ESTATE PLANNING, BUSINESS CONTINUATION, TRANSITION AND SUCCESSION FOR FARMERS

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I. INTRODUCTION

A Farming Precursor

What is a Family-Farm? Above all, family farming carries with it a commitment to certain values, entirely independent of the pettiness of economics. Family farming may be a business. However, it is not just a business; it is a way of life as well.[1]

When evaluating the farm, learning about the farm operations and the land will prove useful. Typical types of farming operations include: crop, vegetable (potato, onion, muck farming), livestock (cattle, poultry, hog, aquatic), and dairy farming, which is the most prevalent in Wisconsin.[2] Most likely the farmer will consider the equipment part of the operation. With regard to the land, it may be important to learn what portion of the land is necessary to sustain the farm operations versus non-essential land. Based on the goals gathered at the outset of the engagement, the farm operations and the land may need independent, but coordinated planning to maximize goals which at times may be conflicting. Failure to consider this may ultimately

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[1] Doris P. Slesinger & Julie Whitaker, *A Portrait of Family Farmers in Wisconsin*, CDE Working Paper #98-30, at 35 (1988), http://www.ssc.wisc.edu/cde/cdewp/98-30.pdf (quoting Marty Strange, a staunch advocate for farming as a way of life).

[2] According to the most recent U.S. Census, out of all agricultural commodity groups in Wisconsin, milk from cows has the largest market share by value. https://www.agcensus.usda.gov/Publications/2012/Online_Resources/Rankings_of_Market_Value/Wisconsin/ (last visited June 26, 2017). Wisconsin is the second highest producer of milk in the United States behind California. https://www.nass.usda.gov/Statistics_by_State/Wisconsin/Publications/Annual_Statistical_Bulletin/2016AgStats_web.pdf (last visited June 26, 2017).

defeat the clients' goals of continuing the farm as a viable farm business.

For those clients that have a child interested in continuing the farm operation, they may be reluctant to give up management and control. They may be concerned with whether (and how) the child will be able to purchase the farm assets, the child's spouse, and the other non-farm heirs who have moved off the farm and pursued other professions.

When a farm family has an on-farm heir successor, they most likely will like the idea of creating a plan that articulates and defines a path for the on-farm heir to purchase the farm "operations" overtime, and the farm "land" if possible. Other goals may include: creating a plan for retirement to ensure steady income during life and adequate income/retirement for spouse in the event of death; making provisions for disability and/or incapacity that enable the on-farm heir to continue managing the farm during disability/incapacity and death; minimizing administration and taxes; avoiding probate; and passing a legacy to their children. Above all, the farm family desires to treat children equitably so that the on-farm heir can continue making a living as a farmer and all off-farm children inherit upon the sale of the farm. The term equitably should not be confused with the term "equal."

When no children want to farm, but the farm parents would like the farm to serve as an ongoing income source for children, the farm parents may want to plan so that the farm continues during their incapacity and for the life of their children. In such situations, the farm family goals are essentially the same as above, with a few caveats. The plan will need to ensure that the income from the farm operation pays for the farm and provides adequate income to the children sufficient to stave off a sale. Further, the plan will have to provide solutions for management, and solutions for disposition of farm if it becomes too much to manage.

Regardless of whether the farm owner has an on-farm heir -- life, health, long-term care and disability insurance are important aspects of a farmer's estate plan. It is also crucial that farmers have made arrangements regarding the operation and management of the farm during a period of incapacity. In addition to Health Care Powers of Attorney, every farm family should have a clear management plan for their finances and farm operation to ensure the continuation of the farm. The attorney should create customized documents that coordinate the farm business with the farmer's estate plan.

At the bare minimum, all farm owners should have a durable financial power of attorney (for personal and business finances) and a power of attorney for health care. This is to avoid court imposed guardianship and potential limitations on the ability of the family to operate the farm without court restrictions. Creating a funded revocable living trust based plan — that is ***fully funded***[3] — is also ideal to avoid probate, provide expanded directions upon incapacity, as well as coordinate the farm operation's business planning with the farm family's estate planning goals.

Deceivingly, the tabula rasa farmer (blank slate – untouched by the hands of a lawyer) is the most difficult client for attorneys because the entire structure from business entity organization to estate planning must be created and coordinated. It is too much to cover in one sitting, for sure, and often, too much to cover over several sittings. In my practice, we divide and conquer, then coordinate. Initially, based on our conversations, I determine whether the estate planning aspects of the plan or the business aspects of the plan should be handled first, which is based on how the clients prioritize their needs and concerns. Essentially, what decisions can they make now, and what decisions have kept them from planning over the past three to four decades? Starting the planning process on the right foot dictates the entire engagement.

II. BUSINESS STRUCTURE CHOICE AND CONVERSION

In my farm continuation planning process, if there are on-farm and off-farm heirs, I separate the farm business planning from the estate planning. Depending on the type of operation, size of the operation, and their goals (living and death), the clients may also be served in separating the farm operations from the farmland. When discussing and planning for the farm business, entity selection is key. Below, this outline discusses the various entities, each entity's formalities, management structure, liability protection, taxation, and application in farm planning.

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[3] The only method to absolutely ensure that probate is avoided in Wisconsin, and most other states, is to ensure that all titled-controlled assets are retitled into the name of the trust, and all non-qualified beneficiary designated assets have the trust as the beneficiary.

A. Entity Choice

Farmers have traditionally operated farms as sole proprietors or general partnerships. Although formal business entities may feel like an additional burden, the use of Corporations or Limited Liability Companies ("LLCs") may provide substantial benefits to modern farm operations.[4] Advantages of limited liability entities include: (a) limited personal financial liability of the owner to assets held by the entity; (b) ongoing entity continues at the death of the farm owners;[5] (c) retirement planning opportunity; (d) facilitates gifts of ownership to children; (e) farm owners can retain control over all farming operations even after gifts are made; and (f) potential discounting of farm assets for federal estate tax valuation purposes.[6]

1. Sole Proprietorship

A sole proprietorship is a business owned by a single individual. A business conducted by a sole proprietor has no existence apart from its owner.

Formalities. There are no legal formalities or filing requirements to form this business organization. However, it is a good idea for the sole

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[4] According to WIS. STAT. ANN. § 182.001 (2017), "Anti-Corporate Restriction," no corporation or trust may own land on which to carry on farming operations or carry on farming operations unless the corporation or trust meets three standards: 1. The number of shareholders or beneficiaries does not exceed fifteen. Lineal ancestors and descendants and aunts, uncles and first cousins thereof count collectively as one shareholder or beneficiary, but this collective authorization shall not be used for more than one family in a single corporation or trust; 2. It does not have more than two classes of shares; and 3. All shareholders or beneficiaries, other than any estate, are natural persons. These corporate restrictions do not apply to LLCs engaged in farming operations in Wisconsin, unless one of the members is a corporation.

[5] *Johann and Johanna Hess*, T.C. Memo 2003-251 (Aug. 20, 2003); *Estate of Blount v. Comm'r,* T.C. Memo. 2004-116 (May 12, 2004); *Estate of True v. Comm'r*, T.C. Memo. 2001-167 (July 6, 2001) (Caution, agreements that represent testamentary devices are ignored in setting value and in determining other discounts under the tax code).

[6] Valuation discounts under Internal Revenue Code, Section 2704, are presently in flux, making the reliability of this often-used method for intra-family transfers speculative. In 2016, the IRS announced Section 2704 had become ineffective, and new regulations were needed to address the valuation of business entities for estate, gift and generation-skipping tax purposes. Proposed regulations seek to limit the use of valuation discounts for family-owned business entities by further specifying (and limiting) what constitutes control.

proprietor to file a statement with respect to its use of a business name with the county Register of Deeds, or by filing a trade name application with the Department of Financial Institutions.[7] After a trade name is established, the sole proprietor may refer to the business as follows: Michael Landon *dba* Prairie Family Farm.

Management. Sole proprietorship is managed by the sole owner.

Liability. Operating as a sole proprietor offers no liability protection. A sole proprietor is advised to have insurance coverage to shield itself from general liability. However, insurance coverage will not cover liability stemming from debts and other financial obligations.

Transferability. Sole proprietorship ends when the sole proprietor retires or dies.

Taxation. All income is taxed to owner.

Farm Planning Application. A sole proprietor may operate with other sole proprietors by using side agreements. Put differently, two or more sole proprietorships may be formed and *linked* together with various types of contractual sharing arrangements. The farmers may own some assets jointly and some separately. Such joint arrangements can be reduced to writing by way of an enterprise or farm operating agreements, as well as by joint ownership agreements with regard to equipment. However, one must be careful to avoid creating a partnership.[8]

This concept is similar to farming together but apart, and may be a way to "test drive" the compatibility of the farm owner and farm successor in forming a joint enterprise. Positioning the farm successor as his or her own sole proprietor may serve to test the family member's business and management skills, commitment, devotion and readiness to enter into the farm business.

Caution: Though this method is perceived to be a "simple" solution, this arrangement may get complicated. Sole proprietorships are not preferred. While the test drive is good for those unsure of the business arrangement, if sole proprietors are willing to enter into several joint agreements and farm operating agreements with the farm successor, then a more comprehensive and developed plan is needed to ensure proper farm transition and continuation. The farm owner should be advised to create a separate Farm LLC.

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[7] The Department of Financial Institutions is a filing repository office for business entity organizational documents. Other states may assign this function to the Office of the Secretary of State.

[8] *See* WIS. STAT. § 178.04 (determination of whether partnership exists) (2017).

2. Partnerships

i. General Partnership

General partnerships are governed by Wisconsin Statutes, chapter 178. A general partnership is an association to two or more persons to carry on as co-owners a business for profit. Typically, two or more persons contribute assets to the business and share the management responsibility, profits, and losses.[9] All partners are agents of the partnership, and may equally bind the partnership. Partners have a fiduciary duty to one another.

Formalities. General partnerships are not filed with the Department of Financial Institutions. No written agreement is required to form a partnership; however, a partnership agreement is strongly advised, especially when real estate is involved.[10] The agreement may be recorded with the county Register of Deeds, but recordation is not required.

Management. Partnerships are managed by the partners, all of whom may separately and equally bind the partnership. Each partner is a fiduciary of the partnership.[11] A partnership agreement is advised to reduce the partnership details to writing. Such details could include the partnership's goals and purpose, the capital contribution and labor involvement, decision-making guidelines, check writing authorization, responsibilities of each partner, and termination and withdrawal provisions.

Liability. Partnerships offer no liability protection. Each partner is jointly and severally liable for everything chargeable to the partnership, and all other debts and obligations of the partnership, Wis. Stat. § 178.12, unless registered as an LLP under Wis. Stat. § 178.40.[12]

Transferability. Each partner owns a partnership interest, which is freely transferable by sale gift or inheritance. A partner may make inter vivos gifts of its partnership interest and transfer its interest from the older to the younger party, although not quite as easily or conveniently as LLC interest or corporate stock. At death, the

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[9] The receipt of a share of profits is prima facie evidence that a person is a partner, but a partnership will not be implied merely because of common ownership of property, whether or not profits are shared. *Anderson v. Anderson*, 54 Wis. 2d 666, 196 N.W.2d 727 (1972).

[10] *See Estate of Schaefer*, 72 Wis. 2d 600, 241 N.W.2d 607 (1976).

[11] WIS. STAT. § 178.18 (2016).

