Preserving the Family Woods:
Tools to Help Guide Transfer to the **Next Generation** of Landowners

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Note:

An accompanying CD has been produced that includes an electronic version of this publication and the following publication:

Estate planning for forest landowners: what will become of your timberland?
Siegel, William C.; Haney, Harry L.; Greene, John L. 2009. Gen. Tech. Rep. SRS-112. Asheville, NC: U.S. Department of Agriculture, Forest Service, Southern Research Station. 180 p.

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FAMILY FOREST LEGACIES: SECURING THE FUTURE OF YOUR WOODS

This publication is about one thing: securing the future of your woods. To get you the information about how to do that, we've taken two approaches. We start with summaries of estate and succession planning options in the early pages, then we delve into deeper detail on those options through a series of articles.

While we cover the most common options, it's important to stress that there is no "one size fits all" choice for securing your woods. In fact, it's likely that you'll mix and match options to create the best solution for you and your heirs.

Our best advice on starting the estate and succession planning journey is to look many generations into the future. With a vision for ownership and use of your woods established, then inform yourself about tax and legal options. Place great emphasis on the often overlooked aspect of communications. Talk about the future of your woods with co-owners, advisors, heirs, and their heirs.

Ultimately, decisions about the future of your woods are up to you and any co-owners. To ensure your legacy with the land continues, there are only four rules to follow from here:

- You have to think.
- You have to talk.
- You have to decide.
- You have to document.

Now, please read on.

PREFACE TO THE READING MATERIALS

The trick to helping forest owners plan for woodlands in their estates is to encourage communication, between spouses and between parents and their children. Although it is important that prospective heirs understand the motives of parents, it is absolutely not necessary to obtain an heir's permission. One landowner recently shared the perspective that she views her forests as "just another kid at the table." Undaunted by nary a single one of her own children willing to take over the family forest, she recruited and eventually hired her own "stewards"—a young couple whose dream of living on and managing forests has now come true.

Too many forest owners are willing to give up if a son or daughter does not step forward, and these same owners often live long enough to see what happens when valuable forest is turned over to disinterested children. Hopefully, the articles included here will convince passionate forest owners that there are nearly as many options for keeping lands intact as there are good reasons for doing so.

Forest Matters – The Stewardship Newsletter
[selected articles]
This series of articles addresses transferring forest land from one generation to the next.

How Important is Your Forest?
This brief describes information developed by Oregon State University Cooperative Extension. A book and DVD contain materials used in a training course, and a Web site also contains helpful information.

Preparing for the Next Forest Owner
The three most important tasks in planning for forests in the estate are communication, communication, and communication. If you can't describe what it is about your forests that is worth planning for, or agree with your spouse which—if any—of your children can provide the necessary leadership after you're gone, what is the point of considering the disposition of forests in your estate? The purpose of this exercise, which should take 6 to 8 hours to complete over the course of a week, is to identify what's important and who among your heirs can take your place. It doesn't matter if a project is difficult or easy, you still must start at the beginning. Complete this exercise and you're well on your way to planning for forests in the estate.

Planning the Future Forest
This article describes a project to tell the stories of forest-owning families in the United States that have developed strategies for passing well-managed lands intact and within the family. This information will be published by the University Press of New England in a book by the same name and authored by Thom McEvoy.

Intergenerational Planning Methods for Forests
This excerpt from *Positive Impact Forestry* (2004 Island Press) identifies the effects of property tax on parcelization of forests, the long-term effects of parcelization, and some thoughts on how to plan for forests in the estate.

Planning for Woodlands in Your Estate
This is an excerpt from *Owning and Managing Forests* (2005 Island Press). Only those portions of the chapter not duplicated in other articles in this package are presented.

The Importance of Land Trusts to Forestry
There is a great deal of misinformation about land trusts, so much so that most forest owners refuse to consider the possibility of using trusts to help keep productive lands intact. This article explains how land trusts operate and the important role they can play for those forest owners who want to keep woodlands intact and in the family.

Estate Planning Saves Money
By using trusts, a forest-owning family can double the estate tax exemption that is available to lessen—or even eliminate—any tax liability on the family forest (and other assets in the estate).

A Sustainable Family Forest LLC
This article describes how the limited liability company can provide an almost perfect structure for passing forests within the family.

Family Forest Partnerships
This is a fairly popular way to engage family members in forest operations even though it is not for everyone. There are also good reasons for not including the spouses of children in ownership positions within the family forest.

Conservation Easements Can Come With Tax Benefits
For those who decide to give easements to land trusts or other “qualified” organizations, the rules that allow donors to treat development rights as a gift have changed significantly in favor of the donor. However, the changes were set to expire at the end of 2007.

Estate Planning Opportunities and Strategies for Private Forest Landowners
This is an overview of a self-directed course developed by Penn State Cooperative Extension. The course provides landowners with information about estate planning, property transfer, taxes, conservation easements, trusts, and other topics.

Forest Matters

The stewardship newsletter

TALK ABOUT IT

by Robert Fitzhenry, U.S. Forest Service, Northeastern Area State and Private Forestry

Northeastern Area employees have spent many weekends on the road. We've been peddling a message—"Talk about it." It's a message we brought to assemblies of landowners in Connecticut and Rhode Island, and a message we brought to the American Tree Farmers national meeting in Wisconsin. We brought it to our own Festival of Wood at Grey Towers National Historic Site, and we brought it to Boston, for the AARP Life at 50+ national convention. We're sure to be coming soon to a place near you, too, but are asking you here, as well, to talk about it.

You're probably wondering, "Talk about what?" Well, we want you to talk about the last thing on Earth many folks like to address. Talk about estate planning for your family forest, because your family legacy with the land depends on it.

"The road trips added more worrisome stories to our book of lost family forests and feuding relatives," observed Mark Buccowich, U.S. Forest Service program leader of the Next Generation of Landowners initiative. "The sad thing is, most of the problems could have been taken care of with a little basic communication early on."

While there were many examples of families who sat down early and communicated their vision for land ownership generations into the future, there were far more examples of owners who hadn't yet had discussions, and tales of lament over what can never be undone.

Don't be one of these coulda-shoulda-woulda families. Be the family that got around to talking about their family forest legacy, and backed up their decisions with written, legal paper that secured their money, family relationships, and their woods.

We've dedicated this issue of Forest Matters to facilitating discussions and exploring available planning options. We don't answer it all, and the hardest parts—the choices and discussions—are up to you. Talk about it with your spouse, family, and advisors. Talk about it. Get to it.

Forest Matters: the stewardship newsletter is published semiannually by the USDA Forest Service Northeastern Area Forest Stewardship Program. Its goal is to bring the stewardship message to natural resource professionals, consultant foresters, and private forest landowners in the Northeast and Midwest. If you have any questions, or would like to be added to the hard copy or electronic mailing list, please contact Jane McComb, U.S. Forest Service, 271 Mast Rd., Durham, NH 03824, phone: 603-868-7693, fax: 603-868-1066, e-mail: jamccomb@fs.fed.us.

LOSING SMITTY'S WOODS—BASED ON A TRUE STORY

by Anonymous

The loss of the "Smith" family forest started with a simple phone call.

"Mr. Smith? You don't know me, but I heard you own some land in Franklin County. I'm looking for a camp lot up that way. Do you have some land you might want to sell?"

Henry Smith was rather brusque with the caller. He told the young man in no uncertain terms that he was not interested in selling, and not to call again.

But after he hung up, Henry kept thinking about the caller's request. Did the man know that Henry was 78 and had had a major heart attack 6 months ago? Did he know that because of gout, and shortness of breath, Henry had not been "up to camp" for over a year, even though he worried that someone would break into his cabin? Maybe the stranger knew that the property tax bills had just gone out, and the rate Henry paid for taxes on his little deer camp and 300 acres had more than tripled in the past 10 years.

Maybe, he thought, it is time to think about that little piece of forest.

Henry's wife Elaine was in good health, but she was the same age as he, and was not interested in the camp or the land around it. Henry's only son was not an avid deer hunter, and lived 50 miles away. While Tim had hunted there as a boy, he'd only visited camp a few times in the past 10 years. One of Henry's two granddaughters had just completed a degree in forestry, but she was working in Washington State. She'd never talked to him about the camp or the forest, even though as a youngster she had played in the woods around camp and enjoyed petting the bear rug on the camp's hearth. The other daughter had visited camp, too, but now she was working, and had never seemed much interested in the woods. At least she had never mentioned any interest to Henry.

That winter night, things were set in motion for Henry to make a decision about the forest land that he had owned for nearly half a century, the area he had dubbed "Smitty's Woods." The property included the cabin to which he had brought fifteen autumn bucks, two black bears, and uncounted ruffed grouse and woodcock from his hunts. He thought about the little sugarbush there that he had leased each spring to his friend Pete, and the logs that Pete had sawn up on his portable mill to build the cabin porch in '82. Henry thought about the pond, and the stonewalls where he'd taken the photos of beaver, mink, weasels, and grouse that hung in his home.

Since Henry didn't believe that anyone in his family was interested in the camp and land, he did not talk to them about it. They'd probably just sell it anyway. Henry didn't think much of those community "land trusts" that come in and give you money to change deeds to keep people from developing in the future. He didn't understand how they work, and probably wouldn't have liked it anyway.

A new fellow was working at the local bank branch. He'd come by a few weeks ago and left a card. His specialty was setting up trusts for older folks. The bank could arrange that Elaine would be comfortable if something happened to Henry. Henry knew she'd get his pension when he died, but he wanted to see that she didn't get stuck with a lot of taxes or have to worry about probate when he kicked the bucket. While they had Medicare coverage, would that be enough if one of them needed to go into a nursing home?

Henry called the trust guy at the bank, and they talked for a while about assets, property, and different types of trust "instruments." The trust officer suggested that Henry sell the forest land and put the proceeds in a trust. He gave Henry a card for a lawyer who could help him write up a will for the trust.

When they were working on the will, the lawyer suggested that Henry could place more money in the trust if he split up his land into several lots before he sold it. Henry hesitated. It was hard to think of the woods being carved up, but finally, with a heavy heart, Henry reasoned that he might as well do it as have someone else do it. The lawyer guided him through the town subdivision process, and advised him to allow his trust to hold the mortgage on the land. If Henry died before the land was paid off, the mortgage money would continue to go into the trust, ensuring that Elaine would have a flow of cash from that as well as from her survivor's pension.

Just before they put the land up for sale, the lawyer drove Henry out to camp. It was hard to think that the wooded hillside would soon be sprouting more camps. But Henry had to admit that he had enjoyed some great days out here, hunting and tramping around in the woods. He gave the lawyer the bearskin rug as a "thank you" for taking him out for one last look at "Smitty's Woods."

Just after Henry completed the work on his trust, he was diagnosed with inoperable cancer. He spent his last days at home, comforted by the thought that he had been able to "take care" of the land that no one except he had ever appreciated.

After Henry's death, Tim and his daughters were shocked to find out that Henry's land had been sold and that Henry himself had subdivided it! They had never talked to Henry about his land, because that seemed nosy and impolite. But they assumed since Henry had loved it so, he would want it to be kept in the family or at least conserved somehow.

To this day, the family members blame the lawyer and the young trust officer for talking Henry into selling off the family forest (and for taking the bearskin rug). Tim drove up to the camp a year after his father died, and was heartbroken to see that most of the land was posted, and the sugarbush was being cleared for a vacation home. He never returned.

Elaine lived 15 years after Henry died. She stayed in her home with a caregiver at the end of her life. When she died, the trust dissolved and Tim and the girls received cash and bonds from the trust.

The Smiths did not use the money they received to buy another piece of forest land, but sometimes when they get together, they still reminisce about the family times they had spent up at Gramp's camp in "Smitty's Woods."

CHOICES. CHOICES!

by Robert Fitzhenry, U.S. Forest Service, Northeastern Area State and Private Forestry

By now, it should be clear that one of the main threats to keeping family forests in family hands is simple lack of planning and communication. Without plans and discussion, family forests are jeopardized by heavy estate taxes and other burdens, often leading to subdivision or other unpredicted changes to the land.

A complicating factor is that a forest is a functioning ecosystem that is not suited to traditional choices of dividing wealth equally among heirs. When your forest gets subdivided, it gets one step closer to going away forever. For this reason alone, the Forest Service asks that planning begin with an end in mind: keep the land intact.

Though families must make their own choices about the future of their land, there are several options to help get what they want. The more common choices follow. Sometimes, one shoe fits all. Other times, owners and families combine and customize these options to fit their unique goals and situation.

Do nothing: Few advisors, if any, support the do-nothing option when it comes to estate planning. While doing nothing spares one's time, expense, and worry in the short term, the long-term implications can be complex for a surviving spouse, or divisive among heirs. The "do-nothing" option is the choice that leaves the estate and the forest most at risk.

Will: A last will and testament is the simplest and least expensive method of active estate planning. While traditional wills divide assets such as stocks and bonds equally among heirs, a forest is a somewhat nontraditional part of an estate. The forest holds an economic function, but also provides environmental benefits, too, such as being a source of clean air, clean water, and wildlife habitat. A subdivided forest loses its value as a functioning ecosystem if the use of smaller, separately owned parcels changes over time. Balancing fairness to heirs with other goals may require a serious discussion.

Sell or give the forest to heirs before death: Some family forest landowners prefer to sell or give portions of their estate to their heirs before death to mitigate estate taxes. A basic principle here is to first develop a shared understanding of how the land will be used.

Here's some quick math on gifting: Given the Federal tax annual gift exclusion of $12,000, husband and wife co-owners can vest two children into $48,000 worth of forest land per year, or $480,000 worth of land in 10 years. The gifting option is often combined with a family partnership or other arrangement, especially if the landowner doesn't want to lose control of decisions on the property (including home).

Family partnerships: Some families choose to put their forests in family partnerships or qualifying conservation trusts. This helps keep the forest together as a functioning ecosystem. How the family land and the partnership are managed can be set by the owner when establishing the partnership, or the decisions can be shared among the owner and heirs.

Limited liability company: Family members can join together to form a Limited Liability Company (LLC) around the family forest. The LLC can be member-managed (all) or manager-managed (for instance, parents make decisions, while children share ownership). All the members of the LLC become "shareholders" in the forest, similar to owning stock in a family corporation. Unlike stocks, however, the shares can't move out of the family.

Conservation easement: A conservation easement lets landowners maintain ownership of the land, allowing them to live on it and manage it according to the easement. Typically, what they promise is to keep the land intact by giving up subdivision or development rights. Easements can be permanent or for a specified period of time (15 years, for instance). The easement can be donated, sometimes with property tax offset benefits. Often, easements are bought by another party, providing the landowners some financial security as well as peace of mind regarding the future integrity of their forest.

Land trust: Land trust organizations exist across the country. They can be found at the national or State level, or may be managed by friends and neighbors in small communities as well. Land trusts often purchase conservation easements on family forests, purchase forest outright, or have forest donated to them from an estate.

Public landholders: A curious fact is that land adjacent to or within the proximity of conserved land is more at risk for development than other rural land. Forest owners abutting or near national forests or other conserved land can consider donating their land, donating with stipulations, or selling their land to the public landholder. This choice has the environmental benefit of keeping large, contiguous forests intact so that they may continue their environmental function.

For all the options out there and others not touched on, there may be an exact fit for you, or room to negotiate an agreeable outcome from a combination of choices. It's important—very important—to remember that the course for the future is charted by today's owner or co-owners. The decisions are theirs to make to secure the vision they hold for their land and family legacy.

Detailed explanations of the options listed can be found at: http://www.na.fs.fed.us/stewardship/estate/estate.shtml.

