

Legal Considerations OF INTERGENERATIONAL FOREST LAND TRANSFER

by Julie King, Esq.



Like it or not, you already have an estate plan in place even if you have never met with an attorney or signed a will. In Virginia, the laws of “intestate succession” apply to individuals who die without a will and specify how your estate will be administered and distributed. This default plan usually does not work for forest landowners that wish to transfer their property intact and for their next generation. Further, relying on these default laws will end up being more expensive and time consuming (and public) than if a succession plan had been implemented during your lifetime.

There are many steps and components to effective estate planning. Your attorney can detail these but the one that is often overlooked is open communication. It is crucial to understand, between generations, what the hopes and goals are. Too often, I meet with clients who think they know what their children want but have never taken the time to ask them.

Common Ownership Options

The ownership structure you select for your forest land will have taxation and liability implications. Each option has advantages and disadvantages, and it is important to remember that your succession plan will be

unique—it is not a “one size fits all” concept.

Sole Proprietorship. Most landowners hold their property in their individual names as sole proprietorships—the simplest form of ownership. However, for some, the risk of personal liability is an issue, as sole proprietors are directly and personally responsible for any debts, losses, violations and court judgements.

With a sole proprietorship, all activities of the owner cease to operate when the business owner is no longer living or becomes incapacitated; continuity of the business in such cases is an advantage of other ownership structures. But with a properly structured legal entity, the business operations can continue on without the need for court approval. For a forest landowner, this continuity can be important. Consider if the forest land owner died or became incapacitated during a time when timber harvesting is needed or if access to cash or other assets is necessary.

Limited Liability Companies (LLCs). The LLC has become the preferred entity for many landowners. In an LLC, the owners (called members) can both retain control over the business affairs of

the company and, if properly structured and administered, also receive liability protection from the activities of the business. And, the owners can designate management decisions to one or more of the owners. Shares of the LLC (called membership interests) can be sold or gifted to the next generation so that they have equity in the company. The senior generation can retain as much or as little control as they desire and may continue to shift membership interests over time to their heirs.

For tax purposes, generally an LLC doesn't pay taxes directly. Instead, it passes all profits and losses through to the LLC members.

Corporations. Unlike LLCs, a corporation generally must pay income taxes on its profits. In some cases, such as when the business is a C-Corporation this can lead to double taxation, where the corporation is taxed first on its profits and then again when the owners take the profits out.

The S-Corporation is often preferred over a C-Corporation because it retains the liability protection of a corporation but also the single level of taxation of an LLC or partnership. One distinct advantage of an S-Corporation is that it can save a business owner employment taxes. S-Corporations are liable for self-employment taxes on the salary portion of income, but only pay ordinary income tax on the distribution portion. By comparison, all income of an LLC is subject to self-employment tax.

Revocable (Living) Trust. A Revocable Trust is a commonly used estate planning tool but also can be an effective type of ownership for forest landowners. A trust is a legal arrangement in which property and assets can be transferred from personal owner-

ship to the trust with a trustee who administers the assets for the benefit of the beneficiaries. By transferring assets to a Revocable Trust, you can still have control and access to the assets during your lifetime. During your lifetime, the Revocable Trust is treated as your own for tax purposes.

A primary benefit of establishing a Revocable Trust is that upon death, the assets are not subject to the public court probate process, thereby allowing the forestland business to continue without interruption. Unlike a will which only takes effect upon death, a Revocable Trust can address the situation where you become incapacitated by naming a back-up (successor) trustee to administer the trust for your benefit.

Revocable Trusts can hold forest land and other real property interests and greatly simplify the transfer of these properties upon death and, if desired, place restrictions on the use or transfer of the forest land beyond your lifetime. For example, property can continue to be held in trust for your beneficiaries' lifetimes to protect property from your beneficiaries' creditors and ex-spouses in the event of divorce.

Liability protection, however, with a Revocable Trust is generally not afforded to the current owner (grantor), but generally is only for other/future beneficiaries if held in further trust. However, used in connection with another legal entity that offers liability protection, such as an LLC that owns the forest land, and in turn having the LLC interest owned by your Revocable Trust, the combined benefits of privacy, flexibility and limited liability can be achieved.

Fundamental Documents

In addition to selecting an appropriate entity for forest landownership, several fundamental legal documents

should be prepared. Regardless of the ownership structure, a Last Will and Testament is an essential document that everyone should implement. Beyond naming your beneficiaries, a will allows you to name the executor who will handle the administration of your estate after death, including the transfer of your land or interests to your beneficiaries.

A General Durable Power of Attorney names an agent that you select to act on your behalf to handle your financial affairs in the event of incapacity and avoids what would otherwise require lengthy and costly court involvement.

An Advance Medical Directive addresses end-of-life treatment (a Living Will) and allows you to appoint an agent to act on your behalf for medical decisions (Medical Power of Attorney).

Don't let the many options and unfamiliar terminology be an excuse not to start your succession planning. A qualified estate planning attorney familiar with forest landowners leads you through this maze. To make the best use of time and save legal fees, have all your personal and financial information organized and provided to the attorney ahead of time.

The attorney, together with a team of qualified professionals, including an accountant, financial planner and forester, can help you put a succession plan in place so that your vision can come to pass. If transferring your forest land to the next generation intact and "in forest" is a priority, succession planning should be your priority. 🌿

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