ESTATE PLANNING

HEIRS' PROPERTY

Resource Guide for Your Next Steps

Heirs' property (sometimes known as family land) is property that has been transferred to multiple family members by inheritance, usually without a will. Typically, it is created when land is transferred from someone who dies without a will to that person's spouse, children, or other heirs who have a legal right to the property. However, even if the person who died had a will, they may still create heirs' property if they leave land to multiple heirs without specifying which heirs get which section of the land.

This guide is a resource provided to support attendees of the Spartanburg County Foundation's Estate Planning learning series.

"Everyone should have a purposeful estate planning strategy based on what matters most to them."

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*This document is meant to help you **start** planning for future actions. It is not meant to replace the legal, financial, or tax advice from professionals with whom you share details of your finances and assets.*

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Mr. Walden was born in Mt. Airey, North Carolina but has lived in South Carolina since 1979. He grew up in Chapin, South Carolina approximately 20 miles outside of Columbia. He received a bachelor's degree in psychology from The University of South Carolina in 1996. Mr. Walden earned his Juris Doctorate from The University of South Carolina School of Law and was admitted to practice law in 2000. He is a member of the South Carolina Bar and Charleston Bar Associations and has practiced primarily in the fields of real property and estate planning/probate law. He has served as a Guardian Ad Litem in the family court for SC Department of Social Services and SC Department of Juvenile Justice cases and is a South Carolina Board Certified Civil Court Mediator.

CENTER FOR Heirs' Property PRESERVATION®

www.heirsproperty.org

The Center for Heirs' Property Preservation® is a 501(c)(3) non-profit that protects heirs' property and promotes its sustainable use to provide increased economic benefit to historically under-served families.

This information was prepared for participants of the Estate Planning – Heir's Property educational event hosted by the Spartanburg County Foundation on March 14, 2024. We thank Mr. Josh F. Walden, Esquire, for supplying information included in this resource guide. **This material is intended for educational purposes only and does not contain legal advice, nor does it establish an attorney-client relationship.** Please contact the Center for Heirs' Property Preservation if you are interested in discussing such a relationship.

Basic Definitions

Heirs' Property. (sometimes known as family land) is property that has been transferred to multiple family members by inheritance, usually without a will. Typically, it is created when land is transferred from someone who dies without a will to that person's spouse, children, or other heirs who have a legal right to the property. However, even if the person who died had a will, they may still create heirs' property if they leave land to multiple heirs without specifying which heirs get which section of the land.

The Public Record (Deeds and Probate.) There are generally two ways property is transferred from one person to the next. A person transfers their ownership interest in a piece of land to another by deed OR they die owning the property and the administration of their estate (probate) passes the property to heirs (intestate) or devisees (by will.)

The Chain of Title. The resulting public record created by the deeds recorded in the Register of Deeds Office and the estates filed, and of record, in the Probate Court.

Marketability of Title. This term reflects the fact that the records involving the ownership of land should be traceable (for example) from an owner in 1900 to the modern day (current) owner by tracking the chain of title in the public records for the county where the property is located. These records are usually found in the County Register of Deeds Office, the County Probate Court and sometimes the County Clerk of Court's Office. When the chain of title is intact and the ownership traceable (on record) then the title is marketable which basically means a Bank would be willing to accept the property as a source of collateral on a mortgage for a purchaser or home equity line or refinance by the owner. In other words, the record clearly shows who the owner is and who has the right to sell or use the property. The marketability aspect also reaches to the marketability of timber on a particular tract of land as the public record also speaks to the ownership timber on a particular tract of land.

Heirs Property Owners do not have clear and marketable title as the chain of title does not disclose or reflect the current owners of the property.

What do I own?

Tenancy-in-Common Form of Ownership. Heirs' property is property that is owned by the heirs of a deceased person. The law calls this type of ownership a Tenancy-in-Common because all of the heirs own an interest in the property along with the other heirs.

Rights to Use and Enjoyment. All heirs own a fractional interest so everyone gets to use or enjoy the whole of the property regardless of the size of the fraction. They can live there, go there for family reunions, fish and hunt there or do anything with the land that any other heir can do.

Ten Heirs, Ten Acres Example:

> If you have 10 heirs and 10 acres everyone owns a 1/10th fractional interest in the whole 10 acres rather than each heir owning an acre. Generally, all heirs are responsible for paying their share of the taxes and upkeep even though that may not happen in real life!

Limitations of This Form of Ownership. The limitations speak to the property being a liability versus an asset. Without a clear title to the land, you will have trouble selling your land for what it's worth, getting mortgages, title insurance, public utilities, grants, qualifying for the best tax assessments through the county, and/or qualifying for assistance through local or state home rehabilitation programs or FEMA assistance when natural disasters (floods) are involved. The ability to sell the timber on a parcel of heirs' property is also affected by this form of ownership. Most reputable timber buyers will not touch heirs' property due to liability concerns, so heirs are often left dealing with someone who is offering only a fraction of what the timber is actually worth.

