

HEIRS' PROPERTY:

Understanding the Legal Issues in *Virginia*



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Introduction

The purpose of this factsheet is to prevent the loss of land owned as heirs' property in Virginia. It examines state laws that are relevant to heirs' property owners in Virginia, and outlines steps they can take to resolve property issues before seeing an attorney.

It also explains relevant legal issues, including:

- 1. how to identify the legal heirs of the original ancestor who owned the land,**
- 2. state partition law,**
- 3. state law that permits the sale of land due to unpaid property taxes, and**
- 4. state law addressing adverse possession and condemnation**
(these terms are defined in the glossary, below).

This resource may be useful to professionals assisting heirs' property owners, such as lawyers, nonprofit and community development advocates, and cooperative extension agents.



For a glossary of legal terms used in this factsheet, refer to page 11.

What is Heirs' Property?

Heirs' property (sometimes known as family land) is property that has been transferred to multiple family members by inheritance, usually without a will. Typically, it is created when land is transferred from someone who dies without a will to that person's spouse, children, or other heirs who have a legal right to the property. However, even if the person who died had a will, they may still create heirs' property if they leave land to multiple heirs without specifying which heirs get which section of the land.

When heirs' property is created, the heirs own all the property together (in legal terms, they own the property as "tenants in common"). In other words, they each own an interest in the undivided land rather than each heir owning an individual lot or piece of the land. In addition, unless the heirs go to the appropriate administrative agency or court in their jurisdiction and have the title or deed to the land changed to reflect their ownership, the land will remain in the name of the person who died.

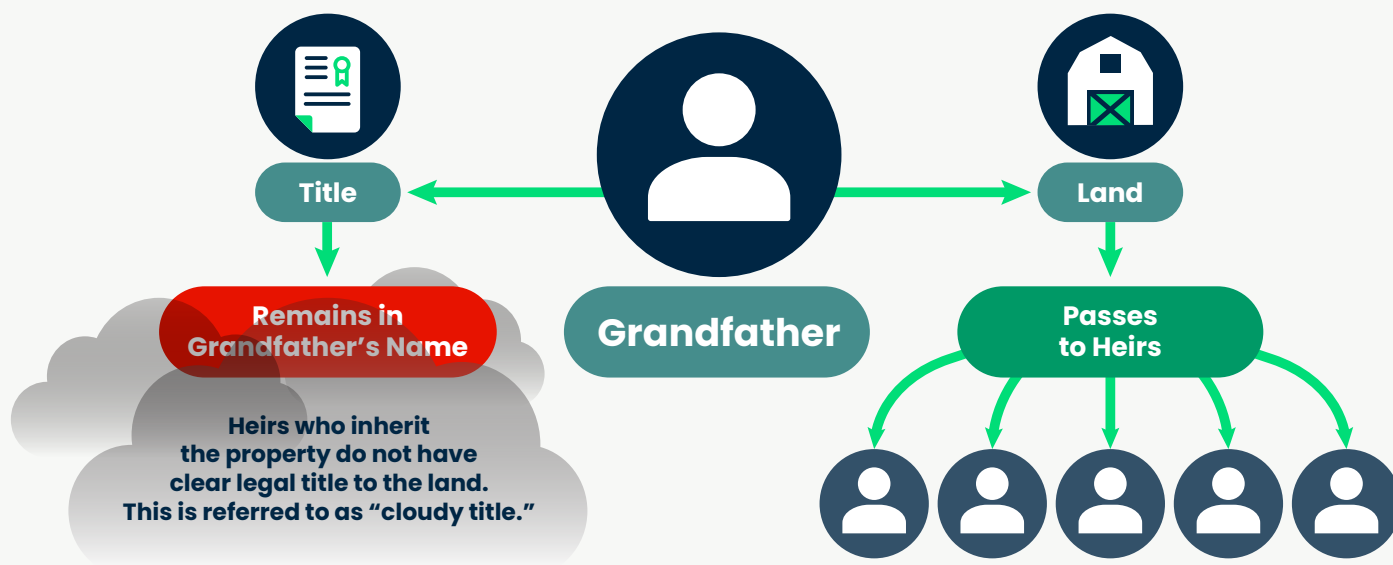
For the heirs, owning property as tenants in common without a clear title can lead to many challenges. Because it is difficult for heirs to prove ownership, they may be unable to access loans and mortgages, apply for USDA grants or loans, and build wealth from the land by engaging in commercial activity, such as selling timber or other resources—all of which require proof of ownership. It also leaves the property vulnerable to being acquired by real estate developers and unscrupulous actors.



