

OH DEER: THE PUBLIC TRUST DOCTRINE AND ISSUES REGARDING ESTATE PLANNING FOR THE CERVID BREEDING INDUSTRY

Comment

*by Kirby L. Crow**

I.	INTRO“BUCK”TION.....	376
II.	BIG BUCKS IN THE INDUSTRY AND THE RISING NEED FOR EDUCATED ESTATE PLANNERS	376
	A. <i>Background and History of the Industry: That’s a Lotta “Doe”</i>	376
	B. <i>A “Typical Buck” Operation</i>	378
	C. <i>Opposition Groups</i>	380
	D. <i>“Rut” Roh: Financial Burdens of Raising Deer and the Rising Need for Legal Counsel in Developing and Planning for a Deer Breeding Facility</i>	381
III.	THE PUBLIC TRUST DOCTRINE	382
	A. <i>The Difference Between Estate Planning for Cattle Ranchers and Deer Breeders: Planning for the Transfer of Deer After the Death of the Owner/Operator and the Role of the Personal Representative</i>	382
	B. <i>Ferae Naturae: Jones v. State</i>	383
	C. <i>The Power of the Texas Parks and Wildlife Department and Concerns Regarding the Direction of Current Regulations</i>	385
	D. <i>How the Public Trust Doctrine Ultimately Affects Estate Planning for the Cervid Breeding Industry</i>	386
IV.	“SHEDDING LIGHT ON THE VALUE OF WHITETAIL SHEDS”	386
	A. <i>Market Price of Breeder Deer</i>	387
V.	MANAGING THE DECEDENT’S ESTATE	388
	A. <i>The Personal Representative’s Duty to the Deer Farm</i>	388
VI.	ESTATE PLANNING FOR THE BREEDING FACILITY AS A BUSINESS	388
	A. <i>Limited Liability Corporation</i>	389
	B. <i>Joint Operations</i>	390
	C. <i>Partnerships</i>	390
	D. <i>Sole Proprietorship</i>	391

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E. Corporation.....	391
VII. TRUST	392
A. The Benefits of a Trust	392
B. Creating a Trust for Specific Cervids (a Pet Trust).....	392
C. Creating a Trust for a Breeding Operation in the Operation's Capacity as a Business Entity	394
VIII. CONCLUSION.....	395

I. INTRO“BUCK”TION

The purpose of this Comment is to describe different routes that an estate planning professional can take to effectuate an estate plan for a cervid breeding operation, with emphasis on Texas regulations. A cervid is “any member of the deer family, Cervidae . . . characterized by the bearing of antlers in the male or in both sexes.”¹ To begin the analysis, it is critical to understand the history of the industry, the economic impact of the industry, and the current direction of the industry.² Next, a discussion of opposition groups, regulating agencies, the unique way that the state holds cervids in trust for the people, and the financial burdens of the cervid breeding industry will help determine what kind of business entity would best serve the owner’s goals and whether a trust would serve as the best estate planning technique for the business.³

This Comment will also briefly consider the role of the personal representative and the role of the trustee in the cervid breeding industry.⁴ The main objective of this Comment is to demonstrate how different types of business entities establish a cervid breeding operation and why a revocable living trust (as compared to a pet trust) is the best vehicle for a cervid breeding operation to convey an owner/operator’s interest at death.⁵

II. BIG BUCKS IN THE INDUSTRY AND THE RISING NEED FOR EDUCATED ESTATE PLANNERS

A. Background and History of the Industry: That’s a Lotta “Doe”

It is easy to underestimate the economic influence of the deer breeding industry.⁶ Many people are unfamiliar with the industry not only because it is rural in nature but also because there is a substantial amount of behind-the-

1. DICTIONARY.COM, <http://dictionary.reference.com/browse/cervid> (last visited June 27, 2014).

2. See *infra* Parts II.A–B, III.C.

3. See *infra* Parts II.B–D, III.A–D, VI, VII.

4. See *infra* Parts III.A, IV–V, VII.

5. See *infra* Parts VI–VII.

6. See generally Brian J. Frosch et al., *Economic Impact of Deer Breeding Operations in Texas*, TEX. A&M UNIV. (2008), <http://ageconsearch.umn.edu/bitstream/6830/2/sp08fr01.pdf> (stating that the industry is largely rural and emphasizing the need for research into the size and economic growth of the industry).

scenes work.⁷ To recognize the growing need for legal counsel and estate planning professionals for cervid breeding operations, it is critical to understand the impact the industry has on the economy.⁸ The industry “generates an estimated \$652 million of economic activity while supporting 7,335 jobs.”⁹ A single deer can generate impressive revenue: a 2.5 year-old deer can sell for up to \$2,000 or more.¹⁰ A mid-size farm might produce fifty or more straws of semen per year, ranging from \$300 to \$1,500 per straw, which could produce up to \$75,000.¹¹ There is a lot of money in the industry and a lot of different ways to generate it.¹²

The sale of large antlered bucks with impressive genetic dispositions is not the only source of revenue for the deer breeding industry.¹³ For example, venison products and the sale of antlers for decorative purposes can also provide additional revenue.¹⁴ Overall, the cervid farming industry has directly influenced the American economy: “U.S. deer farming had a direct impact of \$893.5 million on the U.S. economy and a \$3.0 billion total impact. Over 29,000 jobs were supported as a result of deer farming. As deer farming does not require large areas, it is most popular with small, part-time, and mid-size farmers.”¹⁵

Whitetail deer are the main product of the deer breeding industry, but mule-deer and elk facilities are great for diversification and have unique benefits of their own.¹⁶ “The deer farm, especially if it is a breeding-oriented operation, may include a multi-species mix of some combination of elk, red, whitetail and fallow de[e]r and may include reindeer (actually a long-domesticated dwarf caribou), sika, rusa or other exotic species.”¹⁷ For an

7. See generally *id.* (explaining that rural operations, such as deer farming, are underresearched and undervalued as an economic force driving various rural communities). “Given a lack of experience and published information, budgeting for the construction and operation of deer farms has not received significant attention in management literature.” Eric A. DeVuyst, *Construction and Operating Costs for Whitetail Deer Farms*, J. AM. SOC’Y FARM MANAGERS RURAL APPRAISERS 7 (2013), <http://www.asfmra.org/wp-content/uploads/2013/06/377-DeVuyst.pdf>.

8. See generally Frosch et al., *supra* note 6 (demonstrating that there are a lot of variables in the deer industry and noting the importance of up-to-date research for economic planning).

9. *Id.*

10. DeVuyst, *supra* note 7, at 6.

11. *Id.* (demonstrating that not only are there significant opportunities for progress and success, but there is also a significant amount of risk because of the amount of money that must be spent on overhead). Startup costs and maintenance, such as feed and labor, can be significant depending on the size of the farm. See *id.* However, this significant cost also demonstrates that the deer breeding industry contributes significantly to the economy as far as money paid out. See *id.* For example, a one-year investment cost for a mid-size whitetail deer farm is approximately \$92,185. *Id.* at tbl. 8.

