



## Heirs Property in Arkansas

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### *Background*

“Heirs property” has disproportionately affected BIPOC communities, especially in the southern United States. Often, a heirs property situation occurs when a landowner passes away “intestate,” without a will or other estate plan. If, for example, that landowner is unmarried and has three children, the laws of intestate succession will typically divide the property so that each of the children have an undivided 1/3 interest as “tenants in common.” That means that each of the children have a right to the use and occupation of the entire property. As generations pass, the number of tenants in common for a single property can increase significantly.

This fractional ownership greatly increases the risk that an heir, in attempting to separate their interests, will force a partition sale of the property, or that the land will be lost to tax default. When property is partitioned by a court, it can either be partitioned in kind or partitioned by sale, but the more common outcome is for the property to be partitioned by sale. Property partitioned by sale, or sold to redeem tax debt, often results in the family members losing ownership of the property.

To combat that loss, 19 states, including Arkansas, have enacted the [Uniform Partition of Heirs Property Act](#) (“UPHPA”), which provides protections to other tenants including notice, appraisal and right of first refusal. If the other tenants choose not to exercise that right, the UPHPA includes requirements for conducting a sale for fair market value supervised by the court. However, because it is still essential to understand the foundation of intestate succession, and partition actions to see how the UPHPA modifies these laws, this fact sheet will outline each of these sections.

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### *Intestate Succession:*

Each state has passed a series of laws governing intestate succession. A person who passes away “intestate” has not made any other estate plan, such as a will or trust, to identify the people who they wish to leave their property. Without further direction from the decedent, intestate succession laws act as a default estate plan, of sorts. Generally, intestacy laws transfer portions of the estate to a surviving spouse and then through the decedent’s bloodline to their heirs. Typically, descendants such as children and grandchildren will be first in line to inherit.

If no descendants exist, the property will ascend through the bloodline to the decedent’s parents, their parent’s children (the decedent’s siblings), and descendants of those children (the decedent’s nieces and nephews). If there are no surviving relatives in those groups, the property will ascend to the decedent’s grandparents, their children, and the descendants of those children.

Once the surviving heirs are identified, the property is divided between the group regardless of the number of members. It is common for land to be inherited by multiple people at the same time. For example, if the decedent had five children and no surviving spouse, then the court will give all five of the children property ownership. This ownership, as “tenants in common”, provides each child with an undivided 20% ownership in the property as a whole. This can create both practical and legal issues.

### *Property Ownership: Tenancy in Common:*

Tenancy in common is a type of ownership where multiple owners have a fractional interest that combines into a one hundred percent undivided interest in the property. Using the example above, intestacy laws would divide the property among all five children as tenants in common, with each having an undivided 20% interest.

Another generation of intestate succession, or if a cotenant transfers their interest to their heirs as tenants in common, just compounds the ownership concerns. For example, assume that one of the five siblings in the original problem has died unmarried and intestate, leaving behind two children. Those children will inherit their parent’s undivided interest, which they will split between them. According to the county records the land itself still remains in the name of the original landowner. However, it is now owned by the four children of the original landowner, who each have a 20% undivided interest, as well as the two grandchildren of the original landowner, who each have a 10% undivided interest. As generations pass, the number of owners can increase exponentially. No matter how many owners there are or what percentage of ownership they have, they are referred to as cotenants.

All cotenants enjoy complete and equal rights to the real property including possession, benefits, and profits of the land, no matter how small their interest in the property. Along with the right to the property, each cotenant also has an equal responsibility to the costs, including costs to maintain the property as well as the cost of taxes on the property. This may be difficult to do on a property that is not income-earning, leading to disagreement among the cotenants, or even the failure to maintain the property or pay property tax. However, a



co-tenancy on an income-earning property such as farmland, for example, can still lead to disagreements, as each cotenant generally retains the right to farm the property, lease it out, choose the crops to plant or make any other production decision.

Further, each cotenant may also sell or transfer their interest regardless of what proportional percentage they own. Often, cotenants decide to request a partition action as the result of disagreements with other co-tenants or because they wish to convert their interest into money.

#### *Partition Action:*

A partition is a legal procedure that is used to resolve a land dispute brought by a tenant in common. There are two variations, a partition in kind and a partition by sale. While partition is an important focus of UHPA laws, the following section is general overview of how it operates without UHPA in place.

Partition in kind is a request for the land to be physically divided amongst cotenants. This is a more difficult route for a court to take, however, because each property is unique. It is usually difficult to physically divide property fairly as different parts of the same piece of property may have different values. For example, if the property contains both cropland and timber is it possible to physically divide the property so that all tenants receive a similar portion of each?

