Understanding Different Ownership Options For You And Your Estate

From John Ross, Estate and Probate Attorney from Tennessee

Tips For Deciding What Ownership Is Right For You

1. Make sure it is a structure that you, as the landowner, understand and can maintain.
2. Set realistic objectives.
3. Be careful of setting up something where you control the land for too long into the future and make it difficult for future generations to maintain the land.
4. Set up something that works for your potential liability issues.
5. Get multiple opinions and do your research on these different ownership options.
6. Find an attorney that you trust and understands your assets, your goals and can work with you to develop something that works for you, your family and your land.
7. Laws, taxes, the value of your assets are always changing, so even after you have your estate plan developed, you will need to review and maintain your plan over time. Plan to re-evaluate your plan, especially as your family situation changes.

Different Ownership Types

Sole Ownership

- Simple structure.
- But you will need to have a power of attorney. A power of attorney is a trusted person who will make decisions for the property if the owner(s) are unable to do so due to illness.
- Also need a will or the state will designate who are your heirs.
- Fully exposed to creditors. If there are medical or long-term care expenses, then the creditors can force a sale of the land to cover those expenses.

Joint Ownership with Right of Survivorship

- Similar to Sole Ownership.
- However you need to think about who you'd like your heirs to be and work with a professional to develop a plan to designate them. Family situations can change over time and your spouse's heirs might not always include your heirs.

Tenancy in Common

- Can be used for non-related people or within families.
- Each owner can sell or designate their shares.
- Risks are that an owner can force a sale.
- The land can still be exposed to creditors
- You might also be forced into partnership with someone that you might not anticipate.

General Partnership

- Depends on the arrangement, can include outside investors or be used by a family.

- Each state has its own partnership laws and you will need to set up a partnership agreement to establish this ownership type.
- More flexibility to develop an agreement that addresses the management of your land, how to transfer/buy/sell shares, resolving disputes, who is in control/makes decisions, voting.
- This option is recommended for larger properties and for people with some expertise in the law or accounting.
- Can use to gift shares to the next generation.
- This option is more complicated and time consuming to manage. Requires extra tax returns, as well as legal and accounting work.
- Partners share the liability for the partnership.
- You need to be willing and able to manage the partnership.

Family Limited Partnership

- Used when the original owner wants to keep control of the land but transfer some of the value of the land to the next generation.
- A general partner manages the partnership and limited partners have the economic value but limited or no voting rights to control it.
- All the complications of a general partnership plus more.
- IRS will look at this type carefully and you can have issues with valuation of a transfer.

Limited Liability Company

- Income and losses pass through to the partners but with limited liability to the owners, no personal responsibility for the LLC debts beyond what is invested in the LLC.
- Flexibility in setting out the rights, duties and procedures for the members.
- Provides a legal structure for how disputes can be resolved, but depends on how the LLC was established and decision making was outlined.
- Can be managed by a board or all members have a vote.
- Best for unrelated parties.
- Regulations can vary by state and can have state taxes depending on your state.
- Operating agreement can be the hardest part to develop. Getting agreement on what to include in the operating agreement.
- No advantage for families if they are interested in passing it on to the next generation, it is more the liability protection that is the advantage for this structure.
- Can have high fees every year that you pay for filing and LLC protection.
- Majority is supposed to have a fiduciary duty to the minority owners but this isn't guaranteed to occur.

S and C Corporations

- Not ideal for family landowners. No advantage over the LLC for family landowners.
- Corporation paperwork is much more complicated.
- Need to follow corporate law and taxation.
- Causes issues with tax basis and capital gains.

Revocable Living Trusts

- One person (the trustee) holds and manages the assets/title/control/management and the beneficiary is the recipient. This is a step beyond just having a power of attorney.
- Can be used to take care of minor children as well as those with health issues or disabilities.
- Can help keep your land in the family by designating the distribution of the property after each generation.
- Excellent way to help with legacy planning, including skipping a generation of owners.
- Can be oversold and not needed for most situations (unless your state has a high probate cost like California) but more appropriate for special situations as described above.
- No income tax benefits for the current owner as the asset is still considered theirs.
- Still need to go through probate even with a trust.

Irrevocable Living Trust

- You no longer control your property and you can't take it back although you can be designated the trustee but you might not be able to change designees.
- Used to avoid health care cost, so won't be considered an asset for qualifying for Medicare.
- But the best way to avoid long-term care expense issues is to give the land away to the next generation.
- Need to consider the tax consequences, giving up the stepped up basis benefit and can be an issue for timberland.
- Not on record and the beneficiaries might not have a copy. Up to the trustee to share trust documentation. No court supervision without going into litigation to enforce the trust. Sometimes a trustee will not do what they are supposed to do.

Selecting a Trustee

- Who will be your trustee? This is your most important but often the most difficult decision when setting up a trust.
- The Trustee needs to have knowledge and understanding for what they are doing, particularly for managing your land.
- Can have co-trustees but then they need to agree.
- Can have a corporate trustee but can be expensive and have issues with understanding timber management.
- Can include a process to remove/replace a trustee.
- Not recommended to have a sibling being a trustee for another sibling.

Life Estate

- Provide in the will and deed that someone has ownership/benefit for their lifetime and then at their death it goes to someone else.
- Commonly to use to avoid Medicaid issues.
- These need to be carefully developed to avoid issues and future disagreements, including issues like a life tenant's rights to timber income and other relevant issues.