WHERE THERE'S A WILL THERE'S A WAY. OR IS THERE?: TRANSITION TOOLS FARM OPERATIONS SHOULD CONSIDER FIRST BEFORE OPTING TO WRITE A WILL

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I. INTRODUCTION

In Russell County, Kansas, in the fall of 2011, a storm was brewing on the plains—a family feud was about to ensue.[1] Both parents in a farm family of five had passed away.[2] Shortly thereafter, a four-year legal battle began.[3] The five siblings

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1. *In re* Estate of Mahoney, No. 110,894, 2015 WL 2342357, at *3 (Kan. Ct. App. May 8, 2015).
2. *Id.* at *2–3.
3. *Id.*

soon reached a high level of "animosity" toward one another.[4] As the battle came to an end, one brother lost the farmland that was left to him in his mother's will, farm equipment was shifted from supposed owner to supposed owner, and a farm was left in disarray.[5]

Farmers' estates have enormous costs: time, money, jobs, the farm, and family could all be lost. For example, the probate of a will could last several years, and court and legal fees can range into the thousands.[6] For some families, it could result in an emotional dispute where the remaining family is torn apart. A farm could even be split between conflicting siblings or sold to a nonfamily member.

Most farmers have the same two goals: to ensure their farming operation continues to prosper and to keep the farm in the family.[7] The current owner's farm operation is usually personal—it is their identity, what they have done every day since childhood, and a family activity.[8] The farm converting into a housing development or halting operations after the current owner's death are fates farmers usually try to avoid.[9] Farmers want to provide the future farm operator with the tools and skills that will lead to success.

Due to the high stakes involved, farm operations require unique and complex considerations. Farmers must utilize three different plans to have a cohesive transition. First, a farm succession plan is the process of transferring the business capital and management to a successor who will eventually take over the farm operation.[10] Farm successions occur while the farmer is still alive.[11] In contrast, a farm estate plan, or the process of arranging for certain people to inherit the farm at the farmer's death, may be decided while the farmer is alive but will not be effective until his death.[12] Finally, the topic of retirement is unique to farmers as well. A farm retirement plan is the process of a farmer beginning to step away from the daily business tasks of running the farm, and eventually no longer working on the farm and relying on the farm for retirement income.[13] This Article will discuss the legal tools that implement these plans.

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4. *Id.* at *2.

5. *Id.* at *8–10.

6. *See infra* Section III.B.

7. Shannon L. Ferrell et al., *Farm Transitions*, FARM TRANSITION PROJECT i-4, http://agecon.okstate.edu/farmtransitions/files/farm-transitions-workbook.pdf (last visited Mar. 22, 2018) [hereinafter *Farm Transitions*].

8. *See* Tim Eggers, *Evaluating Your Estate Plan: Retirement Planning for Farm Families*, IOWA ST. U. EXTENSION & OUTREACH 1 (Jan. 2012), https://www.extension.iastate.edu/agdm/wholefarm/pdf/c4-56.pdf.

9. *See* Lori Lynch et al., *Estate Planning for Maryland Farm Families*, CTR. FOR AGRIC. & NAT'L RES. POL'Y 2 (Apr. 2014), https://drum.lib.umd.edu/bitstream/handle/1903/15582/FS%20972%20Estate%20Planning%20Updated%202014.pdf?sequence=1.

10. Matt Lobley et al., *Farm Succession and Retirement: Some International Comparisons*, 1 J. AGRIC., FOOD SYS., & COMMUNITY DEV. 49, 50 (2010).

11. Shannon L. Ferrell & Rodney Jones, *Legal Issues Affecting Farm Transition*, OKLA. ST. U. AGRIC. ECON. DEP'T (2013), http://agecon.okstate.edu/farmtransitions/files/Legal%20Issues%20Affecting%20Farm%20Transition.pdf.

12. Maria Pippidis et al., *Choosing your Will and Estate Planning Attorney*, U. MD. EXTENSION 5, https://extension.umd.edu/sites/extension.umd.edu/files/_images/locations/talbot/fs925.pdf (last visited May 28, 2018); Ferrell & Jones, *supra* note 11.

13. Lobley et al., *supra* note 10, at 51.

One estate planning trend that could cost a farm operation is the use of a will to transfer all of an individual's assets. While wills are frequently used by estate planning attorneys, agricultural attorneys should suggest other options to ensure that the focus of the farm transition is not solely on the estate plan, but the other two plans as well. This Article will advocate that farmers should consider other estate, farm succession, and retirement planning tools instead of only using a will to transition the farm. First, it will discuss how both the complexity of farm estates and probating a will can cause issues for farms across the United States. Section II examines the unique issues with farm transitions. Section III will describe the probate process for wills and the taboo of choosing other farm succession tools over a will. Section IV will then provide alternative options for farm owners and their professional advisors to consider. These options could save farm families time, money, and even their farms. Even so, each farm estate is complex and in the end the use of a will to plan a farm transition may be required. Farmers' legal and financial advisors should consider farmers' unique situations and how the farm can be preserved for generations through the use of farm estate, succession, and retirement planning tools.

II. FARM TRANSITION ISSUES

Out in the cornfields of Iowa, Frank was a farm tenant on his parents' land.[14] When his parents passed away, their will did not leave the land to him, but instead, to two of his brothers.[15] Frank went to court to claim the will was invalid.[16] As years of battling over the land began, the court answered one important question: who is in possession of the land while a will is being probated?[17] Title to the estate's property could not pass onto the designated heirs until the will was probated.[18] The two brothers were not the owners of the land until probate was completed.[19] In the meantime, the court determined who owned the land, and thus, who decided what to do with Frank's farm lease.[20] The court held the executor of the estate, a non-family member, held possession of the land and could determine what to do with Frank's lease until the will was probated.[21] The fate of Frank's farming operation would first be determined by a random third party.[22]

It's no secret that with farm estates there is a lot to lose. Farm estates are usually worth a significant amount. In 2010, U.S. farm real estate was worth over $1.8 trillion. [23] The majority of farm estates is usually land.[24] Farmers in the U.S.

14. *In re* Estate of Franzkowiak, 290 N.W.2d 1, 2 (Iowa 1980).
15. *Id.*
16. *Id.*
17. *Id.* at 2–6.
18. *Id.* at 4.
19. *Id.*
20. *In re* Estate of Franzkowiak, 290 N.W.2d at 3.
21. *Id.* at 6.
22. *See id.*
23. NEIL E. HARL, 5 AGRICULTURAL LAW § 41.01 (2018).
24. *Id.*

owned over 555 million acres of land in 2014.[25] Furthermore, a large number of sole owners also own a large amount of acreage; over 316,000 principal operators are the sole owners of 500 to over 2,000 acres of farmland.[26] Unlike other estates, farms' real estate includes both a business and the family's home.[27] The business and the home both have probably been in the family for several generations.[28] Not only is there a lot of money on the line, but a poorly planned farm transition could also mean the loss of a family's home and business.

Farmers and those assisting with farm estate, succession, and retirement plans should note several issues that could prevent a successful farm transition. For example, farmers rarely have a plan in place, in part, because of the challenges of an intergenerational transfer and because most struggle with considering their own retirement and mortality.[29] Sixty-four percent of farmers do not have an estate plan.[30] Approximately ninety percent of farms have no transition plan in place.[31] With no plan, state law dictates who inherits the operation.[32] This could lead to several methods of destruction. The law might split the farm between multiple heirs, creating split pieces of land that can no longer be utilized for farming.[33] Some of the land might be sold or the heirs may disagree on how to operate the farm.[34] Loans or even government-funded farm programs may not be approved because several individuals will now have to fill out the paperwork.[35] The farm could quickly go from having sufficient to insufficient capital to pay operating costs during the next season if there is no business plan and individual to manage the farm's finances.[36] All of the heirs may not have the same end goal of continuing on the family farm.

There has been a significant increase in farm size in the past few decades, which has caused an increase in farm estates' worth.[37] The increase in the worth of farm estates in the past few decades has also created new legal issues. Farmland prices also continue to increase, creating issues with the transferring and selling of

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25. *See Farmland Ownership and Tenure*, U.S. DEP'T OF AGRIC., ECON. RES. SERV., https://www.ers.usda.gov/topics/farm-economy/land-use-land-value-tenure/farmland-ownership-and-tenure/ (last updated Apr. 10, 2017).

26. U.S. DEP'T OF AGRIC., NAT'L AGRIC. STAT. SERV., AC-12-A-51, 2012 CENSUS OF AGRICULTURE 239 (2014), https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf [hereinafter 2012 CENSUS OF AGRICULTURE].

27. Neil Hamilton, Professor, Drake Univ. Law Sch., The Role of Land Tenure in the Future of American Agriculture at Changing Lands, Changing Hands Conference 1 (June 13, 2017), *located at* http://landforgood.org/wp-content/uploads/The-Role-of-Land-Tenure-by-Neil-Hamilton.pdf.

28. *Id.*

29. Neil D. Hamilton, Feeding Our Green Future: Legal Responsibilities and Sustainable Agricultural Law Tenure, 13 DRAKE J. AGRIC. L. 377, 387 (2008).

30. *Farm Transitions*, *supra* note 7, at i-5 (note that the statistics were from 2006); *see* KEVIN SPAFFORD, LEGACY BY DESIGN: SUCCESSION PLANNING FOR AGRIBUSINESS OWNERS XI (2006).

31. DVD: Land as Your Legacy (Nationwide Insurance Company 2014) (on file with author).

32. *E.g.*, MD. CODE ANN., EST. & TRUSTS §§ 3-101–3-105 (West 2018).

33. *Farm Transitions*, *supra* note 7, at i-4.

34. *Id.*

35. *See* Ga. Appleseed Ctr. For Law & Justice, Unlocking Heir Property Ownership: Assessing the Impact on Low and Mid-Income Georgians and Their Communities 9–10 (2013).

36. *Farm Transitions*, *supra* note 7, at i-5.

37. HARL, *supra* note 23.

farmland.[38] This will require careful planning and the use of legal tools that can preserve the necessary capital required for farm businesses.