FOREST LANDOWNERS SPEAK OUT

by Glen Rosenholm, U.S. Forest Service, Northeastern Area State and Private Forestry

As a result of our Next Generation Initiative efforts, the following landowners came forward to share their stories about land ownership. They are a geographically diverse group, hailing from Maine to Arizona and Georgia to Montana. Some of the people live on their land, while others live more than 1,000 miles away from theirs. Some people bought their land and others inherited theirs. All of the forest landowners had one thing in common—they loved their land. What follows is a condensed version of the landowners' responses. Visit our Web site (www.na.fs.fed.us) for the complete article.

How long have you owned forest land? How much forest land do you own?

Bill & Ruth Park (PA): My great-grandfather bought it in 1846. We have 73 acres with 50 in timber.

Miles Schulze (TX): We bought the first parcel in 1970 and the last one about 3 or 4 years ago. There are several parcels in all, which raises the total acreage owned to 700–800 acres.

Everett Towle (ME): I've owned my forest land since 1950. Most of it was inherited. We have around 175 acres.

Ed & Carol Nigl (AZ): We've owned it since 1966. I own today 100 acres. I used to have 200 acres, and I sold off 100 of them over the years.

Steve Graham (NY): The lands we own are part of an area that was homesteaded in 1865 by my family. It's been in our family name off and on for six generations. We now own 1,700 acres, including the 12-acre Graham Pond, named after our ancestors, stocked with brook trout.

Don & Sharon Schiltz (MT): We had owned 180 acres since 1972, though we own none today.

Mike Greenheck (MN): It's been in my family for 100 years. I've personally owned property since 1987. Family-wise, we own 3,500 acres. Personally, I own about 500–600 acres.

Josiah Phelps (GA): I've owned it since 1972. I own 75.25 acres.

Why do you own forest land?

Bill & Ruth Park (PA): We own it because our great-grandfather bought it in 1846. We never lived on [the] property. It's been passed down in the family through the generations. It continues to be family land.

Miles Schulze (TX): Our objectives have changed over the years. When we first bought it we thought the forest land was pretty and it would be a good place to go to on the weekends. We see it now more as an investment property. It generates periodic income when you harvest trees. You can sometimes get government grants to improve it. Plus, it increases in value over time. That's not a bad return. We feel an obligation to be a good trustee of the land. We're always considering our impact on the environment. We are working to improve the land.

Everett Towle (ME): I got it because I love a forest and because it's a real pleasure to see a forest improve over the years. A little management goes a long way. It has helped my retirement income. I'm now age 73. I'm a forester. I worked for the U.S. Forest Service for 33 years. My folks owned a lot of the land we own now. Some of that land goes back six generations. The principal reason we retired back here in 1991 was to be near our family and our land. I think a lot of people like myself grew up on the land. They like the trees and the birds and the wildlife. Owning land also makes a good retirement nest egg. I also do cross-country skiing.

Ed & Carol Nigl (AZ): My dad in his infinite wisdom knew that some day recreational opportunities were going to diminish in the area. The land we found had a brook trout stream on it. We bought it for hunting and fishing and because we love the outdoors and wildlife. My dad taught me the names of the trees and the types of birds. It's more for selfish reasons. I want to enjoy it myself. My dad was really possessive of it; I don't mind people walking on it as much.

Steve Graham (NY): We own it mainly for recreation. The financial benefits are secondary. When I think of my net worth, I don't include the forest land because I think of that as belonging to future generations.

Don & Sharon Schiltz (MT): The forest land we owned was given to our children.

Mike Greenheck (MN): My father was a tree farmer by heart. My reason for owning forest land is based upon sustainable forestry. We kind of look at the whole picture and say why is this watershed important. Both grandfathers were some of the first people to manage forest lands in their area. They were influenced by Aldo Leopold. Part of it is an investment for the future of my kids. It gives me a tremendous peace of mind and helps me to be a better businessman. I get an emotional cleansing from it. I also manage my woods for economic value.

Josiah Phelps (GA): I like land. I like forests.

Have you dealt with forest estate planning issues recently?

Bill & Ruth Park (PA): We've had it in our family since June 9, 1846. When we bought the place from my brother and sister in '97, we deeded it to our four children. That's how I had gotten it. My great-grandfather originally owned it. In 1885 my grandfather bought it. When my mother and father retired, they purchased the land from my dad's two brothers. . . I'm afraid from what I can tell that there will be a tax liability for my children if they ever sold it.

Miles Schulze (TX): Our will is probably 20 pages long. It's a combination of will and estate planning. It doesn't get into forest management issues specifically, though. It was written up about 5 years ago.

Everett Towle (ME): Yes.

Ed Nigl (AZ): No, we haven't done any estate planning beyond a will.

Steve Graham (NY): Yes, we're equalizing the shares of the LLC ownerships between my two sons and myself by gifting; they actually become the owners of the LLC while I'm alive. We are tenants in common and joint tenants in the involvement in the LLC. It just stays with the members of the LLC when someone dies, and you can bring someone into the LLC by gifting them shares of the membership.

Don & Sharon Schiltz (MT): The first thing I did was put [a] conservation easement on it. I'm a big believer in conservation easements, because they prohibit development of that land. Once you put homes and asphalt on a piece of ground, it's no longer a forest. It can no longer provide timber, wildlife, or water purification or recreation. All those things that no longer exist when you put asphalt on the ground are things that are beneficial to society.

Mike Greenheck (MN): My brother and I are trustees. My father passed away in '97. He wanted to set things up for a long-term family ownership. He wanted to get it out there as far as he could. The idea behind his estate planning was that our generation would also have the capacity to do estate planning. Now my brother and I are negotiating with other family members about it. The end for me is that our family members will have the same type of attitudes that my father had. I've gone through lawyers. We've had trusts and corporations. You have to be careful when you transfer ownership of something that it's not done wrong. Trusts can be expensive. Our planted forests are 50 years old, but there are a lot of existing forests that have been managed for a long time. My focus is to keep it sustainable, keep it intact. When you let forest land reach maturity and you harvest it, that is good. You don't have to sell it off to benefit from it. I try to keep a business approach to it, but it's different when you're dealing with family members.

Josiah Phelps (GA): I'm actively working to make sure my daughter and other relatives inherit my land. I just want to set it aside for my wife and my relatives.

How did you resolve those forest estate planning issues?

Bill & Ruth Park (PA): I may have given my kids a problem by deeding it to them because of tax issues. We did that because that had been done to me. It's the way my family did it for generations.

Miles Schulze (TX): We wrote up a will. We also converted all the forest land in Oklahoma from outright ownership to a trust. If we had to go through probate, with our land in three counties, that would have been three different probates we'd have to go through. We converted it all to a trust and then recorded the trust in those towns. When we die that trust will go on. We didn't want to do anything that would limit our heirs from using the estate. I'm fortunate that our two sons have a very good relationship. If they didn't, we'd have an estate planning problem.

Everett Towle (ME): I divided up the ownership of the forest land between my wife and I. I've taken care of it in wills. I am pondering the issue further, but I haven't come to a conclusion yet.

Ed & Carol Nigl (AZ): Our will is outdated. We set up a trust for our children, but that's outdated now. We'll have to update it sometime soon.

Steve Graham (NY): I'm giving the remainder of my shares to my grandchildren when I go.

Don & Sharon Schiltz (MT): We put a conservation easement on it and then established an LLC. We have four children and gave the LLC to the children. They all now have equal shares and own it collectively; however, they must comply with the easement.

Mike Greenheck (MN): At this point, I'm not sure we have the issue completely resolved. I'm trying to keep our family communications open. We're at a wait-and-see point. I have some ideas about it, but it's not resolved.

Josiah Phelps (GA): I don't plan to put my land into an estate.

Would you recommend others doing estate planning for their forests?

Bill & Ruth Park (PA): I think it's very important if you're interested in keeping it undeveloped and keeping it as forest land. In the past we've lost a lot of forest land. With the current development, we're losing more. We need to be responsible stewards of the forests. We can do lots of harm to the land if we're not careful.

Miles Schulze (TX): That's the easiest question. If you don't do it the State will do it for you and it's taken totally out of your hands. When you think of estate planning you think of a formal document. The real work is the planning for what is going to go into that document: what your wishes are, family considerations, what the taxes are, etc.

Ed & Carol Nigl (AZ): I would. I think all parents want to treat their children fairly. You should formulate your will to capture their different personality types and attitudes and values.

Steve Graham (NY): Everybody's situation's different. If you're a large forest owner and are going to hold onto the property for any length of time, an LLC makes the most sense. It makes it much easier to pass it on within the family. It also gives you all of the advantages of running it like a business.

Don & Sharon Schiltz (MT): Yes. Forest management is a long-term business. In most parts of the Northwest, it takes 60–80 years from when you plant tree seedlings to when you harvest timber. I've developed a sequence to follow for estate planning. The major reason you need to follow this sequence is because this is a long-term plan. Most of us don't live long enough to see the plan come to its culmination. The forest does, but you don't. This is the first thing: develop a forest management plan. You can be assisted by a State forestry agency to help you do one, or you can pay for a consulting forester to do it for you. Make sure the plan reflects your goals, not your planner's goals. If it's a good plan, it's going to show a progression even if you're not around. My second step is, once you have a plan, put an easement on it. That will make sure that whoever owns the land continues to manage it in a way that reflects your original plan. The third step is: develop an estate plan so that whoever gets that land will comply with your management plan. The most important reason for the estate plan is to avoid encumbrances such as inheritance taxes. Without an estate plan, your heirs sometimes have to sell part of the land just to pay for the taxes.

Mike Greenheck (MN): Of course I would recommend estate planning. It eliminates the possibility of losing the property or taking it out of the family. A lot of my family members do a lot of work on the forest. For me, the work we're putting in now is going to add additional value down the line. Estate planning is important because you set the future. Forests take a long time. Estate planning enables you to think long term. Forests need long-term processes. Estate planning goes along with that.

Josiah Phelps (GA): Yes, my will includes everything that goes to my family.

HOW IMPORTANT IS YOUR FOREST?

by Gary Micsky, Penn State Cooperative Extension

For most people reading this brief article, the answer to "How important is your forest?" will likely be something like "very important," "critical," or "irreplaceable." Undoubtedly, you have many reasons for your beliefs. Your answer is a testament to your bond with your woods. Perhaps your woods have been passed down through your family and represent part of your heritage. Or, they symbolize the realization of a dream—owning a retreat in the woods. In either case, you have probably invested a great deal of time and money educating yourself on being a better steward. Forest ownership represents an opportunity for each of us to "do the right thing" for our little piece of the world.

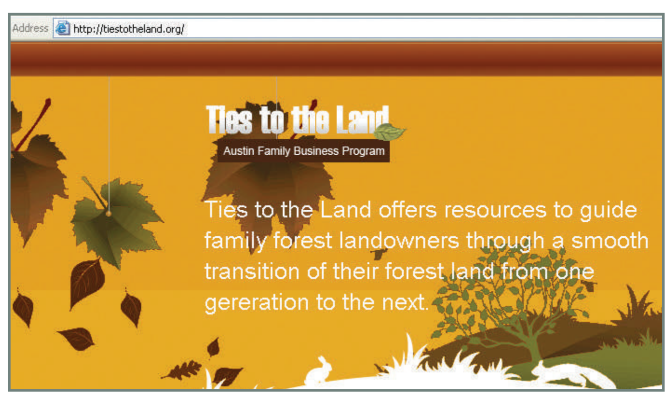
Forest landowners and the resource professionals who serve them seem to have an intuitive gift of vision. Whether it is the ability to visualize what a management treatment will look like 10 years down the road, or knowing how today's actions will bring pleasure to others in the days and years to come. Forest ownership is often a deeply emotional issue and research finds that many of us value these "softer benefits" over financial rewards. Ironically, it is our emotions which often affect our ability to ensure the long-term sustainability of that which we treasure. While we watch over the continuous cycle of the seasons and the resulting changes in our woodlands over time, we sometimes fail to learn lessons taught by the forest and apply them to ourselves and our families. When you consider the importance of your forest, ask yourself some serious questions:

- Does your family share your vision?
- Are they engaged in the decisions which affect its future?
- What will happen when you are gone?
- Who is best suited to become the next steward of your forest?

If your answers are uncertain, so too is the eventual fate of your woodlands. Each of these questions depends on good family communications. It is never too early to initiate the type of sustained family dialogue required to ensure the survival of family lands. To this end, Oregon State University created an exceptional resource, "Ties to the Land," to provide a wealth of information to help you get started or revisit what may just be your most important stewardship duty—ensuring its legacy into the future.

The Ties to the Land Web site will help guide family landowners through ownership transition. Developed to address the needs of forest landowners, the site has relevance for families with agricultural or other land-based businesses as well. The Web site includes streaming video clips, excerpts from the Ties to the Land workbook, a calendar of events and links to other relevant sites. The site will be expanded, and new features added, to meet users' emerging needs.

Check it out: http://tiestotheland.org/.



PREPARING FOR THE NEXT FOREST OWNER

Exercise

1. Schedule three, hour-long meetings with your spouse or partner. The goals of the meetings are:

   First – Identify the attributes of your forests that are important to each of you – even if you don't agree. The list should be as long as necessary and include both tangible and intangible benefits that you want available for future generations. This discussion is fairly easy, provided spouses are supportive of one another and respectful.

   Second – Make a list of prospective heirs. Candidly discuss the ability and willingness of each to assume responsibility for the family forest. This is a very tough discussion for some families because the most qualified candidate(s) may not be the eldest, smartest or most charming. Prospective candidates are good listeners, they have a sense of fairness and, above all, understand the workings of diplomacy. And they are willing to engage other family members in decision- making. This can be an extremely difficult discussion since parents don't often share their true feelings about children (My wife and I usually never make it past 5 minutes into this discussion before giving up; so be prepared for hard-going, and don't give up!)

   Third – What is the purpose of the family forest? Why do any sort of special planning, and what should happen if a generation comes along that has no interest in the forest? This is the very heart of what you're doing, so make sure the family has clear, easily-articulated motives.

2. Schedule a family meeting (excluding spouses of children, a request that may prove difficult to execute) for the purposes of discussing the disposition of family forest land, mostly from the 'first' and 'third' items above. This is your opportunity to listen, so let them talk and you take notes, or better yet tape the conversation. Try to identify instances where someone was telling you what he or she thought you wanted to hear (as opposed to what he or she really thinks), and try to pinpoint any barriers to open and frank communication (for example, the presence of a big brother may intimidate one of his sisters). **<u>What was the biggest surprise in these conversations?</u>**

3. **With your spouse, try to identify squabbles among prospective heirs that may arise.** Are any of these disagreements likely to get in the way of your plans? Are you willing to consider someone from outside the family to provide leadership? A consulting forester? Yes, it may be necessary to locate leadership outside of the family.

4. **What advice would you give to others faced with the same circumstances?** In other words, now that you have had a chance to complete the exercise, do you have any pointers to share with other forest-owning families given the same challenge? You'll be amazed at how closely others will listen to your observations.

PLANNING THE FUTURE FOREST

The United States is one of a small pantheon of countries in the world with a high proportion of privately owned forests. Almost 75 percent of our timberlands are privately held by more than 10 million owners. Of these, roughly 2 million non-industrial private forest (NIPF) holdings are in tracts of 25 or more acres representing a combined 181 million acres of productive woodlands. This means that most U.S. timber is owned by individuals and families. Although recent surveys have discovered that about half of this population intends to initiate harvests from their lands within the next 10 years, only 5 percent of NIPF owners – with a combined 39 percent of the acreage – say they have a written forest management plan in hand. With so few NIPF owners using planning methods, there is a real cause for concern about the long-term disposition of forests, when lands change hands.

