`

STATE BAR OF WISCONSIN
PINNACLE
Your Practice. Our Purpose.

WSSFC 2024

Substantive Law Track – Session 6

A Peaceful Home Away from Home: Riparian and Other Concerns Involving Family Cabins

Presenters:

Brian A. Schuk, Schuk Law LLC, Lake Geneva

Alyssa S. Wilson, Schuk Law LLC, Lake Geneva

About the Presenters...

Brian A. Schuk focuses his practice mainly on landlord-tenant law, representing both landlords and tenants. After being a partner of Wassel, Harvey & Schuk, LLP for 12 years, Mr. Schuk opened his own law firm, Schuk Law, LLC, in June of 2017. He continues to offer experienced and effective representation to businesses and individuals by assisting with negotiating and drafting leases, evictions, and damages/security deposit disputes. Attorney Schuk is also familiar with HUD and Rural Development rules and regulations Attorney Schuk has participated in numerous speaking engagements for Sterling Education Services (SES), Wisconsin State Bar's Pinnacle, and for local associations and groups. In May 2017, he was program chair for Pinnacle's webinar, From Evictions to Damages, which included a panel discussion with local commissioners and a circuit court judge. He also is an adjunct professor at UW-Madison Law School, and previously taught at Marquette University Law School. Brian is an active member in good standing of the State Bar of Wisconsin and is a former President of the Walworth County Bar Association. Mr. Schuk received his undergraduate degree from the University of Wisconsin - Milwaukee, and his J.D. from Marquette University Law School.

Alyssa S. Wilson focuses her practice mainly on real estate, estate planning, business administration, and collections. Attorney Wilson was born and raised in Walworth County. After graduating from Big Foot Union High School, she completed her undergraduate degree at the University of Wisconsin – Madison. She continued her educational pursuits at Drake University Law School in Des Moines, Iowa, earning a Juris Doctor degree. After law school, Attorney Wilson worked at a boutique employment discrimination firm representing employees in a variety of different types of matters. After practicing in Iowa for several years, Attorney Wilson returned home to Walworth County. Alyssa has been in private practice in the area before joining Schuk Law, LLC, as an equity member. Attorney Wilson is an active member in good standing with the State Bar of Wisconsin and Walworth County Bar Association. Attorney Wilson enjoys assisting individuals, families, and businesses in her community with their legal needs. When she is not practicing law, Alyssa enjoys playing tennis with her husband (John) and baking with her daughters (Violet and Hazel).

SESSION: A Peaceful Home Away from Home: Riparian and Other Concerns Involving Family Cabins

PRESENTERS: Attorneys Brian A. Schuk and Alyssa S. Wilson, Schuk Law, LLC

I. **Seminar Overview:** The purpose of this seminar is to understand legal issues related to owning, managing, and dealing with the potential fallout of family-owned property in Wisconsin. We will be discussing the core topics that should be considered when handling shared ownership real estate, which include, but are not limited to, ownership structure, property maintenance and usage, estate planning, riparian rights, local regulations, and possible litigation issues.

II. **Ownership Structure**: It is common for people, family or friends, to share ownership of property. There are many considerations that need to be made before sharing ownership of a property, whether it is a planned purchase or was unexpectedly inherited. The most important decision to be made with a family-owned property is how you'll be holding title. There are various options available:

   a. **Limited Liability Company ("LLC")**

      i. Generally, we recommend that clients form an LLC to hold title of properties such as a cabin "up north," lake properties, or hunting grounds. Creating an LLC pursuant to Wis. Stat. Ch. 183, together with an Operating Agreement, can help establish a solid groundwork for how the property will be owned, managed, and succession or buy-out plans.

      ii. An Operating Agreement created pursuant to Wis. Stats. §§ 183.0105-183.0107 is a document that is commonly used for LLC governance and outlines how the LLC will function. An Operating Agreement can be customized to fit your family's specific needs and the needs of the family. It is best to agree to the terms of an Operating Agreement at the outset of ownership to prevent problems from arising. In any Operating Agreement there are general key terms to be included:

         1. <u>LLC's Assets</u>

            a. Typically, the LLC will own the real estate.

            b. Additional assets may be owned by the LLC, including a LLC bank account to cover the costs of repairs, improvements, real estate taxes, and homeowners' insurance. We recommend that LLC members set up a bank account with an initial emergency fund. If more funds are needed, the Operating Agreement will provide provisions related to mandatory additional contributions from members. If a member does not contribute, the Operating

Agreement can dictate what the recourse would be (i.e. restricting usage or buy out process).