The increasing age of farmers also requires careful consideration of the legal options these farms have when creating a farm succession, estate, or retirement plan. The older age of a majority of farm owners in the U.S. could result in a significant amount of farm transitions in the next few years; over 915,000 farm operators are sixty-five or older.[39] The average age of principal farm operators across the U.S. is fifty-eight.[40] In some areas of the country, transition planning is more urgent. For example, in Maryland, the average age of principal farm operators is fifty-nine.[41] If there is more than one principal farm operator, a transition plan could save a co-operator time, money, and maybe even the farm if it contains a swift process for the transition of ownership after one co-operator's death. If the principal operator is the sole owner of the land and a majority of the farm property, a number of concerns must be addressed such as who, if anyone, will run the farm, or whether the heirs should rent or sell the land. For example, in Kansas, approximately 13,000 farmers that are sixty-five years of age or older are the sole operator of their farm.[42] The next generation of owners might be ready to take over the farm but are unable to do so because of a poor business transition plan where one person owned and operated the farm alone—instead of including the next generation of farmers. The large number of farm owners that are sole business owner requires a unique plan that meets both the owner's goals and protects future heirs from any issues that may occur once they inherit the farm.[43]

Farms, as mentioned above, have unique business models that require different transition planning considerations compared to other businesses. Farm estates are predominately sole proprietorships, whereas most other businesses are Limited Liability Companies (LLC).[44] With sole proprietorships, one person is the operator of the business.[45] When the sole operator dies the business entity ceases to exist.[46]

38. *Id.*

39. 2012 CENSUS OF AGRICULTURE, *supra* note 26, at 53.

40. *Id.* at 218.

41. U.S. DEP'T OF AGRIC., NAT'L AGRIC. STAT. SERV., 2012 CENSUS OF AGRICULTURE STATE PROFILE MARYLAND (2014), https://www.agcensus.usda.gov/Publications/2012/Online_Resources/County_Profiles/Maryland/cp99024.pdf.

42. U.S. DEP'T OF AGRIC., NAT'L AGRIC. STAT. SERV., 2012 CENSUS OF AGRICULTURE KANSAS 200 (2014), https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Kansas/st20_1_069_069.pdf.

43. *See* HARL, *supra* note 23.

44. *Compare id.* (stating the unique dominance of sole proprietorship in agriculture), *with* Kelly Phillips Erb, *LLCs, S Corps, & PCs: Choosing a Business Entity*, FORBES (Aug. 19, 2015), https://www.forbes.com/sites/kellyphillipserb/2015/08/19/llcs-s-corps-and-pcs-choosing-a-business-entity/#41473d726b8a (discussing LLC's as the most popular business choice).

45. *Farm Transitions*, *supra* note 7, at 3-15.

46. William M. Sheets et al., *Estate and Succession Planning for Farmers and Ranchers*, *in* COLO. BAR ASS'N, 2017 COLORADO SENIOR LAW HANDBOOK 192 (2017).

The nature of farm businesses are unique as well and go beyond simple management and growth strategies.[47] Farm businesses require careful timing and reasonable weather conditions.[48] Access to clear title is essential because loans are a huge part of farm businesses.[49] Farms' main asset is usually the land, which could be a concern for some farms economic vitality because farm businesses usually have a low ratio of liquid-to-fixed assets.[50] This could make the farm business vulnerable when unexpected changes, such as a transition of the business or the death of the sole business owner occurs, and as a result, certain assets freeze during that transition.[51] The business operation may not be able to continue on without a strong transition plan that ensures access to capital and the ability to pay off debts, taxes, and other bills on time.[52] Farm business models are divergent and require distinct legal tools for ownership transfers.

Retirement is also a unique concern with planning farm transitions. Retirement is rarely immediate: farmers usually assist the next generation for years after the initial transition process begins.[53] This could cause the younger generation to be unprepared if they are suddenly required to take over the operation. Farmers also often rely on leasing their land as their "retirement" plan.[54] Issues arise if this is a farmer's sole source of retirement income, creating concerns about death taxes and even a lack of sufficient income.[55] Some farmers also make certain income tax decisions that then reduce their social security benefits later on in life and eliminates this option as a source of retirement income.[56] Farmers usually have different retirement plans than the average retiree.

The different pieces and unique structure of farm businesses require new legal approaches. The specific issues mentioned above all noted the distinctiveness of farm transitions. Family dynamics almost always play a role.[57] However, there are legal tools that can further a smooth farm transition. Professionals that assist with farm transitions must focus specifically on the types of legal tools that are most useful for farm estate, succession, and retirement plans.

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47. Shayna Windsor Borakove, *Estate & Business Planning for Family Farms*, WIS. LAWYER (July 2017), http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=90&Issue=7&ArticleID=25746.

48. *Farm Transitions*, *supra* note 7, at 1-20.

49. *See* HARL, *supra* note 23.

50. *Id.* (noting "it would be unrealistic to view land as a highly illiquid asset in all settings").

51. *Id.*

52. *See id.*

53. Eggers, *supra* note 8, at 2.

54. *See id.* at 3.

55. *See* Sheets, *supra* note 46.

56. Eggers, *supra* note 8, at 3.

57. Heirs that live off the farm could create problems for parents that hope to leave each child some of the estate, while at the same time ensuring the farm will continue to thrive after their death. *See* Lynch et al., *supra* note 9, at 5.

III. THE TABOO OF AVOIDING WILLS

Farmer John was the third generation to cultivate his family's farmland in Ohio.[58] His son, Jason planned to inherit the farm and continue on the family tradition.[59] However, John remarried and executed a will that left the farm to his new wife, Kim.[60] When John passed away in the summer of 2013, Jason's plans to keep the farm in the family were diminished.[61] Jason contested his father's will in court three years later, in 2016, and appealed and fought for the family land once more in 2017.[62] Jason had a lot to lose, the farm was a majority of his father's $3.7 million estate.[63] In the end, an almost four-year legal battle ended the fourth generation's opportunity to farm the family's land.[64]

A. Wills: An Oversold Option?

The use of *one* legal document—a will—to transfer a farm has both consequences and benefits. Frequently farmers rely solely on a will.[65] The document is popular: a will is the most commonly used estate planning tool.[66] A will can include all property a person owns, with the exception of payable on death bank accounts, property held as joint tenants, life insurance, retirement benefits, certain trust assets, stocks and bonds held in beneficiary, and any transfer on death property.[67] Thus, a majority of the property a farmer owns could typically be transferred to the next generation in a will. However, each farm operation is unique and should consider the positives and negatives of using a will, along with other estate planning tools, to create a transition plan tailored to their farm. A will may provide farmers with a strong estate plan, but it cannot provide a strong plan for succession or retirement because the document does not address what occurs before the farm owner's death, only after. Unfortunately, some farmers that have only used a will to transfer the farm operation have learned that the outcome of this choice can be detrimental.[68]

Wills cannot continue to be the default option for the transfer of farm assets. There are numerous tools that may be more effective for some farming operations'

58. Kiefer v. Kiefer, 95 N.E.3d 687, 688 (Ohio Ct. App. 2017).

59. *Id.*

60. *Id.*

61. *See id*. at 689.

62. *See id*. at 688.

63. *See id*.

64. *See Kiefer*, 95 N.E.3d at 693.

65. *See* Gary A. Hachfeld et al., *Establishing a Will*, U. MINN. (2017), https://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/estate-planning-series3-establishing-a-will.pdf.

66. *See id*.

67. *See, e.g.*, DEL. CODE ANN. tit. 12, § 1901 (West 2018); Anne Redalen Fraser et al., *Estate Planning Handbook for Native Americans,* GREAT LAKES INDIAN L. CTR. U. WIS. SCH. L., 7 (Nov. 11, 2007), https://law.wisc.edu/glilc/documents/estate_planning_handbook_final.pdf.

68. *See infra* notes 71–84 and accompanying text.

transitions.[69] Attorneys must consider the negative side effects of wills when advising farm clients. Also, as discussed herein, probating a will can be detrimental to a farm operation.[70] While a will can be a useful tool for some farm transitions, it cannot be the only tool and in some situations, may not be an appropriate tool.

A will cannot prepare the next generation for taking over the farm.[71] If the farm transition plan relies solely on a will, the property will not be transferred until the owner's death.[72] A will is simply an estate planning tool. Farmers often struggle with teaching and allowing the next generation to take over their operation.[73] The successor must learn how the operation runs on a daily basis and how to make business decisions.[74] Through the use of farm succession and retirement tools, a farm can transfer more smoothly while the owner is still alive. A single estate planning tool, like a will, is not sufficient enough to ensure that the next generation can successfully run the farm after the owner's death.

Wills are easily contested, which creates additional costs and consequences for farm estates.[75] Most claims are based on undue influence or a lack of mental capacity.[76] When a will is written or rewritten later in life, as they frequently are, a claim could easily be made because of a person's age, dependence on caretakers, and physical and mental weaknesses, the person's decisions were unduly influenced and thus, the will is invalid.[77] Contesting a will, on average, costs between $10,000 to $50,000 in attorneys' and other legal fees.[78] Also, will contests can take a year or more, tying up essential farm assets and stalling access to a clear title to the farmland.[79] In contrast, non-probate transfers are rarely contested because usually the law is clearer and more difficult to contest.[80]

A will may not provide adequate protection for your farm. Wills may become ineffective over time due to death, birth, marriage, change of plans, etc. If a spouse remarries the farm could end up with an entirely different family.[81] Farm assets may

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69. *See infra* Part IV.

70. *See infra* Section III.B.

71. *See generally Farm Transitions*, *supra* note 7, at i-4 (noting that a cohesive plan that begins before the farm owner's death is essential for a successful farm transition).

72. *See* Hachfeld et al., *supra* note 65.

73. Bryan Schurle et al., *Transition Planning: 12 Steps to Keep the Family Farming*, KAN. ST. U. RES. & EXTENSION, DEP'T AGRIC. ECON. (Dec. 1, 2012), https://www.agmanager.info/transition-planning-12-steps-keep-family-farming.

74. *Id*.

75. *See* Dennis W. Collins, *Avoiding a Will Contest – The Impossible Dream?*, 34 CREIGHTON L. REV. 7, 8 (2000); *How to Contest a Will*, CONSUMER REP. (Mar. 2012), https://www.consumerreports.org/cro/2012/03/how-to-contest-a-will/index.htm.

76. Collins, *supra* note 75. *See generally* KAN. STAT. ANN. § 59-601 (West 2017) (cannot create a will if not of "sound mind"); *In re* Will of Everhart, 364 S.E.2d 173, 174 (N.C. Ct. App. 1988) (example of a finding of undue influence).

77. John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 345 (2013).

78. *How to Contest a Will*, *supra* note 75.

79. *See, e.g.*, Estate of Franzkowiak v. Wunschel, 290 N.W.2d 1, 2 (Iowa 1980); *How to Contest a Will*, *supra* note 75.

80. *How to Contest a Will*, *supra* note 75.

