Part 2: The Legal Side of Farm Transition Planning

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OSU Extension Agricultural & Resource Law Program

The Ohio State University Extension
Today’s topics
Materials
Next week

Attorneys
Directives
Non-probate transfers
Wills and trusts

Slides, worksheets, bulletins online at go.osu.edu/planforfuture

Strategies
Business entities
Guest attorney Robert Moore
What’s on the legal side of farm transition planning?

- Powers of Attorney
- Advance Directives
- Transfers on Death
- Wills
- Trusts
- Business Entities
A bad beginning makes a bad ending.

Chinese Proverb
Good beginnings
## Factors to consider when selecting an attorney for your farm transition plan

<table>
<thead>
<tr>
<th>Farm transition competence</th>
<th>Individual focus</th>
<th>Comfort level</th>
<th>Cost</th>
</tr>
</thead>
</table>
| - Estate and business knowledge  
  - Knowledge of agricultural operations | - Tailoring tools to you  
  - Explaining the plan to you | - Location  
  - Mode of working  
  - Personality  
  - Referrals | - Total cost  
  - Payment options |
Critical questions

1. Is the attorney you have now a good fit?

2. Which factors matter most to you?

3. Who can provide trustworthy referrals?

4. Who do you want to “interview”?

5. What are your interview reactions?
What will your attorney be thinking?

- Is there a federal estate tax issue?
- What’s the financial situation for the operation?
- What assets are farm versus non-farm?
- What special needs must be addressed?
- What pieces are already in place?
- What needs to be changed?

And more .....
What does your attorney need from you?

- Balance sheet showing personal and farm assets and debts.
- List of how assets and accounts are titled, including beneficiary designations.
- List of heirs, their relationships to you, and their birthdays and addresses.
- Business entity(s) you own or have an ownership interest in.
- Existing estate planning documents such as wills, powers of attorney, etc.
- List of advisors: accountant, insurance, financial planner, other attorney.
The role of the federal estate tax exemption

• **Net worth** is used to assess estate tax liability.
• Portability rule allows to use up couple’s combined exemption.
• But exemption is subject to changes by Congress.
• Plan as if it’s at the lowest possible exemption level.
  • *Strategies to reduce the net worth of the estate...*

<table>
<thead>
<tr>
<th>Year</th>
<th>Exemption</th>
</tr>
</thead>
<tbody>
<tr>
<td>2017</td>
<td>$5,490,000</td>
</tr>
<tr>
<td>2018</td>
<td>$11,180,000</td>
</tr>
<tr>
<td>2019</td>
<td>$11,400,000</td>
</tr>
<tr>
<td>2020</td>
<td>$11,580,000</td>
</tr>
<tr>
<td>2021</td>
<td>$11,700,000</td>
</tr>
<tr>
<td>2022</td>
<td>continued increases, with adjustments for inflation</td>
</tr>
<tr>
<td>2023</td>
<td></td>
</tr>
<tr>
<td>2024</td>
<td></td>
</tr>
<tr>
<td>2025</td>
<td></td>
</tr>
<tr>
<td>2026</td>
<td>Back to $5,000,000 adjusted for inflation</td>
</tr>
</tbody>
</table>

Tax Cuts and Jobs Act of 2017
Getting more personal with the information you share

Details of farming operation
- Do you have any business entities in place?
- Who owns interests in your entity?
- Who makes decisions?
- Who’s provided sweat equity?
- Any problems getting along?
- Who else wants in, or do you want to bring in?

Details about the family
- Special needs like disabilities, financial problems, difficult spouse.
- Is divorce or remarriage a concern?
- Family dynamics—who doesn’t get along?
- Who wants to live on or return to the farm?
The right attorney with the right information can develop the right plan

• Help farming heirs get into the operation.
• Help farming heirs afford to lease or buy out non-farm heirs in the future.
• Maintain a viable land base for farming.
• Provide a revenue stream for non-farming heirs.
• Restrict land ownership to family members.
• Protect the land as agricultural land.
• Deal with the equitable v. equal dilemma.
• Prevent family drama and ruined relationships.
Which pieces should be in your plan?

### Legal tool checklist

What legal tools do you already have in your farm transition plan and what more might you need? Use this checklist to assess where you are now, tools that may need updating, and tools you want to discuss with an attorney about adding to your plan.

