

Preserving your Property: A Guide to Heirs' Property in North Carolina



Developed by the Heirs' Property Retention Coalition (HPRC)

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INTRODUCTION

At the beginning of the 20th century, African Americans owned over 15 million acres of rural land. Since that time, however, they have been losing their land rapidly and today African Americans own only about 2 million acres of farmland. One of the causes of this land loss is a form of land ownership called **heirs' property***

This guide provides information about **heirs' property** in North Carolina and dispels numerous myths associated with this risky form of land ownership. The guide also includes ways to prevent losing your land, actions to take if you are in the process of losing your land, and organizations to contact for more information.



**Definitions of bolded terms can be found in the glossary on p. 30*

WHAT IS HEIRS' PROPERTY?

Heirs' property is a term used to describe land that is owned by two or more people, where most of those people inherited, rather than purchased, their shares of the property. Each owner's share of the land is **undivided**. **Undivided** means that although an owner might own 1/3 of the property, that owner cannot point to a specific piece of the property that he or she owns.



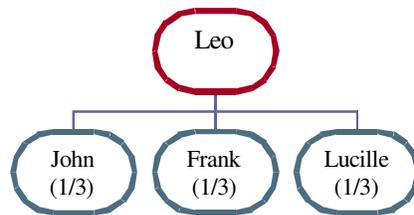
When a landowner dies without a will (called **dying intestate**) or with a will that isn't written correctly, the law says that the land is automatically divided among the surviving family members. Those family members who inherit land from the deceased landowner are called **heirs**.

If the **heirs**, who now own a portion of the land, also do not have a **will** when they die, their interests in the land will be divided among their descendants. With each passing generation, the land continues to be divided among surviving **heirs**.

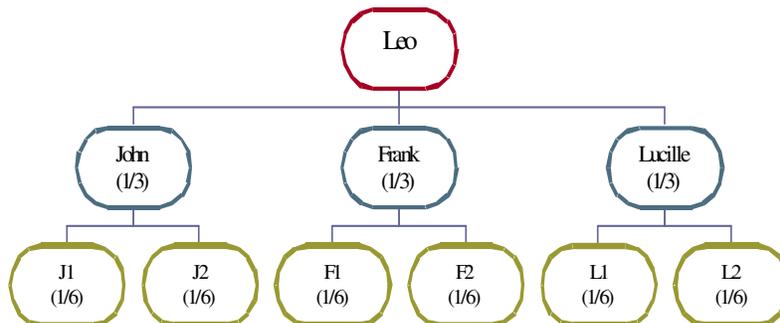
WHAT IS HEIRS' PROPERTY? (cont'd)

To show how the number of owners of a piece of land may grow, consider the following example. (For simplicity, assume that all spouses die before the land-owners die.)

Suppose that Leo bought a piece of land in 1910. He had three children: John, Frank, and Lucille. When Leo died, the land was split between the three children. Each child received $\frac{1}{3}$ of Leo's land.

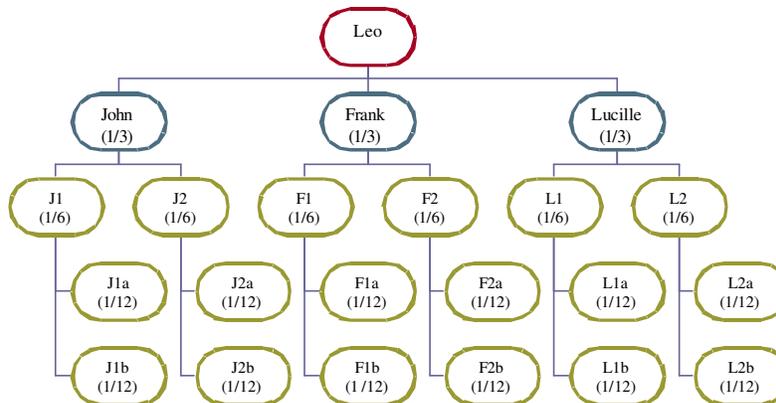


Now suppose that John, Frank, and Lucille each have two children. The family tree would now look like this:



WHAT IS HEIRS' PROPERTY? (cont'd)

If John, Frank, and Lucille do not make wills (or make wills that do not work properly) then when they die, their shares of the land will be automatically divided among their children. John's $\frac{1}{3}$ will be split between his two children so that each child inherits $\frac{1}{6}$. The same happens with both Frank and Lucille's children.