Myths About Heirs' Property Ownership

I Pay the Taxes! - The payment of taxes does not increase an heir's fractional ownership interest, nor does non-payment reduce an heir's fractional ownership interest.

I Have a Survey! - A survey (cutting a piece off) does not separate the legal ownership although it separates for tax purposes. ***See 10 heirs and 10 acres example.***

I have a Tax Deed! - Letting the heirs' property go to tax sale and then buying (as an heir) at a tax sale does not clear the title.

I am the Oldest and Wisest and Mamma Loved Me More! – Anything Mamma or Daddy (Grandma or Grandpa) told you they wanted to have happened to the land, as far as dividing or utilizing the property, is in no way legally binding. The family can decide to collectively respect those wishes but they do not have to do so. The best way for Mamma or Daddy, Grandma or Grandpa, to be sure their wishes are followed is to have a Will. You should have a Will for the same reason. No particular heir has decision-making authority based on being the oldest male, or the oldest child, or the last living child, or the most educated, the richest, being a local heir who lives on the land, paying taxes, or even being the best looking. Again, folks may give deference to certain heirs based on such factors, but they are not required to do so.

Who is an Heir?

Intestate Inheritance. Intestate means someone has died without a Will or the Will was not filed within a ten-year period (from the date of death.) Under the SC Probate Code heirs have a ten (10) year period to probate the estate of a loved-one. This time frame is set in stone and applies whether the deceased died with or without a Will. If ten years pass with no probate, then the estate (the property owned by the dead person) can no longer be administered through a regular probate process. In this instance, even if the deceased had a Will; said Will is no longer valid. When someone dies without a Will and/or ten years have passed with no probate being filed, SC law has written a Will for all of us and any property owned by the deceased passes in accord with the provisions (rules) under that law. After 10 years it will take a Court Order to determine the heirs and to fill in the gap in the Chain of Title we discussed earlier.

- Note: If the person *had a will*, and Will is filed/probated within the 10-year period from the date of death, they have ordered who gets their property = Testate (they decide who inherits.)
- Note: The Probate Code is the South Carolina Law that controls the probate process. It is called Title 62 of the South Carolina Code of Laws, and you can look it up on the internet at **www.scstatehouse.net** or at the library.

Adopted versus Raised. Only a child who has been formally adopted through the Court is considered an heir. It does not matter how long a child lived with a family or whether the family treated and considered the child as "one of their own".

Divorced versus Separated. Separated is NOT divorced. There is no Common Law Divorce, you need to go to court and get a real divorce even if that spouse moved away and you haven't seen them in years. This means that if you get married to somebody else, with a license and formal church ceremony, that second marriage may not be valid, and you are still married to the "first" spouse. If you are concerned about this, speak with an attorney as soon as possible.

Outside Child. Generally, children born outside of marriage are heirs of the decedent owner regardless of the marital status of the decedent or the other children the decedent may have with his/her spouse.

The Family Tree

It is very important for you to know who the actual heirs are.

When you are constructing a family tree, you should start with the ancestor who is on the deed to the property. List any spouse(s) or children that they may have had, and you need to include both living and deceased children. For any member of your family that has died, you must include their spouse and any children they may have. Keep doing this until you have all the generations written down. Remember that children are either biological or legally adopted. You can do a chart if it's helpful.

Once you have your family tree, you should pass it around to other family members because they may remember things that you do not.

