

Estate Planning and Wealth Transfer Principles



NC Agricultural Mediation Program – Farm Bill expansion

- Created under Agricultural Credit Act of 1987 (born of 80's farm crisis)
- Mediation: dispute resolution by 3d party neutral
 - Collaborative agreement, not focused on winning
- Program reauthorized under Farm Bill, provides grant funding for ag mediation as free service
 - Run in NC by NC Agricultural Mediation Program (housed at Western Carolina University)
- Existing: adverse letter rulings, wetlands determinations, conservation program compliance
- 2018 Farm Bill expanded list of "issues" a farm mediation program may mediate, now includes
 - Landowner/farmer disputes (leases)
 - Equipment leases
 - "farm transition" (including partition)
 - Organic certification loss
 - Right to Farm (neighbor disputes)
- "Other" as state agriculture department determines
 - Examples: Easements, water rights, environmental compliance, etc.



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 (hosted by Farm Bureau)
- Private (Farm) Law Practice (2010 - 2018)
- NCSU Agricultural and Resource Economics (2018)
 - 70% Extension appointment
 - 30% Teaching (Environmental and Agriculture Law)



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



Agricultural and Natural Resource Law

- Meet Our Staff
- Events
- Agribusiness Law
- Farm Transition and Succession
- Land Use and Zoning
- Environmental and Natural Resource Regulation
- Energy
- Public Lands and Wildlife Management
- Department of Agricultural and Resource Economics
- Publications & Factsheets

News and Updates

Clean Water Act: EPA Issues Draft WOTUS Rules for Comment

On February 14, 2019, the Environmental Protection Agency and the Army Corps of Engineers (under the Department of Defense) ...

— 3 days ago



NC FarmLink Featured in Southeast FarmPress

NC FarmLink is working with NC Choices on a grant funded project to tackle one of the biggest barriers ...

— 1 week ago, NC FarmLink

Raw Milk: Branan and Day Present on Cow Sharing Agreements

Andrew Branan, Extension Assistant Professor with the NC State University Department of Agricultural and Resource

Timely Article on Wetland Value Published by NC State's Burchell and Hunt

North Carolina State University's Dr. Mike Burchell and Dr. Bill Hunt, both of the Department of Biological and Agricultural ...



Now on Twitter



Are You a Landowner?

This Lawyer's Advice to Clients

- Try not to give heirs undivided interests in land
- The Estate Tax is not the issue (at the moment), let's focus on distribution and rights to acquire title
- Careful of PUV when planning land disposition
- Please do not set up a system of obligations to protect *your* legacy
- Farm Succession is a distribution framework filled with execution events
- You can't make it perfect, so make it flexible

“I don’t want the nursing home to get my farm”

- Must be poor (very poor) to qualify for medicaid
 - Difficult to plan
 - Must relinquish almost all of your assets
- Medicaid Rules: Qualifying vs. Recovery (lien)
 - Property/wealth that **disqualifies from medicaid**
 - Property that is exempt but subject to reclaim after death
- 5 Year “Look-back” Rule
- For this plan to work, there must be medicaid
 - Policy winds against social security and medicaid... “you should have gotten rich”

A Question 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 (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land: **why the son should have a right to exclude his fellow-creatures from a determinate spot of ground, because his father had done so before him**: or **why the occupier of a particular field or of a jewel, when lying on his death-bed, and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him**”.
- Sir William Blackstone 1753

Review

- Real Property Titling
 - Joint Tenancy/Tenancy by the Entireties = survivorship = non-alienable/severable
 - Inherited land is not **joint property**
 - Spouse may have rights to inherited property at owner's death or divorce
 - Tenancy in Common = severable/alienable interests
 - Other severable interests (timber, water, farming, etc.)
 - Life Tenancy = remainder interest is *vested*
- Business Entity Interests
 - Governing document (e.g. Operating Agreement) controls disposition of interests in entity
 - The Buy-Sell Agreement (option, valuation (purchase price, payment)
 - Business Entity interest (shares, membership) = **intangible personal property**
 - **Gifts of interest to create equity in younger generation**
 - Land titled to business entity = personal property

Managing Tenancy in Common

- “Tenancy in Common Agreement”
- **OPTION TO PURCHASE.** “Lessor grants to Lessee an Option to Purchase the Property, **reserving to Lessor the timber interest** in the Property. Lessee may exercise this Option at any time up to the 90-day termination notice period in § 1, and the intent to exercise this Option must be submitted to Lessee in writing delivered to Lessee by the termination notice date in § 1. Lessee may purchase the Property at 125% of its independently appraised value, said appraisal to be paid for by Lessee or otherwise as agreed between Lessor and Lessee. Closing on the sale must occur before sixty (60) days of the termination of this Lease.”