12. See *id.* at 7.

13. See *id.*

14. See *id.* (demonstrating that antlers are implemented in the furniture industry as well).

15. *Id.*

16. See generally Russell Sawchuk, *So You Want to be an Elk Farmer*, N. AM. ELK BREEDERS ASS’N, http://www.naelk.org/so_you_want_to_be_an_elk_farmer.cfm (last visited June 27, 2014) (explaining that existing livestock farmers and grain farmers are promising candidates for elk production).

17. Dan Burden, *Deer (Venison) Ranching Profile*, AGRIC. MARKETING RESOURCE CENTER, http://www.agmrc.org/commodities__products/livestock/deer-venison-ranching-profile (last updated June

example of the demographics of the deer breeding industry, the National Deer Farming Association (NADeFA®) boasts the largest membership of deer breeders in Texas:

NADeFA®'s demographics are a reflection of the industry and its agricultural value. The organization states that they represent the owners of over 75,000 cervid livestock, and NADeFA® members represent more than \$111 million in livestock value. The organization's ownership data shows the following species mix: axis, 9.2 percent; fallow, 23.7 percent; red stag (red deer), 30.4 percent; sika, 21.1 percent; whitetail, 26.9 percent; wapiti (elk), 4.6 percent and other species, 3 percent.¹⁸

Education organizations, such as NADeFA®, can spread awareness for effective estate plans.¹⁹ The deer breeding industry is expanding: "[I]n 2007 there were 7,828 cervid farms in the U.S. with 5,654 deer and 1,917 elk farms, a 15 percent increase from 2002 to 2007."²⁰ As the cervid farming industry expands, so does the need for educated estate planning professionals, particularly in the area of trust law.²¹

B. A "Typical Buck" Operation

Hunting operations frequently accompany whitetail deer breeding facilities.²² For example, a deer farmer may operate a deer breeding facility inside of a high-fenced ranch.²³ When the ranch is high-fenced, it will likely contain a large amount of native cervids along with cervids that the deer farmer releases from the deer breeding facility.²⁴ The breeding facility will most likely serve a double function when located inside a larger high-fenced game ranch; the deer farmer will use the facility to enhance the genetics of deer outside and inside the pen.²⁵ To determine the controlling provisions of the trust and the business entity that will best serve the farmer's needs, it is important to understand the goals of the farmer because owners or operators raise cervids for a variety of reasons:

[T]he consumption side is represented by other breeders, trophy hunting preserves, or game ranches, and ultimately, hunters. Producers market

2012).

18. *Id.*

19. *See generally id.* (demonstrating that such a large organization might serve as a good platform on which to educate deer breeders regarding certain developments in the industry).

20. DeVuyst, *supra* note 7, at 1 (citing Frosch et al., *supra* note 6).

21. *See infra* Part VII.

22. Interview with Anonymous Texas Resident, Whitetail Deer Breeder (Dec. 13, 2013) [hereinafter Anonymous Resident Interview].

23. *Id.*

24. *Id.*

25. *Id.*

breeding stock to other breeders and stocker deer to game ranches. With hunting as the end market the industry serves, producers selectively breed deer in an attempt to attain consistent genetics to produce trophy whitetail. The Texas deer breeding industry represents a portion of the national cervid farming industry. . . . At the national level, the industry includes commercial venison producers, commercial urine collection operations, and antler and other products operations, in addition to breeding operations.²⁶

Determining the objectives of a breeding facility is the first step in the estate planning process.²⁷ For instance, in a sole proprietorship, an operator's principal goal may be to enhance the overall genetics of the game ranch.²⁸ If the objective is to enhance the genetics of the larger game ranch, the owner or operator may not want to plan for the continued operation of the business.²⁹

A breeding facility is most likely to release the following categories of deer to a larger game ranch: does, bred does, deer that have outlived their ability to breed, and deer under three-years-old.³⁰ There is a common misconception that large antlered bucks are part of a prearranged sale when they are subsequently released onto a game ranch and shot by a customer.³¹ While this may not be strictly forbidden, the Texas Parks and Wildlife Department (TPWD) places strict requirements on the date that an owner or operator may release a deer and the date that a hunter may harvest a deer.³²

Developing genetics for high-quality antler growth will most likely be the main goal of a whitetail deer farmer and the driving force of a farmer's day-to-day decisions.³³ Because a significant amount of money is spent on purchasing deer; feed; protein; shelter; medicine; management; and water, it is financially impractical and adverse to the ultimate goal of most deer farmers to release and immediately negotiate paid hunts for deer that are still capable of breeding and

26. Frosch et al., *supra* note 6.

27. *See generally id.* (explaining the different goals that a breeding facility may have and how these goals can vary greatly from facility to facility).

28. *See generally* Charles A. DeYoung, *Releasing Breeder Deer on Ranches: Risks and Unknowns*, CAESAR KLEBERG WILDLIFE RES. INST., at 1 (Aug. 2009), http://ckwri.tamuk.edu/fileadmin/user_upload/docs/Deer_Research/eNews_Archives/Releasing_Breeder_Deer_on_Ranches_DeYoung_August_2009s.pdf (explaining the pros and cons regarding the release of deer onto a larger high-fenced game ranch for the purposes of genetics enhancement).

29. *See generally id.* (explaining an owner's or operator's possible reasons for the release of deer onto a larger game ranch).

30. *See* Burden, *supra* note 17.

31. *See generally id.* (explaining the different ways that deer farms can generate revenue).

32. Cody Permenter, *Deer Breeding Industry Looks to Lawmakers to Relax Rules*, N.Y. TIMES (Apr. 4, 2013), <http://www.nytimes.com/2013/04/05/us/texas-deer-breeders-seek-relaxation-of-rules.html>. A recent bill introduced by State Representative John Davis, Republican of Houston, would increase the time a deer may be harvested after its release by a breeder from ten days to sixty days. *Id.* While many think that this is a noble idea, if a deer farmer releases a deer sixty days before the hunting season starts, the deer will have a lower chance of surviving in late September, in the stressful heat of a Texas summer. *Id.*

33. *See generally* Burden, *supra* note 17 (explaining that some deer farmers also seek to capitalize on velvet shed and others seek to capitalize on venison).

have high-quality genetic dispositions.³⁴ What many people (who are unfamiliar with the industry) believe to be the heart of the industry (releasing pen-raised deer for “canned hunts”) is opposite to industry goals and to many hunting purists’ goals.³⁵ Due to the lack of a general understanding of the cervid breeding industry, there are several opposition groups that lobby for heavier regulations on the industry.³⁶ An estate planning professional should be aware of changing regulations and how the regulations may affect the estate plan and estate planning maintenance.³⁷

C. Opposition Groups

A number of participants in the cervid breeding industry believe that opposition groups, with varying motives, successfully influence TPWD regulations.³⁸ For example, one motive for increased regulations on the deer breeding industry may be to eliminate the competition that joint deer breeding and hunting operations pose for low-fenced game ranches.³⁹ An increasing number of deer breeders have urged a change in the regulatory power of TPWD; however, this group of deer breeders have met resistance:

