



ESTATE AND SUCCESSION PLANNING

Estate and succession planning is a crucial part of maintaining land ownership. Many factors can come into play when planning for the transition of property to the next generation. Estate and land succession planning should not be done haphazardly as this process can be very emotional and should entail thoughtful discussion and planning. Family discussion plays an important part of the succession planning process and should not be put off for fear of creating controversy or hurt feelings among family members. It is never too early to consider how you would like to manage and maintain your family's assets.

WILLS

Anyone who owns anything should have a will and landowners especially need a will. A will provides you with an opportunity to distribute your assets and property according to your wishes. It also allows you to name an executor, who is the person responsible for carrying out the instructions in your will. Your executor is responsible for determining, overseeing and assisting in the distribution of your assets according to the provisions of your will and paying all valid debts from the assets of your estate. The appointment of an executor will also allow for communication between the executor and lenders to resolve any payment issues that may arise after death. You should keep your will with other valuable papers in a safe place, protected from fire, theft and flood, or in a safe-deposit box.

Intestate Succession

If you die without a will, a condition known as "intestate," your property may end up with someone other than who you wanted to have it. In North Carolina, if you pass without a will there is a legal process, called intestate succession, which follows a statutory formula for the distribution of property. For example, if a descendant is survived by a spouse and one child the surviving spouse gets a one-half undivided interest in the real property. The remaining half of real property would go to the surviving child. If you die intestate and your heirs also die intestate, the land can end up belonging to several people at the same time.

Heir Property

Historically, many families did not write wills, and their land is now owned as "heir property," meaning interests in the land were passed on several people who were classified as "heirs" in the eyes of the courts. Each of the owners or heirs are called cotenants and own an undivided interest in the property. That means that each cotenant is entitled to complete possession and use of the property and cannot exclude another tenant from any part of the property. Additionally, any physical division of the property among the cotenants is not valid or legally enforceable unless done with a deed conveying title and signed by every tenant. This form of fractionated land ownership can be unstable and owners must be willing to work together to maintain the land, pay taxes, and make joint decisions about conveyances of the property.

When several people own land together as heir property, there can be many problems. Some may want to sell the land while others may want to live on it or farm it. Some may always pay their share of the property taxes while others never pay. Some may want to remortgage the property while others may not. These issues could result in the loss of the land. For example, if owners of fractionated land cannot decide on how the property taxes will be paid and the property taxes go

unpaid then the county government can collect the tax by foreclosing on the property and selling the land. In certain circumstances, if one owner sells or gives away his or her rights to the land, the land may become vulnerable to partition, a procedure in court where the land may be sold or physically divided. If the property has a home with a mortgage the mortgage company may be less willing to work with several property owners to remortgage the property. Having a will can help mitigate the issues with heir property and ensure your wishes are followed after you pass.

Additional Tools for Succession Planning

- ❖ **Business Entity Formation:** Business entities potentially can be used to transfer assets into a legal entity with corporate bylaws or limited liability company articles of organization used to set up procedures for the use of property and safeguards on future transfer on interests. Business entity formation can be especially helpful with heir property. For example, heirs may be able to convey their interest in the property to a business entity, such as a limited liability company or corporation, which would be the official owner of the property. Each heir would then be awarded a membership interest or shares, depending on the business entity, in the property. This tool should involve the services of an attorney and a tax professional to minimize future problems and ensure compliance with the law.
- ❖ **Trusts:** A trust is a legal entity that holds assets, such as property, for the benefit of certain individuals or an organization. A revocable trust can assist in the orderly running of a family farm upon the death of the owner. A farm owner can transfer his or her interest in property into the trust and become the trustee under the trust. As the trustee, the farm owner would be responsible for managing the trust property. A successor trustee can be named in the trust document and upon the owners death can continue to operate the farming business pursuant to the terms of the trust. Individuals who are likely to become incompetent can also benefit from a trust. While still competent, an individual can create a trust that will allow a trustee to manage the trust creator's financial affairs and direct how the trust property should be distributed upon death.
- ❖ **Life Estates:** A life estate creates a lifetime interest in property, allowing the property owner to use and enjoy the property during his or her lifetime. A "remainder" interest is created in another individual or individuals that results in the passing of the entire ownership interest to the holder of the remainder interest at the death of the life estate holder. During the lifetime of the life estate holder, the owner of the remainder interest has an interest in the property but the life estate holder has the right to the use and enjoyment of the property during his or her lifetime. A life estate can be an effective tool for passing real property to a family member while retaining the use of the property or home during one's lifetime.
- ❖ **Conservation Easements:** Through a conservation easement, an owner of private land can give up a right to a specific use of the property in order to allow for conservation. The rights the landowner may choose to sell or donate to an agency or organization such as an independently run land trust are varied and may range from the right to subdivide to the right to build additional buildings. A conservation easement can be tailored to meet the needs of the landowner and achieve a wide variety of conservation goals. Most easements permanently restrict use and bind anyone who buys or inherits the land from the landowner.
- ❖ **Joint Ownership:** Under North Carolina law, there is a type of ownership unique to husbands and wives – "tenancy by the entirety" – created when a husband and wife acquire real property during their marriage unless the conveying instrument clearly states otherwise. In this form of ownership, the surviving spouse maintains fee simple ownership of that property upon the death of the other spouse. Unmarried couples can take property

under a deed that provides for a right of survivorship that will result in fee simple ownership by the surviving individual upon the death of the other owner.

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About the Land Loss Prevention Project The Land Loss Prevention Project is a non-profit law firm that offers legal representation of clients, community education, and professional outreach in the effort to promote wealth, land preservation, and rural livelihoods. www.landloss.org

About the W.K. Kellogg Foundation The W.K. Kellogg Foundation (WKKF), founded in 1930 as an independent, private foundation by breakfast cereal pioneer, Will Keith Kellogg, is among the largest philanthropic foundations in the United States. Guided by the belief that all children should have an equal opportunity to thrive, WKKF works with communities to create conditions for vulnerable children so they can realize their full potential in school, work, and life.

The Kellogg Foundation is based in Battle Creek, Michigan, and works throughout the United States and internationally, as well as with sovereign tribes. Special emphasis is paid to priority places where there are high concentrations of poverty and where children face significant barriers to success. WKKF priority places in the U.S. are in Michigan, Mississippi, New Mexico and New Orleans; and internationally, are in Mexico and Haiti. For more information, visit www.wkkf.org.