Sample Reservations and Options

- **RESERVATION OF TIMBER INTEREST.** Lessor retains the right to harvest timber during the term of the lease. Such harvest must not unreasonably interfere with Lessee's farming operations.
- **OPTION TO PURCHASE.** "Lessor grants to Lessee an Option to Purchase the Property, **reserving to Lessor the timber interest** in the Property. Lessee may exercise this Option at any time up to the 90-day termination notice period in § 1, and the intent to exercise this Option must be submitted to Lessee in writing delivered to Lessee by the termination notice date in § 1. Lessee may purchase the Property at 125% of its independently appraised value, said appraisal to be paid for by Lessee or otherwise as agreed between Lessor and Lessee. Closing on the sale must occur before sixty (60) days of the termination of this Lease."
- **RIGHT OF FIRST REFUSAL.** "If at any time during the term of this Lease Lessor receives a bona-fide and irrevocable written offer from a third party of no relation to Lessee, Lessor must notify Lessee of such offer, and Lessee has the right to purchase the Property at a price that is the greater of a) the written purchase offer, or b) 125% of the value reflected in an appraisal commissioned by Lessor."

Powers of Attorney

- A written document, signed and notarized
- Where an adult person (the “principal”) assigns his or her rights and powers over **property** to another person, called an “**attorney in fact**”
 - “Attorney in Fact” acts in the shoes of Principal
 - Sell property, take loans, make financial dispositions, etc.
- 1. **Durable Power of Attorney:** powers of attorney in fact over property ‘survive’ the incapacity of principal
 - Requires recording with Register of Deeds
 - **Power ends at death of Principal**
- 2. **Health Care Power of Attorney:** Principal empowers another to make medical decisions for him or her if cannot directly communicate with healthcare providers
- 3. **Living Will** or Advance Medical Directive: **speaks directly to** healthcare providers regarding decision to end life support
 - Takes decision away from anyone other than physician
 - Covid-19 language: might specifically exclude care (e.g. ventilator) related to Coronavirus or similar virus

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
- **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
 - Tax Consequence
 - Subject to federal estate tax
 - Property exempted up to \$11.4 million per person

No Strings Attached

- Give property away
 - Carryover basis
 - Life Estate
- Sell property
- Distribute property to heirs by will
 - Share and share alike
 - Specific distributions



Strings Attached

- Transfer property to a Trust
 - During life
 - At your death
- Transfer property to a “Business Entity” (ie. Limited Liability Company)
 - Contract governs
 - Cannot “paper over” humans



Taxation of Property and Income

- Income – tax on earnings from your labor
 - Each person taxed individually
- Capital Gains – tax on earnings from appreciation in value of specific property
 - Tax paid at time you “liquidate” (sell) the property
- Estate and Gift Tax
 - Tax on transfers of wealth (cumulative value of property)
 - Single or group of items (gift)
 - All wealth (estate)
- Property Tax – assessed by county on real and certain personal property
- Sales Tax – tax on certain items sold in course of business

Property Disposition Tax Implications

- **Sale** of property: **Capital Gains Tax**
- **Gifting** of property:
 - Carry Over Basis (potential higher capital gains tax)
 - Gift Tax (for annual gifts above \$15,000 [per donee])
 - Lifetime gift tax exemption: \$11,400,000
- Property at **Death**:
 - **Estate Tax**: percentage tax levied by law on all wealth transferred at death (aka “taxable estate”)
 - Subject to “**Wealth Exemption**”
 - **Federal Exemption = \$11,400,000 per individual (federal only)**
 - Reverts to \$5.6MM in 2025
 - “Unified” with lifetime gift tax exemption (dollar for dollar, above annual exclusion of \$15,000/yr/donee)
 - Abolished in North Carolina
 - Probate costs: percentage levied by county on **personal property** wealth (aka “probate estate”)



Disposition by Sale

- Marketing and sale price
- Transaction (real property)
 - Contract for Sale
 - Closing and Recording
 - Deed
 - Loan Documents and Deed of Trust
- Calculation of Capital Gains Tax
 - **Basis** in property: value at acquisition (inherited or purchased)
 - Exception: gifted property retains grantor's basis (value at time of acquisition, not transfer)
 - **Capital Gain Tax** = $(\text{FMV} - \text{Basis}) \times \text{Tax Rate}$
 - Capital gains tax rate range according to tax bracket (generally 15%)