As each generation goes by and the ownership shares are divided and passed on to new family members, more and more people become owners of the same piece of land. Imagine if instead of having two children in the example above, Leo's children had four, five, or six children who then each had four, five, or six children of their own. You can see how the num-

WHAT IS HEIRS' PROPERTY? (cont'd)

ber of owners can become quite large. In fact, it is not uncommon for there to be hundreds or even thousands of owners of a single piece of land.

As the land gets passed down from one generation to the next, not only are there more and more owners, but the size of the owners' shares in the property gets smaller and smaller as they are divided among more and more people. Consequently, there are more and more owners with smaller and smaller interests who must try to agree on how the land should be used.

Intestacy

To get a basic understanding of who the heirs are in your family, it will be helpful to draw a family tree, starting with the original landowner of the property. However, North Carolina's laws of **intestacy** (the rules governing the distribution of property when someone dies without a will) can get complicated, because they take into account factors such as whether the spouse is still alive at the time the landowner dies, as well as the number of children that the landowner left behind. To get an accurate picture of exactly who owns shares in your family's property, it would be best to get legal assistance to

WHAT IS HEIRS' PROPERTY? (cont'd)

help you sort out the rules.

Rights

All heirs' property owners have a right to use and enjoy the entire land. This means that any owner can enjoy the entire property as if she were the only landowner. She can use and occupy any part of the land at any time as long as she does not prevent other owners from entering and using the property. If the owner occupies the entire property, she does not need to pay rent to the other owners. All owners have this right no matter the size of their share of the land.

In addition, all owners may sell or transfer their own interest in the land without consulting the other owners. When an owner sells his or her interest in the land to a person outside of the family, the entire property becomes vulnerable to a **partition sale** (see p. 17 for more information).

At the same time, however, a person cannot deed land that she does not have. So if an heirs' property owner writes a deed that says "I sell Blackacre to Joe," Joe does not own all of Blackacre. Instead Joe owns just that fraction of an interest that the heirs' property owner had before selling it to Joe. This can

WHAT IS HEIRS' PROPERTY? (cont'd)

have an impact if later owners try to **clear title** to their land (see p. 20 for more information).

Responsibilities

Heirs' property owners have the same responsibilities to take care of their land as any other landowner. This means that heirs' property owners must pay property taxes, keep squatters or other unwanted intruders from living on the land, and cover basic repair and upkeep.

However, the law does not divide up the responsibilities for managing the land. As a result, sometimes this task may fall on one or two owners because the other owners are unwilling, unable, or unaware of their responsibilities.

Heirs' property owners must also divide among all owners any profits gained from using the land. So, for example, if timber is cut from the land, any profits must be split among all the owners.

Dividing the profits must be made according to the percentage interest that each owner has in the land. If an owner has 1/10 of an interest and a timber sale results in a \$100 profit, that owner is entitled to \$10.

WHAT IS HEIRS' PROPERTY? (cont'd)

Even if one or two owners take greater responsibility for managing the land, the law does not allow those owners to receive a greater percentage of the profits.

Characteristics of Heirs' Property Recap:

- Owners do not own a specific part of the land but rather own an undivided fraction of the entire property;
- Owners have the right to use and occupy the entire property regardless of the size of their interest;
- Owners can do whatever they want with their own individual interests in the property without consulting the other owners;
- Owners cannot give away the property interests of other owners;
- Owners must pay property taxes, keep unwanted people off the land, and cover basic repair and up-keep;
- Owners must split any profits gained from using the land.

WHAT IS HEIRS' PROPERTY? (cont'd)

Problems with Heirs' Property Ownership:

The large pool of owners and the small percentage interest of each owner make heirs' property very difficult to hold onto and maintain. This can result in the following problems:

- It can be difficult to keep track of all of the owners;
- Owners may move far away from the property and be difficult to find;
- Owners may not know that they own any land;
- Owners may own such a small fraction of the land that they do not care what happens to the entire property and thus are willing to sell their interest to any interested buyer who may attempt to force a **partition sale** (see p. 17) of the entire property;
- Different owners may have different visions of what to do with the land, including whether to hold onto, develop, or sell the land.