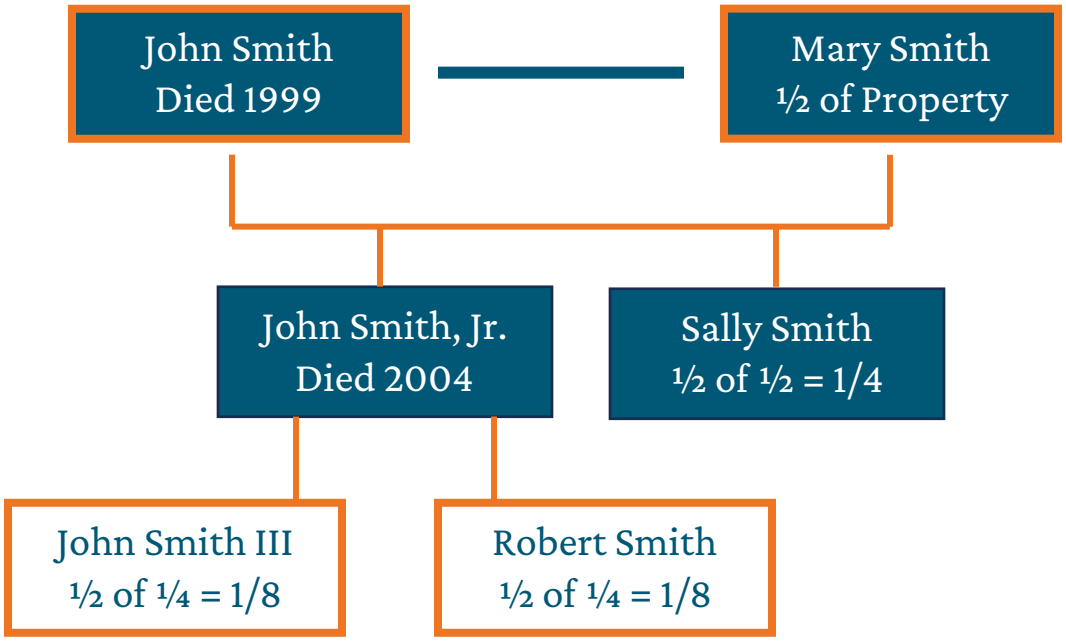
Family records such as bibles, obituaries and funeral pamphlets are good resources even though they might not be completely accurate.

You will need the full name and address of all living heirs.

Here is a sample of what that might look like:

FAMILY TREE

If someone died in the State of South Carolina after 1986 without a Will and they had a Spouse (Husband or Wife) who survived them, that Spouse gets ½ interest in the property. Their children share the rest equally. There are many more situations that may apply to your situation. This is just one simple example. Remember in our example that if John Smith, Jr. had a wife that survived him, she would have 1/2 of his property.



I have Heirs' Property, So now What?

The Dangers of Heirs' Property. This type of ownership makes the land vulnerable. Below is a list of issues heirs face and why curing the problem as soon as possible should be a priority. As difficult as it is today; it will never be easier than it is today.

Lack of Full 100% Agreement. If you remember anything from this session, remember that ALL heirs must be in 100% agreement if your first priority is to protect the land.

Lack of Organization. Very often land is lost due to a lack of organization as to who pays the taxes and having a back-up plan to pay the taxes and to confirm on a yearly basis the taxes are being paid.

The Number of Heir Owners Keeps Growing. Again, as difficult as it is today; it will never be easier than it is today. As heirs pass away their fractional interests flow down their family tree to their heirs (which usually include husbands and wives) and the continuous chain of inheritance can lead to folks inheriting who have no relation to the family. Remember, Wills can curb this problem but will not eliminate the issue all together.

Partition Sales. If one of the heirs can't agree on the division or wants their money, the judge may order the property to be sold and the heirs receive the monetary value of their share. If an heir has sold their interest to some third party, that nonfamily member may also bring an action to force a sale. The sale can happen even if a majority of the heirs who live on the land want to keep the property. Currently, non-petitioning heirs have the right to buy out the interest of those who want to force a sale. However, such a right offers little protection if the heirs do not have the money to buy out those interests. If heirs can't agree and the heirs seeking to protect the land can't buy out those who want to sell, the property is usually sold at auction. **Again, it is very important to agree before going to court.**

Predatory Development. Circumstances where an heir sells their interest to a developer usually lead to the developer forcing a sale of the property. Often these developers misrepresent what they are buying and will assert they want to buy your "piece" of the land or your "portion" and we all now know they do not own a piece of land but rather own an undivided fractional interest in the land. If you sell your interest to a developer, you are setting the land up to be sold at auction and the other heirs are almost always forced off the land.

So now What? *continued…*

Tax Sales. Organization (as referred to earlier) is the best way to prevent this problem and to remember that letting the property go to tax sale does not cure title problems.

Secondary Effects of Development. As commercial and residential development comes to the more rural areas of the state, heirs' property that may have once been safe in its anonymity becomes more and more desirable to those wanting to build. Additionally, as development spreads in a given area, the taxes generally rise and put more pressure on heirs' property owners who may not be able to qualify for a reduced tax assessment due to the chain of title problems.

I Didn't Know What I was Signing (Quitclaim Deeds). This is a deed that transfers any interest you may have in the property to another person. It does not guarantee that you have any interest, or that you will defend them in court. It simply says, "whatever interest I have in this property is yours." A Quitclaim Deed is final once you sign. Unless the person to whom you transferred your ownership signs another deed back to you, you have no interest left in the property no matter what they may have told you. These deeds are also called *quick-deeds* by some. **KNOW WHAT YOU ARE SIGNING!**

Title Search. Once the property is identified and a family tree is completed, you will want a title search performed so an attorney can calculate the interests owned and identify any non-heirship title issues such as access or judgements of record (if any).