<table>
<thead>
<tr>
<th>Tool</th>
<th>Have</th>
<th>Update needed</th>
<th>May need</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial Power of Attorney</td>
<td></td>
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<tr>
<td>Health Care Power of Attorney</td>
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<tr>
<td>Living Will</td>
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<tr>
<td>Donor Registry</td>
<td></td>
<td></td>
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<tr>
<td>Funeral Arrangements</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Will</td>
<td></td>
<td></td>
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<tr>
<td>Joint Survivorship Deed</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Transfer on Death designations –land, vehicles, stocks, bonds</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Life insurance</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Payable on Death designations –accounts</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Trust</td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Business Entity</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Operating Agreement/Bylaws/Partnership Agreement</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Buy-Sell Agreement</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Leases to Heirs</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gifting Plan</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Agricultural or Conservation Easement</td>
<td></td>
<td></td>
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<td></td>
</tr>
</tbody>
</table>
Which pieces do you have? (survey question)

- Will
- Power of Attorney
- Health Care Power of Attorney
- Living Will
- Trust
- Gifting plan
- LLC, partnership or corporation
- LLC Operating Agreement
- Buy-Sell Agreement with heir(s)
- Leases with heirs
Some basic parts

Tools to prevent disruption:
• Financial Power of Attorney
• Healthcare Power of Attorney
• Advance Directives
# Financial Power of Attorney

- **General v. Limited**

- **Durable v. Springing**

<table>
<thead>
<tr>
<th></th>
<th>Non-Durable</th>
<th>Durable</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Non-Springing</strong></td>
<td><em>Takes effect</em> once signed</td>
<td><em>Takes effect</em> once signed</td>
</tr>
<tr>
<td></td>
<td><em>Terminates</em> upon revocation or principal’s <em>incapacitation</em></td>
<td><em>Terminates</em> upon revocation or the principal’s <em>death</em></td>
</tr>
<tr>
<td><strong>Springing</strong></td>
<td><em>Takes effect</em> once the trigger occurs</td>
<td><em>Takes effect</em> once the trigger occurs</td>
</tr>
<tr>
<td></td>
<td><em>Terminates</em> upon revocation or the principal’s <em>incapacitation</em></td>
<td><em>Terminates</em> upon revocation or the principal’s <em>death</em></td>
</tr>
</tbody>
</table>
Healthcare Power of Attorney

Similar to Financial Power of Attorney

• But for medical decisions

Advance Directives

• Living Will
• Donor Registry
• Funeral Arrangements
Tools for transferring assets
Transferring assets at death

Assets

Will

Probate Court

Trust

TOD, POD, survivorship, insurance, business entity

Beneficiaries
The Will: your instructions to the court

• Appointment of personal representative
• Distribution of property
  • Special rules
• Guardianship for children

Not just for the older generation!

Types
• Simple or “sweetheart”
• Pour-over
• Complex
A simple plan for transferring assets

- Assets
  - Will
    - Probate Court
    - Beneficiaries
      - TOD, POD, survivorship, business entity, insurance, assignments
Non-probate transfers of assets

- Avoiding probate can save time and money.
- County court sets maximum amounts attorneys can charge for probate.
  - Charges only apply to assets that go through probate.
  - Estate attorneys are not required to charge this rate, it’s negotiable.
  - Client can ask for an hourly fee instead of percentage fee.

**Example of county rates:**

For personal property including proceeds of real estate sold under power of sale:

- 6% on the first $3,000
- 4% between $3,001 and $15,000
- 2% on the balance

For real property not sold:

- 2% on the first $10,000
- 1% on the balance

For all other property: 2%
Joint survivorship deed

- Automatically transfers real property to surviving co-owners upon death, doesn’t go through probate.
- Typically used with spouses but can be used by any joint owners.
- Deed **must** include language to the effect of “for their joint lives, remainder to the survivor of them.”
## Transfer on Death “TOD” designations

**Assets transferable by TOD**

<table>
<thead>
<tr>
<th>Real estate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Motor vehicles</td>
</tr>
<tr>
<td>Boats, campers, recreational vehicles, mobile homes</td>
</tr>
<tr>
<td>Stocks and bonds</td>
</tr>
<tr>
<td>NOT equipment—not titled!</td>
</tr>
</tbody>
</table>

