

# **From NASCAR Condominiums To Private Mausoleums: Keeping The Vacation Home In The Family (With Sample Tenancy In Common Agreement)**

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## **A. Introduction**

1. Some family homes serve as a magnet that pulls the family together. Others become the family battleground, literally and figuratively. Stories of family arguments over ownership of a vacation home abound. Yet, families continue to desire and invest in these properties.
2. A number of things can motivate the initial purchase of a recreational cabin. These include:
  - a. The desire to create a sense of family, cultural identity, or other affinity. Vacation communities are often defined by race, religion, or other commonalities, including sexual orientation or even a passion for NASCAR racing. People gravitate toward these communities to vacation with others who share similar values or lifestyles.
  - b. The opportunity to conspicuously display wealth. The grand homes of Newport, Rhode Island are early examples of this motivation.
  - c. The opportunity to teach children to appreciate the benefits of nature. The Transcendentalist writers, including Henry David Thoreau, Ralph Waldo Emerson, and Walt Whitman, first documented their ex-

periences in nature and their philosophy that a personal spiritual transformation could take place by getting away from the city to a restorative environment in the 19th century. In 1854, Henry David Thoreau recorded the experience of his retreat to Walden Pond in “Walden.” Art Buchwald said about his own summer home on Martha’s Vineyard, “I think for most people summer houses have more meaning than homes in winter, because all the memories, usually, of a summer place are happy ones. When you’re in the city, you’re just in the city, but here I have been happy.” Joyce Wadler, *At Home With Art Buchwald: A Defiant Jester, Laughing Best*, The New York Times (July 27, 2006).

d.

The wish to get away from any reminders of routine daily living. The following quote from the New York Times encapsulates the desire to “get away from it all”:

Forget the Tuscan villa, the chateau in Provence and the pied-a-terre in Paris. They’re so cliché, not to mention overpriced. Savvy second-home hunters are packing their passports, pouring through foreign classified ads and snapping up homes in far-flung countries from Argentina and Bulgaria to Nicaragua and Turkey.

Even though these places may lack the glamour of Cannes and are sometimes harder to get to than Timbuktu, they are picturesque, not overrun by Americans and, in some cases, even fashionable. Best of all, there are still bargains to be found. Denny Lee, *A Second Home in Bulgaria?*, New York Times, Oct. 28, 2005.

3.

The sociological component of second home ownership is fascinating and important to a thorough understanding of the related underlying issues that arise in families, but it is a subject beyond the scope of this outline. (For an analysis of the sociological component, see Ken Huggins, *Essay—Passing It On: The Inheritance, Ownership and Use of Summer Houses*, 5 Marquette Elder’s Advisor 85 (Fall 2003); Judith Huggins Balfe, *Passing It On: The Inheritance and Use of Summer Houses* (Pocomo Press 1999); and Judith Huggins Balfe, *Passing it On: The Inheritance of Summer Houses and Cultural Identity*, 26 The American Sociologist 29 (Winter 1995).) This outline will focus mainly on the equally important legal component of how families succeed in passing on ownership of a cabin from one generation to the next, with an emphasis on charitable planning, followed by a brief discussion of some unusual transfer issues—cabins on public land and cabins in British Columbia. The more daunting task of ongoing management is also discussed below.

4.

Few families successfully transfer ownership of a cabin or vacation property by accident. Families that do accomplish this Herculean feat do so only with a great deal of advanced multi-generational planning, often with mechanisms to adjust the plan as circumstances and needs change. In this article, the term “cabin” is used collectively to refer to vacation properties of all shapes, sizes, styles, and fair market values.

5.

Cabins are frequently located in desirable areas where property values have appreciated at a rate far beyond a family’s other assets. Often, a cabin may represent a large percentage of a family’s financial holdings, posing complex estate tax and liquidity issues for the senior generation. For the junior generation, keeping a cabin in the family can create financial burdens. It can also bring the challenge of reaching a consensus among family members as to how to deal with this property, whether they

want the property or not.

6.

The legal mechanism for transferring the property is only the first of many challenges. Following the transfer, the next generation must determine how to maintain the property; how to pay taxes, insurance, and maintenance; and how to divide use of the property among the family members. The transfer itself is relatively easy compared to maintaining harmony among the owners following the transfer.

## **B. Creating A Master Plan**

1.

Before a plan to transfer the family cabin can be implemented, it is helpful if the family can reach a consensus, in the form of a master plan, as to how that transfer will take place. (See James S. Sligar, *Estate Planning for Major Family Real Estate Holdings*, 133 *Trusts & Estates* 48 (Dec. 1994) (“Sligar, *Major Family Real Estate Holdings*”) for a comprehensive discussion of master plans; Stephen J. Small, *Preserving Family Lands, Book I: Essential Tax Strategies for the Landowner* (Landowner Planning Center 3d ed. 1998); Stephen J. Small, *Preserving Family Lands, Book II: More Planning Strategies for the Future* (Landowner Planning Center 1997); and Stephen J. Small, *Preserving Family Lands, Book III: New Tax Rules and Strategies and a Checklist* (Landowner Planning Center 2002).) The most successful transitions involve detailed and thoughtful advanced planning developed jointly by the senior and junior generations. The use of a mediator or other trained neutral third party can be invaluable in developing a master plan. (See Olivia Boyce-Abel, *When to Use Facilitation or Mediation in Estate and Wealth Transfer Planning*, *Family Office Exchange*, Vol. 9 No. 35 (1998), and Robert Solomon, *Helping Clients Deal With Some of the Emotional and Psychological Issues of Estate Planning*, 18 *Probate & Property* 56 (March/April 2004) (“Solomon, *Helping Clients*”) for discussions concerning the role of a facilitator.)

a.

