

Minimizing Risk for Landowners

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Four Areas of Significant Risk for Landowners

- ▶ Long-term Care
- ▶ Family Disputes
- ▶ Leases, Deeds, and Contracts
- ▶ Premises Liability

LONG-TERM CARE

The slide features a white background with the text 'LONG-TERM CARE' centered in a black, serif font. On the right side, there are several overlapping, semi-transparent green geometric shapes, including triangles and polygons, creating a modern, abstract design.

Who will take care of you?

- ▶ Will your spouse be able to provide the level of care you need without compromising his or her own health?
- ▶ Do your children live close enough to help?
- ▶ Do your children have time to help?
- ▶ How will you reward or compensate the child who take care of you?

Three Ways to Pay

- ▶ Private Pay
- ▶ Insurance
- ▶ Need-Based Government Benefits

Average Annual Cost of Long-Term Care in N.C. in 2015 (Genworth Insurance Co.)

- ▶ Skilled Nursing - \$75,190 (Semi-Private)
- ▶ Assisted Living - \$36,000
- ▶ Home Health Care - \$40,040

Things to Avoid:

- ▶ Running out of money with no plan in place.
- ▶ Risking the health of a caregiver.
- ▶ Leaving home or land unprotected.
- ▶ Not planning for incapacity.

Example

- ▶ 75-year old widow.
- ▶ Two responsible adult children who like each other.
- ▶ Farm has been in mother's family for three generations.
- ▶ Other assets are \$200,000 in cash and \$100,000 in IRA.
- ▶ No current creditors.
- ▶ Wishes to protect farm.

Issues to Consider:

- ▶ How much control does mom want?
- ▶ How will she pay for long-term care?
- ▶ How do children feel about the property? Can they manage it together?
- ▶ How will decisions be made when mom is incapacitated?
- ▶ Do children have potential creditors, marital issues, addictions, or mental illness that could affect the plan?

Summary:

- ▶ Goal is to protect specific assets from long-term care costs if expenses are more than you can afford.
- ▶ Long-term care planning should be undertaken as part of a comprehensive plan.
- ▶ Consider all available tools when making a plan.
- ▶ Planning in advance will give more options.

FAMILY DISPUTES

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Second & Subsequent Marriages

- ▶ Do you have a Premarital Agreement?
- ▶ What will you leave directly to your spouse?
- ▶ What if your spouse takes an Elective Share?
- ▶ Should you use a marital trust?
- ▶ Can your new spouse pay for long-term care?
- ▶ What if your spouse remarries after your death?

Protecting Your Children From Each Other

- ▶ Fair vs. Equal
- ▶ Effect of Spouse on Decisions
- ▶ Effect of One Child's Creditors on Other Children
- ▶ Decision-making for jointly-owned property.
- ▶ Unequal Cost, Unequal Work, Equal \$

Protecting Your Children From Predators & Creditors

- ▶ The Daughter-in-Law Your Hate
- ▶ Effect of a Child's Divorce
- ▶ Creditors/Lawsuits/Tax Liens
- ▶ Purposeful & Accidental Disinheritance
- ▶ Effect of Child's Incapacity

Guardianship

- ▶ Necessary without proper incapacity planning.
- ▶ Expensive, restricts rights, strips dignity.
- ▶ Family members may see guardianship as a way to gain control.
- ▶ Can usually be prevented.

Example

- ▶ H&W marry at age 60, each with 2 children.
- ▶ H owns an inherited farm in his name only.
- ▶ H&W execute new wills leaving everything to each other, with all four children as contingent.
- ▶ H dies, leaving all assets to W.

What Could Go Wrong?

- ▶ W could sell the farm and give the money to her children.
- ▶ W could sell the farm to pay for LTC.
- ▶ W could change her Will, leaving all assets to her two children.
- ▶ W could go into Medicaid facility, with a lien attaching to the farm.
- ▶ W could remarry and predecease her new H.

