

*(Tree) Growers Legal Update*  
**Timberland Transfer and  
Liability Protection**

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# *This Lawyer's Observations*

- Try not to give heirs undivided interests in land
- Don't worry about the Estate Tax
- All land dispositions must be in writing
- Careful of PUV when planning land disposition
- Succession is a framework filled with execution events
- START with what bothers you most...

# Overview of Planning Process

- What do you **WANT**?
  - Your vision for your future
  - Vision for family
  - Land and business (legacy, heirloom, career opportunity)
- What do you **HAVE**?
  - Resources (liquid and not liquid)
  - Family resources, status and abilities
  - Current documents
  - Community Resources
- What do you **NEED**?
  - Financial resources
  - Asset Transfer Plan
    - Estate plan, business organization (?)
    - Business disposition (transfer or liquidation)

# Real Property 101

- Life Estate
  - Life tenant pays taxes, collects rents, no “waste”
- Tenancy in Common
  - Undivided interest in entire parcel
- Joint Tenancy with Rights of Survivorship
  - Rarity in land
  - Common with bank accounts and stock
- Tenancy by the Entireties
  - Property ***purchased*** during legal marriage
- Severed Interests
  - Timber
  - Hunting
  - farming

# Preventing Partition

- Tenant in common has right of partition land
  - Actual Division ( § 46-1 *et seq*)
  - Sale in Lieu of Partition (NCGS § 46-22)
  - Life tenant may partition timber (NCGS § 46-25)
- LLC Operating Agreement restricts partition
- Beneficiary of Trust
  - Limited to action against Trustee or Trust
- Rights of First Refusal – maximum 30 years
  - requirement to deal before partition
  - Specific requirements (record Memorandum!)

# Asset Protection: “I don’t want the nursing home to get my farm”

- Difficult to plan for poverty
- Medicaid Rules: Qualifying vs. Recovery (lien)
- 5 Year “Look-back” Rule
- Uniform Fraudulent Transfer Act (existing debt)
- NC – only probate assets (but including land) subject to recovery

# Durable Powers of Attorney (New Statute)

- **The NC Hot Powers are powers to**
  - Make a gift.
  - Create or change rights of survivorship.
  - Create or change a beneficiary designation.
  - Delegate authority granted under the power of attorney.
  - Waive the principal's right to be a beneficiary of a joint and survivor annuity,  
including a survivor benefit under a retirement plan.
  - Exercise fiduciary powers that the principal has authority to delegate.
  - Renounce or disclaim property, including a power of appointment.

# Disposition by Gift

- Gifting of Land
  - Loss of right to rental/timber income
  - Carry-over basis (potential higher capital gains)
  - Exceed annual gift exclusion
  - Survey Costs and Subdivision Process
- Piece-Gifting of Equipment
  - Bill of sale (non-titled equipment)
- \$15,000 annual exclusion
- Lifetime gift exemption = \$11,200,000 (2018)
  - \$22,400,000 for married