Poor planning is one of the principal reasons woodland owners report negative experiences with forestry professionals subsequent to harvesting. This is especially true for owners who decide to work directly with logging contractors. Without planning, forest owners have no conception of 'good' versus 'bad' practices and a bad experience (real or perceived) tends to sour owners to the idea of long-term planning. In other words, owners that are burned by bad logging are less likely to develop inter-generational plans that pass woodlands within the family, probably because they would rather forget about a bad experience than retain a constant reminder of their mistakes.

Getting woodland owners to do forest management planning is a necessary prerequisite to demonstrating among these same owners the need for planning the disposition of woodlands in the family estate. The successful management experiences that result from good planning are an excellent incentive for owners that want to share the rewards they've realized from forests with heirs and subsequent generations. "Nothing succeeds like success," and fundamental to success with forests – both near-term and long-term – is good planning.

With less than one out of ten NIPF owners using written plans to guide management of their lands, it is safe to assume by inference that a smaller number – possibly significantly smaller – has planned for woodlands in their estates. If this is true – that less than 5 percent of all NIPF owners have planned for the disposition of forests in their estates – then the fate of more than 60 percent of U.S. timberlands – at least 110 million acres – is unknown. Given increasing rates of migration from city to country and the subdivision of land for housing that follows, the long-term prognosis for forestry in some parts of the country is not good.

Poor planning – or no planning – usually results in parcelization of land (the division of a given tract into smaller and smaller units).The potentially negative effects of parcelization on the long-term fate of forests are so significant that we can no longer afford to speculate. A pending acceleration in the rate of parcelization is now perceived by many in forestry to be one of two major threats to woodlands in the U.S. The other – which underscores the significance of an increasingly divided landscape – is the threat of invasive species on forest ecosystems. Approximately 80 invasive and pernicious species in the U.S. are now responsible for more than $100 billion in losses (mostly agricultural), and the rates of invasion and resulting losses are expected to increase.

No where is the effect of forest parcelization more apparent than in Vermont; a small, rural and densely forested state in northern New England. Its landscape – virtually all of which is owned by families – lies within an easy half-day drive of nearly a quarter of the U.S. population. Market pressure to subdivide land for development is high and the trend is increasing, especially when forest land is a primary asset that must be divided among family to settle an estate.

Unplanned estates of "land-rich-cash-poor" decedents are often sold to the highest bidder or divvied among heirs to settle an estate. Valuable timber is liquidated before its time and cut-over lands are sold to homesteaders or to others who care little about long-term forest benefits. The more parcelized a forest becomes the more fragmented its purpose. Vital habitats and productive woodlands – that help support sustainable, Vermont-like communities – are converted into developed uses. Eventually, Vermont's forest landscape becomes a façade for tourists; a caricature of what it once was. Unless forest owners can see the benefits of long-term forest management, and the advantages of passing lands intact and within the family, within two generations Vermont will evolve from a rural, agrarian state into a service-oriented economy that supports an enclave of second-homes.

This was the setting for a recently completed project called "Estate Planning for Woodland Owning Families." Our goal was to develop a cooperative venture of organizations concerned with the future of forests. And, through them, host workshops around the state for forest-owning families and their advisors. Workshop methods and content varied from two-hour 'interactive television' lectures to day-long workshops. Instructors were committed to teaching estate planning methods that are both easy to learn and adaptable to any combination of goals; from maximizing timber values to creating ecological reserves.

The curriculum was purposely designed to effect communication between spouses, and between parents and children. Subjects included: current estate tax laws that apply to forest owners, the potential effects of parcelization on fragmentation of purpose, what to look for in an estate planner, and overviews of the various strategies for passing lands within the family, such as limited liability companies, family partnerships, S-corporations and land trusts.

Of the many different methods we used to advertise the workshops, from magazine advertisements to association newsletters and direct mail invitations, the most effective method was 'word of mouth.' Many workshop participants told us they learned of a workshop – and decided to attend – based on personal communication, usually with a neighbor, consulting forester or some other person whom they trusted. Most workshop groups were small; anywhere from 5 to 30 participants. Day-long workshops, featuring other subjects in addition to estate planning, and evening workshops that focused only on planning methods, were, by far, more effective (and considerably less expensive) than 'interactive television.'

Generally, participants gave the workshops good scores overall (averaging 4.4 on a Likert Scale between 1 and 5). The most popular topics usually dealt with strategies for passing lands and with the process of developing long-range plans. Participants were less interested in tax-related subjects. All workshop presentations were backstopped with copies of the presenter's notes (usually PowerPoint slides formatted 6 frames to a page), and with supporting popular articles on estate planning for woodlands. Our evaluations indicated that participants were very appreciative of the written materials, both to help them recall points discussed during the workshop and to offer more detail and references on technical subjects.

Participants were asked to estimate the chances of them initiating, completing or amending an estate plan for their woodlands – as a direct result of having attended a workshop. The overall response was no better than 'maybe,' indicating that workshop participation alone was not sufficient to compel clients to do estate planning. This last point is an indicator of just how challenging it is to change any behavior. Meaningful progress on estate planning of any kind requires owners to contemplate their own mortality, which is difficult for most owners and impossible for some. When forest is the principal asset problems are exacerbated especially for owners who want to keep lands intact while also divvying the value of forest assets to children, or other heirs, some of whom want nothing to do with forests.

Those workshop goers who indicated in the evaluations that they do not intend to provide for woodlands in their estates told us they needed more information before setting a plan in motion. Others said "legal costs are too expensive;" "I am reluctant to tamper with assets while still alive;" and the most prophetic: "I trust my heirs to do the right thing." Some also told us that the availability of 'planning grants' – possibly as a federal cost-share program – would provide an adequate incentive to seek out an estate planner and initiate the process of forest planning.

Workshop participants also told us that hearing the experiences of peers was extremely valuable. In fact, the effects of sharing were so significant that a proposal to follow-up the project in Vermont with a national effort to catalogue success stories of woodland owners who develop viable plans to pass managed forests within their families was a logical 'next step.'

That project, known as 'Planning the Future Forest,' was funded with a grant from the U.S. Forest Service. The mission of this project is to identify woodland owning families that have developed long-range, intergenerational plans for their forests and to get them to tell us their stories. The purpose of this project is to document some of the many success stories where woodland owning families have protected their lands from development, and to share these stories with other families that need help developing their own strategies to protect forest ecosystems.

Also, most of the subject-related material on estate planning that is available to forest owners focuses on 'preservation of wealth' and not on the impor tance and benefits of healthy, productive forests. For example, a primary concern of parents who leave assets to children is to maintain a sense of family among children after they are gone. Yet, even proportionally equal divisions of assets can lead to fatal bickering between children, destroying the very fabric parents intended to maintain. When forest lands are left to children intact, with clear directions as to how lands are to be managed and used and how benefits are to be shared, surviving children are much more likely to come together as family for the purposes of managing forests, usually as a legacy to their parents, and thus establishing a pattern for future generations.

McEvoy, T.J. 2004. Planning the future forest. National Woodlands Magazine. 27(4): 10–12. [Updated to Fall 2006]

INTERGENERATIONAL PLANNING METHODS FOR FORESTS

One of the most tragic failings of traditional forestry is an unreasonable emphasis on profitability. Although woodlands are capable of producing a sustained flow of products, the shorter the planning horizon of any particular owner, the less sustainable woodlands become (Landsberg and Gower 1997). The root of this unreasonable emphasis is a ridiculously antiquated system of property taxation based on "highest and best economic use." It is hard enough for a woodland owner to keep up with property taxes in areas where the highest and best use is for forestry purposes. Near urbanizing areas, forests are assessed – by law – at highest and best use for development.

Property taxes and other expenses of owning forest land force the hands of many owners to cut timber more frequently than is prudent, or to liquidate timber at a fraction of its maximum value. But the situation is dire in forest ecosystems located within a few hundred miles of cities. In these areas "highest and best economic use" is defined not in terms of ecosystem values – for both private and public benefits that forests provide – but for the number of housing units land is capable of supporting. Where taxes are onerous and there is little incentive for owners to manage and protect forest ecosystems, owners are forced to harvest all merchantable timber using non-sustainable practices before lands are sold for development. The calamity of property tax policies is in their failure to account for the enormous public benefits forests provide: from clean water to buffering runoff from storms that, if not for forests, would cause flooding and serious loss of property downstream; scenic vistas that support tourism in many forest areas; habitat for wildlife that is owned by the state; filtering pollution and sequestering carbon from autos, home heating and manufacturing; and recreational opportunities for millions of people who do not own the forests they enjoy.

Framers of the Constitution intended to allow local governments to use the property tax as an inviolate source of revenue for local services, especially education. To this day, it is the principal means of paying for services that local citizens understand and use, but it is based on an indicator of 'wealth' that no longer applies. Not too long ago – the equivalent of a millisecond in 'forest time'– land ownership was a good indicator of wealth and means. But no longer; socioeconomic patterns shifted during the first half of the 20th century (probably coincidental with the Great Depression) placing wealth in the hands of those closer to consumers. A widely dispersed agricultural economy gave way to a more centralized industrial one, obviating wealth on which local communities depend. But in the interest of maintaining 'state's rights' and local control, mechanisms that could have shifted tax burden were avoided by local officials who feared federalism

It is quite likely that one day the destructive effects of property taxes on parcelization of farm and forest lands – causing fragmentation of habitat and other forest values – will become enough of an issue to effect changes. But until then, no woodland owning family should have to liquidate timber or land to pay property and/or estate taxes. All states offer programs to owners that tax lands based on 'current use' and/or on actual 'yields' from forests that can substantially reduce property tax burden. Unless 'fair market values' are low in a community, it is virtually impossible for owners to practice positive impact forestry without some form of property tax relief.

Some owners avoid these special valuation programs out of mistrust, or because of penalties associated with converting forests to other uses. Local officials tend to disfavor current-use taxation out of a mistaken belief that it severely limits a community's ability to raise revenue; their reasoning being developed lands bring in more taxes. Study after study, however, have demonstrated that increased tax revenues fall far short of the eventual costs of development.

There are a number of alternatives available to woodland owners who intend to keep forests intact and pass them on to succeeding generations. Each, however, comes with two requirements: 1) Long-range planning must extend far beyond the 10- to 20-year planning horizon of most traditional forest management plans; and 2) Forest owners and their families must accept the fact that truly sustainable forests are measured in terms of centuries, not decades. Families that subscribe to the concepts of positive impact forestry are willing to forego current income opportunities to create a legacy for the future.

Forest Parcelization and Fragmentation of Purpose

One of most insidious problems facing forest areas is parcelization of land: the division of larger tracts into smaller ones. According to one source, about 3 million acres are converted every couple of years into parcels that are less than 100 acres in size, and during the same time-frame, about 2.5 million acres of forests are 'developed' into other uses (DeCoster 2000). Forest land conversion and diseconomies created by parcelization cause erosion of the forest land base; and less woodland means less timber and higher stumpage prices. So serious is forest parcelization that it makes the sum of every other economic threat to forest utilization pale in comparison (with the possible exception of economic impacts from pernicious invasive species, discussed earlier). Moreover, it is impossible to lay blame for the effects of parcelization; there are no environmental groups to excoriate, no federal programs to criticize, no laws to condemn. Forest owners, or prospective forest owners, are the cause of parcelization and there is almost nothing short of major policy changes that will turn things around.

But how did it get to this? Why has parcelization been allowed to proceed unabated with no regard for the future of forests or agriculture. It is a long story, but one worth telling.

Private property law in the U.S. is mostly based on English common law, the first codification of which was known as 'feudal law.' Under feudal law the King owned everything, but his lands were managed by lords who were responsible for keeping the peace among vassals and for collecting taxes. A lord could pass within his family the privilege of managing the King's lands, but to only one heir: usually his first-born son.

Eventually the King realized that, with a system of taxation, he did not need to own land to extract its wealth. Thus, feudal law evolved into the allodial system, which is the precursor of common law in most of North America. A lord owned land in the allodial system (provided he paid his taxes), but his ability to divide the estate was limited. Upon his demise, the lord's entire estate passed to only one heir: his first-born son, or to the closest consanguine male (father, brother, uncle, cousin and so on).

Known as 'primogeniture,' it was not uncommon for an eldest daughter to see her father's lands inherited by a late-born, five-year-old brother; or – if her father never sired any sons – the land might go to her uncle. If the uncle predeceased her father, the estate might end up in the hands of a male cousin. It is primarily for this reason that kings and other nobility were so hung up about fathering sons. Since determination of a child's sex resides with the male's chromosomes – a fact that was not known to science until much later – it is ironic that the wife was blamed for being barren of sons, when in fact it was her husband who was responsible. It is quite likely that primogeniture would have never developed if nobility had been aware of this, and women would have enjoyed a higher social status much earlier in the human experience than proved to be the case.

Primogeniture evolved in feudal times as a way for the King's lands to pass within families of nobility, but since the King was under no obligation to share his interests, the lords had no rights to divide the estates entrusted to them. Primogeniture survived evolution to the allodial system because it prevented fragmentation of productive lands and also maintained a relatively easy method of gathering taxes.

With a growing population of noble-born, second sons the King was faced with the question of what to do with the disinherited whose choices were few. Colonialism was a result of primogeniture and the Americas were settled mostly by sons who were expatriated to the colonies. For this reason, primogeniture was one of the first concepts abandoned by the separatists and in doing so, the Continental Congress added rights to the bundle of private property rights: the right to divide and the right to bequeath. Little did they know it would lead to a quiet crisis of epic proportions in less than 300 years.

A totally capricious, unfair and unreasonable method of passing land to prevent parcelization (primogeniture), became a reasonable alternative with now dire consequences. One can only wonder what the founding fathers would think of the situation today. Although it is doubtful they would have embraced primogeniture as a way of keeping lands intact, conversion of productive lands to idle or unproductive uses would have been unacceptable. "Highest and best use" in an economic sense was for agricultural purposes when the Constitution was drafted, not residential housing or retail space as is the case today. Who could have foretold that productive land would be worth more for housing than for timber and crops? Anyone suggesting a future such as this in the late 18th century would have been branded a heretic and a fool.

Under our current system, land is a capital asset that has the same status as any other form of capital, except that it cannot be moved from place to place. Land ownership is defined by rights, in exactly the same context as originally claimed by the King. One can easily argue the State has taken the King's place under our current interpretation of real property rights. The State reserves the same rights as those reserved by the King: the right to tax, the right to eminent domain, the right to escheat (to claim land when an owner dies intestate and without legal heirs), even the rights to wildlife. But the one deviation from the old English allodial system is the right to divide land however the current title holder sees fit. It is this deviation from a course that was obvious to the King of England hundreds of years ago, when the only true wealth was measured in land that makes parcelization one of the most difficult issues of our time.

Families who measure a substantial portion of their wealth in forest land face a major dilemma: How to pass wealth from generation to generation without dividing up the forest? Fortunately there are many alternatives to keep land intact, discussed earlier. The bad news is, parcelization is proceeding at rate that exceeds the ability of alternatives to make even a small dent in the urbanizing of America's forests. With the median age of forest owners still increasing, most parcelization and conversion will take place over the next 20 to 30 years as lands are passed to heirs, many of whom want nothing to do with managing forests. When a surviving parent dies, heirs are concerned not with land, but how quickly the estate is settled. In the near term, liquidation of forest assets can result in a windfall for local primary wood-using companies. But as conversion to other uses proceeds, or as forested parcels get smaller and smaller, there is less timber available and the cost of doing business increases.

What does the effect of parcelization hold for the future of forests? Less harvesting on public lands has already led to increasing reliance on private lands. This trend will continue, especially as more public lands are taken out of production. Some local wood-using companies will profit from probate of family forests, but where there is one owner now, expect to see five, ten or more owners in the future. These new owners will have almost no connections to the land and they will be less willing to manage lands for periodic timber production. Those who do agree to harvest will expect high stumpage rates and impeccable extraction methods.

