

# **A HOME BUT NO WILL:**

## ***Problems Faced by Low-Income Homeowners Lacking Access to Probate Systems in Texas***

**Texas Title Project<sup>1</sup>  
William Wayne Justice Center for Public Interest Law  
The University of Texas School of Law**

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### **I. Background**

This report details the problems experienced by **low-income families who have historically lacked, and currently lack, access to probate systems<sup>2</sup>** due to poverty and lack of information. The problems discussed below were experienced firsthand by the disaster victims who became the clients of the Texas Title Project, a project housed within the William Wayne Justice Center for Public Interest Law at The University of Texas School of Law.<sup>3</sup> However, these problems are, in our experience, quite common among low income-homeowners across Texas outside of disaster zones.<sup>4</sup>

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<sup>1</sup> The opinions and conclusions expressed here are solely those of the authors, Frances Leos Martinez and Lucy Wood, and do not represent the opinion or policy of the Texas General Land Office, the William Wayne Justice Center for Public Interest Law, The University of Texas School of Law, or The University of Texas at Austin. The authors thank Texas Title Project fellows Amelia Friedman and Molly Powers for their contributions to this report and to the Project.

<sup>2</sup> We use “probate systems” herein to refer broadly to the legal services that would allow low-income homeowners to execute wills protecting their assets, and to the court systems that, if rendered accessible, would allow them to probate these wills. We also include with this term the alternatives to traditional probate which do or might allow for assets to be passed on without the imposition of unforeseen co-ownership structures.

<sup>3</sup> See <http://www.utexas.edu/law/centers/publicinterest/txtitleproject/> The Texas Title Project is funded by the Texas General Land Office and is an initiative of the Justice Center composed of members of the law school community committed to the study of, and fostering of, the acquisition of clear title by low-income homeowners in Texas. The Title Project was formed in response to an immediate need for title clearing and

The clients of the Texas Title Project this past year needed clear title in order to participate in disaster recovery programming. More generally, having clear title generally means that no one else has a claim of ownership or interest in the property that is “superior to” the owner of record, and that no one else has a financial interest in the property. Having a “cloud” on the title can prevent a person from selling his or her land, from obtaining loans needed to improve or repair the property, or from qualifying for many government assistance programs. The problems created by the lack of clear title can lead to underinvestment in land, the deterioration of property and neighborhoods, and the abandonment of property that then becomes extremely difficult to redevelop. Over generations, these problems – impacting both poor people and the local government entities responsible for the maintenance of abandoned property – can lead to crime and other social ills associated with abandonment.<sup>5</sup>

The sources of the clouds on titles are diverse and complex. **This report focuses on those clouds, or title problems, created by the lack of access to probate systems we found pervasive among our client base.**

## II. Summary of Findings

This report is organized around eight key findings, each of which is accompanied by case studies illustrative of the problems our clients encountered in not having access to probate systems:

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other legal services for victims of Hurricanes Ike and Dolly, which ravaged the Texas Gulf Coast and Lower Rio Grande Valley in 2008. It grew out of the work of several members of the UT Law community already engaged in title clearing in the context of community development in low-income informal settlements in Central Texas, and in the study of titling practices and land acquisition among the poorest of the poor via contracts for deed and other similar vehicles notorious for creating or compounding title defects. *Infra* note 4.

<sup>4</sup> For example, many of the barriers and problems discussed here were also observed in a 2012 study (the “CFD Study”) conducted by the Justice Center, available online at <http://www.tdhca.state.tx.us/housing-center/docs/CFD-Prevalence-Project.pdf>. Others have been observed as well through the work of the Entrepreneurship and Community Development Clinic at the University of Texas School of Law, <https://www.utexas.edu/law/clinics/community/>, and through the work of Lone Star Legal Aid, Texas RioGrande Legal Aid and Texas Community Building for Attorney Resources, <http://texasbar.org/>, entities with which the authors of this report are also involved.

<sup>5</sup> For more information about the costs of and government responses to abandonment, please see the recent HUD publication at <http://www.huduser.org/portal/evidence.html>.

