



Alachua County Heirs' Property and Estate Planning Overview



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AN HEIRS' PROPERTY STORY

John Davis lived on the family farm. Davis told his children never to sell the property. It had been in the family since his grandparents were freed from slavery in the 1800s. The farm was the Davis family's legacy and all they had of value.

Davis and his grandparents, parents, and some of his brothers and sisters have died and left behind several children. Many of the children also have children. Davis didn't write a will because he was sure his three children would follow his verbal instructions and assumed the property was his because he was paying the taxes and living on the land. Unfortunately, that assumption was false. After Davis died, one of the many family members, also related to Davis' grandparents, realized she had part ownership in the property, and wanted to sell her share because she needed the money for a down payment on a house. Even though the Davis children and grandchildren disagreed, the property was sold after years in court. The proceeds were split among the many generations of heirs, including grandchildren and great-grandchildren. The farm was developed into single-family homes.

Unfortunately, family feuds and the loss of family land and generational wealth is a familiar story for many families with **Heirs' Property**. It is happening at alarming rates in the USA and in Alachua County. According to the United States Department of Agriculture (USDA), Heirs' Property issues are the leading cause of involuntary land loss for African Americans. Current estimates from the USDA are that more than 11 million acres were lost over the last hundred years. Alachua County Property Appraisers estimated there were approximately 1,700 Heirs' Properties in Alachua County in 2022.

Heirs' Property issues can devastate families, but the good news is it is avoidable! With simple estate planning, you can ensure that your family property is protected. This guide provides an overview of Heirs' Property issues and a short summary of how you can plan ahead to avoid them.

WHAT IS HEIRS' PROPERTY?

Heirs' Property is a legal term that means the property has passed to family members by inheritance but has not gone through a necessary court process called **probate** to determine who legally owns the property. When a property owner dies, and the title to the property does not already reflect the new owners through **estate planning** (see section below), or is not quickly changed through probate in court, it creates what is called a **cloudy title**. The new owners might be a person or persons designated in the original owner's will, called a **beneficiary**(s). If there is no will, known as **intestate**, the new owners will be all the legal heirs or relatives, such as a spouse, children, or grandchildren. Each will get a share, known as a **fractional share**, determined by law based on their relation to the original owner.

In all cases, the court determines legal ownership through probate. The court recognizes the will or, if there is no will, determines each heir's fractional shares and ensures the title reflects the ownership. When probate is not done quickly, usually within a year, it can become complicated. Identifying all the owners of fractional shares can be difficult as time passes. Owners can be hard to find, family records may not be clear, and/or one or more co-owners may have died, creating additional probate processes that must also be completed. After a couple of generations, there might be people holding tiny fractional shares who don't even know they have inherited anything.

The second big problem with not retitling the property quickly through probate is that people can lose track of their relatives, and/or it is very difficult to track them down. For example, if a property owner is married and has three children, and each of them is married and has three children, that is 16 potential heirs. If

each of the grandchildren had three children, and some or all of them are married, the math quickly gets complex, and there could be over 40 heirs!

No matter how many heirs are in a case, all must be identified, notified, and included in all legal matters because they are all **co-owners** or **tenants-in-common**. As co-owners, they are required to act together to manage or sell the property, including applying for property insurance or permits to improve the land.

Once the title has fractionated, it is very difficult to put the pieces back together. In the example above, even if the heirs go to court and get the legal documents to identify the potential new owners, and their names are all listed in the title records, they all have to agree on how to use the property. Each co-owner or tenant-in-common:

- Has equal rights to full use and ownership.
- Is legally responsible for taxes and other property-related expenses.
- Must agree on any major decisions about the property.
- May transfer their interest in the property to another heir or an outsider - meaning portions of the property can be transferred to a developer or other interest, not in the family.
- May seek a legal division, known as a **partition action**, of the property.

Due to these facts, families with Heirs' Property are particularly vulnerable to losing their land. Developers and speculators often look for Heirs' Property and try to purchase a share or shares from co-owners. They then push to force a sale of the property so they can own it outright. State law generally provides that any tenant-in-common can bring an action in court to sell their interest in the property. Once this action is filed, a court can order a **partition-in-kind** or **partition-by-sale**. A partition-in-kind results in a court ordering the physical division of the property proportionate to the value of each owner's share. Partition-by-sale results in the joint property being sold and the proceeds being divided among the co-owners.

The Uniform Partition of Heirs' Property Act (UPHPA) was adopted in Florida in 2020 and contains legal protections for Heirs' Property owners to address the devastating effects of partition sales.

The UPHPA defines the way partition sales occur and includes three major reforms to partition law:

1. If a co-owner, also known as a **tenant-in-common**, files in court for it to be divided, the court must provide an opportunity for other co-owners to buy out the co-owner who brought the action at fair market value.
2. If there is no buyout, then the law provides a preference for the court to order a partition-in-kind and divide the property among co-owners rather than order a sale. The law requires courts to consider factors other than money, such as the value of family heritage, the historical value of the property, and the impact of the sale on those living on the property.
3. If a partition-in-kind is not ordered, the UPHPA requires the court to sell the property at a market sale, not at an auction sale, and specifies a process for the property to be appraised and sold for its fair market value.