[12] WIS. STAT. ANN. § 178.12 (2016); WIS. STAT. § 178.40 (2016).

partnership is dissolved and the partnership is wound up, not continued, "in the absence of agreement otherwise.[13]

Taxation. General partnerships are "flow through" or "pass through" entities for income tax purposes. This means that while the general partnership must file a tax return, the partnership is not a taxpayer, and does not pay income taxes directly to the Internal Revenue Service ("I.R.S.") The taxable income channels to the individual partner and is included on the partner's income tax return. Profit or loss is distributed to partners based upon ownership percentage.

Farm Planning Application. This business planning option may be appropriate for farmers who farm on halves but are reluctant to enter into a more formal business entity, or have a limited budget. If chosen, the partnership should have a formal, written partnership agreement.

Caution: If liability protection is a concern, this is not the proper planning tool.

ii. Limited Liability Partnership ("LLP")

An LLP is a partnership that is registered as a limited liability partnership under Wis. Stat. § 178.40.[14] "A partnership that registers as a registered limited liability partnership is for all purposes the same partnership that existed before the registration and continues to be a partnership under the laws of [Wisconsin]."[15]

Formalities. The LLP must be registered as an LLP under Wis. Stat. § 178.40.[16] As a registered entity, the LLP must have a registered agent and address.

Management. All partners may participate in day-to-day operations without losing limited liability protection.

Liability. Partners of a limited liability partnership are not personally liable for obligations of the partnership. However, the limited partnership does not protect a partner from liability for the partner's own omissions, negligence, wrongful acts, misconduct or malpractice or the omissions, negligence, wrongful acts, misconduct or malpractice of any person acting under the partner's supervision and control.[17] All

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[13] *See Schaefer*, 91 Wis. 2d at 283; *Klug Farm P'ship*, No. 99-50046-12 (U.S. Bankr. W.D. Wisc. May 27, 1999) ("[P]artnership act may recognize some ability to continue the business after the death or retirement of one partner.").

[14] WIS. STAT. ANN. § 178.40 (2016).

[15] WIS. STAT. § 178.41 (2016).

[16] WIS. STAT. § 178.40 (2016).

[17] WIS. STAT. ANN. § 178.12 (2016).

partners in a limited liability partnership have limited liability—even if they participate in management.

Transferability. Same as general partnerships.

Taxation. Like the general partnership, the LLP is a pass through entity, and taxation passes through to its partners. Each partner needs to report his or her share of the company's income or loss.

Farm Planning Application. Essentially the same as general partnerships.

iii. Limited Partnerships

Limited partnerships ("LP") are governed by Wisconsin Statutes, chapter 179, the Uniform Limited Partnership Act[18]. Limited partnerships must have at least two partners. One partner must be a general partner with unlimited personal liability for the debts and obligations of the partnership. The remaining partners may be limited partners.

Formalities. A LP may be formed only by filing a "Certificate of limited partnership" with the Department of Financial Institutions.

Management. Management of a limited partnership is vested in the general partner or partners. As mentioned below, LP's risk loss of liability protection if they participate in management.

Liability. The general partner is liable for the partnership obligations, even beyond the funds invested. Many general partners are corporations. A limited partners' liability is restricted to their contribution of capital. LP's generally are not personally liable for the debts and obligations of the entity, but they risk loss of liability protection if they participate in management.

Taxation. For income tax purposes, limited partnerships are treated like general partnerships. All partners individually report and pay taxes on the profits in proportion to their interest each year. Limited partners do not pay self-employment taxes, because they are not active in the business. The LP has been used mainly as a discounting tool for estate planning purposes. The minority discount/lack of marketability discount allows transfer of the LP to the next generation at a discounted value from what the underlying assets would have had independently.

Farm Planning Application. As mentioned above, LPs have been used as a discounting tool. The business continues in existence without

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[18] Wis. Stat. § 179.

interruption upon the death of a limited partner or upon transfer of a limited partner's interest. The LP as an estate planning tool is fading from use, especially because of the flexibility and increased use of LLCs.

3. Corporations

Corporations are governed by Wisconsin Statutes, chapter 180[19]. A corporation may have one or more shareholders. It is a separate distinct entity from its owner, and consists of Shareholders, Directors & Officers.

Formalities. Every Wisconsin corporation must file an annual report with the Wisconsin Department of Financial Institutions, and pay an annual filing fee. Corporations are required to have an annual meeting of the shareholders. Written minutes from the annual shareholders' meeting should be prepared and kept in the corporate minute book. Closely held corporations sometimes dispense with the formality of conducting an annual shareholders' meeting, and prepare a written consent resolution in lieu of the meeting. Regular meetings of the board of directors should be held in accordance with corporation's bylaws. Written minutes of the meeting should be prepared and kept in the corporate minute book. Assets should be held in the name of the corporation, and shareholders should be careful in not commingling personal assets with corporate assets.

Liability. Shareholders and directors are shielded from personal liability so long as corporate formalities are recognized.

Taxation. May elect to file as an S. Corp or a C. Corp.

An S. Corp. is a pass-through entity for taxes that cannot have different classes of stock. Shareholders of S corporations report the flow-through of income and losses on their personal tax returns and are assessed tax at their individual income tax rates. S corporations avoid double taxation on the corporate income. The corporation must submit Form 2553, Election by a Small Business Corporation.[20]

A C-Corp. offers some unique tax advantages. For example, meals and lodging for employees may be deductible, as well as fringe benefits. Fringe benefits for employees are deductible to the corporation, and are not taxable to employee. Such benefits include health and accident insurance and up to a certain amount term life

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[19] Wis. Stat. § 180.

[20] 26 U.S.C. 1361 (I.R.S. definition of S. Corp.)

insurance, and more retirement plan options. In addition, Long Term Care Insurance may be 100% tax deductible. When a business purchases a tax-qualified long-term care insurance policy on behalf of any of its employees, or their spouses and dependents, the corporation is entitled to take a 100% deduction as a business expense on the total premium paid.

The C-Corp. also has disadvantages. If the C-Corp. is profitable but not growing/acquiring new assets, profits paid to shareholders as dividends are taxed twice: income to corporation & dividend income to shareholder. Further, excess profits retained may be subject to accumulated earnings tax.

Like LP interests, corporation stock may be discounted for purposes of gift and estate tax planning.

Farm Planning Application. Allows operations to continue through generations - individuals can enter and leave without disruption. Farm owner may transfer shares of stock by sale, gift or inheritance.

A corporation may rent land from shareholders without self-employment tax on rent received. However, see *Caution* below.

Typically, the farmer is an employee of the corporation.

Caution: If the farmer is an "employee," there must be an employer-employee relationship, i.e., written employment agreement.

Operating assets go into corporation; however, land should not go into the corporation. Creating and funding the corporation is a tax-free event, however, getting out of the corporation is not a tax-free event. Most often, the land is either kept as individually titled in the name of the farmer and leased to the Corporation, or placed into an LLC and leased to the Corporation. When renting land from shareholders, there clearly must be a landlord-tenant relationship, *i.e.*, a written lease agreement.

Corporate ownership of a house eliminates exclusion of gain on sale.

4. Limited Liability Company

LLCs are governed by Wisconsin Statutes, chapter 183, the Wisconsin Limited Liability Company Law ("WLLCL"). An LLC is a distinct business entity that adopts and combines features of both partnership and corporate forms.[21] It combines elements of a partnership with that of a corporation. The LLC offers flexibility in

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[21] Joseph W. Boucher et al., LLCs and LLPs: A Wisconsin Handbook § 1.4 (rev. ed. 1999).

management, governance and taxation, while maintaining limited liability for its members.[22]

A member's ownership can be in terms of Membership Units or Membership Interests. Like a corporation, each LLC members' interest may be represented by certificate if so provided in the LLC Operating Agreement.

Formalities. LLC is effective upon filing of the Articles of Organization with the Wisconsin Department of Financial Institutions. Failure to file the annual report will cause administrative dissolution under § 183.0901(3).[23] The Articles of Organization set forth the following: that the LLC is organized under chapter 183, the name of the LLC; the street address of the registered office and the name of the registered agent at that office; whether the LLC management structure is manager-managed or member-managed; the name and address of the LLC organizers; and whether the effective date of the LLC is delayed.

The LLC must file an Annual Report each year. The LLC is not required to conduct annual meetings or keep minutes, but must keep certain written records, including copies of the LLC's tax returns, records of the LLC members, the value of each member's contributions to the LLC, records of the times at which, or the events upon which, any additional contributions are agreed to be made by each member. For purposes of farm continuation, it is advised that the LLC also hold annual meetings and keep annual minutes. *See Liability* below. While not required under statute, an Operating Agreement is strongly advised.

Management. The LLC offers considerable flexibility in how the business can be managed. Generally, a LLC may be managed by its members or by a manager or managers. Unless the articles of organization or an operating agreement provide for management by a manager or managers, the management of the LLC is vested in its members. The members of an LLC may enter into an operating agreement to vary the roles of its members, rights of its members and define how the LLC will operate.

In a member-managed LLC, all of the members (owners of the LLC business) manage the LLC by making the day-to-day business

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[22] *Id.*; *see also Decker v. Decker*, 726 N.W.2d 664 at 669, 2006 WI App 247, 298 Wis.2d 141 (Wis. App., 2006).

[23] WIS. STAT. ANN. § 183.0901(3) (2017).

decisions, subject to the terms of the operating agreement. This is similar to a general partnership.

In a manager-managed LLC, the members may appoint one or more managers to manage the LLC. The manager may be, and often is, a member, but the manager need not be a member. The managers will have the authority to set policy and run the day-to-day operations of the LLC.

Liability. A properly formed and managed LLC offers "limited" liability to its members. Generally, liability of the members is limited to their investment in the LLC, and a member or manager will not have personal liability for company debt or liabilities.

As with all rules, there are exceptions. "A member or manager may become personally liable by his or her acts or conduct other than as a member or manager."[24] Also, a member or manager will be personally liable for any LLC debt that the member or manager personally guaranteed, if the LLC cannot satisfy the debt.

A judgment creditor of a member may seek a charging order from a court to collect an unsatisfied judgment.[25] The entry of a charging order creates a judicial lien against the charged LLC membership interest. The judgment creditor steps into the shoes of the judgment debtor with regard to its rights to receive LLC distributions as an assignee. The entry of a charging order does not require the LLC to declare and pay any distributions—it simply redirects actual distributions to the judgment creditor.[26] The practitioner should plan with the members and creditors in mind, and be careful when drafting the Operating Agreement with regard to assignee rights, especially with regard to an assignee's admittance to the LLC and voting rights.

Piercing the "LLC" Veil? Common law principles of piercing the corporate veil apply to LLCs. Although many states are silent on piercing the LLC veil, in Wisconsin both the WLLCL and case law support applying piercing the corporate veil principles to LLC members. Wisconsin Statute § 183.0304(2) states that "[a] court may ignore the LLC entity under common law principles that are similar to

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[24] WIS. STAT. Ann. § 183.0304 (2017).

[25] WIS. STAT. ANN. § 183.0705 (2017) ("Rights of a Judgment Creditor").

