

**Arlington County Bar Association
Trusts & Estates Section**

July 21, 2020

Ryan A. Brown, Esq. and
Jacob D. Hopkins¹

Arlington
LAW GROUP

(703) 842-3025

rbrown@arlingtonlawgroup.com

<https://www.ArlingtonLawGroup.com>

Heirs Property: Understanding the Concept to Protect Ownership and Prevent Land Loss

Relevant Virginia Code Sections:

- § 8.01-81. Who may compel partition of land; jurisdiction; validation of certain partitions of mineral rights; when shares of two or more laid off together.
- § 8.01-83. Allotment to one or more parties, or sale, in lieu of partition.
- § 8.01-83.1. Open-market sale, sealed bids, or auction.
- § 8.01-91. Effect of partition or sale on lessee's rights
- § 8.01-96. Decree for sale; how made; bond of commissioner
- § 8.01-296. Manner of serving process upon natural persons
- § 8.01-316. Service by publication; when available
- § 55.1-101. When deed or will necessary to convey estate; no parol partition or gift valid
- § 55.1-135. Joint ownership in real and personal property
- § 64.2-200. Course of descents generally; right of Commonwealth if no other heir
- § 64.2-319. Perfection of title of personal representative, heir or devisee
- § 64.2-502. Grant of administration of intestate estate
- § 64.2-510. Affidavit relating to real estate of intestate decedent
- § 64.2-534. Liability of heir or devisee for value of real estate sold and conveyed; validity of premature conveyances
- § 64.2-2402. Proceedings to sell property of absentee after failure to locate heirs

Selected Case Law:

- Phillips v. Dulany, 114 Va. 681 (1913)
- Adkins v. Adkins, 117 Va. 445 (1915).
- Virginia & West Virginia Coal Co. v. Charles, 251 F. 83, affirmed 254 F. 379, 165 C.C.A. 599, error granted 255 F. 992, 167 C.C.A. 671, error dismissed 40 S.Ct. 345, 252 U.S. 569, 64 L.Ed. 720 (1917).

¹ George Mason University School of Law Juris Doctor Candidate 2022

- Bridge v. Snead, 151 Va. 383 (1928)
- Shotwell v. Shotwell, 202 Va. 613 (1961).
- Sensabaugh v. Sensabaugh, 232 Va. 250, 256 (1986)
- Khanna v. Khanna, 18 Va. App. 356, 358 (1994)
- Davis v. Henning, 250 Va. 271, 274, (1995).
- F.D.I.C. v. Hish, 76 F.3d 620, 623 (4th Cir. 1996).
- Estate of Hackler v. Hackler, 44 Va. App. 51, 74 (2004).
- White v. Caudle, 65 Va. Cir. 377 (2004).
- Maine v. Adams, 277 Va. 230, 238 (2009).
- Squire v. Virginia Hous. Dev. Auth., 287 Va. 507, 520 (2014).

Outline and Discussion Questions

1. Why Heirs Property

- On March 3, 2020, Virginia adopted the Uniform law of the Uniform Partition of Heirs Property Act through SB 1605.²
 - 2020 Virginia Laws Ch. 115 (H.B. 1605)
- A USDA study found Virginia to have the tenth most heirs property holdings in the country.
 - U.S.D.A., Heirs' Property and Land Fractionation: Fostering Stable Ownership to Prevent Land Loss and Abandonment, U.S.D.A. (July 18, 2020).
- Heirs property is one of the worst property problems many have never heard of and it affects disadvantaged populations disproportionately.
 - Lizzy Presser, *How to Close Heirs' Property Loopholes*, ProPublica, July 15, 2019, 4:59 a.m. EDT available at <https://www.propublica.org/article/what-can-heirs-property-owners-do-to-protect-their-land-loss>

2. Heirs Property in General

- Heir property refers to land that has been passed down informally from generation-to-generation, without written wills.
 - Owners of heirs property are tenants in common:
 - Each heir has equal rights to full use and possession of the real property.
 - Each heir is legally responsible for taxes and other real property-related expenses.
 - Each heir may transfer interest in real the real property to another heir or outsider.
 - Each heir may seek a partition of the real property.
 - Each heir must agree to any major decisions about the real property.