[T]he Texas Wildlife Association and the Texas Chapter of The Wildlife Society—fear that such a change in regulatory authority would be a large step away from the North American Model of wildlife management, especially its central tenet, the Public Trust Doctrine, as well as the concept of fair chase.⁴⁰

TPWD and other opposition groups “are concern[ed] about disease transmission and genetic transfer from captive bred deer to wild populations The escape of a captive cervid or a wild animal entering a reserve could also lead to the transfer of genetic traits that may be maladaptive to free-ranging wildlife.”⁴¹ Due to these regulations, an owner or operator may want to include specific instructions for a trustee, whether the goal is to transfer the operation to a beneficiary or to effectuate a complete sale and disposition.⁴² Due to TPWD

34. Anonymous Resident Interview, *supra* note 22.

35. *Id.*

36. See discussion *infra* Part II.C.

37. See discussion *infra* Part II.C.

38. See generally Hal Herring, *Is High Fence Hunting a Good Thing for Sportsmen?*, FIELD & STREAM (July 31, 2007), <http://www.fieldandstream.com/node/1005011218> (discussing the motivation behind opposition groups).

39. See *id.* (discussing the experience of hunting on a high-fenced ranch and on a low-fenced ranch and explaining how many hunters opposed to high-fenced hunts underestimate the size and diversity of deer populations on high-fenced ranches).

40. Christine Proctor, *Bill Seeks to Change Texas Deer Breeding Authority*, WILDLIFE SOC’Y (May 7, 2013), <http://news.wildlife.org/wpn/bill-seeks-to-change-texas-deer-breeding-authority>.

41. *Id.*

42. See generally Vincent Bonazzoli, *The Family Meeting: An Essential Part of the Estate Planning*

regulations, however, it may not be feasible to just open the gates.⁴³ Vigilant estate planning will help to circumvent a scenario in which loved ones are deciphering the complexities of the TPWD regulations during a difficult time.⁴⁴

A revocable living trust is a tool that estate planning professionals can utilize to ensure that these TPWD regulations are met.⁴⁵ A revocable living trust is a written agreement, established while the settlor (the cervid farmer) is alive, that designates “someone to be responsible for managing [one’s] property.”⁴⁶ As long as the settlor is mentally competent, the settlor will have discretion to change or dissolve the trust while he or she is alive; however, a revocable living trust typically becomes irrevocable upon the death of the settlor.⁴⁷ If the cervid owner or operator names him or herself as trustee while he or she is alive, the owner or operator will retain the power to manage the operation with full discretion, or choose to dissolve the operation entirely.⁴⁸ The trust also grants flexibility, which will permit the owner or operator and the estate planning professional to maintain the effectiveness of the estate plan as regulations and financial burdens change.⁴⁹

D. “Rut” Roh: Financial Burdens of Raising Deer and the Rising Need for Legal Counsel in Developing and Planning for a Deer Breeding Facility

“Across the state, breeding operations spend an average of \$306,000 per year.”⁵⁰ For an idea of the deer-to-acreage ratio, breeding-only operations (deer farmers that do not also have hunting and lodging expenditures) “averaged [seventy-seven] deer on their [sixteen] acres of pens” in 2008.⁵¹ The

Process, ESTATEPLANNING.COM (Jan. 20, 2010), <http://www.estateplanning.com/Communicating-Your-Estate-plan-to-the-Family> (explaining the importance of discussing an estate plan with the client and the client’s family members in order to implement the estate plan immediately after death). If “the client consents to the attorney communicating with the fiduciaries and selected family members the specific plan and any special issues in an estate plan, many of the obstacles and conflicts inherent in implementing the estate plan can be avoided, where families are close and are not in conflict.” *Id.*

43. See generally Tex. Parks & Wildlife Dep’t, *Trap, Transport Transplant Permit: White-Tailed Deer – Applicant Information*, TEX. WILDLIFE INFO. MGMT. SERVICES (TWIMS) (Jan. 17, 2014) <https://apps.tpwd.state.tx.us/privatelands/permitTTTHelpDeer.seam.jsessionid=7A24AD0149123C471E01D64CD31DD223?cid=5264> (demonstrating the various ways that the Texas Parks and Wildlife Department regulates the release of pen-raised whitetail deer). “An approved Texas Parks and Wildlife Department Wildlife Management Plan must be approved and on file for each proposed release site. Landowners can prepare their own plan, or seek professional assistance.” *Id.*

44. See generally *id.* (discussing Texas Parks and Wildlife Department regulations).

45. See discussion *infra* Part VII.

46. William J. Lynott, *10 Things You Should Know About Living Trusts*, AARP BULL. (Sept. 15, 2010), http://www.aarp.org/money/estate-planning/info-09-2010/ten_things_you_should_know_about_living_trusts.html.

47. *Id.* (“A trust involves three parties: . . . the creator, the trustee or trustees who agree to manage [the] assets as directed by the terms of the trust, and the beneficiaries.”).

48. See generally *id.* (discussing the power that the settlor retains).

49. See discussion *infra* Part VII.

50. Frosch et al., *supra* note 6.

51. *Id.*

management costs can be extraordinary and many times the ranch owner is the primary ranch manager.⁵² The owner or operator and estate planning professional should plan for these financial burdens in the revocable living trust and perform regular maintenance on the estate plan to ensure that immediate post death financial burdens will be met.⁵³ The regulations and financial burdens that the cervid breeding industry operates under are very different from other agricultural endeavors and must be planned for accordingly.⁵⁴

III. THE PUBLIC TRUST DOCTRINE

A. *The Difference Between Estate Planning for Cattle Ranchers and Deer Breeders: Planning for the Transfer of Deer After the Death of the Owner/Operator and the Role of the Personal Representative*

Deer are similar to cattle in that they are a part of an agribusiness.⁵⁵ However, estate planning for deer breeders differs from estate planning for cattle ranchers because of the differences in the way that cervids are “owned.”⁵⁶ There are also vast differences in the way that administrative agencies regulate pen-raised cervids.⁵⁷ Interestingly, deer are not private property of the landowners just because they feed them, raise them, and sell them, whereas, it is possible to privately own cattle.⁵⁸

There are also differences in regulations regarding the transportation of whitetail deer and cattle.⁵⁹ For example, to trade deer, release deer, or extend hunting seasons to better manage the herd, many deer farmers frequently seek more flexibility by utilizing the TPWD’s Managed Land Deer Permit (MLDP) program.⁶⁰ “Three levels of MLDP allow for liberalized doe harvest, a longer

52. *See id.*

53. *See generally* Bonazzoli, *supra* note 42 (demonstrating how ineffective estate planning can cause chaos immediately following death).

When the client dies, the fiduciary is thrust into his role as executor, trustee or guardian and is expected to take action. At the same time, and while grieving the loss of a loved one, they may also be juggling other practical issues including having to locate, identify and organize personal and financial items left behind by the deceased or cleaning out the family home with decades worth of sentimental items.

Id.

54. *See infra* Part III.A.