81. *See* Sarah Everhart, *Protecting the Family Farm in Divorce,* U. MD. EXTENSION (2016), https://drum.lib.umd.edu/bitstream/handle/1903/18453/Divorce%20and%20Farming_FINAL.pdf?sequence=1.

not end up with the individuals that were planning on taking over the farm.[82] A farmer's will may not address every unexpected event. If an heir has legal liabilities, a will may not protect the farm from being sold to pay off those liabilities.[83] There are specific legal tools that could ensure the next generation does not lose vital farm assets.[84]

It should be noted that there are some benefits farms might see if they decide to use a will as one of the several legal tools that are part of their transition plan. Wills can include a detailed plan for farm assets.[85] For example, the will could contain a provision that only allows the property to be inherited by children only and not a daughter-in-law or son-in-law.[86] This would add a layer of protection if divorce occurs later on: nonblood relatives would not gain automatic ownership in the farm.[87] A child could also be granted with the option to purchase the farm if the other siblings are not interested in taking it over.[88] A will could also account for past gifts to specific families members and provide those that have not previously been gifted with large assets to receive more of the final farm property.[89] Overall, a will can include the exact items that should go to each person, providing the owner with a wide range of options.

The document also allows farmers to plan for all possible future scenarios. For example, two siblings out of a family with five children may plan to take over the farm. The parents can plan for this in their will by leaving other assets to the three off-farm children, and the essential farm assets can be left with the two children that will run the farm. However, before the parents pass away one of the on-farm siblings passes away before his parents. Here, the will could state that if one of the on-farm siblings passes away, the other on-farm sibling will receive all of the assets that were left to that deceased sibling. A will can consider some of the unexpected life events that could happen, such as marriage, birth, divorce, or death, and provide some options for farmers to address what issues arise from these events.[90]

There is also the peace of mind and ease that a will provides to farmers. Wills can be revoked later on in life if there is a significant event within the family or with the farm.[91] If one small part of the will needs to be changed, a codicil can amend the will instead of rethinking and paying for an entirely different will.[92] Farmers are short on time during certain seasons, and this is one way they can make a quick

82. *See id.* at 3.
83. Hachfeld et al., *supra* note 65.
84. *See, e.g.*, *id.*
85. Everhart, *supra* note 81.
86. *Id.*
87. *Id*.
88. Hachfeld et al., *supra* note 65.
89. *Id*.
90. *Id.*
91. *Farm Transitions*, *supra* note 7, at 4–23.
92. Hachfeld et al., *supra* note 65.

change without having to redo their entire plan. A will is also the most familiar option. Farmers, as mentioned, struggle to complete estate plans,[93] and a will may be the simple option if they have finally decided to implement a plan.

Even so, farm families should be concerned about the overuse and underuse of wills in farm succession plans. There is still the concern that a majority of farm families have no form of estate plan whatsoever.[94] There is also the concern that using a will could create a rocky transition. Thus, a will is certainly a better option than no plan at all, but it can still create more problems in comparison to other estate planning tools when it comes to farm transitions.

i. The Costs of Probating a Will

There has been a trend over the past few decades to find alternative transition planning tools instead of solely using a will.[95] This trend has resulted from the increased interest in avoiding probate.[96] Probate expenses and paying an executor to maintain the estate while it is being probated are two major expenses.[97] The probate process can also complicate farm transitions.[98] Now, individuals are starting to look at other tools instead of using a will as the only legal document in their transition plan.[99]

Probating a will can be expensive. For example, in Delaware, a farm estate's probate paperwork could cost between $60 to over $500.[100] Then, to complete the probate process the estate could be required to pay 1.75% of its net worth, excluding real estate.[101] If the farm's personal property (such as paid-off farm equipment, vehicles, etc.) equaled around $250,000, the estate would be required to pay an additional $4,375 to probate the will.[102] If the farm estate's personal property equaled $500,000, the cost would be $8,750.[103] In comparison, a farm estate in Maryland will pay a probate fee based on the total gross estate, including all real estate.[104] A farm estate worth $500,000 would only have to pay a $750.00 fee; an estate worth $1 million would have to pay a fee of $1,500.[105] In Nebraska, to formally close a farm estate the probate fees are approximately $570.00 for an estate

93. *Farm Transitions*, *supra* note 7, at i-5.

94. *See* SPAFFORD, *supra* note 30 and accompanying text.

95. *See, e.g.*, John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108 (1984).

96. *See, e.g.*, *id.* at 1115–16.

97. Shannon L. Ferrell, Assistant Professor, Okla. State Univ. Dep't of Agric. Econ. & Derrick Davies, Okla. State Univ. Found., Family Farm Transition and Estate Planning 2.0 at American Agricultural Law Association 2017 Annual Educational Symposium (Oct. 28, 2017).

98. Hachfeld et al., *supra* note 65.

99. *Id.*

100. Ciro Poppiti, *Fee Schedule*, NEW CASTLE CTY. 2, http://www.nccde.org/DocumentCenter/View/153 (last visited June 11, 2018) (example of one Delaware county's probate fees).

101. *Id.*

102. *See id.*

103. *See id.*

104. *Fees*, MD. OFF. REG. WILLS, http://registers.maryland.gov/main/fees.html (last visited June 11, 2018).

105. *Id.*

worth $500,000.[106] Even in states labeled "probate friendly" probate costs could still be in the low thousands.[107]

The cost of probate can also increase significantly if a farmer owns land in multiple states.[108] Farmland must be probated in the state where it is located.[109] Farmers might have to pay probate costs in two, or even, three states.[110] Imagine the costs for a farmer who owns land in both Delaware and Maryland.

A farmer's will may also take several seasons to probate, creating issues for the new farm owner. In Maryland or Delaware, an estate can be closed within approximately one year.[111] In Kansas, an estate cannot be closed until it has been open for at least six months after death.[112] However, several issues can increase the amount of time it could take to probate a will. If the will is contested, as mentioned in the above section, the probate process could last years.[113] The title to the land and other farm assets will not clear until the probate process is complete.[114] Access to clear title to the land is essential for farm operations that need collateral for the credit lines farms rely on each year.[115] Also, the new farm owner may not even be able to access the property in the will. The executor will exercise control over the property while the will is being probated.[116] The executor will make all decisions as to what can be done on the land during the probate process.[117] By the time the new farmer has access to the farm assets and a clear title, it may be too late.

Farmers also have a large number of assets that they want to keep private; yet, the probate process is public.[118] The estate information will be made public, which could make some farm families uncomfortable.[119] Some farmers prefer that their neighbors do not know the extent of their assets.[120]

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106. NEB. REV. STAT. ANN. § 33-125 (West 2018) (includes real estate); *Filing Fees and Court Costs*, ST. NEB. JUD. BRANCH, https://supremecourt.nebraska.gov/rules/administrative-policies-schedules/fees (last visited June 11, 2018).

107. *See* Catherine Anne Seal & Michael A. Kirtland, *The Transfer-on-Death Deed in the Elder Law Setting*, 4 NATIONAL ACADEMY OF ELDER LAW ATTORNEYS JOURNAL 71, 80 (2008).

108. *See generally* Ferrell & Jones, *supra* note 11, at 4–17.

109. *See generally id.*

110. *See generally id.*

111. *Frequently Asked Questions*, MD. COURTS, http://www.courts.state.md.us/orphans-court/faqs.html (last visited June 11, 2018); *Probate Process*, NEW CASTLE CTY., http://www.nccde.org/155/Probate-Process (last visited June 11, 2018).

112. *Frequently Asked Questions About Probate*, KAN. LEGAL SERV., https://www.kansaslegalservices.org/node/1092/frequently-asked-questions-about-probate (last visited June 11, 2018).

113. *See How to Contest a Will*, *supra* note 75.

114. *See Wills and Probate*, IOWA ST. U. COOPERATIVE EXTENSION: BEGINNING FARMER CTR. (Feb. 2009), https://www.extension.iastate.edu/agdm/wholefarm/pdf/BFC5WillsProbate.pdf.

115. *See id.*

116. *See id.*

117. *See id.*

118. Gary Hachfeld et al., *Estate Planning Principles*, U. MINN. EXTENSION (Aug. 2017), https://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/estate-planning-series1-estate-planning-principles.pdf.

119. *See id.*

120. *Wills and Probate*, *supra* note 114.

Farmers should consider alternative options for their farm transitions because the use of a will could result in unintended consequences that are detrimental to the farm operation. The probate process can cause serious issues for farm operations. Other farm transfer tools can help avoid the issues probate creates and may be the best business choice for a farm.

IV. CONSIDERING OTHER TOOLS FOR FARM SUCCESSION PLANS

One Maryland farm family recently learned about how some of the other tools impact farm transitions. Back in the 1970s and 1980s, a partnership between a father and son was created.[121] When the father died in the early 1990s, the son was able to assume operation of the farm because he had fully transitioned into managing the business, and his father had retired prior to his death.[122] The farm continued to thrive for years after the father's death.[123]

However, the son did not utilize transition tools and failed to build a farm transition plan of his own.[124] When the son died recently, the partnership had never been dissolved.[125] This created some problems for a grandson who wanted to continue farming the land.[126] The grandmother had even executed a life estate deed that would have given the grandson the land and herself a life estate in part of the land.[127] While the transition was smooth for the son, there were still steps that should have been taken to prevent the eventual splitting of the farm.

There are several tools that can create strong farm transitions. This section will discuss the options that can be more efficient in accomplishing the goals of a farm transition. These tools are oftentimes better options and should be considered first, before opting to write a will. Yet, even with stronger tools in place, the Maryland farm example makes it clear that in order to have a successful farm transition, each person needs to understand how to use the tools, what tools should be used when, and how to preserve the tools for continued use in the future.

A. Deeds

Farmland and buildings can be transferred outside of the probate process through different types of deeds. While only real property can be transferred through this tool, it is still one that farmers should consider because real property is most likely a majority of their estate.[128] This section will provide an overview and the positive and negative consequences of the different types of deeds used in farm transition plans. While not every state has each type of deed, this option is still an essential tool for farm transition plans.

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121. Layfield v. Insley, No. 0177, 2016 WL 4379230, at *1 (Md. Ct. Spec. App. Aug. 17, 2016).
122. *Id.* at *2.
123. *See id.* at *2–4.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *See* HARL, *supra* note 23.

i. Transfer on Death Deed

One of the newest tools farmers can use to transition their land is the Transfer on Death Deed ("TODD"). A TODD transfers the ownership of real property, such as farmland and buildings, to named beneficiaries.[129] However, the land must be located in a state that has passed the TODD law.[130] The first state law was passed in Missouri in 1989,[131] but in 2005 only seven states had passed the TODD.[132] Today, a little over a decade later, about half of the states have passed the TODD law.[133]

A majority of state TODD laws are the Uniform Transfer on Death Act ("uniform law"),[134] which provides a simple and quick process for transferring real property. The uniform law allows owners to designate a beneficiary of real property during their lifetime.[135] When the owner dies, the property passes to the beneficiary without going through the probate process.[136] The beneficiary only needs to record the owner's death certificate in the county where the property is located, and an affidavit may need to be filed as well.[137] This is one way to quickly transfer real property.

