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HEIRS' PROPERTY
A Quagmire for the Unprepared

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A nice woman comes to your office and asks for a deed to some property that her family has owned. After you explain that lawyers cannot create a deed and can only transfer property from one owner to another, she explains that the land was owned by her great-grandfather and has been passed down through the family. She explains that she and her mother and father live in a family home on the land but want to get a mortgage. The bank has advised them that without a deed, they cannot get a mortgage, so they told her to see a lawyer to get a deed. As you explain the legal process involved in transferring property, it becomes apparent that you have just entered ... The Heirs' Property Zone. This article is intended to serve as a how-to resource to equip attorneys to handle the heirs' property situation rather than a research overview. Please bear in mind that for a more in-depth review of the intricacies of complex issues, a practitioner should conduct further research.

An action to quiet title is normally a common law equitable action to determine the ownership of a parcel of real property. “Normally, an action to quiet title to property is an action in equity.” *Clark v. Margrave*, 323 S.C. 84, 86, 473 S.E.2d 474, 476 (Ct. App. 1996) cited in *Jones v. Leagan*, 384 S.C. 1, 10 681 S.E.2d 6, 11 (S.C.App. 2009). If the complaint seeks a claim based on adverse possession, that would change the action to one at law. *Frazier v. Smallseed*, 384 S.C. 56, 682 S.E.2d 8 (S.C. App. 2009). The actual relief being sought is the final determination whether it is an action at law or in equity but, as mentioned above, this article is not intended to be a review of the status of the law nor the standard of review for appeals.

Most of the case law available deals with the issue of adverse possession and its relationship to an action to quiet title. For purposes of this article, however, there will be no further reference to adverse possession. The focus now will be on the initial pleadings and initial trial only as it relates to title through an heirs' property situation. The following cases can serve as a reference to learn more about the distinction between a quiet title action at law or equity. *See* *Eldridge v. City of Greenwood*, 331 S.C. 398, 503 S.E.2d 191 (S.C. App. 1998) and *Lowcountry Open land Trust v. State*, 347 S.C. 96, 552 S.E.2d 778 (S.C. App. 2001). Heirs' property is a non-technical term often used to describe the situation where someone has died without a last will and testament nor any probate of an estate, and the survivors just continued to operate as if the deceased were alive. As those survivors pass away, their survivors take their place and most of the time everyone knows which part of the land is “theirs” and few problems arise. Oddly enough, many county tax records will allow this unclear ownership chain to continue and will simply send a tax notice to whichever person volunteers and the notice will be sent to “The Estate of X” or “The Heirs of X.” This gives the heirs a false sense of security that their ownership has been legally recognized, and it is always a difficult task to explain to heirs that merely paying taxes on the property will never ripen into legal ownership.

Eventually, however, someone will want to sell or mortgage his portion of the property or another event will occur which will require proof of legal ownership. If the last titieholder died more than 10 years ago, opening a new estate is not an option. Fortunately, there is a process for resolving the questions of legal ownership and apportioning the property among the living heirs. This will involve an action for quiet title and most likely a collateral action for partition. These actions ***26** may be brought at the same time in a single action.

When bringing a quiet title action, it is best to assert jurisdiction and venue in the county in which the property is located. S.C. Code Ann. §15-7-10. One or more of the heirs should be designated as the plaintiff and all other living heirs should be designated as defendants. It is extremely advisable to have the family members communicate with one another to ensure that

all of the defendants understand the nature of the action and that, although technically they are defendants in a legal action, it is a vastly different situation than being sued for damages. Many defendants will become very angry if they receive the pleadings with no warning and will believe someone is trying to trick them or take something from them. All defendants should be encouraged to consult with an attorney if they wish to learn more about the process involved and to receive reassurance that their interests are being protected.