[26] Carter G. Bishop, *LLC Charging Orders: A Jurisdictional and Governing Law Quagmire*, 12 No. 3 BUSENT 14 (October 4, 2010). This paper can be downloaded without charge from the Social Science Research Network: http://ssrn.com/abstract=1545855.

those applicable to business corporations and shareholders."[27] This section strongly suggests that the entire body of law dealing with piercing the corporate veil will apply to LLCs. Therefore members should ensure that the LLC is adequately capitalized and treated as a distinct entity. LLC assets and member assets should not be commingled—personal expenses should not be paid with LLC funds or LLC obligations paid with personal funds. In short, if the members ignore the LLC, a court may also ignore it, and impose personal liability on the members."[28]

> [T]he 'instrumentality' or 'alter ego' doctrine is applied to determine when equity requires piercing the corporate veil, and this doctrine requires proof of the following elements: (1) control and complete domination of finances, policy and business practice in respect to the transaction attacked so that the corporate entity had at the time no separate mind, will or existence of its own; (2) control used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights; and (3) control and breach of duty must proximately cause the injury or unjust loss complained of.[29]

Taxation. Contributing assets to the LLC in exchange for an ownership interest is not a taxable event so there usually are no income taxes to be paid as a result of forming the LLC. The LLC's income tax basis in assets contributed to the LLC in exchange for an interest in the LLC is the same as the member's income tax basis in the asset before the exchange. The member's income tax basis in his or her interest in the LLC is also equal to his or her basis in the asset before the exchange.

An LLC may be taxed as a Disregarded Entity (an entity disregarded as separate from its owner), Partnership, or Corporation (S-Corp. or C-Corp.). Taxation as a corporation is not automatic. Entity classification may be elected by filing Form 8832 with the I.R.S. However, if electing to be taxed as an S-Corp, the LLC should file Form 2553 instead of Form 8832. If electing taxation as an S. Corp., the LLC

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[27] WIS. STAT. ANN. § 183.0304(2) (2017).
[28] Kenneth B. Axe et al., The Wisconsin Business Advisor Series: Business Organizations 7 (2006).
[29] *NII-JII Entm't, LLC v. Troha*, No. 2006AP2204 (Wis. App., June, 13, 2007) (unpublished) (quoting *Consumer's Co-op of Walworth County v. Olsen*, 142 Wis. 2d 465, 484-85, 419 N.W.2d 211 (1988)).

cannot have different classes of interests (shares). However, the LLC may still have voting and non-voting shares.[30]

Like limited partnership interests and corporation stock, LLC membership interests may be discounted for purposes of gift and estate tax planning.

Farm Planning Application. LLC is becoming the preferred business entity for farms and small businesses alike. The LLC offers flexibility in its management structure and its tax classification options. The LLCs application and value to a comprehensive farm continuation plan depends on three variables: 1) the quality of the counseling; 2) the quality of the Operating Agreement; and 3) the farm owner(s)'s follow-through.

The most important aspect of creating a Farm LLC is quality counseling, prior to drafting the operating agreement.[31] Proper counseling requires learning about the farm (operations, land and history), the family, and their goals. The attorney must aid the farm owners in making decisions that maximize business efficiency and preserve family harmony.

As to the second variable, this outline discusses areas that should be carefully drafted into the Farm LLC Operating Agreement. As a baseline, under the WLLCL, an Operating Agreement means "an agreement in writing, if any, among all of the members as to the conduct of the business of a limited liability company and its relationships with its members."[32] Operating Agreements may, among many other functions:

> -vary the terms of the statute;
> -clearly articulate the purposes for which the Farm LLC was created,
> -set forth how the farm business will function, presently and in the absence of the farm matriarch and patriarch;
> -provide a management structure and a succession of managers (this may also be provided under the terms of the farm owners revocable living trust);
> -deal with a manager or member's disability,
> -satisfy divergent estate planning objectives of the patriarch and matriarch (upon death, the farm successor continues farm and other family members share equally *but silently* in ownership (i.e., they all get to share in proceeds if farm is sold).

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[30] For more information regarding the taxation of LLCs, see I.R.S. Publication 3402.

[31] *See Seidls' Mountain View Dairy, LLC v. Seidl*, No. 2009AP2959 (Wis. App. 2011) (interpersonal disputes caused "broad, deep, enduring and significant" damage that "led to paralyzing dysfunction of the business).

[32] Wis. Stat. Ann. § 183.0102 (2017).

-set forth what the manager may decide and what the members may decide (manipulate voting rights);
-provide a right of first refusal of membership interests for farm successor;
-restrict transferability among members.

This outline will highlight the following areas that need special attention in the Family Farm LLC operating agreement, including: (a) Business Purposes of the LLC; (b) Fiduciary Duties of Family Managers; (c) Management Structure; (d) Formalities; (e) Voting Rights of Members/Classes of Members; (f) Restrictions on Assignment, Withdraw Rights and Transfer.

i. Business Purposes of the LLC

For LLCs that will continue the farm for the benefit of multiple generations, the purposes of creating the LLC should be clearly articulated to keep the LLC manager and members in check, avoid the LLCs termination based on failure to adhere to its purpose, and minimize disagreement when the farm parents, i.e., the family mediators, are no longer present.

A carefully drafted business purpose can clarify the intent of the business to avoid conflict, as well as legitimize the business's creation for tax purposes.[33] Stating generally that the business purpose of the LLC is "to exercise all other powers necessary to, or reasonably connected with, the Company's business which may be legally exercised by LLC's under state law," alone, without more, fails to properly characterize the nature of the LLC business. Such sloppy drafting creates a fault line within the operating agreement that can shake the family and farm apart when met with family conflict. Practitioners should be mindful of the events that could give a disgruntled member, or financially strapped member cause to seek judicial dissolution. The business purpose should be drafted with this in mind.

Ask your clients, why are you creating the LLC? Is it to manage farmland for farming purposes, ensure that the family farm remains in the family, avoid family conflict, provide an order of succession, restrict the rights of non-members to acquire an interest in the LLC, etc.? This is the practitioner's opportunity to step away from form documents, and use their innate legal drafting skills. For example, is the Farm LLC created to maintain and manage farmland for farming

[33] *See Estate of Mirowski*, T.C. Memo 2008-74 (March 26, 2008).

purposes, resolve disputes privately, prevent expensive and embarrassing public litigation of private family business matters, establish an order of succession, prevent transfers of membership interests because of failed marriages, protect members from the company's creditor claims, etc. In crafting a customized business-farm purpose, the general language should be included as well. Consider adding three simple words, italicized below, to your general business purpose catch-all language:

> To exercise all other powers necessary to, or reasonably connected with, the Company's business *as described above* which may be legally exercised by limited liability companies under state law.

ii. Fiduciary Duties of Family Managers

If a manager-managed structure is chosen, the fiduciary duty language should be carefully altered to avoid fiduciary duty violations for family member managers.[34] The practitioner should define what actions would not constitute a material conflict of interest, improper personal profit, and willful misconduct. Consider inserting the following language into the Farm LLC Operating Agreement:

> CERTAIN ACTS OF SELF-DEALING WAIVED
> A Named Manager or Manager that is also a family member may, on behalf of the Company, continue the obligations of contracts, leases or agreements, or otherwise enter into contracts, leases or agreements with himself/herself or any of his/her affiliates, so long as the contract, lease or agreement does not require Additional Contributions from the Members that would otherwise be avoided if entering into a contract, lease or agreement with an unrelated person.

iii. Choosing a Management Structure

In choosing a management structure, the attorney must understand the present, mid-term and long-term goals of the farm owner. In the farm context, sometimes the farm parents wish to give the off-farm heirs an interest in the farm, while limiting the powers associated with such an interest. This is used to avoid interference with the on-farm heir as the farm's operator. If that is the overriding goal, then a manager-managed structure is ideal.

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[34] For a discussion on the duties of members, see *Gottsacker v. Monnier*, 2005 WI 69, 281 Wis.2d 361, 697 N.W.2d 436) (Wisconsin's first LLC case).

Since a non-member may serve as Manager, the Farm Successor could serve and be paid as the Manager, thus creating flexibility for the farm owners. This is a nice solution when the farm owners are concerned about losing control. Having the farm successor serve as manager may allow a retiring member to step away from the day-to-day operations of the farm without transferring ownership. Further, providing for successor managers in the event of incapacity or death would allow the farm operations to continue without significant interruption. Therefore, income generated from the farm could continue to be distributed to the incapacitated and non-incapacitated spouse or upon death, to the surviving spouse (if the spouse does not possess the requisite knowledge to effectively manage the farm operations). A clearly defined succession of managers ensures that the farm's continuation plans are followed to completion.

A member-managed structure is appropriate for single member LLCs (including those owned by a joint revocable living trust) or when all members are on equal footing, i.e., husband and wife, dad and son create LLC together and both are involved in day to day operations. However, in a multi-member LLC where divergent interests exist, a manager-managed structure is good for clearly defining who has authority to bind the LLC to third parties.[35] The farm owner's revocable living trust may contain adequate successor provisions by way of its successor trustee provisions.[36] If relying on the trust's successor trustee provisions, the attorney should confirm that the revocable living trust contains successor trustee provisions in the event of a trustee's incapacity and/or death. Coordination of all planning documents – business and estate planning – is absolutely necessary.

The attorney should remember that this is a contract – by accepting a membership interest, the member is bound by the terms of that contract. Therefore, if a member-managed management structure makes sense at the outset, but a manager-managed management

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[35] *Sanitary Dist. No. 4-Town of Brookfield v. City of Brookfield*, 317 Wis. 2d 532, 767 N.W.2d 316 (Wis. App. 2009) (holding that a member's oral authorization was sufficient to bind the LLC in a written document signed by one of the members).

[36] After creating the LLC, the LLC would be assigned to the revocable living trust as part of the trust funding process. If member-managed, the trustee would then manage the LLC interest on behalf the trust. Upon incapacity or death, the successor trustee provisions would control who succeeds to manage the LLC interest. If manager-managed, the operating agreement's manager provisions control, and the trustee may vote as a member.

structure makes sense upon the death or disability of the patriarch or matriarch or both, then the attorney should craft language that triggers structural changes upon the happening of certain stated events.

iv. Formalities

Members and managers should also follow the formalities of holding annual meetings and keeping minutes of those meetings. This procedure can be spelled out in the Operating Agreement to solidify the internal requirement. While meetings and minutes are not required under statute, it is a good procedure to ensure, among other useful reasons, that the (1) annual report is filed, (2) insurance contracts have been reviewed; and (3) farm continuation plan is reviewed to assess goals, next steps and coordination with estate planning). Annual meetings may also serve as leadership training for the on-farm heir, *i.e.,* the farm successor-in-training.

v. Voting Rights of Members/Classes of Members

Under Wis. Stat. § 183.0504, an operating agreement may establish at the outset, or permit for future use, different series or classes of members, managers, or limited liability company interests. Between such series or classes, the "preferences, limitations, rights, or duties, with respect to profits, losses, distributions, voting, property, or other incidents associated with the company" may all differ.[37]

In the Family Farm Example[38] provided at the end of this outline, upon the death of the farm owners, the Family Farm LLC succeeds to their five children equally, with their son serving as the successor manager under the Operating Agreement. The language of the Operating Agreement gives members the right to vote on very limited matters if a "named manager" is serving as the manager. Named managers include the patriarch, matriarch and the farm successor child. By limiting the voting rights of the members, the farm successor can still manage the farm for its farming purposes without the input of those who are not actively engaged in farming. The voting restrictions are in effect so long as a named manager manages the farm and the LLC is being farmed.

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[37] WIS. STAT. ANN. § 183.0504 (2017).