The rest of this booklet details the risks associated with heirs' property as well as ways to prevent land loss and protect your land.

RISKS OF OWNING HEIRS' PROPERTY

Holding onto your land as heirs' property can be difficult and there is a great risk of losing your property. The two biggest causes of heirs' property land loss are tax foreclosures and partition sales.

Property Taxes

No matter how many people own a piece of land, the owners must pay taxes on that property. Although all of the owners should help pay the taxes, often the task falls on one person or a few people. This means that some landowners may not pay taxes or may be unaware that taxes are due for their property. The greater the number of owners, the more potential there is for confusion.

When are property taxes due?

Every year you must pay your property taxes between September 1 and January 6. If the end of the year approaches and you have not paid your property taxes yet, you should find out if the taxes have been paid. If another owner has paid all of the taxes, then you should contact that owner and reimburse her for your portion. If nobody has paid the taxes, you should figure out the amount of the tax. Then,

RISKS OF OWNING HEIRS' PROPERTY

try to get all of the owners to pay their share of the tax. As a last resort, you can cover the entire tax yourself. To avoid losing your land, the property taxes should be paid.

What if we are late paying our taxes?

If you are late paying your taxes, the government will add a late fee to the amount you owe. If you do not pay your tax by January 6 (when it is due), the government will add an additional 2% to your property tax. This means that if you owe \$1,000 in property tax and do not pay the tax in January, you will then owe \$1,020. For every month after January, the government will add an additional .75%. So if you also miss February, the amount you owe will increase to \$1,027.65.

What happens if we do not pay the taxes?

If you do not pay the property taxes the government can put a **lien** on the property and can eventually **foreclose** on the property.

A **lien** is basically a claim that the government makes on your property to cover the amount of taxes that you owe. If the tax is not paid, then the govern-

RISKS OF OWNING HEIRS' PROPERTY

ment can take your property and sell it to recover the amount of the unpaid taxes. This is called **foreclosure**.

How do I find out if there's a lien on the property?

Every March, the tax collector puts an ad in the newspaper. This ad contains the names and addresses of the properties that have liens on them as well as the amount of property taxes that those properties owe.

How do I remove a lien?

It is possible to remove the lien on the property by paying the taxes owed (including the fees for the months that the payment was late) as well as the advertising costs (for the tax collector's ad in the paper). Make sure to pay the tax collector directly and get a receipt showing you paid the amount due.

What happens if I do not remove the lien?

Thirty days after the tax lien is first advertised, the government files a certificate with the county courthouse. This certificate acts as a judgment

RISKS OF OWNING HEIRS' PROPERTY

against your property and allows the government to sell your land. The government must then wait three months after filing the certificate before it can put the property up for sale.

The government should send you a letter thirty days before the lien turns into a foreclosure. The letter will be sent to your last known address, but if the government does not know your last address it does not have to send you the letter. So if you do not receive a letter, the government can still foreclose on the land.

What can I do if my property goes into foreclosure?

If you discover that your property has gone into foreclosure but has not been sold yet, you can stop the sale. First you must pay the amount you owe and then ask the clerk of court to stop the sale.

You can also buy your land back at the auction if you are the highest bidder. If somebody else outbids you, you have ten days to make a higher bid and take your land back.

If the government buys the property, you can try to convince them to sell you the land for the amount of taxes you owe plus any additional fees or costs.

RISKS OF OWNING HEIRS' PROPERTY

Partitions-in-kind

When there are many owners of a piece of land and the owners disagree about what to do with the land, any owner may ask the court to order a **partition-in-kind**. A partition-in-kind divides the land between owners according to the fraction that each owner owns. So if an owner has 1/4 of an interest in the property, that owner should receive a section of the land that is worth 1/4 of the value of the entire property.

If one owner receives a more valuable piece of the land than his share entitles him to, the court may order him to pay some money to the owner of a less valuable piece (this is called **owelty**). Dividing the land up in this manner allows an owner to farm, build, lease, or sell a specific piece of the land.

