6), partition in kind is preferred over partition by sale and that the focus should be on the feasibility and practicability of physically dividing the property:

---


\(^{200}\) Haw. Rev. Stat. § 560.2-105.5 (“...if the owner of an inheritable interest in kuleana land dies intestate, or dies partially intestate and that partial intestacy includes the decedent's interest in the kuleana land, and if there is no taker under article II, such inheritable interest shall pass to the department of land and natural resources to be held in trust until the office of Hawaiian affairs develops a land management plan for the use and management of such kuleana properties, and such plan is approved by the department of land and natural resources. Upon approval, the department of land and natural resources shall transfer such kuleana properties to the office of Hawaiian affairs.”).


\(^{202}\) *Chuck*, 532 P.2d 657 (Richardson, C.J., dissenting).

\(^{203}\) The court will appoint a Commissioner to determine the feasibility of partitioning the property in kind. If the Commissioner determines that partition in kind would be impracticable or greatly prejudicial to the parties interested, then the court orders the Commissioner to conduct an auction to sell the property. See Haw. Rev. Stat. § 668-13.

\(^{204}\) *Chuck*, 532 P.2d 657 (Richardson, C.J., dissenting).

\(^{205}\) *Id.*

\(^{206}\) *Id.* at 661 (Richardson, C.J., dissenting).
In so ascertaining whether partition in kind is impracticable, I believe the focus should be placed on whether the physical division of the subject property is feasible and practical, that is, whether the property is susceptible of partition in kind. If such actual division is indeed found to be practicable…then HRS § 668-7(6) precludes the trial court from ordering a judicial sale, but rather authorizes the court to effect partition in kind of the realty.207

Despite the statutory additions of partition by sale to the equitable remedy of partition in kind, the purpose of partition has remained the same, “the law favors partition in kind.”208 It is the general rule that:

…As between a partition in kind or sale of land for division, the courts will favor a partition in kind, since this does not disturb the existing form of inheritance or compel a person to sell his property against his will, which, it has been said, should not be done except in cases of imperious necessity.209

Despite Chief Justice Richardson’s urgings to interpret Hawai‘i’s partition statute in accordance with its common law origins, recent cases have continued to push for greater judicial discretion. Indeed, the court in Kimura v. Kamalo stated, “HRS § 668-7(4) vests the court with authority to partition in kind or to order a sale.”210 This statement appears to give equal weight to partition in kind and partition by sale, and does not convey the general rule preferring partition in kind. Further, “absent an abuse of discretion in the exercise of its powers, a trial court’s discretion should not be disturbed.”211

B. Partition by sale has a disproportionate impact on Native Hawaiian cotenants due to socio-economic disparities and cultural differences

In Hawai‘i, many parcels of land are heavily fractionalized, meaning that hundreds to thousands of people might have a valid interest. Alan Murakami, NHLC Litigation Director, explains how fractionalization occurs to the detriment of preserving Native Hawaiian ancestral lands:

*The operation of both the passage of time and the law tends to work against protecting Native Hawaiian lands and keeping them in Hawaiian hands. I say that because the passage of time means that generations follow each other, and eventually lead to what we call the fractionalization of that interest into so many hands that it becomes practically difficult to try to hold title within the family group....*212

One primary reason for the increased fractionalization of property interests amongst Native Hawaiians as opposed to other groups of individuals is that many Native Hawaiians have limited financial resources and thus limited access to legal representation. Native Hawaiian families in Hawai‘i have the lowest mean family

207 Id. (Richardson, C.J., dissenting).
208 Id. at 662 (Richardson, C.J., dissenting) (citations omitted).
210 Kimura, 107 P.3d at 436.
211 Id. at 437 (quoting Sugarman, 85 P.3d at 649).
212 Interview with Alan Murakami, Litigation Director, NHLC, in Honolulu, Haw. (Feb. 25, 2011) (transcript on file with author).
Stephanie Chen

income of all major ethnic groups in the State.213 Kamehameha Schools’ 2005 assessment of income and poverty in Hawai‘i reported that the mean income for Native Hawaiian families with minor children was 15.9 percent lower than the statewide average.214 As a comparison, the mean income among Japanese families with children exceeded the Native Hawaiian mean income by 58.3 percent.215 Even without adjusting for Hawai‘i’s higher cost of living, in 1999 Native Hawaiian families reported a median family income that was less than the national average.216 Limited resources correlate with a decrease in adequate legal representation:

Estate planners and real estate lawyers believe that tenancy-in-common ownership under the default rules represents one of the most unstable forms of real property ownership. [These professionals have a number of ways of addressing] the dangers of this form of ownership…. However, a substantial percentage of tenancy in common property owners are not able to afford the services of these professionals….217

Lack of adequate legal representation advising clients to execute valid wills results in implementation of intestacy statutes, which in turn results in fractionalization of the land:218

…[m]any low to middle-income property owners transfer their real property by intestate succession instead of by will which is consistent with studies that have documented low will-making rates among Americans of more modest means. The more that property is transferred from one generation to the next by intestate succession, the more likely it is for an increasingly large number of tenants in common to acquire an interest in the property….219

Land ownership becomes increasingly unstable as it becomes more heavily fractionalized, augmenting the risk that a cotenant will request a partition by sale:

[An increasing number of tenants in common results] in increasingly unstable ownership given that each cotenant possesses an unfettered right to request a partition by sale of the entire property irrespective of the wishes of the other cotenants.220

213 Kana‘iapuni, Malone, & Ishibashi, supra note 137.
214 Id. at 2. The mean income for Native Hawaiian families with minor children was $55,865 as compared to the statewide average of $66,413.
215 Id. The mean income among Japanese families with children was 88,456 as compared to that of Native Hawaiian families with children which was $55,865.
216 Id. The median family income for Native Hawaiian households in 1999 was $49,214 as compared to the national average of $50,046.
217 Uniform Partition of Heirs Property Act, Executive Summary and Overview of How the Act Works.
218 See Craig-Taylor, supra note 183, at 776. Craig-Taylor examines the effect of partition statutes on African American families. She states that, “Limited resources and a legitimate distrust of the legal system provided the rationale for many families to allow the intergenerational transfer of property to proceed through intestate succession. Many African Americans ‘came to perceive the law and its enforcers as an outside alien force.’ Without recourse to the courts for probate, the passing of their property as interests as ‘heir property’ was a safer alternative and would in effect keep the property in the family. This system of transfer created its own set of practical and legal problems.” Id.
219 Uniform Partition of Heirs Property Act, Executive Summary and Overview of How the Act Works.
220 Id.
Where Blood Runs With the Land: Partition Actions and the Loss of Native Hawaiian Ancestral Land

There is a higher occurrence of fractionalization amongst Native Hawaiian families that do not possess valid wills because Native Hawaiian families tend to be larger than average. In 2000, the average number of individuals in Native Hawaiian households was 3.4 compared with the statewide average of 2.9. A larger family size increases the likelihood that more individuals will have an interest in the intestate succession of real property, thereby increasing the fractionalization of the land.

C. County zoning ordinances often preclude partition in kind and contribute significantly to courts ordering partitions by sale

Further compounding the problem, Hawai’i land use regulations require a certain minimum acreage for a specific lot to be carved out in an action for partition in kind. Alan Murakami illustrates the effect that Hawai’i’s land use regulations have on heavily fractionalized pieces of property:

…land use regulations governing Hawai’i require a certain minimum acreage for a specific lot to be carved out for a set of co-owners to hold. If you are so fractionated in terms of interest, and you can only accumulate a certain percentage of that interest, that may not be sufficiently large enough to carve out a separate parcel just for that Hawaiian family group. You come up against the legal barrier of the county’s minimal lot size requirements that preclude you from being able to get a parcel of land separate and apart just for your ‘ohana.