The creation of a TODD is also a simple process. Under the uniform law, a TODD is similar to a typical gift deed, but with an additional statement that the property will transfer only at the death of the current owners.[138] Then, the deed must be recorded in the county where the property is located before the owner's death.[139] Some states also require that the deed expresses the TODD can be revoked at any time.[140] The quick and easy process is oftentimes more appealing to farm families compared to a will, which can take more time, money, and effort.

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129. *See, e.g.*, N.M. STAT. ANN. § 45-6-402(A) (West 2018).

130. *Id.*

131. Brad Reid, *The Transfer on Death Deed*, HUFF. POST (Mar. 29, 2016), http://www.huffingtonpost.com/brad-reid/the-transfer-on-death-dee_b_9566464.html.

132. Michael A. Kirtland & Catherine Anne Seal, *Beneficiary Deeds and Estate Planning*, 66 ALA. LAW. 118, 118 (2005).

133. Julie Garber, *Avoid Probate With a Transfer-on-Death Deed*, BALANCE (May 11, 2017), https://www.thebalance.com/transfer-on-death-deed-3505607.

134. UNIF. REAL PROP. TRANSFER ON DEATH ACT (UNIF. LAW COMM'N 2009), http://www.uniformlaws.org/shared/docs/real%20property%20tod/URPTODA_2011_Final%20Act_2014sep10.pdf. Alaska, District of Columbia, Hawaii, Illinois, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, Virginia, Washington, West Virginia have all passed the uniform law.

135. Michael A. Kirtland & Catherine Anne Seal, *The Significance of the Transfer-on-Death- Deed*, AM. BAR. PROBATE & PROP. 43 (Aug. 2007), http://www.americanbar.org/content/dam/aba/publishing/probate_property_magazine/rppt_publications_magazine_2007_ja_KirtlandSeal.authcheckdam.pdf.

136. *Id.*

137. *Id.*

138. *See, e.g.*, N.M. STAT. ANN. § 45-6-409 (West 2018). If there are multiple owners, each owner should sign the deed, unless it is a tenancy in common and only one owner wants to sign over his or her interest. If the current owners are joint tenants of the property and one owner does not sign the deed and is still alive at the death of the other, the TODD will not be valid. KAN. STAT. ANN. § 59-3505 (West 2018).

139. *See, e.g.*, N.M. STAT. ANN. § 45-6-409 (Westlaw).

140. Kirtland & Seal, *supra* note 132, at 120.

Other states have passed versions of a TODD act as well.[141] These states' laws usually differ slightly from the uniform law. The laws may include more or less requirements for the TODD language. Other TODD laws have time limits for when all documents must be filed after the owner's death. Overall, most TODD laws are similar.

TODDs provide less of a chance for a contest in court compared to wills. While a TODD can be contested if the owner signed it due to undue influence, there is a lesser chance that the document will result in litigation.[142] The language on TODDs is straightforward—there is less of a concern for ambiguities resulting in litigation when compared to a will.[143]

TODDs also allow for some flexibility. An owner can place one or more beneficiaries on the deed.[144] A TODD also allows for alternative beneficiaries to be listed, in case the original beneficiary passes away before the owner.[145] This allows farmers to plan ahead for any unexpected changes with the next generation of farmers.

TODDs provide some protections for the farm business. The beneficiary's creditors cannot come after the land because the beneficiary does not have any ownership interest.[146] The TODD cannot be a part of the beneficiary's divorce assets as well.[147] The owner still has the power to revoke the deed, in case something changes.[148] Wills cannot change a TODD either.[149] If for some reason, the parent is convinced to execute a new will by a child, the will cannot change the TODD.[150] These protections can be used with other tools to help ensure a strong transition plan.

There are a few concerns with TODDs. For example, under the uniform law, if there are multiple beneficiaries their ownership interests will all be equal.[151] There is no way to give one beneficiary a larger interest in the land than the other beneficiary; in some situations, it could benefit the farming operation if one person has a larger interest. Also, if one listed beneficiary dies before the owner, the beneficiary's heirs will have no rights to the property.[152] Only living beneficiaries can become new owners of the land.[153] However, some state laws do provide an exception that allows for rights of survivorship.[154] There are also concerns with any creditor interests, mortgages, and other debts that impact the land. The new owner of the

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141. ARIZ. REV. STAT. ANN. §§ 33-401, 404-405 (2018); ARK. CODE ANN. § 18-12-608 (West 2018); CAL. PROB. CODE § 5614 (West 2018); COLO. REV. STAT. § 15-15-101 (West 2018); IND. CODE ANN. § 32-17-14-11 (West 2018); KAN. STAT. ANN. § 59-3501 (West 2018); MINN. STAT. ANN. § 507.071 (West 2018); MO. ANN. STAT. § 461.025 (West 2018); OHIO REV. CODE ANN. § 5302.23 (West 2018); OKLA. STAT. ANN. tit. 58, § 1253 (West 2018); WIS. STAT. ANN. § 705.15 (West 2018); WYO. STAT. ANN. § 2-18-103 (West 2018).
142. *See, e.g.*, N.M. STAT. ANN. § 45-6-408.
143. *See, e.g.*, N.M. STAT. ANN. § 45-6-411.
144. *See, e.g.*, N.M. STAT. ANN. § 45-6-413.
145. N.M. STAT. ANN. §§ 45-6-416, 417.
146. Kirtland & Seal, *supra* note 132, at 120.
147. *Id.*
148. *Id.*
149. UNIF. REAL PROP. TRANSFER ON DEATH ACT, *supra* note 134.
150. *Id.*
151. *See, e.g.*, N.M. STAT. ANN. § 45-6-413 (West 2018).
152. *See, e.g.*, *id.*
153. *See, e.g.*, *id.*
154. ARIZ. REV. STAT. ANN. §§ 33-401, 404-405 (2018).

land will be subjected to these debts, unlike with the probate process where the estate settles debts.[155]

Similar to a will, a TODD does not always incentivize a transition plan by itself. The owners retain all property rights to the land with a TODD, until death.[156] The beneficiary of a TODD has no ownership interest in the land until the owner's death.[157] A farmer could allow the next generation to use the land, but will most likely still participate heavily in the operation if they need to sign legal documents related to the land or if they know they can still sell or re-gift the land at some point. A farmer may not consider transitioning the entire operation to the next generation if they still own all of the farmland.

There are also concerns that creating a TODD may trigger Medicaid reimbursement rules.[158] Even so, TODDs in some states do protect an estate from Medicaid Recovery, providing an essential tool for preserving assets in an estate.[159] In other states, the TODD property may be considered an asset of the owner, and the state will mandate the deceased owner's estate reimburse a certain amount if the owner received Medicaid payments.[160] Assets transferred to others during a specific time must be disclosed if an owner applies for Medicaid or Medicaid Nursing Home Assistance.[161] TODD beneficiaries would then be personally liable for up to the value of the property in the TODD for any Medicaid reimbursement amounts.[162] If the owner becomes incompetent the TODD will not be revocable, which could also impact Medicaid benefits.[163] However, a power of attorney could revoke the TODD if specific provisions are included.[164]

In sum, states with a TODD law have a useful tool for farm transitions; but TODDs are not the only tool. TODDs only transfer the farmland and buildings. Farm equipment, business interests, bank accounts, etc. cannot be transferred with a TODD. A TODD may simply not work for a farm owner's transition plan goals. Other tools may need to be used with or instead of a TODD to ensure a successful farm transition. Even so, this tool is a strong resource that can help avoid the probate process for a significant part of farm estates.

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155. *See, e.g.*, N.M. STAT. ANN. § 45-6-413.
156. *See generally* Kirtland & Seal, *supra* note 132.
157. *Id.*
158. *See, e.g.*, NEB. REV. STAT. ANN. § 76-3410 (West 2018).
159. Rick Weaver & Travis Weaver, *Home Sweet Home: Making Sense of Medicaid Recovery*, 80 TEX. B.J. 128 (2017).
160. *See, e.g.*, NEB. REV. STAT. ANN. § 76-3410(b)(1) (Westlaw).
161. Kirtland & Seal, *supra* note 135, at 44.
162. *See, e.g.*, NEB. REV. STAT. ANN. § 76-3410(b)(1) (Westlaw).
163. Kirtland & Seal, *supra* note 135, at 46.
164. *Id.*

ii. Life Estate Deed

The life estate deed has been a popular choice for avoiding the probate process for real property.[165] Life estates differ slightly from TODDs but can provide a similar option for farmers that live in a state that does not have a TODD. Even for farmers that have TODDs in their state, a life estate deed may still be a viable option for that farm's unique situation or goal. Here, the inexpensive nature and ease of a life estate deed are appealing to farmers who are hoping to save the next generation time and money.

A life estate deed allows the original owner to transfer interest in real property to both a *life tenant* and a *remainderman*.[166] The life tenant is the person who receives a specific interest in the property until death.[167] All of the life tenant's remaining rights to the property will transfer automatically to the remainderman upon the death of the life tenant.[168]

A life estate deed is a tool that can be used to address a number of different situations. A farmer could leave a life estate to a spouse and list their children as the remainderman.[169] The owner could designate him or herself as the life tenant.[170] A couple could list themselves as the life tenants and the child taking over the farm as the remaindermen. A couple may even be able to list themselves as both life tenants and as remaindermen with their children, so later on the couple can still transfer their percentage of the property to future interests.[171] If the goal is to keep the farmland in the family the remainderman can be listed as joint tenants so one child cannot transfer his or her interest to another.[172] The life estate deed is an appealing option for farm families that require a more flexible transition plan option.

There are two types of life estate deeds farmers could utilize: one option leaves the life tenant without any powers to transfer the property to others; the other option grants the life tenant with specified powers to transfer the property.[173] A life estate deed with powers can specify what types of transfer powers the person has, i.e., the life tenant has the right to mortgage the property but cannot sell or gift it to another person.[174] Both types of life estate deeds can be used to benefit farmers because they can be tailored to fit their unique farm transition plan.