2. Proposed Use of the Property

    a. The Operating Agreement addresses the purpose of the LLC. If the property is for family use only, then the Operating Agreement would need to prohibit commercial or rental usage.

    b. If the property is being used for commercial or rental usage, then the Operating Agreement needs to address these items, including how any losses and profits from such use would be handled.

3. Rules and Regulations

    a. The Operating Agreement should address the general rules and regulations for the property. These can include general rules on usage of the property, but, more specifically, should include provisions related to:

        i. Appointing a Managing Member: This will allow one person to be in charge of day-to-day items and serve as the point of contact for taxes, insurance, and any repairs.

        ii. Buyout Provisions: To account for the buyout plan and valuation if one of the current owners wants out of the property. For example, the ownership can decide whether valuation is based on an appraisal, tax statement, or other value.

        iii. Restrictions on Ownership: This places restrictions on who can become ownership in the event of a sale or inheritance (i.e. descendants vs. spouses).

        iv. Rules on Usage: For many families, this can be rules and restrictions on the number of days each owner/family is entitled to use the property, written rules on watercrafts, lawn care maintenance, age limits on who can stay at the property, etc.

iii. With an LLC, there is an initial fee for filing of the Articles of Organization (currently $130.00 for an LLC) and annual reporting requirements with the Wisconsin Department of Financial Institutions (currently $25.00 per year). Additionally, the Federal Government now requires reporting of any beneficial ownership information of a company with the Financial Crimes Enforcement Network. There are no fees for the Beneficial Ownership Information form, but you do have to report the list of members of the LLC.

b. **Joint Tenants with Rights of Survivorship**

i. Pursuant to Wis. Stat. § 700.17(2)(a) (2021-22), a joint tenancy is where "[e]ach of 2 or more joint tenants has an equal interest in the whole property for the duration of the tenancy, irrespective of unequal contributions at its creation. On the death of one of the 2 joint tenants, the survivor becomes the sole owner." Joint tenancy is usually something seen with married couples; however, some families choose joint tenancy to ensure a family cabin stays with the family.

ii. There are issues with joint tenancy. First, you may be inadvertently disinheriting your descendants and the "last to die's" family is the only one that benefits subsequent generations. Secondly, each owner has the right to possess the entirety of the property. This can lead to issues on usage by other owners.

iii. The co-owners can enter into family agreements regarding the various particulars of use and maintenance of the property, however, even with an agreement in place the only real recourse in a dispute is a partition action.

c. **Tenants in Common**

i. Pursuant to Wis. Stat. § 700.17(3) (2021-22), a tenant in common is "[e]ach of 2 or more tenants in common ha[ving] an undivided interest in the whole property for the duration of the tenancy. There is no right of survivorship incident to a tenancy in common." Therefore, each ownership interest with the property will pass in accordance with the individual owner's estate plan or pursuant Wis. Stat. Ch. 852. This could lead to a person owning land with an unwanted family member(s).

ii. Similar to joint tenancy, the co-owners can enter into family agreements related to the property, however, disputes usually result in a partition action.