Murakami elaborates on NHLC’s struggle in partition cases to combine the interests of family members to meet the land use regulations to allow for partition in kind rather than partition by sale:

It becomes very problematic because we are constantly struggling to figure out how we can get a large enough interest amongst those family members that want to hold onto land…. We deal with the restrictions on minimum lot size by trying to get as many people together to agree to hold land, or to consolidate interests that might be available for neighboring parcels, to try to keep it in one parcel.

Tying these two issues together, where there are heavily fractionalized land interests combined with land use regulations that preclude a party from subdividing the parcel, partition in kind often becomes impracticable. Evidence of judicial preference for partition by sale in these instances lies in the treatment of kuleana lots, which are akin to other fractionalized parcels of land to which Native Hawaiian families have an interest: “[W]here kuleana lots are concerned, because of their small size and the fact that there are often several claimants, the court orders a partition by sale, where the land goes to one party, and the fractional interests are bought for cash.”

---

221 Kana’iapuni, Malone, & Ishibashi, supra note 137, at 3.
222 Id. At a national level, households headed by a Native Hawaiian had 3.19 persons, fully 0.60 persons more than the national average of 2.59 persons and higher than that of most other ethnic groups.
223 Interview with Alan Murakami, supra note 212.
224 Id.
225 “Any plan for a subdivision shall, before approval of the court, be subject to approval by the planning department of any county having laws and regulations covering subdivisions.” HAW. REV. STAT. § 668-7(7).
226 Garavoy, supra note 6, at 559-60. The court verifies the claimant’s interest in the property by requiring a full title
D. Developers are often the only qualified bidders, allowing them to obtain the properties at below market values

Courts “typically order the property sold at auction utilizing forced sale procedures that are notorious for yielding sales prices well below market value.”227 This is because, in many partitions by sale, the developer is often the only qualified bidder.228 As previously discussed, many Native Hawaiian families are precluded from purchasing the entire parcel outright at auction due to limited resources.229 Where there is only one qualified bidder, the property is often sold at below market values: “The forced sale conditions under which partition sales occur virtually guarantees that wealth will not be maximized for tenants in common even though judges frequently order partition sales because they claim that a partition sale will be wealth maximizing for the cotenants.”230 In these judicial proceedings for sale, Native Hawaiian cotenants receive compensation that fails to reflect the nonmarket value of the property as well as the fair market value.231

To make matters worse, many states, including Hawai‘i, allow partition-seeking cotenants to recoup attorney’s costs and fees from cotenants that unsuccessfully resisted the partition, “forcing them in effect to pay for the deprivation of their property rights and their resulting loss of wealth.”232 Of course, these fees and costs are in addition to their own attorney’s fees.

In 2000, Professor Phyliss Craig-Taylor wrote an article examining the impact of partition statutes on African American family-owned land. While Native Hawaiians cannot be directly compared to African Americans due to the unique circumstances and histories surrounding both groups, Professor Craig-Taylor’s article provides valuable insight into the impact of partition by sale on family-held property. In terms of socio-economics and a heightened cultural importance placed on family-held land, there are similarities between Native Hawaiians and African Americans. Professor Craig-Taylor explains the crux of the issue—courts misinterpreting the intent of partition statutes: “The courts have misinterpreted the intent of the judicial partition statutes, which was to protect property rights unless extraordinary injury would occur. This goal is sacrificed in order to facilitate convenience and efficiency.”233

Professor Craig-Taylor compares court-ordered sales of land to the doctrine of eminent domain, where the government may seize private property for a public purpose only after just compensation has been given: “Property is a scarce resource which is traditionally protected in the law, except in cases involving public need and compelling state interest. Here there is no public need which compels the forced sale of

---

227 Uniform Partition of Heirs Property Act, Executive Summary and Overview of How the Act Works.
228 “Many times, partition lawsuits are brought by outside developers who have acquired an heir’s interest, or the suits are funded by developers who have established an agreement to purchase the property pursuant to negotiations with an heir. Through the courts of equity, developers can legally purchase an entire tract of heirs’ property and gain equal right to possession, no matter how small an interest they originally acquired and without regard to the wishes of the majority of the other heirs.” Rivers, supra note 183 (internal citations omitted).
229 Kana‘iapuni, Malone, & Ishibashi, supra note 137, at 1-2.
230 Uniform Partition of Heirs Property Act, Executive Summary and Overview of How the Act Works.
231 See Craig-Taylor, supra note 183.
232 Uniform Partition of Heirs Property Act, Executive Summary and Overview of How the Act Works.
233 See Craig-Taylor, supra note 183, at 743.
property.”234 The National Conference of Commissioners on Uniform State Laws adds that unlike eminent domain proceedings, partition actions do not require that fair market value be paid to those being stripped of their property:

[T]he law of partition and of partition sales often functions to give those cotenants who petition a court to force a sale upon their fellow cotenants an eminent domain-like power of condemnation. Unlike eminent domain, however, under a partition sale, fair market value compensation need not be paid to those who end up losing ownership of their property at the conclusion of the forced sale.235

Articulating the inconsistency between the law’s protection of a person’s real property and courts’ consistent use of economic valuation as a means of establishing injury in partition cases, Professor Craig-Taylor states:

A sale of the property is set out in state partition statutes as an extraordinary remedy. For courts to allow a purely economic valuation to establish the “injury” and to determine who gets the property does violence to the intent and spirit of the law. Historically, partition sales were ordered in extraordinary circumstances when a division could not be clearly established.236

Though legal, skirting this legislative intent does great injury to particular groups of individuals, namely those that have historically experienced disenfranchisement and disparate socio-economic impacts:

The circumventing of this intent by an outside interest, supported by the courts, may be legal, but it is not objective or fair to all interests in the property. The devastating impact of this liability regime in judicial partition has a devastating impact on particular segments of society....237

In Hawai‘i, while partition actions may result in a monetary award to Native Hawaiian claimants, the payout to each claimant can be miniscule238 relative to the market value of the land and to the intangible value of having an interest in land itself.239 Chief Justice Richardson articulates the significance of partition actions in Hawai‘i and the impact of these actions on Native Hawaiian culture: “[T]he action for partition [is] a remedy which is particularly significant in Hawaii where the retention of land ownership in one family line is an important interest worthy of preservation and diligent protection.”240

234 Id. at 742, 771.
235 Uniform Partition of Heirs Property Act, Executive Summary and Overview of How the Act Works.
236 Craig-Taylor, supra note 183, at 771.
237 Id.
238 Rivers, supra note 183 (“Typically a court-ordered sale draws less than optimal market value because of the forced, timed conditions of the court sale. In these situations, developers who force partition sales are able to capture the property at bargain prices and realize high financial gains when the land is sold at a higher price with consolidated title.”) (internal citations omitted).
239 See Garavoy, supra note 6, at 560 (referring to partition sales of kuleana lands) (citing to an interview with Tom Pierce, Attorney, in Wailuku, Maui (June 2, 2003) (notes on file with Jocelyn B. Garavoy).
240 Chuck, 532 P.2d at 661 (Richardson, C.J., dissenting).
Recognizing Hawai‘i's unique circumstances and the importance of land to Native Hawaiian culture, Chief Justice Richardson explains the importance of preferring partition in kind over partition by sale:

It is especially important to restate this preference for partition in kind so that in Hawaii we preserve the right of the individual joint tenant or tenant in common to hold onto his parcel of land where he opposes any forced sale of such property. Indeed, there are interests other than financial expediency which I recognize as essential to our Hawaiian way of life. Foremost is the individual's right to retain ancestral land in order to perpetuate the concept of the family homestead.241

E. Family dynamics are inseparable from the discussion of partition actions contributing to the loss of Native Hawaiian ancestral land

It takes family effort and agreement. I get my kupuna and family input when working on land issues in order to succeed...I am not my own boss, I am the voice of my kupuna and 'ohana.242

—Charleen Tinao on the indivisibility of family and ancestral lands

Perpetuating the concept of the family homestead in a legal system that favors alienability of land above all else presents its own set of challenges. Each and every cotenant that has an interest in a parcel of land has the right to alienate his or her portion of the property. If one family member is unhappy or in need of money, or if one outsider finds a way into the cotenancy with the intent of cashing out, the entire concept of the family homestead can be destroyed. The mechanism for destruction is the statutory remedy of partition by sale, whereas perpetuating the idea of the family homestead requires communication, respect, and a shared vision.

