

A Lawyer's Suggestions for Heirs' Property Owners

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Passing family land from one generation to the next is a source of pride and a huge source of security for families. But holding on to family land owned as heirs' property can be very challenging. It can be very difficult to find a clear path to ownership security for land held in this way. However, there are many reasons to act, and numerous things to be done to keep family land owned as heirs' property secure.

Planning for Intergenerational Ownership of Your Family Land

Here are a few reasons to act now to avoid loss or physical division of heirs' property:

- Family-owned land is intergenerational wealth regardless of the size of the property.
- Taking action to address challenges now helps increase the size of that intergenerational wealth, avoiding additional expenses for later generations.
- Dealing with the challenges now can lead to income generation from rent, hunting licenses, conservation, timber, or food production.
- If the land is used for agriculture, including forestry, there may be cost share and other US Department of Agriculture (USDA) programs available, and other possible technical assistance/financial help from various state and county agencies.
- Agricultural landowners may qualify for tax assessment of their land at a lower rate.
- You can make your heirs and ancestors proud.

Be Proactive to Avoid Creating Heirs' Property

It's important to engage in estate planning so that your action (or inaction) does not create or further complicate heirs' property.

Wills. Estate plans should at least include a will that specifies who inherits your property, including real estate, and the will should include language to avoid creating heirs' property.

Do not:

- write your will yourself, use a form will, or get advice from an attorney who does not specialize in estate planning
- leave a piece of real estate to more than one person
- bequest your real estate and your other assets lumped together
- bypass writing a will because you do not own real estate or you don't believe the value is significant
- leave your share of heirs' property to multiple people who will ultimately have even smaller shares

Do:

- work with an estate planning attorney who is able to assist you with your unique needs and goals
- be thoughtful about who receives your real estate, and leave specific pieces of real estate to individual people
- ask your estate planning attorney to craft language in your will to avoid creating heirs' property

Trusts. Your estate plan could also include a trust, either as part of your will or separately. A trust is an entity created to own assets, including real estate. You should consider whether a trust will help you avoid creating heirs' property. You could consider transferring ownership of your land into a trust now. For example, let's say you own land in your name only. You can transfer its ownership to a trust, appoint yourself as the trustee to manage the trust, and then appoint yourself as the beneficiary, the person who benefits from the trust. In the trust instrument, you would also appoint successor trustees and beneficiaries to plan for when you pass away. Ownership of the land will remain in the trust and no heirs' property is created. (The trust will need to be created by an attorney who specializes in estate planning.)

LLCs. You could also consider transferring ownership of your land into a business entity, such as a limited liability company (LLC). Like a trust, you would transfer ownership of the land to the LLC, and then remain the member (owner) and the manager. You can add others if you wish, and vary their responsibilities and how they benefit from the LLC. Both the trust option and the LLC option give you the ability to implement an ownership structure now that continues for generations going forward. They can be tailored to your goals and circumstances. Of course, you should work with an attorney to make sure you get the benefit of a trust or LLC to insure that you don't create the heirs' property challenges you are trying to avoid.

Talk to your Family

Whatever your plan of action, communication and transparency with your loved ones is also important. Sharing your plans and even including your family in some of the decision-making can optimize the chances that your plan for your land will be accepted and embraced. In communicating with your family, you should find out who is not interested in being connected to your land now or in the future. That may be difficult information to accept, but sharing a common understanding with your family about the land is important to its future.

Strategies for Addressing the Legal Challenges of Heirs' Property Ownership

If you own heirs' property, you need a plan for your own share in the family land or else you can add to the challenges your family experiences. This is the first step in addressing the legal challenges of heirs' property ownership.

Goals. Become clear on your individual goals with your family-owned land. Do you want to continue to be an owner? Do you want to make sure the land stays in the family? Do you plan to improve the economic value of the land through income activity or by adding improvements?

Having clear goals for addressing the challenges involved in owning land as heirs' property is important to the development of a strategy that leads to family agreement and, perhaps, resolution of the issues faced by heirs' property owners. The goals can vary depending on your circumstances. They can include figuring out how to get qualified for USDA and other programs for agriculture and conservation, ensuring the family always has a place to live, or simply taking care of the same land your ancestors cared for. Having clear goals allows you to be thoughtful about your strategy. It's also important to know the goals of the other owners. This is important because they may not be the same and may even conflict. Other owners may have no interest in the property and may even not want the burden of ownership.

Limitations. You should also understand your limits. How much time and money are you willing to invest? What about emotional limits? Family dynamics can be complicated, especially when it comes to shared assets. Are there family members with whom you cannot work well or don't want to engage? Knowing your goals and limitations is important and should help inform any strategy you pursue. It can be useful to check back on them if things get difficult and you need to decide whether to stick with the strategy you've developed.

Steps towards single-entity ownership. If your family decides to pursue ownership of the land under a single entity (like a trust or an LLC, discussed above), there are four key phases in this process that should be followed to minimize expenses, manage emotions, and give you the ability to change direction if necessary.