Learn More Using the Farmland Access Legal Toolkit

For a more comprehensive overview of heirs' property issues, visit farmlandaccess.org/heirs-property.

Find additional advice for heirs' property owners, including how to proactively avoid and address legal challenges, at farmlandaccess.org/suggestions-for-heirs-property-owners.



Identifying Heirs

To resolve heirs' property issues, an important first step is tracing the ownership of the land from the original titled owner to the current owners. Many practitioners encourage heirs' property owners to build a family tree identifying all the heirs, deceased and living. Specifically, heirs' property owners will want to collect:

1. **the heirs' birth and death dates,**
2. **county of death,**
3. **proof of whether they died with a will, and**
4. **any current contact information for living heirs.**

The goal is to gather information about anyone who may have at any time held any interest in the land, so it is important to identify all the heirs, all of whom might be entitled to an interest in the land.

When a person dies with a valid will, they die "testate" and their will determines who inherits their property.¹ When a person dies without a will, they die "intestate" and state law governing intestate succession determines who inherits that person's real estate and other assets.² Who inherits a person's land by intestate succession varies depending on which family members survive the decedent.

There are generally a number of types of living heirs entitled to inherit from a decedent, including: the spouse of the decedent; biological and adopted children, and their descendants; parents of the decedent; siblings of the decedent, and if they have died, their descendants (the decedent's nieces and nephews); and grandparents and cousins.

Finding the Family (Genealogy) and Land Records

Resources to help identify and locate heirs and build the family tree include genealogists and family history sites such as [ancestry.com](https://www.ancestry.com), [myheritage.com](https://www.myheritage.com), and [familysearch.org](https://www.familysearch.org). Family bibles can be a good source of information and can sometimes be used to show heirs. Local libraries can also be a great resource for genealogical records and research help (see contact information below). Individuals can also visit the following resources:

Library of Virginia (LVA)

800 East Broad Street
Richmond, Virginia 23219-8000
Phone: (804) 692-3500

LVA Visitor's Guide

lva.virginia.gov/about/visit.asp

LVA Research Guides and Indexes

lva-virginia.libguides.com

LVA Genealogy Workshops

lva.virginia.gov/public/genealogy_workshops

The Virginia Museum of History and Culture (VMHC)

428 N Arthur Ashe Boulevard
Richmond, Virginia 23220
Phone: (804) 340-1800 or (800) 358-8701
Email: Info@VirginiaHistory.org

VMHC Recommended Online Resources

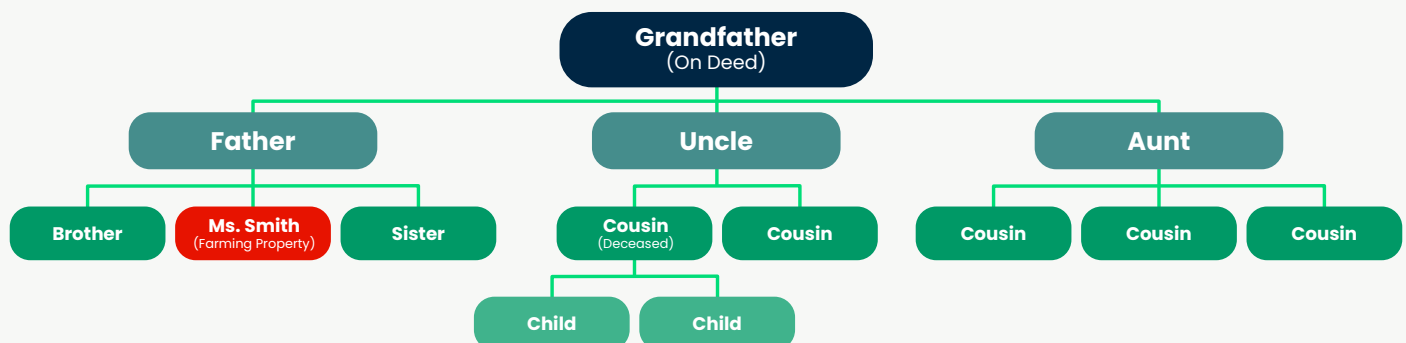
virginiahistory.org/research/research-resources/recommended-online-resources

