

Heirsâ?? Property from a Title Insurance Perspective

Description

During winter, many of you might have visited Massanutten Ski Resort in the mountains of Virginia. If you havenâ??t been to Massanuttenâ??s slippery slopes, youâ??ve likely heard of it, if you live in Virginia. While skiing or snow tubing with your family and friends, despite your passion for title insurance and real estate, you likely werenâ??t wondering about the property surrounding Massanutten. Questions such as, â??Who ownâ??s the land around here?â?•, and â??How did Massanutten get so much land in the mountains to build this ski resort?â?• likely did not go through your head. (If youâ??re like me, you were probably wondering other things like, â??Why am I so cold?â?• â??How is everyone else making this look so easy?,â?• and â??Will I break my leg if I fall down again?â?•)

What you probably didnâ??t know is that basketball legend Ralph Sampsonâ??s familyâ??s property is located on the land surrounding Massanutten. Sampsonâ??s grandparents, George and Josephine Blakey, purchased a farm in McGaheysville, on property that is now surrounding Massanutten. The property was purchased roughly 80 years ago for about \$6000.

The Blakeyâ??s raised their children and their agricultural products on that soil. Many great memories with the family were made on that farm.

Upon George and Josephine Blakeyâ??s death, the land had to be divided between George and Josephineâ??s descendants. They died without a will, so their property passed through â??intestacy,â?• the process by which property passes when a decedent dies without a will. The process of dividing the property among George and Josephineâ??s descendants took a long time since they had nine sons and three daughters. Sarah Sampson, Ralph Sampsonâ??s mother, said the process took about five years.^[1]

This property, known as Blakey Farm, is a prime example of heirsâ?? property.

1. What Heirsâ?? Property Is

Heirsâ?? property refers to land that has been passed down informally from generation-to-generation, which is now owned by cousins or more remote relatives, possibly of multiple generations.

Heirâ??s property is created when land is passed down to heirs of a decedent who does not have a will. The original owner of the land could have owned the property in the early 1800s, with his or her interest passing to his or her heirsâ??, and then all subsequent owners of the property have died as well, thus leaving a web of heirsâ?? who may have an interest in the property.

• 2. The Problems Created By Heirsâ?? Property

Heirsâ?? property creates social issues and impacts disadvantaged communities the hardest. Heirsâ?? property issues disproportionately affect minority populations and rural populations. After the Civil War, African Americans in former slave states were able to acquire widespread ownership of agricultural land

for farming and waterfront property for fishing. Between 1865 and 1920, approximately 16 million acres of agricultural land was acquired by African Americans.^[2] These pieces of land would often expand over numerous acres in rural areas.

Over the last hundred years, many of these millions of acres of land that were acquired post-Civil War have been lost.^[3] While some of the acreage has been lost due to foreclosure, eminent domain, and tax sales, many properties were also lost due to partition actions.

Some Statistics

A USDA study found that Virginia has the tenth most heirship property in the country.^[4] 9.1 million acres of property in the south owned by African Americans is considered heirs' property.^[5] Many of these 9.1 million acres are considered "dead capital" – the fractionation of the properties stemming from so many outstanding interests makes it impossible to capitalize the property and sell.^[6] Therefore, the economic value of the property cannot be maximized.

Likely because of lack of educational opportunities and lack of access to lawyers following the Civil War during Reconstruction, African American communities, particularly in the South, allowed property to transfer from generation to generation by intestacy. This property, held as tenants in common by numerous heirs, was referred to in such communities as "heirs' property."

Problems can arise when property is held by so many people. Heirs' property could be owned by tens or hundreds of different owners at once, with owners having no clear knowledge of who the other property owners are.

Owners of heirs' property own the property as tenants in common. Each owner has equal rights to full use and possession of the real property and is legally responsible for taxes and other property-related expenses. Each owner also must agree to any major decisions about the real property. Each owner may also transfer his or her interest in the real property to another heir or a third party. Additionally, each owner may seek a partition of the real property.

Because each owner has the same rights in the property, regardless of his or her interest in the property, individuals living on heirs' property face an increased risk of forced sale, caused by another co-owner, and eviction. Any co-owner or purchaser of the property can petition for partition and force a buyout or sale.

Heirs cannot sell, mortgage or lease the property without agreement of all heirs. They can sell or mortgage their tenant in common interest in the property, but a sale is often at a fractional share discount and the fractional share interest is often not one a lender would accept as collateral

or that a buyer would be interested in purchasing.

3. The Provisions of the UHPA That Have Been Adopted in Virginia

In 2020, Virginia adopted provisions of the Uniform Partition of Heirs' Property Act (UPHPA) to help prevent involuntary loss of family land.

The UHPA specifically targeted a few key elements of a partition suit that had historically been unfavorable to heirs' property.

Virginia's approach to the UHPA preserves many elements of Virginia's traditional approach to partition law (which favors partitions in-kind) while adopting major provisions of the UHPA, designed to protect heirs' property. (These new provisions are integrated into Virginia's partition statute for all cases, not just cases relating to heirs' property).

The UHPA implemented measures designed to protect heirs', including:

- A requirement for an independent, court ordered appraisal of the property
- The right to first refusal to purchase the share of the petitioner
- In-kind division, if it can be done equitably (court will look to a totality of the circumstances test vs. an economics only test)
- Guidance through factors to consider when determining how the property should be sold, including sentimental attachment and ancestral value
- Open-market sales, meaning that the property is listed for sale at the appraised value before an auction

Owners of real property may assume that since they hold a larger interest in the property than anyone else, that they are entitled to make all decisions regarding the property, especially when it comes to the sale of the property. This is not true. It is important as a title insurance agent that you make sure your customer knows that all people with an interest, no matter how large or small, must be involved in the decision making relating to actions involving the property.