If you disagree with the way the land is divided, you have ten days to protest by filing an **exception** with the clerk of courts. If you believe that there were mistakes in the ruling or that the division was the result of fraud, you may be able to get the division changed or thrown out. It is a good idea to contact an attorney if you find out that you are involved in a court-ordered partition action.

RISKS OF OWNING HEIRS' PROPERTY

Partition Sales

Any of the owners, no matter how small their share or how recently they acquired it, can also ask the court to order a **partition sale**. This means that the entire property is sold and the money from the sale is divided among the owners according to the fraction of the entire property that the owner owns.

For example, if land is sold for \$100,000 and there are ten owners who each own 1/10 of the land, then each owner receives \$10,000.

Courts order partition sales if physically dividing the property will cause substantial injury to any of the landowners. Substantial injury means that the land would be worth less divided into individual pieces than as a whole. So if a landowner would make less money by selling his physical slice of the property than if the entire property were sold and the landowner took his share of the overall sale price, then substantial injury has occurred.

If there is a single family home on the property, a court may order a partition sale because physically splitting up the home according to the owners' shares may not be practical.

RISKS OF OWNING HEIRS' PROPERTY

During a partition sale, the land is auctioned off and the highest bidder gets the property. It does not matter how much or how little that highest bidder bids—there is no requirement that the property be sold for fair market value. However, an owner can argue that the sale price is inadequate and unfair and the amount of the sale price will cause the owner irreparable damage.

All of the owners are responsible for all of the court costs associated with the partition sale. Those costs will be deducted from the sale amount. The costs may even include the attorney's fees of the person who forced the sale.

If you learn that your property is going to be sold by a partition sale, contact an attorney as soon as you can. It is possible to fight a partition sale by convincing the court to divide the land between the owners instead. You would need to show that the property can be split fairly between all of the owners and that splitting the land would actually be better for everybody.

Even if the land is sold, there may still be ways to save the property. You can appeal the court's decision to sell the land. Or, you can ask the court to cancel the sale if you do so within fifteen days of the date that the

RISKS OF OWNING HEIRS' PROPERTY

court orders the sale. To be successful, you must prove one of the following:

- (1) you never received notice that the land would be partitioned;
- (2) you never received notice that the land was sold; or
- (3) the amount of money that the purchaser paid for the land is inadequate and inequitable and will harm the other landowners.



PREVENTING LAND LOSS

Clearing Title

Now that you know more about the risks of owning **heirs' property** you may want to confirm who owns the property. Remember, even if you have a piece of paper that deeds land to you, you do not own that land unless the person who gave you the land actually owned it.

Clearing title is an important step to preserving and protecting heirs' property. Title is basically evidence of ownership. Having a title to a piece of property means that you have the right to own that property. Clearing title means making sure that there are no disputes over who owns the property.

The necessary first step in clearing title is to determine who has a stake in the land. Creating a family tree can help identify who those people are. Once you identify the heirs, there are different ways to reduce the number of owners:

- **Renunciation of property.** If someone has an interest in the land, she has a stake in the property. If she does not want that stake, she can give up the stake, also known as renouncing it. For example, if Casey in Pennsylvania inherits an interest in land

PREVENTING LAND LOSS

outside of Raleigh, she can say that she does not want the property, renouncing her claim. If she does this within nine months of getting the property, she may not have to pay taxes on it.

- **Quitclaim.** Quitclaim is similar to renunciation of property. With a quitclaim deed, the stake in the land is actually transferred to someone else. So if Casey in Pennsylvania inherits the same piece of land outside of Raleigh, she could transfer her stake to someone else who has a stake in the property.

There are some court processes you can use to help clarify specifically who owns the land:

- **Petition to correct an error.** If you find a mistake in the registry of deeds, you can ask that county's superior court clerk to correct the mistake. Thirty days before you petition the clerk, you would have to tell the grantor (the person who gave you the land) and anyone else who might think they own the land that you are petitioning. Anyone who disagrees with the clerk's decision can appeal to the superior court.