[38] See infra page 47.

vi. Restrictions on Assignment, Withdraw Rights and Transfer

The Farm LLC Operating Agreement should fully address the transfer rights and withdraw rights of members to avoid the disruption of farm business.

A desirable estate-planning feature of the LLC is the ease of property transfer while maintaining control of the business. Transferring property involves transferring of interests rather than property items. Often parents want to transfer part of their property to the farming children or other heirs without giving up control over the business.[39] With a LLC, parents can transfer a substantial amount of the business ownership in the form of shares or interests, or as little as one unit or percentage can be sold or given away at a time making an interest in the business easily transferrable. Control can be maintained in two different ways: Member-Managed, as long as they retain 51 percent or more of the interest, they retain control of the business; or Manager-Managed, with the parents serving as managers.

By default, § 183.0704(1) permits assignment of LLC interests in whole or in part.[40] Until the assignee becomes a member, the assignor retains its rights as a member. For an assignee to become a member, the members must unanimously vote.

Allowing a member to freely assign its interest may take the family out of family farm. The operating agreement should include express provisions concerning the assignability of interests and the rights of an assignee to become a substitute member. Other techniques include (1) drafting a right of first refusal into the operating agreement for the LLC or other members upon assignment, withdrawal or other transfer; (2) allow certain "Permitted Transferees," as defined under the Operating Agreement, to become substitute members, not mere assignees, upon notice to the LLC Members or Manager, or upon simple majority vote. Permitted Transferees can be limited to lineal descendants, spouses, specific individuals, trusts created by a member for the benefit of the member and the member's descendants.

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[39] *See Hackl v. Comm'r*, 118 T.C. Memo 279 (2002), appeal docketed, Nos. 02-3093, 02-3094 (7th Cir. 2002) (operating agreement's transfer restrictions meant that the interests were without immediate value to the donees and therefore failed to qualify for the gift tax exclusion).

[40] WIS. STAT. ANN. § 183.0704(1)(2017).

Under § 183.0802, a member may withdraw and dissociate from an LLC.[41] Upon such dissociation, the member is entitled to "complete redemption of the fair value of the member's interest . . . based on the member's right to share in distributions from the limited liability company" under § 183.0604.[42]

If the member acquired the interest for little or no consideration, i.e., inheritance, the Operating Agreement can alter a member's withdraw rights. Consider inserting the following language into the operating agreement:

> No Member may withdraw from the Company or receive a return of any contributions to the Company until the Company is terminated and its affairs. wound up according to the WLLCL and this Agreement.

5. Multiple Entities

Determining whether multiple entity planning is an option, the current farming operations should be defined and the farmland should be separated. As discussed under the section of this outline entitled "Planning for a Gradual Transfer within the Family" separating the operations out into a separate entity may assist with the transfer of at least a portion of the farm. For an actual example of multiple-entity planning with a family farm see the FAMILY FARM EXAMPLE at the end of this outline.

6. Entity Comparison

Classes of Ownership. Flexibility allows an LLC to establish different classes of ownership interests, different priorities within classes of interests, special allocations of income and losses, and any other specific arrangements that members agree on. S corporations are allowed to have only one class of stock, which eliminates any flexibility in creating financial and management relationships among the owners. That said, an S. Corp. may still have stock with different voting rights.

Taxation. An LLC can be taxed as a sole proprietorship, partnership, S-Corp or C-Corp. The other entities are limited to their state law creation. LLCs avoid double taxation.

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41 WIS. STAT. ANN. § 183.0802 (2017).
42 WIS. STAT. ANN. § 183.0604 (2017).

Liability. LPs, LLCs and Corporations share *like* liability protection. However, the flexibility of the LLC and lack of formalities often causes a sense of "unlimited" liability, which simply doesn't exist. Further, case law is less robust regarding LLCs than corporations. With regard to an LP, at least one partner will be liable, the general partner. Some practitioners have established LPs with a corporation serving as the general partner. However this is an overly complicated structure when a less restrictive and cumbersome planning tool exists, i.e., the LLC.

Conclusion. If organizing an entity is the right choice in planning your clients' farm transition plan, then the LLC is this attorney's recommendation. Wisconsin places no restrictions on farms being organized as LLCs like some states.

7. Entity Conversions: Why and When

As a threshold matter, entity conversion under state law must be differentiated from tax conversions. For example, if a client with an LLC calls and says they need to convert their LLC to an S. Corp., this involves a tax conversion not an entity conversion. However, if the client called wanting to convert its corporation to an LLC, they are referring to an entity conversion under state law. Below I discuss some of the common conversions, how they are accomplished and some considerations.

i. Corporation to LLC – Entity Conversion

A business entity may convert to an LLC if it satisfies the requirements of Chapter 183 and if the conversion is permitted under the laws of the jurisdiction that governs the business entity. Wisconsin Statutes § 180.1161 governs the conversion of a Corporation to an LLC.[43]

Under state law, converting a corporation to an LLC, a Plan of Conversion must be submitted and approved by the corporation's Board of Directors and Shareholders (with 20 days' notice) and the LLC's members (with 10 days' notice). The LLC Operating Agreement may alter this requirement, and the members may waive

[43] WIS. STAT. ANN. § 180.1161 (2016).

this requirement. A plan of conversion must satisfy the requirements of a plan of merger under § 180.1103 (Plan of Merger).[44]

This type of conversion is not without significant tax consequences. The I.R.S. will treat any conversion as a liquidation of the corporation for federal income tax purposes. Liquidation triggers recognition of gain or loss for both the corporation and its shareholders. Therefore, if the assets of the corporation have increased in value during corporation's existence, the increase will be taxable to the shareholders - most likely as capital gains, making the tax cost of liquidation prohibitive.

Each situation must be analyzed to determine feasibility. Assuming that creditors are agreeable, the tax cost of liquidation must be weighed against the benefits from conversion to an LLC.

Although a highly complex area of law, the practitioner may also consider a tax-free organization. Generally, reorganization provisions of the Code include §§ 354, 355, and 368.[45] The Code allows tax-free treatment only where the corporation has continued its old business without distributing cash or other assets to the shareholders, and there has not been a sufficient change in the economic circumstances of the corporation and its shareholders to justify imposing an income tax.

Section 368(a)(1)(F) provides that the term "reorganization" means a mere change in identity, form, or place of organization of one corporation, however effected.[46] The merger of an S-Corp. into an LLC under state law and the LLC's election to be treated as an association taxable as a corporation for federal tax purposes (in effect on the date of the proposed transaction) qualifies as a reorganization under § 368(a)(1)(F).[47] When an S corporation merges into a newly formed corporation in a transaction qualifying as a reorganization under § 368(a)(1)(F), and the newly formed surviving corporation also meets the requirements of an S corporation, the reorganization does not terminate the S election.[48] The merger would provide that the

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[44] WIS. STAT. ANN. § 180.1103 (2017).
[45] WIS. STAT. §§ 354, 355, AND 368.
[46] WIS. STAT. § 368(A)(1)(F).
[47] I.R.C § 368(a)(1)(A)(2017) (The LLC first files an I.R.S. form 2553 making an election to be taxed under subchapter S, then the entities can do a statutory merger that can be federal income tax free under Section 368(a)(1)(A) of the Internal Revenue Code).
[48] Rev. Rul. 64-250, 1964-2 C.B. 333.

corporation would die and the LLC would be the surviving entity.[49] The surviving corporation will continue to use the tax identification number of the pre-reorg corporation.[50] The "surviving corporation" refers to the tax status of the surviving entity, and therefore, may be an LLC taxed as an S-Corp.[51] With such reorganization, the corporation will not recognize any gain or loss on the exchange, and the surviving LLC's basis in the assets will be the same as the corporation's prior to the reorganization.[52]

Other ways of doing a tax-free reorganization are laid out in Section 368(a)(1).[53]

ii. LLC to Corporation – Tax Conversion

Conversion of LLC to other entity is governed under § 183.1207. However, since an LLC may be taxed as a corporation, entity conversion under state law is unnecessary. However, the LLC Operating Agreement should include provisions authorizing the change in tax status.

iii. LLC to Partnership – Tax Conversion

Since an LLC can be taxed as a partnership, there is no need under Wisconsin law to convert the LLC to a partnership. In fact, such a state law entity conversion would result in personal liability for the members, as the limited liability shield would be lifted.

iv. Partnership to LLC – Entity Conversion

A conversion from a general or LP to an LLC has no income tax consequences if there are no changes in ownership percentages and the LLC is taxed as a partnership. The LLC continues to file a partnership income tax return as it did before the conversion and each member will

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[49] I.R.S. Priv. Ltr. Rul. 200622025 (merger of an S-Corp. into an LLC with the LLC surviving the merger).
[50] Rev. Rul. 73-526, 1973-2 C.B. 404.
[51] I.R.S. Priv. Ltr. Rul. 200622025 (June 2, 2006).
[52] *See* IRC §§ 361(a), 357(a) & 362(b); I.R.S. Priv. Ltr. Rul 200528021 (July 15, 2005); I.R.S. Priv. Ltr. Rul 200548021 (Dec. 2, 2005).
[53] *See also* Mary Meehan-Strub & Philip E. Harris, *Limited Liability Company: A Farm Business Arrangement Alternative*, Staff Paper No. 473, Univ. of Wisconsin-Madison Dept. of Ag. & Applied Economics (April 2004), http://www.aae.wisc.edu/pubs/sps/pdf/stpap473.pdf.

continue to report his or her share of the LLC income on his or her individual return.[54]

B. Creditor/Liability Protection

See the above individual business entity sections above.

C. Dissolution Planning

Family owned farms fail to address future business contingencies and have woefully inadequate agreements governing the farm operation.[55] Practitioners should counsel plan and draft with the end in mind to avoid future family conflict and minimize tax liability. As a baseline, the operating agreement can spell out what specific events will lead to dissolution.[56] If continuation is the goal, the farm parents typically desire that the on-farm heir have control over the farm operations in working the land, but also desire the land to be divided if the on-farm heir ceases to farm. If this is the goal, then the operating agreement should define what it means for the on-farm heir to "cease to farm." For example, the agreement should specify whether ceasing to farm means when the on-farm heir ceases to farm, or when the on-farm heir or manager ceases to make agriculture use of the land by leasing or otherwise. Unless the operating agreement provides differently, chapter 183 allows dissolution upon the consent of all members or upon judicial dissolution. For obvious reasons, judicial dissolution is something the farm parents would like their planning to avoid.

An LLC may be subject to judicial dissolution if any of the following is established by a court:

(i) That it is not reasonably practicable to carry on the business of the LLC. For example, what if turning a profit is the business purpose of the Farm LLC? Will members be able to sue the Manager or dissolve the LLC to develop the property, leaving the on-farm heir without land to farm, disrespecting the intent of the farm owners? This is why clearly expressing the purpose of the Farm LLC is so important.

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[54] *See also* Rev. Rul. 95-37.

[55] Steven C. Bahls, *Judicial Approaches to Resolving Dissension Among Owners of the Family Farm*, 73 NEB. L. REV. 14, 22 (1994).

[56] WIS. STAT. ANN. § 183.0901 (2017).

(ii) That the LLC is not acting in conformity with an operating agreement. In fact, a limited liability company may be dissolved if it acts contrary to its operating agreement.[57] This is why follow through by the farm owners is important. If the operating agreement is brilliantly drafted, but then completely disregarded by the farm owners, it will fail to deliver as expected, and may potentially lead to unexpected results. For example, if the operating agreement provides for annual meetings every year with corresponding written minutes, but the farm owners fail to follow their own formality, one could see how such failure could support an argument to pierce the veil.