Addressing the role that family dynamics play in quiet title and partition actions is essential to the discussion of preserving Native Hawaiian ancestral lands. The story of Guye Lee, mentioned earlier, and his family's land in Kona on the Island of Hawai‘i serves as an example of how partition statutes can destroy a family's efforts to preserve ancestral land. Recall that in Lee's case, a cousin actually initiated the partition action, which resulted in fissures between family members. Lee's story is ultimately one of success, however, as he was able to combine his interest with those of other family members who wished to retain their ancestral land to create a parcel large enough to meet county zoning regulations.243 That 86-acre parcel is now in a land trust that was created by Lee's family with the help of NHLC. The aspects of the land trust will be discussed later in this Article.

Guye Lee is an accountant in Honolulu, and was a defendant in a partition action involving his ancestral land in Kona on the Island of Hawai‘i. The beginning of Lee's story, pre-establishment of the land trust, demonstrates the effect that miscommunication and financial trouble can have on the ability of a family to retain ancestral land.

241 Id. at 662 (Richardson, C.J., dissenting) (citation omitted).
242 Email from Charleen Tinao, to Stephanie Chen, Post-J.D. Research Fellow, Ka Huli Ao Center for Excellence in Native Hawaiian Law (May 11, 2011, 14:49:00) (on file with author).
Where Blood Runs With the Land: Partition Actions and the Loss of Native Hawaiian Ancestral Land

First, Lee describes his family’s property, what it means to him, and his memories of going there with his grandmother:

I would always go [to Kona] with my grandmother when I was a little boy, and we’d always go and visit the property. We’d see what it looked like and she always told me, “Guye this is our land, this is where my ancestors were born and this is where they lived. This is the King’s trail – King Kamehameha’s trail would just come right past. You have a lot of history here and you need to make sure that you preserve this history because you need to make other generations know how important this is.”

Currently, the property is covered in lava due to a relatively recent eruption. Lee talks about the prosperity and history of the land in earlier times and his family’s duty to pass the heritage on to future generations:

[On the land] I feel like I’m at home. I know that’s an unusual thing to say because all we are talking about is lava that’s there. But before the lava came down, it was actually a very prosperous, fertile area and a lot of activity happened during that period. King Kamehameha would walk on that trail and that has a lot of significance for me and for my family. We have a duty, a heritage to carry on and to pass on to future generations so that they understand how important it is.

Currently, a large part of Lee’s ancestral lands is being preserved for future generations through the use of a land trust. Prior to the formation of the trust, Lee’s family was forced through the partition process. In this case, the action was initiated by a family member who was experiencing financial trouble:

That’s what brought us into this situation. [We all held] this property as tenants in common, so no particular person owned one specific piece or portion of the land. One of my cousin’s family members passed away, and he was stuck with the responsibility of taking care of their portion of the property. My cousin did not want to carry on the responsibility so he said he was going to bring us to court – that he wanted to sell, that he wanted out.

Lee’s story demonstrates the harsh realities of the rights that accompany cotenancy: every interest holder, no matter how small the interest, has the right to file for partition. Yet, beneath the obvious, is a comment on the responsibilities of cotenancy. That is, in order to preserve ancestral lands, each family must make an affirmative decision to communicate to work towards a shared vision. The nature of family dynamics and the fact that families will not always agree, presents a substantial challenge to preservation of ancestral lands.

244 Interview with Guye Lee, supra note 191.
245 Id.
246 Id.
247 Haw. Rev. Stat. § 668-1. See also Uniform Partition of Heirs Property Act, Executive Summary and Overview of How the Act Works (stating, “It is well known among estate planners, real estate lawyers, business lawyers and planners, and others that the default rules of partition make tenancy in common property one of the most unstable forms of common ownership of assets under the law because any one cotenant no matter how small his or her interest may request a court to order a forced sale of the whole property even if all the other cotenants oppose such a sale.”).
Stephanie Chen

The story of the Veloria family provides a great example of how a family can collectively create a vision for the future of ancestral lands. It also illustrates the inseparability of family dynamics from preservation of family property. Chris Rothfus, of the Veloria family, now a young attorney in Honolulu, was raised on the Hilo side of the Island of Hawai‘i. He grew up going to family events and celebrations on their half-acre piece of property in Pohoiki. The property borders the ocean and includes a little red house that has been in his family for many generations. He describes the meaning of the land to his family:

My parents have been taking me there since I was a baby, and this is the same for everyone in my family. We go there from when we are born and for almost every occasion. That’s how it’s been for my generation, that’s how it’s been for my mom’s generation, and beyond that.248

Rothfus continues to paint the picture of the importance of his family’s ancestral land:

I feel pretty much the same as everyone in my family – a strong connection to the land, a strong connection to our history, our ancestors. My aunty, one of my kupuna told me that the land is like a tangible reminder of our history and our ties to our ancestors. The land is also a reminder of our cultural identity as Hawaiians because that’s where we practice our traditions.249

Like many parcels of land in Hawai‘i, the Veloria family property has been heavily fractionalized. His family has managed to hold onto its property through hard work and the creation of a land trust. Rothfus speaks about what it takes for his family to hold onto the land:

It takes cooperation and respect, aloha for one another. These are all things that have been told to me by my kupuna…everyone has to be committed to following the kuleana and willing to discuss and decide and be respectful of everyone’s mana‘o….Others have told me that everyone has to be committed – committed to preserving the land for the future and committed to respecting one another….250

Rothfus surmises that his kuleana as a Native Hawaiian with an interest in ancestral lands is dramatically different from that of his ancestors:

The kuleana now, for those of us that have an interest in ancestral lands, is so much greater than what it was before for our ancestors who took care of the land. They didn’t really have to think about the future and the legal ramifications of quiet title lawsuits and expanding families with multiple interests. Their kuleana was just to take care of the land and produce on the land for the family.251

248 Interview with Chris Rothfus, in Honolulu, Haw. (Jan. 7, 2011) (transcript on file with author).
249 Id.
250 Id.
251 Id.
Where Blood Runs With the Land: Partition Actions and the Loss of Native Hawaiian Ancestral Land

Today, modern Native Hawaiian families are faced with the realities of Western legal constructs such as quiet title and partition actions. Rothfus encourages families to redefine kuleana in the context of land tenure and ownership to include estate planning for future generations:

Now, as landowners, our kuleana is much greater. It includes many more responsibilities [and] we really have to take it upon ourselves to understand what those responsibilities are. One of those responsibilities [is] talking to your family about what you want to do with the land, what the family wants to do with the land, and whether [and how] the next generation is going to be able to enjoy that land.\(^{252}\)

Communication and planning results in families being better equipped to confront issues such as fractionalization of property, and thus better equipped to retain ancestral lands for the benefit of future generations:

If you only have one parcel of land, the interests are just going to get more divided with the next generation. That’s why it’s so important now, before the interests get divided further, to make these decisions about how the land will be managed and shared.\(^{253}\)