- (1) Low-income homeowners lack wills.
- (2) Those who manage to write wills do not probate them.
- (3) Co-ownership structures significantly burden low-income homeowners.
- (4) Low-income families have a very tough time making use of causes of action designed to relieve the burdens of co-ownership through forced sale or partition of property.
- (5) These families can seldom make use of the doctrine of adverse possession.
- (6) The persistence of contracts for deed makes probate access even more important.
- (7) Invalid liens interact with poor families' lack of probate access to render the small amounts of equity in family homesteads even less accessible to these families.
- (8) Forms can help ameliorate problems created by lack of access to probate systems. Additional, accessible legal services will be needed to meet the needs of this population.

### **III. Case Studies**

#### **Finding 1: Low-Income Homeowners Lack Wills**

The CFD study<sup>6</sup> demonstrated the very high (about 90%) rate of absence of wills among low-income homeowners in informal settlements, particularly along the border. These families frequently have aging (over 65) heads of households and large families (more children than in TX or US families, on average), indicating that this lack of wills will quickly spawn even more rampant co-ownership issues, and clouded titles, in these areas.<sup>7</sup>

Our work with our current clients has verified this finding. Of the nearly two hundred families represented in our client base<sup>8</sup> who reported having received their properties

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<sup>6</sup> *Supra* note 4.

<sup>7</sup> *Supra* note 4. See also Way and Wood, *Homeownership Without a Net*, SHELTERFORCE, Spring 2013. [http://www.shelterforce.org/article/3472/homeownership\\_without\\_a\\_net/](http://www.shelterforce.org/article/3472/homeownership_without_a_net/)

<sup>8</sup> At the time of this report, our project had served about 185 individuals.

upon the death of a family member, only a handful reported having been named beneficiaries in a will; of these wills, only a few had been probated. Many of our clients have expressed an interest in drawing up a will to protect their primary assets following their receipt of title clearance assistance. Strikingly, none of our clients has had a will.<sup>9</sup>

*Case Study: No Money for a Will? A Work-Around Gone Wrong.*<sup>10</sup>

When Alma Barrientos learned that her health was failing, she sought to transfer her only asset of value – her homestead – to her daughter. The cost of a will was prohibitively expensive for the family. To deal with this problem, Ms. Barrientos used a form Warranty Deed to transfer the property to her daughter instead. Because Mrs. Barrientos remained as resident but not an owner and her daughter became an owner but not a resident, the arrangement made the family unable to meet the requirements for disaster recovery. This is just one story that illustrates some of the difficulties that can arise when low-income owners use work-arounds to address their inability to afford the legal services needed in drafting and executing wills. Informal and alternative arrangements are quite commonly attempted, particularly in informal settlements and colonias.<sup>11</sup>

**Finding 2: Wills Frequently Not Probated**

*Case Study: “We Didn’t Know We Had To Probate The Will.”*

When Jose De Los Santos passed away fifteen years ago, his grieving daughter Clara and wife of more than 40 years took solace knowing that they had taken care of his financial

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<sup>9</sup> As we began to do this work, we heard from many people that affidavits of heirship could function as a “poor man’s will.” However, these affidavits serve only to record the “family tree” and do not allow low-income homeowners to allocate their resources to specific members of that “tree.” Second, even if the homeowner desired to have their property allocated upon their death in the way that is dictated by our state’s laws of intestate succession, the affidavit would not operate to “prove up” the co-ownership structure created upon death as would a probate proceeding. For that, the decedent’s family would need to hire a lawyer. An example of a case involving an “Application to Determine Heirship” appears below in the Appleton case study.

<sup>10</sup> Each of these case studies presents a factually accurate depiction of a case handled by our project. We have changed names in an effort to protect their confidentiality. Where photos are presented, we have obtained the client’s consent to include photos and to discuss their actual names and facts in this publication, but have used different names in an abundance of caution.

