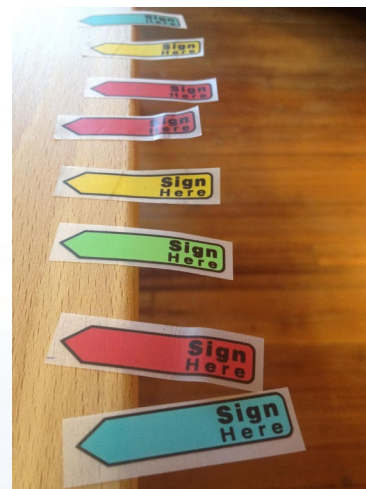


Farm Law for Producers and Landowners

Conservation Easements and Farm Succession

Part I: Rights in Real Property



This Series

- Part I: Rights in Real Property (9/7)
- Part II: The Disposition of Real Property (9/14)
- Part III: The Impact of Conservation Easements on Real Property Transfer Decisions (9/21)
- Part of NC Soil & Water Foundation effort to support and empower Conservation Districts in developing and monitoring conservation easements on working lands
- Funding: NC Tobacco Trust Fund Commission and Southern SARE PDP program

This Lawyer's Background

- Member of the Virginia State Bar (1992) and North Carolina State Bar (2003)
- Non-profit work in agriculture
 - American Farmland Trust
 - NC Farm Transition Network
- Private (Farm) Law Practice (2010 - 2018)
- NCSU Agricultural and Resource Economics (2018)
 - 50% Extension appointment
 - 50% Teaching (Environmental and Agriculture Law)

<https://farmlaw.ces.ncsu.edu/>

NC STATE EXTENSION

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News and Updates

Conservation Easements: Save the Date for Three Part Series, September 7, 14, 21
Please join this series of webinars on September 7, 14 and 21 at 1 p.m. for an update on ...

Farm Management: NCSFMRA Members Tour Shenandoah Valley Agriculture
In the last week of July, members of the North Carolina Society of Farm Managers and Rural Appraisers (NCSFMRA) ...


Landowner Liability: Branan Presents Webinar on August 31
The North Carolina Tree Farm Association – in collaboration with NC State Forestry Department – is hosting a lunch ...

FEATURED

[Landowner Liability Webinar \(on demand\)](#)
(sponsored by NC Tree Farm Association)

So You Inherited a Farm

Topics and Templates Concerning Transfer and Management of Interests in Farm and Forest Land



This Lawyer's Observations

- Try not to give heirs undivided interests in land
- Estate Tax exemptions still high
- All land dispositions must be in writing
- Careful of PUV when dividing land
- Legacy planning is a series of disposition decisions and executions
- **Be mindful of leaving obligations behind**



A Thought for the Ages

- “We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that there is no foundation in nature or in natural law, **why a set of words upon parchment should convey the dominion of land**”
 - Sir William Blackstone 1753

“Property”

- Black’s Law Dictionary defines “Property” as “[t]hat which is peculiar or proper to any person, that which belongs to one... In the strict legal sense, [property is] an **aggregate of rights** which are guaranteed and protected by the government.”
 - In other words, guaranteed to belong to a person by the law.
- Personal Property: **Things** that are moveable
- Real Property: **Land**
 - And things affixed to land (structures and trees)

The Nature of Property

- Property law concerns a humans right of use, control and disposition over things (“personal property”) and land (“real property”)
- Land includes the surface, the subsurface and the sky above
 - *cujus est solum, ejus est usque ad coelum et ad inferos* [whose is the soil, his is even to the skies and to the depths below]
- An interest in land is known as an **Estate** (from Latin “status” meaning state or condition)
- Descriptive term for any type of Estates is called a **Tenancy** (from Latin “tenir” meaning “to hold”)
- A holder of an estate in land is called a “Tenant”
- Property rights are recognized in the US Constitution (5th Am) but the substantive law of real property is purely the realm of state sovereignty
 - common law claims re trespass, nuisance, etc.