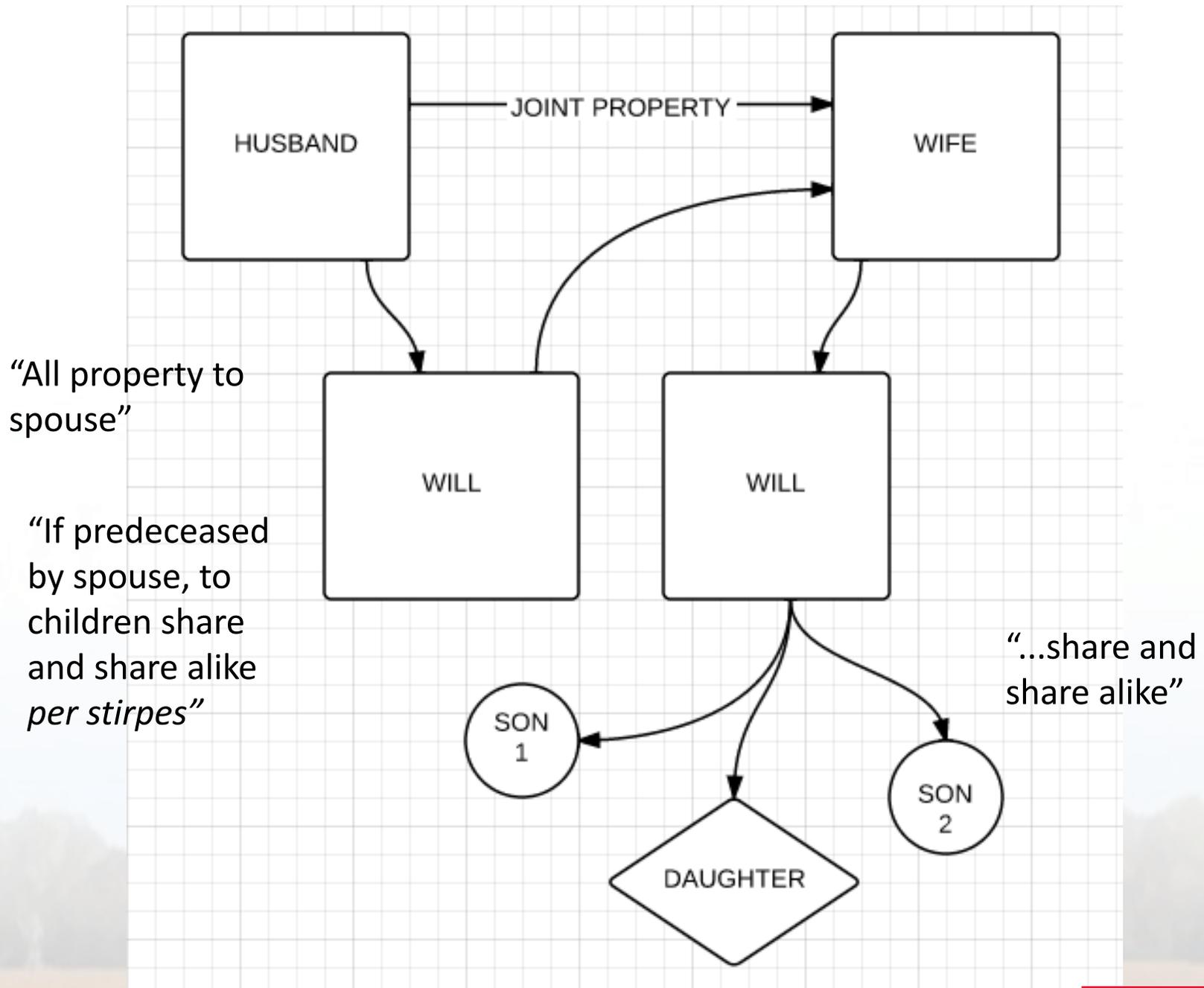
# Disposition at Death: By Will

- Will directs **bequests** (personal) and **devises** (real) property
- Personal property listed in probate
- Real Property not a probate asset (“drops like a stone”) (still listed required to pay debts)
- Executor power to sell property (NCGS § 32-26 & 32-27)

Tradeoffs:

**Pros:** Relatively lower cost, “deadline” to close estate, property distributed no strings attached, matter closed

**Cons:** Potential co-tenancy among disagreeable heirs, distribution to troubled heirs



# Disposition by Trust

- Use as “will-substitute” to direct bequests and devises
  - Offers greater level of post-death administration
  - Easier to amend
- Use to Protect Certain beneficiaries
- Separate or Joint?
  - “It depends”
- Use to step-up basis at death of first spouse