III. Property Maintenance and Usage

a. **Operating Agreements**

i. Operating Agreements are a tool that can be used for any shared ownership property that has the title vested in an LLC. As noted above, the scope, function and limitations of an Operating Agreement are outlined in the Uniform Limited Liability Company Law at Wis. Stat. Ch. 183.

ii. An Operating Agreement is defined at Wis. Stat. § 183.0102(13) (2021-22) and "means the agreement, whether or not referred to as an operating agreement and whether oral, implied, in a record, or in any combination thereof, of all the members of a limited liability company, including a sole member, concerning the matters described in s. 183.0105(1)."

iii. If the family cabin or other shared property is owned in an LLC, the members should consider putting together a written Operating Agreement that outlines the terms of property usage, maintenance, and succession/buyout.

b. **Family Agreements**

i. Families who choose not to create an LLC for their shared ownership property may still wish to come up with a written agreement that outlines the terms of property usage, maintenance, dispute resolution, and buyout.

ii. Items that should be discussed in agreements for joint tenants/tenants in common include:

1. Create calendar or expectation for owners' usage of the property;

2. Insurance coverage for all owners;

3. Plan for payment of regular costs, such as: real estate taxes, insurance, and utilities;

4. Plan for payment of variable costs, such as: furniture/furnishings, cost of ancillary items (lawn equipment, watercrafts, ATVs/UTVs, snow mobiles) and insurance related thereto, maintenance costs, and cost of any improvements; and

5. Estate Planning that should be done contemporaneously with shared home ownership.

c. **Rental Agreements**

i. If the owners intend on renting the shared property, the first step should be determining if the real estate is subject to any restrictions on rentals. Many associations and planned developments have started to place restrictions or limitations on short-term rentals. If the property is located within an association or planned development, the owners should carefully review the governing documents for any restrictions on rentals.

ii. The second step is to review the municipal and/or county ordinances related to short-term rentals.

iii. After confirming rentals are permitted, the owners will need to proceed with obtaining the required permit(s) from the municipal and/or county level, together with state permitting requirements.

iv. When coming up with rental agreements, keep in mind that rental income must be attributed to joint tenants in proportion of ownership. See *McManus v. Dept. of Revenue*, 91 Wis. 2d 682, 283 N.W.2d 576 (1979). Therefore, even if one owner if completely uninvolved with the process or an owner is only renting out "their time," that rental income is something that shall be divided in proportionate share of ownership.

IV. Estate Planning: Whether you're making a conscious decision to own a piece of real estate with extended family, or it is thrust upon you at a parent's death, that is an ideal time to examine your own estate planning.

a. <u>Operating Agreements</u>: If your family cabin is owned by an LLC, generally, the Operating Agreement will dictate what happens in the event of a member's passing. If it does not, it should. If a client has a Revocable Living Trust set up, I usually suggest owners assign their LLC interest into the name of their Revocable Living Trust.

b. <u>Joint Tenancy</u>: If your family cabin is owned as "joint tenants with rights of survivorship," then your interest will pass automatically to the surviving owner(s) at your death. If you are the last surviving owner, you should consider setting up a Transfer on Death Deed (Wis. Stat. § 705.15) or look into setting up a Revocable Living Trust.

c. <u>Tenants in Common</u>: If your family cabin is owned as "tenants in common," then your interest will either pass in accordance with the terms of their Last Will and Testament or the laws of succession. It would be strongly suggested to set up some form of a Revocable Living Trust or Transfer on Death Deed regarding your share of the family-owned cabin.

d. <u>Other Considerations</u>: Discussions related to shared property ownership go hand-in-hand with estate planning. Deciding between utilizing basic Last Will and Testaments and Transfer on Death Deed(s) or setting up a Revocable Living Trust is a personal decision based on family dynamics, estate size, and other assets. That said, it is imperative to do some form of estate planning to ensure a portion of real estate is not subject to probate administration. Additional estate planning, such as a financial power of attorney or a limited power of attorney regarding the family cabin, may also be a useful tool in the event of incapacitation.