“The Bundle of Sticks” (severable)



Water Rights:

shared with
neighbor

Right to

Subdivide: Deed
to land trust in
form of
conservation
easement

Right to Take

Wildlife: Leased
to hunt club

Right to Farm:

Leased to farmer

Right of sole

possession: Deed to
DOT for Right of Way

Right to

Timber: Deed
to timber
buyer

Right of Sole

Possession: Leased
to house tenant

Right of sole

possession:
Deed of
Easement to
neighbor

Right to

subsurface

minerals: Deed
to energy
developer

The “Permanent” Conservation Easement (the sticks removed)

Right to

Subdivide: CE

Deed restriction
on parcel
subdivision

Right to Timber:

CE deed *may*
restrict timber

Right of sole

possession: CE deed
must allow entry for
monitoring



Right to

Build: CE

Deed
restricts
increase %
of
impervious
surfaces

Right to subsurface

minerals: CE

Deed likely
restricts mining

Written Transfer of Rights in Real Property

- **The Statute of Frauds** – all dispositions of any right in land must be in writing to be enforceable (1677 England)
 - You can allow verbal access, but in most cases it does not amount to a transfer of right
 - Exception: Agricultural Tenancies of one year in North Carolina (protected by Statute)
 - Other “time” or “necessity” exceptions:
 - Easement by prescription: use easement long enough
 - Easement by necessity: landlocked land has no other access
 - Adverse possession (“squatter’s rights”,
 - Seen often as an encroachment of building, fence or driveway across property line
 - Title or right not defensible unless recorded prior to other claim
- **Personal Property: “Possession is nine-tenths of the law”** –
 - Can establish ownership with verbal testimony, other evidence
 - Exception is titled vehicles

Exception: Statutory Ag Tenancy in NC

- Vast majority of non-owner farm use is “verbal” (not written)
- NCGS §42-15 through §42-25
 - Termination 30 days (generally Jan 1 to Jan 1)
 - Select counties Dec 1 to Dec 1 (notice by Oct 31)
 - Wheat and cover crops (over-winter)
 - Landlord crop lien (and crop insurance lien)
- Evidence of term? (e.g. NRCS contract)
 - Statute of frauds (3+ years)
 - **Must file Memorandum of Lease**
- **A tenancy on transferred land (purchased, inherited) is not automatically renewable**
- Extension Fact Sheet: [The Verbal \(Statutory\) Farm Tenancy](#)

Exception: Adverse Possession

- When one may claim title to land from another without specific conveyance... “squatter’s rights”
- Requires proof of **four elements**:
 1. Actual Possession – exclusive to the claimant
 2. Possession must be “open and notorious” (essentially, discoverable to point where landowner could force the other to quit his or her property (called “ouster”))
 3. Possession must be “hostile” = claimed as one’s own
 4. Possession must be continuous for 20 years (in North Carolina)
 - 7 years under “color of title” (possessor has a defective deed)

Titled Estates in Land (the ways land is owned)

- **Joint Tenancy with Right of Survivorship (RARE)**
 - Two or more simultaneous owners of **undivided interest**
 - When an owner dies, his interest belongs to surviving owner(s) (Interest not inheritable)
 - One joint tenant may not transfer interest
- **Tenancy by the Entireties:** Joint Tenancy except for married couples ([NCGS §41-55](#))
 - property purchased during marriage presumed “marital property”
 - property *deeded* to both spouses considered Tenancy by Entireties
- **Tenancy in Common**
 - Two or more simultaneous owners of **undivided interests**
 - When an owner dies, interest passes to owners heirs by will or intestacy
 - Each interest is freely alienable (can be sold or given to someone not currently a co-owner)
 - Inherited property is not marital property [[NCGS §50-20\(b\)\(2\)](#)]

Farm Law Article: [Land Title: Understanding Rights in Property](#)

Life Estates

- **Deed to Grantee(s) with a reservation of life estate in Grantor(s)**
 - Grantee's remainder interests vests upon recording of deed, but possession delayed until death of Grantor
 - Entire value of property may be reportable as gift (IRC § 2702)
 - may be transferred as life estate *per autre vie* (another's life)
- Life Tenant responsible for taxes ([NCGS §105-384](#))
- Life Tenant may not commit “waste” (deplete resources) ([NCGS § 1-533](#))
- May not encumber property beyond term of life without agreement of remainderman
 - Generally may not timber the land without agreement
 - Life tenant or remainderman may partition standing timber ([§ 46A-80\(b\)](#))
- **Tip: reserve timber rights when granting life estate**
- **[NWOA Article: Use Life Estates with Caution](#)**

Example: Life Tenancy

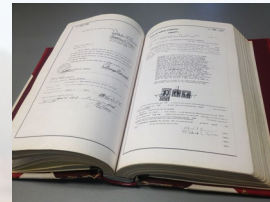
- Execute and record deed with the following language: “I (Andrew) or we (Andrew and Laura) convey the property described in Exhibit A to Caroline and Joe, subject to the reservation of a joint life estate in the Grantors herein”
- Andrew and Laura are responsible for paying property taxes, maintaining the structures, etc.
- When survivor of Andrew and Laura dies, Caroline and Joe own land as co-tenants
 - Land does not pass by will or intestacy