VMHC "Searching for People"

virginiahistory.org/research/research-resources/searching-people

For land records, individuals can go to the circuit court in their district to review any judgment or probate records regarding the land.³

An example of a simple family tree for Ms. Smith



Intestate Succession in Virginia⁴

The following chart describes some of the many possibilities under Virginia intestate succession laws. If there are multiple generations involved, it will likely be important to work with an attorney to successfully identify all the current owners.

If a person dies with:	Here's who inherits:
children but no spouse	the children inherit everything equally
a spouse but no descendants or parents	the spouse inherits everything
a spouse and descendants, all of whom are descendants of the decedent and the spouse	the spouse inherits everything
a spouse and descendants, at least one of whom who is not a child of the surviving spouse	the spouse inherits one-third of the person's estate, and the remaining two-thirds is shared between the children of the decedent (whether from the surviving spouse or not)
parents but no spouse or descendants	the parents inherit everything equally
siblings but no spouse, descendants, or parents	the siblings or their descendants inherit everything equally
children born outside of marriage ⁵	<p>children born outside of marriage inherit from a man if paternity is established during the man's life or shortly after his death, or if an attempted marriage between the child's mother and the man was prohibited by law, nullified or voided, or dissolved by a court</p> <p>children are presumed to belong to their biological mother, unless the child is legally adopted by another family</p>

Understanding Partition Law

Heirs who inherit land intestate (without a will) own it as tenants in common.⁶ Tenants in common each own an *undivided* interest in the whole parcel of land, which means that none of the heirs can claim any specific piece of land. As tenants in common, each heir has equal rights to use and occupy the land.

Heirs' property owners are especially vulnerable to losing their land because they are subject to partition actions to physically divide or sell the land.

As co-owners of the property, any of the tenants in common can bring an action in court asking for partition of the property.

There are two ways a court can partition or divide the property: partition in kind or partition by sale. If a court orders partition in kind, the land must be physically divided equitably and proportionate to the fractional interest and value of each co-owner's share. If the court orders partition by sale, it triggers a process that requires the property to be sold. Virginia law allows for a third kind of partition called partition by allotment, which is discussed below.

Historically, when a court ordered partition by sale, the property was sold to the public. This typically happened by a mandatory sale at an auction. Often, property owners lost their family legacies and generally received a small percentage of what the land was worth—far below the property's fair market value.⁷ This has resulted in a tremendous amount of land loss among African Americans in the United States. Since 2010, there have been efforts to pass legislation at the state level to ensure that heirs' property owners have certain due process rights, or fair treatment under the law in accordance with established rules and requirements. This includes protections to ensure that property sold in a partition action is sold for fair market

value. That legislation, drafted by the Uniform Law Commission, is called the **Uniform Partition of Heirs Property Act** (UPHPA). It provides a more equitable system for partition actions of heirs' property.