Disposition by Gift

- Gifting of Land
 - Loss of right to rental/timber income
 - Carry-over basis (potential higher capital gains)
 - Donee receives donor's original basis for calculation of capital gains in event property is sold
 - Survey Costs and Subdivision Process
- \$15,000 annual exclusion
 - Gifts often exceed this amount (refer to LLC option)
- Lifetime gift exemption = \$11,400,000 (2019)
 - \$22,800,000 for married

Disposition at Death

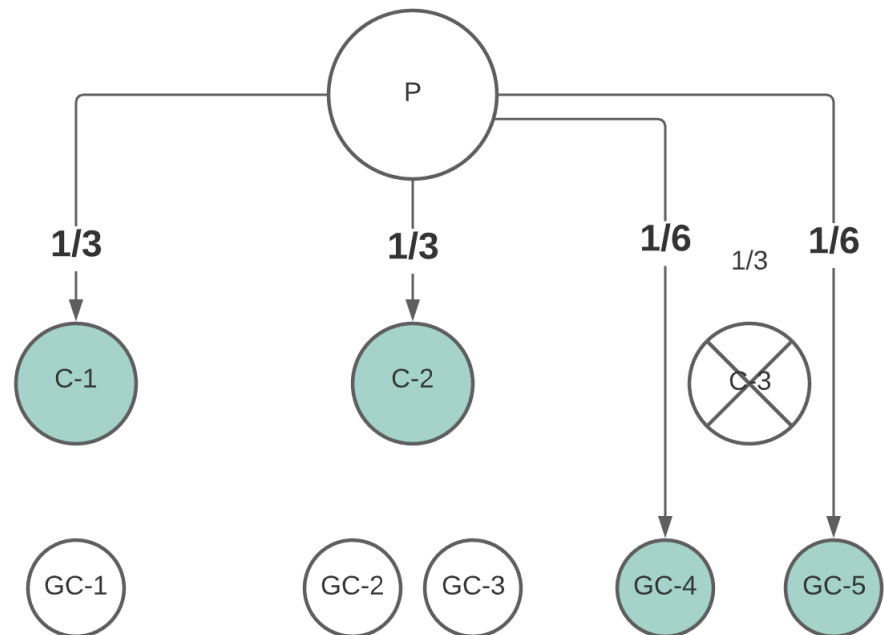
- **Testate:** person dies (decedent) with a valid will
 - late 15c., from Latin *testatus* "public, manifest, published"
- **Intestate:** person dies without a valid will, property is distributed according to **Intestate Succession Act** ([N.C.G.S. Chapter 29](#))
 - Distributions to spouse, lineal descendants, lateral descendants, or ancestors depending on facts at moment of death
 - Spouse % varies with # of children or grandchildren
 - Children and grandchildren (% varies by glass)
 - Siblings and parents (depends on whether lineal descendants alive)

Will Legal Concepts

- “*Voluntatem ait ad mortem*” (“**The will speaks at death**”)
 - A will has no legal significance prior to death of testator
 - No one is an “heir” while the testator lives
- **Class:** groupings of individuals according to generational relationship to deceased (testate or intestate)
 - Parents, siblings, children, grandchildren are each a “class”
- **Per Stirpes:** Latin for “by root” or “by branch”
 - Share of inheritance flows through deceased heir to lineal descendants
- **Per Capita:** Latin for “by the head”
 - Share of inheritance divided among living descendants
 - Share to Pre-Deceased would-be “heir” is extinguished
- **Ademption:** property no longer owned by decedent at time of death (not part of estate)
- **Intent of Testator:** judicial rules of interpretation focus on what testator wanted, not circumstances of heirs