Wood-using companies that rely on local timber supplies need to develop ways to thwart the impacts of parcelization within their procurement areas. Forestry professionals need to have candid conversations with clients about the long-term disposition of woodlands. And they must also be prepared to suggest estate planning alternatives, discussed earlier, that keep forest lands intact.

Some other changes that may help keep lands intact:

* States (with federal grants) will offer local taxing authorities 'payments in lieu of taxes' for forest lands owned by families that have agreed to effect a long-term easement (300 years or longer) that passes forest lands within the family, or to heirs that agree to maintain practices for the requisite period. In exchange, forest lands are exempt from all forms of taxation – property, estate – even income tax, but on a 'scaled' basis (i.e., the longer timber is held, the lower the tax on income from its sale).

* Owners who agree to establish 'ecological-reserves,' by effecting an easement in perpetuity, are also exempt from taxation (under the same concept described above). As a condition of benefits, owners must allow qualified research projects on the property. And, if an owner (now or in the distant future) violates the easement, title is forfeit in addition to monetary penalties.

* Local communities in forest areas wanting to expand opportunities for commerce may offer packages of incentives to forest owners who agree to supply raw material for processing facilities that provide local employment opportunities. The same incentives are available to owners who agree to protect 'view-sheds' that support tourism, finally allowing a method to share tourism wealth with those who provide the view.

* Generally, wood-using businesses have been distrustful of land trusts because of the misperception that trusts take forests out of production. Mills may want to consider establishing long-term relationships with local land trusts to help woodland owners sell or give development rights that maintain traditional forest uses. Working with a land trust may seem like a foreign concept to some mill owners, but the key to keeping productive lands intact lies with separating the bundle of rights and disallowing the possibility of future development.

Finally, an idea that has less to do with parcelization than with ending a long-standing practice of liquidating timber assets when the owners begin to feel they're too old to continue holding forests, and their kids have no interest in the land. Those families that cannot afford to wait for social change may finally be able to 'liquidate' their timber resources without actually cutting trees. A federal banking authority (or federal grants to fund the establishment of state banking authorities), will buy stumpage (or, the rights to stumpage through an easement) providing the family with needed cash. The 'authority' manages timber and other ecosystem values – using positive impact practices – paying the family an annual 'lease' (possibly equal to the value of annual increments, property tax liabilities or by some other measure).

Such a program can end the non-sustainable practice of cutting-off woodlands before selling them, while allowing families to cash in on equity. The result: forest ecosystems are protected, timber is left to grow in volume and value, and all the while forests provide a complement of public services and benefits society expects of forests but for which it has yet to discover a way to reimburse woodland owners.

Planning for Woodlands in the Estate

Good planning to maintain land through many generations requires a long-view that extends far beyond an individual's life. It is so for all land, but especially true for forests because managed woodlands change slowly. One of the first realizations of a conscientious forest manager is that the fruits of his or her labor will most likely ripen for the next generation. And yet there are alarmingly too few instances where forest owners have planned for the disposition of land in their estates; probably less than 10 percent, possibly as low as 5 percent.

Some refuse to confront their own mortality, others figure they "will leave it to the kids to deal with." In these instances it is the forest and the family that suffer when siblings are left to fight over an estate that must be divided, and on which a federal and state estate tax may be looming. The result: forest ecosystems are abused, timber is sold before it reaches maximum value, and/or land is sold to the highest bidder who often intends to develop. On top of all that, a destructive federal tax may be due on the fair market value of the decedent's estate, and the children – held together by parents who are now gone – never talk to one another again after the estate is settled.

There are lots of reasons people put off estate planning, but high among them is an unwillingness of families to communicate. Children are reluctant to bring up the subject for fear parents will think them greedy and wish them dead, and parents don't discuss it because the subject is uncomfortable. Notwithstanding, if spouses do not resolve matters involving forests between them, and engage their children as to their plans, chances are slim important issues will ever be resolved. Other reasons to delay include mixed feelings about children, an unstable marriage, or a mistaken belief that the estate is too small to worry about.

Good planning requires open and candid conversations between spouses. Even if only one or the other has been the principal decision-maker; when it comes to long-range forest planning in the estate, both should be of one mind since it is almost a sure bet one spouse will predecease the other. An easy way to initiate these conversations is by making lists of things about the land that are important to both, including values like; a quiet knoll where wind whispers through crowns even on a calm day, a young stand of timber on rich soils that has veneer potential 150 to 200 years from now, a favorite trail, a scenic vista or a special habitat. Couples should view this exercise as a chance to leave a living memory of the combined efforts of both partners. The goal is to ensure future decisions are made with the land in mind. It is remarkably easy to do so without hamstringing future generations. Any practices that are detrimental to forests, or decisions solely predicated on quick financial gain, are disallowed.

When spouses have established priorities, it is time for a candid conversation about heirs; who among them is best suited to the task of seeing to it that ideas, concerns and objectives for the land are fulfilled and passed on to future generations? This is often more difficult than it sounds, particularly when the couple discovers that none of their closest relatives meets the test. Choosing a son or daughter to assume responsibility for managing forest ecosystems should not be a process of picking the lesser of evils. If none of the prospective heirs is suited to the task, there are other options discussed later. It is, however, essential that children understand and accept the 'will' of parents; and this is the next step – communicating with family.

Assuming prospective heirs are most likely children, if they have reason to feel as though they have a stake in the estate, they must understand – in the most certain terms – their parent's goals for the forest. It is not essential they agree, but they should understand and accept what parents want. Obtaining this acceptance early on gets children used to the idea that their control over the land may be limited after parents are gone. Knowing this in advance, children are less apt to dispute the provisions of the estate plan when it goes into effect. If necessary, there are also 'disincentives' that parents can declare making it risky for an heir to actively dispute the estate when parents have passed.

After details are resolved between spouses, and with the rest of the family, it is time to locate a qualified estate planner. This person is most apt to be a lawyer, but not just any lawyer will do. Estate planning is still a relatively new area of law, except among the very rich who have been planning their affairs to avoid taxation ever since the estate tax was levied. In fact, most people never think of estate planning because of its association with the wealthy. Most attorneys will offer estate planning services if a client makes such a request. But locating someone who can do estate planning for forests is another matter and it may require some shopping around.

A general guideline is to locate a person who has some experience with forests and devotes at least half-time to estate planning, working with three to five families, or more, each month. Another thing to look for is someone who develops his or her own forms for easements, wills, trusts and other documents, as opposed to using standard documents – also known as 'boilerplate'– with fill-in-the-blanks capabilities. If at all possible, try to find someone who has experience working with woodland owners. A good source of information on attorneys with these qualities is the local land trust.

Aside from the fact that it is good business practice to plan for the disposition of forest land in an estate, the estate planner may suggest some alternatives that can result in estate tax savings. In 2010, the estate tax is eliminated. But in 2011 it is reinstated unless Congress votes to continue the repeal.

Keeping Forests in the Family

The sad fact is most children will end up selling the family forest to settle an estate, unless the parents have set up an alternative that prevents such a sale. Everyone likes to think children will not quibble about money after they are gone, but the facts are they do. Leaving well-managed forest land to children in the hope that they will carry on the parent's forest management ideals is more often than not a prescription for failure. There are more than a few instances where the best laid plans of Mom and Dad were discarded the first time the children argued about 'their share.' Soon after, the woodland is sold to the highest bidder, who is usually thinking about where to put houses rather than how to protect and sustain healthy forest ecosystems.

So what can parents do? Some woodland owners have formed legal 'entities' that own the land, and gradually 'vest' children into ownership and decision-making positions. Doing so keeps the land intact and passes not only the land but the value of good management on to children who will eventually benefit from dad's or grandpa's or great-grandpa's good decisions. There are basically three choices: 1) a limited family partnership, 2) a closely held 'S-corporation' or 3) a limited liability company.

Until just a few years ago only the first two options were available. Family partnerships and the S-corporation have served many families that have passed managed forest to heirs. But both strategies have limitations that may kick in years after the founders pass away. For this reason, the newest of the three – the limited liability company, or LLC – holds a great deal of promise for woodland owners who are looking for a way to pass forests to children, and have children continue to manage the forests using positive impact practices.

Although the concept of a limited liability company (LLC) has been in existence for more than 100 years, first in Germany then throughout Europe spreading in the 1900s to Latin America, it has only been in the last few years that every state in the U.S. has developed a statute that allows this form of organization.

An LLC combines the most favorable aspects of a partnership with the best characteristics of a corporation. In a partnership, decisions are made exclusively by the partners. But the partners are liable for those decisions, jointly and individually. The bottom line is that partners are responsible for each other's mistakes. This liability, or potential liability, far exceeds one of the primary benefits of a partnership: the profits, losses and credits are passed directly to the individual tax returns of the partners and are taxed only once.

A corporation, on the other hand, is set up as a separate entity – just like another taxpayer but without a body. The shareholders, or owners of a corporation, are for this reason protected from liability: if someone screws up the corporation is responsible, not the individuals who own the corporation. But since the corporation is a separate entity it is taxed as such, and profits paid out to owners are taxed a second time on each individual's return.

Congress created the S-corporation to allow small businesses and non-profits to incorporate providing owners protection form liability while eliminating double taxation. But—as is the case with most things involving the IRS—it is not as simple as that.

There are many rules an S-corporation must abide by in order to maintain its status. For example, an S-corporation can not have more than 75 shareholders and it can have only one class of stock. A 'closely held' S-corporation can develop rules about who can hold stock (which is one of the reasons it is favored by families that want to pass forest lands), but it can have no more than 30 shareholders. An S-corporation that breaks the rules will end up being viewed by the IRS as a regular corporation, with the threat of back taxes and penalties.

The LLC structure assumes at least two of the following four conditions of a corporation are not true: 1) limited liability for the owners, 2) centralized management, 3) no restrictions on ownership interests (anyone can hold stock), and 4) continuity of existence. In other words, the IRS will tax the LLC in the same manner that a partnership is taxed if it lacks at least two of the above conditions. Most often those two are items 3 and 4, since an LLC by nature is intended to protect owners from liability (item 1 is true), and there is usually (but not necessarily always) a centralized management (item 2 is true). Item 3 is false for an LLC because the owners, like partners, want to restrict ownership and decision making.

It would be to the advantage of a founding woodland owner who sets up an LLC to have it exist irrespective of the current owners (like a corporation), but to meet the conditions of an LLC, item 4 must be false: a family woodlands LLC can not have a continuity of existence. It must either have a finite existence, or exist at the will of its owners. On the surface, this condition appears to be a problem for a long-term family woodlands enterprise, but it needn't be. Although it may be possible to demonstrate that a family forest LLC lacks centralized management (item 2; which means the LLC could have "continuity of existence"), it would be exceedingly difficult, perhaps impossible, for the company to do business if all decisions were handled 'by committee.'

An LLC is composed of two parts; one public, the other private. The founder of an LLC must file Articles of Organization, usually with the Secretary of State. The 'articles,' in its simplest form, is a series of questions. In an LLC (the name of the company must include LLC, or LC, indicating a 'limited liability company'), the owners or principals are called "members" and one of questions has to do with whether the company is to be managed by 'members' or by a 'manager,' who may or may not also be a member. Another question has to do with the issue of 'continuity of existence.' The founder must choose whether the company has a fixed 'term' or it exists 'at-will' of the members. Resolving this aspect of an LLC (does it exist for a fixed term, or at the will of the members) is worth paying for good legal advice.

Given the long-term nature of forest ecosystems and forest investments, and the need to protect the forest LLC from dissolution, it is fairly easy to argue for a fixed term of 150 years or more; but a knowledgeable attorney might advise otherwise.

When a 'term' LLC expires, the statute assumes that it becomes an 'at-will' LLC until the members decide to dissolve the company or establish a new term.

The second – private – part of an LLC is the 'Operating Agreement.' It sets forth in detail the purpose of the LLC, who its members are, and all the conditions of the company. The agreement details important matters of governance and also regulates the affairs of the company and how it does business. For a family woodland owning business, it should also include the founder's management plan that clearly spells out how management decisions are made in the future. The Operating Agreement also describes how members will handle the 'expiration' of the term (presumably by specifying a new term) and how 'managers,' or the member-management team, will operate. The Operating Agreement is a proprietary document of the LLC. It is not filed with the Secretary of State, but each member should have a copy. The agreement is like a contract between the members and it clearly spells out all the conditions the members support. For example, it is probably a good idea to identify all of the positive impact practices the LLC insists are used by managers, now and in the future. And it should specify a method for handling disputes, or differences of opinion, especially as knowledge of forest ecosystems and markets change with time.

When the LLC is set up, woodlands are appraised so the parents can use the annual IRS gift exclusion to vest children with undivided interests (member shares) in the LLC. For example, under current laws a husband and wife can give annuals gifts of up to $22,000 to each child, tax-free. In fact, if the Operating Agreement restricts the way children can handle these shares – as it should – then the gift can be considerably more on the grounds that the value of the gift is 'discounted' because its marketable value is limited by the Operating Agreement.

Income from the family woodlands LLC can be distributed to the members (or in trust for children), much as a dividend is paid by a corporation. If a future family member wants out of the LLC, the Operating Agreement describes how that member's shares are purchased, and whether or not a former member's offspring are eligible to buy back in to the LLC. When the family forest LLC 'term' expires 120 years after the founding family set the company up, the Operating Agreement describes how members are to proceed to set up a new 'term.'

The LLC is perfectly suited to passing forest lands and carefully considered forest management plans to family members. It is easy and cost-effective to set up, can be amended, and the 'manager' controls the property and decision-making, whether or not the manager is also a member. The primary disadvantage is that it may be difficult to effect continuity without sacrificing the pass-through tax benefits. If the IRS determines that an LLC exists independent of its members, it may view the arrangement as a corporation resulting in back taxes and penalties. Good legal advice can help prevent this from happening.

McEvoy, T.J. 2004. Positive impact forestry – a sustainable approach to managing woodlands. Washington, DC: Island Press. 268 p. [Excerpt from chapter 10]

PLANNING FOR WOODLANDS IN YOUR ESTATE

Sharing Property with Children

When title to property is held between two or more people as "joint tenants with rights of survivorship" (often abbreviated on documents as "JTROS"), the surviving joint owners automatically own 100 percent of the property when one owner dies. An interest that someone has in a JTROS property title is not part of the person's probate estate. Whatever interest the decedent had in the property automatically reverts to the survivors. Consequently, many families mistakenly use this strategy to remove assets from a parent's estate to avoid estate taxes on the property. Unless the children can prove they contributed to the formation of the joint tenancy, or the joint tenancy was formed as a result of a long-term, tax-exempt gifting strategy, the full value of the JTROS title is included in the decedent's estate. In other words, simply changing the property title to include children is not a valid strategy to lower estate value. Also, when you share title as joint tenants, you give up control of the property, and a joint tenant cannot sell his interests without consent of the others (state laws vary in this matter). Fortunately, a joint tenant's share is usually not very marketable.

Another, more acceptable way to share title with children and lower estate values at the same time is discussed in the sections on family partnerships and limited liability companies.

Deferred Gift

A gift to a qualified charitable organization can also be deferred. The deferment can be specified many different ways. For instance, the gift can be effected immediately but with a provision that you (and your survivors, if you wish) receive income from the property even though the title of the property has passed. A gift of a remainder interest means you continue to own and enjoy the benefits of the property while you are alive. When you die, whatever is left of the property (i.e., the remainder) goes to a charitable organization. A testamentary gift is any gift effective on death. When made to a qualified charitable organization, the value of the gift is fully deductible when figuring the total taxable estate. The testamentary gift has estate tax advantages but does not have current income tax savings because the donor can change his or her mind (rewrite the will) before death.