F. High property taxes effectively force many Native Hawaiian families off of their ancestral lands

Just as a lack of family cohesiveness plays a large role in a family’s physical ability to keep ancestral land, high property taxes affect a family’s financial ability to do so. The reality is that many Native Hawaiian families are effectively forced out of their property because they cannot afford to pay the taxes on land they have owned for generations. D. Kapua’ala Sproat is an Assistant Professor of Law at the University of Hawai‘i, and a Native Hawaiian rights lawyer. Professor Sproat is from Kalihiwai on the Island of Kaua‘i, where her family has resided since time immemorial. She speaks about the burden that property taxes have on many Native Hawaiians families:

In my opinion, property taxes are a huge burden on many people throughout Hawai‘i nei. It’s a huge burden on my particular ‘ohana – it’s also a major issue in our community. Having been born and raised on the North Shore of Kaua‘i, what was a very small fishing and farming community for many years has now become a destination for people who want to buy vacation homes, or people who want to get married.\(^{254}\)

The increased demand for property has in effect driven up real estate values and taxes to an unsustainable level for many of Kalihiwai’s Native Hawaiian families, the original occupants of the area:

We have tons of large gated communities and estates in what used to be a small fishing village. So in our community, many people have been forced to sell either kuleana or land grants, or other ‘āina that their ‘ohana has been able to obtain, simply because they can’t afford to pay the property taxes.\(^{255}\)

---

\(^{252}\) Id.

\(^{253}\) Id.

\(^{254}\) Interview with D. Kapua’ala Sproat, supra note 18.

\(^{255}\) Id.
Stephanie Chen

To put a number figure on some of the exorbitant taxes that are being assessed on Native Hawaiian ancestral lands, Professor Sproat states:

*We know some Maoli families who had kuleana right on the beach in Ha‘ena and because of increasing property taxes at $25,000 or $40,000 a year, they couldn’t afford to pay it and so they were forced to sell it. I know people in our community whose property taxes are now $25,000, $40,000, $60,000 a year for a single piece of property.*

Increased property values that drive Native Hawaiian families off ancestral lands change the entire atmosphere of rural areas such as Kalihiwai:

*It’s tragic in so many ways. It facilitates the urbanization and gentrification of rural communities because the people who are from that place – even [those] fortunate enough to be able to obtain and maintain ‘āina in their family, because very few have been able to do that – are losing it over time because of huge property taxes.*

Illustrating the devastating impact that property taxes can have on a family’s ability to retain ancestral lands for the benefit of future generations, Professor Sproat talks about her personal knowledge and experience:

*I know of many families in our community on the North Shore of Kaua‘i who’ve had to sell their land because they can’t afford to keep paying the property taxes. In my own family, our property taxes on Kaua‘i are more than my mom’s entire retirement income as a retired teacher for the state.*

For Professor Sproat’s family, preserving their ancestral lands is a kuleana, one that requires sacrifices from all members of the family:

*…[I]n order to just simply maintain land that we’ve had in our family for many generations, it’s a huge personal sacrifice and a commitment that my entire family has made…. It’s a huge kuleana in order to be able to continue to maintain that.*

For properties classified as “kuleana lands,” tax exemptions actually do exist but they do not reach far enough. The tax exemptions apply to lands acquired through the Kuleana Act, including lands that fall under Section 4. Recall that Section 4 of the Kuleana Act permitted the fee simple sale of government parcels...
These kuleana land tax breaks are a big factor in a family’s ability to retain ancestral kuleana parcels. Though the kuleana land tax exemptions are extremely helpful for families that are eligible to benefit, many families are precluded from taking advantage of them because their properties were not obtained through the Kuleana Act. As Donovan Preza, Ph.D. Student in Geography stated earlier, much of the land held by Native Hawaiian families today was not acquired through the Kuleana Act. For all intents and purposes, these ancestral lands being held and used by Native Hawaiian families for the benefit of future generations, are analogous to kuleana parcels. Yet, these families with lands that do not qualify for the kuleana tax breaks are often forced to choose between financial stability and preservation of their ancestral properties.

The Weber family, mentioned earlier, is one such example. Recall that the Webers acquired title to six acres of their ancestral land after receiving improper notice of the quiet title action brought against them. After the Webers received title to their six acres in Hāwī, on the Island of Hawai‘i, the family gathered there to scatter the ashes of an uncle. Doug Weber reminisces:

_It was pretty cool, to see our ʻāina, and see the land that we’ve been negotiating for seven years now. My aunt brought my uncle’s ashes up there to be put on the land. He passed away about eight years ago…I don’t think Uncle knew that we had the land because he passed away before I was notified._

Despite the great meaning that this land has to the Weber family, whether its members are able to keep it ultimately boils down to finances:

_There was a dilemma where the family wanted to keep the land because it’s part of our family, our ʻohana…but we just kept coming down to the economics of it – if we are going to keep this land, we are going to have to pay the property taxes. I hate to talk about assets and money and things like that, you know family is family and what’s more important is your lifestyle and your upbringing, and carrying on your Hawaiian heritage is more important than carrying on assets._

Overly burdensome property taxes often preclude Native Hawaiian families from preserving their ancestral lands for future generations. Many Native Hawaiian families, like the Webers, would want to “keep [their] ʻāina – keep it going and pass it down to [their] family so they would have something special,” but it always “comes down to economics.”

---

261 The Kuleana Act of Aug. 6, 1850, 2 REV. LAWS HAW. 2141–42.
262 Interview with Doug Weber, _supra_ note 102.
263 _Id._
264 _Id._
G. Many remedies exist to solve, or mitigate, the devastating impacts of partitions by sale on Native Hawaiian families trying to preserve ancestral lands

These remedies seek to level the playing field of partition actions by reducing the correlation between wealth and winning and by empowering Native Hawaiian families to draw upon traditional notions of land tenure.

1. Revise the current partition statute to state a clear preference for partition in kind and to allow courts to consider other equitable options

Perhaps the most obvious solution to the problem of the courts favoring partition by sale over partition in kind is revising the partition statute. Traditionally, legislators reason that ambiguities in statutes offer courts much needed flexibility in dealing with the complexities of modern property transactions. However, the wording of Hawai‘i’s current partition statute gives judges total discretion as to whether to order partition in kind or partition by sale, and does not allow courts to consider other equitable options.

Vermont provides a good example of a partition statute that is detailed, yet flexible enough to allow judges to make equitable decisions on a case-by-case basis. Vermont’s statute permits assignment of a party’s interest in the event that a partition in kind is impracticable. Assignment of the interest is contingent upon payment of a sum determined equitable by the court-appointed commissioner. The only exception to this statutory power is that in case one of the parties interested will not take the assignment and pay the sum, the court must order the commissioners to sell the land at public or private sale.

Recognizing that “the common-law partition action is equitable in nature[,]…suggest[ing] that courts should consider all relevant circumstances to ensure that complete justice is done,” the Vermont Supreme Court determined that Vermont’s partition statute “should be interpreted to give the trial court as many options as possible to achieve equity between the parties.”