PREVENTING LAND LOSS

- **Petition to perfect title.** If a husband and wife own property together and either spouse dies, the personal representative may petition the court to perfect title of the land. Perfecting title establishes that the surviving spouse owns the land. This is different from quieting title (see below).
- **Petition to register land.** You can petition the court to register the title to your land. This is called a Torrens proceeding. This proceeding will eliminate any other claims that other people have to the land.
- **Action to quiet title.** In some cases, you can trace land ownership through the **grantor and grantee index** at your county's Register of Deeds. This tracing is called the **chain of title**. If there is a gap in the chain or if people disagree about who owns the property, a family can ask a judge to decide who owns the property. They would file an action to quiet title. When you file an action to quiet title, you are the plaintiff and you must prove that you own the land through:
 - (1) reliance on the Real Property Marketable Title Act, or
 - (2) using traditional methods of proving title.

PROTECTING YOUR LAND

There is a significant threat of losing your land when you hold the land as heirs' property. There are steps you can take, however, to protect your land from loss. No single solution is right for all situations. The following is a general description of different options available for heirs' property owners. It is a good idea to consult with an attorney before undertaking any of these options.

Limited Liability Company (LLC)

One method is to form a Limited Liability Company (LLC) with the other heirs' property owners. To form an LLC, the owners transfer their shares of the property to the LLC. The LLC then owns the entire piece of the land and the heirs' property owners own the LLC. The LLC is either managed by all of the heirs' property owners or the owners can elect managers to run the LLC.

There are many benefits to the LLC model, such as:

- The LLC centralizes ownership of the property. Owners can still control what happens to the land, but they can also keep track of the decisions being made for the entire property.

PROTECTING YOUR LAND

- The LLC never dies, so there is no risk of the property getting split into smaller and smaller pieces.
- Though the LLC never dies, the owners naturally do. When an owner dies, however, there is no impact on who owns the land because the LLC continues to own the property.
- The terms of the LLC agreement set out how the LLC will conduct business for the property. This includes how many votes each member is entitled to as well as how profits are distributed among members. The agreement also can state that if one landowner wishes to sell his or her share of the property, that landowner must first offer the share to the other members of the LLC (called a **right of first refusal**).
- The individual members have limited liability for the debts and losses of the LLC. This means that if the land has debts attached to it, a single owner is only responsible for her portion of that debt. For example, if the property owes \$1,000 in taxes and an owner owns 1/10 of an interest in the property, then that person is only responsible for \$100 of the overall debt.

PROTECTING YOUR LAND

Land Trusts

Heirs' property owners can also set up a family land trust. The people whose names are on the deeds donate their interests in the land in order to form a trust. They then name one person to serve as a trustee. The other family members are beneficiaries of the trust, meaning they are the ones who the trust is set up to help. The trustee may be a family member or some other person who makes decisions for the property on behalf of the other family members.

The trust holds the title to the land, so the land is no longer divided among the heirs. This prevents the land from being divided or lost through a partition sale. Even though the beneficiaries may change over time as family members die, the trust continues to control and manage the land. As a result there is no confusion over who should pay the taxes and maintain the property. The trust agreement describes how the land should be maintained and how any profits earned from the land should be distributed.

PROTECTING YOUR LAND

Tenancy-In-Common Agreements

Another way to preserve your property rights is to create a Tenancy-in-Common (TIC) Agreement. A TIC agreement sets out ownership rights and responsibilities among all of the owners. Such an agreement can give a particular owner the right to use a specific part of the land.

Common problems addressed in a TIC agreement include:

- How much of the property each owner may use;
- Who will manage the property and what that person's responsibilities are;
- How the members will handle paying the property taxes on the property;
- What happens when an owner wishes to sell his share of the property (often preventing an owner from seeking a partition sale by requiring that owner to first offer the other owners a chance to buy his share, called the **right of first refusal**).

PROTECTING YOUR LAND

Sometimes TIC agreements can be a better option for landowners, especially when the owners actually live on the land. With an LLC, tax laws often treat the LLC owners as though they do not own real estate (even though these owners own the LLC which owns the land). Since the law does not consider these people landowners, they cannot claim the same tax benefits as a person who owns and lives on the land. Such tax benefits include the resident-owner's ability to deduct mortgage interest and property tax from his or her tax return.



If you are interested in a TIC agreement, please find a lawyer to help you. The Property Preservation Task Force of the Real Property, Trust, and Estate Law Section of the American Bar Association has resources that can help your attorney further understand TIC agreements.