A gift of a remainder interest does have income tax advantages as well as estate tax savings. Figuring the income tax advantages of a remainder interest, however, is very complicated and requires the services of a qualified estate planner or accountant.

A variation on the gift of a remainder interest is a present gift of a future interest in property. This is an especially useful technique when the gift involves real property, such as woodlands. The charitable organization that accepts the gift usually wants to have a large degree of control as to how the property is used during the lifetime of the donor (or the other beneficiaries if the future interest extends beyond the lifetime of the donor). In exchange for control, the charitable organization—usually a land trust—will hold the property in trust and pay the donor an annual fixed or variable annuity that is based on a percentage of the fair market value of the assets. When the donor or designated beneficiaries pass away, the property belongs to the charitable organization. These types of gifts must be irrevocable, so they require careful thought and planning. Gifts of a remainder interest are often used when the donor does not have any direct descendants and he or she is concerned about the cost of elder care and/or a protracted illness. Organizations that accept present gifts of future interests are usually very flexible about the terms of the annuity. They are more than willing to design support arrangements that ensure the donor that costs will be met during his or her lifetime, and will usually also accept the donor's conditions about how the land is to be managed and used by future owners. This type of arrangement – usually with a land trust – is very appealing to single woodland owners with no children. In exchange for a future interest in well-managed forest lands, the trust will agree to bear the responsibility of elder care and also sees to it that the donor dies with the dignity he or she deserves.

Special Valuation

Internal Revenue Service rules allow farm and forest lands to be evaluated for estate tax purposes using special valuation. These procedures allow lands to be assessed at current-use values rather than fair market value, at the discretion of the executor but only if all family members agree. If it is the family's intention to keep forest lands intact, but the parents never got around to doing the necessary paperwork, special valuation may be an option. Recapture rules apply, however, if the land is used for purposes other than what was specified in the special valuation. The services of a qualified estate planner and an independent appraiser are necessary to claim special valuation of forest resources.

Closely-Held S Corporation

A corporation is an entity set up under four primary conditions:

1. Limited liability for the owners
2. Centralized management
3. No restrictions on ownership interests (anyone can hold stock)
4. Continuity of existence (a corporation exists in its own right)

As a separate entity, it is taxed as such and this is one of the primary disadvantages of the corporate structure: profits are taxed twice; first as corporate income, then as income when profits are dispersed to the owners. Congress created the S-corporation to allow small businesses and non-profits to incorporate providing owners protection from liability while eliminating double taxation. But – as is the case with most things involving the IRS – it is not as simple as that. There are many rules an S-corporation must abide by in order to maintain its status. For example, an S-corporation can not have more than 100 shareholders (increased from 75 as of January 2005) and it can have only one class of stock. In 2004, the American Jobs Creation Act allows family members – representing up to six generations – to be treated as one shareholder but only United States citizens can hold stock. Also, when a shareholder is sued for personal reasons (not related to the business of the S corporation), his or her shares are viewed as assets that can be seized by court action.

A closely-held or 'closed' S corporation is a special variation that allows the corporation to restrict ownership (contrary to the third condition of a corporation mentioned above). For this reason, the closely-held S corporation is a favorite of small family businesses even though ownership interest is limited to 30 shares. Being able to control ownership, along with all the other advantages of a corporation, made the closely-held S corporation a popular method for keeping well-managed forest lands in the family. It still is, but the limited liability company (LLC) is proving to be a far more flexible.

Like-Kind Exchanges

Land trusts often identify parcels that are important for connecting wildlife travel corridors, for protecting water resources or prominent vistas, or for adding to an existing block of protected land. When owners of these lands are approached, often they are unwilling or financially unable to donate an easement. For instance, even a willing owner may not have enough current income to take full advantage of the tax savings when an easement is donated, and may be expecting profits from a sale of the land at retirement. An unwilling potential donor may not want to lose the economic potential of the land for crops, timber, or future development. For both willing and unwilling potential donors, a like-kind exchange with a land trust may prove acceptable.

A like-kind exchange is a tax-free transaction, usually initiated by a land trust but not necessarily, whereby an owner exchanges his or her property for qualified, like-kind property. As long as the like-kind property qualifies under IRS rules, there is no taxable gain. The advantage to a landowner is the ability to defer the capital gain that would otherwise be due with an outright sale, and to obtain property of like-kind that allows fulfillment of financial goals with minimal impacts on important landscape features. The advantage to the land trust—and society—is protection of significant lands from development. For more information on like-kind exchanges, contact your local land trust.

Like-kind exchanges are not unique to land trusts even though they are a common method that trusts use to protect land. Any taxpayer has the right to exchange property held for investment or for other productive purposes under Title 26, sub-section 1031 of the Internal Revenue Code. By following the rules of such an exchange, the taxpayer avoids having to pay capital gains on the theory that the gain from the sale of one property is being used to purchase another property of equal or greater value and for similar purposes. Thus an owner of forest land in Connecticut can sell the land and use the proceeds to purchase forest land in Idaho. To qualify, the purchaser must use an intermediary, such as a lawyer, to handle the exchange. Within 45 days of the sale of the property in Connecticut, for example, the owner must locate a property of similar value in Idaho and notify the intermediary. Then the purchase of the Idaho property must be consummated within 180 days of the sale of the Connecticut forest. If handled properly, there are no capital gains on income from the Connecticut land. A like-kind exchange is the perfect tool for a family that is forced to relocate. Or in situations where development pressures have dramatically inflated forest land values for a family that has no intentions of developing land. They simply sell the land that is doomed for development and use the proceeds to acquire productive forest lands in an area that is less threatened.

Forming a Local Land Trust

Creating a land trust requires three things: people, money and land – usually in that order. Locating like-minded people in a community who are willing to invest time in the significant effort required to form a land trust is probably the easiest of the three. But locating financial support and convincing local farm and forest owners that it is a good idea to donate easements from their lands is more challenging.

In order to meet IRS standards that maximize the amounts donors can deduct when they make gifts (of cash, easements or of land outright), the trust must achieve status as a public charity. It must also obtain status as a private operating foundation (which means no (or limited) political lobbying among other things), and it must obtain status as a supporting organization (meaning that it is contributing to the efforts of one or more parent organizations). It is also critical for a land trust to obtain – and protect – a tax-exempt status with the IRS. Doing so triggers a host of IRS requirements having to do with where it gets its money, recordkeeping and – once again – restrictions on lobbying.

The initial leg work to form a local land trust is considerable and without question requires the service of an attorney, preferably one who is well-versed in IRS rules that govern non-profits. Nevertheless, it is possible to form a land trust that suits the needs of local people. An excellent source on the subject is: Starting a Land Trust – A Guide to Forming a Land Conservation Organization, published by the Land Trust Alliance. To obtain a copy, or for more information on land trusts in your area, contact The Land Trust Alliance, 1319 F Street NW, Suite 501, Washington, DC 20004-1106, 202-638-4725, www.lta.org.

The Forest Legacy Program

The Forest Legacy program was introduced in the 1990 Farm Bill to "protect environmentally sensitive forest lands." It represented a first attempt to use federal dollars to purchase conservation easements on private lands. Generally, the purpose of easements is to restrict development on productive forest lands and to protect forest ecosystem while also requiring owners to employ sustainable practices. First funded in 1992, the program now encompasses conservation easements in 26 states and territories. To date the U.S. Forest Service has spent $132 million to obtain conservation easements on more than 600,000 acres of forest land with a market value of nearly $270 million. In addition to the states and territories where Legacy lands are located, 16 additional states have either been authorized to establish Forest Legacy projects or authorization is pending.

Decisions are made by state forester-appointed Forest Legacy committees in authorized states. Although specific criteria vary between states, decisions are usually based on a combination of: local needs, the degree to which proposed forest lands are threatened, public support for projects, and how well any given project complements other nearby conservation efforts. The U.S. Forest Service and state Forest Legacy committees underscore that the program is intended to support private ownership of forest lands and participation is completely voluntary. As with conservation easements that are sold or given to local land trusts, the owner still owns the forest and can sell or bequeath the land to prospective owners who agree to abide by the terms of the easement. The program is open to any private forest owner in authorized states. Contact your state extension forester or the state forester to find out if your land is in a Forest Legacy authorized area, and if so, how to apply.

Locating an Estate-Planning Attorney

The best way to locate a suitable estate-planning attorney is to make inquiries about his or her practice. You want someone who devotes at least half-time to estate planning, which may entail preparation of five or more estate plans each month. Ask if they are involved in continuing education seminars. Because estate planning is constantly changing, active involvement in professional development in this area is essential, at least to the extent of ten or more hours per year. Find out if the attorney has given presentations to groups on the subject and, if so, can provide you with a copy of the materials used. Most estate-planning attorneys are asked to speak a few times each year. A copy of the teaching materials will give you hints as to their focus and how well organized and experienced they are. The attorney may be able to provide references, but is bound by rules of confidentiality from revealing the identity of a client, let alone discussing the specifics of another client's estate plan. However, you might ask if you may have permission to speak with at least one recent client.

Another key question: Does the attorney prepare his or her own standard forms for wills and trusts or obtain them from another source? How often are the forms revised or updated? Obviously, the attorney should have his or her own forms, and updates should be continuous to reflect changes in the tax law or changes in local probate procedures or statutes. Finally, ask if the attorney has had any experience working with forest owners, especially where the disposition of forest assets was a major consideration. Have they ever worked with a forester and, if so, on what types of projects? Finding a qualified estate planner will be a relatively easy task compared to finding one who has also had the experience of working with forest owning families that want to keep lands intact. Yes, forests are assets that may contribute to a person's wealth, but the analogy between forests and other types of wealth ends there. More often than not productive forests and healthy forest ecosystems require at least two generations to become sustainable and so good stewardship is the job of families not individuals.

Summary

People who own forest land have a special responsibility that extends beyond a lifetime. It is this responsibility, more than short-term financial gains, that make estate planning an essential exercise for all families owning and tending forest ecosystems.

Following are some points to remember about planning for forests in your estate:

- Do not rely on Congress to abolish the estate tax. Although it affects relatively few families, it is a significant source of revenue and thus will probably continue even after 2010.
- Do not be fooled into thinking the best way to avoid estate tax is to leave everything to your spouse. Eventually, the estate of one or the other may have to pay a tax.
- Obtain advice from a qualified estate planner on when to use joint tenancy with rights of survivorship for personal property, such as automobiles and bank accounts. Use JTROS to share woodland ownership only with the advice of an estate planner.
- Know the value of forest land in your area. It may be higher than you think—high enough to trigger an estate tax your family will not be able to pay.
- There are lawyers, and then there are lawyers who know estate planning, and then there are lawyers who know how to plan for woodlands in the estate. Choose the latter.
- Involve your children in estate planning; find out who is interested in maintaining the forest and who can carry on your traditions. But remember, it is not necessary to obtain permission from your children if your goal is to pass forests intact.
- Learn more about every angle of estate planning but don't do it by yourself. Hire an experienced estate-planning attorney (preferably one who has experience with forests) to draw up the necessary documents.
- Assemble a team that includes a consulting forester, an attorney, an accountant, an insurance underwriter, and interested family members.
- If your total estate exceeds current estate tax credit limits, investigate ways to lower the estate value.
- Consider the advantages of living trusts (also known as an 'A/B trust') as a way to hold assets to avoid probate and to minimize estate taxes.
- Think about giving an easement to a local land trust to gain immediate income tax advantages, lower estate value, and ensure woodlands are protected from development.
- Finally, consider a like-kind exchange of land with a local land trust to forever protect an important feature of your forest.

Your forest estate plan should emphasize descriptive phrases and ideas you believe are important about forest values that should be recognized, managed for, protected, or celebrated in the future. This is your chance to create a living legacy by which people will remember you long after you have passed away. The plan should acknowledge uncertainty and be flexible. It should describe your visions, the principles behind decisions you have made in the past, and the conditions you believe are desirable for the future. Finally, the forest estate plan is your chance to leave behind something truly important.

McEvoy, T.J. 2005. Owning and managing forests – a guide to legal, financial and practical matters. Washington, DC: Island Press. 300 p. [Excerpted from Chapter 9: Planning for Woodlands in Your Estate. I have included here less than a third of the entire chapter simply to backstop information presented in the other articles.]

Planning

THE IMPORTANCE OF LAND TRUSTS TO FORESTRY

Consider the following scenario:

A husband and wife with two children own a 200-acre tract of highly productive timber land. The parents leave the land to their children, but divide it into two parcels. One child decides to continue managing forests in the tradition of her parents, the other sub-divides his tract into four parcels, selling three and keeping one.

The exact same pattern of ownership takes place over three subsequent generations – even among families that buy the sub-divided parcels; each married couple has two children, one keeps his inheritance intact, the other sub-divides four ways keeping one of the sub-divisions for himself.

After three generations (i.e., the 'great-grandchildren'of the original couple), how much forest land is still in the original family? How many tracts are there in total (among all families) and how big is the largest tract?

The spawn of the original husband and wife will still own about 48 acres in eight tracts that range in size from 0.4 to 25 acres. The rest of the land has been divided into 117 other tracts, the largest of which is 12.5 acres, and the smallest 0.4 acres. The original property owned by two people is now owned by 250 different people (125 couples), only eight of whom can claim any connection to the original family. Over the course of about 120 years – less than a 'rotation' for most northern hardwoods – a productive forest is 'parcelized' into housing lots, and fine old-growth timber becomes landscape trees and tethers for the family dog. What a waste of good timber land.

If the original couple had been inclined to keep the land intact and still provide for their children, is there a way they could have created a bequest for their heirs without having to sub-divide the land? Absolutely; but the only way to ensure that subsequent generations do not sub-divide the land is to give or sell an 'easement' to a local land trust. Aside from assurances that the land will never be sub-divided, if the easement is for 'conservation purposes,' there are lucrative tax benefits, as well.

Almost everyone in forestry has heard of land trusts since they have become a common fixture especially in areas that are rapidly urbanizing. But the unfortunate perception of many forest and farm owners is that land trusts are not to be trusted because their real purpose is to steal private property and pull lands out of production. Nothing could be further from the truth, but critics rely on false 'private property' threats to turn land owners away from land trusts even before owners understand how they work. A forest owner who knows how land trusts operate is more inclined to protect lands from development than owners who know little about this highly innovated to protect forest lands from development.

A common goal of land trusts is to keep important lands intact for a variety of purposes; to protect significant wildlife habitats, to avoid over-development of an area, or to maintain a working landscape. The premise of their existence is that parcelization of land leads to fragmentation of purpose. It is the process by which land trusts are able to protect lands that has created confusion and distrust on the part of land owners, a process that is not as obscure as critics make it seem.

Trusts evolved under English Common Law as a way to separate the legal and beneficial interests in property. It involves three parties: a trustee, who holds and protects the legal interests; the trustor (or 'settlor' in some states), who provides assets for the trust; and the 'beneficiary' who, as the name implies, has a beneficial interest in the assets of the trust. When an asset is held in trust, the trustee makes all the decisions, but the benefit of those decisions go to the beneficiary.

Trusts have been a very common way for wealthy families to pass assets to children or grandchildren before the kids are mature enough to make their own investment decisions. Another common form of trust is known as a 'Unified Credit Trust' that a married couple can use to shelter assets from estate taxation. In this type of trust, the three parties mentioned above are all assumed by the husband and wife: they are at once the 'trustors,' the 'trustees,' and the 'beneficiaries.' In fact, it is this ability for the parties of a trust to be held in the hands of a single person that is one of the primary benefits of using trusts.

Although the practice of putting land in trust has been known ever since the concept of trusts evolved hundreds of years ago, land trusts as we know them today are not that old. In the early 1970's, the steep trajectory of parcelization was becoming increasingly apparent, especially in the eastern states. Large tracts of land were destined to become smaller, and accessible, usually productive, lands were being converted into non-productive uses at an alarming rate. It was in this climate that the popular concept of >land trusts= evolved as a way to separate the legal and beneficial interests in real property.