Virginia's partition laws were amended in 2020 to include key provisions of the Uniform Partition of Heirs Property Act (UPHPA).⁸ In the states that have adopted it, the UPHPA changes the way partition sales occur. Virginia's legislature adopted the UPHPA with some modifications to more effectively protect property ownership:

- 1. First, the court must determine whether the property can be partitioned in kind.⁹ Virginia law recognizes a default preference for partition in kind and provides a set of factors for the court to consider when determining how to divide the property. These factors account for: sentimental value, family legacy, evidence of length of ownership, evidence of continued use of the property, assumed responsibility for upkeep, payment of property taxes, and whether any of the parties to the action are related.**
- 2. If the property cannot be partitioned in kind, the court must provide an opportunity for partition by allotment. If allotment is not practicable, then the court will order a sale of the property. A key difference between the UPHPA as enacted in most other states and the law as it exists in Virginia is that the person who brought the partition action can buy out the other co-owner's shares through allotment. Allotment means that *any* of the co-owners of the property can buy out any of the other co-owners at a price set by the court. Generally, this price is the fair market value as determined by an independent appraiser or a price agreed to by the parties. If more than one person wants the property to be allotted to them, the court must consider the same factors as it does when considering partition in kind to decide who should be permitted to purchase the other co-owner's shares. The court will determine who can participate in the allotment proceeding and give those parties at least 60 days to pay the amount due to the court.¹⁰**

3. If partition in kind and allotment are not practicable, the court will order the sale of the property at fair market value. The law details a process for the property to be fairly appraised and sold, with proceeds distributed to all co-owners based on their respective shares.

Court actions for partition should be avoided if possible. If a physical partition of the land is desired by all co-owners, they should attempt to divide the property voluntarily by agreement with the help of a surveyor and real

estate attorney. If an heir receives a notice of a partition action, they should immediately consult an attorney to protect the heirs' rights in the land. Historically, partition sales have been devastating to African American landowners, resulting in forced sales of millions of acres of property and the loss of a tremendous amount of land, wealth, and family legacy.

Avoiding Tax Sales

It is very important for heirs' property owners to make sure property taxes are paid in full because tax sales can lead to loss of land. Property becomes subject to a tax sale when a landowner fails to pay annual property taxes on time. The overdue amount generally becomes a tax lien, which may cause the local government authority to begin a process to sell the land. Heirs' property owners should not wait to clear title to the property (see definition in the glossary) before paying the property taxes.

Note that in many families, one or more of the heirs pays the total amount of the annual property taxes due, including the portions owed by other co-owners. Ideally, the other co-owners reimburse the family members who cover their share. If they do not, the co-owner who paid the taxes can get reimbursed through voluntary repayment, distribution of income received from the property, or sale proceeds if the land is sold. Importantly, payment of taxes does not increase a co-owner's ownership interest. Rather, it creates a claim for reimbursement from any co-owner who is not paying the taxes. Anyone who pays taxes on the property should keep tax bills and receipts so that they can request or claim reimbursement.

How Tax Sales Work in Virginia

Virginia Code Section 58.1-3965 lays out the procedures for the sale of land to satisfy delinquent taxes.

Specifically, officers in the locality charged with collecting taxes must send the property owner notice at least 30 days prior to initiating any judicial proceeding for a tax sale of the property. This notice must give the taxpayer the option of asking the tax collector to enter into a payment agreement over a period not to exceed 60 months. Notice must also be published in a local newspaper.¹²

Virginia law gives some protections to heirs' property owners in the event of a court-ordered tax sale. At any time before the sale, owners listed in the tax records must be given the option to enter into a payment plan to pay off delinquent taxes over a period no longer than 72 months. Once the tax sale action commences, heirs' property owners, including those not listed on the property records, can suspend the sale by giving notice asserting their ownership rights to the officer charged with collecting taxes. The officer must alert the court. If the court confirms these ownership rights, then the individual is named as a party in the court action for the tax sale, and they have 30 days to either redeem the property (see below) or enter into a payment plan to pay off the delinquent taxes over a period no longer than 72 months.

In Virginia owners may redeem (get back) their property prior to the date set for the judicial sale of property by paying all taxes, penalties, and interest due plus all court costs, including a reasonable attorney's fee set by the court.¹³ If the owner fails to redeem before the date of sale, the taxing authority's attorney or a special commissioner puts the property up for sale. The successful bidder on the property obtains title to the property and owns it from that point forward.¹⁴ If the property sells for an amount greater than the taxes due plus the costs incurred by the tax authority in undergoing the proceeding, the surplus is paid to the property's original owner.¹⁵



Potential Tax Savings for Agricultural Land

Heirs' property owners of land devoted to agricultural, horticultural, forest, or open-space use in Virginia should explore available options in the locality where the land is located to have it taxed at its current use value, instead of its market value, which may result in financial advantage in any county, city, or town that has adopted a land ordinance allowing this type of tax assessment.¹¹ Savings over time can be significant for heirs' property owners because an appraisal based on use value is usually much less than an appraisal based on fair market value.