Any person with an interest in the property, no matter how large or small of an interest that is held, can file a partition action.

Partition Suits in Virginia

There are two main types of partitions – a partition in kind and a partition in sale. A partition in kind occurs when the property is divided, equitably and fairly, between the multiple owners of the property. A partition in sale occurs when one (or more) co-owners of a property want to sell the property, but the other co-owners do not. The co-owners who want to sell have the right to divide the property and sell their portion.

Prior to recent amendments, if the land could not be divided by partition in kind, the court would order the public or private sale of the property to an unrelated buyer, and then divide the proceeds among the parties. However, the UHPA is intended to combat these issues.

If some co-tenants want the land to be sold and some don't, under the new laws, any co-tenant who does not want the land to be sold has the right to buy out the ownership interests of those who do want the land to be sold. This is an alternative to requiring a forced sale of the whole property.

The court must appoint a disinterested appraiser to determine the fair market value of the property, unless all co-tenants agree on the property's value.

The property may be allotted to any one of the parties who will buy out the other parties' rights to ownership, either by agreement or by court order.

If multiple co-tenants want to purchase the whole property, the court must consider a number of factors in determining who will get to purchase the property.

These factors include:

- The length of time each person has owned it,
- Sentimental value attached to the property,
- Who has been paying the necessary expenses for the property, such as taxes and insurance, and
- Who currently lives on the property.

While these factors are not the only things considered, they do set forth guidelines that the court can look at when determining which co-tenant will be able to purchase the property in a situation where multiple co-tenants want to purchase the whole property.

A forced sale of the property may only take place where it is neither practical or equitable for the property to be allotted or sold to co-tenants. The adoption of the UHPHA in Virginia now favors keeping the property in the family, if the family so chooses, instead of selling it to a third party and breaking all family ties and connections to the property.

The codification of the UHPHA also included a new notice section, addressing the need to provide notice to all parties involved by posting and maintaining a posting of notice while the action was pending. This posting must be a "conspicuous" sign that is posted on the property that is the subject of the action.

The new laws provide heirs the ability to hold on to their family property for generations. The addition of these sections serves to solidify the fact that a forced sale may only take place where it is neither practical nor equitable for the property to be allotted or sold to co-tenants.

4. How Heirs' Property Can Impact Title Insurance

It is not uncommon for heirs' property that has been passed down for generations to be owned by one hundred people or more. The possibility of having outstanding, unknown interests in the property can create a problem for title insurance purposes. It is important when working with a situation involving heirs' property to ensure that all interests are known and addressed.

The first covered risk of all title insurance policies protects the policy owner as the sole owner of the property.

The policy is designed to protect the owner of the property against other interests in the property. It is because of this provision that we must be careful that we account for all fractional interests and cover them all.

When you have a situation involving heirs' property, it is crucial to determine all possible interests in the property. This can be done through conversations with your customer and their family members and reading obituaries and death notices, provided by the customer or either found online by searching the decedent's name through either a Google search or by searching the decedent's name on FindAGrave.com.

Obituaries are a useful resource for determining heirs' and outstanding interests in a property. They often name the decedent's spouse, children, and grandchildren, which, although not necessarily definitive, can be helpful in determining interests in a property.

As with all title insurance cases, a title search should also be obtained. If the property came into the family before the period of time covered in the title search, extend the search back to the date the property came into the family.

Another recommendation to make sure all possible interests are conveyed is to have a family work on making and discovering a family tree. Although this might seem like a simple task, a family tree can become quite complicated and complex with many heirs¹ involved. A family tree can help trace the chain of title and also identify heirs² at law of the estate.

Once all heirs³ are located, a list of heirs⁴ should be filed with the clerk of the circuit court in the jurisdiction where the decedent lived, as well as any jurisdiction where the decedent owned real property.^[7] An affidavit with the list of heirs⁵ could also be filed in the circuit court of any jurisdiction where the decedent owned real property in the case of intestate succession.^[8]

In a situation where identifying all the heirs⁶ is not possible, a lawyer may need to get involved and may need to bring an action to judicially identify who owns the real estate in the circuit court of the county where the property is located.

In summary, heirs⁷ property issues disproportionately impact disadvantaged communities and the UHPHA has been adopted in Virginia to help overcome some of these issues.

[1] https://www.dnronline.com/news/northam-signs-heirship-bill-on-mcgaheysville-farm/article_e618e41e-4b91-579d-9055-3f707ba566f1.html

[2] Thomas W. Mitchell, *Destabilizing the Normalization of Rural Black Loss: A Critical Role for Legal Empiricism*, 2005 Wis. L. Rev 557, 563 (2005).

[3] Mitchell, Thomas W., *Historic Partition Law Reform: A Game Changer for Heirs⁸ Property Owners* (June 12, 2019). HEIRS⁹ PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT, Cassandra Johnson Gaither, Ann Carpenter, Tracy Lloyd McCurty, and Sara Toering, eds., U.S. Department of Agriculture, e-General Technical Report, Forthcoming; Texas A&M University School of Law Legal Studies Research Paper No. 19-27. Available at SSRN: <https://ssrn.com/abstract=3403088> , pp. 1-2.

[4] 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).

[5] *Id.*

[6] *Id.*

[7] Va. Code Â§ 64.2-509.

[8] VA. Code Â§ 64.2-510.



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