- Designations that transfer property upon death without going through probate.
- Owner must follow legal procedure to establish the designation.
- Beneficiary must follow steps after death to finalize the transfer.
Life insurance and Payable on Death accounts

• Proceeds pass directly to named beneficiary.
• But benefits are included in policy owner’s estate, regardless of who pays premium or is the beneficiary.
• Ownership of a policy can be a complex matter.
  • New policy v. transferring policy
  • 3-year rule
  • Gift-tax implications

A good tool for
• Offsetting farm assets
• Providing cash for non-farm heirs
• Liquidity for buy-outs
• Paying estate taxes.
### Reviewing Your Transfer on Death and Payable on Death Assets

This worksheet encourages you to review the assets that you can designate as transfer on death or payable on death. List your assets below, consider their values, and note if you have or want to transfer an asset or make it payable to a specific heir upon your death. You and your attorney can use this information to analyze how these assets fit into your transition plan and to ensure that they're designated according to that plan.

<table>
<thead>
<tr>
<th>Asset</th>
<th>Estimated value</th>
<th>Is there a specific heir(s) you want to receive this asset?</th>
<th>Is this asset involved in the farm operation?</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Real estate</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Motor vehicles, boats, campers, recreational vehicles, mobile homes</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Checking and savings accounts, stocks and bonds, life insurance, annuities, IRAs, investment accounts, 401K</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
So you have a will... do you also need a trust? (a trust based plan)

Factors that help determine the answer:
1. Complexity of your situation
2. Desire to avoid probate
3. Privacy
4. Cost
## Will or trust based estate plan: factors

<table>
<thead>
<tr>
<th>Issue</th>
<th>Will Plan</th>
<th>Trust Plan</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Complexity of situation</strong></td>
<td>Simple</td>
<td>Complex</td>
</tr>
<tr>
<td><strong>Concerns about heirs</strong></td>
<td>Little or none</td>
<td>Some or significant</td>
</tr>
<tr>
<td><strong>Remarriage concerns</strong></td>
<td>Little or none</td>
<td>Some or significant</td>
</tr>
<tr>
<td><strong>Transition of operation</strong></td>
<td>Little or none</td>
<td>Some or significant</td>
</tr>
<tr>
<td><strong>Estate taxes</strong></td>
<td>Little or none</td>
<td>Need to maximize savings</td>
</tr>
<tr>
<td><strong>Probate</strong></td>
<td>Don’t mind; probate judge is in charge</td>
<td>Want to avoid; trustee is in charge</td>
</tr>
<tr>
<td><strong>Privacy</strong></td>
<td>Not important</td>
<td>Important</td>
</tr>
<tr>
<td><strong>Legal fees</strong></td>
<td>Less at outset; maybe more later</td>
<td>More at outset; maybe less later</td>
</tr>
</tbody>
</table>
What exactly is a trust?

- A “container” with rules.
- The container fills up with assets upon your death, and the rules direct what happens to the assets.
  - Assets can stay in, or assets can go out.
- A trustee oversees trust administration.
- You appoint who is the trustee.
  - Can be you, until your death.
- You can change the trust if it’s “revocable.”
  - You can’t change an “irrevocable” trust, because you’ve let go of the assets.
Transfer of assets at death

- Assets
  - Will
    - Probate Court
  - Trust
    - Beneficiaries
      - TOD, POD, survivorship, business entity, insurance, assignments
A simple trust

First spouse passes

Income and Principal to Surviving Spouse

Second spouse passes

Grantor/settlor/trustor
- Owner creating the trust

Trust assets
- Land, cash, accounts, business

Trustee
- Administers trust for grantor

Beneficiaries
- Recipients of trust property
A two trust plan

Husband passes

Husband's Trust 

Jointly Titled Assets

Wife

Wife's Trust

Income and Principal to Wife

Heirs

Wife passes
### Trust “rules” useful for farm transition

<table>
<thead>
<tr>
<th>Conditions of inheritance</th>
<th>How to deal with a second marriage of surviving spouse or heirs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Certain age, blood heirs only, finish education, treatment for addiction, divorce</td>
<td></td>
</tr>
<tr>
<td>Beneficiary must lease farmland to farming heir or designated tenant</td>
<td>Create a real estate trust or LLC to hold land longer term</td>
</tr>
<tr>
<td>Grant heir a Right of First Refusal to purchase land or home</td>
<td>Special rules for heirs with disabilities</td>
</tr>
<tr>
<td>Grant farm successor option to purchase land and machinery with specific terms</td>
<td>Contributions to church, non-profit, alma mater, etc.</td>
</tr>
</tbody>
</table>

A creative and willing attorney can tailor rules to your situation.
Considering a trust?