Avoiding Adverse Possession and Condemnation

Heirs' property owners must also manage and monitor their land to ensure the property is not taken through adverse possession or eminent domain.

Adverse Possession

Adverse possession allows a trespasser to become the owner of land they do not own if they meet certain criteria and bring an action in court asking a judge to declare them the owner. Failure to monitor and manage heirs' property can invite neighbors and others to develop a strong case for seeking ownership of land in this way. To avoid this, "No Trespassing" signs should be posted, and if a family member cannot check the land periodically, a manager should be hired to do that.

A person can gain full ownership of land they do not own by occupying the land and meeting the following requirements.

The occupation of the land must be:

- actual (living or working on the land);
- hostile (without permission);
- open, notorious, and visible (for example, building on a piece of property);
- continuous and uninterrupted for 15 years;
- exclusive (the person must possess the land for themselves); and
- under claim of right (meaning the occupier is acting like the owner of the land).¹⁶

Adverse Possession Claims by Co-owners

In Virginia, a person who owns property as a tenant in common (including an heirs' property owner) can bring a claim of right by adverse possession against their co-tenants. To be successful, the person claiming right to the land through adverse possession must show that they "ousted" the other co-tenants from the property to gain full and exclusive possession of the premises. Ouster generally means excluding or removing someone from accessing or using property.

Like in most jurisdictions, in Virginia, all co-owners have the right to occupy property they own. This creates a legal presumption that the possession of property by one co-owner is the same as the possession of property by all the co-owners. This presumption can make it difficult to prove right by adverse possession against a co-owner, because a person claiming adverse possession must demonstrate that their possession of the property is hostile¹⁷ to possession by the true owner. In the case of heirs' property, this would include all the co-owners.

To prove ouster in Virginia, the co-owner must show they meet all the elements to make a claim of adverse possession (set forth above). In addition, they must show they "ousted" all the other co-owners by proving their co-owners were notified that they claimed sole ownership of the property.¹⁸ Selling the property can meet Virginia law's criteria for proving ouster. Because this activity is visible and recorded with the local office of land records, it can show the co-owner is acting as if they are the *sole* owner. This may be sufficient to demonstrate the other co-owners were notified of the claim.¹⁹

Condemnation and Eminent Domain

Condemnation occurs when the local, state, or federal government forces a landowner to sell their land to the government. State and federal governments, local city and county governments, and private businesses can take private land under “eminent domain” laws if they can show that the land is necessary for a public use or purpose.

The Constitution of the State of Virginia provides that private property shall not be taken without just compensation, and only for public use.²⁰ Public use is defined in Virginia laws.²¹



Agricultural Mediation Services

Family disputes are unfortunately common with heirs’ property. There are often multiple generations of heirs who must come to an agreement, which can be difficult. The United States Department of Agriculture’s Farm Service Agency (FSA) runs an Agricultural Mediation Program which can be used by heirs’ property owners to mediate family disputes. The FSA provides funding to relevant state agencies to support mediation between individuals involved in many kinds of disputes related to agricultural issues. These include USDA decisions on loans, conservation programs, wetland determinations, and rural water loan programs; lease issues between landlords and tenants; family farm transition issues; farmer-neighbor disputes; and family disputes regarding heirs’ property.