55. Anonymous Resident Interview, *supra* note 22.

56. *See generally* David Schechter, *Who Owns All Deer In Texas? You May Be Surprised*, WFAA.COM, <http://www.wfaa.com/news/texas-news/Who-owns-all-deer-in-Texas-You-may-be-surprised-111499214.html> (last updated Dec. 8, 2010, 9:00 PM) (discussing the Public Trust Doctrine).

57. *See* Dan Van Schaik, *In Need of a High-Fenced Management Area Permit*, TROPHY WHITETAIL WORLD, Summer 2013, at 34, *available at* http://www.dbcdeer.com/articles_sum_2013/HIGH_FENCE.pdf (discussing the concerns that deer breeders have with regulations issued by Texas Parks and Wildlife Department). “Arguments concerning who should regulate captive whitetails, where they can be released and when they need to be liberated before hunting have all been hot topics as of late.” *Id.*

58. *See* Schechter, *supra* note 56.

59. *See* 31 TEX. ADMIN. CODE § 65.610 (2013).

60. *White-Tailed Deer Surveys, MLDP Applications*, LANDMARK WILDLIFE MGMT. LLC, <http://www>.

hunting season, and/or the use of permits for buck harvests. As one moves from Level 1 to Level 3, management efforts increase as does harvest flexibility.”⁶¹ The TPWD approves and issues these permits.⁶² Depending on the permit level issued, the TPWD requires that the deer breeder provide information on population and harvest data, including antler size.⁶³

Inevitably, heavier regulations on transportation will pose additional burdens on planning the transfer of the deer breeding operation at death.⁶⁴ Without special permits, owners or operators cannot transport deer at all.⁶⁵ Regulations unique to the deer breeding industry will bring up simple issues, which if left unaddressed, may cause complicated problems.⁶⁶ Where will the deer go?⁶⁷ Can they stay in the deer breeding facility?⁶⁸ Can they be combined with another deer breeding facility?⁶⁹ Does the owner or operator need to plan for a full time ranch manager to care for the herd in the interim of probate?⁷⁰

B. *Ferae Naturae*: Jones v. State

To effectively plan, probate, and administer an estate, it is important to know what kind of property a trust settlor or executor is responsible for managing.⁷¹ The Public Trust Doctrine has put a unique spin on cervids as a property interest.⁷² To determine who owns wildlife, an understanding of *Ferae Naturae* is necessary:

Ferae naturae is a Latin word which means, of a wild nature. Animal *ferae naturae* are not subject of absolute ownership. A qualified property in such animals might be acquired by taking or taming them or while they are on one's estate. If such animal is either killed or caught in a trap so that the capture is certain, the individual who traps or mortally wounds it acquires a vested right to possession. The owner of land has a qualified property in animals *ferae naturae* when, in consequence of their inability and youth, they

landmarkwildlife.com/author/kolenick (last visited June 27, 2014).

61. *Id.*

62. See TEX. PARKS & WILDLIFE DEP'T, PWD 1047 – W7000, MANAGED LANDS DEER PERMIT: WHITE-TAILED DEER PROGRAM INFORMATION (2013–2014), available at http://www.tpwd.state.tx.us/publications/pwdforms/media/pwd_1047_w7000_mldp_program_information_white_tailed_deer.pdf.

63. See *id.*

64. See generally 31 TEX. ADMIN. CODE § 65.610 (discussing regulations regarding the transportation of deer).

65. See generally *id.* (containing specific requirements for the transportation of deer).

66. See generally *id.* (illustrating the difficulties with compliance).

67. See generally *id.* (explaining that deer may only be transported to approved facilities or game ranches).

68. See generally *id.* (demonstrating that compliance with regulations will not cease after the death of an owner or operator).

69. See generally *id.* (noting that the underlying purpose of these regulations is motivated by a fear that pen-raised cervids may be carriers for CWD).

70. See generally *id.* (explaining that the regulations are unique and specific to the industry).

71. See Bonazzoli, *supra* note 42.

72. See *supra* Part III.A.

cannot go away. In common law, the owner of an animal *ferae naturae* is strictly liable for damages caused by the animal.⁷³

The general rule is that animals *ferae naturae* belong to the state, but a person can reduce an animal to private ownership by containing the animal.⁷⁴ According to *Jones v. State*, a property right attaches to a wild animal when an individual reduces the animal to possession and to control.⁷⁵ *Jones* stood for the proposition that, although deer are *ferae naturae*, if an individual claims and encloses a cervid, the cervid becomes the subject of property and passes to the executors.⁷⁶ However, individuals should query the current status of cervids.

The state and administrative agencies regulating the cervid breeding industry do not consider captive, pen-raised deer private property.⁷⁷ In *State v. Bartee*, the court discussed the history of the common ownership of wildlife, complete with a discussion of Ancient Athens, Roman Law, Salic Law, Legislation of Charlemagne, and the Napoleonic Code to determine that common ownership of deer extended to deer held in captivity.⁷⁸ The relevance of this ancient law as it applies to modern agriculture employs a monarchial approach to its subjects (also known as the citizens of the United States of America).⁷⁹

The rule of the Civil Law recognizing the qualified title of the sovereign in wild animals, having been adopted by England, became the common law of the United States, and here the rule is that the general ownership of wild animals, as far as they are capable of ownership, is in the state, not as a proprietor, but in its collective sovereign capacity as the representative and for the benefit of all its citizens in common.⁸⁰

In *Bartee*, the court determined that the State could be a plaintiff in an action against an individual illegally transporting deer.⁸¹ However, the court suggested that the people of the state, and not the state itself, own all wildlife and that the state may have unfettered regulatory power over the protection of the public's interest in wild game.⁸²

73. See *Ferae Naturae Law & Legal Definition*, USLEGAL.COM, <http://definitions.uslegal.com/f/ferae-naturae> (last visited June 27, 2014).

74. See *Jones v. State*, 45 S.W.2d 612, 614–15 (1931) (“[I]t was not the legislative intent to place restriction on the owners’ control over fishing in privately owned ponds, as distinguished from fresh water streams and lakes.”).

75. See *id.*

76. See *id.* at 613–14.

77. See Proctor, *supra* note 40.

78. See *State v. Bartee*, 894 S.W.2d 34, 41 (Tex. App.—San Antonio, 1994, *pet. denied*).

79. See *id.* (discussing the legislation of Charlemagne in order to make a modern determination of property rights in deer and beginning a discussion of the reasoning by flipping through the pages of time).

80. *Id.* (quoting *State v. Ward*, 40 S.W.2d 1074, 1077 (Mo. 1931)).