Documents of Tenancy and Title

- **Purchase contract** – a *promise to convey* title
- Recording documents of transfer – County Register of Deeds “chain of title”
- **Deed** – transfers complete or partial fee title
 - Can transfer a specific right – e.g. Timber Deed (right to cut timber) – or all rights
 - Description of Property: “metes and bounds” survey or plat
- **Deed of Trust (and Mortgage)** – attaches lien to a piece of real property as security for a purchase loan
 - Property with a lien is called collateral
- **Easement** – allows non-owner a right of access, usually to cross the property (may be verbal or prescriptive)
 - Right of Way (highway or utility)
- **Lease** – allows a non-owner to use the property as a contractual property right

Types of Deeds

- **Warranty Deed** – Grantor promises that he or she owns the rights being conveyed in the deed, has the right to convey those rights, and promises to “defend the title” against others claiming any of those rights
 - Meaning: Grantor is financially responsible curing/defending title defects (claims of others to title)
 - Deed language limitation:
“Subject to all liens, easements and other encumbrances of record”
 - Title Insurance has effectively replaced grantor’s guaranty
- **Quit Claim Deed** – Grantor makes no promise that he or she owns or has the right to convey
 - not “quick claim”



Other Deeds - Specific Conveyances

- **Timber Deed** – conveyance of the right to harvest standing timber
 - Includes right of access
 - Timber cut becomes personal property
- **Deed of Easement** – the granting of passage over the land of another
 - Can be narrowly defined by language or map
 - Recorded easement "Runs with the land"
 - Easements are generally transferrable (unless restricted in the deed)
 - **Conservation Easements** – conveyance of right to subdivide and subject land to restrictive use
- **Deed of Trust** – conveyance to another (i.e. lender of money) of the right to sell property in payment of a debt

Grantor and Grantee

- Grantor – conveys his or her interest in the land
 - Grantor can only convey that to which they have title
 - For example: if Andrew conveyed his rights in his standing timber to Tom last year, Andrew can convey the balance of his rights to Scott
 - Tom owns the right to cut standing timber
 - Scott does not own the right to cut standing timber
- Grantee – receives the conveyance
 - Only receives the rights granted in the deed
 - And only receives the rights owned by Grantor

Title Search

- Search Grantee Index back 30 years
 - To determine previous Grantors
- Search Grantor Index forward to present
 - To identify any out conveyances
- North Carolina Marketable Title Act ([N.C.G.S. § 47B-1](#))
 - Extinguishes claims during 30 years unbroken chain of title (provided no claims are made)
 - Exceptions include
 - Mineral rights
 - Railroad rights of way
 - Easements, etc.



Easements Terminology

- Grantor of easement owns the “servient” estate over which easement crosses; Easement Grantee owns the “dominant” estate to which access is granted
 - The right of ingress and egress dominates the landowner’s right to sole possession
 - Easements “run with the land” and generally benefit parcels, not people (unless the grant of easement is term-limited to an individual’s ownership of the dominant estate)
- **Express Easement** –
 - Conveyed specifically by deed (appurtenant – runs with land)
 - Reserved in a deed transferring subdivided property
 - Easement shown on a plat
- **Easement by Prescription** – adverse possession (20 years in North Carolina)
- **Easement by Necessity** – when one parcel is subdivided, a landlocked parcel has an access easement implied by law
 - see Cartway Proceeding ([NCGS §136-69](#))
- **Implied Easement** – two parcels under (at least one) common owner, dominant parcel continues easement from prior use
- Gates on Easements: [Farm Law case summary of Taylor v Hiatt](#)

Partition of real property

- Tenant in common has right of partition land
- Co-tenant files partition petition with Clerk of Court
 - Clerk appoints 3 “commissioners” to study partition claim and make recommendation
- Actual Division (§46-1 *et seq*)
 - Land surveyed into equal divisions
- Sale in Lieu of Partition (NCGS §46-22)
 - Commissioners cannot recommend or reach consensus on equal land division
 - Too many heirs (“Heirs Property”): multiple tenants-in-common of differing generations
- Conservation easement likely requires ‘sale in lieu’
 - (current research; no NC cases)

Preventing Partition

- LLC Operating Agreement restricts partition
- Tenant in Common Agreement (template coming)
- Beneficiary of Trust
 - Limited to action against Trustee or Trust
- Rights of First Refusal
 - requirement to deal before partition
 - Specific requirements (record Memorandum!)