(iii) That one of the members or managers is acting or will act in an illegal or fraudulent manner.[58]

(iv) That the LLC assets are being misapplied or wasted.

Section 183.0905 sets forth a plan of distribution at dissolution in the absence of an operating agreement and when assets remain after paying creditors.[59]

III. PLANNING FOR A GRADUAL TRANSFER WITHIN THE FAMILY

A. Farm Ownership vs. Right to Use

1. Leasing Land to Family

Farm parents may want to plan so that they receive retirement income without giving up control of the land; and losing the land's agricultural use valuation for property tax purposes. Also, a lease arrangement can serve as a "test drive" for the farm parents to evaluate whether the farm successor can "take over" the operations, without organizing a business entity and/or entering into a formal business arrangement with the farm successor.

On the other hand, leasing arrangements with family offer no clear succession plan. What if the farm operator dies and his or her spouse does not want to deal with the lease? What if both farm parents pass and the Personal Representative or Trustee wants to sell the farmland? In addition, if the farm successor also is leasing the land, they are not

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[57] *Lynch v. Ridge*, Appeal No. 02-0528 (Wis. App., 2003) (unpublished).

[58] *See Decker v. Decker*, 2006 WI App 247, 298 Wis. 2d 141, 726 N.W.2d 664 (2006) (LLP Members outrageous offer to buyout other member, coupled with the offeror's failure to close the deal or cooperate, was oppressive behavior devoid of good faith).

[59] Wis. Stat. § 183.0905 (2017).

able to build equity in the land. This would not help the farm parents in accomplishing their farm continuation goals and is more likely a short-term fix than a long-term solution.

Caution. When a retired farmer assists the successor farmer (child) with farm management issues related to the leased real estate, such assistance may expose the parents to self-employment tax or the loss of Social Security benefits. The regulations under I.R.C. § 1402 provide that farm rental income is not taxable as self-employment income unless the lease contemplates the owner's "material participation" in the production or farm management and such participation actually occurs.[60] Material participation may be defined as paying for half of the cost of producing the crop, serving as a crop consultant to the lease, taking an important part in making management decisions which substantially contribute to the success of the enterprise, working 100 hours or more over a period of 5 weeks in activities connected with crop production or any activities showing material involvement. If rental income is treated as self-employment income, the retired farmer may be required to pay self-employment tax and his or her social security benefits may be reduced if the farmer is under age 70 and certain income limits are exceeded.

If self-employment tax is to be avoided, farmers will want to avoid leases where landlord and tenant share in the cost of production and profits, and instead, utilize cash rent leases with fixed cash payments where the landlord does not participate in farm management.

For retired farmers renting farmland to neighbors, the issue is less important because material participation is unlikely.

2. Planning for a Full or Partial Outright Sale or Gift

Depending on the finances of the individuals involved, the farm structure and operations, liability risks, the desired timing of the transfer, (i.e., all during life, all at death, or a little now and a little later), and most importantly, the family dynamics, planning for the farm transfer is a process and factual, client-by-client, farm-by-farm, and family-by-family determination.

As a first step, the current farming operations should be defined and the farmland should be separated. Depending on the farm operations, certain elements of the farm are easier to sell to the farm successor. Selling shares or interests of a farm business holding equipment,

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[60] I.R.C. § 1402 (2017).

machinery, or farm produce is more easily digestible than a farm business holding highly appreciated land. If the farm owners and the on-farm heir are farming together, their current arrangement, agreements, and understandings should also be reduced to written form. Once the business is separated from the land, the attorney will be in a better position to determine how to stage the transfer.

Next, as a practical matter, the clients' financial needs relative to the farm transfer will serve as the baseline for determining what transfer strategy would make the most sense for a comfortable, but reasonable retirement. If the clients need a steady stream of income from an on-farm heir, then inheritance and capital gains issues are deprioritized. On the other hand, the on-farm heir's financial ability to follow through with the transfer will affect the choice of strategy selected as well. If the on-farm heir has the present ability to purchase something, and may need a pat on the back from dad for sake of giving credence to their "oral" understandings, then creating a separate entity for the farm machinery, crops and/or farm product may prove useful. Depending on the on-farm heir's financial ability and stage in the farming business, the farm parent could create the business entity and sale business interests over time. Alternatively, if the on-farm heir has been in the business for some time and has something to contribute, then they could form the business together.

With regard to a sale of all or a portion of the farmland, a land contract can be used, especially if traditional financing is unavailable. This is ideal when the farm owner is fully retired, and the only child is taking over the farm. The farm owner can receive a steady stream of income during the length of the land contract, and the farm successor can have a sense of permanency allowing him or her to confidently make improvements to the farm. However, if the farmland appreciation is extraordinary, and capital gains upon sale will be overly burdensome, then leasing is the better alternative. Land contracts and gifting can be used together, but the I.R.S. has been very critical of such arrangements. For example, if the farm parents forgive all of the interest of the land contract, the I.R.S. may argue that no sale was intended. This would cause the buying farm successor to have no more basis than that possessed by the parents.

If the land contract is an appropriate tool, both parties should consider how the operation of the farm affects their interests during the life of the contract. Depending on the relationship and the farm owners continued involvement in farming, the farm owners may want to make a "reservation of use" in the terms of the contract. In addition, the farm owners may want to insert provisions allowing for the inspection of the property, especially when good agricultural practices are essential to maintaining the farm's value. Moreover, if the farm owner desires some control, the contract could specify that certain conservation practices are to be followed. To ensure mutual agreement when entering into the land contract, the farm owner and farm successor should describe all improvements that may be removed by the seller, and those that are acquired by the buyer in the land contract. Language could also be included which would require written consent before making improvements to the land if that was a concern, especially if the farm owners reside on abutting land. Lastly, the land contract can also provide rules regarding assignment during the life of the land contract.

Although the legal requirements are minimal, both parties should be aware that other provisions may be included that more clearly articulate their intent and expectations.

3. Gift Planning

Given the nature of farmland in Wisconsin, i.e., highly appreciated property combined with a farm owner's relatively little basis in the property, there are severe basis issues when incorporating gifting into the farm continuation plan.

As a general rule, a person can only gift the basis they have in the property to another during their life. Assets received as a gift have the same basis in the hands of the donee as they have in the hands of the donor. To figure basis of property received as a gift, you must know its adjusted basis to the donor just before it was given to the donee, its fair market value ("FMV") at the time it was given to you, and any gift tax paid on it.

If the owner's basis in the property exceeds the FMV, the donee's basis depends on whether there is a gain or loss when the donee sells the property. The donee's basis for figuring gain is the donor's basis plus/minus any adjustments to basis while the donee held the property. As for figuring loss, the FMV of property must be used at the time the gift is made plus/minus any required basis adjustment while the donee held the property. The donee should increase their basis by all or part of any gift tax paid, depending on the date of the gift.

Once gifted, if the gift is held as business property, the basis for figuring any depreciation, depletion, or amortization deduction is the same as the donor's adjusted basis plus or minus any required adjustments to basis while the donee held the property. Therefore, the donee's basis in the property is the FMV on the date of the gift for purposes of calculating the donee's depreciation.

For example, say Dad gave forty acres with a $14,000 basis and $200,000 FMV to Son. Son's basis in the land would be $14,000. No gift tax is due because the amount of the gift qualifies as an annual exclusion gift. If Son sold the property, Son's basis would be $14,000, incurring a capital gains tax on $186,000. Alternatively, if Dad gave forty acres with a $275,000 tax basis and $200,000 FMV to Son, no gift tax would be due because of the Gift Tax Lifetime Exclusion, and Form 709 should be filed.[61] If Son sold the property, Son's basis would be $200,000 for purposes of calculating his loss, and $275,000 for purposes of calculating his gain. For more information about the federal gift tax,[62] please see the Instructions for Form 709,[63] and I.R.S. Publication 559, Survivors, Executors, and Administrators.[64]

In light of the relatively high estate tax thresholds, discussed in depth below, and the basis issues, gifting during life may not be advantageous to the farmer, at least not to the degree it has been used over the past two decades.

4. The Drawbacks of Life Estates

Using life estates in farm planning is not typically viewed as comprehensive or coordinated planning. In fact, when we see this in our offices, it is clear that the planning was not clearly thought through. Below this outline discusses a few of the drawbacks with life estates.

First, there is a loss of the exclusion for capital gains for any owner not residing on the property. Therefore, if a remainder interest is gifted or sold with a life estate retained by the original owner, upon the sale of the entire interest (Life Tenancy plus Remainderman Interest), the

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[61] Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return, IRS, https://www.irs.gov/pub/irs-pdf/f709.pdf (last visited May 12, 2017).

[62] I.R.S. Publication 950 (Revised October 2011), http://www.unclefed.com/IRS-Forms/2011/p950.pdf (last visited June 26, 2017). Unfortunately, the I.R.S. has removed this publication from its list of Forms and Publications, and therefore should only be referenced for historical purposes.

[63] Instructions for Form 709, 2016, https://www.irs.gov/pub/irs-pdf/i709.pdf (last visited June 26, 2017).

[64] I.R.S. Publication 559, Survivors, Executors, and Administrators, https://www.irs.gov/pub/irs-pdf/p559.pdf (last visited June 26, 2017).

remainderman will have to pay capital gains tax in proportion to their interest due upon the sale.[65]

Second, if the gift of a remainder interest is given during a farmer's life and with a life estate retained for the farmer, that portion of the remainder would be a gift of a future interest. Because it would be a future interest gift, it would not qualify for the annual gift tax exclusion and would eat into the donor's unified credit, i.e., the entire value of the home will be includible in the life tenant's taxable estate for estate tax purposes.[66]

Lastly, here are a few of the non-tax consequences:

> -Lack of flexibility and control for person who has the life estate;
> -The life tenants must preserve the property for the remainderman, may be liable to the remainderman for damages to the property and cannot commit waste;
> -May restrict the ability to finance the property;
> -Remainder interest is subject to attachment of donee for their creditors, divorces, death or bankruptcy;
> -Donee cannot be changed unilaterally by the Life Tenant at a later date;
> -All parties must agree to sell the property and in the event of a sale of the property during the tenant's lifetime, the remainderman will receive part of the sale proceeds and they will have no legal obligation to return any portion of it to the tenant;
> -Must wait five (5) years from the date of transfer to protect from the costs of a nursing home; and
> -If any of the remainderman die before the life tenant, it will be necessary to probate that remainderman's estate. In Wisconsin, usually, a remainder interest will go to his or her spouse, if they are married.

B. Taking "Off-Farm" Beneficiaries' Interests into Consideration

After determining the gradual transfer plan, the farm parents should communicate their intentions and plans with the off-farm heirs, in addition to the on-farm heir. If the on-farm heir is contributing equity or providing services that have value in building and growing the farm, this should be made apparent to mute any misunderstanding that the on-farm heir received a handout.

If the farm parents transfer the farm over time to the on-farm heir, the farm parents could use life insurance to balance the equities at death. This is accomplished by giving life insurance proceeds to the heirs either by direct beneficiary designation, or by designating the

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[65] I.R.C. § 1001(e)(1) (2017).
[66] I.R.C. § 2503(b)(1) (2017).

revocable living trust as the beneficiary, and designating the division of assets under the trust. This may also be helpful to flood liquidity into the trust estate upon death to ensure all estate tax liability, if any, is equally shared and can be paid without farmland liquidation.