<sup>11</sup> Almost half of the families surveyed (44%) in the CFD study had made such arrangements. *Supra*, note 4, Chapter 5, p. 26.

affairs. The family had, before his death, scraped together the money necessary to hire an attorney and allow Mr. De Los Santos to execute a will. When the family's homestead was destroyed by Hurricane Dolly in 2008, they were shocked to learn that they lacked clear title to the property: the will had never been probated.

This particular family was ultimately successful in probating the will many years<sup>12</sup> after the death of Mr. De Los Santos; they were, due to their status as hurricane victims, able to receive free legal services. However, under Texas law, simply being unaware of the legal requirement that a will be probated has been held insufficient to allow a judge to authorize a late probating of a will.<sup>13</sup> And, even had the De Los Santos family been aware of



the requirement, they likely would not have filed a timely application to probate the will as a muniment, they say, because they lacked the money commonly asked by attorneys in their region to do so. Had they not been successful in their effort to probate the will of their husband and father, the De Los Santos family would not have been able to qualify for the HOP program,<sup>14</sup> which

will ultimately put them in a new home outside of the floodplain and in an area of increased economic opportunity and safety.

### **Finding 3: Co-ownership Structures Created by Lack of Wills (Or, in Some Cases, Created by Wills) Significantly Burden Low-Income Homeowners**

Many people – even lawyers – with whom we've discussed our project's work have been surprised by the co-ownership structures we've encountered among our client families,

<sup>12</sup> See Tex. Estates Code §256.003.

<sup>13</sup> See, e.g., *In re Estate of Rothrock*, 312 S.W.3d 271, 274-75 (Tex.App.—Tyler, 2010, no pet.).

<sup>14</sup> [http://www.glo.texas.gov/GLO/\\_documents/disaster-recovery/housing/hop-guidelines.pdf](http://www.glo.texas.gov/GLO/_documents/disaster-recovery/housing/hop-guidelines.pdf)

some of which have involved more than several dozen family members and potentially hundreds of “unknown heirs” or unidentified co-owners. “Heirs’ property” is a phrase used to describe property passed to family members without a will, and is most often used to refer to property that has passed through several generations of intestate deaths. In these situations, Texas intestacy law produces fractionalized ownership among children or brothers and sisters in which each owner’s share is undivided. Often, in Texas and in other states with similar laws, it is difficult to locate all (or sometimes recall the names of all) of the heirs that may have a claim of ownership. With each generation, the number of heirs involved increases exponentially, and the opportunity for collaboration becomes exceptionally remote. In such situations, it can be extremely difficult to obtain all of the signatures needed to take out loans to make needed repairs, or to sell or even rent the co-owned property. Sometimes co-owners, caught in a collective action problem, fall behind in the payment of taxes, resulting in the loss of the family property. Even when all co-owners are known, communicate effectively, and are willing to chip in, they often do not agree about what to do with the familial property. For our clients it has been no different. The families for whom we have resolved co-ownership issues have had to work extensively to persuade members to gift their shares of property in order for one member to qualify for relief. This process is time-consuming and incredibly emotionally taxing on family members.

*Case Study: No Will? Pursue Fifteen Gift Deeds.*

When Lucia’s husband Armando passed away, she had hoped simply to remove her husband off the deed to her home, assuming that the property was hers. Instead, she lacked the clear title that would become necessary in the wake of Hurricane Dolly. Unbeknownst to Lucia, parts of her husband’s ownership interest in the property had passed to his ten children via intestate succession. Years later, in order to consolidate the property ownership in Lucia, our project prepared fifteen gift deeds for the children, and the children of two of those children who had since died, to sign. This work is not ordinarily performed by local attorneys, who would need to be paid considerably to track down, make contact with, and convince family members (who often don’t know of their

ownership interests) to sign deeds.