81. See *id.*

82. See *id.*

In *Martin v. Waddell's Lessee*, the Supreme Court held that the Public Trust Doctrine is vested in the sovereign states.⁸³ “Using these ancient references and the cases following *Martin*, the Court emphasized the state police power and the states’ ability to regulate the taking of game, and went on to make a sweeping assessment of the transformation of the public trust principle into modern American law.”⁸⁴ History has set the stage for heavy, and often confusing, administrative regulations.⁸⁵ Estate planning professionals should become familiar with these regulations, particularly regulations affecting the transportation of deer, and draft a revocable living trust that will ensure compliance.⁸⁶

C. The Power of the Texas Parks and Wildlife Department and Concerns Regarding the Direction of Current Regulations

Currently, there is ongoing litigation in Hunt County, Texas, where the state criminally charged Mr. Anderton, a Texas deer breeder, with illegally dealing deer across state lines.⁸⁷ As a result of the illegal dealing, the TPWD targeted the Anderton deer farm out of fear that chronic wasting disease (CWD) may spread into Texas.⁸⁸ The only way to test for CWD is by killing the animal.⁸⁹ Over seventy deer were euthanized.⁹⁰ The deer were not tranquilized, but shot.⁹¹ The TPWD did not report a positive CWD test result from the Anderton herd.⁹²

Mr. Anderton and his family are seeking compensation.⁹³ The TPWD is currently searching for the unwary deer breeders in Texas that may have purchased deer from the Anderton herd.⁹⁴ Many deer breeders share the concern that if an innocent party to an illegal trade were to lose an entire herd and seeks fair compensation for this loss, it would be futile.⁹⁵ Cervid breeders

83. See *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 367 (1842). “All the authority exercised by the state in granting ferries, bridges, turnpikes and railroads, & c., [sic] are the exercise of powers vested in the government over private property, for public uses, and formed a part of the powers of government surrendered by the proprietors to Queen Anne.” *Id.* at 433.

84. Paul Wilson, *The Public Trust in Wildlife Conservation*, SIERRA CLUB W. VA. (July 2005), http://westvirginia.sierraclub.org/newsletter/archives/2005/07/a_001.html (citing *Martin*, 41 U.S. (16 Pet.) at 367).

85. See *infra* Part III.C.

86. See *infra* Parts III.C, VII.

87. Brantley Hargrove, *The Fight Over the Future of Texas’ Deer*, DALL. OBSERVER (July 11, 2013), <http://www.dallasobserver.com/2013-07-11/news/the-new-hornographers>.

88. *Id.*

89. Schechter, *supra* note 56.

90. Hargrove, *supra* note 87.

91. *Id.*

92. *Id.*

93. *Id.*

94. See *id.* Texas deer breeders “feared [that] TPW would shut down by any means necessary an industry that violated a closely held, almost canonical belief—that whitetail deer were a public trust, belonged to the people of Texas, and should not be corralled, bred and sold like livestock.” *Id.*

95. See Schechter, *supra* note 56.

are urging the legislature to declare clear title so that issues, such as these, have more predictable and consistent outcomes.⁹⁶

D. How the Public Trust Doctrine Ultimately Affects Estate Planning for the Cervid Breeding Industry

So what does this mean for estate planning professionals? It is not clear; however, a discussion of the history of the Public Trust Doctrine and recent cases in which plaintiffs seek compensation from the TPWD may shed some light on the issue.⁹⁷ The conclusion that estate planning professionals can take from this is that it is important to limit liability by choosing an effective business entity, and by re-characterizing the cervid breeding operation as trust res to facilitate and maintain a working relationship with those responsible for complying with administrative regulations after the death of the owner or operator (regardless of whether the operation will be transferred to a beneficiary for continued operation, will be sold, or the cervids will be released).⁹⁸

IV. "SHEDDING LIGHT ON THE VALUE OF WHITETAIL SHEDS"⁹⁹

An estate planning professional must understand the value of the estate, the financial implications of choosing between different business entities, and the financial implications of trust dispositions (including funds needed to comply with administrative regulations).¹⁰⁰ Also, one of the most critical steps in effective estate planning (and estate administration) is the inventorying and appraisal of claims.¹⁰¹ The personal representative must file an accurate inventory of the assets, and the personal representative will likely turn to an attorney, perhaps the drafter of the trust, for assistance.¹⁰² In addition to valuing assets, an estate planner must value the liabilities of the estate.¹⁰³ Practically, how can this be determined?

96. *See id.*

97. *See generally* Hargrove, *supra* note 87 (discussing a recent incident in which a deer farmer illegally transported deer into Texas and subsequently exterminated his herd for fear of disease due to the illegal transfer).

98. *See infra* Part VII.A–C.

99. Les Davenport, *Shedding Light On the Value of Whitetail Deer*, N. AM. WHITETAIL (Sept. 22, 2010), http://www.northamericanwhitetail.com/2010/09/22/huntingtactics_naw_sheddingsheds_200808.

100. *See infra* Parts VI–VII.

101. *See generally* Lecture with Professor Gerry W. Beyer, Governor Preston E. Smith Regents Professor of Law, 2005, Texas Tech University School of Law (Fall 2013) [hereinafter Fall 2013 Lecture with Beyer] (discussing the importance of timely filing an inventory and appraisal of claims).

102. *See* Kynda Curtis, *Estate and Farm Transition Planning for Agricultural Producers*, U. CAL. AGRIC. & NAT. RESOURCES, at 3, http://ucanr.org/alf_symp/2006/06-285.pdf (last visited June 27, 2014).

103. *See id.*

A. Market Price of Breeder Deer

The personal representative will have a limited time to identify the cervid deer breeding population and list the operation's fair market value.¹⁰⁴ An appraiser may assist the personal representative in the valuation of the cervid population.¹⁰⁵ For example, in Texas, a personal representative must include all real property located in Texas and all personal property, regardless of its location.¹⁰⁶ When filing an inventory in Texas, the personal representative is not required to list the value of each individual deer.¹⁰⁷

The personal representative will most likely collectively appraise the captive breeder deer.¹⁰⁸ However, if there are any outliers—a breeder buck that scores very high, a bred doe, or a yearling buck with a very impressive genealogy—the personal representative may need to have them appraised separately.¹⁰⁹ A personal representative or appraiser could value a single one-year-old buck, with a carefully documented three-generation pedigree that demonstrates a high-quality disposition, as high as \$8,800.¹¹⁰ An estate planning professional should reference these records in the revocable living trust because, while it may be easier to recognize a valuable outlier breeder buck with impressive antlers, underdeveloped younger bucks, bucks that have shed their antlers, bucks that have had their antlers removed by the owner or operator, or does may be impossible to value with only the naked-eye.¹¹¹ The personal representative may not be acting reasonably if they do not include a one-year-old deer separately in the inventory if the buck's genealogy references a \$200,000 sire.¹¹²

104. See generally Raymond C. Barry & Assocs., PLLC, *Inventory and Accounting – Additional Duties of the Personal Representative*, PROB. EST. PLANNER (2011) [hereinafter Barry & Assocs.], <http://www.probate-estate-planner.com/Inventory-and-Accounting.html> (discussing the importance of filing an inventory and appraisal of claims). In Texas, personal representatives have ninety days from the time they qualify to gather all of the property; the court may shorten this time period. Fall 2013 Lecture with Beyer, *supra* note 101.

