A Landowner's Perspective

by Olivia Boyce-Abel

Editor's note: The story of preserving a family's land is often the story of the family itself. The particulars described here will be different in every case but, sadly, the situation will sound familiar to many families who have been drawn into conflict over their land inheritance. This article is written for landowners, and land trusts are welcome to make copies of it.

As a landowner who has survived uncharted waters, I am writing this article to help other landowners understand the complications that can be involved in passing land from one generation to the next. Most of us hope that if we ignore the future of our land, any potential problems will go away of their own accord. This simply is not true.

In my own case, I wish I had had the opportunity to read an article or hear a lecture about all these complications four or five years before the situation became desperate, with my mother dying and the land in jeopardy.

A coastal farm

As the youngest daughter of a traditional Southern family, I assumed that the less I knew of the family land and business the better. After all, my interest was organic gardening, not reading monthly accountings or minutes from the quarterly trustees meetings.

My grandfather purchased our family land, a beautiful coastal farm which included a barrier island, in the 1920s for timber and as a vacation site. He paid $2,000 for under 3,000 acres, adding more land in later years.

Upon his death he left a one-third undivided interest to his daughter (my mother), a third to his son, and a third to his wife. (With an undivided interest, each person owns a percentage of the property as a whole.) When my grandmother died she left her third to the grandchildren to be divided evenly, or so we thought. Shortly after her death, a long, quiet battle between my mother and my uncle emerged over how their mother's will was to be interpreted. My uncle was sure that my grandmother's third should be divided in half, with one half going to his two children and the other half going to my mother's four children.

I thought the mounting tension between my mother and my uncle resulted because he wanted to build golf courses on the land and she wanted to leave it as is—"a home for all of God's creatures," as she would often say. It wasn't until one afternoon when she told us that litigation had been going on for a long time that I understood. By then the judge had ruled in favor of my uncle, but my mother begged us, with tears in her eyes, not to appeal the ruling.

If either my aunt or my mother were to die, their $10 million estate would trigger $5.5 million in inheritance taxes.

My mother and her brother never saw eye to eye on how to manage the land—which her brother wanted to develop into a Hilton Head-type resort—and there was a constant, insidious distance between them, punctuated by small squabbles over the land or my grandmother's trust.

Facing $5.5 million in inheritance taxes

Thirty years after my grandmother's death, my uncle died and left his share of the land to my aunt. At that time we found to our surprise that our property was worth $30 million dollars. If either my aunt or my mother were to die, their $10 million estate would trigger $5.5 million in inheritance taxes. That would mean immediate sale of all of the land. Our worst nightmares were becoming a reality.

First, we had a family meeting to talk about all of this. My aunt's lawyer facilitated the meeting, and he was the only non-family member present. Unfortunately, it wasn't recorded and there was a lot of miscommunication and misunderstanding. People heard what they wanted to hear.

Based on some of the miscommunication and actions that resulted from the meeting, my aunt decided she wanted to know what property was hers, so she sued for partition (division) of the land. This way she would not be forced into selling her share if my mom died and her estate did not have the money for inheritance taxes. My mother decided she wanted to donate or sell the major portion of her share to a conservation organization and leave her house with a few acres to her children. She approached The Nature Conservancy and Audubon, but they were not interested in an undivided interest. Then, within the year, my mother was critically ill with cancer.

My mother turned for help to advisors outside of the family. Different environmental planners and lawyers came up with various ideas. The idea for a limited development plan was a good one, but we needed much more time to sell it to the "other side" (which my aunt and cousin had somehow become). Also, the realtors and appraisers in our area had no idea of how to appraise the land with part of it set aside for preservation. Local lawyers couldn't understand what my mother wanted to do. Preserve her share of the land? Why, surely someone with a 10 million dollar asset wouldn't want to cheat her children out of their inheritance!

A series of family meetings began, but by then there was dissension among my siblings. A sibling and a cousin had acted as land agents in several land sales which some of us were unhappy about because they had not included conservation easements in the deed, only the contract. The tension built quickly as our mother's health declined.

A few months before her death, my mother and father divorced, so she had no marital deduction for estate tax purposes. Fortunately, she had begun to find some professionals who understood her goals. They were not from our state, let alone our area. With some remarkable planning from Boston family lands attorney Stephen Small, she created her own foundation (a 501(c)(3) charitable trust). The trust was to preserve her 1,000 acres minus her house and two acres around it. Because of the undivided ownership, we couldn't know where the trust's land would end up in the partition suit, but we could fight for it to surround the house and two acres. That way we children could enjoy the land and not pay the impossible inheritance taxes on it, and her share of the land would be preserved. She appointed environmentally oriented trustees who included only one family member—myself. She set up the foundation at this time but did not yet put the land into it. She could do that at any time she chose. Also, through her will the land would automatically pass to the foundation.

Still, the partition suit was breathing down her neck. She hoped and waited for solutions from her children and the trust. The trust began negotiations with the state to buy all of the land with bond money for state parks. It was always my mother's dream that somehow we could preserve all of the land, even though she only owned one- third. Five days before her death she deeded the land to the foundation.

Three lawsuits

My mother had been concerned there might be a will contest and, though there were many warning signs along the way, I just didn't see or wouldn't believe them. Less than six months after her death, two of my siblings sued to overturn her will and her deed of the land to the foundation. With that, our lives were changed forever. Mother had left enough money to help us all out substantially, but what she hadn't left were people who were content with and knowledgeable about what she had done. She was too sick toward the end to communicate clearly with everyone because she knew it would lead to disruption in the family and she simply didn't have the energy for it.

