



# Do "It" with a

# Trust

By **BILL Hoover**

Trusts are a flexible tool that play significant roles in the financial and estate plans of many Tree Farmers. They are definitely not a do-it-yourself tool, and for most Tree Farmers their primary role should not be to avoid probate. Please don't become a victim of the trust salespersons who travel from state to state selling a one-size-fits-all, solves-all-problems trust kit. The laws and administrative procedures in each state are different, and each Tree Farm family's situation is different. Use an attorney in your state, one that specializes in estate planning. If you have property in another state, your home state attorney may also recommend having an attorney in the state where your property is located.

Trusts can be used to achieve an amazing variety of objectives. And the flexibility of trust arrangements has increased significantly during the last decade as a result of changes to the "rule against perpetuities" adopted in most states, discussed later.

The legal devices called trusts are ancient, going back to Roman law, and derived in the English common law system from the needs of landed gentry to have their interests protected and managed while they were away fighting for the king. I tell my students that in the story of Robin Hood, he was acting as the trustee for King Richard's estate.

I'm going to introduce the essential legal terms associated with trusts so that you'll be able to effectively communicate with your attorney and better understand the vast amount of writing on trusts. Then I'll introduce you to what trusts can be used for. In future columns I'll discuss the tax treatment of trusts and their specific roles in the estate plans of Tree Farmers.

What is a trust? A trust is a fiduciary relationship involving specific property whereby a trustee holds legal title to the property for the benefit of individuals or organizations — the beneficiaries. The person creating a trust is generally referred to as the "settler," but if the trust is established while the settler is alive, the term "grantor" or "donor" may be used, and if the trust comes into being upon the death of the settler, the term "testator" may be used. Thus, if the term "grantor trust" is used, it means a trust established by a living person, and if the term "testamentary trust" is used, it means a trust that comes into being upon the death of the settler. The property that is controlled by the trust is referred to as the "res" or sometimes the "corpus."

How is a trust created? A trust is created by a carefully crafted legal document, sometimes called the trust agreement or instrument. It explicitly lays out the legal purposes of the trust, the property subject to the agreement, the trustees, and the ben-

eficiaries. Specific steps are needed to make a trust agreement valid in your state and for it to remain valid. Your attorney will carry these out and explain its operation.

What are trusts used for? In essence, trusts are used when someone wants to set aside property to specifically benefit individuals or charities. If established and managed according to legal requirements, the legal system protects this relationship. The protection could be from future creditors of the settler or beneficiaries. The interests of the beneficiaries are also protected by holding trustees to established fiduciary standards. Since the property held in trust, the res, is owned by the trust, not the settler, the income from the property may be treated differently for tax pur-



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poses. Needless to say, the tax treatment can be very complex in terms of income, gift, and estate taxes. The tax savings possibilities are a significant motive for their use, but when used for this purpose, an attorney familiar with tax law, as well as trusts, is needed.

Many Tree Farmers use trusts because it enables them to “rule from the grave” to a greater extent than is possible by passing outright ownership to heirs under the assumption that they and their children are morally obligated to carry out a Tree Farmer’s wishes after he has died. Since the trust itself is the owner of the Tree Farm (and barring exceptional circumstance), the beneficiaries can’t sell it for development if the trust agreement includes this restriction. The trust agreement can also include instructions on how the trustee is to manage the Tree Farm. But keep in mind that any such instructions must be realistic in financial terms. If the instructions were to prohibit harvests of timber, for example, then there would have to be other sources of income from the Tree Farm itself or other sources of funding included in the trust to cover the costs of ownership and management.

How long can you rule from the grave? I’m very tempted to give an irreligious response to this question, but of course I won’t. Our infinitely wise and pragmatic legal system has a rule to deal with this, the “rule against perpetuities.” Trusts established to benefit a public charity can be perpetual. As applied to trusts for the benefit of private individuals or organizations, a trust’s length is tied to the lifetime of the beneficiaries. The long-standing common law rule was that the term was limited to 21 years past the death of an existing person named as a beneficiary by the settler. For example, if the settler had a 1-year-old great-grandchild, he

could name him or her as a current or future beneficiary, and the trust would have to be dissolved 21 years after this great-grandchild dies, assuming he or she is the longest living beneficiary. The trust document should specify the disposition of the property when the trust is terminated.

But most states have adopted a new version of this rule or have dropped the rule in part or entirely. Again, your attorney is the expert in the application of the rule in your state and its meaning given what you’d like to accomplish.

The new version of the rule, the Uniform Statutory Rule Against Perpetuities, includes the life of someone living plus 21 years, and a 90-years-from-creation rule. The latter is referred to as the “wait and see” rule.

This combination gives courts greater flexibility in achieving the objectives of the settler.

Is it possible to rule from the grave forever? It is not possible if your goal is to benefit a private person or organization. It is possible if your goal is to provide a public benefit. Tree Farmers who aren’t willing to limit to 90 years their control on how their Tree Farm is used should consider a conservation easement. These require that the holder of the easement be a unit of government or an appropriate charity. But the owner has the same rights to pass on or sell the land as he would if there were no conservation easement, as long as the future owners keep it as a Tree Farm. A conservation easement is not appropriate for Tree Farmers who don’t want to tie the hands of future generations. 🌿

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