² The author was unable to find recent case law involving a heir property case under the new VA Code § 8.01-81.

- ii. Heirs' Property and Land Loss Prevention, Lawyers' Committee for Civil Rights Under Law,
http://www.lawyerscommittee.org/projects/community_development/page?id=0029.
 - iii. Va. Code Ann. § 8.01-81 provides “Tenants in common, with the power to sell, and coparceners of real property, shall be compellable to make partition and may compel partition, **but in the case of an executor only if the power of sale is properly exercisable at that time under the circumstances**; and a lien creditor or any owner of undivided estate in real estate may also compel partition for the purpose of subjecting the estate of his debtor or the rents and profits thereof to the satisfaction of his lien.”
(emphasis added)
 - iv. Real Estate must pass through intestate succession in the course set forth in Va. Code § 64.2-200.
 - v. In Virginia, legal title to property can be conveyed only by deed or will. F.D.I.C. v. Hish, 76 F.3d 620, 623 (4th Cir. 1996)
- b. Heirs Property is created when:
- i. The owner dies with a Will leaving real property to multiple beneficiaries; or
 - ii. The owner dies without a Will so the real property passes to heirs at law via intestate succession.
 - iii. When a decedent dies, title to his real estate vests immediately in his heirs at law, subject to divestment by a valid will. Estate of Hackler v. Hackler, 44 Va. App. 51, 74 (2004)
 - iv. What is Heirs' Property?, Southern Coalition,
<http://www.southerncoalition.org/hprc/?q=node/5>.
 - v. The Virginia intestate succession laws state “if there is no surviving spouse, then the estate descends and passes to the decedent’s children and their descendants.” VA. Code § 64.2-200(2)
- vi. Heirs Property Example #1**
- a. Property limits the owner’s landowner benefits.
 - i. Individuals living on heirs property face an increased risk of forced sale and eviction.
 - ii. Heirs cannot sell, mortgage or lease the heirs property without agreement of all heirs.
 - iii. Heirs have more difficulty farming, qualifying for agriculture loans, and selling agriculture products.
 - iv. Heirs cannot qualify for most rehab programs or secure financing for needed repairs for their heirs property.
 - v. Heirs may not be able to participate in government programs, including loans and disaster relief programs offered by USDA, HUD, FEMA, and other federal and state agencies.

- vi. Heirs cannot qualify for loan modifications and other loss mitigation programs when facing foreclosure.
- vii. Heirs may not be able to qualify for conservation use tax reductions, homestead exemptions or other property tax exemptions.
- viii. AARP, *Where There Is A Will ...: Legal Documents Among The 50+ Population: Findings From An AARP Survey* (2000), available at <http://assets.aarp.org/rgcenter/econ/will.pdf>.
- a. Heirs Property creates social issues and impacts disadvantaged communities the hardest.
- b. 9.1 million acres in the Deep South owned by African Americans is considered “dead capital” or heir property. The fractionation of the properties makes it impossible for the use of the property to be maximized.
- c. More than 900,000 black-owned farms comprised 14 percent of all farms in the US in 1920 yet the number of black-owned farms dropped 95 percent to under 46,000 in 1974.
- d. Researchers at Auburn and Tuskegee Universities estimate that there are between 150,000 to 175,000 acres of heirs’ property owned by people of any race or ethnicity in the 36 Black Belt counties in Virginia and that this property conservatively is valued at \$650 million.
- e. The rate of intestacy among African-Americans is more than double the rate of intestacy among white Americans and only about twenty percent of African-Americans have wills. Heir property therefore continues to be the leading cause of Black involuntary land loss.
- f. Virginia Conservation Network, *Ensuring Rightful Property Ownership Through the Uniform Partition of Heirs Property Act*, available at: <http://www.vcnva.org/ensuring-rightful-property-ownership-through-the-uniform-partition-of-heirs-property-act/#:~:text=Heir%20property%20refers%20to%20land,set%20foot%20on%20the%20land>. (July, 18, 2020).
- g. Virginia Lawyer, *Back to the Land: Nonprofit Wants to Connect Black Landowners to Lawyers*, pages 46-48, Virginia Lawyer, August 2018
- h. U.S.D.A., *Heirs’ Property and Land Fractionation: Fostering Stable Ownership to Prevent Land Loss and Abandonment*, U.S.D.A. (July 18, 2020).
 - ix. African Americans
 - 1. U.S. Department of Agriculture: – Heirs’ property is “the leading cause of black involuntary land loss.”
 - 2. More than 1/3 of black-owned land in the South is estimated to be heirs property.

3. Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 N.W. L. Rev. 505 (2001)
 4. J. F. Dyer, *Heir Property: Legal and Cultural Dimensions of Collective Landownership*, Ala. Agr. Exp. Sta. Bull. (2007), <https://aurora.auburn.edu/bitstream/handle/11200/4107/BULL0667.pdf?sequence=1> [<https://perma.cc/N8LB-FQ6B>]
- x. Rural Appalachia
1. Appalachians who purchase housing on property classed as heirs' property do so by taking out a personal loan. These investments typically depreciate in value, unlike constructed homes financed with conventional mortgages.
 2. James Deaton, Jamie Baxter & Carolyn S. Bratt, *Examining the Consequences and Character of "Heir Property,"* 68 ECOLOGICAL ECON. 2344 (2009), at 2344-2345
 3. B. James Deaton, *Intestate Succession and Heir Property: Implications for Future Research on the Persistence of Poverty in Central Appalachia*, 41 J. of Econ. Issues 927, 928 (2007).
- xi. Native Americans
1. On Native American reservations, some landowners manage to make some profits by leasing out land that is too small to farm due to fractionalization. Many of the tenants are non-Native. The territory that was once reserved for the Indians is now interspersed with 'white' patches and thereby, to some extent, escapes the control of the tribe.
 2. J.A. Shoemaker, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 Wisc. L. Rev. 733).
- xii. "Compounding the issues associated with heirs property is the fact that the property often holds great sentimental value to the heirs. Courts often fail to consider this noneconomic or subjective value in addressing partition cases, particularly in determining whether to partition in kind or by sale. The literature, however, recognizes this subjective value as extremely important, connecting the personhood or identity of

the property owner to the property itself.” Jesse J. Richardson, Jr., *The Uniform Partition Of Heirs Property Act: Treating Symptoms And Not The Cause?* 45 Real Est. L.J. 507, 514 (Spring 2017).

xiii. Identity Value in Property Causes

1. Increases the likelihood of family disputes and discord.
 2. Loses a connection to family’s identity (farming, family history and community).
 3. Loses the sense of independence associated with ownership.
 4. Title status makes it difficult for cities to identify owners, enforce code ordinances and collect property taxes.
 5. Heirs property is a contributing factor to the decrease in owner occupied homes and family owned farms.
 6. Heirs property hinders efforts to increase affordable housing and family stability.
 7. Communities can lose funding for revitalization efforts if heirs property is pervasive.
- i. **Case Example** – Client inherited property among 10 different heirs, has been starting trace family tree to consolidate title.
- j. **Discussion Question:** What are some considerations that may need to be made for these types of cases? Have you ever worked on an heirs property case and how did it go?

3. Remediating Heir Property Issues

a. To Start Tackling an Heir Property Case

- i. Obtain an informal history of the property from conversations with client/family members.
- ii. Obtain a completed heirs determination worksheet from the client.
- iii. Obtain title search back to date the property came into the family
 1. 50 year search may not even catch most recent deed of record.
 2. Search back to the most recent deed may not reveal incomplete conveyances from the original family member.
- iv. Most cases require a clear title.

b. Title

- i. Because heirs’ property can potentially have a significant number of heir-owners, attorneys recommend that individuals start by discovering their family tree. “
 1. A lawyer will discover the family tree for two purposes: (1) to trace the chain of title;
 2. and (2) to identify the beneficiaries of the estate of a decedent who did not have a will.”