HEIRS' PROPERTY: TRUE OR FALSE?

Heirs' property is the most secure way to hold on to family land.

False. Heirs' property is the least secure way to hold land. Heirs' property owners often lose their land through tax foreclosures and partition sales.

An heir who lives on the land or maintains it has greater rights to the use and ownership of the land than absent heirs.

False. Heirs who do not live on the land have exactly the same rights as those heirs who live on and take care of the land.

All living heirs are entitled to an equal share of the property.

False. An heir's share depends on which family members are alive as well as the number of certain family members alive when the landowner dies. A family tree must be created to determine the size of each heir's share.

If one owner requests that the entire property be sold but the other owners want the land divided, a court will not order the sale.

False. A court will order a partition sale if physi-

HEIRS' PROPERTY: TRUE OR FALSE?

cally dividing the property would cause substantial injury to any of the landowners.

Any of the heirs' property owners can sell his interest in the land without consulting the other owners.

True. *An owner may sell his interest any time during his life (or give that interest to somebody at death) without consulting the other landowners. However, one single owner cannot sell the entire piece of property as a whole (since that one owner doesn't own the entire property).*

If an heir pays all the taxes and other assessments on the property, that heir can gain title to the entire property.

False. *Heirs who do not help pay taxes do not lose any ownership rights.*



GLOSSARY

Chain of title — the record of land ownership from owner to owner.

Clear title — a title whose ownership is not disputed.

Dying Intestate — dying without a will.

Exception — a method by which a landowner may show disagreement with a court's decision to divide the land.

Foreclosure — when the government sells property to recover unpaid property taxes.

Grantor-grantee index — the record of land title being passed from one owner to the next. This may be in book format or electronic.

Heirs — family members who is entitled to take property under the law when a landowner dies without a will.

Heirs' property — land owned by two or more individuals where a majority of those individuals inherited rather than purchased their interest in land.

Intestacy — the rules governing the distribution of property when somebody dies without a will.

Lien — a claim on the property for payment of an owed but unpaid debt.

Owelty — in a partition-in-kind where the land is not divided equally, the amount of money paid by one owner who receives a superior share to another owner who receives a lesser share.

Partition-in-kind — the forced division of property held by more than one owner so that each owner gets a piece of the land that corresponds to the fraction of the entire

GLOSSARY

property that that owner owns.

Partition sale — the forced sale of property held by more than one owner; each owner gets a proportion of the proceeds depending on the owner's share.

Renunciation — giving up your claim to a piece of land.

Right of first refusal — in an LLC, if one landowner wants to sell his or her property share, that landowner must first offer the share to the other LLC members.

Quiet title — a court action that establishes title to land by forcing someone else who claims the land to make his claim or be prevented from making it in the future.

Quitclaim deed — a kind of deed that passes an interest in land from one person to another.

Tax sale — court-ordered land sale to pay off unpaid property taxes.

Tenancy in common — a way of owning land in which the owners have undivided interests in the land and each owner has the right to use and occupy the entire property.

Undivided — although an owner might own 1/3 of a piece of property, that owner cannot point to a specific piece of the property that he/she owns.

Will — a legal device that dictates where and how the landowner's property should be distributed.

SOURCES

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1-7 WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA S. 7

FOR MORE INFORMATION/HELP**Land Loss Prevention Project**

P.O. Box 179
Durham, NC 27702
1-800-672-5839
<http://www.landloss.org>

Southern Coalition for Social Justice

115 Market Street, Suite 470
Durham, NC 27701
(919) 323-3380
www.southerncoalition.org

UNC Center for Civil Rights Black Family Land Trust

UNC School of Law
Chapel Hill, NC 27599-3380
(919) 843-7896
www.law.unc.edu/centers/civilrights

411 W. Chapel Hill St.
11th Floor, Suite 1104
Durham, NC 27701
(919) 682-5969
www.bflt.org

Land Rich

P.O. Box 46202
Madison, WI 53744
(608) 332-4423
www.landrich.org

SPECIAL THANKS TO:



This booklet is intended for informational purposes only and is not meant to serve as legal advice. For help dealing with a specific legal problem, please contact a licensed attorney.