*Case Study: Will Conferring Equal Shares? No Agreement to Consolidate.*

Wills tracking the laws of intestate succession can create the same problems. One client family of four brothers was presented with the opportunity to obtain disaster recovery for a family home destroyed by Dolly. The brother resident in the home and eligible to pursue relief was the “black sheep” of the family and disliked by his brothers, who refused to gift their undivided interests in the property to him to enable him to relocate out of flood plain and into a newly-constructed home worth many times the value of the old family estate. They remained resistant even after much counseling around possible ways for them to retain ownership interests in the newly-constructed, more valuable, home. In other words, the dynamics in some families are such that even the prospect of each member’s significant enrichment will not lead to cooperation within co-ownership structures, even when those structures are created by the wills of well-meaning parents.

**Finding 4: Families Without Wills Have Tough Time Making Use of Causes of Action Designed to Relieve Burdens of Co-ownership Created by Intestate Succession**

Chapter 29 of the Texas Property Code allows a tax-paying co-owner to seek reimbursement from other co-owners for her payment of taxes and to buy their interests when not reimbursed. We found that, in practice, few of our clients could make use of this law. First, many had just recently become co-owners in families where the parents, lacking access to probate, had only recently passed away. Not enough time (a minimum of three years) had passed for these resident co-owners to have qualified to use Chapter 29. Second, in “doing the math” with our clients, we found that the amounts owed by co-owners who had failed to pay was relatively small when split among multiple co-owners. One co-owner sent us a check for twenty dollars, threatening our client’s ability to use Chapter 29 at all with just that small amount. Finally, many low-income resident co-owners lack the resources to buy out other co-owners’ shares, even when the price of these shares is discounted by the taxes they’ve paid.

Chapter 23 of the Texas Property Code, the partition statute, is of even less help. The provision allows a co-owner to force a sale or division in kind. However, in cases where the number of co-owners is high, or the size of the parcel of land is small -- or both, as we found was common -- the law favors a forced sale, which would have been devastating for our clients. Because we feared partition suits were unlikely to bring about clear title to land to our clients, who could not afford to buy property at auction, we chose not to bring suit in several cases.

*Case Study: Heir Property Litigation*

Nancy Appleton owns an undivided fractional interest in her family's historic home. Because her property is located in an industrial zone, she has not been afforded the option to rebuild, and has been required to consolidate ownership and present clear title in order to receive disaster relief in the form of relocation.

Having paid all of the property taxes for several years, Nancy is eligible under Chapter 29 to seek reimbursement from the multiple known and unknown co-owners. She



plans to use the partition statute to ask the judge to award her sole ownership to the property, because the value of the taxes she had paid on behalf of the co-owners, combined with the improvements she had made to the property, exceed its post-hurricane value.

Even though we worked exclusively with owners of homes severely damaged by storm, in no other case did we manage to locate a home owner for whom the taxes paid actually exceeded the value of their asset, making Chapter 29 a seldom-considered option for most of our clients. The vehicle is designed for co-owners with resources to “buy out” other co-owners. Worse, the costs involved in a partition suit are considerable, because notice by publication can cost thousands of dollars, as can the appointment of an ad litem to

represent the interests of unknown heirs. Appraiser and surveyor costs add even more to total costs. The costs of litigating Nancy's case have already exceeded the value of her homestead -- and this is without any attorneys' fees included.

### **Finding 5: Once Lack of Access to Probate Leads to Co-ownership, Adverse Possession Not Helpful Within Families**

Several of our clients might have been able to consolidate ownership in their names had they been able to use the doctrine of adverse possession against family members. Adverse possession is a doctrine that traditionally has allowed those making obvious use of land to claim ownership of it after a certain period of time and under certain other circumstances.<sup>15</sup> Under Texas law, co-owners are rarely allowed to claim property by adverse possession. This is yet another way in which why co-ownership structures burden those seeking to prove up ownership to property in the ways available to those who have had proper access to probate systems. We had several clients for whom we wished this doctrine had been available to clear title.