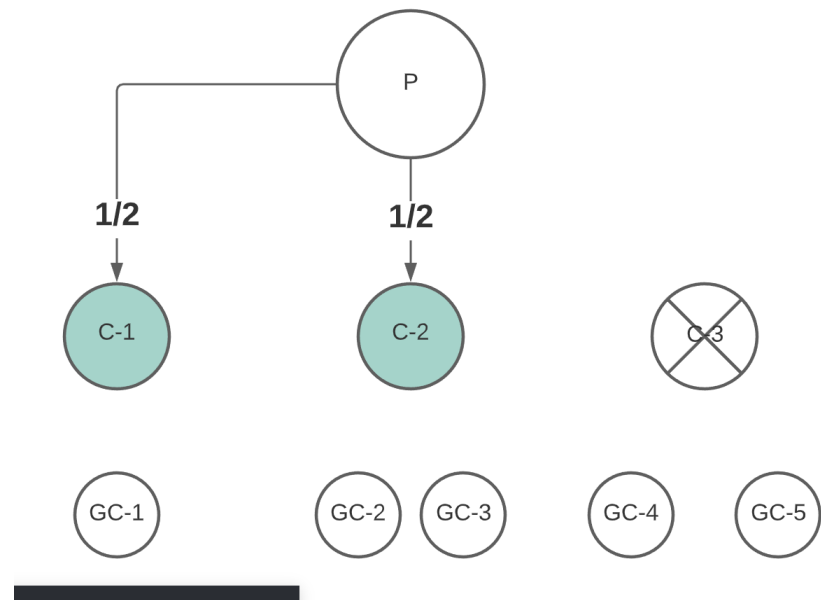
Per Stirpes Example

- To my children, ***per stirpes***
- Note the deceased child's share is preserved for lineal descendants of deceased child
- Descendants of surviving children to not inherit

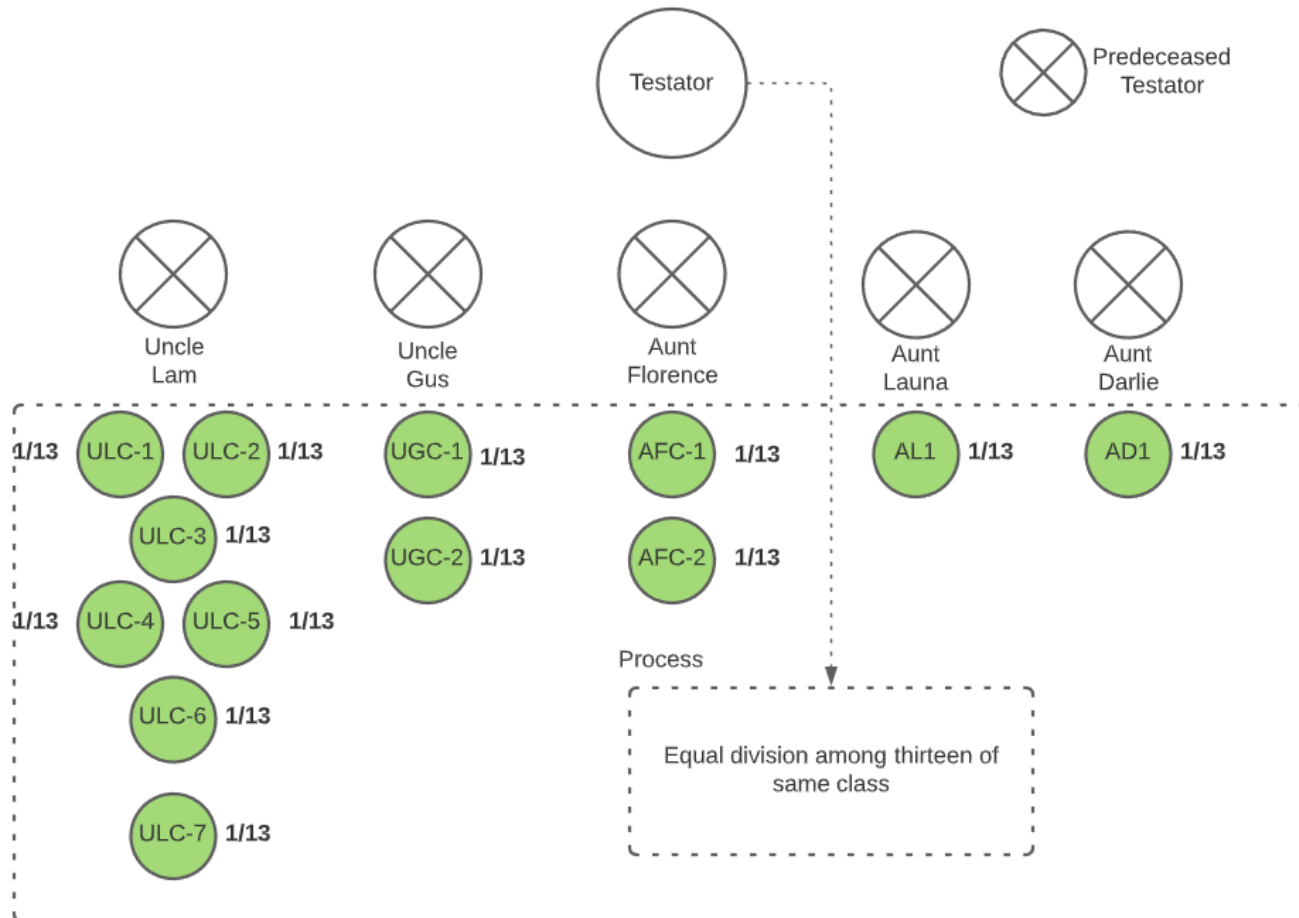


Per Capita Example

- I devise and bequeath all of my property to my children, ***per capita***
- Note: share of predeceased child is extinguished