Although it is easy to say that all living heirs should be named as defendants, it is far more difficult in actual practice to accomplish this feat. Depending on the length of time since the death of the last titleholder of record, there could be many children, marriages, deaths and other occurrences. Many relatives have lost touch with one another and addresses, full names and other important information can be difficult to obtain. A client should be advised of the need for this information in advance lest they begin to feel that they are being asked to do all of the work. Nevertheless, the client's assistance will be essential since there is no other way for the attorney to know that (as a client once said before the hearing), “Uncle Joe had an illegitimate child who moved to Seattle and married a woman half his age but we do not like her so now that he is dead we do not want to mention the child.” If a family chooses to conceal an heir, the attorney should be absolutely certain that he has taken all reasonable steps to inquire about heirs and should have as many heirs as possible verify, under oath, their belief that all heirs have been named.

It is also important that John Doe or another fictitious person be named to represent any unknown heirs as well as an additional fictitious person to represent any unknown heirs of anyone other than the last titleholder of record. The fictitious person will need to be represented by a guardian *ad litem;* therefore, it will be necessary to have one appointed. Service on the fictitious person or upon heirs who cannot be located will have to be done through publication. Each of these will involve additional costs in the litigation. It is advisable to forewarn the client that there will be substantial expenses and to collect the funds in advance. More information about service by publication can be found in §15-9-710, et seq.

Once all of the heirs have been identified, it is advisable to make a flow chart or diagram of all of the heirs and their relationship to one another. Depending on the number of heirs involved, a chart can be an essential element in proving the case and demonstrating the relationships to the court. While it is not difficult in a case involving five heirs, it would be almost unimaginable to try to explain heirs in a case involving 76 living heirs and almost an equal number of predeceased heirs. It is rare to have a case with only five heirs and very common to have cases with more than four generations of living and predeceased heirs. The flow chart can also help when drafting the pleadings in order to ensure that the relationships are clearly delineated and shown. It is a good practice to start with the last deed recorded and then proceed forward through that person, and all of the heirs, until you reach the present day.

Another important consideration to keep in mind is that South Carolina's probate law underwent a large change. The date of death for each party involved can become important. Although the present law of intestacy states that a surviving spouse take 50 percent of the estate and any surviving children split the remaining 50 percent (S.C. Code Ann. §62-2-102 and §62-2-103), that division has been different in prior years. At one time, a surviving spouse would only receive one-third of the estate if there were two or more surviving children and the children would divide the remaining two-thirds. Also, bear in mind that if a person dies without a spouse or children, the interest goes back up the line of inheritance. As you trace the lineage of an heir, his or her percentage of inheritance may change several times depending on direct and indirect inheritance.

Pursuant to S.C. Code Ann. §15-61-50, the Court of Common Pleas has jurisdiction in all cases in which more than one person holds an interest in property to hear a request from one of the owners to have the property divided or, if division in kind is not feasible, to order the property sold and the proceeds divided appropriately. If the property is part of an active estate, the probate court has concurrent jurisdiction (§ 62-3-911). The full process of a partition action is described in §15-61-10, et seq. Although any owner of the property (whether holding legal title or an equitable interest) may bring an action for partition, there are a couple of important points to bear in mind. First, if it is feasible to divide the property, it will be divided and apportioned to the owners. Second, if it cannot be feasibly divided, the property will be sold and the proceeds divided. In this sale, it is not required that the property be sold at auction if another commercially reasonable method is used and any owner is allowed to make an offer for the purchase of the property. Finally, before the property is divided or sold but after the action is filed, there is a requirement that all co-owners be given an opportunity to purchase the property at a reasonable price. S.C. Code Ann. §15-61-25 sets out the method to determine the reasonable price and the method to provide the other owners the opportunity to purchase the property

The action is typically filed as a non-jury case. It is possible to offer cooperative heirs a *pro se* answer that admits the allegations and ***27** joins in the prayer for relief if they wish to file an answer rather than be in default. Since many cooperative heirs will be defendants, it is a helpful way to make them feel more comfortable with the process and less suspicious that someone is trying to act in an underhanded manner. As soon as allowed, the attorney should move to have the matter referred to the master-inequity or a special referee depending on whether the county has a master. When a hearing is set, notice should be sent to all parties required to be provided notice, but it is a good practice to take special efforts to ensure that cooperative heirs are given reassurance that they can attend the hearing and offer their confirmation to the hearing officer that the heirs listed are the true and correct heirs. Often, one of the heirs will be an elderly person who may be receiving guidance or assistance from a child. The attorney should seek permission from the person to provide his or her child with a copy of the notices that are sent to parties.