# Types of Trusts

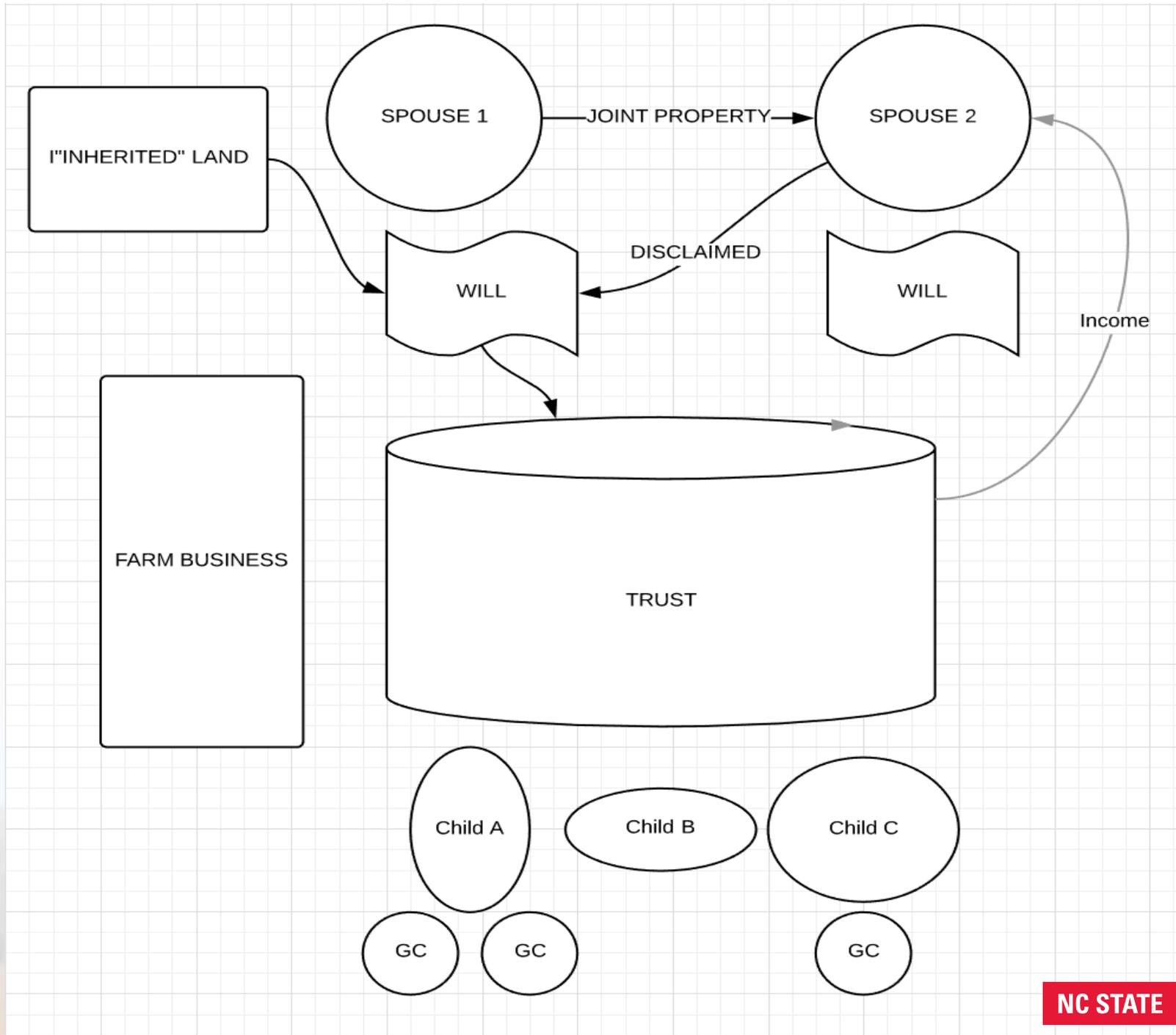
- Testamentary Trust (in a will)
- Revocable Trust
  - Fund during lifetime (put in, take out)
  - Fund through ‘pour over’ will
  - Amend as needed
- Irrevocable Trust
  - Insurance Trust (ILIT)
  - “Asset-Protection”
- Special Needs Trust
- Charitable Trusts
- “Dynasty” Trusts