165. Lillian M. Jacquard, *Preserving and Planning for the Principal Residence*, 51 R.I. B.J. 11, 12 (2003).

166. Reichertlegal, *Maryland Property Deed Attorney: Two Types of Maryland Life Estate Deeds*, L. OFF. STEPHEN J. REICHERT, LLC (Apr. 28, 2015), http://reichertlegal.com/maryland-property-deed-attorney-two-types-of-maryland-life-estate-deeds/.

167. *Id.*

168. *See* Jacquard, *supra* note 165.

169. *See id.*

170. *See id.*

171. *See, e.g.*, Roland v. Messersmith, 56 A.3d 806, 808 (Md. Ct. Spec. App. 2012).

172. *Life Estate Deeds*, ABRAHAM & BAUER, LLC, http://www.abraham-bauer.com/news/2015/09/01/life-estate-deeds/ (last visited June 21, 2018).

173. Reichertlegal, *supra* note 166.

174. *Life Estate Deeds*, SINCLAIRPROSSER L., LLC. (Apr. 5, 2012), https://www.sinclairprosser-law.com/life-estate-deeds/.

There are several benefits to using a life estate deed that retains some powers for the original owner. The avoidance of probate is a popular reason.[175] The farm owner could continue to farm and would still have the authority to mortgage the property, use the entire property as collateral for operating loans, sell the property, re-gift the property, etc. The deed must list each power the life tenant holds—a misprint could cause a road bump in the transition plan.[176] Therefore, if a farmer wants the farm estate to avoid probate, but hopes to retain all rights to the land while alive, the life estate deed should clearly list every right to transfer the property including the right to sell, lease, mortgage, or gift the property.[177] The farmer will still be able to transfer the property and will not have to notify any remaindermen of these adjustments unless notice is specifically required in the deed.[178] This provides farmers with the flexibility to adjust their transition plan without worrying about a costly or stalled farmland transfer after their death.[179]

Life estate deeds have some tax benefits as well. In some states, life estate deed transfers allow property taxes to remain capped even when the property is transferred to the remaindermen.[180] Also, when the remaindermen receive the real property at the death of a life tenant, that property receives a step-up in basis.[181] The step-up in basis is useful if the remaindermen decide to sell certain property after the life tenant's death because the income tax amount will be significantly lower.[182]

Life estate deeds have some benefits that are similar to TODD benefits. The deeds can protect the land from remaindermen's creditors.[183] In some states, a life estate can also protect an estate from Medicaid recovery, but in others, the estate may have to reimburse the state for Medicaid costs.[184] In some states, a life estate deed can protect the estate's assets from Medicaid penalties if it is executed five years before the application for Medicaid benefits is completed.[185] Life estate deeds also allow for timely land transfers and avoid the probate process. TODDs and life estate deed have mostly the same positive outcomes.

Life estate deeds also differ from TODDs. While both deeds avoid probate and have other similar benefits, the rights the beneficiaries of the property received

175. *E.g.*, 1-4 MICH. ESTATE PLANNING § 4.09 (2018); *see* MICH. COMP. LAWS ANN. §§ 556.111–32 (West 2018).

176. *See, e.g.*, Grimes v. Gouldmann, 157 A.3d 331, 332–35 (Md. Ct. Spec. App. 2017) (concluding that a life estate deed only granted the life tenant with the powers to "sell, mortgage, lease or otherwise encumber[,]" not the right to "gift" the property to another individual because there was no language in the life estate deed that allowed the life tenant to "gift" the property).

177. *Id.*

178. MASS. REAL ESTATE LAW SOURCEBOOK CITATOR § 4.18 (2015).

179. *See* 1-4 MICH. ESTATE PLANNING, *supra* note 175.

180. *Id.*; *e.g.*, MICH. COMP. LAWS ANN. § 211.27(a)(7)(d) (2018).

181. 26 U.S.C. §§ 1014, 2036(a) (2012); 1-4 MICH. ESTATE PLANNING, *supra* note 175.

182. 1-11 ELDER LAW IN MD. § 11.07 (2017); *see* 26 U.S.C. § 1014.

183. DIANNE REIS, TEXAS ESTATE PLANNING § 5:32 (James Publishing, 2017).

184. *See id.* at §10:80–83.

185. 1-4 MICH. ESTATE PLANNING, *supra* note 175 (most states follow the five-year requirement but the amount of time may vary by state).

upon the execution of the deed is a major difference. Life estate deeds may not include the power to revoke the deed, whereas with TODDs there is always the option to revoke the deed.[186] A life estate deed can specifically state that the remaindermen have rights of survivorship, unlike a TODD that does not include rights of survivorship.[187] Life estate deeds could provide more rights and flexibility.

A life estate deed also has negative implications if it is not used properly. A farmland transfer via a life estate deed may cost more in taxes. A life estate, if not used properly, will not include an income tax benefit if the house is sold.[188] If the remaindermen are not living in the property before the life tenant's death, they may not be able to claim the capital gains tax exemption if they decide to sell the property later on.[189] A life estate deed must be used carefully in order to prevent the estate from paying a large amount in taxes.

State laws may have specific requirements for a deed to be valid.[190] In some states, those requirements may be more stringent than others. A farm transition plan should consider the state law where the farm is located and that unique family's dynamics and business situation before deciding to choose this tool.

Overall, life estate deeds can provide similar and different benefits when compared with a TODD. The most significant benefit is the avoidance of probate. But this option can also save an estate money through tax savings and the avoidance of government recovery. In the farm transition plan toolbox, the life estate deed can be an extremely useful tool.

iii. Avoiding Probate through a Deed: An Underutilized Tool?

Deeds should be a primary tool for farm transition plans. The land is usually the largest part of farm estates;[191] a deed is an inexpensive and quick way to transfer the majority of a farm estate to the next generation of farmers. The next generation of farmers need the land to transfer quickly in order for the farm business to continue to succeed. Deeds are also a legal tool that can treat all beneficiaries equally, preventing some disputes among farm heirs. For some farm transition plans, a deed is the best tool for transferring real property.

Deeds instantly provide new farmers with clear title to the land. In contrast, land transferred via a will could end up stuck in the probate process for a year or more.[192] The next generation of farmers will not have clear title to the land until probate is complete.[193] The next generation may not be able to access enough capital without clear title to the land, and as a result may not be able to purchase the necessary supplies to support the farm operation's income sources.[194] With a deed,

186. *Beneficiary Deeds vs. Life Estate Deeds, What's the Difference?*, JAMES A. LITTLEPAGE L. OFF. (Mar. 30, 2013), https://www.denverestateplanningprobate.com/blog/2013/03/beneficiary-deeds-vs-life-estate-deeds-whats-the/.

187. *Id.*

188. *Life Estate Deeds*, *supra* note 172.

189. Jacquard, *supra* note 165.

190. Reichertlegal, *supra* note 166.

191. HARL, *supra* note 23.

192. *See* Payne, *supra* note 114.

193. *See id.*

194. *Id.*

title to the land clears quickly, allowing the new farmers to use the farm's largest asset to access more capital.

A deed can also help farmers treat all children and relatives fairly.[195] Farmers are usually concerned about treating the farm heirs equally in order to avoid family conflicts that could harm the farm business.[196] Deeds can distribute property equally among all the children.[197] Separate deeds can also be executed for different pieces of real property to provide each child with an asset, but at the same time ensuring an on-farm heir receives the appropriate amount of farm real estate to continue the farm operation.[198] For example, a farm with three farmhouses, two barns, and hundreds of acres with one on-farm heir and one off-farm heir could distribute these pieces of real property via deeds. The farmer could deed his off-farm heir all three farm homes. Then the farmer could deed the barns and the acreage to his on-farm heir. While the worth of each child's inheritance may not be exactly equal, the idea of each child receiving significant parts of the estate ensures a stronger family dynamic during the beginning stages for the new farmer.[199]

There are two other types of deeds used in farm succession planning: a gift deed and a deed for the sale of the property.[200] A gift deed grants the named beneficiaries the real property immediately once it is recorded.[201] The beneficiaries will automatically become the new owners, and the original owner will no longer have any rights to the property.[202] A deed for the sale of the property is similar, except the original owner will receive money for the real property listed on the deed.[203] A farmer could use the money from the sale for retirement.[204] These two deeds are quicker ways to transfer real property in comparison to a will.

There are a few downsides to selling or gifting farmland. The farmer will no longer have control of the farm. Even if the farm is sold to a relative, if the farmer hoped to continue working on the land there could potentially be family conflicts about how to run the farm. A gift of the entire farm operation could trigger state

195. Brody Swanson, *Allowing Farmers to "Take Back" What's Theirs: Adoption of the Revocable Life Estate Deed*, 21 DRAKE J. AGRIC. L. 409, 411 (2016).

196. *Id.*

197. *See, e.g.*, Kristine A. Tidgren, *When Tenants in Common Own the Farm*, IOWA ST. U. CTR. FOR AGRIC. L. & TAX'N (Apr. 29, 2016), https://www.calt.iastate.edu/article/when-tenants-common-own-farm.

198. Farm estate planning professionals frequently discuss examples of how to split inheritance fairly among off farm and on farm heirs in order to avoid the farmland being sold. This provides just one of many examples on how to split assets equally while still ensuring the on-farm heir will be able to keep the farm business assets. See Kynda Curtis, *Estate and Farm Transition Planning for Agricultural Producers*, U.C. DAVIS (2006), http://alfalfa.ucdavis.edu/+symposium/proceedings/2006/06-285.pdf.

199. *See* Swanson, *supra* note 195.

200. Paul Goeringer, *Property Ownership and Transferring Are Important Features of Your Farm Succession Plan*, U. MD. EXTENSION, AGRIC. L. EDUC. INITIATIVE (Feb. 2017), https://drum.lib.umd.edu/bitstream/handle/1903/19589/FS1056%20property%20ownership.pdf?sequence=1&isAllowed=y.

201. Melissa O'Rourke, *Evaluating Your Estate Plan: Estate Planning Terms*, IOWA ST. U. EXTENSION & OUTREACH (May 2014), https://www.extension.iastate.edu/agdm/wholefarm/pdf/c4-50.pdf.

202. *See* Goeringer, *supra* note 200.

203. *See id.*

204. *See id.*

and federal estate and inheritance taxes.[205] If a farmer sells the land income taxes could be costly.[206] Even though using a deed to transfer real property could cost a farmer some money, it could save the next generation of farmers' time and money.

B. Trusts

A trust is another tool that can be extremely useful for farm transitions. A trust is an instrument that transfers property from the owner to a trustee.[207] A trustee then holds this property for the benefit of others and distributes the property to the listed beneficiaries based on the instructions given by the creator of the trust.[208] A trust is like a barn, but instead of storing all the farm's physical equipment, it stores the legal titles to all the property the owner places in the trust. Trusts allow the original owner to list out details on when and where the property in the trust should be distributed.[209] The levels of control within a trust could benefit a farm transition plan through careful and flexible options to ensure the farm operation continues to thrive throughout the transition.