Even with this new law, families with Heirs' Property who do not go through probate quickly:

- Face increased risk of forced sale and eviction
- Face increased risk of pressure to sell the property, especially if any co-owner sells a fraction of the property to a person outside the family. This often happens, especially when a family member is struggling financially and is contacted by speculators or development companies to sell their portion.

- Cannot sell or mortgage property without the agreement of all co-owners
- Cannot qualify for many rehabilitation programs, emergency assistance, or secure financing for repairs or enhancements
- Cannot get a building permit
- Cannot participate, or will find it difficult to participate, in government programs offered by USDA and other agencies for assistance, home repair, and other support
- Cannot qualify for loss mitigation programs when facing foreclosure
- May have difficulty finding property insurance
- May have trouble getting communications about the property to know what needs to be done
- May have difficulty agreeing on who will maintain the property and pay taxes, which can result in codes violations and/or a forced sale
- May deal with family issues due to disagreements about the property
- Can lose family history, family wealth, community connection, and legacy, particularly if there is a court-ordered property sale.

It is important to understand that the most important thing to do when you have Heirs' Property is to act quickly to retitle the property to the living heirs through probate. The sooner this is done, the better. It will reduce the chance that co-owners will lose track of who the heirs are. It also helps ensure all co-owners are alive, can be found, and that co-owners can manage the property jointly, so it doesn't sit idle and deteriorate.

HOW DO I SOLVE HEIRS' PROPERTY ISSUES?

If you believe you might be an heir of a family member's property, you have the right to go to court and seek to have the property retitled in the name of the new living owners. As mentioned before, this process is called probate and is handled by a special judge in a special court. The judge's role is to ensure the property is going to the lawful owners. If the property owner left a will, it is important to determine that the will was signed by the owner and was not the product of undue influence, meaning the owner was forced to create the will. If the owner did not leave a will, otherwise known as intestate, then the court must ensure that all the legal heirs are identified, located, notified, and understand their rights, before any property can be distributed to them. Even for a relatively simple estate, a lawyer is usually needed to ensure that all the property forms are filed, any debts are paid, the title documents are recorded, and all property is distributed to the new owners without issues.

The probate judge understands that sometimes an heir might not be able to locate all other potential heirs with absolute certainty. Still, there must be a serious attempt to find the potential heirs. To prove the identity of the heirs, a notarized document called an ***Heirship Affidavit*** might have to be filed with the court. The family will have to demonstrate it did an in-depth search for all the heirs. ***Families should start by creating a family tree and collecting all available information regarding the property and its owners.*** Family bibles or other papers where handwritten records of births and deaths have been kept, birth certificates, and death certificates are all important.

Legal counsel from an attorney with probate experience is advised to assist with the Heirs' Property process because it can be complex and time-consuming. A lawyer can review the family documents, check public records, discuss issues regarding the property, and recommend the next steps for how to proceed with the court based on your situation. These lawyers should provide estimated costs for each stage of the process prior to doing work and provide advice on what the family can do to prevent further Heirs' Property issues. For those who qualify, free or reduced-cost legal services may be available to

assist. Three Rivers Legal Counsel offers this service in North Central Florida. The Self-Help Center in the Eighth Judicial Circuit Civil Courthouse also has limited support and resources to assist those without legal counsel.

HOW DO I AVOID HEIRS' PROPERTY ISSUES?

Estate planning is a great way to control your assets and transfer them quickly, easily, and with less cost to your heirs. In addition to limiting or eliminating the court-managed probate process, which can be long and expensive, an estate plan allows you to accomplish your goals for your property in a way that best suits your family's needs. It gives you a tool to plan for other contingencies, such as injury or incapacity, allows you to stipulate how the assets will be used, and set an age for when they can be accessed. The estate planning process also gives you the opportunity to have conversations with your family about how your assets will be managed and distributed. This can help to avoid disputes and confusion for your heirs.

Wills are one tool for dealing with who takes your property after death. A will allows you to carefully spell out who gets what and why. Consider this: if you die intestate, all your heirs will be entitled to fractional shares of your property. If you have no spouse but three children, your property will be divided into three equal shares for each of your children. This doesn't mean that one child gets the car, another gets the furniture, and a third gets the bank account. Instead, they all get three equal shares of each item and take a fractional one-third share of everything. But how do you divide a sofa into three shares? You can't. Usually, the children will decide among themselves that one will take the car, another the furniture, etc. This is not easy with items of large value, such as land or a house. A will is an excellent way for you to decide who gets what. A very important factor to consider is giving different people entire property items. If you want to treat all the kids equally, you could instruct in your will that everything is to be sold and the proceeds split evenly. Since that is usually not the best option, it makes more sense to give different people different things in their entirety based on who might need them, value them, care for them, or benefit from them the most. A will is a great way to avoid the Heirs' Property problem because it allows you to designate individual people to take specified property. Even if you have a will, your family members will still have to go through probate when you die so the court can verify the will and the rightful heirs.