Things to Consider. Off-farm heirs have left the farm to pursue family and educational goals, and may have received help through tuition assistance or otherwise. On the other hand, the on-farm heir, through hard-work and devotion, may have helped create and build the farm and contributed to its value without comparable compensation. The on-farm heir may be the only one to share the farm parents' goal of keeping the farm in the family. In such a situation, equal is difficult to accomplish and is actually not desired by the farm clients.

If that is not the belief of the farm parents, and fair does mean preserving substantially equal distributions upon death regardless of the gradual transfer during life, then the attorney should get a clear idea of the extent to which the gradual transfer of the farm to the on-farm heir will have on the distributions at death. Do the farm parents want to offset the on-farm heir's inheritance by a certain amount or percentage based on what stage the transfer process is in upon the farm parents' death? As mentioned in the introduction to this outline, is there a portion of the "farm" that can be sanctioned off? Again, each farm and each farm family is different. No situation will be the same – if it is, something is getting missed in the process.

In the absence of life insurance or other liquid assets available for division at death, if the off-farm heirs' interests are a sticking point for the client, then the use of LLCs, combined with trust planning may ensure that the off-farm heirs' interests are at least manageable at death.

IV. TRANSFERS UPON DEATH: KEY ESTATE ADMINISTRATION CONCERNS

In light of the recent tax law changes under The American Taxpayer Relief Act of 2012 ("ATRA"), many farmers' estate tax concerns have been significantly minimized. In 2002, the average farm consisted of 195 acres, with a per acre value of $2,272 in Wisconsin, $4,330 in Dane County and $2,897 in LaCrosse. The actual land sales in 2011 show the price per acre to be closer to $6,000 in South Central Wisconsin, which includes Dane County and surrounding counties, and $3,700 in West Central Wisconsin, which includes LaCrosse

County and surrounding counties.[67] The average cash income from farm production per farm is around $34,909, with only around a quarter of the farms making over $40,000.

The current estate tax exclusion amount is $5 million indexed for inflation, i.e., $5.49 million in 2017. In addition to the applicable exclusion amount, married couples may pass an unlimited amount of assets to one another, i.e., the Marital Deduction. In addition to the $5.49M, and the unlimited marital deduction, current estate tax law under ATRA permits portability of any unused federal estate tax exclusion to the surviving spouse. Portability is not automatic, and must be elected on the Form 706 filed by the deceased spouse's estate. Form 706 is due nine months after death. A six month extension may be filed. Portability is forfeited if the spouse fails to timely make the election.

With regard to lifetime gifts, a person may gift $5.49 million during their life. However, if a person gifts $5.49 million during their life, their applicable exclusion amount at their death will be $0. The decedent's estate will have to rely on the marital deduction and portability (if elected by filing an estate tax return, Form 706 upon the death of the first spouse).

Taking the estate tax thresholds and the Wisconsin farm together should cause planners to reprioritize and shuffle the goals of estate planning. Simply stated, the majority of farmers in this state do not have 800 acres of land valued at the highest value of $6,000. The estate planner should focus the counseling on minimizing capital gains upon sale, retirement income, farm management, and the minimization of family conflict, as well as liability and asset protection.

A. General Estate Planning Solutions that Accomplish Estate Tax Planning Goal

Below I have outlined a few common estate-planning strategies. Each comprehensive plan is composed of a number of different components. The estate planner should evaluate which combination of components will best serve their farm clients' needs and goals.

An All-To-Spouse Plan. If married, a spouse may transfer an unlimited amount of assets to their spouse estate tax free. This strategy utilizes the estate tax unlimited marital deduction, as well as ensures

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[67] http://www.nass.usda.gov/Statistics_by_State/Wisconsin/Publications/Land_Sales/index.asp.

another full step up in basis upon the death of the surviving spouse when coupled with a Marital Property Agreement. However, giving the assets to the spouse may miss valuable planning opportunities, and ultimately fail to address the family's goals. For example, what if this was a second marriage? When a spouse dies that had children prior to his or her second marriage, what is surviving spouse's interest in ensuring the first spouse's children inherit something upon the survivor's death? With second marriages, potential inequities and unintentional disinheritance is a possibility. Moreover, this solution may also fail to take advantage of potential asset protection strategies that may serve to protect the surviving spouse, as well as prevent unintentional disinheritance of the farm heirs by the survivor's remarriage. Further, depending on how the survivor's assets are position, there is a potential for a probate upon the second death.

QTIP Trust created under Revocable Living Trust.[68] A Qualified Terminable Interest Property ("QTIP") Trust (some attorneys may refer to this as a Marital Trust) takes advantage of the unlimited marital transfer tax deduction to permit a tax-free transfer of assets upon the funding of the trust. A QTIP trust is funded with assets owned by a married person who wishes to ensure not only that his or her surviving spouse is provided for during survivorship, but also wishes to control the ultimate disposition of the trust assets at the surviving spouse's later death. Therefore, the primary purpose of this trust is not avoiding transfer taxes, rather, it is to control and manage trust assets during the survivor's life, and distribute the remaining assets beneficiaries designated by the decedent.

If creating a QTIP trust, there must be enough income generating assets between the decedent spouse's individual assets and the decedent's marital property interest to fund the trust. The spouse must receive all income at least annually and be able to convert any non-income producing assets to income-generating assets. Therefore, placing real estate in the trust is not advised, especially if the real estate is non-income producing, i.e., not receiving sufficient rental payments. Like with the All-To-Spouse Plan, upon the surviving

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[68] QTIP Trusts may also be created under a Will. However, it is the opinion of this attorney that the administrative costs of creating such a trust through a probate procedure make this an unwise decision. Most, if not all of the farmers I have worked with specifically desire to avoid public awareness of their assets (i.e., keep their farm and family business private), avoid probate and minimize administrative costs. Creating trusts under wills goes against these goals.

spouse's death, any assets exceeding the survivor's federal estate tax exclusion amount will have estate tax consequences.

Create a Family Trust upon the Death of First Spouse. With a revocable living trust based plan, the family may utilize the marital deduction and the federal estate tax exclusion amount by creating a family trust in addition to creating the surviving spouse's share. The value of the property in the Family Trust will not be included in the spouse's estate and will not be subject to estate tax. Estate tax planning aside, the family trust can incorporate elements of the QTIP, such as remarriage protection, can restrict distributions of principal to spouse, as well as provide asset protection for all assets inside the trust. Unfortunately, real property placed in the family trust will not receive a step up in basis upon survivor's death.[69] However, if the spouses are close in age, this may be inconsequential when viewed with their overall estate planning goals. Also, if using a marital property agreement (discussed below), promissory notes can be issued between the survivor and the family trust to provide liquid assets to the survivor.

If the Family Trust will be funded with subchapter S stock, consider adding the language that gives the Trustee power to elect to qualify the trust as a Qualified Subchapter S Trust ("QSST") under Internal Revenue Code Section 1361(d)(3) or as an Electing Small Business Trust under Section 1361(e)(1), and the power to administer the trust in accordance with the requirements of the IRC Sections.[70]

Family Farm Trust upon Death of First Spouse or Upon Survivor's Death for Farm. Farm parents can also create a family farm trust to hold farm assets upon the death of the first spouse or the survivor. The Family Farm Trust can provide management provisions and rules that guide the survivor or the heirs in managing the farm operations as well as provide asset protection.

When placing any farm assets into trust, it is important for the estate planner to include specific agricultural, farming and ranching powers in the Trustees' Powers article of the trust so that the Trustee can

[69] If using a Family Trust, a marital property agreement should also be executed to ease administration and funding of the family trust at the first death. The marital property agreement will allow the spouses to decide what assets are individual and marital, as well as allow division of assets at death based on the aggregate value, rather than item by item.

[70] I.R.C. § 1361(d)(3) (2017) (Electing Small Business Trust under Section 1361(e)(1)).

retain, acquire, and sell any farm or ranching operation, whether as a sole proprietorship, partnership, or corporation, as well as engage in the production, harvesting, and marketing of farm and ranch products, either by operating directly or indirectly with management agencies, hired labor, tenants, or sharecroppers. Further, the trust can spell out the trustees' powers further by including provisions that the trustee can engage and participate in any government farm program, whether state or federally sponsored, purchase or rent machinery, equipment, livestock, poultry, feed, and seed, improve and repair all farm properties; construct buildings, fences, and drainage facilities, and acquire, retain, improve, and dispose of wells, water rights, ditch rights, and priorities of any nature. Generally, the trust should at least direct that the trustee can do all things customary or desirable to operate a farm or ranch operation for the benefit of the beneficiaries, or in line with the intent of the trust (if, for example, a specific farm continuation intent is drafted into the trust).

B. Estate Tax Provisions Unique to Family Farms

1. Special Use Valuation Under § 2032A[71]

Special Use Valuation applies to certain farms operated as a family farm.[72] As discussed above, when an individual dies the value of his or her assets, i.e., his or her gross estate, is determined based on the assets' fair market value as of that date. For farms, the value of his or her farm at its fair market value regardless of whether the farm will be sold or not is quite high causing taxable issues for very illiquid estates. With this in mind, Internal Revenue Code, Section 2032A allows an inflation-adjusted reduction in the value of the real property (land and buildings) used in a family-owned.[73] For an estate of a decedent dying in calendar year 2017, the inflation adjusted amount is $1,120,000.

In order to make an election under § 2032A, the following requirements must be met:

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[71] As applied to farms, 2032A is rooted in farm preservation. See I.R.S. Publication 551, Valuation of Farm or Closely Held Business at Death, for helpful analysis.
[72] Bahls, *supra* note 26 (citing H.R. Rep. No. 1380, 94th Cong., 2d Sess. 21-22 (1976)).
[73] I.R.C. § 2032A (2017).

> -Decedent must be a US citizen or resident at the time of death.[74]
> -The relevant real property (real property for which the special use valuation is sought) muse be located in the US and held by the decedent or by a closely-held family business in which the decedent had an interest.
> -Real estate must pass to a qualified heir.[75]
> -Decedent must have been using the property for farming purposes (or any other trade or business) at the time of death. If the decedent was retired or disabled, the decedent must have been using the property for such purposes at the time retirement or disability began, and the farm must have been taken over by a family member.[76]
> -The property must have been used for farming for five out of the eight years preceding death. The five-year period need not have been continuous.[77]
> -The value of the farming property must total twenty-five percent (25%) or more of the decedent's gross estate value (the value must be adjusted to reflect unpaid mortgages or other indebtedness).[78]

If the above requirements are met, the Personal Representative ("PR") may elect Special Use Valuation under § 2032A, meaning that for estate tax purposes, the PR may value the property as a "farm" rather than at its value in its highest and best use.[79] The valuation is computed as of the date of death, unless an alternative valuation is elected under I.R.C. § 7532 (valuation six months after death).[80] Therefore, if the value of an individual farmer's farm is $6,610,000, and assuming for illustration purposes the farmer had no other assets and is unmarried, that the farmer's estate will pay zero estate taxes. As explained above, this result would occur because even though the qualifying family farm exceeded the estate tax threshold of $5,490,000 by $1,120,000, the estate made the election under § 2032A, and received the $1,120,000 reduction.