At the hearing, the attorney will need to set out the history of the heirs just as in the complaint. Testimony or affidavits verifying the relationships are necessary at this time. The hearing officer will determine how many or whether live testimony must be provided. Once the history and heirs are explained, the hearing officer will determine the appropriate percentages of ownership. It is advisable to have these numbers calculated and set forth beforehand since, if there is a large number of heirs, it can quickly become difficult to determine which heirs own a 1/29 interest as opposed to 1/17. The fractions and percentages can quickly become very small, yet each is essential.

In some cases, the hearing will then proceed to the partition action, but in other cases, the hearing officer will recess the hearing to allow the parties to have it appraised or surveyed. If you are seeking to have the property divided, you should either have a survey already prepared or seek to have the hearing recessed to allow a survey to ***28** be prepared. In preparing the survey, most surveyors know how to properly apportion the property once they are provided with appropriate percentages. Most surveyors are able to also consider the value of the property in the division since two acres of land on a road is not worth the same as two acres of swampland. It will be important to have testimony ready that the values of the divided parcels accurately reflect the percentages of ownership, and this can be provided by the surveyor, an appraiser or in some cases by a realtor. If dividing the property, it is also wise to ask the heirs to work with the surveyor so each heir receives property consistent with his desired use.

If the property cannot be satisfactorily divided, you should consult with your client, and possibly the other heirs, on the method of sale that will be preferred. If a method other than public auction is to be used, it is advisable to have either all heirs stipulate to a value in writing or to have an appraiser offer sworn testimony concerning the appraised value of the land. In some cases, there will be a willing buyer at the appraised price and the heirs will be advised and offered a right of first refusal. If no heir elects to purchase it at that price, the buyer is allowed to proceed and the funds are divided. In some cases, the hearing officer will set a minimum price then ask for the heirs to submit sealed bids with the highest bidder receiving the property. There are many methods for conducting the sale, but prior coordination with the client, heirs and the hearing officer can ensure that things will proceed smoothly.

The order will often provide that the clerk of court can execute a deed to an heir if the property has been divided. The heir would be responsible for preparing the deed and presenting it to the clerk of court. It is common for the action to require each owner to pay an appropriate portion of the costs, including attorney's fees, of the action based upon his percentage of ownership. If the property is sold, these costs can be withheld before the proceeds are divided. If the ***29** property is divided, it is common for the order to provide that before an heir can receive a deed signed by the clerk of court for his share, he must tender payment of the costs. So long as an heir has not paid his portion of the costs, the costs remain a lien on that heir's portion. There are many ways to handle this issue and these are two of the most common. Since normally one or a few heirs will have paid the costs initially, as the costs are paid the money is refunded back to them.

Some final words of caution and practice tips are in order. First, resolving heirs' property is not overly difficult, but it is time consuming and requires a lot of cooperation from the client. It is strongly advised that the attorney charge a retainer equal to at least 12 hours of time and collect advance costs to cover the filing fee, guardian *ad litem* and service by publication. Second, take each stage of the process in a step-by-step manner and do not get ahead of yourself. Details are important and clients will often overlook an heir. It is vital to stress to the client that he must tell you of all children or spouses, whether living or dead, whether nice or not nice and whether friendly or unfriendly. Clients will honestly misunderstand many stages and will not understand

why it is necessary to list heirs who have passed away; thus, it is necessary to be patient and keep the client well informed. Finally, warn the client in advance that this type of action takes time. Gathering the information, drafting the pleadings and filing the action are only the start. The action will not move swiftly since it is necessary to obtain service on all of the heirs. If that service of process involves service by publication, there will be even more delays. The client should be made aware of the fact that this type of case moves slowly in order to ensure that expectations are kept consistent with what will be experienced.