If the property cannot be divided equally through a partition in kind, then the court will turn to the process of partition by sale. Partition by sale is a request for a forced sale of the property. After the costs of the sale are subtracted, the proceeds are divided among the cotenants according to their ownership interest. So, in our earlier example, each of the five children would receive 20% of the proceeds from the sale of the property and if one of those children died intestate then their 20% would be equally divided among their children. In Arkansas, a partition by sale is generally conducted by public auction. Depending on the interest and turnout, the price received at auction might not be as high as if it were sold through the traditional real estate process, for example. Further, partition by sale can also compound familial land loss, because any members of the family who may have been living on the property will be forced to move once ownership changes hands.

Any one cotenant may ask for the property to be partitioned. Courts typically grant petitions for partition even if the majority of cotenants do not want the property partitioned, and regardless of a cotenants' percentage of ownership or their involvement with the property. The UHPA modifies this standard approach for properties that qualify as heirs property.

#### ***Arkansas Uniform Partition of Heir Property Act (Ark. Code Ann. § 18-60-1002 et seq)***

The goal of the UHPA is to help balance the rights of cotenants in the event of a partition action, as well as give the cotenants tools to try and maintain ownership of the property. The UHPA outlines options to buy out a petitioning cotenant, rules for



property valuation, a stronger emphasis on partition in kind instead of partition by sale, and provides flexibility in the sale process if partition by sale is the only equitable outcome. Arkansas adopted the UHPA in 2015, and it applies to partition actions for heirs property filed on or after January 1, 2016.

When a partition has been requested, an Arkansas court will first determine whether the property in question is heirs property. If it is, UHPA must be applied unless the cotenants have reached another agreement.

### ***Definitions***

In order to answer the question of whether something is heirs property and thus falls under the UHPA, it is important to consider the definition of key phrases. In Arkansas, heirs property is real property that is owned by tenancy in common and that also meets each of the following three requirements:

1. There is no recorded agreement that explains how the property should be partitioned.
2. At least one of the cotenants has received their ownership of the property from a relative.
3. At least one of the following must be true:
  - a. 20% or more of the interests are held by cotenants who are relatives
  - b. 20% or more of the interests are held by one cotenant who acquired title from a relative
  - c. 20% or more of the cotenants are relatives.

A relative is an “ascendant, descendant, or collateral or an individual otherwise related to another individual by marriage or law”. As described earlier, an “ascendant” is someone who comes before a person in their bloodline and a “descendant” is someone who comes after a person in their bloodline. In Arkansas, ascendants include adoptive parents and their ascendants while descendants include adopted children and their descendants.

### ***Notice:***

All parties must be made aware that a legal action has started. The cotenant who has requested partition is responsible for giving this “notice” to all cotenants. While individual notification is always preferred, in some situation a notice “by publication” is allowed. If the court allows notice by publication, the partitioning party will be required to post a sign on the property stating that the action has been started and identifying the court that will hear it. Further, the court may require the partitioning cotenant to include their name and that of another other known cotenants.



### ***Valuation and Cotenant Buyout Options:***

After the action for partition has started, the property is determined to be heirs property, and proper notice has been given, the market value of the property must be assessed. The UPHPA outlines three ways that may be done. The first and easiest route is that the cotenants may agree to the value of the property itself, or agree to their own form of valuation. If this method is selected, no appraisal is conducted. Second, it is possible that “the evidentiary value of an appraisal is outweighed by the cost of the appraisal.” In other words, the value of the property itself is low enough that a formal appraisal would be cost prohibitive. In those cases, the court may determine the fair market value after holding an evidentiary hearing. Third, the court may determine the fair market value of the property by ordering an appraisal by a disinterested real estate appraiser.

This fair market valuation will be done as if the property had a single owner. This eliminates the possibility that the property would be undervalued for being owned as a tenancy in common. Within ten days the court must send notice to each cotenant with a known address identifying the appraised fair market value, stating that the appraisal is available to each party, and explaining that all parties may file an objection to the appraisal within thirty days of the first notice being sent. At least thirty days after the notice is sent, the court typically will hold a hearing to consider the appraisal and any other evidence offered by parties to the case. After the hearing the judge will determine the fair market value of the property and notify all parties of the decision.