3. The most logical place to begin is with the owner of record, tracing all of the owner's descendants.
 - a. Va. Code § 64.2-508 (A) "Except as otherwise provided in this section, a personal representative of a decedent's estate or a proponent of a decedent's will when there is no qualification shall provide written notice of qualification or probate, and notice of entitlement to copies of wills, inventories, accounts, and reports, to the following persons":
 - i. "The surviving spouse of the decedent, if any;
 - ii. "All heirs at law of the decedent, whether or not there is a will;
 - iii. "All living and ascertained beneficiaries under the will of the decedent, including those who may take under § 64.2-418, and beneficiaries of any trust created by the will; and
 - iv. "All living and ascertained beneficiaries under any will of the decedent previously probated in the same court."
 - ii. Once the all of the heirs have been identified and located, the lawyer will first try to have them relinquish their property interest by executing a quitclaim deed.
 1. Statute authorizing allotment of entire subject of partition to one or more parties willing to pay value of interests of others therein is permissive and exercise of such authority rests in sound discretion of court. Shotwell v. Shotwell, 202 Va. 613 (1961).
 2. When [interpreting quitclaim deeds] intention appears by giving the words their natural and ordinary meaning, technical rules of construction will not be invoked. When writing the Court must look to what the words express, not what the grantor may have intended to express. See White v. Caudle, 65 Va. Cir. 377 (2004).
 3. Heirs are often reluctant to sign away all of their interests in the property due to personal connections with the property, expectations of payment, or family strife.
 - iii. If obtaining quitclaim deeds from all the heirs is not possible, the lawyer may proceed to bring a quiet title action in the circuit court of the county where the property is located.
 1. All relevant parties must be served according to Va. Code § 8.01-296.
 - a. Except in condemnation proceedings, service by publication is available under Va. Code § 8.01-316. an order of publication may be entered against a defendant in the following manner if a party is able to obtain:

- i. An affidavit, Va. Code § 8.01-316(1)(b), by a party seeking service stating that diligence has been used without effect to ascertain the location of the party to be served;
 1. Code § 8.01–316(1)(b) authorizes service by publication only when “[due] diligence has been used without effect to ascertain the location of the party to be served.” Khanna v. Khanna, 18 Va. App. 356, 358 (1994).
 - ii. Or; That the last known residence of the party to be served was in the county or city in which service is sought and that a return has been filed by the sheriff that the process has been in his hands for twenty-one days and that he has been unable to make service; Va. Code § 8.01-316(1)(c)
 - iii. “A suit to establish existence and contents of a lost document evidencing the title of one in possession of land is to be regarded as quasi in rem, and an order of publication against nonresident defendants gives a court of equity jurisdiction over them for the purpose of establishing the contents of the lost document.” Virginia & West Virginia Coal Co. v. Charles, 251 F. 83, affirmed 254 F. 379, 165 C.C.A. 599, error granted 255 F. 992, 167 C.C.A. 671, error dismissed 40 S.Ct. 345, 252 U.S. 569, 64 L.Ed. 720 (1917).
2. “[A]n action to quiet title is based on the premise that a person with good title to certain real or personal property should not be subjected to various future claims against that title.” Maine v. Adams, 277 Va. 230, 238(2009).
 3. A person seeking to quiet title must plead that she has superior title over the adverse claimant. Squire v. Virginia Hous. Dev. Auth., 287 Va. 507, 520 (2014).
 4. In the heir property situation, a quiet title action is a proceeding to establish the resident heir’s title to the property by forcing the other heirs to establish a claim to ownership or be forever prevented from asserting such right.
- iv. Changes to Partition Sale
 1. From 2020 VA H.B. 1605 (NS)
 2. “Any court having general equity jurisdiction shall have jurisdiction in cases of partition ; , and in the exercise of such jurisdiction , shall order partition in kind if the real property in question is susceptible to a practicable division and may take

cognizance of all questions of law affecting the legal title that may arise in any proceedings, between such tenants in common, joint tenants, executors with the power to sell, coparceners and lien creditors.” 2020 VA H.B. 1605 (NS)