If farm property is indirectly held, an arrangement must exist calling for material participation in the business by the decedent owner or family member.[81] Holding an office in which certain material

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74 I.R.C. § 2032A(a)(1)(A) (2017).
75 I.R.C. § 2032A(e)(1)-(2) (2017).
76 I.R.C. § 2032A(b)(1)-(2) (2017).
77 I.R.C. § 2032A(b)(1)(C) (2017).
78 I.R.C. § 2032A(b)(1)(B) (2017).
79 I.R.C. § 2032A (2017).
80 I.R.C. § 7532 (2017).
81 I.R.C. § 469(H)(1)(2017); *Passive Activity Loss Audit Technique Guide (ATG), Chapter 4: Material Participation*, IRS (last visited May 15, 2017), https://www.irs.gov/pub/irs-mssp/pal.pdf.

functions are performed may be enough for material participation. However, merely receiving a salary, or being listed as a partner and sharing in the profits and losses does not constitute material participation. Further, passively collecting rents, salaries, draws, dividends, or other income from the farm or other business is not material participation.

There are various consequences of the § 2032A election, which should be carefully weighed.

i. Qualified Heir Must Continue to Farm for 10 years or Face Personal Liability

One of your heirs has to continue to farm, or be materially engaged in the farming operation for ten additional years to avoid recapture of any estate tax reduction. If the qualifying farmland is taken out of production or sold to a non-family member during that ten-year period, any estate tax reduction is recaptured, and the qualified heir is personally liable for the estate tax. This "tax lien" on the farmland may hinder the heir's ability to seek financing down the road, as lenders might be uncomfortable with the potential tax lien.[82]

ii. Basis Step-Up at Sale

If the personal representative or trustee chooses this method of valuation for estate tax purposes, that value is the basis of the property for the heirs. Therefore, if the § 2032A special use value election is made, the land does not receive a total step-up in income tax basis. The basis is only adjusted to the alternative special use value. This could have adverse income tax consequences later for the heir(s) if the land is sold after the ten-year period.

However, if within ten years after the death of the decedent, the property is transferred to a person who is not a family member or the property stops being used as a farm, a recapture occurs. Upon such an event, the heir can make an election to increase the basis in special-use valuation property. To increase the basis in the property, an irrevocable election must be made and interest paid on the additional estate tax figured from nine months after the decedent's death until the

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[82] I.R.C. § 6324B (2017) (imposes a lien on the special use real estate for the duration of the eight-year and ten-year periods. This special lien is in the amount of the adjusted tax difference attributable to the real-estate interest).

date of the payment of the additional estate tax. If these requirements are met, the basis in the property is increased to its FMV on the date of the decedent's death or the alternate valuation date. The increase in the basis is considered to have occurred immediately before the event that results in the additional estate tax.

For those who are convinced that their client will never have an estate tax problem, serious consideration should be given to disqualifying for valuation discounts, in favor of maximizing the valuation of the land. However, a key component to successful farm estate and business plans is flexibility. Such flexibility is achieved by giving personal representatives, trustees and farm heirs the ability to make tax calls upon death, at a time when the facts are known.

For example, consider inserting the following language in the powers provision:

> QUALIFIED REAL PROPERTY VALUATION
> The Trustee has the power to amend the terms of a trust holding *qualified real property* as defined in Internal Revenue Code Section 2032A, in order to permit the qualified real property to qualify for special use valuation permitted under Section 2032A, even if the amendment changes beneficial interests and that directs the segregation of trust property into more than one trust.

2. Installment Payments of the Estate Tax Under § 6166

When property is used by a closely-held business, as it must be to qualify for special use valuation under § 2032A, the estate tax attributable to that property may also qualify for extended-payment treatment under the rules of I.R.C § 6166.[83] A special lien is available under I.R.C § 6324A to secure the § 6166 installment payments and thus release the executor from liability.[84]

Section 6166 allows the deferment of estate tax payments up to nearly 15 years after the death of the decedent where the estate contains a qualifying interest in a closely-held business, including farms.[85] Those seeking this installment plan must apply for an extension of time to pay taxes over ten years under § 6166. Once filed, payment commences in the fifth year, and then payments are spread over a ten-year period.

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[83] I.R.C § 6166 (2017).
[84] I.R.C § 6324A (2017).
[85] *Supra* note 83.

To qualify, business's value must exceed thirty-five percent of the gross taxable estate. The statute also provides a special two percent interest rate on approximately the first $1 million of deferred unpaid estate tax. Farm residences and related improvements receive special consideration for purposes of determining whether an estate meets the thirty-five percent test of § 6166. The interest in a closely-held business "which is in the business of farming" includes any interest in residential buildings and related improvements on the farm which are occupied on a regular basis by the owner or lessee of the farm, or by their employees, for purposes of operating or maintaining the farm.

For an estate of a decedent dying in calendar year 2016, the dollar amount used to determine the "two-percent portion" (for purposes of calculating interest under § 6601(j)) of the estate tax extended as provided in § 6166 is $1,480,000.[86]

3. Discounts[87]

i. Sale Discounts

Sale restrictions in buy-sell agreements or buy-sell provisions under an operating agreement between the owners of the business entity greatly influence the marketability discount. [88] However, I.R.C. § 2703 will nullify the marketability discount where the restrictions go overboard.[89] Section 2703 provides that any restrictions on the sale and use of property, including interests in an LLC, are ignored for estate and gift tax valuation purposes unless: (1) it is a bona fide business arrangement; (2) it is not a device to transfer such property to members of the decedent's family for less than full and adequate consideration in money or money's worth; and (3) its terms are

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[86] I.R.C. § 6601(j) (2017).

[87] Other notable discount tax court cases not referenced in this outline include: *Smith v. Comm'r*, T.C. Memo 1999-368 (Nov. 5, 1999) (tax Court allowed a 76 percent combined minority and marketability discount on the decedent's one-third stock interest in a corporation containing 1,300 acres of farmland in Ohio. The combined 76 percent discount consisted of a 64 percent minority discount and a 35 percent marketability discount); *Estate of Mirowski*, T.C. Memo. 2008-74 (2008); *Estate of Piper v. Comm'r.*, 72 T.C. 1062 (1979); *Gow v. Comm'r.*, T.C. Memo. 2000-93, affd. 19 Fed. Appx. 90 (4th Cir. 2001); *Gallum v. Comm'r.*, T.C. Memo. 1974-284; *Litchfield v. Comm'r*, T.C. Memo 2009-21.

[88] *See* Treas. Reg. § 25.2703-1(a)(3) (2017) (sale restrictions may be contained in a partnership agreement, operating agreement, or buy-sell agreement).

[89] I.R.C. § 2703 (2017).

comparable to similar arrangements entered into by persons in an arms' length transaction.[90]

Section § 2703 applies to operating agreements and buy-sell agreements.

ii. Minority and Lack of Marketability Discount of Farmland

Minority and Marketability Discounts are two principles used to describe valuation discounts particular to closely held businesses.[91] The two principles often overlap, especially since minority interests in closely held businesses are naturally less marketable than controlling interests.

Minority discounts center on a minority interest's lack of control over the business. The lack of control element of minority interests supports a discounted valuation since a buyer will pay less for the non-controlling interest. Determining the discount is a factual determination.[92]

Marketability discounts, on the other hand, center on the attractiveness of the business interest and the difficulty of selling the interest. The marketability discount applies to gifts of majority interests (more than fifty percent interest in the company), whereas a minority discount would not apply.

In farm planning, a marketability discount has been applied where a farm consisted of non-contiguous parcels of land.[93] It should also be noted that built in capital gains are also a relevant factor in determining the discount to apply.[94]

Absorption Discount. An absorption discount is a discount in the value of real estate if the sale of such real estate within a short period of time would reduce the price for which real estate otherwise would sell.[95]

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[90] *Id.*

[91] *Moore v. Comm'r*, 1991 T.C. Memo 546. For a thorough analysis of the factors used, see *Moore v. Comm'r* cited *supra* note 41.

[92] *Estate of Berg*, 1991 T.C. Memo 279 (tax court will not consider discounts applied in other cases); *Janda v. Comm'r.*, T.C. Memo. 2001-24, N. 24 (each case must stand on its own merits).

[93] *Estate of Wildman*, 1989 T.C. Memo. 667.

[94] *Estate of Davis*, 110 T.C. Memo. 530 (1998); *Eisenberg v. Comm'r*, 155 F.3d (1998); *Estate of Jones* v. Comm'r, 116 T.C. No. 11 (2011).

[95] *Astleford v. Comm'r*, T.C. Memo 2008-128 (May 5, 2008) (flooding the local real estate market with 1,187 acres of farmland all in one year would require a price reduction of 20 percent to accomplish the sale). *Astleford* involved the application of

C. Liquidity Problem in Administering an Estate that Includes a Farm

Farmers and ranchers are typically strapped for cash given that their wealth is tied up in land and equipment. Having costly administration expenses due to probate or estate tax liability can cause the family to have to sell farmland to cover the costs. That does not have to be the case.

Farm clients should be encouraged to plan in order to minimize administrative costs, namely expenses from a costly probate.

D. Gift Tax Planning

The gift tax is a tax on the transfer of any property by one individual to another while receiving nothing, or less than full value, in return. The tax applies whether the donor intends the transfer to be a gift or not. The general rule is that any gift is a taxable gift. Examples of gifts include:

> -Outright gifts of money
> -Gift of trust-held assets
> -Rent-free use of property with no expectation of receiving anything of equal value in return.
> -Income from property with no expectation of receiving anything of equal value in return.
> -Sell something at less than its full value.
> -Give an interest-free or reduced-interest loan.

As with all general rules, there are exceptions. The following gifts generally are not taxable gifts:

> -Annual Exclusion Gifts. Gifts less than the annual exclusion for the calendar year. The Annual Exclusion amount in 2017 is $14,000, up from $13,000 in 2012. The annual exclusion amount does not count against the lifetime exemption amount.

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a multi-tiered discounts to a gift of a limited partnership interest. The taxpayer gifted an interest in a newly created limited partnership which owned a 50 percent interest in a general partnership which owned 1,187 acres of Minnesota farmland valued at $3,500 an acre. The Tax Court first applied a 20 percent "absorption" discount to the farmland owned by the general partnership, and applied a combined 30 percent minority and marketability discount to the one-half general partnership interest owned by the limited partnership. After the discounts, the farmland was reduced to $1,269 per acre with an effective discount rate of almost 64 percent.

-Educational Exclusion. Tuition expenses paid directly to an educational or to a Qualified State Tuition Program established under I.R.C. § 529 to prepay the cost of tuition[96]
-Medical Expense Gifts. Medical expenses paid directly to a medical institution for someone else under I.R.C. § 2503(e).[97]
-Spousal Gifts. The federal gift tax marital deduction allows an unlimited amount to be transferred from one spouse to the other without triggering any federal gift consequences.
-Gifts to Political Organization.
-Charitable Gifts.

If an exception does not apply, then the gift may be subject to gift taxes. The Gift Tax Lifetime Exclusion amount is $5 million indexed for inflation -- $5.49 million in 2017. Whatever portion of the Gift Tax Lifetime Exclusion used during one's lifetime is subtracted from their federal estate tax exclusion amount available at death. In making a gift that does not qualify for an exception, a gift tax return, Form 709, should be filed.[98]

Under current law Wisconsin does not impose a gift tax on gifts.