105. See Barry & Assocs., *supra* note 104.

106. Fall 2013 Lecture with Beyer, *supra* note 101.

107. See generally *id.* (stating that clothes may all be grouped together, but a fur jacket may be listed separately). A lot of times when a personal representative is acting as a reasonable person, the personal representative will need to use common sense. See *id.*

108. See generally *id.* (discussing the appraisal process).

109. See generally *id.* (explaining that a significant piece of artwork may require a separate appraisal); see also Anonymous Resident Interview, *supra* note 22.

110. See, e.g., *Showtime Grandson - 1 Year Old*, BUCKTRADER.COM (Feb. 25, 2014) <http://www.bucktrader.com/ListingDetails.aspx?catName=DEER-FOR-SALE&subName=Breeder-Bucks&id=1665&name=Showtime-Grandson--1-Year-Old>.

111. Anonymous Resident Interview, *supra* note 22.

112. See generally Fall 2013 Lecture with Beyer, *supra* note 101 (explaining that a personal representative is responsible for, and must swear to, an inventory and appraisal of claims in Texas).

V. MANAGING THE DECEDENT'S ESTATE

A. *The Personal Representative's Duty to the Deer Farm*

Along with a personal representative's duty to file an inventory and appraisal of claims, the personal representative also has a fiduciary duty to protect the property from loss or destruction and may even have to insure it.¹¹³ Personal representatives must manage property with the same care that prudent individuals would manage their own property.¹¹⁴ Interestingly, this is not the prudent investor rule utilized for trusts.¹¹⁵ The use of the property is for such a short term that the prudent investor rule is not practicable.¹¹⁶

Similarly, the personal representative is not under a duty to ensure that the value of the property (the deer breeding operation) will be maintained throughout the estate administration.¹¹⁷ However, under certain conditions, the personal representative may run the decedent's business, in which case a duty to ensure the business may arise.¹¹⁸ If the personal representative is the same person or entity as the trustee, the personal representative will have additional fiduciary duties to consider.¹¹⁹ Also, the duties of the personal representative or trustee depend on the classification of the type of breeding operation the business entity possesses.¹²⁰

VI. ESTATE PLANNING FOR THE BREEDING FACILITY AS A BUSINESS

The best way to hold a deer farm depends on the farmer's goals.¹²¹ It is critical that an estate planning professional understands what a deer farmer is trying to accomplish and how the owner or operator would like the farm to pass at death, and to choose the most effective business entity classification to accomplish those goals.¹²² Some of the main issues to consider when deciding on a business structure for a cervid breeding operation are that the operation "can be capital intensive (e.g., breeding stock); production standards are non-existent; and many producers are small with breeding farms that are part-time or hobbies."¹²³

113. Barry & Assocs., *supra* note 104.

114. Fall 2013 Lecture with Beyer, *supra* note 101 (citing TEX. ESTATES CODE ANN. § 351.101 (West 2014)).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *See infra* Part VII.

120. *See infra* Part VI.

121. *See generally* Curtis, *supra* note 102 (discussing the importance of planning for the family farm).

122. *See generally id.* (noting the importance of determining the farmer's goals).

123. Anita Campbell, *Deer Farming is a Growing Business*, SMALL BUS. TRENDS (Jan. 1, 2004), <http://smallbiztrends.com/2004/01/deer-farming-is-growing-business.html>.

Additional objectives of the deer farmer may include: “lowering estate taxes, providing for a surviving spouse, allocating assets among children, or continuing the business.”¹²⁴ Another important consideration is whether the farmer’s main objective is to maintain complete independence and control.¹²⁵ The owner or operator and estate planning professional may also need to consider family issues, including “[c]ertain business entity choices [that] may eliminate certain tax incentives for hiring children.”¹²⁶ Choosing the most effective business entity and re-characterizing it as a trust is also a risk allocation technique.¹²⁷ Moreover, organizing a farm into more than one entity may be an option:

Often real estate resources are separated from the operating portion of the business, or risky or “dangerous” enterprises are separated from the more stable or safe enterprises, for risk management purposes. Income tax management, estate planning and retirement planning are also common reasons for using multiple entities. . . . From an estate planning perspective, the on-farm heirs might receive the operating assets, while the non-farm heirs could receive the real estate assets. This would limit the disruption of the operating portion of the business, requiring only that payment of rent be made to a different landlord(s).¹²⁸

A. Limited Liability Corporation

An owner or operator could create a Limited Liability Corporation (LLC).¹²⁹ “[O]ne of the primary advantages of an LLC over other business entities is the flexibility of the management structure. The LLC can be managed on a very formal basis like a corporation or managed on a more informal basis like a partnership.”¹³⁰ Depending on the farmer’s goals, the LLC structure may raise issues regarding the best way to transfer at death, because the cervid breeding operation may have more value to a future buyer if the farmer incorporates it or establishes it as an LLC, rather than as a sole proprietorship.¹³¹ Having the business incorporated, or held as an LLC, may

124. William J. Thompson & Wayne A. Hayenga, *Business Entity Planning*, TEX. COOPERATIVE EXTENSION, TEX. A&M UNIV., at 1 (Nov. 2002), <http://www.aacc.ttu.edu/faculty/jefjohns/farm%20mngt/public%20farm%20mngt/links/tce%20bus.%20plan.pdf>.

125. *See id.*

126. *Id.*

127. *See id.*

128. *Id.*

129. *See* Robert Moore & Barry Ward, *Starting, Organizing, and Managing an LLC for a Farm Business*, FACT SHEET: AGRIC. & NAT. RESOURCES, OHIO ST. UNIV. EXTENSION, at 1 (2008), http://ohioline.osu.edu/bst-fact/pdf/LLC_Farm_Business.pdf.

130. *Id.* at 3.

131. *See* Bonnie Kreitler, *Planning an Exit*, STABLE MGMT. (Nov. 27, 2011), <http://stablemanagement.com/article/planning-an-exit> (discussing how a horse breeding business may be transferred).

mean less commingling of business and personal funds, which might enable a potential buyer or beneficiary to see just how the cervid farm functions.¹³²

LLCs are most useful when each member of the business contributes capital and when there is debt capital.¹³³ By agreement, the LLC members can assign control to a single managing member or expressly agree to equal control by all members.¹³⁴ “Death or withdrawal of [an] interest will not necessarily terminate [an] LLC.”¹³⁵ Consequently, there is a potential for tax consequences, because a buying or selling agreement of the interest will dictate withdrawal.¹³⁶ A key feature of an LLC, and why it may be a good choice for a partner in a cervid breeding operation who does not have a lot of input in day-to-day operations, is that the LLC limits a partner’s financial liability to their investment.¹³⁷

B. Joint Operations

Similar to a sole proprietorship, a joint operation terminates upon death.¹³⁸ Also similar to sole proprietorships, the joint operation works best when capital sources derive “from personal resources or debt capital of each proprietor.”¹³⁹ Termination of the business is subject to an operating agreement, and there are no considerable tax consequences upon termination.¹⁴⁰ The proprietor will have control subject to any particular agreement by other participating members.¹⁴¹ From an estate planning perspective, joint operations are not ideal for deer-farming operations due to the inflexibility of risk allocation.¹⁴²

C. Partnerships

A partnership differs from a joint operation because the partners may agree upon the entity’s termination upon the death of one of its partners.¹⁴³ There is potential for tax consequences because the partnership can terminate upon death, partner withdrawal, or the execution of a buy-sell agreement.¹⁴⁴ This business entity is most effective when each member contributes capital.¹⁴⁵

132. *See id.*

133. *See* Thompson & Hayenga, *supra* note 124, at 3.