3. “Any two or more of the parties, if they so elect, may have their shares laid off together when partition can be conveniently made in that way. If the court orders partition in kind, the court may require that one or more parties pay one or more parties' amounts so that the payments, taken together with the court-determined value of the in-kind distributions to the parties, will make the partition in kind just and proportionate in value to the fractional interests held. If the court orders partition in kind, the court shall allocate to the parties that are unknown, unlocatable, or the subject of a default judgment a part of the property representing the combined interests of such parties as determined by the court, and such part of the property shall remain undivided.” 2020 VA H.B. 1605 (NS)
4. The new law preserves the rights of co-tenants to sell their interest in inherited real estate but also ensures that other tenants have the proper due process. Bettina Ring, *Bettina Ring column: Keeping land intact, in farm and forestland, and in the family*, Richmond Dispatch (Jul 17, 2020) available at: https://richmond.com/opinion/columnists/bettina-ring-column-keeping-land-intact-in-farm-and-forestland-and-in-the-family/article_5d7b2348-98c7-515b-9957-8cff37abe111.html.
- v. If the quiet title fails a more drastic approach would be a partition sale of the property.
 1. All relevant parties must be served according to Va. Code § 8.01-296.
 - a. Except in condemnation proceedings, service by publication is available under Va. Code § 8.01-316. an order of publication may be entered against a defendant in the following manner if a party is able to obtain:
 - i. An affidavit, Va. Code § 8.01-316(1)(b), by a party seeking service stating that diligence has been used without effect to ascertain the location of the party to be served;
 1. Code § 8.01–316(1)(b) authorizes service by publication only when “[due] diligence has been used without effect to ascertain the location of the party to be served.” *Khanna v. Khanna*, 18 Va. App. 356, 358 (1994).
 - ii. Or; That the last known residence of the party to be served was in the county or city in which service is

sought and that a return has been filed by the sheriff that the process has been in his hands for twenty-one days and that he has been unable to make service; Va. Code § 8.01-316(1)(c)

2. “Any person who, before the partition or sale, was lessee of any of the lands divided or sold, shall hold the same of him to whom such land is allotted or sold on the same term on which by his lease he held it before the partition.” Va. Code § 8.01-91
3. “Before a court is authorized to allot or sell an undivided interest in a partition action, it shall first determine that partition in kind cannot be practicably made. When the subject land is not susceptible to a practicable division in kind, the court shall next consider an allotment of the entire subject property to any one or more of the parties who will accept it for a price equal to the value determined pursuant to § 8.01-81.1, and pay therefor to the other parties such sums of money as their interest therein may entitle them to receive, notwithstanding that any of those entitled may be a person with a disability.” Va. Code § 8.01-83 (B).
4. “The sale of property in lieu of partition is a matter long controlled by statute in Virginia. Code § 8.01–83, in effect at the time of the proceedings below, reads in pertinent part as follows: in any case in which partition cannot be conveniently made, if the interest of those who are entitled to the subject, or its proceeds, will be promoted by a sale of the entire subject, or allotment of part and sale of the residue, the court may order such sale, or an allotment of a part thereof. By its terms, the statute does not permit sale except where it is first determined that partition cannot be conveniently made.” Sensabaugh v. Sensabaugh, 232 Va. 250, 256 (1986).
5. “We have repeatedly held that a court has no power to order the sale of property without first determining that partition in kind cannot be conveniently made and then determining that sale will be in the best interest of all the parties.” Sensabaugh v. Sensabaugh, 232 Va. 250, 256 (1986).
6. In determining whether sale should be directed in partition suit, situation and interests of parties involved should be considered. Bridge v. Snead, 151 Va. 383 (1928).
7. The fact that a part of the tenants in common leased a portion of the property will not prevent the others from suing for partition. Phillips v. Dulany, 114 Va. 681 (1913)
8. Va. Code § 8.01-91, does not authorize the court in partition to settle controversies between the tenants growing out of their

general indebtedness to each other having no relation to title to the land. Adkins v. Adkins, 117 Va. 445 (1915).