Hawai‘i’s partition statute could be revised to look something like Vermont’s. The revised statute should first state a clear preference for partition in kind, using language modeled after Chief Justice Richardson’s dissent in Chuck v. Gomes: “Mindful of our Hawaiian heritage, we must not lose sight of the cultural traditions which attach fundamental importance to keeping ancestral land in a particular family line.” In the event that partition in kind is not feasible, courts in Hawai‘i could prefer assignment of shares to a single co-tenant rather than forced partition by sale. Currently, the outcome of a partition sale is directly impacted by the parties’ distribution of wealth. Parties that are able to secure funds in order to competitively participate

265 Craig-Taylor, supra note 183, at 754-55 (referencing the Reports and Recommendations & Studies, 13 Cal. Law Revision Comm. 413-14 (1975-1976)).
266 See Kimura,107 P.3d at 436.
268 Id.
269 Id. § 5175.
271 Chuck, 532 P.2d 657 (Richardson, C.J., dissenting) (quoting Hawai‘i Constitution Preamble) (“But let us recognize that such preference for partition in kind should not be so easily disregarded. “Mindful of our Hawaiian heritage,” we must not lose sight of the cultural traditions which attach fundamental importance to keeping ancestral land in a particular family line.”).
272 See Craig-Taylor, supra note 183, at 778.
in the bidding process have an incalculable advantage over those who are unable to do so.\textsuperscript{273} A partition statute such as Vermont’s effectively eliminates the bidding process, and instead requires that a court-appointed commissioner determine an equitable sum.

In the same vein, Hawai’i’s partition statute should also be revised to better indicate the circumstances under which partition by sale is allowed. Currently, impracticability and prejudice are left to judicial interpretation. The court in \textit{Chuck v. Gomes}, for example, was not bound to the court-appointed commissioner’s findings that it was actually feasible to partition the property in kind. Instead, the court upheld the Circuit Court’s ruling that partition in kind was not feasible.\textsuperscript{274}

Revising Hawai’i’s partition statute could potentially have a dramatic effect on Native Hawaiian families that find themselves in the precarious situation of being cotenants to a heavily fractionalized parcel of property. Native Hawaiian families might stand a better chance at preserving ancestral lands if assignment were allowed, as opposed to the current system where families are forced to compete with highly qualified bidders such as developers. It is difficult to say how many Native Hawaiian families would be financially able to buy the assigned interests, but this should not preclude amendment of Hawai’i’s partition statute. Revision of Hawai’i’s partition statute has the potential to preserve Hawaiian heritage. Expediency and efficiency in the courts would not be affected too greatly either if Hawai’i’s partition statute were to be revised. The only added steps would be determining the equitable price of the shares and offering assignment of those shares to a single cotenant.

Because preservation of Native Hawaiian ancestral lands is an important interest, and because there would be little impact on the current system, Hawai’i’s partition statute should be revised to allow for assignment of shares.

\section*{2. Retain the current statute but adopt Chief Justice Richardson’s dissent in \textit{Chuck v. Gomes}}

In \textit{Wilk v. Wilk}, the Vermont Supreme Court ruled that preventing the “unnecessary forced divestment of numerous family farms” constituted an important policy reason for assigning interests to a single cotenant rather than ordering a partition sale.\textsuperscript{275} In so holding, the Vermont Supreme Court recognized that forced partition by sale had a “disproportionately negative impact on African Americans” that lost family farms and also relied on Chief Justice Richardson’s dissent in \textit{Chuck v. Gomes}.\textsuperscript{276} Despite the differences between Hawai’i’s current partition statute and that of Vermont, there is room for judicial interpretation preferring partition in kind.

The courts in Hawai’i should recognize preservation of “Hawaiian heritage”\textsuperscript{277} as a policy reason for limiting the availability of partition by sale as a remedy. The Supreme Court of Vermont provides an excellent example as it cited the “unnecessary forced divestment of numerous family farms” as an important policy reason for favoring assignment over partition by sale.\textsuperscript{278}

\begin{footnotes}
\item[273] Id.
\item[274] \textit{Chuck}, 532 P.2d 657 (Richardson, C.J., dissenting) (the finding of partition in kind not being feasible implicitly indicated that great prejudice to the owners would result if such a partition were to be ordered).
\item[275] \textit{Wilk}, 795 A.2d at 1195.
\item[276] Id.
\item[277] \textit{Chuck}, 532 P.2d at 662 (Richardson, C.J., dissenting) (citing HAW. CONST. pmbl.).
\item[278] \textit{Wilk}, 795 A.2d at 1195.
\end{footnotes}
3. Create land trusts to preserve ancestral lands for future generations

*I think the difficulty of the Western system is that everyone has gotten used to the individual – you know, “that’s my land” – but the land trust in a way takes you back to the old system of collective ‘ohana decision-making…. The land trust is a Hawaiian practice…. We’re lucky. I think we’re lucky.*

—Chris Rothfus on the Veloria family’s land trust

The land trust is a progressive, yet traditional means of preserving Native Hawaiian ancestral lands. Interest holders to a parcel of property convert their interests into shares, which go into the trust to be managed by trustees for the benefit of the beneficiaries. Depending on the trust agreement, property rights are typically taken away from the individual and placed within the collective. Alan Murakami, NHLC Litigation Director, explains the basic function of a land trust:

*The basic function of a land trust is to take a legal interest in land out of the hands of the personal estate of the owner and convert it to a share within a trust. The personal holders of these interests, basically, once the trust is set up, transfer their legal interests in the property to the trustees who then hold in trust for the entire trust.*

The greatest benefit of the land trust is the avoidance of probate and fractionalization of interests:

*What [the land trust] does functionally is it helps avoid probate because these shares are not treated as the real property interest anymore. [The shares] can be dealt with by formula, as determined by the trust agreement – how they get distributed upon the death of a person – without going through all the probate proceedings typically necessary if the land is kept in a real property holding.*

Each land trust is governed by a trust agreement that enumerates the rules or kuleana, including how shares are passed down upon the death of a beneficiary. Land trusts are extremely flexible and can be tailored to fit different needs or desired outcomes:

*Similar to a will, through a formula [to be determined by the trust agreement] you can figure out how the interests get passed onto heirs so that they can then step in as, in sense, shareholders to the trust. [These heirs] can then participate in the decision-making given the formula that’s set*

---

279 Interview with Chris Rothfus, *supra* note 248.
281 Interview with Alan Murakami, *supra* note 212.
282 Id.
283 *See generally* *HAW. REV. STAT.* § 558.
Where Blood Runs With the Land: Partition Actions and the Loss of Native Hawaiian Ancestral Land

up for how allocation of the real property interests affects the ability to vote and decide on how to hold the property.\textsuperscript{284}

Perhaps the second greatest benefit of the land trust is that management of the property becomes much easier. In a cotenancy, any cotenant can strike down a decision regarding management of the property, whether to encumber the entire property with a mortgage, whether to allow a lease of the entire property, etc. Conversely, any cotenant can freely encumber or lease his or her personal interest in the property. The interplay between the rights and restrictions of cotenancy can make management of the property extremely difficult. These types of decisions become infinitely easier to make when there is a trust agreement enumerating the number of votes that it takes to effect the change:

Because the trustees then become the legal owners, you’re not chasing down every owner of that land for a signature to sign off on whether there should be lease, or if there’s a decision to sell on the deed, or taking out insurance policies on it. That’s all in the hands of the limited number of trustees that then have to sign. It really expedites the manner in which you hold a property, how you deal with the property, how you manage or encumber the property. You can do it much simpler under the trust agreement.\textsuperscript{285}

A third attractive attribute of land trusts is that they are extremely flexible, custom tailored to fit the shareholders’ desires. For example, anyone can be a trustee, including all, some, or one of the beneficiaries. Further, the beneficiaries can direct the trustees’ actions. The trust agreement, drafted by the interest-holders can limit the duration of the land trust. The trust agreement can require that shares only go to family members or other shareholders in the event that a shareholder wishes to exit the trust. Alternatively, the trust agreement can even allow for transfer of a shareholder’s interest to a third party, unrelated to the family. Though this aspect is clearly not desirable when the goal is to preserve a family’s heritage, it illustrates the extreme flexibility of the land trust. The flexible nature of the land trust is an important means to empower a Native Hawaiian family to make meaningful choices for the future, a feature commonly denied in the case of partition by sale.