#### *Case Study: Adverse Possession Against Whom?*

Even when a low-income resident can fulfill the requirements of the doctrine, the prevalence of co-ownership in this region stemming from lack of access to probate can make victory improbable. Ana Martinez, who has lived with her four boys in a colonia prone to flooding for nearly fifteen years, will rely upon the doctrine to claim title to a property she attempted to purchase from a record land-owner who died without a will. His failure to execute a will means that the court must now appoint an attorney to look



after the interest of the "unknown heirs." As in the Appleton matter, the costs of safeguarding the interests of the "unknown heirs" created by intestate succession and lack

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<sup>15</sup> Texas Civil Practice and Remedies Code, Chapter 16, Subchapter B.

of access to probate make these kinds of cases prohibitively expensive. As in Appleton, the litigation costs and fees will certainly dramatically exceed the value of the asset.

### **Finding 6: Persistence of Contracts for Deed Makes Probate Access Even More Important**

Contracts for deed (CFDs) are alive and well, particularly in low-income settlements.<sup>16</sup> When users of CFDs lack access to probate, title problems abound. We saw many contracts for deed in our work this past year, about half of which were unrecorded.

#### *Case Study: "It Wasn't Yours To Sell To Me?"*

Antonio Garza and his wife took care of Antonio's grandmother, whose will left the family homestead to her three grandchildren and not to any of her children. After her death, Antonio and his wife lived on their property for more than ten years, buying the shares of the other two grandchildren over time through an informal unrecorded contract for deed. When the hurricane hit, the couple applied for relief and were stunned: they could not present clear title because the grandmother's will had not been probated. And through the contract for deed, the two grandchildren who had not inherited any interest in the property under the laws of intestate succession had inadvertently tried to sell something owned by their aunts and uncles!



Antonio was fortunate in that a county judge allowed him to probate his grandmother's will as a muniment of title even though he was late in filing. He was also fortunate that none of the family members who would have inherited under the laws of intestate succession contested the will. Nor did his cousins fail to honor the terms of the contract for deed. This kind of an

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<sup>16</sup> *Supra* note 4.

outcome might not be expected in most families, and could not have been obtained without extensive attorney involvement.

### **Finding 7: Invalid Liens Further Complicated by Lack of Access to Probate Systems**

Second only to co-ownership caused by intestate succession, clouds created by liens on our clients' properties posed the most common barrier to clear titles, affecting nearly one third of families we encountered. Strikingly, of the 187 liens we discovered, 155 turned out to be invalid for one reason or another. These liens were invalid for having been filed in the wrong person's name (130), had already been paid off (15), or were by law not able to attach to homestead property (10). That is, only 17 percent of liens were valid, often purchase liens.

Like other title defects, liens are made far worse by the expansion of co-ownership that results from lack of access to probate systems for poor people. When a lien is filed in a county's deeds records it appears to attach to all property in which the person subject to the lien has any interest. As property becomes held by larger and larger numbers of people, it appears to become subject to more and more liens, even when the resident or tax-paying co-owner has no relationship to the lien-holder, and even when the lien is invalid.

#### *Case Study: "Your Lien is My Lien?"*

In the case of the Roberts family, the parents of seven children died leaving a co-ownership arrangement that put title in two siblings. One of these co-owning siblings -- the seventh child -- had had a child support lien filed against him in the deed records. Mabel, the sibling resident during the hurricane, had significant difficulty in clearing title to her residence, even once her sibling had expressed the desire to transfer his interest in the property to her. The title company involved refused to remove the exception of the child-support lien until our project was able to convince the local assistant attorney general to file a document with the county clarifying that the lien was invalid as to Mabel's homestead property. A will transferring the interest in the property to Mabel alone would have ensured that the

child-support lien of the seventh child would not have interfered with Mabel's ability to repair the home or relocate.

**Finding 8: Forms Can Help Ameliorate Problems Created by Lack of Access to Probate But Must Be Accompanied By Accessible Legal Services**

Our work has involved the filling out of countless simple forms to clear title for, and consolidate ownership in, Texas hurricane victims whose families have historically lacked access to probate systems. These forms make the voluntary transfer of property less burdensome on all involved, and additional forms are needed, such as Form Wills and Lady Bird Deeds Forms, among others, to increase access to probate for this population. We also feel strongly that increased access to legal services will be necessary to assist those unable to make use of forms, and those whose cases are sufficiently complicated as to necessitate the involvement of an attorney.