9. Although partition actions might seem attractive options due to their simplicity, it is often difficult for the heir in possession to hold onto the property. If the court determines that the property cannot be divided between the co-owners, the property will be put up for sale at a public auction.
- i. Barriers to Stopping Title Problems
 1. Determining Heirship
 - a. 10+ heirs can live throughout the country.
 - b. Non-marital children, lack of clarity regarding legality of a marriage, community property issues, and remarriage add complications.
 - c. Some heirs may have moved and lost touch with the family.
 - d. Some heirs may have died.
 2. Cost
 - a. Legal fees and title work
 - b. Recording and filing fees.
 - c. Buying out other interests in the property.
 - d. Paying back taxes.
 - e. Correcting title may raise property taxes if property was held in the name of a decedent who qualified for a freeze or exemption.
 3. Title Consolidation
 - a. Unrealistic for 10 people to own a house together.
 - b. Some of heirs might agree to donate their interests to W and X.
 - c. Others might want W and X to buy them out—which is often not economically feasible.
 - d. Partition action by W and X similarly not an ideal solution.
- vi. **Story** - Patriarch of a family of twenty-seven children, grandchildren, and great-grandchildren, Johnny Rivers was born on this seventeen-acre tract on Clouter Creek near the Cainhoy Peninsula of Charleston, South Carolina.
 1. His father, Hector Rivers, son of a former slave, acquired the land in 1888, and Rivers family members have been born, reared, and buried on it ever since.
 2. Unfortunately, despite never having missed a tax payment, on September 27, 2001, twenty-five members of the Rivers family were evicted in the largest eviction carried out by the Berkeley County Sheriff's Department in at least the last nine years.

3. Mr. Rivers, who shared title to the land with more than thirty family members scattered as far as New York, Florida, and Georgia, could officially claim only 3.515 percent of the proceeds after attorneys' fees.
 4. April B. Chandler, *“The Loss In My Bones” : Protecting African American Heirs' Property With The Public Use Doctrine*”, 14 Wm. & Mary Bill Rts. J. 387.
- vii. **Discussion Question:** How would you approach assisting an heirs property case? Are there alternatives to those listed that may prevent asset forfeiture for the owner?

4. Preventing Heirs Property

- a. The owner dies without a will so the real property passes to heirs at law via the Rules of Inheritance; or
- b. The owner dies with a will leaving real property to two or more beneficiaries.
 - i. It is not enough to have a will. Must have a will that purposefully prevents heirs property.
 1. In construing deeds, the Court must look to the intent of the parties, taking into account the language used, and the general purpose and scope of the instrument in light of the surrounding circumstances. *Davis v. Henning*, 250 Va. 271, 274, (1995).
- c. Estate Planning Services are essential to preventing Heirs Property.
 - i. Many low- and middle-class families unfortunately lack the funds to retain an attorney to represent them throughout these lengthy legal processes.
 - ii. Many minority groups are especially vulnerable to falling into Heirs Property situations.
 1. Property is often most valuable source of generational wealth for families.
 2. April B. Chandler, *“The Loss In My Bones” : Protecting African American Heirs' Property With The Public Use Doctrine*”, 14 Wm. & Mary Bill Rts. J. 387
 - iii. Organizations are trying to help resolve VA. Heir Property issues
 1. Heirs' Property Retention Coalition (HPRC), was formed in the summer of 2006 as an organization of lawyers, advocates, and academics heavily involved in litigation, legislative reform, and/or scholarly study related to heirs' property, and in particular to the preservation of heirs' property within low income African-American communities.
<http://hprc.southerncoalition.org/?q=node/5>
 2. Black Family Land Trust, Inc. (BFLT), incorporated in 2004 and based in North Carolina, is one of the nation’s only conservation land trust dedicated to the preservation and protection of African-

American and other historically underserved landowners assets.
<http://www.bflt.org/>

5. Questions and Answers