Under the Arkansas UPHPA, all cotenants who did not seek partition have the option of buyout. In other words, they may purchase the interest in the property owned by the partitioning cotenants. Any cotenant who did not seek partition has forty-five days from the day the buyout notice was sent to notify the court that they will pursue a buyout. The purchase price will be based on the cotenant’s percentage of ownership and the value of the property. Depending on how many cotenants elect to use the buyout option, one of three things may occur:

1. If only one cotenant agreed to buy the petitioning cotenant’s interests, all cotenants must be notified.
2. If more than one cotenant elects to buy the petitioning cotenant’s interest, the court will determine how much interest each cotenant can buy based on their existing ownership interest in the property. The court will then send notice to all the cotenants with the price to be paid based on those ownership interests.
3. If no one elects to buy the interests of the cotenants that requested partition the court will notify all the cotenants that the buyout did not work and move on to the next option.

If either of the first two circumstances occur, the partition action is resolved once the non-partitioning cotenants complete the buyout. If none, or only some, of the interests of the petitioning cotenants are bought then the court will move on to a partition in kind.



### ***Partition in Kind:***

A partition in kind occurs when a court physically divides property among the cotenants. For example, if there are twenty acres owned by tenancy in common among four cotenants, then a court would typically award ownership of five-acre tracts to each of the cotenants. A partition in kind can be difficult to execute because all land is not the same. Going back to the example, some of the twenty acres may be more valuable than other parts of the property. This makes physically dividing the property difficult if there is no equitable means of doing so. The UHPHA offers more flexibility for courts to consider a partition in kind as a viable option. Under the UHPHA, a court may require that some cotenants pay others to even out the value of the property.

When a court executes a partition in kind, it will allocate a portion of the property to any cotenants that are unknown, not locatable, or the subject of a default judgment. If those interests were not bought out, a part of the property would represent the combined interests of these cotenants as determined by the court. This part of the property remains undivided among those cotenants.

A court will not partition the property in kind if it finds that the partition would result in great prejudice to the cotenants. To determine whether there is a great prejudice the court should weigh a variety of factors, including:

- If the property can be practicably divided;
- If the partition would divide the property in a way that the market value of all the parcels divided would be materially less than the value of the property if it were sold as a whole;
- Evidence of possession of the property by a cotenant;
- Cotenant's sentimental attachment to the property, including any attachment arising because the property has ancestral or some other special value;
- Lawful use being made of the property by a cotenant and the degree to which they would be harmed if they could not continue the same use of the property;
- Degree to which the cotenant has contributed their share of the property taxes, insurance, and other expenses associated with maintaining ownership of the property or have contributed to the physical improvement, maintenance, or upkeep of the property; and
- Any other relevant factor

### ***Partition by Sale:***

After the buyout option and consideration of partition in kind, the court may order a partition by sale as a final option. The sale of heirs property must be an open-market sale unless the court finds that sale by sealed bids or auctions would be more economically advantageous and in the best interest of the cotenants. Real estate brokers have a timeline to file a report with the court once they receive an offer from someone to purchase the property for at least the fair value that has been previously determined. Once the property has been sold for at least fair market value, the proceeds from the sale, minus any expenses, are distributed to the heirs based on their percentage of ownership in the property.



In states without a version of the UPHPA, the partition by sale process may result in the property being sold for substantially lower rates. This can prove particularly harmful for BIPOC owners of heirs property.

### ***Conclusion***

The Arkansas UPHPA governs partition of heirs property. It provides tenants in common of heirs property the opportunity to buy out other cotenants who want to force a partition of the property; it defines what considerations should be reviewed under partition in kind and allows courts greater flexibility to use this form of partition; and it protects all cotenants' ability to receive the full market value of the land if sold. Heirs property is a significant legal risk to BIPOC producers' generational ownership of farmland, and the Arkansas UPHPA helps create more opportunities for families to keep their ancestral property.

### ***Additional Resources***

[Intestate Succession and Agriculture Factsheet](#)

[Estate Planning and Taxation Reading Room](#)

[Arkansas Uniform Partition of Heirs Property Act](#)

[Uniform Partition of Heirs Property Act with Prefatory Note and Comments](#)

[Arkansas Code Intestate Succession](#)

[Children--Legitimacy--Inheritance by Illegitimate Children](#)

[Petition for Partition](#)

Haunting the Title from the Beyond: When is a Probate Required in Arkansas? By J. Mark Robinette Jr. Law Offices of Mark Robinette

Thomas W. Mitchell, Reforming Property Law to Address Devastating Land Loss, 66 Ala. L. Rev. 1, 36 (2014)

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