Land is a capital asset with one huge difference from other forms of capital: you can't move it around. When you acquire land, you obtain rights associated with the use of that land, also know as the "bundle of rights." Real property law in the U.S. recognizes a broad, inclusive interpretation of rights. Essentially, you can do almost anything on your land so long as it does not have a negative impact on your neighbors, or on society as a whole.

The most common method of separating the bundle of rights is through 'easements.' An easement grants rights to land without actually owning the land. For example, if a neighbor needs to cross a corner of your property to gain access to one of his stands, he will most likely request that you grant him an easement to do so. The easement is recorded with the titles to both properties and is usually permanent. So granting (by gift or sale) an easement from your property is not something to be taken lightly.

An "easement for conservation purposes," which almost always includes a transfer of development rights, is arguably the most important tool to keep productive farm and forest lands intact. Over the past thirty years, hundreds of mostly local, private, non-profit conservation organizations have emerged to protect farm and forest lands from development. According to the Land Trust Alliance (www.lta.org), there are more than 1,200 land trusts in the U.S. and the number is growing daily. More than 6.2 million acres have been protected from development, but this is just a drop in the bucket in comparison to the many millions of acres at risk.

The process to protect land usually begins with the current owner, but sometimes the land trust will contact an owner if there is some significant value the trust wants to protect. The trust will usually ask the owner to 'donate' an easement, but in some instances the trust may offer to purchase. A donated easement for conservation purposes constitutes a 'gift' under IRS rules, and depending on the value of the gift it can offset income from other sources for up to 16 years; a huge benefit for most taxpayers. This recent change that increases the amount of the deduction and the time over which the deduction can used is set to expire at the end of 2007.

The exact nature of an easement depends on the interests of the current owner, and it is usually negotiated with the trust. So, for instance, if the owner wants to spell out the conditions for managing forest stands, or for protecting special habitats, or maintaining vistas, the easement articulates these values. Land trusts like to keep things as simple as possible, but they are usually also flexible. Keep in mind, though, the more complicated the easement, the more 'expensive' the donation. This may sound like a contradiction of terms, but the fact is that the land trust will request an 'endowment' from the current owner to pay the legal costs of developing and protecting the easement in perpetuity. The size and timing of the endowment is usually tailored to the client; if the landowner is not wealthy, the trust may request a 'remainder' interest in the landowner's estate to fund the endowment.

If the owner wants to set aside a portion of his land for future generations to build on, no problem; but it will cost more to set this up, and the owner is expected to foot the bill. Almost any reasonable conditions are acceptable, provided there is an easy and cost-effective way to enforce the condition and the current owner is willing to pay the cost of creating an easement.

Land trusts will usually handle all of the legal paper work, have the land appraised (for tax purposes), and make sure that all documents are properly executed and recorded. When it is done, virtually nothing changes, including your property taxes. You would expect the taxes to go down since you have given up a huge share of the taxable value of your asset, but such is not the case. Local taxing authorities will still tax the land as though it is being held in inventory for development, and land trusts do not pay property taxes on the easements it owns, for good reason: it has made promises to protect the easements in perpetuity and these promises represent liabilities not assets. The next property owner may have more success arguing for a lower appraisal, but conservation of forest and farm lands is not known to ever lower property taxes that are based on fair market value.

If the current owner decides to sell land instead of leaving it to children, no problem. Generally, the owner has agreed to contact the land trust in the event of a sale, and a local land trust enforcement official is one of the first 'neighbors' the prospective buyer will meet. The land trust will review conditions of the easement with a prospective buyer, most of whom are usually not intimidated by the conditions. In fact, there are some instances where 'protected' land is worth more to a buyer than unprotected land, because the hassle and expense of setting up the easement was borne by a former owner. The trust will also schedule annual or semi-annual visits to make sure the new owner is towing the line.

If an owner wants to sell some timber – and the forest management plan says it's time – a sale is scheduled. The land trust may take a more active role in the sale than most private owners would prefer, but it is the trust's prerogative and its responsibility. Income from the sale, however, belongs to the current land owner.

What happens if the local land trust dissolves? State laws require land trusts to have 'successor' agreements with other land trusts so that if one folds, its responsibilities are picked up by another trust. An owner who decides to work with a local land trust will want to explore the successor agreements to be sure his easements are protected in perpetuity.

The one argument I have heard about land trusts that holds some merit is the long-term impact of a conservation easement on asset value. When a current owner gives or sells an easement that excludes the right to ever develop the land, most of the fair market value of the land is disposed of in the transaction. The 'consideration' for this transaction is whatever the trust is willing to pay, or – more likely – the income tax deductions allowed for a 'charitable contribution.' In most circumstances the consideration is but a fraction of what the owner could have received if he had sold land to the highest bidder, bearing in mind that the highest bidder could care less about the timber or wildlife habitats.

Woodland owners who protect lands by giving or selling easements to land trusts are less concerned about financial gain than maintaining and protecting the intrinsic value of land and the integrity of forest ecosystems. They are banking on the fact that one day these values will be far more important than money, and chances are in their favor.

McEvoy, T.J. 2002. The importance of land trusts to forestry. Forest Products Equipment Journal. May Issue: 26–27(2). [Updated to Fall 2006]

ESTATE PLANNING SAVES MONEY

With the changes in estate tax laws promulgated by Congress in 2001, legislators have created the ultimate concept in estate planning. Under these rules, the estate of a taxpayer who dies in 2010 is completely exempt from tax (although a gift tax may be due, the estate tax is eliminated). That's right; an estate of any size is completely exempt from taxation if the taxpayer passes away during calendar year 2010. The word is wealthy – but not so healthy – U.S. taxpayers are already inquiring about the availability of euthanasia in European countries just to ensure their demise coincides with that narrow window of opportunity. Those feeling like they might not make it five more years are trying to hold on.

Why such ridiculous circumstances? Although it is impossible to guess the will of Congress, it is no secret that many legislators have been opposed to estate taxation for years. Despite opposition from factions who see elimination of the estate tax as a benefit primarily available to the rich, most charitable, non-profit organizations are opposed to lifting estate taxes as well. All wealthy people have gifting strategies to lower their taxable estates. Without this need to lessen the burden of taxation on estates, directors of non-profits reason, there is little incentive for donors to pony up for good causes. Most wealthy people make donations because their accountants tell them to, not because they want to make the world a better place. If the estate tax disappears, along with it goes the incentive for a lion's share of planned giving in this country.

But why 2010? Those in favor of eliminating estate tax assuaged the concerns of the opposition by proposing a gradual, 10-year transition, to measure the effect of less revenue from taxable estates. This transition culminates in a single year when the tax is zero. The law also has a built-in 'sunset' provision that reverses the changes put into effect with the 2001 law if Congress does not act to retain them. Supporters of eliminating estate taxes are gambling that the Congress seated in 2010 will not reverse changes passed in 2001, probably reasoning that no elected official wants to be associated with an increase in taxes.

Only a very small percentage of U.S. taxpayers actually end up paying an estate tax, but with rates that begin at 45 cents on the dollar, a substantial amount of revenue is raised from a small number of taxpayers. If the U.S. is still plagued with a growing deficit in 2010, all bets are off. The prospect of raising revenue with a tax that affects only a minority will look appealing to most voters.

Congress is not known for reversing earlier decisions, especially when those decisions were generally popular. But creating a situation where people are planning to die by euthanasia to avoid estate taxation is morbid and outrageous. And, since the estate tax really only affects relatively few taxpayers (most of whom are also fabulously wealthy), it is not entirely unlikely that the estate tax will be back in some form in 2011. The one segment of society often hurt by estate taxes is the 'cash poor, land rich.' Most are farm and forest owning families that do not realize the fair market value of their land is often high enough, when coupled with the decedent's other assets, to trigger a tax.

There is also a cruel irony that the due-date on estate taxes is equal to the human gestation period: nine months after the decedent passes away, taxes must be settled unless the family requests an extension. Even a taxable estate (after applying the Unified Gift and Estate Tax credit, described below) of $100,000 in 2007 leaves the family with a $45,000 tax bill, which is more cash than most people keep on hand. Families facing such a tax often sell timber or land, usually to a highest bidder who does not have farm or forest values in mind. Forcing farm and forest owning families to parcelize land to settle an estate is an absurd policy and completely unnecessary. Most families can easily and cheaply avoid estate taxation with just a little extra planning. In other words, don't depend on Congress to eliminate estate taxes in 2011.

Unified Gift and Estate Tax Exemption

Year	Exemption Amount
2006	*$2.0 million*
2007	*$2.0*
2008	*$2.0*
2009	*$3.5*
2010	*No Estate Tax (Gifts are still taxed) – Exemptions are irrelevant*
2011	*Quite Possibly: $1.0 million – plus effects of inflation since 2001 (unless sunsetted by Congress)*

Current rules allow a taxpayer to shelter otherwise taxable gifts plus the final estate with a 'credit' that for most taxpayers covers the tax due on the sum of taxable gifts and the estate. In 2007 and 2008, for example, the exemption is $2.0 million. The exemption jumps to $3.5 million in 2009, and in 2010 the estate tax is eliminate, but for one year only (and just the estate tax, not taxes on gifts). In 2011 – if the current law is not sunsetted – the rules revert back to those of the Taxpayer Relief Act of 1997. If this happens, the exemption plummets to $1 million per taxpayer plus adjustments for inflation.

Under either law, spouses can inherit an estate of unlimited value, tax free (or, realistically, tax deferred). Such has always been the case and this rule has fueled many of the problems forest and farm families experience today. After all, there is little incentive to do estate planning if one or the other spouse can die without being taxed. But when the surviving spouse passes, the Unified Gift and Estate Tax rules apply and the effects on survivors can be devastating. With just a little planning and a relatively minor expense, most farm and forest families can pass an estate to their heirs completely free of estate tax. The opportunity to do so arise from IRS rules that view a husband and wife as separate taxpayers. Here's how it works:

A married – or civil union – couple develop a revocable trust agreement in two parts, one in the name of each spouse. They then divide their property interests roughly down the middle and re-title assets to the two trusts. This allows the family to take advantage of two exemptions rather than one, effectively sheltering twice the amount they are able to shelter without using a 'unified credit trust' (also known as an A/B trust).

A 'trust' is a separation of legal and beneficial interests in property. In a unified credit trust, the legal and beneficial interests are separated for tax purposes, but the trustees are also the beneficiaries until they die. Since a trust is considered a contractual relationship, another advantage of placing one's assets into trusts is that it avoids the cost and hassle of probate.

When one spouse passes away, the Unified Gift and Estate Tax exemption available that year (see table) shelters the trust of that spouse. But here's the best part: the decedent's trust—both the assets and income from the trust—is available to the surviving spouse. When the surviving spouse passes, the exemption available that year shelters the other trust. Confused? Here's an example for a couple without a trust, followed by the same example covered with a Unified Credit Trust.

A husband and wife purchased 1,000 acres of forest land in 1953 for $300,000. In 2007, the land is worth $1.5 million (due to development pressures from a nearby ski area). Combined with other assets their total estate in 2007 is valued at $2.3 million. These numbers may sound outrageous, but it doesn't take much development pressure to inflate real estate values.

The wife dies in 2007 leaving the entire estate to her husband who inherits it tax-free. In 2008, when the total estate is worth $2.5 million, the husband passes away leaving the land and other assets to his children. The 2008 taxable estate is figured as follows: Total estate value minus the exemption available under the current Unified

Gift and Estate tax rules. In this case, it is $2.5 million minus a $2.0 million exemption (in 2007), resulting in a taxable estate of $500,000 and an estate tax of $245,000. If the husband had died a year later in 2009, a $3.5 million exemption available that year would have sheltered the entire estate.

Families with cash and other assets that are easily liquidated can pay the estate tax without having to sell land or timber. But more often than not, families must sell timber or land to settle with the IRS and to divide the estate among heirs. The result: parcelization of forest land and fragmentation of purpose, a tragedy that could have been easily – and cheaply – avoided with an A/B Trust.

Consider the same couple, same land, same values, but in this case they decide to create an ‘A/B Trust’ in early 2007, placing half the value of their assets in a trust under the wife’s name, and the other half in a trust under the husband’s name. The wife dies in late 2007 and approximately half of their total estate ($1.15 million) is sheltered by the exemption available that year – $2 million. The husband can use income from his wife’s trust, or the assets themselves, while he is alive. Or, the wife’s trust can be disbursed to her heirs (as intact, well-managed forest land!); the choice is up to the couple at the time they set up the trusts.

When the husband dies in 2008 his trust is sheltered with the $2.0 million exemption available that year. If his trust encompasses about half the total estate, it has about $1.25 million of assets in it and this amount is fully sheltered by the $2 million exemption. The result: no estate taxes are due!   The same family without an A/B Trust pays $245,000 in estate taxes.

At workshops on estate planning for woodland families, participants are always amazed and more than a little incredulous about setting up an A/B Trust. After all, AIf it’s too good to be true, it probably is.” The accounting also has an air of impropriety, and people are reluctant to risk their fortunes on what appears to be an unbelievable tax shelter. But the A/B Trust is a perfectly legal and valid strategy to protect assets from estate taxation.

The cost of setting up this type of trust depends on the circumstances, but most families can expect to pay $1,500 to $3,000 for legal assistance. Fees are lowered by helping the attorney do some of the leg work, such as re-titling assets. Although this may seem like a lot of money, an A/B Trust can also save $5,000 - $15,000 in probate expenses, and tens of thousands of dollars in estate taxes assuming, that is, the owners are not planning a European death-pact in 2010.

McEvoy, T.J. 2005. Estate planning saves money. Farming – The Journal of Northeastern Agriculture. 8(2): 78–80. [Updated to Fall 2006]

A SUSTAINABLE FAMILY FOREST LLC

Until fairly recently, there were no good alternatives available to woodland-owning families who, after years of effort, now find themselves having to leave forests—and forest management plans—to children. Thankfully there is now a perfect alternative to maintain management traditions, kept lands intact and in the family, while also removing the burden of ownership from any one heir.

In this issue we describe the Limited Liability Company (LLC), the ease with which it is formed, and why it is perfectly suited to passing forests within the family. Also covered is the process of 'vesting' children with ownership interests in the family forest without losing control, and the tax benefits to those who handle transfers correctly. In the next issue we describe important elements of the Operating Agreement, which is the equivalent of a contract between the members of an LLC and the 'Constitution' that describes its purpose and governance, even its succession years in the future when it comes time to re-evaluate the goals and objectives of the family forest. [Parts 1 & 2 are combined here]

Forest owners who want to keep ecosystems intact and in the family have four options: family partnership, closely-held S-corporation, a qualified trust for conservation purposes or a limited liability company. Of the four, the simplest to set up and easiest to manage is also the most flexible alternative: a limited liability company, or LLC. One of the useful features of an LLC – especially as it relates to long-term management of forests – is that profit motive is irrelevant. Thus, the family forest LLC can be dedicated to any purpose; investment, business, conservation or – best of all – any combination of motives. LLCs provide the liability protection of a corporation, pass-through taxation aspects of a partnership, and the essential ability to restrict ownership in the family forest that a closely-held S-corporation provides. Plus, an essential added benefit, crucial to an entity that must add members at the same rate that families grow: there are no limitations on the number of members an LLC can have. The individuals that form the LCC, also known as "founders," have the choice of restricting the number of members (the concept of 'members' to an LLC is exactly the same as 'shares' to a corporation), allowing fractional membership, forming more than one class of membership, or allowing membership to grow with the family.