134. *See id.*

135. *Id.*

136. *See id.* at 2–3.

137. *See id.* at 2.

138. *See id.* at 3.

139. *Id.*

140. *See id.*

141. *See id.*

142. *See generally id.* (noting the pros and cons of a joint operation (not necessarily in the context of a cervid breeding operation)).

143. *See id.*

144. *See id.*

145. *See id.*

Partnerships also differ from joint operations because the partners are “[j]ointly and severally liable for the business actions of all partners.”¹⁴⁶ A partnership may be beneficial if a member of a cervid-breeding business does not have the opportunity to oversee daily operations, particularly deer transportation activities, and if the main focus of the estate plan is to limit liability.¹⁴⁷

D. Sole Proprietorship

Currently, most cervid-breeding operations are held as sole proprietorships because of the entity’s simplicity.¹⁴⁸

“It is an unincorporated business owned and [operated] by one individual with no distinction between the business and . . . the owner. [The owner or operator is] entitled to all profits and [is] responsible for all [the] business’s debts, losses and liabilities.”¹⁴⁹

Sole proprietorships have limited usefulness, because the entity terminates upon death.¹⁵⁰ This type of entity best serves businesses that derive financial resources from personal and debt capital.¹⁵¹ The proprietor (the owner or operator of the deer farm) will retain control and will exercise discretion as to family member involvement.¹⁵² The proprietor is “responsible for all income, self-employment and capital gains taxes[,]” however, the proprietor is “[f]ree to terminate the business at will, paying taxes only if [the] assets are liquidated.”¹⁵³ In this type of business entity, all of the risk will fall on the owner or operator of the deer farm, and the owner cannot apply sole proprietorship status to multiple entities.¹⁵⁴

E. Corporation

If a deer farmer’s goal is to continue the operation as an ongoing economic activity after death, a corporation is an effective method of organization.¹⁵⁵ A corporation can also be effective if there are a lot of decision makers.¹⁵⁶

146. *Id.*

147. *See generally id.* (explaining the benefit of a holding each member jointly and severally liable).

148. *See generally id.* (discussing that a sole proprietorship is the most common method to start a business).

149. *Sole Proprietorship*, SBA.GOV, <http://www.sba.gov/content/sole-proprietorship-0> (last visited June 27, 2014).

150. *See Thompson & Hayenga, supra* note 124, at 3.

151. *See id.*

152. *See id.*

153. *Id.*

154. *See id.*

155. *See generally Moore & Ward, supra* note 129 (discussing the necessity of determining the farmer’s goals).

156. *See generally id.* (demonstrating the effectiveness of a corporation for an agricultural farm).

For many farm and ranch businesses . . . continuation of the business after the death of the owner or major stockholder is not contemplated. If the assets involved will be sold, or transferred by gift or inheritance, and recombined at retirement or death with assets of other firms, the governing objectives will be heavily influenced by estate planning considerations.¹⁵⁷

Cervid breeders may form corporations to accomplish certain objectives, such as “maintaining reasonable security of income and capital for retirement and fairly distributing family wealth among the heirs.”¹⁵⁸ Regardless of the chosen business entity, an owner or operator should consider re-characterizing the business interest as trust res.¹⁵⁹

VII. TRUST

A. *The Benefits of a Trust*

There are numerous advantages to re-characterizing the cervid breeding operation as trust res.¹⁶⁰ For example, the personal representative will not need to list the property held in a trust in the inventory and appraisal of claims.¹⁶¹ Although the personal representative does not need to list trust res in the inventory, the assets (in this case the cervids) may still be relevant for federal estate tax.¹⁶² Additional advantages to a trust include: an opportunity to place conditions on how and when a trustee distributes assets upon the death of the settlor; a reduction in estate and gift taxes; probate avoidance; creditor protection; and the opportunity to appoint and empower a trustee to manage trust assets after a farmer’s death, or while the owner or operator is alive but unable to manage the cervid breeding operation.¹⁶³

B. *Creating a Trust for Specific Cervids (a Pet Trust)*

Deer breeders get into the business of deer breeding for a variety of reasons; however, one thing that most deer breeders have in common is their love for deer.¹⁶⁴ A deer farmer’s bottle raises many deer and monitors their growth and well-being closely.¹⁶⁵ Some of these “monster bucks” will eat right out of the hand that feeds them.¹⁶⁶ Unsurprisingly, an owner or operator may

157. *Id.*

158. *Id.*

159. *See infra* Part VII.A.

160. *See infra* notes 161–63 and accompanying text.

161. *See* Fall 2013 Lecture with Beyer, *supra* note 101.

162. *See* Barry & Assocs., *supra* note 104.

163. *See Estate Planning: Is a Trust Beneficial?*, CNN MONEY, <http://money.cnn.com/magazines/moneymag/money101/lesson21/index6.htm> (last visited June 27, 2014).

164. Anonymous Resident Interview, *supra* note 22.

165. *Id.*

166. *Id.*

decide to create a trust for a specific deer. However, this raises some special concerns.

Under the law, animals are considered property, so they cannot directly hold title to assets.¹⁶⁷ However, “[u]nlike gifts intended to benefit a specific animal, a gift that is intended to benefit an indefinite number of animals is deemed to be charitable in nature.”¹⁶⁸ One issue with this is that trust law does not consider an animal to be an identifiable beneficiary that can be described or classified in definite and certain terms.¹⁶⁹ “Another issue is that the Rule Against Perpetuities, which applies to the law of wills and trusts, provides that an interest in property must vest, if at all, no later than twenty-one years after the death of a measuring life.”¹⁷⁰ “The measuring life must be a human life ‘who can affect the vesting of the interest.’”¹⁷¹ By appointing a cervid or group of cervids as the beneficiary in a trust, the trust may violate the Rule Against Perpetuities, because the cervids would be the measuring lives.¹⁷²

Section 2-907 of the Uniform Probate Code (UPC) sets the framework for an enforceable trust for “the care of a designated domestic or pet animal.”¹⁷³ Instead of treating the trust for a particular cervid as honorary, § 2-907 of the UPC actually provides the structure for a legally enforceable trust.¹⁷⁴ “An individual designated by the trust or appointed by the court can enforce the terms of the trust.”¹⁷⁵ When drafting the trust, “an ‘enforcer’ . . . negates the need for a guardian ad litem to protect the interests of the animal beneficiaries of an enforceable pet trust.”¹⁷⁶ Drafters must carefully follow the relevant provisions of the governing state statute, or the state may not enforce the trust.¹⁷⁷ Unfortunately, only a few states have adopted § 2-907 of the Uniform Probate Code, and most states lack a similar provision entirely.¹⁷⁸ However, Texas does have such a statute, which reads as follows: “A trust may be created to provide for the care of an animal alive during the settlor’s lifetime.”¹⁷⁹ If an

167. Rebecca J. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, 74 U. COLO. L. REV. 181, 232 (2003) (citing Gerry W. Beyer, *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617, 629 (2000)).