Restrictive Covenants

- Landowner may place restrictions on property prior to transfer
 - often recorded as separate document
- Common in subdivided rural properties (where original landowner still resided following parcel subdivision)
- Covenants may be changed with approval of other landowners
 - the covenants are considered a condition upon which they purchased their property
- Can inhibit small farm development (usually limits on livestock, poultry, swine, commercial activity)
- problem of enforcement as a civil matter...

Land Disputes

- Processioning action (**a boundary dispute**) (NCGS 38-1 et seq)
 - Establish correct location of dividing line
 - Petition to Clerk of Court, who decides boundary
 - Loser can appeal to Superior Court
 - Dividing line is question for jury based on evidence
 - Jury may set the line based on evidence (does not need to agree with either P or D)
 - If title to land is an issue, then becomes Action to Quiet Title
- **Action to Quiet Title:** NCGS 41-10. An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims
- Plaintiff (the filing landowner) must bring the proof

Government Taking of Private Property

- U.S. Constitution 5th Amendment **Takings Clause** “... nor shall private property be taken for public use without just compensation”
 - Requirement the government pays fair market value for “taking” your property
 - May only “take” property for public purpose (cannot hand it off to private entity)
 - Just compensation is Fair Market Value
- U.S. Constitution 5th Amendment **Due Process Clause**
 - Requirement of process for taking: **Eminent Domain**

Eminent Domain

- Authorized by state statute: [NCGS §40A-1 et seq.](#)
- Available to public and private condemnors for various purposes
 - Utilities (e.g. Duke Energy, Atlantic Coast Pipeline)
 - NC Department of Transportation
- No requirement of prior negotiation (though often made)
- Reimbursement of property taxes
 - Present use valuation “roll back”
- Process initiated with County Clerk of Court
 - Private Condemnors NCGS § § 40A-19 through 34
 - Public Condemnors NCGS § § 40A-40 through 56
- Just Compensation (NCGS §40A-62)
- Cartway Proceeding ([NCGS §136-68](#))
 - private use of eminent domain process for easement to landlocked parcel for production purposes

Present Use Value Disqualification

- Tax deferment program, full taxes must be paid at some point in future
 - benefit: only past 3 years must be paid
 - called a “roll back”
- Purchaser may agree to continued use and lien
- Roll Back assessed by county upon disqualification
 - voluntary removal (sell to non-farm purchaser)
 - discovery upon transfer
 - discovery upon audit (all PUV tracts reviewed once every 8 years)
 - **some counties have shorted 8 year review**
 - use of new satellite imagery to discover land changes
- Care exercised in subdivision and transfer
 - careful not to reduce tract size below min acreage
 - careful to allocate ‘roll back’ or ‘continued use’ to purchaser (must be done in purchase contract [or non-farm commercial lease, e.g. solar])
- Extension Fact Sheet: [Present Use Value: Transferring Property Enrolled in Present Use Value Property Taxation](#)

Zoning: The “Bona Fide Farm”

- NC Counties are authorized to implement land use restrictions through zoning in their jurisdiction (outside of municipality)
- A farm that qualifies for exemption from zoning under statute
 - The term exists only in the context of zoning
 - It has been appropriated to denote “legitimate farmer” (without statutory authority)
- A bona fide farm parcel may not be annexed by a municipality without consent of the parcel owner [[NCGS §160A-58.54\(c\)](#)]
- A bona fide farm parcel located in municipal extraterritorial jurisdiction (ETJ) is not subject to municipal zoning restrictions
 - So long as parcel *remains* a bona fide farm

Bona Fide Farm ([N.C.G.S. 160D-903](#))

- The zoning exemption for farming and forestry
 - formerly a general exemption “R/A”
 - drawback of old exemption: county could interpret “agricultural use”
- Objective qualifications (safe harbors), one of:
 - Sales Tax Exemption Certificate (from NCDOR)
 - Land qualifies for PUV
 - Forestry plan
 - Owner or tenant files a Schedule F (tax P&L farming)
- Has a statutory definition of “agritourism”
- *Not* an exemption from state building code

Only Three Ways to Dispose of Property

● Sale

- Completely relinquish rights in property, receive fair market value in cash or equivalent (aka consideration)
- May reserve rights (timber, an easement, etc.)
- Tax consequence: capital gains on sale income (if held for more than one year)

● Gift

- Completely relinquish rights in property, nothing in return
- File gift tax return for gifts over \$15,000/donee/year
- Tax Consequence: Carry-over basis

● Death

- Property interests pass to heirs at law, or devisees in will
- Tax Consequence
 - Subject to federal estate tax
 - Property exempted up to \$11.4 million per person

THANKS FOR INVITING ME!



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