#### **IV. Recommendations**

The Texas Title Project appreciates having had the opportunity to report on the lack of access to probate confronting poor homeowners in Texas. In reviewing the problems created by this lack of access among our clients, we make the following recommendations:

**1. Forms.** There is a significant need for form wills to be officially promulgated and for resources to be devoted to their dissemination. There is an especially significant need for Spanish forms. The forms should be in plain language and accompanied by a glossary and detailed instructions on how and when to use each form. The Texas Title Project has begun to collect a number of these forms used in various clinics or other pro bono contexts. We understand that the Commission and the State Bar of Texas Real Estate Probate and Trust Law Section are working collaboratively on several forms to be approved by the Supreme Court of Texas. We look forward to using them once completed.

**2. Community Education About the Need to Probate Wills.** Although the importance of wills is noted in our first finding, "wills campaigns" will not be enough if low-income persons with wills do not have the means to pursue timely probate or have not been

educated about the requirement. One relatively easy step would be to place on form wills a cautionary note about timely probate.

**3. Increased Access to Legal Services.** Because the use of work-arounds without lawyers has proven harmful to some families, and because probating a will involves money many families do not have, the solutions to the lack of access to probate problem must address the underlying lack of access to legal services. Added staffing at the county level, perhaps in county clerks' offices, should be considered. In a best-case scenario, lawyers would be on staff at these offices, or at regional satellites, to assist with the drafting of and timely probating of simple wills.

**4. Interim Workgroup to Develop Potential Solutions to Lack of Probate Access.** A workgroup of experts to look at the **issue of lack of access to probate** should be convened immediately and throughout the summer months. The work group should look for relatively simple “fixes” or “tweaks” to the existing probate system that would enhance access to probate for the poor in an effort to bring them to the attention of the Texas Legislature this session. It should look to other states and possibly other countries, particularly those with informal settlements in which title problems persist and have proved intractable, in thinking creatively about ways to transfer low-value real property that are financially accessible to very low-income homeowners. Options for this group to consider could also include:

- A system of automatic transfer upon death similar to what is used in the mobile home context;
- The creation of a specialized probate court (not unlike a small claims court) for the affordable probate of low-value estates; and
- The facilitation of pro se or assisted pro se solutions for some proceedings.

**5. Legislatively-Created Task Force.** A Task Force should be charged with developing additional long-term solutions to the **problems caused by co-ownership** structures created by the persistent lack of access to probate over generations. In addition to the ideas generated by the interim workgroup, the solutions to be considered by the Task Force might also include:

- A voluntary mediation program for families wanting but unable to consolidate ownership in one or more family members;
- Allowing ways for tax-paying resident co-owners to obtain clear title to property without litigation;
- Establishing new co-ownership structures that allow a single family member to make decisions, including the decision to sell, on behalf of other owners; and
- Reviving SB 473 from the 82nd session in order to allow for adverse possession against a cotenant heir.

**6. Study.** An in-depth regional study of the most significant barriers to probate access, including those listed in the eight findings of this report and those additional barriers, if any, identified by the Work Group, should be designed and conducted concurrently with the convening of the Task Force, beginning in the fall of 2015. Study components should include:

- The selection of and in-depth *survey* of five communities with historically low access to probate and high prevalence of co-ownership structures;
- *Focus groups* held with court staff, local attorneys, and others knowledgeable of probate systems in the same geographic areas to deepen the understanding of barriers identified by the survey of low-income residents;
- *Additional research*, if necessary, around the implementation of potential solutions to the most prevalent barriers to probate access identified;
- The *piloting* in three communities of one or more identified solutions to lack of access to probate and/or to the persistence of co-ownership structures.

For more information about this report or its recommendations, please contact Lucy Wood at (512) 626-2060 or Frances Leos Martinez at (512) 232-1222.