There are four parts to a trust: (1) trustee; (2) trust property; (3) named beneficiaries; and (4) specific instructions about distributing the trust property.[210] A farm couple could name one spouse as a trustee and list the other as the successor trustee.[211] The couple could also list the child who will take over the farm one day as a successor trustee.[212] The trust property could include the land, farm equipment, cash, or shares of a business entity.[213] Titled property must be retitled to be owned by the trust.[214] Trusts can include the specific instructions, such as providing a purchase agreement or buy-out option for one heir.[215] These four parts allow farmers to plan for all different scenarios that might arise during a farm transition.

There are two different types of trusts: living trusts and testamentary trusts.[216] Testamentary trusts are established in a will and do not avoid probate.[217] Therefore, the focus here will be on living trusts and how they are useful tools that avoid probate. There are both revocable and irrevocable living trusts.[218] A farmer has options and can be flexible with living trusts, all while avoiding the probate process.[219]

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205. *See id.*
206. *See id.*
207. *See* Gary A. Hachfeld et al., *Trusts: Definitions, Types & Taxation*, U. MINN. EXTENSION (2017), https://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/estate-planning-series4-trusts-definitons-types-and-taxation.pdf.
208. *See id.*
209. *Id.*
210. *Id.*
211. *See id.*
212. *See id.*
213. Hachfeld et al., *supra* note 207.
214. *Id.*
215. *Id.*
216. *Id.*
217. *Farm Transitions*, *supra* note 7, at 4-25.
218. *Id.*
219. Hachfeld et al., *supra* note 207, at 1–2.

A significant benefit of a living trust is the avoidance of probate.[220] A living trust with specific and clear instructions can ensure a quicker transfer of ownership compared to a will.[221] The rapid ownership transitions created by a living trust helps ensure the farm's viability remains strong.[222] A living trust is also an appealing option for farmers because the farm's assets will remain private, and unlike with a will, they will not be exposed to the public.[223] If land is transferred via a will and a farmer owns land in multiple states, the probate process requires that the land is probated in the state where it is located.[224] This would require a farm estate to pay probate costs in multiple states, whereas with a living trust the property is distributed in the state of the deceased's residence or according to their trust.[225] For a farmer who wants the farm transition to the next generation to be private, inexpensive, and quick, a living trust is a tool that constructs this plan.

Living trusts provide choices that farm operations require when developing and implementing a transition plan. For example, a farmer can name a family member as the successor trustee or if there is a concern about family conflict as the farm transitions, a neutral third party could be named as trustee.[226] If at any point the trust creators want to modify or completely revoke a revocable living trust, they have the ability to do so.[227] The farmer can decide when property will leave the living trust and who will receive it.[228] The farmer can even include specific conditions that must occur before the beneficiary can receive the property.[229] The farmer could state that an heir be given a small percentage of the farm business shares, and then, upon five years if the heir has managed the farm in accordance with the instructions in the trust, the trustee may grant him a majority or the remainder of the business entity shares. These options allow a farmer to develop a plan that ensures the next generation will be able to run a successful farm operation and prevents family conflict or a struggling new farmer from collapsing the farm.

Beyond the avoidance of probate, the slow transfer of the farm business via a living trust is a major benefit to a farm transition plan. A carefully written revocable living trust can provide a level of control while the farm heir begins to take over the farm business.

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220. Ferrell & Jones, *supra* note 11, at 4; *see* Hachfeld et al., *supra* note 118 (explaining the difficulties posed by probate).

221. Ferrell & Jones, *supra* note 11, at 4.

222. *Id.*

223. *Id.*

224. Gary A. Hachfeld et al., *Revocable Living Trusts*, U. MINN. EXTENSION (2017), https://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/estate-planning-series5-revocable-living-trusts.pdf.

225. *Id.*

226. *See* Hachfeld et al., *supra* note 207.

227. *See, e.g.*, MD. CODE ANN. ESTATES & TRUSTS § 14.5-602 (West 2018); *Farm Transitions*, *supra* note 7, at 4-25.

228. Lynch et al., *supra* note 9, at 8.

229. *Farm Transitions*, *supra* note 7, at 4-29.

> Purchase agreements or buy-out provisions can be written into the [revocable living trust], which allow the farming heir the right to purchase machinery, breeding livestock or other assets over a period of years. [It can] also give the farming heir the right to rent the land for a number of years at a given amount of rent. In addition, the farming heir might have the right (option) to purchase the farm from the other heirs over a pre-determined time and at specified terms. A protection provision in [a revocable living trust] can prevent the farming heir from having to buy-out the non-farming heirs with a lump sum purchase, which may not be financially possible.[230]

A living trust can be flexible and fair for a farm family hoping to both avoid conflict and grow the farm business. A living trust is also useful because it is very difficult to contest in comparison to a will.[231] A living trust is a contractual legal tool, whereas a will has several stages, each of which could be contested.[232] A living trust has very few requirements to be authenticated.[233] Therefore, for a farm family worried about potential conflicts, a living trust is a strong option to avoid future litigation that will tie up the farm's assets for a year or more.

Living trusts also protect farm assets from liabilities.[234] The assets will be protected from lawsuits and other creditors if the living trust is set up to provide this protection.[235] After the owner's death, the assets can still be protected from an heir's actions, including divorce and other liabilities.[236] A will usually does not create this protection after the owner is deceased.[237] Living trusts are a valuable tool for preventing others from seizing the farm assets.

Living trusts can also preserve farm assets for minors that might one day take over the farm.[238] Farming is one of the most dangerous occupations, with a high rate of workplace deaths compared to other occupations.[239] Farmers should consider establishing a living trust in case an accidental death occurs while the next generation is still minors. The living trust can continue to manage the farm assets until the child is of age and able to help run the farm operation.[240]

There are a few concerns with living trusts that should be noted. Living trusts do not always save the farm operation money. In some states, irrevocable trust assets are not exempt from Medicaid recovery, regardless of when they were created.[241] Living trusts can be expensive. An attorney will have to create the living

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230. Hachfeld et al., *supra* note 224.
231. Ferrell & Jones, *supra* note 11, at 4.
232. *Id.*
233. *See id.*
234. Hachfeld et al., *supra* note 207.
235. *See id.*
236. Hachfeld et al., *supra* note 224.
237. Gary A. Hachfeld et al., *Distribution of Estate Assets*, UNIV. OF MINN. EXTENSION (2017), https://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/estate-planning-series2-distribution-of-estate-assets.pdf.
238. Hachfeld et al., *supra* note 207.
239. Daniel Walmer, *Farming, Construction Ran Among Most Dangerous Jobs*, AGWEB (July 16, 2016), https://www.agweb.com/article/farming-construction-rank-among-most-dangerous-jobs--naa-associated-press/.
240. Hachfeld et al., *supra* note 207.
241. *Id.*

trust.[242] Then, the farmer and the next generation of farmers will have to pay fees for the management of the living trust.[243] The living trust may need to be modified to accommodate for changes in the farm transition plan, costing even more in legal fees.[244] Each farm should determine whether or not the costs of using a living trust would be a benefit or a hardship.

Living trusts may not provide the type of flexibility a farm business needs to thrive. After the death of the original owner, the revocable living trust's flexibility disappears.[245] The trustee is required to follow the deceased's instructions.[246] If a change in the farm operation requires modification, the trustee cannot modify the trust.[247] This could be detrimental to a farm business. Also, the legal title to the land is now owned by the trust, not the farmer. The trustee may be required to approve every action taken in regards to the land, which could cause time management issues.[248] A living trust's flexibility may not bend in the direction that benefits a specific farm.

Living trusts require action. The owner must place the asset in the living trust in order for it to be transferred to the next generation through the trust's instructions.[249] If the farmer is too busy to place new assets into the living trust, the property will pass intestate and will not avoid the probate process.[250] Living trusts may be too difficult for a farmer to manage and could be detrimental to a transition plan if they do not include certain parts of the farm operation.

A living trust can save a farm operation time and money when compared to the process of writing and probating a will. For farms with land in multiple states, a living trust is a simple solution that transfers the farm's property altogether.[251] A living trust can also be used in combination with other transition tools to create a plan that ensures a smooth transition and avoids the probate process.[252] This tool should be kept at the top of the toolbox.

B. Business Entities

The creation of business entities that hold farm assets is another way to construct a transition plan. The creation of a farm business entity may allow for a smoother transition and more direct participation from the next generation.[253] There are multiple types of business entities that can be created, depending on each

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242. Ferrell & Jones, *supra* note 11, at Section II.B.
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Farm Transitions*, *supra* note 7, at 4-31.
249. Hachfeld et al., *supra* note 224.
250. *See id.*
251. *See generally* UNIF. TRUST CODE (UNIF. LAW COMM'N 2000).
252. *Farm Transitions, supra* note 7, at 4-28.
253. Ferrell & Jones, *supra* note 11, at Section IV.

state's laws. This section will briefly discuss these entities in general and how they can ensure an efficient farm transition.

Some business entities can help transition the farm while others cannot. A sole proprietorship is a business with a single owner and operator, and cannot be used as a farm transition or estate planning tool.[254] This type of business ceases to exist at the death of the owner.[255] Other entities, if used correctly, can be strong transition tools. For example, corporations and LLCs that are correctly established can continue to operate forever.[256] An entity's flexibility can allow for a quick transfer of ownership interests in the business.[257] Partnerships can also continue to exist in the future but require more careful transfers and construction.[258] These three tools can further a fair, quick, and inexpensive farm transition if they are properly constructed.[259]

There are several ways a business entity can assist with a farm transition plan. An entity could be created to help transfer the farm to the next generation.[260] The farm entity might already exist, and ownership interests in the entity need to be transferred. A business entity's shares can be sold, gifted, or transferred via another transition planning tool to the next generation.[261] A farmer might finally be ready to transfer a majority interest in the company to the next generation of farmers, but there are also other options for transferring the farm operation if a farmer is not ready to completely give up control.[262] Through ownership in the farm business entity, a farmer could even remain in control of the majority shares with the child who will eventually take over the farm, while off-farm heirs still have earned some income from their minority shares.[263]

The rapid transfer process is another benefit of using a business entity to transfer the farm business. All that is required is a transferring of shares.[264] If the real property is already owned by the business, the title to the land will not have to be obtained by the next generation and the title does not have to be cleared in probate.[265] Business entities are popular transition tools because property can be quickly transferred to the next generation by conveying shares in the business.[266]

This transition tool is relatively inexpensive. The filing costs to create the entity depend on the state, but usually, these costs are fairly cheap. For example, in Maryland, where business filing fees cost from approximately $100 to $170, it is

254. *Farm Transitions*, *supra* note 7, at 3-16.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *See id.*

260. *See* Kelvin Leibold, *Evaluating Your Estate Plan: Business Entities*, IOWA ST. U. EXTENSION & OUTREACH 2 (Mar. 2014), https://www.extension.iastate.edu/agdm/wholefarm/pdf/c4-52.pdf.