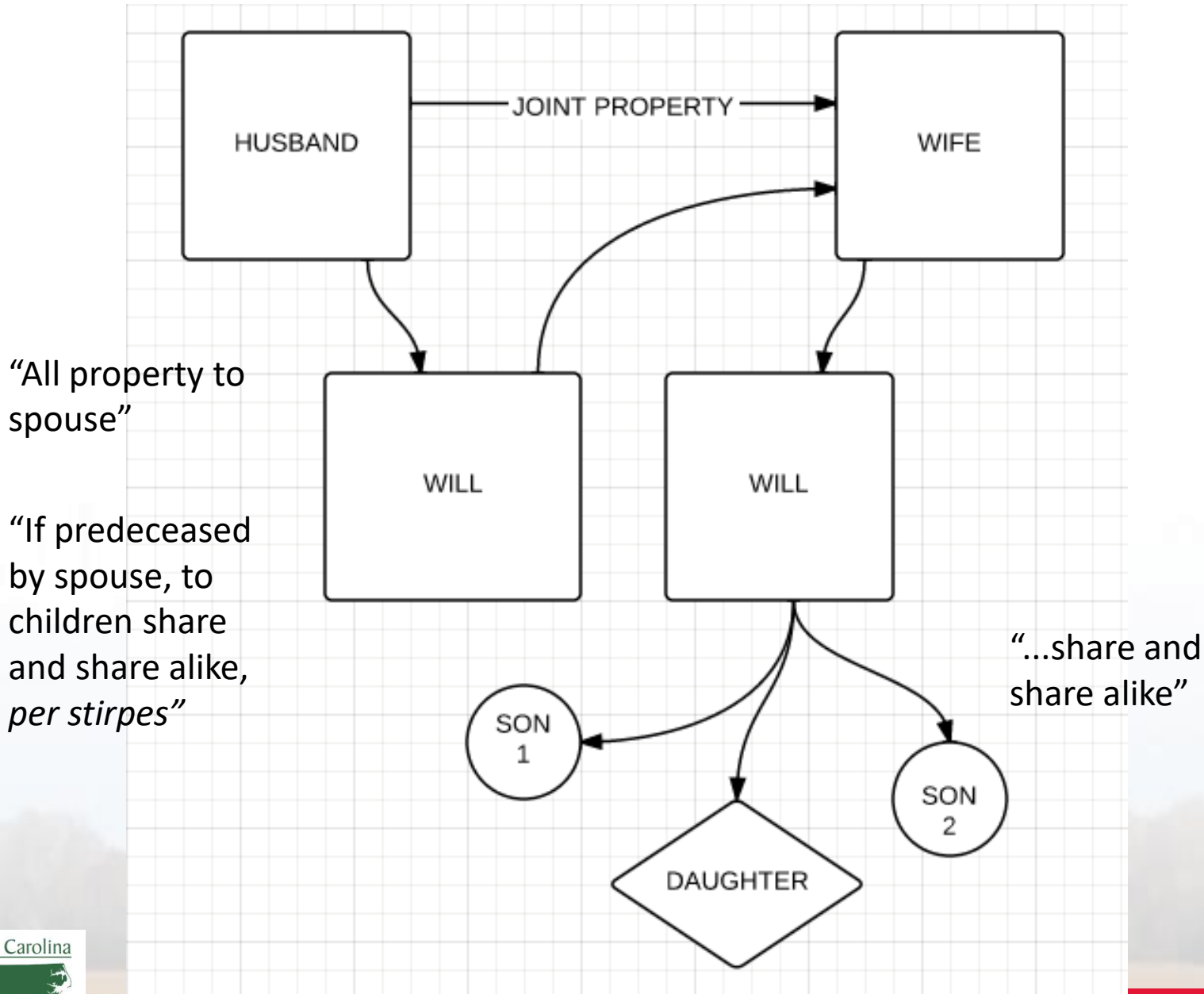


I leave my estate to *my grandchildren per capita*



Creating a valid Will

- Requirements codified N.C.G.S. § 31-1
- Testator (age 18+) must have mental capacity
 - Understand you are making a will
 - Understand Nature of property you own
 - Understand Who you are leaving it to
- Testator must sign
 - In the presence of two “disinterested” witnesses
 - Have no inheritable interest under the will
 - **Self-Proving Will:** Testator and witnesses sign in the presence of a notary public
 - With no notary, Clerk must call in will witnesses to testify as to validity of signature
- **Holographic Wills:** written and signed in handwriting of testator (N.C.G.S. § 31-3.4)
 - If found among testators “valuable papers”, safe deposit box, etc.
- **Clerk must decide if will meets legal sufficiency for entry into probate**