Here is a “simple” example that is very common. Normally it takes some time to gather the information. All of this takes place in a mythical part of South Carolina where you can safely assume that the Uniform Probate Code was always in effect and the intestacy statute always provided that one-half of an estate goes to the spouse and the remaining one-half goes to be divided among the children. Albert owned 100 acres of land. He was married to Alice and had four children, Becky, Barney, Beth and Bert. He died without a will. Alice never remarried and died a few years later. Becky died after her husband and they had two children, Colleen and Clarence. Clarence was divorced and had one child, Dwayne, when he died. Colleen is still alive and married to Colin and they have two children, Drew and Diane. Barney is still alive. Bert outlived his wife and at his death he had three children, Connie, Carl and Cathy. Carl died before Bert. Carl had no spouse but three children, Donna, Dixie and Doris. Dixie was killed in the same accident that killed her father and had no children. Cathy died most recently. Connie is divorced and died about a year ago and she had three children, Don, Doug and ***31** Dave. Doug was single but had one child, Evan, when Doug was killed skydiving. Beth had only one child, Charlie, and the father was never identified. Charlie was the father of Devin before Charlie died from shark attack the day before his wedding to Devin's mother.

Now to analyze these facts step by step. Albert died survived by Alice and four children. Alice has 50 percent, and each of the children has a 1/8 interest. Alice died without any other heirs so each of the children inherit her interest and now own an undivided 1/4 interest each.

Barney is alive and owns his 1/4 interest.

Becky is deceased and her interests were divided with 1/2 to Colleen and 1/2 to Clarence. Clarence died so his interests went to Dwayne. Colleen is alive so neither her husband nor her children have any interest. Final result, Colleen owns a 1/8 undivided interest and Dwayne owns a 1/8 undivided interest.

Bert died and a 1/3 interest of his interests went to Connie, Carl and Cathy.

Cathy died without children so her interests go back to her father (deceased) then down to her siblings Connie and Carl who are deceased. So her interests go down to her nieces and nephews, where we find the first living heirs. The interests divide and Evan takes in place of his deceased father Doug. Dixie has no heirs and does not take, so Donna and Doris divide Carl's interests in Cathy's share equally. Their share of Cathy's interests will be shown below.

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Carl died with his interests being divided with 1/3 going to Donna, Dixie and Doris. Dixie died without children so her interests go to her father (deceased) then down to her siblings, where we have living heirs. Donna and Doris split Dixie's share equally. Donna and Doris receive 1/2 of Carl's interests as well as each receiving 1/2 of the 1/2 interest belonging to Cathy. From Carl's interest, Donna and Doris each own an undivided 1/24 interest in the whole. In addition, they each receive half of Carl's inheritance of half of Cathy's 1/12 interest. Thus, they each receive an additional 1/48 interest in the whole. Now, Donna and Doris each own an undivided 3/48 (1/16) interest in the whole.

Connie was survived by Don, Doug and Dave, so each would receive 1/3 of her interest. Doug is deceased so Evan receives Doug's interest. Don, Dave and Evan each take 1/3 of the interest from Cathy. So, from Connie, each receives an undivided 1/36 interest in the whole. From Cathy, each receives a 1/72 interest in the whole. This gives each of them a 3/72 interest (1/24) in the whole.

Beth's 1/4 interest went to Charlie upon her death. Charlie's interest went to Devin upon Charlie's death. Devin therefore owns a 1/4 undivided interest in the whole.

The final ownership of the whole is shown in the attached chart (allowing for the rounding to two digits of Don, Evan and Dave's interest).

Barney	1/4	25%
Colleen	1/8	12.5%
Dwayne	1/8	12.5%
Don	1/24	4.17%
Evan	1/24	4.16%
Dave	1/24	4.17%
Donna	1/16	6.25%
Doris	1/16	6.25%
Devin	1/4	25%
	1	100.00%

At the very least, a case involving heirs' property will make you glad that you learned fractions in grammar school. Hopefully this article has at least offered a basic road map of the procedures to use in advising a client about the necessary steps and the length of time the process will take. The murky depths of the Heirs' Property Zone should no longer cause any fear in the practitioner armed with this basic road map.

Footnotes

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