V. Riparian Rights and Local Regulations

a. Riparian Rights

i. Riparian rights are special privileges associated with the ownership of shoreland real estate, which include the right to use the water, right to protect and maintain the lands up to the water, and the right to construct structures (i.e. piers/docks) that allow for access to the water. These rights pass with the transfer of land. See *Priewe v. Wisconsin State Land Improvement Co.,* 93 Wis. 534, 550, 67 N.W. 918 (1896). Therefore, riparian rights are a consideration for any family cabins that are located on a shoreland.

ii. Commonly issues with riparian rights arise with adjacent property owners. These issues usually stem from interference with another owners' riparian zone. However, that could come into play with owners of a shared property. If a family cabin is located on a waterway or has water access, the family should discuss how they plan to manage access to and usage of shoreland and water areas as well as the maintenance and improvement to a pier/dock, patio, and/or shoreland grounds. Riparian rights pass with the transfer of land, therefore, all owners of a shared family cabin would be entitled to the same rights and access to any shoreland areas and access to the waterways, if there are any at the property. The easiest way to avoid any potential issues between family members of a shared cabin is discussing the parties' expectations on handling these items and recourse options for one's failure.

b. Local Regulations

i. Short-Term Rentals have become a very popular option for many landowners in Wisconsin as tourists flock to the state for vacations. Local governments face a myriad of different issues arising from the boom in the short-term rental market. As such, many local communities have started to put in place regulations and permitting requirements for short-term rentals.

ii. If short-term rentals are part of the planned usage of a family-owned cabin, the owners should consider placing the property in an LLC and retaining an attorney to review any relevant association, municipal, county and state requirements.

VI. Partition Litigation: Leaving a cabin to the kids through a will or trust can cause problems down the road. Fights often erupt over issues such as who gets to use it, when people get to use it, and how the maintenance and taxes be paid for. Problems are also inevitable when a child who owns part of the cabin passes away, divorces, has a medical emergency, or faces the high cost of nursing home care for themselves or a spouse.

a. **Partition Law:** If a co-owner no longer wishes to own their interest in the shared property, he or she has the right to partition their share of the property pursuant to Wis. Stat. Ch. 842. Through a partition, the owners can agree to divide the property amongst themselves by exchanging deeds and terminate their separate interests. However, if the owners cannot come to an agreement, a partition action through litigation is the only option. Generally, we see partition actions arise where siblings co-own an inherited property or an unmarried couple ends their relationship. There are two types of partition actions:

   i. <u>Partition in Kind</u>: In this situation, the court will physically divide the property between the owners. This option is only available if the land can be easily divided into lots of nearly equal value. From a practical perspective, this only really applies with vacant land.

   ii. <u>Partition by Sale:</u> In this situation, the court will sell the entire property, and the sale proceeds will be divided between the owners according to their ownership percentages. This is the more common option. The sale in this situation can occur by a real estate agent if the owners agree or at public auction.

VII. Conclusion: Whether owners have chosen to purchase a family cabin or it is inherited, there are a lot of considerations to discuss related to their vesting language, management of the property, estate planning, and potential remedies in the event of a conflict. It is not impossible for families to own real estate together, but it is a situation that is rife with potential conflict that careful planning and open dialogue can help diminish.

A Peaceful Home Away from Home: Riparian and Other Concerns Involving Family Cabins

Brian A. Schuk & Alyssa S. Wilson

Schuk Law, LLC

Lake Geneva, WI

1

COMMON CONCERNS

- Ownership structure
- Property maintenance & usage
- Estate planning
- Riparian rights
- Local regulations
- Possible litigation

2

Ownership structures

- LLC
- Joint tenants with right of survivorship
- Tenants in common

3

Ownership structure

- LLC – membership interest

4

Ownership structure

- LLC
- Joint tenancy with right of survivorship
  - Typically used to make sure the property stays in the family
  - Equal interest in the whole despite an unequal contribution
  - "Last to die"

5

Ownership structure

- LLC
- Joint tenancy with right of survivorship
- Tenants in common
  - An undivided interest in the whole property
  - Passes by the individual owner's estate plan

6

Property Maintenance & Usage

- Operating agreements
- Family Agreement

7

Agreements

- May be recorded (covenants and restrictions)
- Provisions
  - Assets: real estate and bank accounts
  - Use of assets
  - Maintenance
  - Dispute resolution
  - Buyouts
  - Costs and expenses

8

Rental Agreement concerns

- Association
- Planned Developments

9

ESTATE PLANNING

10

RIPARIAN RIGHTS

11

LOCAL REGULATIONS

12

Partition action

- In Kind
- Sale
- Unjust enrichment

13