A good facilitator can significantly increase the possibility of a successful outcome. Solomon, *Helping Clients*, *supra*, at 58. Family conflict is inevitable; a good facilitator can help families deal with conflict productively to mediate a mutually satisfactory resolution. Often, the presence of a mediator can provide objectivity and bring family members closer to a consensus when emotions might otherwise take center stage and derail the process.

b.

Once the family members are informed of the various options (which may include setting aside portions for conservation purposes, selling portions to raise capital to support the remaining property, and transferring portions to succeeding generations), the first step in creating a master plan is to have the facilitator interview each family member.

c.

The interview process is an opportunity for each family member to freely express his or her wishes and apprehensions with respect to the property. Not all family members have to participate in the interview process, but all should be given the opportunity. A trained non-family member serving in an intermediary capacity ideally allows the family members to focus on common interests rather than their differences. To do this successfully, the participants need to feel confident that the mediator is not aligned with the interests of any of the family participants or the estate planning attorney. *Id.*

d.

Having met with as many family members as are willing to participate, the neutral third-party would prepare a report summarizing the findings, identifying areas of consensus, if any, and pointing out areas where feelings and opinions diverge. The family members can share this report, and the members of the senior generation and their attorney can use it to begin to develop the master plan.

e.

In some cases, the facilitator's report provides sufficient information so that family members can jointly make meaningful decisions about the property. If the family is yet unable to reach an agreement, one or more family meetings guided by the facilitator could follow to resolve areas of dispute, further define areas of agreement, and continue building a consensus. The development of a master plan with the assistance of a trained neutral third party is especially useful when the senior generation has already ceded control of the property to the next generation and questions and issues concerning actual management have arisen.

2.

Often, the next step in developing a master plan is creating a mission statement to address the family's goals and values with respect to the cabin. Issues to address in the mission statement could include:

- a. What is most important to the family about the cabin?
- b. What does the family value most about how it uses the cabin?

c.

How would the family like to see the ownership of the cabin affect the ways the various members interact?

3.

Of course, the use of a facilitator in estate planning is not going to be accepted by all clients. It is understandably difficult to impress upon clients the value that could be added by employing a facilitator to guide this process. At a minimum, the lawyer could offer to distribute a survey to family members that they could respond to anonymously, to give the senior generation insight into the wishes and apprehensions of the next generation. As a result of the facilitator's work or the lawyer's survey, the senior generation may discover that some or all of the members of the younger generation honestly have no interest in retaining the cabin. They also may be able to determine the apprehensions of those who do want to retain the cabin and resolve those issues before the cabin becomes a battleground.

4.

It may be the case that, rather than being transferred as a whole to the next generation as part of the master plan, the property may need to be divided into separate portions, each to be dealt with differently. The different uses may include development, conservation, and residential use. Next, with the help of the estate planning attorney, the family can identify techniques to accomplish these objectives, which are described below.

### **C. Conservation And Preserving Open Space**

1.

Frequently, families determine that certain portions of their land should be preserved as open space.

They may also choose to restrict development or other uses on the donated property, the retained property, or both. Outlined below are a number of methods for transferring an easement or the real property to charity.

## 2. *Conservation Easements*

### a.

One common way to restrict development is with a conservation easement. (See Nancy A. McLaughlin, *Questionable Conservation Easement Donations*, 18 *Probate & Property* 40 (Sept./Oct. 2004) for an analysis of the IRS's closer scrutiny of conservation easements and also an excellent list of further resources.) A conservation easement is a permanent restriction on the use of privately owned land to promote conservation. Granting a conservation easement typically reduces the value of the underlying real property for development purposes. For a family's purposes this can also have the effect of preserving a property's natural beauty and reducing gift and estate tax costs when the property is transferred between generations.

### b.

The Internal Revenue Code (the "Code") permits income, and gift or estate, tax deductions for a grant of a conservation easement over certain real property. §§170(h), 2055(f), 2522(d). (Unless otherwise indicated, all section references are to the Code.) (The Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (the "Pension Protection Act") increased the deductibility of conservation easements for tax years 2006 and 2007. The Pension Protection Act at §1206, effective January 1, 2006. Section 1206 of the Pension Protection Act amends section 170 by permitting a deduction of up to 50 percent of a donor's contribution base for certain conservation easements rather than the previous deduction of up to 30 percent of a donor's contribution base otherwise allowed under section 170(b)(1)(C). §170(b)(1)(E). Furthermore, it extends a taxpayer's ability to carry forward unused deductions for 15 years, rather than five years as under prior law. §170(d)(1)(A). Other modifications in section 1206 apply for donations of non-publicly traded farming or ranching property. §170(b)(1)(E)(v).) The Treasury Regulations set forth detailed requirements for deductibility, which are summarized below. Treas. Reg. §1.170A-14.

### c. *Qualified Conservation Contributions*

i. Section 170(f)(3)(B)(iii) of the Code provides an exception to the split-interest rules, which would normally disallow a deduction for the gift of a partial interest.

ii. To be eligible for the deduction, the transfer must constitute a "qualified conservation contribution" as defined in section 170(h)(1), by satisfying the following requirements:

(1) The property contributed must be a "qualified real property interest." §170(h)(2).

(2) The property must be donated to a "qualified organization." §170(h)(3).

(3) The gift must be "exclusively for conservation purposes." §170(h)(4). This requirement can be satisfied by providing that the purposes are to continue in perpetuity. §170(h)(5)(a).

iii. Each of these requirements is further defined by the statute and regulations.