So in addition to the partition suit against her share of the land there was now a suit against her estate to overturn her will (even though it contained an interroreum clause[1]), and a suit against her charitable foundation to overturn her deed. As a trustee and executrix of her will, I faced three lawsuits. My once peaceful life was taken over by faxes, continuous conversations with lawyers, court hearings, and motions. I quickly became competent at reading a legal document and gleaning the essentials from it. My personal life was placed on the back burner.

Seven years later it would still probably be going on with one appeal or another if I had not finally said, "Enough," and settled with terms that were not ideal for the land or myself. It was, however, an interesting coincidence how the lawyers encouraged us to settle when there was no money left in the estate or the trust. The only thing left as a payment for fees would have been the land. (I might add, however, that several lawyers we worked with were a great help.)

My mother's share of the land was given to a charitable college foundation for marine research with strict conservation easements. Eight years after the filing of the partition suit, the judge has divided up the land. Since the college foundation would not argue in court on their own behalf, the judge gave them the piece of land closest to existing development.

In the settlement agreement we had agreed that my mother's share of the land would have conservation easements on it before it was deeded to the college. However, neither the organization that would hold the easements nor the reverter organization was established. I worked for three years to find both organizations. When it came down to the final two weeks, I found two agencies to come on board, and the deed for the college's share was recorded with easements.

Now only time will tell how much the remaining land is destroyed or preserved.

Start planning now

I am sure that as you read this you are thinking to yourself, "That would never happen to my family." I thought that too; our family was incredibly close. And our experience is far from unique. I have met many people who have said, "You know, the same thing happened in my family." Sometimes they were fighting over a lot of land or possessions. Once it was for a house worth $3,000, once for a coffee table.

My advice to all landowners is to start planning now, no matter how young you are or how recently you acquired your land. Think of the headaches that would have been saved if my grandfather or grandmother had been able to put easements on the land, or if my mother's share of the land had not been an undivided interest, so that she could put an easement on it.

Especially if there is not a matriarch or patriarch in charge of the land, start family meetings now. Family mem-

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As in any situation involving property and more than one individual, this is a complex case impossible to reduce to a simple story. In addition, every person involved views the circumstances differently. This article represents a synopsis of the experience through my eyes.

1. A legal clause used in wills that states that if anyone contests the will, he immediately forfeits his inheritance. It has not been upheld in court in most states.

Conservation Easements

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monwealth of Massachusetts' director of conservation services, or by a mediator or arbitrator of the director's selection.

Cooperation through memoranda of understanding

As is apparent, the two land trusts that have agreed to co-hold an easement need to have a written framework within which they can document their agreements and understandings about their respective roles. Although these matters could be addressed in the easement document itself, it is usually more advantageous for the land trusts to use a separate two-party instrument—a "memorandum of understanding" (MOU)—for this purpose. For one thing, the land trusts will usually not want to suggest to the landowner that there is even the remote possibility of a disagreement between the two land trusts. For another, the land trusts may not have reached agreement on all matters (for example, monitoring and monitoring reports) at the time the easement is signed and recorded; thus the MOU may be prepared later.

BCLT&CF uses the MOU to articulate the trusts' commitment to unanimity in enforcement and to make provision for all envisioned administrative and enforcement decisions, including a division of responsibility for the financial burden of legal enforcement actions. In each case the local land trust must contribute an agreed percentage to the enforcement effort, though that percentage is obviously not the same in all cases. Each organization is responsible for creating and maintaining its own stewardship endowment fund. BCLT&CF and its co-holders have agreed that their MOU's are legally binding and enforceable, though (fortunately) the need to enforce one has not yet arisen.

If the stewardship roles of the two organizations are to be different in kind (for example, one land trust is to be concerned with open lands and the other is to monitor historic buildings), this can be addressed in the MOU. The MOU can also be a useful vehicle to deal with issues relating to monitoring or endowment funds contributed by a landowner. Will they be jointly held or divided between the two trusts? Will they be pooled with other endowment funds of either or both organizations? Finally, the MOU might address the procedure that will be followed if either trust wants to cease holding the agreement and transfer its interest to the other.

Conclusions

We can draw several conclusions from the experiences of these land trusts. First, there is no single partnership model that will fit every easement transaction. The organizational cultures of the two land trusts, the objectives and wishes of the landowner and, of course, the particular attributes of the land itself all play a part in dictating the correct choice. Second, there is no substitute for careful thought, planning, and draftsmanship. The land trusts need to try to consider all of the "what ifs" when they are exploring an easement partnership. Finally, the land trusts need to revisit the partnership from time to time to evaluate whether it continues to fulfill their original objectives.

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bers who have worked on a plan together are much more likely to stand behind it. Hire an impartial facilitator or mediator whether or not there are any discernible tensions in your family. You may think that you don't need one, but a lot of the families I work with now do exactly that as a preventive measure. When everyone's voice is heard equally and fairly, there is much more likelihood of a family resolving even their smallest differences in a way that they all feel good about, thus preserving the family's integrity as well as the land's. You may need to hire other professionals besides facilitators and mediators—such as accountants and lawyers—who understand the tax laws and can suggest options. Get an up-to-date appraisal of the land's value. Money spent now producing and implementing a plan will be much less than future legal fees.

Talk to other landowners in your area facing similar situations— you can even create your own landowners' network. And finally, get in touch with a land trust, which can give you the names of professionals to help you plan.

Olivia Boyce-Abel is founder of Family Lands Consulting, through which she works in negotiating effective environmental agreements, dispute resolution, and family mediation. She has over 20 years personal involvement in multiparty ownership, including more than nine years of litigation as trustee, executrix, and trust beneficiary.

The Land Trust Alliance has several resources for landowners available, including Conservation Options: A Guide for Landowners *and* Preserving Family Lands, *by Stephen Small. LTA also can put landowners in touch with land trusts in their area.*