Most people own just one house. Leaving that house to all the children, or not leaving it to anyone specifically, creates Heirs' Property, and determining who will own the house or if the house must be sold will be costly and difficult. However, when a will is present, most families honor the owner's desires concerning their property.

Under Florida law, a will:

- Must be in writing, preferably typed, to ensure it is legible. Florida probate courts don't allow oral declarations or handwritten instructions from a testator without witness signatures.
- Must be made by a competent person. Florida law won't validate a will if it's created by someone who is not of sound mind or is under age 18 (unless they're an emancipated minor).
- Must be signed by the owner of the will or **testator**. A testator can make any mark, symbol, letter, or initials, as long as they intend the mark to serve as their signature.
- Must be signed by, and in the presence of, at least two witnesses; the witnesses must sign the will in the presence of the testator and in the presence of one another; any competent person can serve as a witness.

It is also recommended that a will:

- Appoint a trusted person, known as a **personal representative**, to handle the estate, collect and pay property tax, pay debts, and manage the distribution of property according to the instructions in the will
- List all potential heirs, even those that may not be receiving any property
- Provide for a spouse by giving the spouse at least 30% of your property
- Provide for any children and carefully designate which property they will receive. You don't have to leave anything to your children, but you must leave property to your spouse.
- Make any provisions for the care of minor children.

A **trust** is another tool for managing property transfer from generation to generation. Trusts have been around for quite a long time. Trusts are contracts in which you turn over ownership of your property to a person(s) you trust, known as a trustee, with instructions as to how they are to manage and control your property for the named beneficiaries. During life, the property owner may serve as the trustee, but upon death, another trustee(s) will take over and manage the property, pass it to the beneficiaries, hold it in trust if the beneficiaries are minors, or otherwise carry out the instructions of the trust. It is highly recommended for more complex estates, such as those with blended families, families with a lot of property, families where some of the beneficiaries may have special needs, or simply when families want to avoid the court-supervised probate process. Trusts cost a bit more to establish, almost always require a lawyer's help and require that you make the appropriate changes to your title documents.

A particularly useful estate-planning document is a **Ladybird Deed**, also called an **Enhanced Life-Estate Deed**. If you only have a house that would require court-supervised probate, you can execute a Ladybird Deed that designates one or two beneficiaries to take the house at your death, just like you do with life insurance or a bank account. You can also add alternate beneficiaries in case the main one(s) die before you do. Ladybird Deeds are relatively simple to draft, but using a lawyer is still highly advised as there is very specific legal language you will need to include for it to work effectively.

There is no one-size-fits-all estate plan, but most estate-planning attorneys can provide you with the most appropriate options and documents to avoid Heirs' Property issues. Estate planning can be a simple or complex process depending upon the size and composition of your estate, your family situation, and your business situation. No two families have precisely the same set of circumstances. **Investing in estate planning upfront is often far less costly and disruptive than handling these issues after death.**

Whatever you do regarding estate planning, remember that planning is the key to protecting your family from dealing with Heirs' Property, and it will pay off by saving time, money, and likely a lot of strife for your loved ones. Remember, seeking legal counsel from an attorney specializing in probate and estate planning is always advised.

HEIRS' PROPERTY AND ESTATE PLANNING RESOURCES

While probate issues such as Heirs' Property and estate planning are complex topics with many details to consider, there is help available. Here are a few resources to get you started.

- Three Rivers Legal Services: <https://www.trls.org/>
- City of Gainesville Community Redevelopment Area Heirs' Property Program: <https://gainesvillecra.com/#>
- Eighth Judicial Circuit Self Help Center: <https://circuit8.org/self-help/>
- Alachua County Clerk of Court Probate Page: <https://alachuacounty.us/Depts/Clerk/Pages/Probate.aspx>
- Alachua County Property Appraiser: <https://www.acpafl.org/>
- Alachua County Tax Collector: <https://www.alachuacollector.com/>
- Vermont Law School Center for Agriculture and Food Systems Farmland Access Legal Toolkit: <https://farmlandaccess.org/>
- FAMU Community and Resource Development: <https://cafs.famu.edu/outreach/crd.php#>
- USDA Southern Research Station: <https://www.srs.fs.usda.gov/pubs/58543>
- American Bar Association Estate Planning: https://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/
- Department of Interior Estate Planning and Native Americans: <https://www.doi.gov/ost/planning-future>
- Us Government Genealogy and Family History: <https://www.usa.gov/genealogy>

Please note all the information in this document is for informational purposes only. It is not legal advice, and it is recommended that you consult an attorney before making any decisions about your property.