Processing Disposition at Death: **Probate**

- **Probate Estate:** the full extent of *personal property* owned by decedent (dead person) at time of death
 - Administered by county Clerk of Court
 - Validate decedent's will (determine proper execution by decedent)
 - Confirm **Executor** (aka Personal Administrator)
 - Confirm distribution of property
 - Confirm notification of creditors and ensure payment of decedent's debts
 - Real Property is *not* a probate asset
 - Title passes immediately following decedent's last breath
 - (Title "drops like a stone" through probate)
 - Real Property must be disclosed in case needs to be sold to generate cash to pay debts (i.e. probate estate has insufficient property)

Agency and Fiduciary Duty

- Agency = authority to act for another
- Fiduciary = Agency + Obligation to act in best interests of another
 - [NC Uniform Fiduciaries Act \(NCGS § 32-1 et seq.\)](#)
 - Absolves banks of liability for fiduciary violations
 - Examples:
 - Attorney and client
 - Broker and principal
 - Pres. Obama Department of Labor rule requiring financial advisers to work in best interests of their client. Fifth Circuit strikes down rule
 - Pres. Trump Securities and Exchange Commission (SEC) revises rules
 - Trustee and beneficiary
 - specific powers NCGS § 32-27
 - Executors of an estate and the estate's heirs

Role of Executor (aka Personal Representative)

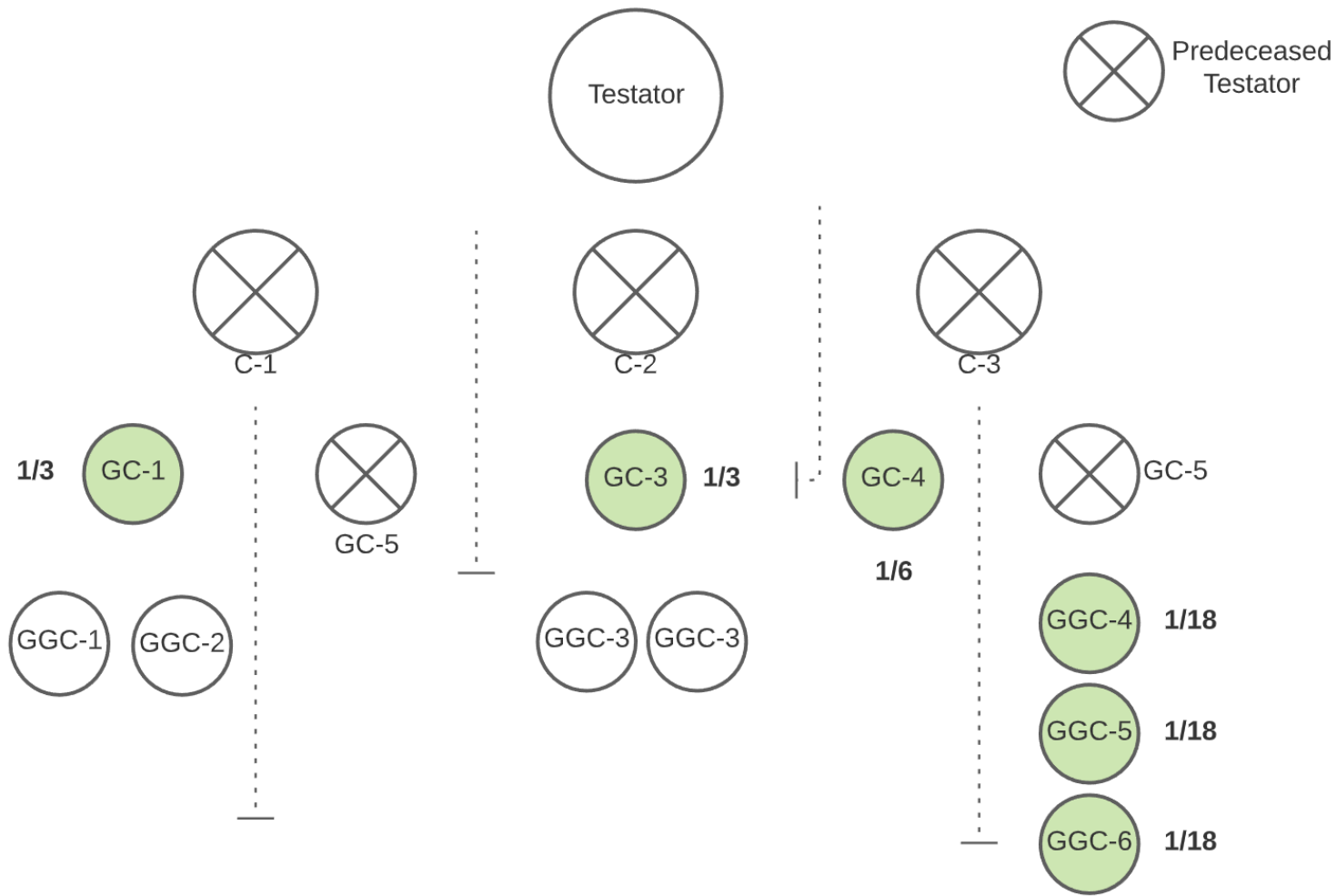
- An agent of the estate, under supervision of the Clerk of Court (executor is a **fiduciary** by statute [§ 28A-13-2])
- Person named in the will, but still must be confirmed by the Clerk of Court
 - E.g. most Clerks will not confirm a named executor who is a felon
- Clerk issues “Letters Testamentary”
- In case of intestacy, a family member approaches the Clerk to appoint
- Executor/PR must distribute according to will or intestate statute, **does not have discretion to decide who gets**