Summary

- ▶ Consider remarriage protection when planning your estate.
- ▶ Consider Premarital Agreement.
- ▶ Don't underestimate the effect of your children's spouses.
- ▶ Consider all available planning tools for your specific situation.
- ▶ Make sure you have a plan for incapacity.

LEASES, DEEDS, AND CONTRACTS

Contracts

- ▶ A contract is an agreement that the law will enforce.
- ▶ The parties must agree to the material terms.
- ▶ There must be consideration.
- ▶ Parties must have capacity.
- ▶ Some contracts must be written.

Leases

- ▶ “A valid lease contains four essential elements: (1) identity of landlord and tenant, (2) description of land to be leased, (3) a statement of the term of the lease, and (4) rental or other consideration to be paid.” *Purchase Nursery, Inc. v. Edgerton*, 153 N.C. App. 156, 568 S.E.2d 904 (2002).
- ▶ If the lease is for a term longer than three years, it must be in writing. N.C. Gen. Stat. 22-2.
- ▶ A court will fill in gaps in an incomplete lease “if the contract provisions can be determined from separate but related writings.” *Greenberg v. Bailey*, 14 N.C. App. 34, 37, 187 S.E.2d 505, 507 (1972).

Deeds

- ▶ A deed is a writing that evidences a conveyance of title.
- ▶ Must be written.
- ▶ Must be delivered – recording raises presumption of delivery
- ▶ Must be recorded to be effective against third parties.
- ▶ Must be notarized and approved to be recorded

Example

- ▶ Landowners negotiates timber sale with timber company.
- ▶ Landowner's attorney prepares timber deed.
- ▶ Timber company bases prices on first-quarter delivery.
- ▶ Timber company cuts timber in January, leaving 1.5 ft. deep ruts.
- ▶ Timber deed does not have clause specifically preventing rutting.
- ▶ Bedding required to remediate at a cost of \$20,000.
- ▶ Who is responsible?

Summary

- ▶ You can read a contract six months later, but you will not remember every detail of your conversation.
- ▶ Certain formalities are required for contracts, deed and leases. Some must be written. Some must be recorded.
- ▶ Your writing must say what it means.
- ▶ If it is not in the written contract, it is not in the agreement.
- ▶ If using someone else's contract, read it.
- ▶ If you don't understand it, don't sign it.

PREMISES LIABILITY



Duty to Visitors

- ▶ An owner or occupier of land owes a duty of reasonable care to all lawful visitors. *Nelson v. Freedland*, 507 S.E.2d 882, 893, 349 N.C. 15, 631 (1998).
- ▶ “Reasonable care” requires a landowner to 1) not unnecessarily expose visitors to danger and 2) give warning of hidden hazards of which it has express or implied knowledge. *Bolick v. Bon Worth, Inc.*, 150 N.C.App. 428, 430, 562 S.E.2d 602, 604 (2002).

Possible Damages

- ▶ The plaintiff is entitled to recover all damages that naturally and proximately result from its negligence. *Holderfield v. Rummage Bros. Trucking Co.*, 232 N.C. 623, 624 (1950).
- ▶ The plaintiff may recover for damages that the defendant could have foreseen would result from its conduct. *Slaughter v. Slaughter*, 264 N.C. 732, 142 S.E.2d 683 (1965).
- ▶ The defendant is liable even if it was not able to have anticipated the particular consequences that ensued. *Lockwood v. McCaskill*, 262 N.C. 663, 670, 138 S.E.2d 541, 547 (1964).
- ▶ It does not matter if the particular injuries were unusual, unexpected or unforeseen. *Wyatt v. Gilmore*, 57 N.C. App. 57, 58 (1982).

Asset Protection

- ▶ Risk Mitigation is Asset Protection
- ▶ Liability Release & Indemnity Agreement
- ▶ Liability Insurance
- ▶ Limited Liability Companies & Trusts

Summary

- ▶ Prevent Dangerous Conditions
- ▶ Warn of Known Conditions
- ▶ Post the Property
- ▶ Carry Adequate Insurance
- ▶ Consider LLCs & Trusts

QUESTIONS?