The one common factor amongst all land trusts is that to create one, every interest-holder must be in agreement. The interest-holders must agree to be governed by the trust agreement and must give up their individual rights as cotenants.\textsuperscript{286} Such rights include the absolute right to partition the property, the right to prevent a lease, and the right to prevent encumbrance of the property. For these reasons, land trusts may not work for many families. But for families with a shared vision for their ancestral lands, taking power away from the individual and placing it within the collective is a positive thing:

It allows this [type of] holding [of land] that is of real benefit to Hawaiians because if it is left in the personal hands of individuals you can raise all kinds of problems. If you have a non-cooperating member in a group of owners who doesn't want to pay taxes, or doesn't agree that it should be leased, or any

\textsuperscript{284} Interview with Alan Murakami, supra note 212.
\textsuperscript{285} Id.
\textsuperscript{286} See generally Haw. Rev. Stat. § 558.
Stephanie Chen

number of things that could be a way that one person can veto and the rest of the group and can't do anything with the property legally.287

Recall Guye Lee, party in a partition action initiated by a minority interest-holder in his family's property in Kona on the Island of Hawai'i. With NHLC's help, Lee and his family were ultimately able to combine their interests to get a large enough tract of land to satisfy the county's zoning requirements. This 86-acre parcel of land is now called the Kamakapua Hulikoa Family Land Trust. Lee elaborates on the concept of placing the power within the collective instead of the individual:

Perpetual continuation, you are preserving the land. No one person can say, "I'm tired of you guys, I want my share out, I want to sell this land." There are very few disadvantages, I think, to having a land trust. Very few. 288

Similarly, Chris Rothfus, of the Veloria family land trust, explains the land trust's effect of removing individual power in favor of the collective:

It takes the power away from the individual and that's how it was back in the old days. Individuals didn't have individual rights towards the land. [The land trust] strips that power away and when people can relate to the past, to their ancestors, then they might be able to see...the difficulty is just getting everyone together and committed to that purpose.289

In human terms, collective rather than individual decision-making encourages families to work together. The land trust does more than simply preserve ancestral lands; it actually brings families together. Each interviewee stated multiple times that communication, respect, and aloha for one another are essential to making a land trust work. Chris Rothfus of the Veloria family land trust elaborates on the land trust's effect of bringing his family together:

The land trust, because of the way it's designed, it actually brings our family together. It brings all the beneficiaries together to discuss and decide on different issues, about how to manage the land, and use the land and so forth. In that sense, it fosters family and it encourages everyone to work together – and it instills this sense of kuleana in everybody so that there's a greater respect for the process, there's greater respect for all the beneficiaries and the results are good.290

Nani Rothfus, mother of Chris Rothfus and beneficiary of the Veloria family land trust, explains that the land trust's fostering of communication amongst family members is a teaching tool for younger generations:

287 Interview with Alan Murakami, supra note 212.
288 Interview with Guye Lee, supra note 191.
289 Interview with Chris Rothfus, supra note 248.
290 Id.
Where Blood Runs With the Land: Partition Actions and the Loss of Native Hawaiian Ancestral Land

One of the things that we’ve tried to teach the younger generation is to respect everybody’s thoughts, manaō, and we invite that. Everyone has an opinion, and we invite those opinions to be put on the table, it’s really okay if we don’t feel the same, but we want to hear it.⁹¹

Similarly, Guye Lee of the Kamakapua Hulikoa Family Land Trust explains the importance of communication:

_The biggest and most important thing in keeping the land trust together is communication amongst the members. Making sure that everybody’s on the same page and that we are going in the same direction….Communication is really important to keep the land trust going._⁹²

Chris Rothfus comments on the land trust’s effect of encouraging members to think first of the family and what the family wants to do:

_When you take power [from an individual] and put it in someone else, then it preserves the land and like what my Auntie would say, “That’s our kuleana, that’s our responsibility, to think first of the family and what the family wants to do.” That’s what we call our kuleana and that works for our family because everyone agrees that’s the way we want the trust to work._⁹³

For Nani Rothfus, the Veloria family’s land trust is ultimately about preserving the family’s heritage for future generations. The land is a vehicle for teaching younger generations about fishing, traditional Hawaiian gatherings, and the importance of family:

_You learn your values and you live it – that’s how you pass it down. So hopefully that’s what we are creating, passing on our values. When you are young, it becomes internalized, just the way that you live. The land is our roots to our kupuna, and that’s really important to us._⁹⁴

For many Native Hawaiian families such as the Lees and the Velorias, land trusts are an invaluable tool in the struggle to preserve ancestral lands. However, there is no one-size-fits-all approach to creating one. Creation of a land trust requires a commitment on the part of each member to forming a trust agreement that meets the family’s needs. If preservation of ancestral lands for future generations is a family’s ultimate goal, then creation of a land trust is certainly worth considering.

4. OHA, or another capable legal entity, could participate in partition auctions

OHA, or another legal entity capable of holding Hawaiian ancestral lands in trust for the benefit of Native Hawaiians, could participate in partition auctions. OHA could stand in as a competitive bidder for non-participating landowners or landowners who would like to participate but cannot afford to do so. Ultimately,

---

⁹¹ Interview with Nani Rothfus, in Onomea, Hawai‘i, Haw. (Mar. 16, 2011) (transcript on file with author).
⁹² Interview with Guye Lee, supra note 191.
⁹³ Interview with Chris Rothfus, supra note 248.
⁹⁴ Interview with Nani Rothfus, supra note 291.
OHA could buy the property outright and hold it in a land bank, or at a minimum, drive the auction price high enough so that landowners would receive the fair market value of the property. This potential remedy would work even if no statutory revisions were made and would greatly benefit Hawaiians as well as OHA. Native Hawaiians in general would benefit from having land preserved in a land bank, held in trust. Native Hawaiian defendants to the action would benefit by receiving just compensation for the forced sale of their ancestral lands.

Further, as Law Professor Phyliss Craig-Taylor states, “[n]ot only is the opponent of sale effectively divested of their ownership interest in their property, but the opponent of sale may be rendered homeless by the sale where the opponent cannot raise sufficient funds to purchase the property outright at the partition sale.” Just compensation could potentially prevent the families, opposing sale of the property, from effectively being rendered homeless.

OHA stands to benefit from its participation in partition auctions as well. The amount of land that OHA could acquire, to be held in trust for the benefit of Native Hawaiians, is unquantifiable. The parcels of land acquired through partition auctions could be added to OHA’s existing properties, to be managed by the Land Management Division.

5. Amend legislation to make OHA an automatic defendant in partition cases where there is no other qualified taker and use current legislation to make OHA guardian ad litem to lumped shares of land

Legislation could be enacted making OHA an automatic defendant in partition cases where there is no other qualified taker, similar to what occurs in quiet title actions involving kuleana parcels. Under the current partition statute, a judge has the power to lump undivided shares together and to bestow title to those shares. Typically, these shares are reduced to their monetary value and held by the court for a period of time to be claimed by the interested parties.

As it stands, the broad discretion afforded to judges under Hawai‘i Revised Statutes § 668-7 creates enough of a platform for a court to convey the lumped shares to OHA. Consistent with principles of equity, OHA could be appointed guardian ad litem (“GAL”) for the lumped shares. This would make getting approval for decisions regarding the property infinitely easier than finding all the absent and unknown cotenants. The statute would need to be revised, however, to give OHA the right to prevent judicial sale of land that cannot be partitioned in kind. That way, OHA could place the land in a land bank instead of accepting the cash proceeds. OHA would serve as a critical placeholder to preserve Native Hawaiian ancestral lands.

County zoning requirements present a problem, however. Under the current statute, “any plan for a subdivision shall, before approval of the court, be subject to approval by the planning department of any county...