Challenging a Will

- **Will Caveat:** action filed by interested party (= standing) to the Clerk of Court, transferred to Superior Court as a “question for the jury”, challenges include:
 - Validity of will due to “**lack of capacity**” to make a will
 - It is not enough, however, to present “general testimony concerning testator’s deteriorating physical health and mental confusion in the months preceding the execution of the will.” *In re Will of Smith*, 158 N.C. App. 722, 725 (2003)
 - Validity of will due to “**undue influence**” (possible factors *In re Will of Andrews*, 299 N.C. 52, 55 (1980))
 - Old age and physical and mental weakness;
 - That the person signing the paper is in the home of the beneficiary and subject to the beneficiary’s constant association and supervision;
 - That others have little or no opportunity to see the signer;
 - That the will is different from and revokes a prior will;
 - That it is made in favor of one with whom there are no ties of blood;
 - That it disinherits the natural objects of the signer’s bounty;
 - That the beneficiary has procured its execution.
 - Other: Duress, Fraud, Forgery, Mistake, Revocation
- Generally, an interested party may not testify as to **oral communications** with decedent if such is to his or her benefit
- 3 year statute of limitations to bring an action

Intestate Succession

- “Statute of Distributions” under old English law, adopted in United States by each state
- Now, **Intestate Succession Act** ([N.C.G.S. Chapter 29](#))
- For disposition of property
 - When no will properly executed
 - When a will has been declared invalid by the court
- Distributions
 - First to spouse (legally married)
 - Then to lineal descendants according to statute



Trusts: Key Concepts

- Trust – “A right of property, real or personal, held by one party for the benefit of another” (Black’s Law Dictionary)
- Fiduciary Duty – generally, duty to act in bests interests of another
 - Common law
 - Uniform Fiduciaries Act (N.C.G.S. Chapter 32)
 - Powers of Fiduciaries (N.C.G.S. § 32–25 *et seq.*)
- “Self Dealing” – generally a violation of fiduciary duty
 - Unless instrument (such as trust) grants authority

The Trust

- A separate legal entity
- Settlor (or Grantor): the person(s) who create(s) the trust and funds it (assigns property to the trust)
- **Trustee**: the “legal owner” of the trust property, bound by a fiduciary duty (state law) and by terms of the trust
 - **Fiduciary powers of trustee NCGS**
- **Beneficiary**: The person(s) who receive the benefit of the trust
 - income from assets
 - distribution of assets
- Language of the Trust controls
- Trusts are **private**, assets not part of probate estate (but part of taxable estate if trust is revocable)

Types of Trusts

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

Revocability of Trusts

- Revocable Inter-Vivos Trust
 - Settlor(s) create while alive
 - Can appoint self as Trustee
 - Can place real and personal property into Trust
 - Can remove property from Trust
 - Property in Trust at death part of federal “taxable estate”
- Irrevocable Trust
 - Settlor creates while alive
 - Appoints another trusted person as Trustee
 - Can place property in, but can’t take property out
 - Can receive income, but not principle