If family members co-owning heirs’ property cannot reach agreement, agricultural mediation services can help. There may be a cost for mediation depending on the type of dispute that exists. In Virginia, families can reach out to:

Farm Agricultural Resources & Mediation in Virginia (FARM-VA)

Western Carolina University College of Business

122 G Forsyth Cullowhee, NC 28723

Phone: (336) 272-2722, (704) 724-9429,
or (828) 227-3567

Email: farmva@att.net

or bsclarke@email.wcu.edu

Additional Resources

Support for Heirs' Property Owners in Virginia

Black Family Land Trust

5800 Faringdon Place
Suite 114
Raleigh, NC

Mailing address:

PO Box 2087
Durham, NC 27702
Phone: (919) 683-5263
Email: info@bflt.org
Website: bflt.org



Visit farmlandaccess.org
for more resources related
to accessing, transferring,
and conserving farmland.



For a list of national organizations helping heirs' property owners, visit farmlandaccess.org/heirs-property/#organizationsprovidingassistance

DISCLAIMER: This document provides general legal information for educational purposes only. It is not meant to substitute, and should not be relied upon, for legal advice. Each operation and situation is unique, state laws vary, and the information contained here is specific to the time of publication. Accordingly, for legal advice, please consult an attorney licensed in your state.

Glossary

The following definitions are from multiple sources and are not specific to any particular state statute. Of course, any statutory definitions (terms defined in the laws of a particular state) would overrule these definitions in any legal proceeding.

Adverse possession

A legal doctrine that describes when someone occupies property for a period of time and then claims legal rights to it.

Ancestor

A person from whom someone is descended; a direct blood relative.

Clearing title

The legal process of proving and obtaining a deed for the current owners of heirs' property.

Condemnation/eminent domain

The right of a government or its agent to take private property for a public purpose, with compensation to the property owner (such as a public utility taking land so they can build power lines).

Co-tenants

Those who own heirs' property with others. In a partition action under the Uniform Partition of Heirs Property Act, the co-tenants are all the co-owners of heirs' property, regardless of the size of the fractional interest owned. See the definition of tenants in common, below.

Decedent

A person who has died; decedent is also often referred to as "the deceased."

Deed

A legal document, usually recorded in the office of a town or county that keeps land records, often used to show the legal owner(s) of a piece of property.

Descendant

A person related to someone who has died, either directly (parent, child, grandchild) or indirectly (aunts and uncles, cousins). This includes anyone legally adopted.

Estate

The real property (land and buildings) and personal property (clothing, furniture, cars, and so on) of a person who has died. In probate settings, the "estate" includes the total assets (things one owns) and liabilities (debts) of a person who has died.

Heirs

People who are entitled under state "intestate" law to inherit property from someone who has died.

Intestate

A person dies "intestate" when they die without a valid will.

Intestate real estate

Land and other property (such as houses or buildings) owned by the decedent when they died and not addressed in a will, and which does not pass to anyone based on language in the deed itself (such as a joint survivorship clause).

Intestate succession

State laws addressing who inherits property from someone who dies without a will (or when a will is found to be invalid), or any property that was not included in the decedent's will.

Joint tenants

Two or more owners of equal shares of property who have a right of survivorship, meaning that if one joint tenant dies their share goes to the other joint tenant(s) in equal shares.

Ouster

A co-owner of heirs' property is "ousted" when one co-owner excludes another co-owner from property they own together as tenants in common.

Probate

The legal process of proving the validity of a will in court, and handling the estate of a decedent whether there is a will or not.

Tax lien

A state or local government's right to keep real estate for payment of some debt or obligation.

Tax sale

A legal process used by a county or town to take the property of a landowner who has not paid their property taxes in full and sell it to recover the unpaid taxes.

Tenants in common

People who each own an individual, undivided interest in property (also known as "co-tenants"), but not necessarily equal interests. See the definition of co-tenants, above.

Testate

A person dies "testate" when they have a valid will.

Title

Refers to ownership rights in land. As a legal concept, title exists even without any documents, but a deed is the most common way to determine who has title in land. (See definition of deed, above.) Sometimes a will or an affidavit may be used to document ownership rights.

Undivided interest

An interest in property that is held in common with others in a single property. These interests can be unequal; that is, the value of each interest can vary.