261. Gary A. Hachfeld et al., *Farm Business Transfer Strategies*, U. MINN. EXTENSION (Aug. 2017), https://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/trans-series2-farm-business-transfer-strategies.pdf.

262. *See* Leibold, *supra* note 260, at 3–4.

263. *Id.*

264. *Id.*

265. *See* Ferrell & Jones, *supra* note 11, at Section V.

266. *Id*.

most likely cheaper to transfer assets via a business entity than to pay for probating a will.[267] In Iowa, costs to create an entity range from approximately $50 to $100.[268] If the entity is already created, taxes are the main concern if the farmer plans to sell shares of the entity.[269] If the farmer sells a small number of shares of the business to his children each year, this could also help reduce the farmer's income tax liability.[270] If the correct type of entity is tailored to the farm operation's unique situation, money can be saved by using this tool to transition the farm operation.

There are also other benefits that can come from creating certain business entities. Some entities limit individual's liability if someone is harmed on the property or other debts arise.[271] Using an entity that limits the next generation's liabilities can also help protect the farm from some creditors.[272]

Farm operations can also place farm assets in multiple business entities to assist with the transition process. Legal entities can receive federal farm program payments, and if set up properly, the use of multiple entities could maximize the farm's federal payments.[273] A child could create an entity that rents the farmland from the parent's entity.[274] Business entities allow for a strong level of protection as the next generation learns about taking over the family business.

There might be a few extra costs if farms use these transition tools. If the farmer decides to sell some of the entity's shares to the next generation, there will probably be income tax costs on the gain earned from those shares.[275] In some states, there are also annual reporting requirements for certain business entities that can cost anywhere from ten to hundreds of dollars and can create extra work for farm family members.[276] There are also certain entities where individual's liability is not protected by the business leaving farmers vulnerable to future legal actions and creditors.[277] Farmers and legal and financial professionals should consider what entity and transfer options might be the most cost-effective option for their farm operation.

267. *Fee Schedule*, MD. BUS. EXPRESS, https://egov.maryland.gov/BusinessExpress/Payment/FeesSchedule (last visited Mar. 23, 2018); *see supra* Section III.A.i*.*

268. *Business Entity Forms and Fees*, IOWA SEC'Y ST., https://sos.iowa.gov/business/formsandfees.html#DLLC489 (last visited June 21, 2018).

269. Gary A. Hachfeld et al*., Utilizing Partnerships & Corporations to Transfer Farm Assets*, U. MINN. EXTENSION (Aug. 2017), https://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/trans-series3-utilizing-partnerships-corporations-to-transfer-farmassets.pdf.

270. *Id.*

271. *See* Leibold, *supra* note 260, at 6.

272. *See id*. at 2–4.

273. *See* RANDY SCHNEPF, CONG. RESEARCH SERV., R44656, USDA'S ACTIVELY ENGAGED IN FARMING (AEF) REQUIREMENT 7–11 (2016).

274. *See Farm Transitions*, *supra* note 7, at 3-18.

275. *See* Robert W. Wood, *Selling Your Business? Taxes are Key*, FORBES: TAXES (July 22, 2011), https://www.forbes.com/sites/robertwood/2011/07/22/selling-your-business-taxes-are-key/#7d35e6a5984e.

276. *See* Nellie Akalp, *How Much It Costs to Incorporate a Business in all 50 States*, SECRET ENTOURAGE, https://www.secretentourage.com/entrepreneur/how-much-it-costs-to-incorporate-a-business-in-all-50-states/ (last visited June 21, 2018) (noting some states do not have annual reporting fees).

277. *See Farm Transitions*, *supra* note 7, § 3.5.2, at 3-13 to -14.

A Family conflict could also destroy certain business entities and the farm operations overall.[278] Problems could arise if the business entity's structure does not provide the main operators with an adequate level of control.[279] Off-farm heirs might be able to take over the farm business and have a direct say in the business operation.[280] If family members disagree about the farm's goals and business actions, the entity could even be dissolved.[281] Careful construction of the entity is required to avoid potential destruction of the entity and the farm.[282]

Another negative to transferring farm business entities is the amount of time it could take to completely transfer the business.[283] The farmer may struggle to hand over a majority or all of the shares in the business. The farmer may not financially be able to hand over ownership in the business until much later in life. If a sudden death occurs and no backup plan is in place, the entity could be completely dissolved.[284] If some of the entity's shares have not been transferred prior to the farmer's death, they will have to be transferred via another instrument, such as a trust, in order to avoid probate.[285] If the shares were transferred in a will, it could take a long time for the remaining shares to be transferred.[286] Unfortunately, in some situations, a business entity cannot further a timely transfer.[287]

There are other issues that could arise during the transition process if the business entity is not carefully transferred to the next generation.[288] A farm transition plan should note how different entities are taxed. Some entities have stronger income tax benefits.[289] Also, if the farm operation uses multiple business entities to hold its property, how the entities are set up and which family members own part of the entity could impact whether or not the entity will receive federal farm program payments under the "actively engaged in farming" definition.[290] These are two factors that must also be considered when creating and using business entities to transfer the farm operation.

C. Other Tools in the Toolbox

There are other tools that can help build a strong farm transition plan. This section will look at several of these tools, including titling the land as joint tenants, gifting or selling farm assets, using a contract to transfer certain assets, life insurance policies, and retirement plans. There are other tools beyond this that can be

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278. *See id.* § 3.5.5, at 3-16.
279. *See id.* § 3.5.4, at 3-15 to -16.
280. *See id.*
281. *See id.* §3.5.5, at 3-16.
282. *See id.*
283. Hachfeld et al., *supra* note 261, at 1.
284. *See Farm Transitions*, *supra* note 7, §3.5.5, at 16.
285. *Id.* §4.5.1, at 4-24.
286. *See id.* §4.4.2, at 4-16 to -17.
287. *See id.*
288. *See generally* Leibold, *supra* note 260.
289. *See id.* at 1.
290. *Actively Engaged in Farming*, U.S. DEP'T AGRIC.: FARM SERV. AGENCY, https://www.fsa.usda.gov/programs-and-services/payment-eligibility/actively_engaged/index (last visited June 21, 2018).

used in a farm transition plan, but these tools specifically assist with the avoidance of probate and therefore, will be the focus of this section.

i. Joint Tenancy

Joint tenancy is another tool that avoids probate and creates a quick and inexpensive transfer of real property.[291] Joint tenancy is the ownership of real property between two or more individuals that passes to all co-owners upon the death of a co-owner.[292] Joint tenancy redistributes a deceased co-owner's share in the property among the other joint tenants.[293] For example, a brother and sister run the family farm business; the siblings own the farmland, barns, and house as "joint tenants." The brother dies before the sister, and the sister automatically receives full ownership of the farm's real property. The brother's spouse or children do not receive an ownership interest in the property. All of this property was transferred in an efficient manner that allowed the sister to continue farming the land.

There are a few concerns with owning farm real estate as joint tenants. Joint tenants can opt to sell their percentage of the ownership in the property, which would not only destroy the joint tenancy, but would also leave the remaining joint tenants with a new co-owner.[294] The next generation could also be unintentionally removed from farm ownership.[295] For example, if a husband and wife were joint tenants, and the wife passes away leaving sole ownership of the farm real estate to the husband, the husband could retitle the land with a new co-owner.[296] If the farmer remarries and retitles the land as a joint tenancy with the new spouse, a child from the first marriage that hopes to take over the farm may not inherit any of the farm's real estate.[297]

ii. Downsizing: Gifting or Selling to the Next Generation of Farmers

The farm transition plan could include the sale or gift of some, or all, of the farm's assets. A gift or sale of farm assets are two additional ways to transfer property outside of probate.[298] Then, through the sale or gift of the property, the next generation will have the authority to use, lease, trade, or use the assets as collateral.[299]

Selling farm property can be a flexible and invaluable option for farm transitions. The younger generation may not have the financial resources to purchase all

291. *Farm Transitions*, *supra* note 7, § 4.3.1, at 4-12.

292. *E.g.*, IND. CODE ANN. § 23-14-40-5 (West 2018); *Farm Transitions*, *supra* note 7, § 4.3.1, at 4-12.

293. *Farm Transitions*, *supra* note 7, § 4.3.1, at 4-12.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. William Edwards & Don Hofstrand, *Transferring Ownership of Farm Machinery*, IOWA ST. U. EXTENSION & OUTREACH 1 (Aug. 2013), https://www.extension.iastate.edu/agdm/crops/pdf/a3-32.pdf.

299. *Id.*

of the farm's assets. The next generation may, however, be able to purchase certain items to further the fair treatment of other heirs.[300] A farm succession plan could list out the assets that could be sold each year to the next generation.[301] This would provide a chance for the next generation to earn the financial resources to purchase the piece of property and might prevent higher income tax rates for the farmer.[302]

There could be some costs to the farmer if he decides to sell his assets to the next generation. If the assets that are sold during a tax year are worth a significant amount the farmer may be bumped up into a higher tax bracket and will then pay a higher percentage of income tax.[303] The farmer will have to pay income tax on the property's capital gain.[304] A farmer should calculate these taxes into the costs of transitioning the farm.

A farm operation could benefit from a parent gifting the farm assets outright to the next generation. The farmer would give up all ownership interest in the property before his or her death.[305] The next generation would already have access to the property when the farmer dies.[306] A gift of farm property is another option to help save time and money.[307]

Farmers are often wary about gifting property to their children. First, on-farm heirs may need certain pieces of property for the farm operation to continue and gifting these assets to only on-farm heirs could leave them with a significantly larger amount of assets.[308] The unequal treatment of heirs could lead to family conflicts.[309] A farmer may not be ready to give up control of the farm operation. The farmer should also carefully consider personal finances and decide whether the asset is still necessary to pay for retirement costs.[310] Once the property is gifted the farmer may not be able to become the owner of it once again without paying a large amount for the property. Therefore, careful consideration is required.