295 See Craig-Taylor, supra note 183, at 757 (citations omitted).
297 Haw. Rev. Stat. § 668-16 (2011) governs what occurs when a properly notified but defaulted cotenant returns to find that his or her share of land has been lumped together, with all the other unknown or absent defaulted cotenants, and allotted in a partition action. The cotenant’s remedy is to file for partition of the allotted parcel.
having laws and regulations covering subdivisions....

Thus, OHA would be precluded from subdividing parcels of land to hold in trust that do not meet the county zoning requirements, even if the statute were revised to give OHA the power to prevent a judicial sale of the property. Hawai‘i Revised Statutes § 668-7(7) would therefore necessarily have to be revised as well.

Though county zoning requirements are a challenge to this solution, it is worth considering. The establishment of a land bank at OHA for partitioned properties has the potential to be a powerful tool in the preservation of ancestral lands.

6. Adopt the Uniform Partition of Heirs Property Act

The Uniform Partition of Heirs Property Act is meant to be an additional chapter, subchapter or part of a state’s existing partition statute. The Act is currently a draft, for approval by the National Conference of Commissioners on Uniform State Laws. The Act attempts to “remedy the serious problems of the deprivation of property rights and loss of wealth resulting from the default use of tenancy-in-common ownership and the rules governing the tenancy in common.” Specifically, this Act provides a “further set of coherent, default rules reforming the worst substantive and procedural abuses that have arisen in connection with the partition of tenancy-in-common property.”

To implement protection against these abuses, the Act establishes a hierarchy of remedies in proceedings for the partition of heirs’ property. First, the Act proposes a right of buyout of tenancy-in-common interests by those cotenants that did not petition the court for a forced sale of the property. If no one is willing to exercise this right, then the Act next recommends a partition in kind of the property. If partition in kind is not feasible, then the Act allows for a sale of the property by open market sale, a sale under commercially reasonable conditions designed to sell the property for its fair market value by listing and marketing the property through a licensed real estate broker. If none of these three options are possible, then the Act allows for sale of the property by auction or similar mechanism.

The Act also sets forth a test for determining when property should be divided or sold that supports the stated preference for partition in kind. Further, the Act strengthens conflict of interest provisions governing the selection of commissioners or similar persons who often advise a court on the manner in which property should be partitioned.

While it is likely that some Native Hawaiian families would not have the financial resources to exercise the buyout option, many Native Hawaiian families could potentially benefit greatly from the adoption of this Act. A right of buyout instead of the default partition by sale has the potential to preserve ancestral lands.

299 Uniform Partition of Heirs Property Act, Executive Summary and Overview of How the Act Works.
300 Id. (“This Act does not apply to any real property which is the subject of a written tenancy-in-common agreement which contains a provision governing the partition of the property (all such agreements typically contain such a provision) or which is owned in under any other form of ownership (e.g., a joint tenancy, limited liability company, partnership, limited partnership, trust or corporation) other than the tenancy in common.”).
301 Id. (defining “heirs property” as the real property owned under the tenancy in common form of ownership that is not subject to a written agreement governing the partition of the property and that has the following attributes: (1) one or more of the cotenants acquired title from a family member whether living or deceased; (2) a significant percentage of the cotenants in terms of numbers or of interests held are related to each other or at least one of the cotenants who owns a substantial percentage of the undivided interests acquired title from a family member.”).
302 Id.
The mere fact that the Act requires appraisal of the property’s value by a disinterested real estate appraiser, is a giant step forward. By not being forced to bid against wealthy developers or parties, families may actually have a chance to buyout their ancestral lands.

Restatement of Hawai’i’s preference for partition in kind over partition by sale would be valuable as well in helping to guide courts’ decisions. As demonstrated in Wilk v. Wilk, the Vermont Supreme Court case mentioned earlier, any legislative guidance as to the intent behind statutes is useful.

Sale of the property on the open market is also a very reasonable solution to the issue of defendant co-tenants being economically harmed, or even rendered homeless by partition by sale. The partition auction has the effect of privileging the wealthier party and usually provides them with an economic windfall as they are often the only qualified bidder. An open market sale, conducted by a licensed real estate broker would almost certainly garner a better price for those that are being forced off their land. At the very least, it would make the developer, or the party that would have participated in the partition auction, pay market value for the property.

The last solution stated in the Act is to allow for sale of the property by auction if the three prior remedies are not possible. This protects each individual co-tenant’s rights to alienate his or her property, consistent with the common law right to partition property in kind. This solution is appropriately the last resort.

This Act has the potential to greatly improve the ways in which partition actions are conducted in Hawai’i, while still retaining the same basic attributes of Hawai’i’s partition statute. The only things that would be added are: (1) appraisal of the property by a disinterested real estate broker; (2) a buy out option for existing cotenants; and (3) an open market sale of the property conducted by a real estate agent. The open market sale provision of the Act finds support in Sugarman v. Kapu, a Hawai’i Supreme Court case holding that equity permitted a judge to reopen the bidding after a public auction where the highest bid was below market value.303 A preference for partition in kind already exists in Hawai’i’s partition statute, as does the remedy for partition by sale.304

Adoption of this Act is a reasonable way to help preserve Native Hawaiian ancestral lands, consistent with Hawai’i’s Constitution,305 thereby promoting fairness and justice for all.

7. Start a community-driven grassroots effort to immediately counteract the negative impacts of partitions by sale

A grassroots effort such as the Land Loss Fund (“LLF”) could play a pivotal role immediately in counteracting the negative effects of partition actions by sale in Hawai’i. The LLF is a grassroots, educational, and charitable organization that seeks to improve the social, educational, and economic welfare of the people whose lives are being affected by the continued loss of land especially in rural African American communities.306 A mix of people, including farmers, educators, social workers, businesspersons, and other interested individuals formed the LLF in 1983.307 “The Fund provides educational, organizing, networking, research, and other

303 Sugarman, 85 P.3d at 647.
305 “[M]indful of our Hawaiian heritage….” Haw. Const. pmbl.
307 Id.
technical assistance to small economically disadvantaged land owners in rural North Carolina counties in the effort to keep the land in the hands of the Black community.9308

To accomplish these goals, the LLF works with farm groups and individual farmers, landowners and homeowners to identify their problems and find possible solutions.9309 The LLF provides educational resources, technical assistance in management, as well as moral support to farmers and landowners as they confront their legal battles.9310 Further assisting farmers and landowners in litigation, the LLF gathers documentation and writes letters on their behalf.9311

Additionally, among other things, the LLF helps to locate legal options and assistance for farmers and landowners, assists with organizing coops, and plans workshops and conferences at both the local and national level.9312 The Fund operates through volunteer efforts, grants to help cover administrative costs, fundraisers, and private donations.9313

A grassroots effort such as the LLF has the potential to provide great benefit to the Native Hawaiian community, which like the African American community, finds itself losing land at an alarming rate. The most attractive attribute of this potential solution is that it does not require any government participation or involvement. Instead, it is entirely community-driven, which is often more beneficial and pertinent to community issues than government-imposed solutions. A collective of Native Hawaiian families, lawyers, scholars, and rights advocates could come together in Hawai‘i to form a similar organization. This could take place immediately and would not be dependent upon passage of new legislation or amendments to existing legislation. Similar to the LLF, the Native Hawaiian-focused equivalent could work with Native Hawaiian families to identify problems and potential solutions. Such solutions could include helping families through litigation by writing letters, gathering documents, or referring the families elsewhere. Organizing workshops and conferences to better educate Native Hawaiian families about partition actions would likely benefit those wishing to preserve their ancestral lands for future generations. Like the LLF, the Hawai‘i-based equivalent could exist on volunteer efforts, grant money, and private donations.