Every state in the U.S. now has an LLC statute, and for reasons mentioned above, it has become a very popular way to organize businesses, non-profits and other circumstances where people come together to make something happen. When that "something" is long-term management of forests, the LLC can allow family members to be the recipients of both tangible and intangible forest benefits but without forcing any one family member to dedicate his or her life to "carrying on Dad's legacy." It is this perception that often causes current owners to rethink the wisdom of dedicating one child with the 'golden brick,' who must then sink or swim while attempting to keep the forest afloat. And when a forest is the principal asset, other children are apt to feel cheated, even though the son or daughter who accepted the responsibility would gladly pass it off. By forming an LLC, the 'golden brick' resides with the 'company' leaving children to enjoy the benefits of forests without the hassles; or to get involved if they are so inclined. It sounds too good to be true, but it is not, so long as the founders give careful thought to language in the LLC's 'operating agreement.'

There are two parts to an LLC; one public, the other private. The public document is known as the 'articles of organization,' and it includes such information as: name (which must include the letters 'LLC' or 'LC' to publicly declare the nature of the company), the state law that governs the few statutory requirements of the LLC, the physical location of it's offices, the name and location for the agent of process (if the LLC is ever 'served' with legal papers, who is the lucky person willing to accept them?), and the LLC's fiscal year.

The articles of organization include two important questions, the answers to which are especially significant for woodland owning families: 1) Is this a term LLC, or an at-will company?, and 2) Is this a member-managed or a manager-managed LLC?. By default, most states will assume an LLC is 'at-will' and that it is managed by members. But an LLC established for the purposes of maintaining a forest management legacy and for keeping forest lands intact will want to designate the company a 'term' LLC of 100 to 150 years or more. Although this may sound somewhat drastic, the operating agreement, discussed below, can specify conditions the members can use to shorten the LLC if absolutely necessary, and/or to establish a new term upon expiration of the old one.

The second question is a little more difficult to answer initially, because chances are the founders are already adequate managers and, therefore, have no reason to relinquish those responsibilities. Nevertheless, they will want to address the issue of future management in the operating agreement, possibly by designating a trusted consulting forester or property manager to serve as 'manager' after the founders have passed away. As a general rule, it is a good idea to place management decision-making in the hands of one person rather than in the hands of a committee – for obvious reasons. But, to avoid the risk of a manager run amuck, the operating agreement should also spell out a series of checks and balances to impeach a manager for cause. Those checks and balances are usually spelled out in the operating agreement, discussed below.

After completing the single-page articles of organization, the founders sign and date it (including their mailing address, E-mail and day-time phone numbers, just in case there are questions). With the required filing fees, the package is then submitted to the Secretary of State. Within a few weeks the founders should receive notification that the LLC is formed. After that, two things need to happen: 1) The founders need to draft an operating agreement that explains the purpose of the LLC, the relationship of members to it, and important matters of governance. 2) Once the operating agreement is finalized, or nearly so, the founders can initiate transfer of title in forest lands to the LLC either directly, or as a trust of the LLC. But, no one should ever take the process of title transfers lightly, so it is at this stage where good legal advice – from an attorney who has had experience with LLCs – is essential.

The forest land is also appraised at the time of transfer so the founding members can use IRS tax-exempt gift rules to vest children into ownership interests in the LLC over time. Under current rules, a husband and wife (or other qualified couple) can give tax-exempt gifts of up to $24,000 per child per year ($12,000 per qualified spouse). And, when the terms of a gift are controlled by a charter, IRS also allows parents to 'discount' the gift for its lack of marketability. In other words, parents can give each child, say, $30,000 of an undivided interest in forest land to create a $24,000 gift for tax purposes (by discounting the gift 20 percent due to the limitations imposed on the gift the LLC operating agreement). An 'undivided interest' in assets is the same thing as 'shares' in a corporation.

The operating agreement is a proprietary document of the LLC, which means that it is private to all except the members (same as 'shareholders' in a corporation) and it does not need to be filed with the state. There are, however, some necessary requirements implicit to the LLC that the operating agreement can not obviate. For example, members have rights to see the books and records of the company; all members have a duty of loyalty and care to one another and to the purpose of the LLC, and members are obliged to act in good faith and deal fairly. Statutory requirements vary by state, and some allow more freedom than others. For this reason, prospective founders many want to read up on LLCs and choose to organize in a state that offers the best set of conditions for a company whose purpose is to manage forest lands and keep them intact for many, many years. As of this writing, there are nearly 300 titles of books in print that come up with a keyword search on ‘limited liability companies,’ so there is no shortage of expertise on the subject.

When the purpose of an LLC is to pass forest lands within the family and to create a management structure that allows goals and objectives established under the current forest management plan to be maintained until the plan says it is time to act, organization and wording of the operating agreement are crucial to long-term success. Here are some of the elements a family will want to include in an operating agreement:

* A strong opening paragraph that clearly describes the purpose of the LLC: to pass forest lands within the family – intact – for the LLC’s term and longer; to manage long-term timber investment values; to create and maintain wildlife habitats (for named species); to provide opportunity for recreational purposes (either reserved for the family, or for townspeople by including a clause that allows public access to forest lands for stated recreational purposes in exchange for an agreement from the town to lower property taxes). The opening paragraph sets the tone for the rest of the agreement and so it is essential that it explain why the founders set up the LLC in the first place.

* The operating agreement should describe a legislative structure that puts most of the decision-making power into the hands of a relatively few members, or in the hands of a manager. For example, any child or grand-child is automatically a ‘member’ of the LLC, but their ability to ‘vote’ is vested to them as they acquire a financial interest in the company. It is the equivalent of having more than one class of stock; and the highest class has voting rights to select a ‘board,’ and then the board appoints a set of ‘directors,’ who are actually charged with making decisions.

The above is a description of a “member-managed” LLC. Here is another: Governing members can be divided into three functions: administrative, judicial, and legislative (sound familiar?). The administrative arm makes day-to-day management decisions. But for some decisions that require drastic measures (such as effecting a ‘reproduction treatment,’ or installation of an expensive road), there must be a vote of the membership. Discrepancies are sent to the judicial board charged with making a decision that the members agree to accept. There are many different alternatives to create a reasonable management structure for a ‘member-managed’ LLC, but the goal of any structure should be to further the original cause of the LLC while installing necessary checks and balances.

* If the operating agreement is amended to put a manager in charge (a consulting forester, for example), the manager is a fiduciary of the LLC; the equivalent of a ‘trustee’ to a trust. Even with a manager-managed structure, the members should retain the power to impeach a manager, as described above. In fact, the operating agreement can spell out conditions that cause an automatic impeachment. And the agreement should also describe the process of appointing a new manager.

* Generally, the members of an LLC are the owners and income and expenses are passed directly to them for tax purposes, unless the operating agreement describes a different method. Given a marginal return on forest investments in some parts of the country, the agreement may want to specify periodic pay-outs of “profits” rather than annual payouts. Income can be distributed to members (or in trust for children), much as dividends are paid by a corporation. Given a choice, people will choose simplicity over almost any alternative, allowing them more time to enjoy forests, and less effort spent worrying about the business.

* The operating agreement should restrict membership to children who are direct descendants of the founders. In fact, prospective spouses should agree to waive any rights to the family LLC as a potential marital asset in the case of divorce. If a future family member wants out of the LLC, the agreement describes how that member's shares are purchased, and if the member's offspring are eligible to buy back in to the LLC. The operating agreement can also grant a non-voting membership to any direct descendent, but each generation must choose one family member to obtain a voting interest.

At the end of a 'term,' the operating agreement should spell out the process voting members will use to establish a new term, or to dissolve the LLC for cause. Since dissolution of the LLC involves land, legal advice is absolutely essential. The founders may want to think about local conditions 150 years from now that might prompt them to encourage members to dissolve, or to create a new term. Finally, the operating agreement should also include a copy of the management plan, and make reference to it in virtually every clause. Future LLC members should never lose sight of the original purpose that caused the founders to take the steps they did to ensure that forests are kept intact and in the family. If the family votes to dissolve the LLC, the original agreement could specify that the land is to be given to a local land trust or some other qualified entity that is willing to continue managing the forest for generations to come.

McEvoy, T.J. 2003. Sustainable family forests: the benefits of an LLC. Parts 1 and 2. Farming - The Journal of Northeastern Agriculture. 6(9 & 10): 49–58. [Updated to Fall 2006]

FAMILY FOREST PARTNERSHIPS

A partnership of any kind is a non-corporate association of two or more people, each of whom own shares of an undivided interest in the assets of the partnership. Unless otherwise indicated, it is assumed that partners have an equal share, but equal ownership is not a requirement. One of the most convenient features of an undivided interest in assets is that shares can be allocated to various partners without having to physically divide the property. Just like when a person buys shares of a company in the stock market, each of those shares represents a small fraction of the total asset value of the company – from its current inventory, to the desks and chairs used by employees. When the principal asset of a partnership is forest land, being able to divide the asset value of land on the basis of shares is much easier than having to divide the land and distribute parcels. Forest owning families that form partnerships often do so to take advantage of the opportunity to keep lands intact while passing land on to future generations in the form of partnership shares.

A family partnership is usually set up as a 'limited partnership' with two types of partners: (1) general partners who make all decisions and are responsible for day-to-day affairs, and (2) limited partners who have only a beneficiary interest in the partnership. Although limited partners own an undivided interest in the assets, they have no authority to make decisions. In most family partnerships, parents are the general partners and children, grandchildren and other prospective heirs are the limited partners. When the principal asset is forests and the business is forest management, the family forest partnership is a great way to pass well-managed lands intact.

In terms of liability, general partners are fully liable for the claims against the partnership resulting from the combined acts of the general partners or even the acts of any one general partner. Although limited partners are always protected from liability, the general partners' exposure to liability is a major failing of family partnerships. For this reason, some family partnerships have decided to form a 'limited liability company' (LLC) as an umbrella for the family partnership which then becomes the principal asset of the LLC.

So how does all this work for a forest-owning family? First, the parents learn as much as they can about family partnerships. Next, they locate an attorney who has experience forming partnerships (which may be a more difficult task than it sounds) to draw up the family partnership 'charter.' Forest land and any other assets the family wants to include in the partnership are appraised and then the parents develop a 'gifting' strategy.

Children, grandchildren and other heirs are vested in the family forest as limited partners using the annual gift exclusion allowed by law. This year (2007) the gift exclusion is $12,000 per taxpayer to as many different recipients as he or she chooses. Married couples can double this amount to $24,000 per taxpayer per gift to each person they want to include in the family partnership. So long as gift amounts are at or below the limits, there are no taxes assessed either the parents or the children.

If the family partnership charter limits the marketability of the gift (as it should, to discourage children from attempting to convert their ownership interest in forest land into cash), the IRS allows gifts to be 'discounted.' In other words, a husband and wife can pass, say, $30,000 in forest land to create a $24,000 gift for tax purposes. In this case they have discounted the fair market value of the gift by 20 percent, presumably because the family partnership charter has strict rules governing limited partners that want out.

In the world of gift appraisal for discounting purposes, a 20 percent discount is fairly conservative. But such gifts are almost always examined by the IRS – regardless of discount rate – so the actual rate must be justified, usually by experts who have experience doing these kinds of valuations. Notwithstanding, I have heard of discount rates of up to 95 percent.

Assuming a modest discount rate of 20 percent and an annual gift exclusion of $12,000, a husband and wife can vest two children into $600,000 worth of forest land in 10 years. If the discount rate is doubled to 40 percent, this same couple can pass $1.2 million dollars in forest land over the next decade.

Parents can also pass the land as a single gift so long as the amount is less than the lifetime exclusion for taxable gifts. For the period 2005 through 2009, the lifetime gift exclusion is $1 million per taxpayer, or $2 million per married couple, plus any discounts for lack of marketability. Also, the estate and generation skipping transfer exemption is reduced by the amount of the gift tax exemption used.

The primary benefit of a family partnership is that it allows parents to disperse the value of forest to heirs while keeping land intact. Because their estate (or a large share of the estate) has been dispersed to the partnership, little or no estate tax is due when they pass. And the parents maintain control – even if their share of the partnership is small compared to that of the children – until new general partners are appointed. The new general partners are, in the opinion of the parents, prospective heirs best suited to carry on in the parent's tradition. Other heirs – the limited partners – share income and other benefits of owning forests, but they make no decisions.

Forming a family forest partnership and vesting prospective heirs into it is easy compared to making a decision when it comes time to appoint a new general partner(s).   It isn't always the oldest child, or the male, or the smartest, or the nicest. Parents need to pick a person who is willing to execute the terms of the partnership agreement while treating the other partners fairly. Even though limited partners do not have a say in management decisions, a wise general partner allows them to share their ideas.

The key to developing an effective family forest partnership agreement is open, thorough and candid conversation between spouses. Yet two subjects spouses avoid, almost as if it were a condition of marriage, are estate planning and children. No one likes to discuss estates because it necessitates talking about dying, a subject we all try to avoid. And conversations about children are tough because it usually results in an expression of favor of one child over another, and everybody knows you should never show favoritism toward children.

The only way to have these conversations is to focus on the future, the long-term good of the forest, and to view children with a hard, cold edge of objectivity. Remember, the goal is to develop a family partnership that provides guidelines to care for land well into the future, and to do so in such a way that the result is equitable and agreeable to your heirs. If heirs don't accept the premise of a family forest partnership, the chances of it succeeding after the founders pass away are limited.

One final bit of advice is this: Never under any circumstances include the spouses of your children in gifts of land. Why? Because the prospects of divorce, even for the 'perfect' couple, are too great to risk having the family forest treated as a marital asset in a bitterly contested divorce proceedings. Children of family forest partnerships should also be encouraged to execute prenuptial agreements with prospective spouses, just so it clear to all that the family forest is not up for grabs.

McEvoy, T.J. 2006. Family forest partnerships. Farming – The Journal of Northeastern Agriculture. 9(6): 64–66.

CONSERVATION EASEMENTS CAN COME WITH TAX BENEFITS

Granting an easement to some portion of the bundle of rights associated with land is the most common method of protecting land from development. But the process of creating and transferring an easement is probably one of the most mysterious concepts among those who own farm and forest land. Since it is easier to ignore something you don't understand than it is to learn about it, most land owners shun the very concept of deliberately changing the title to their lands. These same individuals understand the threats to land from people who want to build houses, but the thought of forever restricting use of their land is just too frightening. Notwithstanding, the use of easements to transfer development rights to a charitable organization that agrees to never exercise those development rights is arguably our last hope of keeping productive lands intact and in the family.

Easements come in two forms: private and public. A private easement – usually between abutting owners, but not necessarily – is a fairly common method to allow others access rights to land. For example, an abutting owner may need to cross the corner of a neighbor's property with a sewer line, or with a section of driveway. The abutter would ask his neighbor for permission, but to make sure the right stays with the property and not just the owners, he would also exercise an easement. Such an easement, whether it is a sewer line or a driveway, might also be called a "deeded right-of-way." Usually the person requesting the easement also agrees to pay all legal expenses, including the costs of filing the new deeds in town or county records.

Since easements stay with the affected land titles, they are almost always permanent. Yes, it is possible to set conditions on an easement so that if a title-holder that benefits from an easement violates terms the easement is revoked. But such conditional easements are rare, mostly because people forget. The important thing to remember about private easements is that one title benefits while the other does not, even though a lack of benefit is not necessarily a detriment. A sewer line crossing under the corner of a neighbor's property, for example, should not in any way detract from property values.

A public easement, on the other hand, is one that largely benefits society. When a farm or forest owner transfers the development rights to a qualified organization, the easement that encompasses those development rights has no value to the organization that agrees to accept them. Why? Because the organization also agrees to forever hold the development rights, and to ensure that all future title-holders will abide by the easement conditions. In other words, the land will always be used for farming or forestry purposes. But more importantly, the land will never be developed.