Trust Features for Farms/Forest

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

Assets to Place in Revocable Trust

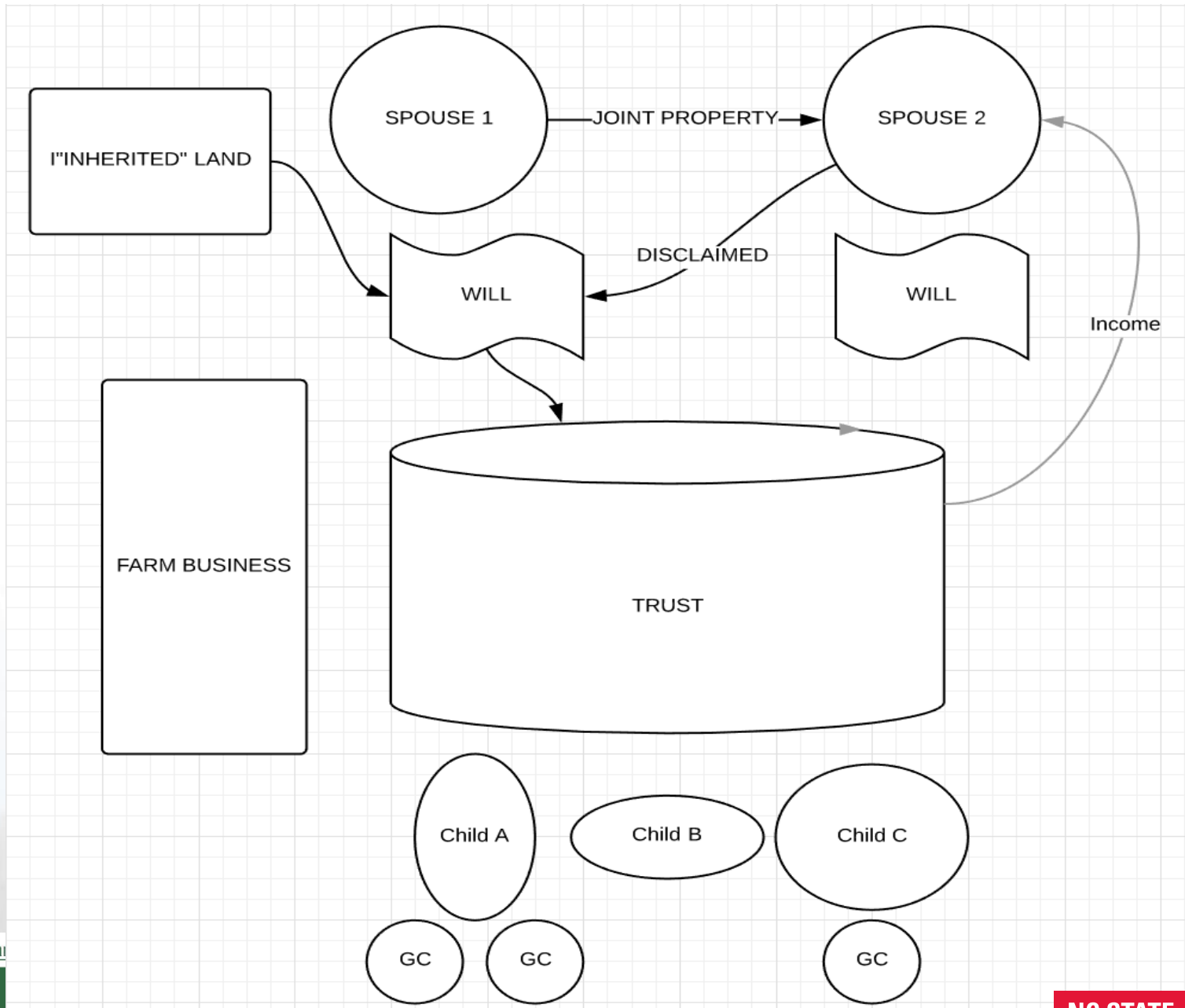
- Land interests
 - Record deed (trust is the “Grantee”)
 - File PUV application within 60 days
- Business entity interests (land or operating)
 - Can use transfer of death certificates
- Assets in Trust not listed in Probate inventory
- Trust as insurance beneficiary
 - Receives proceeds from an insurance policy, which are then distributed according to Trust instructions

Trust Challenges/Opportunities

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

Trust Diagram Example

- Settlers (Husband and Wife) own real property
 - Some land owned jointly
 - Some land inherited by husband from his parents
- Settlers own intangible assets (investments, etc.)
- Settlor(s) own interest in farming LLC
- 3 children (one child involved in farming LLC)
 - 1 non-farm child has rocky marriage
 - 1 non-farm child has disabled child (grandchild to settlor)
- Settlers execute revocable Trust
- Settlers execute Power of Attorney (farming child)
- Settlers execute “pour over” wills
- Husband dies, survived by spouse and 3 children and grandchildren



THANKS FOR INVITING ME!

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