Gifting a piece of farm property could also trigger taxes and other costs.[311] One concern is if a farmer gifts an asset that is still being paid off.[312] If the loan amount exceeds the adjusted basis of the property at the time it was gifted, income taxes will have to be paid on the difference between the debt amount and the adjusted

300. *See generally id.*

301. *Id.* at 4.

302. *See id.*

303. *See id.* at 1–2.

304. Edwards & Hofstrand*, supra* note 298, at 2.

305. *See generally* William Edwards & Don Hofstrand, *Transferring Business Ownership*, IOWA ST. U. EXTENSION & OUTREACH (Sept. 2016), https://www.extension.iastate.edu/agdm/wholefarm/pdf/c4-80.pdf.

306. *See id.* at 4.

307. *See id.* at 2.

308. *See id.* at 1.

309. *See id.*

310. *See* Gary A. Hachfeld et al., *Gifting Assets*, U. MINN. EXTENSION 1 (Aug. 2017), https://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/estate-planning-series6-gifting-assets.pdf.

311. *Id.*

312. Gary A. Hachfeld et al., *Transferring Machinery and Livestock*, U. MINN. EXTENSION 1 (Aug. 2016), https://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/trans-series4-transferring-machinery-and-livestock.pdf (adjusted basis is the difference between what was paid for that property and its worth at the time it is gifted or sold).

basis.[313] Gifts of property can also fall under Medicaid eligibility and estate recovery rules.[314] A gift to a child could cost a significant amount depending on the farmer's financial situation.

Even so, a gift is one way to ensure the next generation of farmers can quickly access farm property. However, the gift should be clearly documented with both parties' signatures and the date to prevent any contentions that the property should still be part of the farmer's estate.[315] The farm business can then immediately utilize the property and will not have to worry about it being tied up in litigation or probate.[316]

iii. Contracts

A contract for the sale, transfer, or lease of farm property is another way to ensure that there is little to no dispute or a lengthy probate process for the next generation. There are several types of contracts that can be used in farm transition plans including contracts for deeds, transfer on death contracts, and leases.

Contracts for deeds are another method of transfer that can prevent the farmland from going through probate.[317] The contract for a deed will put the farmer in the position of the next generation's lender.[318] The payments made toward the loan are included in the farmer's taxable income over a number of years, making the annual tax burden smaller than an outright sale of the property.[319] The contract for deed also allows the next generation to purchase the farmland outright for a more affordable price.[320] It provides a farmer with an annual income to pay for living expenses.[321] If the land is not paid off by the parent's death, the contract will still be honored and the heirs will continue to receive the payments.[322] While the concerns for this method of transfer are the same as the above mentioned issues with selling assets,[323] it could still be a useful method for transitioning the farm to the next generation.

Another way to ensure other specific assets avoid the probate process is through a contract for the transfer of ownership based on a specific event, such as the death of the current owner.[324] Some states allow the transfer of property such

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313. *Id.*
314. Hachfeld et al., *supra* note 310, at 3.
315. *Id.* at 2.
316. *Id.* at 1.
317. Gary A. Hachfeld et al., *Should You Sell Your Real Estate?*, U. MINN. EXTENSION 2 (Aug. 2017), https://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/trans-series5-should-you-sell-your-real-estate.pdf.
318. *Id.*
319. *Id.*
320. *Id.*
321. *See* Hofstrand & Edwards, *supra* note 305, at 2.
322. Hachfeld et al., *supra* note 310, at 2.
323. *See supra* Section III.A.iii.
324. Hachfeld et al., *supra* note 118, at 2.

as checking and savings accounts, certificates of deposit (CDs), investment accounts, cars, boats, and other pieces of specific property, through a contract.[325] These documents are usually called a Payable on Death account or a Transferable on Death account, certificate, or contract.[326] The property is usually transferred immediately upon the death of the owner.[327]

A lease is another option that farmers have increasingly used as part of a retirement and succession plan.[328] A lease allows the next generation to learn about the farm operation while the farmer still has some control of the property.[329] A lease could also be combined with an option to purchase the property or could include the gradual sale of the property.[330] The next generation could have an option to buy the property when financially able to, and the farmer would still have a source of income from the lease for a period of time.[331]

One concern with a lease for farm machinery is that the income will fall under self-employment tax.[332] If a lease has both machinery and land it will avoid self-employment tax.[333] Professional advice could help reduce the income tax burdens of leases.

iv. Life Insurance

Life insurance also is a necessary tool for farm transitions. There are different types of life insurance that could be purchased depending on the age and financial stability of the farmer.[334] This tool could provide heirs with monetary proceeds without having to worry about the probate process.[335] If a farmer is correctly advised on a life insurance policy purchase, the proceeds of the life insurance should go directly to the beneficiaries when the farmer passes away.[336] Life insurance policies are an essential tool for the younger generation that is working on building the farm business after the original operator's death.

Life insurance also can benefit the next generation of farmers beyond the avoidance of probate. For example, life insurance proceeds can help pay the deceased's medical expenses, estate taxes, and other debts.[337] The farm assets that need to be paid off are usually a necessary part of the farm operation.[338] Life insurance could provide the financial liquidity that farm businesses do not always have

325. *Id.*

326. *Id.*

327. *See* David M. Holliday, Annotation, *Payable-on-Death Savings Account or Certificate of Deposit as Will*, 50 A.L.R.4th 272 § 2(a) (1986).

328. Neil D. Hamilton, *The Role of Land Tenure in the Future of American Agriculture* 3–4 (2017), http://landforgood.org/wp-content/uploads/The-Role-of-Land-Tenure-by-Neil-Hamilton.pdf.

329. *Leasing's Role in a Farm Succession Plan*, CAP. FARM CREDIT (June 22, 2016), https://www.capitalfarmcredit.com/news/agdirect-leasing-succession.

330. Edwards & Hofstrand, *supra* note 298, at 5–6.

331. *Id.*

332. Hachfeld et al., *supra* note 312.

333. *Id.* at 2.

334. *Farm Transitions*, *supra* note 7, § 4.6.1, at 4-31.

335. *See* 1-9 STEIN ON PROBATE § 9.01 (2017).

336. *See id.*

337. *Farm Transitions*, *supra* note 7, § 4.6.2, at 4-32 to -33.

338. *Id.* § 4.6.2, at 4-32.

access to, so the farm assets can be paid off instead of being sold to settle the estate's debts.[339]

Life insurance can also help treat all heirs fairly. As previously mentioned, conflicts can often arise between on-farm and off-farm heirs.[340] A farmer can list the off-farm heirs as the beneficiaries of the life insurance proceeds to help even out what each child will receive if they are leaving the essential farm assets to on-farm heirs.[341] On-farm heirs could also purchase life insurance policies on their parents that will provide the necessary income to buy-out off-farm heirs once their parents are deceased.[342] Life insurance proceeds can help avoid a family conflict that causes the farm to be sold to a random third party.

v. Retirement Plans

Farmers and farm couples can also utilize retirement plans as a way to provide the surviving spouse or children with some immediate finances after the farmer is deceased. There are a number of retirement plan options that do not pass through probate.[343] Instead, retirement plan funds are transferred directly to named beneficiaries upon the death of the farmer.[344] Retirement plans can also provide retired farmers with income that allows them to gift or sell some of the farm property to the next generation while they are still alive.[345]

In sum, there are a number of farm transition tools that a farm family can use to create a strong transition plan. Some tools may be more useful to certain farm operations than others. Each tool's positive and negative consequences must be carefully considered before choosing which ones should assist with building the farm transition plan.

V. CONCLUSION

A farm in Delaware's messy history muddied one of the owner's rights to the farm.[346] Prior to the on-going litigation, a farm couple decided to divorce.[347] However, after their divorce, they continued to live together and decided to purchase and run a farm operation together.[348] The husband "had a marked aversion to law-

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339. *Id.*

340. *See supra* Section IV.C.ii.

341. *Farm Transitions*, *supra* note 7, § 4.6.2, at 4-33.

342. Gary A. Hachfeld et al., *Life Insurance and Estate Planning*, U. MINN. EXTENSION 1 (Aug. 2017), https://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/estate-planning-series8-life-insurance-and-estate-planning.pdf.

343. Collins, *supra* note 75.

344. *Id.*

345. *See* Eggers, *supra* note 8.

346. Eaton v. Larrimore, No. 3484-MG, 2009 WL 1395414 (Del. Ch. 2009).

347. *Id.* at *1.

348. *Id.*

yers[]" and decided to instead seek the "professional" skills of a used-car salesman.[349] The used-car salesman drafted a "partnership agreement" for the farm operation.[350] Upon the death of the husband, the poorly drafted document was tied up in litigation for years.[351] The lack of clarity and poor advice caused several problems for the surviving farmer and the farm operation.[352]

Comprehensive legal and financial advice is crucial for the development of a successful farm transition plan. However, farmers may be hesitant to seek professional advice from an attorney or to pay an attorney for the creation of one of the farm transition tools.[353] Professionals must develop an understanding of not only the uniqueness of farms but farmers as well. Legal professionals can also make mistakes that are just as detrimental as the used-car salesman if they do not learn how to communicate the importance of certain estate, succession, and retirement planning tools.

Without a strong transition plan, farm businesses usually fail for three reasons: an unprepared next generation of farmers, a lack of access to capital, and an insufficient estate plan.[354] A will does not prepare the next generation—it only transfers farm assets after the farmer's death. The farmer must prepare the next generation through proper training, family communication, and the use of certain legal tools. A will can also cause problems for new farmers who need timely access to capital; other transition planning tools provide the next generation with quicker access to capital. A will is not the best estate planning tool for every farm. Farm family dynamics may require an estate planning tool that is difficult to contest, or a cheaper estate planning tool may benefit the farm's financial situation. Farmers and legal professionals that use wills as a default without considering the other legal tools for farm transition are not carefully crafting a farm transition.

One hammer cannot build a barn—other tools are necessary to fuse the structure together. Here too, a will alone cannot build a strong farm transition plan. Legal professionals cannot default to a will when it comes to farm transition plans. While some professionals see a will as an easy option for transferring assets to the next generation, it may not be the best choice for farm operations. Every farm family and farm operation has a distinct set of assets and goals. Legal and financial professionals must consider what tools can achieve these goals and preserve farm assets for generations. There are a variety of tools that can mold together a farm's transition plan.

349. *Id.* (the court described the used-car salesman as someone "who practices law without benefit of a license or legal training[.]").

350. *Id.*

351. *Id.*

352. *Eaton*, 2009 WL 13954114, at *1.

353. *See, e.g.*, *id.*

354. *See Farm Transitions*, *supra* note 7, at i-4. s