What sort of organization would accept development rights and also agree to protect and hold those rights forever? Only one that is capable of separating the legal and beneficial interests in property. Also known as a land trust, there are few quasi-public institutions that have been so grossly misunderstood by people who own and love the land.

Land trusts are a product of the late 1960s when the emergence of suburbs had a profound impact on land values, compromising the ability of farming and forestry – even on the very best soils – to keep pace. Land trusts emerged not as a left-wing conspiracy to usurp the sovereignty of private property, but as a way to maintain working landscapes. Eventually, some of the more innovative land owners – especially those whose lands were imminently threatened with conversion to more developed uses – explored the workings of their local land trusts. Others simply sold out to developers – even lands that had been in the family since settlement – pocketed the profits and moved on.

But why would anyone knowingly dump half or more of the fair market value of their land by granting an easement that transfers development rights to a local land trust? Love of the land and ensuring one's family maintains its connections to land can only account for some of what inspires those who transfer development rights. Lucrative tax savings on the 'charitable contribution' of such easements simply sweetens the deal. Here's how it works at least for now since these laws change as tax policies shift:

Although land trusts have been known to buy properties they consider critical to their mission, most trusts rely on gifts. When an owner leaves a gift of land to a trust, commonly the trust will strip the property of its development rights then resell the land to a buyer looking for productive farm or forest. The net income from such transactions allows the trust to acquire easements from the other properties. When a land trust acquires an easement encompassing development rights, the obligation to protect those rights is a financial detriment not a benefit. Since it agrees to never develop the land and to protect the property from those who would, an easement owned by the land trust is a significant financial obligation. When the deal is done, the property is said to be 'conserved.' You still own the land and can continue to use it as you have in the past. The thing you can't do – nor can any subsequent title holders – is convert the land to more developed purposes.

Most conservation projects are initiated by land owners exploring their options. With a solid prospect, the land trust will spend a great deal of time discovering the current owner's goals and concerns, and then they propose an easement that fits. When a deal is imminent, the land is appraised first at fair market value then with the easement in place. The difference between the two appraisals is the current fair market value of the easement and the dollar value of a prospective gift. That's right, when a farm or forest owner gives an easement to a land trust, the value of the easement represents a gift to a 'qualified charitable organization' and is subject to significant tax benefits. The problem is, under current law those benefits are about to become considerably less valuable on January 1, 2010, unless Congress acts to retain existing rules, a move supported by the Obama administration.

Depending on development pressures, an easement's value could be half or more of fair market value. When the owner (donor) grants the easement as a charitable contribution to a qualified organization, the value of the gift offsets the donor's taxable income. Up until a few years ago, the value of a conservation easement could offset up to 30 percent of a donor's adjusted gross income (AGI) in the year of the gift and for up to six additional years at the same rate (no more than 30 percent of AGI).

With property values increasing at rates significantly than income, many farm and forest owners were losing tax benefits. Thus Congress experimentally increased the annual benefit recovery rate and the number years the benefit can be used, from 30 percent of AGI and a total of 7 years to 50 percent and 16 years. Furthermore, for those taxpayers who obtain more than half of AGI from farming, ranching or forestry activities, the recovery rate is 100 percent of AGI for 16 years or until the tax benefit of the easement is fully recovered.

The changes were so popular that Congress extended enhanced tax benefits for conservation easements for an additional two years, but that extension is about to expire at the of 2009. Here's the hitch: Unless Congress acts to retain the changes, the tax laws on charitable donations of conservation easements reverts back to what it was before the law was changed (back to a maximum of 30 percent of AGI for a total of no more than 7 years; and no special treatment for those who earn their living from working the land).

The 111th Congress is attempting to retain the popular changes (in HR 1831 – The Conservation Easement Incentive Act of 2009, and in the Senate with S 812 – The Rural Heritage Conservation

Extension Act of 2009) at an estimate cost of $761 million over the next 10 years. Popular sentiments, however, suggest that the significant cost of health care reform will stifle any attempts to increase the tax benefits of farm and forest conservation this year and for the foreseeable future.

The tax advantages of giving an easement are twofold: it lowers income tax liability while you are alive (as described above) and it can lower or eliminate estate tax liability after you are gone. Because the fair market value of the property has been lowered by the value of the easement, property taxes should be lower as well. Yet this is not often the case, and the point has not been argued enough in courts to have established precedence. Still, if you have given an easement that encompasses development rights, your property assessment – and your taxes – should be substantially lower.

Local taxing authorities are reluctant to lower the assessment on protected lands because land trusts do not pay taxes on easements they hold (and why should they since the easement in their hands is a liability because of the promises they made to the donor). The nature of conservation easements means they have no market value, since the trust cannot sell the easement. From the town's perspective, it is as though a portion of its grand list has evaporated. Nevertheless, most authorities on the subject agree that the dilemma of how to tax protected lands will be resolved as more and more communities address the question of fair taxation on farm and forest lands (and as more owners of conserved lands challenge their property assessments in court, and win).

Another alternative for some forest owners uses Federal monies to buy conservation easements. In the 1990 Farm Bill, Congress created the Forest Legacy program to "protect environmentally sensitive forest lands." It represented a first attempt to use federal dollars to purchase conservation easements on private lands. Generally, the purpose of easements is to restrict development on productive forest lands and to protect forest ecosystems while also requiring owners to employ sustainable practices. First funded in 1992, the program now encompasses conservation easements in 42 states and territories. To date the U.S. Forest Service has obtained conservation easements on more than 1.86 million acres of forest land with a combined market value of nearly $270 million. In addition to the states and territories where Legacy lands are located, almost all other states have either been authorized to establish Forest Legacy projects or such authorization is pending.

Legacy project decisions are made by state forester-appointed Forest Legacy committees. Although specific criteria vary by between states, decisions are usually based on a combination of: local needs, the degree to which proposed forest lands are threatened, public support for projects, and how well any given project complements other nearby conservation efforts. The U.S. Forest Service and state Forest Legacy committees underscore that the program is intended to support private ownership of forest lands and participation is completely voluntary. As with conservation easements that are sold or given to local land trusts, the donor still owns the forest and can sell or bequeath the land to prospective owners who agree to abide by the terms of the easement. The program is open to any private forest owner in authorized states and designated Legacy areas. For more information, contact your State Forester.

The tax advantages of conservation easements – even those created under the Forest Legacy program – are now in jeopardy, thanks to a recent report of a Congressional Joint Committee on Taxation. Reacting to reports of abuses (associated with easements on the facades of historic houses, and stories of developers using tax savings on easements to finance sub-divisions), the committee has proposed limitations on using such gifts as charitable contributions. It has taken the position that most conservation easements are nothing more than tax loopholes for the wealthy. And so legislators are contemplating limitations on gifts for conservation purposes so that only easements which "benefit a specific government conservation program" will allow donors to deduct 100 percent of the gift's value. The changes are intended to raise revenue while putting an end to a developer's ability to "finance the building of subdivisions and golf courses with the tax savings of a conservation easement." But – significantly – such changes will most likely have little or no impact on farm and forest owning families whose intentions are to keep productive lands intact.

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This article was updated by the author on November 6, 2009, to reflect recent changes in the tax savings associated with gifts of conservation easements. Readers are cautioned to check IRS charitable gift rules on conserved lands to see if the higher rates and longer recovery periods discussed in this article still apply.

McEvoy, T.J. 2005. Conservation easement changes in the wind. Farming – The Journal of Northeastern Agriculture. 8(4): 61–62.

ESTATE PLANNING OPPORTUNITIES AND STRATEGIES FOR PRIVATE FOREST LANDOWNERS

John C. Becker and Michael G. Jacobson, The Pennsylvania State University (Prepared June 2002)

To the Reader:
For space reasons, we are including only the Table of Contents and Chapter I of this self-directed course. The full document is available online and can be downloaded and printed from http://www.timbertax.org/estate/penn/fullver.pdf.

Table of Contents

Chapter I

Course Description

A. How to Use This Book

The purpose of this book is to educate readers about the tax and property law issues involved in planning the transfer of property after death. It is not intended to be and should not be considered as legal advice to those who read it. Information provided here will help people who want or need legal advice to understand the questions they must answer, the problems with which they must deal, and some of the choices and options that are available to them as they plan their own estates.

As described in more detail below, the book is divided into chapters to make the discussion more focused. Chapters II through VI are the "basic" chapters: They include information about transfer methods and tax implications that nearly everyone will face. Chapters VII through X are focused on particular issues that might not be involved in estate plans. We suggest the reader decide which of the specific chapters to read based on personal interest in the topics or des ire to use the strategies. Chapter XI describes a series of estate planning strategies specifically directed to forest land owners. Chapter XII presents a series of estate planning problems and notes several ways to approach each of them. This chapter is useful after the reader has gained an understanding of the material. Review of earlier chapters is encouraged. Chapter XIII is a series of short forms that will allow readers to begin the process of planning their own estate by preparing an inventory of their assets. This inventory will assist in identifying crucial issues and thereby help focus the plan that is ultimately prepared.

B. Course Objective and Purpose

Estate Planning Opportunities and Strategies for Private Forest Landowners is an outreach education course designed to acquaint readers with fundamental issues involving transfer of property following the death of the property owner. Although awareness of these issues through personal experience prompts many people to consider lifetime planning for this transfer of property, estate planning also involves other important lifetime decisions. This course will examine each of these issues in some detail.

In addition to this basic approach to understanding estate planning opportunities and issues, this course is designed to include a planning strategy component that focuses specifically on the needs and circumstances of private forest landowners. The audience we hope to reach includes private forest landowners in the northeast region of the United States. Our materials contain information on the planning issues relevant under federal estate and gift tax law as well as state inheritance and estate tax laws in each of the northeastern states. Planning strategies will incorporate consideration of these laws in analysis of various options. While this publication was being written a major change in the tax law took place in June 2001. We have incorporated these changes into the text to make it more useful and up to date. There is a possibility that further changes will occur in the near future. Always check the accuracy of information on tax law-related issues.

The focus of the course is on the estate planning situation of private individuals who own forestland and other assets. These individuals are concerned about the future use and ownership oftheir asset and they fear that without proper planning, the investment potential of the assets and the prospect of long-awaited returns may be lost. Two of the least understood aspects of forest management by landowners are the role of forests in their estate, and the need for coordinated planning to avoid conflicts and compromises that threaten achieving desired goals and objectives. In many respects, their situation is identical to that of other individuals and their families. In some respects, planning choices and opportunities available to forest land owners and their heirs are unique. The course attempts to address both aspects of the subject, pointing out, where applicable, those provisions that have limited application. Although the title might suggest a narrow discussion, it is intended to be much broader. Both non -forest landowners and forest landowners will find interesting and useful information in the course. The course is written for an average lay person who is not experienced with property transfer or death tax issues, but who has an interest in knowing more about them. Bank trust officers, insurance agents, financial counselors, accountants, and others whose interests or employment involve them in these issues will recognize that this course is not as exhaustive a treatment of the topic of estate planning as it would be if it were written for a professional financial or estate planning advisor audience. This decision was intentionally made to limit the scope of the material and the level of discussion so it would help property owners understand what estate planning is about. The objective of the course is to help you understand how issues arise in these estate planning situations. The issues may involve ownership of property, particularly forest land, organization and operation of businesses and interests in various types of business organizations, or the several income or inheritance tax issues that apply to the transfer of property during lifetime and after death. Increased understanding will aid in evaluating the application of these issues to individual situations and improve your decision-making capability in relation to property. Although the course is intended to increase your knowledge and understanding about this subject, it is not intended to be and should not be interpreted as legal advice or opinion concerning these issues or their application. As will be seen in the discussion of income and estate tax issues, this is a detailed and complex matter. Professional advice and counsel are needed to apply these ideas to actual situations. This advice and counsel can only be given after a thorough review has been made by someone competent to evaluate the situation and offer advice. The course does not provide this advice and is not intended to replace the need for it.

C. Overview of Content

In **Chapter II**, the term ***estate planning*** is defined to assist you in understanding the scope of the topic. In this discussion, ***the tools of estate planning*** and the important role that families play in designing effective plans is described. The concept of an ***estate planning team*** and the composition of that team is discussed. This focus is intended to introduce you to the basic framework within which lifetime planning takes place to influence lifetime and after death matters.

In **Chapter III**, the topic of managing forest lands in the northeastern states will be discussed, including such key topics as the importance of establishing forest management objectives, identifying your role as a forest land manager, developing your forest management plan, the role of forestry professionals, forming forest management contracts and finding forestry assistance of various kinds.

Chapter IV discusses four ways by which property is transferred after the property owner's death. ***Transfer by operation of law, through a will, under an intestate distribution statute, and under the terms of a living trust*** are described and compared to each other. General information needed to prepare wills and living trusts are identified. Ownership of property by a single individual or jointly with two or more people is discussed in terms of identifying when joint interests exist and the characteristics of each form. In comparing the forms, consideration is given to the method by which the transfer takes place and costs associated with it.

Chapter V introduces the topic of the tax impacts of property transfer. The chapter discusses various state and federal death, inheritance and gift taxes. In the discussion, consideration is directed to identifying when the tax applies, how it is calculated, when it is due, and who is obligated to pay it. Within the last few years, tax laws were frequently amended and the discussion focuses on the interrelationship among taxes that must be identified in the planning process.

Chapter VI addresses how taxes that apply to various types of estate are calculated. Included in this discussion are topics that include how property of various types is valued under a series of both general and special rules that apply to various kinds of property. In much of this discussion, the focus is on solving practical problems that face estates in these situations.

Chapter VII discusses the concept of lifetime gifts of property as a means to shift property from one owner to another to achieve a particular planning objective. The emphasis of this chapter is to explain what constitutes a gift for property transfer purposes and the tax issues and matters that arise when a gift is made. These tax issues involve income, inheritance, and gift tax considerations.

Chapter IX addresses the estate planning opportunities provided by using trusts created either during lifetime or after death. This chapter will explain the essential elements in the creation of a trust discuss typical situations in which a trust can be used. This discussion will help to explain the various forms that trusts take and the essential requirements they must meet.

Chapter X examines the role that life insurance plays in estate planning. Life insurance products have many different forms; the chapter describes the most common ones. Life insurance is also subject to particular treatment under state inheritance and federal estate tax law and the chapter describes the treatment and issues associated with it.

Chapter XI brings together the various issues and concepts of estate planning and applies them to an estate plan involving a variety of assets, including various quantities of private forest land. Pre-planning information and key decisions are discussed along with strategies for employing the various techniques and opportunities described in other chapters.

Chapter XII addresses a series of additional problems and issues that arise in planning estates that include forest land assets of one type or another. This chapter will give you additional opportunity to evaluate the application of planning strategy.

Chapter XIII outlines the steps needed to gather the information needed to develop the plan. This is information you will need to begin the evaluation of your own situation.

Performance Objectives - Study Hints

At the end of all chapters except Chapters I, III and X through XIII, you will find a series of multiple-choice questions that ask you to evaluate the facts in the situation and address a specific question about it. Each question is intended to evaluate how well you understand the concepts in the chapter and how you will apply these concepts to new situations. You may be as ked to compare several concepts on one point or test your understanding of the concept and the situations where applicable. In addition to the multiple choice questions you will also find several short essay questions for you to consider. These questions involve greater analysis of the situation and help you to understand how the various strategies will work in a given situation.

One of the most common errors in answering multiple-choice questions has to do with not carefully reading and understanding the question. As a result, students respond to what they think the question is asking rather than what the question actually is asking. In some cases these differences are very significant. To avoid this problem, please take your time and carefully read the question before responding. Taking this additional time will prevent wasted effort.

Good luck!

NOTE TO THE READER:

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