Acknowledgments

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About CAFS



farmlandaccess.org

The Farmland Access Legal Toolkit is a project of Vermont Law and Graduate School's Center for Agriculture and Food Systems (CAFS), which uses law and policy to build a more sustainable and just food system. With local, regional, national, and international partners, CAFS addresses food system challenges related to food justice, food security, farmland access, animal welfare, worker protections, the environment, and public health, among others. CAFS works closely with its partners to provide legal services that respond to their needs and develops resources that empower the communities they serve. Through CAFS' Food and Agriculture Clinic and Research Assistant program, students work directly on projects alongside partners nationwide, engaging in innovative work that spans the food system.

Please visit www.vermontlaw.edu/cafs to learn more.

Endnotes

- 1 It is important to file a deceased person's will along with a petition to probate the will with the local court where the person resided and where the property is located as soon as possible after the person has died. *Probate in Virginia*, VA. CT. CLERKS' ASS'N (July, 2019), http://www.courts.state.va.us/courts/circuit/resources/probate_in_virginia.pdf (explaining the clerk of circuit court or a deputy clerk handles the probate of wills, along with how probate works in Virginia).
- 2 Estate planning and will making are critical to avoid the challenges for heirs' property owners outlined above. For more information on the importance of wills and estate planning see the Farmland Access Legal Toolkit. *Heirs' Property*, CNTR. AGRIC. & FOOD SYSS., <https://farmlandaccess.org/heirs-property/#challenges> (last visited Oct. 25, 2022); *Wills*, CNTR. AGRIC. & FOOD SYSS., <https://farmlandaccess.org/wills/> (last visited Oct. 25, 2022).
- 3 See, e.g., *General Information – Land Records*, CFAIRFAX CNTY. CIR. CT., <https://www.fairfaxcounty.gov/circuit/land-records/general-information> (last visited Nov. 8, 2022).
- 4 VA. CODE ANN. § 64.2-200 (2020).
- 5 *Id.*
- 6 Heirs who inherit property through a valid will may also own the land as tenants in common if it is left to them without designation of the specific land each heir receives.
- 7 Thomas W. Mitchell, *Historic Partition Law Reform: A Game Changer for Heirs' Property Owners*, TEXAS A&M UNIV. SCH. L. 74 (June 12, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403088.
- 8 VA. CODE ANN. § 8.01-81 (2020).
- 9 *Id.* (the question for the court is whether the property is "susceptible to a practicable division").
- 10 VA. CODE ANN. 8.01-83 (2023).
- 11 VA. CODE ANN. § 58.1-3965(A) (2023).
- 12 VA. CODE ANN. § 58.1-3965(A) (2023).
- 13 VA. CODE ANN. § 58.1-3974 (2012).
- 14 VA. CODE ANN. § 58.1-3967 (2009).
- 15 VA. CODE ANN. § 58.1-3230 (2018); VA. CODE ANN. §58.1-3231 (2019).
- 16 *Quatannens v. Tyrrell*, 601 S.E.2d 616 (Va. 2004).
- 17 *Hostile Possession*, BLACK'S LAW DICTIONARY (11th ed. 2019) (generally "hostile" in the context of adverse possession is a legal term that means to infringe or encroach on the rights of the owner).
- 18 *Harkleroad v. Linkous*, 281 Va. 12, 17 (Va. 2011).
- 19 *Id.*
- 20 VA. CONST. Art. 1 § 11.
- 21 VA. CODE ANN. § 1-219.1 ("The term "public uses" mentioned in Article I, Section 11 of the Constitution of Virginia is hereby defined as to embrace only the acquisition of property where: (i) the property is taken for the possession, ownership, occupation, and enjoyment of property by the public or a public corporation; (ii) the property is taken for construction, maintenance, or operation of public facilities by public corporations or by private entities provided that there is a written agreement with a public corporation providing for use of the facility by the public; (iii) the property is taken for the creation or functioning of any public service corporation, public service company, or railroad; (iv) the property is taken for the provision of any authorized utility service by a government utility corporation; (v) the property is taken for the elimination of blight provided that the property itself is a blighted property; or (vi) the property taken is in a redevelopment or conservation area and is abandoned or the acquisition is needed to clear title where one of the owners agrees to such acquisition or the acquisition is by agreement of all the owners.").