# Trust Features for Farms/Forest

- Protect land/farm interests, income to surviving spouse, use step-up basis flexibility
- Consolidate personal property farm assets into entity or to “farming heir”
- Specific property distributions (“Equal”)
- Options to Capture Title (“Fair and Equal”)
  - Options in favor of “farming heir” generally
- Obligate Trustee to Lease Farm to farm heir
- Allow Trustee to form LLC for land prior to distribution (Supply terms)

# Assets to Place in Revocable Trust

- Land interests
  - Record deed
  - File PUV application within 60 days
- Business entity interests (land or operating)
  - Use transfer of death certificates
- Assets in Trust not listed in Probate inventory
- Trust as insurance beneficiary



# Trust Challenges/Opportunities

- Trustee Succession
  - Family “benches” sometimes not deep
  - Trustee oversight (trust protector or court)
  - Institutional trustee (need high liquid principal)
- Protect farm assets from creditors or remarriage or “whims” of surviving spouse
- Use of portability and disclaimer
- Specific Power to Decant
  - Power under state law (no good if Trustee is also Beneficiary)

# Use of Business Entities

- Liability protection (protect personal wealth, land)
- Contract between owners
  - Income
  - Management
  - Equity
- Buy-Sell (Manage the D's: Death, Disability, Divorce, Disaster, Disagreement, Disengagement)
- Vehicle for reducing parents' estate value
  - Valuation discounts
  - Organized gifting or sale program

# Limited Liability Company

- Operating LLC (or S Corp)
  - Partners contribute their ownership interest in cattle, bins, machinery, “sweat” etc.
  - Use as transfer vehicle to farming heir (gifts/structured sale)
  - Existing S Corp or Partnerships (merger, conversion, asset transfer, etc.)
- Land LLC
  - Deed Land interest to the LLC (*never* a corporation)
  - Restrict membership
  - Strip partition rights inherit to real property interest
  - Structured exit of equity in land (title substitute)
  - Conversion of existing Limited Partnership (w/o retitle property) (SOS filing)

# The Operating Agreement

- A **Contract** between contributors of assets
- Restricts who can be members
  - Member vs. Assignee
- Dictates voting requirements for decisions
  - Manager
  - Voting and Non-voting Units
- Dictates triggers for buy-sell
  - **Farming Heir Option to Purchase**
  - Who may buy and when
  - Appraisal procedure
  - Price and payment terms (seller finance option)
- For existing S Corps, use Stock Purchase Agreement

# Transfer of LLC Interests

- Gift of Interest (measured in “units”)
  - Calculate value of company
  - Divide value by number of units to determine price per unit
  - Transfer total units < \$14,000 annual gift tax exclusion
- Sale
  - Purchase from Other Members or Trust
    - Purchase with insurance proceeds under Buy-Sell Agreement (Designate beneficiary and agreement between all participants + spouses)
  - Spread capital gain over term note
  - Discounting of interest value
  - Some relief from Self Employment taxes

# LLC Set-Up Tasks

- Sketch plan, get accountant and lender sign-off
- Form entity with Secretary of State (after Jan 1)
- Get EIN (tax ID)
- Open bank account
- Elect S form 2553? (save on payroll tax)
- Re-title over-road equipment with DMV
- Update Contracts (or record DBA's)
- Update FSA payment entities
- For Land, update **PUV** within 60 days

# Hunting Lease Overview

- Description of Property
  - PIN, common name
  - Acreage
  - Exhibit areal photo of 'no hunting' zones
- Term (e.g. April 1 through March 31)
  - Auto renewal?
- Hunting clubs
  - Copy of member rules
  - Incorporate violation as default
- Deer blinds and structures
- Liability Insurance?

# Timber Trespass

- N.C.G.S. § 14-128. Willfull injury to trees is Class 1 Misdemeanor
  - NCDOT gets pass in RW
- NCGS § 1-539.1
  - Injured landowner entitled to double stumpage of timber cut (cutting and burning)
  - Need a good boundary survey (mark boundary trees)
  - Timber harvester entitled to reimbursement from landowner who misrepresents property lines

# THANKS FOR INVITING ME!

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