Determination of Heirs. If the person on the deed is someone you knew personally, like your mother or father, and more than 10 years have passed since that person died, you will have to file a Petition to Determine Heirs suit in the Probate Court. The action will involve you, other family members, and at least one non-family member, testifying in Court as to the deceased person's heirs and providing evidence as to their ownership in a particular piece of land. A Determination of Heirs action only concerns itself with the heirs of the deceased at the time of their death. If someone who inherited from that decedent (was alive at the time of their passing) has since died, their interest would need to be determined by the probate of their individual interest in their individual estate or a Petition to Determine Heirs for their interest if they have been deceased for longer than 10 years.

Quiet Title Action. This is a lawsuit that is required in many heirs' property cases. These types of cases usually involve multiple generations of deceased heirs, issues involving the boundaries of the land, a history of some heirs having transferred their interest to other heirs or third parties and may involve issues of access. These cases are generally more complicated and usually take longer to resolve than a Determination of Heirs action.

If we think back to the 10 heirs and 10 acres example, every heir to the property has a 1/10th in all 10 acres but they haven't divided-it-up yet to see what piece everyone will get. In the context of the heirs seeking to Quiet Title to the land, they may decide they want to physically divide the land based on mutual agreement which would be called a partition-in-kind. The two kinds of Partition requests usually made to the Court are addressed below.

Partition-in-Kind. This is when you go to court and ask the judge to divide the property based upon a recorded survey and agreement among all heirs. This only works if there is enough land for all heirs to get their physical share and the family agrees to the division. If all are in agreement, the Court will issue an Order and Deeds to the heirs for the piece of the land all have agreed each will take. Once this is accomplished, each heir (or group of heirs) now owns a separate piece of the land apart from all other heirs. **You should have agreement on the division before you get to court. If there is disagreement (arguing in court over how it will be divided) the property could be sold by the court.**

Opting Out and Consolidation of Interests. If an heir does not want their interest in the land, they can sign away their ownership (quitclaim deed) to another heir of their choosing, or to a group of heirs, or to all other heirs as a collective group, or even to a non-family member. Often this happens when we have many heirs and only 1 acre or one home.

Trusts & LLCs

Heirs may decide to create an entity to own the property rather than dividing the land. Trusts and LLCs are two of the more common forms.

Trusts - A fiduciary relationship in which one or more persons, trustee(s), hold legal title to property for the benefit of others (beneficiaries) who have an equitable interest therein.

LLCs - The heir owners (if all are in agreement to do so) may decide to create a Limited Liability Company (or LLC.) The heir owners would then transfer their individual ownership interests to the LLC. Once this is done, no individual heir will own any interest in the land as it will then be owned by the LLC (which you can basically think of as a company created and owned by the heirs.) The LLC is run in accord with an Operating Agreement that spells out the name of the LLC, what type of LLC is being created, and the rules that will guide how the business is run for such things as distribution of income generated by the LLC, the rights and responsibilities of the Members, voting rights/protocol, buyout provisions (if a member wants to leave) and can require the membership be sold to another existing member before it's sold to an outside party, Member contribution requirements, asset management, etc., etc.

General Thoughts on Partition-in-Kind Agreements vs. Trusts vs LLCs

When considering these three options, you are basically weighing individual freedom/autonomy against the security of group ownership in a legally recognized form. Autonomy brings the right to do what you want with your portion but will carry the risk in division of the whole. If everyone owns their own piece and can do what they want, then it's not certain that the land will remain in the family forever as ownership is not centralized. The alternative is the security of land being owned by an LLC or Trust (thus centralized) and therefore being sure the land remains whole and always and forever in the family and in one piece but without individual ownership and control. As always, all heirs would need to be in 100% agreement to make this work.

Additional Resources

LANDTRUSTALLIANCE.ORG
https://landtrustalliance.org/resources/learn/explore/heirs-property-toolkit

USDA.GOV

- https:// https://landtrustalliance.org/resources/learn/explore/heirs-property-toolkit
- https://www.nal.usda.gov/farms-and-agricultural-production-systems/heirs-property
- Fact Sheet https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/guidance_heirs_property_operators_participating_in_fsa_programs-factsheet.pdf
- **2021 Legislation**: https://www.usda.gov/media/press-releases/2021/07/29/biden-administration-invest-67-million-help-heirs-resolve-land

UNIFORMLAWS.ORG – Partition of Heirs Property Act Information

- https://www.uniformlaws.org/committees/community-home?CommunityKey=50724584-e808-4255-bc5d-8ea4e588371d

Article: Black Farm Families are Losing Their Land. New State Laws Seek to Help.

- https://www.governing.com/archive/sl-black-farm-family-land-protections.html

Book: Heirs' Property and the Uniform Partition of Heirs Property Act: Challenges, Solutions, and Historic Reform

My Next Steps