1. *Develop a family tree from the first property owners to the youngest generation in the family.* For most heirs' property, this tree starts with the deed showing ownership of the property coming into the family. One important key to a good tree is having the date and place of death for every deceased person in the tree, as well as their surviving immediate family members. You'll want to gather as much information as you can for each heir listed, including marriage and divorce dates and children, including legally adopted children.

2. *Conduct a title search to confirm the current owners of the family land.* A title search is the process of retrieving the necessary documentation and information to determine the current ownership interests in a piece of land. Although a non-lawyer (a title abstractor) can perform the search, it is crucial to have an attorney provide a title opinion confirming the current owners of the property, since all current owners must participate in decision-making regarding the land.
3. *Discuss and agree on transferring ownership of the heirs' property to an entity.* Full participation and agreement of all the owners of the property is ideal and desired but not always possible. It may be that some owners want to end any involvement with the family land, including ownership, and are willing to sell their ownership interests to other family members. You may also have owners who are not participating in the discussion due to personal limitations (age, health, etc.) or conflict. Still, it is worthwhile to transfer as much of the property ownership as possible into the entity even if everyone doesn't agree, because there is less chance that in a partition action, a court would order a sale of the property. It can be useful to work with a facilitator or mediator to have these discussions. (See "Addressing conflict," below.)
4. *Transfer the property into the entity.* This step, like the title search, requires a lawyer familiar with real estate law, business law, and estate planning. This final step can go badly if you rely on someone who is not skilled in the legal aspects of heirs' property, as there are many ways to recreate the current situation or make it worse. Prior to transfer of the property to the entity, the family members must decide on the type of entity, how it is managed and financed, and legally create the entity.

Addressing conflict. No heirs' property ownership is without conflict, or at a minimum, difficult conversations. Family history and relationship dynamics on their own can make it hard. Add something as important as real estate into the family discussion and decision-making can be very challenging. Therefore, it is important to consider resources that can help conversations be productive and disputes be resolved, such as facilitators, mediators, and even arbitrators.

Facilitators are neutral individuals whose job it is to help a group engage in dialogue, ensuring that all participants can share equally and that the group's dialogue leads to a decision or resolution. Even where there is no conflict, having a skilled, neutral person outside of the family be tasked with helping family members have conversations about the property, ensuring that co-owners feel empowered to speak, and keeping the group focused on the task at hand can help tremendously.

Similar to a facilitator, a *mediator* is a neutral third party who facilitates conversation aimed at resolution of a dispute. Like facilitators, they do not make any decisions; rather they facilitate the conversation and make sure all parties are heard and understood. They can identify issues and interests and help guide the parties to a resolution.

Using a facilitator or mediator can be advantageous for numerous reasons. The burden of making sure the conversation happens is placed on the neutral third party. It also is typically more affordable than either inaction, which leads to its own challenges, or going to court. You can choose a professional who has deep knowledge about heirs' property, but this is not necessary since the person is not tasked with making a decision, but rather helping family members come to agreement.

Arbitration, like mediation, is a dispute resolution process. The arbitrator is neutral like a facilitator or mediator, but they do make a decision. Their role is similar to a judge. However, unlike a judge, the parties choose the arbitrator, which allows them to choose someone with expertise in heirs' property, along with estate planning, real estate and business law. Parties present their "case," similar to court litigation, and then the arbitrator makes a decision, ruling for one party or the other.

For someone not familiar with facilitation, mediation, or arbitration, it can be difficult to find resources for these services. You may have to look outside your geographic area and, if so, technology can aid your search and might be used for whichever process you engage in. The USDA runs an agricultural mediation program in most states, which may be a good place to start.

Micromovements

Family land matters are complex and can be overwhelming. Here are some suggestions for small steps you can take now that will have a big impact on your family land.

- Create or update your family tree in order to prepare for creating an agreement between all the heirs and clearing title to the land. This will save a lot of money if you do decide to get legal assistance, as attorneys rely heavily on the family tree to confirm the current legal owners of the property and otherwise would have to create it themselves. The family tree should trace all family members from those on the deed to the land to the most recent generation. Include the date of death and county where each person died. Research genealogists can be very helpful here.
- Make an asset map (visual inventory) of the resources available for your family land. This can include help to make the family tree, local attorneys or nonprofits that work on heirs' property issues, local USDA offices (for example, Natural Resources Conservation Service, Farm Service Agency), and others.
- Make a decision about your own share. What is the best way to keep the land in the family, without adding more heirs and increasing the difficulties associated with heirs' property? Think about how best to stabilize ownership of the land.

Created by: Center for Agriculture and Food Systems, Vermont Law and Graduate School. January 2024.

Source: Farmland Access Legal Toolkit, farmlandaccess.org/heirs-property
The Farmland Access Legal Toolkit is funded by a grant from the National Agricultural Library, Agricultural Research Service, U.S. Department of Agriculture.