H. Other Potential Solutions

There are other potential solutions that deserve mention. This Article is limited to addressing these potential remedies without delving into the details. The reader, however, should be aware of these solutions and the sources from which they originate.

First, upon enactment of the Akaka Bill,9314 the Federal Government, for the benefit of the constituents of the Native Hawaiian governing entity, could potentially take land into trust. Under the current Bill, there is no language guaranteeing that land would be taken into trust. However, the Bill provides for negotiations between the Native Hawaiian governing entity, the State of Hawai‘i, and the Federal Government. It is conceivable that the Native Hawaiian governing entity could regain control over some of the former Crown and

9308 Id.
9309 Id.
9310 Id.
9311 Id.
9312 Id.
9313 Id.
Stephanie Chen

Government Lands in Hawai‘i. Through an act of Congress, this land has the potential to be taken into trust, and held by the Secretary of the Interior for the benefit of the constituents of the Native Hawaiian governing entity. The problems discussed in this Article surrounding partition actions could theoretically be solved with regards to the lands held in trust. The problems would persist, however with regards to all of the Native Hawaiian lands not held in trust by the Federal Government.

Second, in 2003, a bill was introduced before the Hawai‘i State Legislature, that if enacted, would have prohibited parties owning less that fifty-one percent of kuleana land from filing partition actions.\(^{315}\) Similar bills have appeared before the legislature before but have been unsuccessful.\(^{316}\) Enactment of a bill similar to the one introduced in 2003 has the potential to aid Native Hawaiian families in preserving their ancestral kuleana parcels. Requiring that a party own fifty-one percent or more of the land would dissuade an outside party from acquiring a minority interest in the lands with the sole intent of filing for partition. As it stands, however, enactment of such a statute would only apply to kuleana lands and would therefore be of limited effect.

Third, the definition of kuleana land should be expanded by statute to include all parcels of land held by Native Hawaiian families. As demonstrated earlier in this Article, most Hawaiian families did not acquire their ancestral lands through the Kuleana Act. Today however, only those families that received title to land under the Kuleana Act are eligible to benefit from tax breaks. When a family is using and occupying land for the same purpose as intended by the Kuleana Act, it follows that it should be treated as such. The ways in which the State would determine who is “Native Hawaiian” and thus eligible for the kuleana tax exemptions, are outside the scope of this Article. Expanding tax exemptions would have the impact of preserving Native Hawaiian ancestral lands as many families are effectively taxed out of their respective properties.

Fourth, courts in Hawai‘i could appoint a guardian ad litem\(^{317}\) (“GAL”) to advocate for the land’s best interests. Similar to a GAL appointed to advocate for someone that is unable to represent him or herself, a GAL for the land would appear in court to represent the land.

This concept is consistent with “Hawaiian heritage,” as well as the State’s recognition of Hawai‘i’s “uniqueness as an island State.”\(^{318}\) Traditionally, land had rights to be taken care of and made productive. The focus was placed on the rights of the land as opposed to individual rights that accompany ownership.

Today, there is no such thing as court-recognized due process for the land. But perhaps there should be as Native Hawaiian ancestral lands stand to benefit greatly from a GAL advocating for their best interest. Fractionalization, for instance, is extremely detrimental to the odds of a parcel being cared for and managed properly. A GAL for the land could make an assessment, among other things, based on who the parties are, who currently occupies the land, and what the current uses are for the land. After assessing the situation and doing research, the GAL for the land could make a recommendation to the court as to what should happen with the land, consistent with principles of Mālama ‘Āina. For example, it may be in the best interest of the

---

315 See Garavoy, *supra* note 6, at 560-61 (citing H.B. 1677, 22nd Leg. (Haw. 2003)) (OHA testified in support of this Bill).
316 *Id.*
317 A GAL is a person appointed by the court to protect the interests of an individual otherwise unable to protect his or her own interests. GALs are usually appointed in cases involving children and people who lack the capacity to make decisions on their own.
318 *Haw. Const.* pmbl.
land to assign all the shares to one individual who is already caring for the land.319 Alternatively, it may be in
the best interest of the land to partition it in kind, but keep it in the family. In some instances, it may even be
better for the land if it were sold to an outside party, depending on what his or her plans were for the prop-
erty. The caveat is that the GAL would need to understand principles of Mālama ʻĀina, and would need to
apply them unscrupulously. Construction and large-scale development would likely never be recommended
by a GAL applying principles of Mālama ʻĀina. However, just as a GAL for a child's recommendations are
never binding upon a court, the same would be true of a GAL for the land. At a minimum, a GAL for the
land would provide a voice for the ancestor of all Native Hawaiians and could potentially aid the court deci-
sions pertaining to partition actions.

319 In this instance, revision of Hawai‘i's current partition statute would be necessary to allow for assignment of shares
similar Vermont's partition statute.
V. CONCLUSION

Loss of Native Hawaiian ancestral land is one of the defining issues of the Hawaiian sovereignty movement. With colonization came the imposition of Western constructs of land ownership and the diminution of Native Hawaiian holdings of ancestral lands. The current treatment of partition actions is a manifestation of the same process through which land was removed from Native Hawaiian ownership and control. Inherent conflicts exist between Western legal concepts and traditional Native Hawaiian notions of land tenure.

Improper notice plays a major role in this process of land loss as quiet title actions are initiated and land is lost without notice to its rightful owners. Aggravating this problem is a shortage of legal representation for Native Hawaiian defendants. The tendency of courts to order partitions by sale as opposed to partitions in kind also has a significant impact on the abilities of Native Hawaiian families to hold onto ancestral lands for the benefit of future generations. Partitions by sale have become common due to the increasing fractionalization of land and restrictive county zoning ordinances, as well as for reasons of efficiency.

The underlying theme of this Article is cotenancy and the rights and responsibilities that accompany the doctrine. It is a cotenant's absolute right to partition the property and he or she is responsible for providing notice of the action to the other cotenants. The image of an uneven playing field has been employed throughout this Article. The repercussions of colonization, socio-economics, and fractionalization of interests are just a few of the factors that place Native Hawaiians at a disadvantage. The current system of partition actions favors the wealthy and will continue to do so until action is taken both at a community and legislative level.

Fortunately, there are a number of potential solutions that would help to level the partition action playing field. These potential solutions should be undertaken in a certain order to maximize efficiency and minimize the negative effects of the current state of the law on the Native Hawaiian community. First, efforts to revise or enact new legislation should be undertaken. Such efforts could include strengthening the notice requirements, creating a land bank to be held in trust by OHA, and adoption of the Uniform Partition of Heirs Property Act. Revision or enactment of new legislation regarding quiet title and partition actions, consistent with the proposals in this Article, has the potential to effect large-scale change.

Second, community-driven solutions such as an information clearinghouse to scan newspapers and republish notices in a newsletter or online, or a grassroots organization similar to the Land Loss Fund, should come to fruition. OHA could also immediately start participating in partition auctions and either buy the land outright to be held in trust for the benefit of Native Hawaiians, or, at a minimum, drive up the auction price. These solutions have the potential to immediately counteract the disproportionate impact that quiet title and partition actions are having on Native Hawaiian families.

Third, a quiet title and partition action primer should be created and distributed to the public. This primer should be written in plain-language, using the interviews from this Article to illustrate certain points of law. Ideally, this primer would reach those Native Hawaiian communities most adversely affected by the current state of quiet title and partition actions in Hawai‘i. In the same vein, community clinics and workshops should be conducted to spread awareness and educate the Native Hawaiian community of the issues surrounding cotenancy and fractionalization of interests.

With these solutions in place, there is hope for changing a system that is contributing to the loss of Native Hawaiian ancestral lands and creating a long-lasting base for continuation of the practice of Native Hawaiian culture.