There are different factors that affect whether a trust is the right solution—some are personal and some are financial. Consider the factors we discussed, listed in the chart below. Identifying whether each factor applies to you can be helpful to determining whether to consider a trust for your transition plan.

<table>
<thead>
<tr>
<th>Factor</th>
<th>No/not a concern</th>
<th>Yes/is a concern</th>
</tr>
</thead>
<tbody>
<tr>
<td>Special needs or issues with heirs such as age, disability, financial problems, bad habits, divorce, etc.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Concerns about a second marriage for spouse or heirs</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Transitioning the land and operation to farming heir(s)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Federal estate taxes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Keeping estate details private</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Estate assets going through probate process</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Legal costs of going through probate</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Legal costs to prepare documents</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

One advantage of a trust is that it allows you to create your own "rules" for managing and distributing your assets. Review the rules we discussed below and check the provisions that could be useful for your farm transition situation. Add others you've considered.

<table>
<thead>
<tr>
<th>Check the rules below that might be useful to accomplishing your farm transition goals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conditions of inheritance</td>
</tr>
<tr>
<td>Certain age, blood heirs only, education completed, addiction treatment, divorce</td>
</tr>
<tr>
<td>Beneficiary must lease farmland to farming heir or designated tenant</td>
</tr>
<tr>
<td>Grant heir a Right of First Refusal to purchase land or home</td>
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<tr>
<td>Grant farm successor an option to purchase land and machinery with specific terms</td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>
Examples of trusts

Trust 1 - Goals:

Protect farmland

Preserve sibling relationships

Address child’s special needs
Farming Child 3

Mom & Dad’s Trust

Lease of land until death of second spouse

Non-farming Child 1

1/3 sale proceeds or land

Income to child, then to grandchild

Non-farming Child 2

1/3 sale proceeds or land

Non-farming Child 3

1/3 land

Sale proceeds

Option to purchase land at discount at death of second spouse

Farming Child 3

1/3 sale proceeds or land
Trust 2 - Goals:

Balance assets to farm and non-farm heirs

Provide opportunities for grandchildren

Protect the land
Trust 2

Dad’s Trust

1/2 of land, subject to easement
Farm LLC, restricted to blood heirs

Non-farm assets - life insurance, accounts
Non-farming Child

Real Estate Trust
1/2 of land, must lease to Farming Heir

Death of farming heir
Lease
Option to purchase if farming

Grandchild 1/3rd

Non-farm heir has right to lease house

Held until age 25

Grandchild 1/3rd

Grandchild 1/3rd

Trust 2

Farming Child
Trust 3 - Goals:

Keep farm assets in family after second marriage

Provide income for second spouse
Trust 3

- Farm Spouse
  - Farmland
  - Farm Partnership Operating Assets
  - Farm Spouse’s Children
  - Farm Spouse Trust
    (children are trustees)
  - Non-Farm Spouse Trust
    - Non-Farm Spouse
    - Non-Farm Spouse Trust
    - Non-Farm Spouse Children

Cash, personal assets

Income for life
How do you feel about trusts? (poll question)

• A trust could be helpful to our farm transition
• A trust probably isn’t necessary for our situation
• We have a trust and are happy with it
• We have a trust and may need to amend it
• I’m not sure...
• I’m overwhelmed!
In our next session:

- Gifting
- Agricultural easements
- Limited Liability Companies
- Operating agreements
- Buy-sell agreements
- Leases
- Strategies....
- Moving forward

Visit with attorney Robert Moore of Wright & Moore Law Co, LPA

Homework:
1. Review materials
2. Use worksheets
3. Send questions for next week to: aglaw@osu.edu
Part 2:
The Legal Side of Farm Transition Planning

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