168. *Id.*

169. *Id.* (citing Jennifer R. Taylor, *A “Pet” Project for State Legislatures: The Movement Toward Enforceable Pet Trusts in the Twenty-First Century*, 13 QUINNIPAC PROB. L.J. 419, 420 (1999)).

170. *Id.* Because of the perplexities of the Rule Against Perpetuities and its impractical application in certain circumstances, many states have alternative approaches to address the issues that the Rule Against Perpetuities was primarily established to remedy. Lecture with Professor Gerry W. Beyer, Governor Preston E. Smith Regents Professor of Law, 2005, Texas Tech University School of Law (Spring 2013).

171. Huss, *supra* note 167 (quoting Taylor, *supra* note 169, at 421).

172. *See generally id.* (discussing how trusts for pets may be violated if the measuring lives are the pets).

173. *Id.* at 233 (quoting UNIF. PROB. CODE § 2-907(b) (amended 2011)).

174. *See generally id.* (explaining that § 2-907 of the Uniform Probate Code allows for a legally enforceable trust for domestic pets). Note that an honorary trust typically refers to a trust that is not a legally enforceable trust but courts may effectuate, nonetheless. *See id.*

175. *Id.* (citing UNIF. PROB. CODE § 2-907(c)(4)).

176. *Id.* at 234.

177. *See id.*

178. *Id.* at 235.

179. TEX. PROP. CODE ANN. § 112.037(a) (West 2007).

owner's or an operator's objective is long-term planning, then the usefulness of a pet trust is limited, because in Texas, the trust terminates upon the death of the animal provided for in the trust during the settlor's lifetime.¹⁸⁰

C. Creating a Trust for a Breeding Operation in the Operation's Capacity as a Business Entity

Practically, it may be easier to place the owner or operator's business interest in a revocable living trust instead of utilizing a pet trust.¹⁸¹ An estate planning professional can draft the revocable living trust in a manner that will effectuate the passing of the owner or operator's assets to beneficiaries immediately upon death or can designate that the trustee portion out the assets over time.¹⁸² Thus, the trust permits the sale of individual deer.¹⁸³ A revocable living trust is most effective when there is a human beneficiary.¹⁸⁴ However, the settlor can instruct the trustee to sell the owner or operator's interest and distribute the proceeds to the beneficiary.¹⁸⁵

Creditors and beneficiaries may benefit more if the trustee manages the business to maintain the value of the operation until the trustee can sell or distribute the business among beneficiaries.¹⁸⁶ A revocable living trust will allow the owner or operator the flexibility to either set terms within the trust that specify distribution or management, or set guidelines enabling the trustee to exercise discretion.¹⁸⁷ The trust settlor can determine the provisions of the trust that will control the disposition or management of trust assets and name a trustee who assumes a fiduciary role and who must follow the directions the settlor set forth.¹⁸⁸ "Typically, the initial trustee of a revocable living trust is [the settlor]."¹⁸⁹ It is critical that estate planning professionals re-characterize the assets that the settlor chooses for the trustee to distribute or manage as trust res.¹⁹⁰ If there are several owners or operators, or the cervid breeding operation

180. *See id.*

181. *See generally* GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 571 (rev. 3d ed. 2013) [hereinafter BOGERT] (explaining the benefits to holding a business in a trust and continuing the business after the death of the settlor).

182. *See* Lynott, *supra* note 46.

183. *See generally id.* (discussing how a revocable living trust permits the portioning out of assets over time).

184. *See generally id.* (explaining in general terms the beneficiaries' interest under a revocable living trust, thereby illustrating the impracticalities of appointing an animal as a beneficiary).

185. *See generally id.* (noting the terms that a settlor may impose on a trust and illustrating the flexibility of a revocable living trust).

186. BOGERT, *supra* note 181.

187. *See* Lynott, *supra* note 46.

188. *See, e.g.,* Mackenzie Martin, *Estate Planning for Equine Owners*, OR. VETERINARY MED. ASS'N (May 13, 2010), <https://oregonvma.org/care-health/estate-planning-equine-owners> (discussing a revocable living trust as it applies to an equine operation).

189. *Id.*

190. *Id.*

is held in joint ownership, it may be important to determine whether re-characterization of the business interest as trust res is permissible.¹⁹¹

After a careful discussion regarding the farmer's goals and plans for the breeding operation after death (whether the goal is to continue management, transfer to a beneficiary, or sell), and a careful review of the business structure (particularly if the operation is a joint venture), re-characterizing the operation as trust res may be the best estate planning tool for a business of this nature.¹⁹² A revocable living trust would be particularly effective as an estate planning technique because of the issues that the Public Trust Doctrine raises.¹⁹³ Due to the inability to privately own cervids, and the unpredictability and inconsistency that it causes, a revocable living trust is the best way to facilitate a flexible estate plan while still effectuating the deer farmer's intent.¹⁹⁴

VIII. CONCLUSION

In conclusion, the different routes that an estate planning professional may take to effectuate an estate plan for a cervid breeding operation is highly fact specific and will depend upon the goals of the owner. A thorough understanding of the history of the industry, the economic impact of the industry, and the current direction of the industry will help an estate planning professional develop long-term plans for a cervid farmer.¹⁹⁵ The drive behind the opposition groups, the regulating agencies, the unique way that the state holds cervids in trust for the people, and the financial burdens of the cervid breeding industry will help determine the kind of business entity that would best serve the owner's goals, and whether or not a trust would be the best vehicle for the business.¹⁹⁶ A pet trust may be possible depending on whether or not the jurisdiction recognizes the validity of the cervid's interest as a beneficiary.¹⁹⁷

However, a revocable living trust may be the best option for a cervid deer breeder that has concerns about the continued operation of the business after death or has concerns about the cervid breeding operation selling for a price that the deer farmer (or a trustee if the trust permits the trustee to exercise discretion in negotiating a sale) believes to be the true value (which may require management of the operation after death until the sale can take place).¹⁹⁸ In the end, the careful management of the business in an entity that will best suit the

191. *Deciding Which Assets to Transfer Into Your Living Trust*, WEBER L. FIRM, http://weberwills.com/Estate_Planning_Attorney/Deciding_Which_Assets_to_Transf.html (last visited June 27, 2014).

192. *See supra* Part VI.

193. *See supra* Parts VI–VII.

194. *See supra* Part III.A–B.

195. *See supra* Parts II.A–B, III.C.

196. *See supra* Parts II.B–D, III.A–D, VI, VII.

197. *See supra* Part VII.A.

198. *See supra* Part VII.C.

needs of the owner or operator, as well as a well-drafted trust, will ensure that the deer breeding operation transitions smoothly.¹⁹⁹

199. See *supra* Parts VI–VII.