E. Disposing of Trust-Owned Farms and Ranches

Because farms are capital intensive, avoiding the potential expense and delays of probate is a concern for many clients – especially farm clients. Probate is very simple to avoid in Wisconsin through the use of *fully-funded* revocable living trusts.[99]

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[96] I.R.C. § 529 (2017).
[97] I.R.C. § 2503(e) (2017).
[98] Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return, IRS, https://www.irs.gov/pub/irs-pdf/f709.pdf (last visited May 12, 2017).
[99] The Wisconsin Marital Property Act also provides that married persons may agree that upon the death of a spouse, either or both spouses' property, including any after-acquired property, may be transferred without probate to a designated person, trust, or other entity (through the use of a "Washington Will Provision"). The "Washington Will" provision may direct that such assets be transferred to a living trust upon death. Wisconsin is the only state in the nation which permits a living trust to be funded after the Grantor's death while still avoiding probate. Relying on this strategy alone to avoid probate is not ideal. The use of Marital Property Agreements may avoid probate for all assets located in Wisconsin on the first death. However, what about the second death? Farm succession goals typically involve more than one generation. It makes no sense to drag the farm and the farmer's children through a probate process. Comprehensive planning to avoid probate on the first go around keeps farms together and avoids unnecessary administrative costs upon the death of the surviving spouse.

In disposing of trust-owned assets, the Trustee should also be mindful of its fiduciary duties, especially when the trustee will transact business personally with the trust.

Trustee's Duty of Loyalty. As a Trustee, the Trustee must act to further the interests of the trust and the beneficiaries. Trustees serve for the benefit of someone other than themselves. The Trustee should not enter a transaction that gives the Trustee an opportunity to benefit itself at the expense of the trust. As a Trustee, the fiduciary duty rules are strict and apply not only to transactions in which the Trustee would deal directly with itself, but also prohibit transactions in which the Trustee would deal with organizations, such as partnerships or corporations, in which the Trustee is personally interested. This rule applies although the transaction may be scrupulously fair and even if it is favorable to the Revocable Living Trust beneficiaries.

If any situation should arise in which there is a conflict between the Trustee's personal interests and the trust or between the trust and the interests of third parties, the Trustee should put the interests of the trust first. While, trustees of trusts that are considered a "Family Affair," will be held to a lower standard than corporate trustees who are engaged in the business of trustee services, self-dealing should be avoided if possible to avoid family conflict.[100]

For example, the Trustee should not sell trust property to itself; however, this may not be possible if the on-farm heir has a right of first refusal and/or option to purchase in the Trust. In such situations, the drafting attorney should include language that requires an independent Trustee to be appointed to carry out the sale. Also, if the ROFR or Option to Purchase is exercised, but a loan from the trust to the on-farm heir is needed, the independent Trustee could loan trust funds to avoid potential fiduciary duty issues.

Consider including the following language in the Trustee Article of the Trust:

> INDEPENDENT TRUSTEE PROVISION
> If for any reason the Trustee of any trust created under this instrument [is unwilling or unable to act with respect to any trust property or any provision of this instrument] **OR** [desires to exercise any Right of First Refusal or Option to Purchase under this instrument personally (the "deal")], the Trustee shall appoint, in writing, an attorney, CPA, professional trustee or

[100] *Matter of Trust of Sensenbrenner*, 76 Wis.2d 625, 252 NW.2d 47 (1977) (where, for example, the grantor chooses his two sons as trustees, *citing Guardianship of Bose*, 39 Wis.2d 80, 88, 158 N.W.2d 337 (1968)).

> corporate fiduciary to serve as an Independent Trustee limited to carrying out the provisions necessary to complete the deal. The Independent Trustee appointed may not be related or subordinate to any trust beneficiary within the meaning of I.R.C. § 672(c).[101]
> An Independent Trustee will exercise all fiduciary powers granted by this trust unless expressly limited elsewhere in this instrument or by the Trustee in the instrument appointing the Independent Trustee. Upon the completion of the deal requiring the appointment of the Independent Trustee, the Trustee may remove the Independent Trustee by sending written notice of the removal to the Independent Trustee. The removal becomes effective upon delivery of the notice.

In the alternative, the drafting attorney could also include a clear statement of the grantors intent in the trust agreement that clearly supports limited self-dealing by the Trustee. See the example below:

> *Mr. Farmer owns a farm. He has been operating the place for almost 50 years, but has decided to retire and have his four children run the operations. He wants to just live off the rent from the land and a percentage of the crops. He names all of his children as Trustees of his Revocable Living Trust and he does some traveling. After a few years of being retired, Mr. Farmer passes away. The children are all successor trustees of the family trust which was created to hold the farm upon Mr. Farmer's death. While the trust appoints successor trustees and places the farm into a family trust for the benefit of all of his children, the trust contains no language with regard to the trust's management of the farm.*
>
> *The children do not all have equal involvement in the farm. Andy, the oldest son, lives in another state and has nothing to do with the farming operations. Bill, Cathy, and Debbie all live in the area. Bill owns and operates land adjoining the farm. Cathy and Debbie are both married. Cathy and her husband Jim own a small farm, but would like to work more land. Debbie and her husband Mike have been helping operate the Farm for the last five years.*
>
> *Bill wants to lease some of the pastures for grazing his own cattle. Since the area he wants is unsuitable for any other purpose, the others have no problem with Bill using part of the land adjacent to his own for that purpose. Jim and Cathy want to take about one-third of the farming acreage to grow crops on. Debbie and Mike want to operate the remaining portion and have some farming and some ranching. All three children agree on who wants to do what. Of the three, Bill is the only one who is not struggling financially.*

There are several potential self-dealing problems here. If Bill pays less than the fair market value of the land on which his stocks will graze, that is self-dealing. If Jim and Cathy pay less than either fair

[101] I.R.C. § 672(c) (2017) (section defined: related or substantial party").

market value for rent, or the standard crop percentage agreement, that is self-dealing. If Debbie and Mike pay less than fair market value for rental on the place they are running, that is self-dealing. The big danger here is the three agreeing on something less.

Suppose all are willing to pay fair market value. There may still be a problem because of how the fair market value is determined. There could also be a problem if Andy does not agree with something they want to do because he is in the best position (other than the parents) to bring a suit for breach of fiduciary duty. The best thing to do here might be for none of the three to vote on any arrangement that involves any of them.

To avoid self-dealing, the estate planner could include language that provides that Trustee who is interested in a piece of trust property (Interested Trustee) should not make any decision as a Trustee regarding the disposition of that property. All transactions involving an interested trustee who is not the grantor should be at arms-length. Fair market value is the standard and if an issue comes up, the interested trustee must be able to prove the transaction was a fair market value transaction or otherwise point to specific language in the trust that provides otherwise. If the grantor intended the interested trustee to receive a discount the drafting attorney should clearly draft the terms of the purchase arrangement into the Trust.

Generally, a Trustee should avoid purchasing trust property, unless the trust specifically sets forth a method for doing so and all other Trustees agree to the purchase and the purchase price. Consider the following language to mitigate any foreseen fiduciary duty issues:

> SAMPLE LANGUAGE
> If the trust owns or acquires an interest in a business entity, whether as a shareholder, partner, general partner, sole proprietor, member, participant in a joint venture, or otherwise, the Trustee may exercise the powers and authority provided for in this Section. The powers granted in this Section are in addition to all other powers granted to my Trustee in this trust.
>
> The Trustee may act personally and independently with any business entity in which the trust has an interest, separate from any duties owed to the trust as Trustee. This includes serving and receiving compensation for services as an officer, director, general partner, manager, or any other capacity for the business entity. The Trustee may exercise any voting power for any matter, whether the voting power is held as the Trustee or independently as a stockholder, officer, director, general partner, member, manager, or other capacity of the business entity. The Trustee may independently own, purchase, and sell an interest in a business entity owned by the trust upon the appointment and approval of an Independent Trustee.

Gathering and Distribution of Trust Assets and Other Duties. Upon succeeding to the job as trustee, the Trustee has a duty to gather and possess the assets of the trust. Sometimes Trustees may have limited control over assets. For example, limited partnership interests or LLC membership interests may be held in trust but the general partner of the partnership or the LLC Manager, and not the Trustee, controls those interests. In such cases, the Trustee should exercise the control over the assets that the limited partnership or LLC allows.

The Trustee should prepare an inventory of all of the assets in the trust, including the asset values at the date of death. This is necessary to determine a new basis for these assets in order to take advantage of the "step-up" in the basis of the assets, which may minimize the taxable gain when the assets are sold. It may be advisable to obtain a written valuation of one or more of the assets. A written appraisal from an appraiser qualified in Wisconsin farmland valuation on the fair market value of any real estate in the trust is advised.

The Trustee should also review any business agreements, contracts, stock certificates, partnership agreements, etc. If the trust property includes a business interest, it will be important to document the value of this interest. To obtain this valuation we recommend hiring a qualified appraiser of business interests or a CPA who is experienced at valuing farm businesses.

If the Settlor's spouse survives him/her and they have been filing jointly, then a final joint 1040 is to be filed by the Settlor's surviving spouse. After that, the surviving spouse will file a 1040 every year until his/her own death. During the period of administration of the Trust after his/her death, until the trust assets are all distributed, a Form 1041 is to be filed for the Trust using its own tax identification number.[102] This form will cover the period from the date of death until assets are transferred from the Administrative Trust into the Family or Marital or other Trusts. If a Family Trust, Marital Trust, or Family Farm Trust is set up, a Form 1041 is to be filed every year until Survivor's death.[103] If the Family Farm Trust will continue after the survivor's death or be created upon the death of the survivor, a Form 1041 will need to be filed for every year until termination.[104]

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[102] *Form 1041, U.S. Income Tax Return for Estates and Trusts*, IRS, https://www.irs.gov/pub/irs-pdf/f1041.pdf (last visited May 12, 2017).
[103] *Id.*
[104] *Id.*

If a Special Use Election is made under § 2032A, or the estate has elected to make installment payments of the estate tax under § 6166, then the Trustee will need to comply with the I.R.S. procedures to make such elections.[105]

Upon termination of the trust, the Trustee should provide a final accounting, even if an accounting is waived under the terms of the Trust. If the Trust is to continue for the life of the beneficiaries, the Trustee should consider providing an accounting to all beneficiaries each year. However, the terms of the trust can govern this.

E. Fairness to Non-Farm Heirs

What is fair is not always equitable, and what is equitable is not always fair. What is fair and equitable largely depends on the farming family and how they define fairness.

1. Farm to On-Farm Heir & Cash to Off Farm Heirs at Death

In addition to the sample language below, please see the FAMILY FARM EXAMPLE that follows section 2. below.

> SAMPLE OPTION TO PURCHASE LANGUAGE FOR TRUST (OR WILL) UTILIZING LEGACY OFF-SET
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> *If, upon the death of the surviving Settlor, our Trust owns [property legally described on Schedule A]* ***OR*** *[FAMILY FARM, LLC] ("Farm"), we give our HEIR of Dane, Wisconsin, the option to purchase the remaining interest in the Farm held by our Trust at a price equal to [75/80/90% of] the Farm's then-fair market value [(such discount being granted in recognition of the fact that no broker would be involved in such transaction and our desire to see the Farm continued by our Daughter)]. The net fair market value of the Farm shall be determined by agreement among our Trustee and HEIR (the "parties") and be based on the [appraised value]. If the parties are unable to mutually agree on an appraiser, our Trustee shall have the right to select one appraiser, and HEIR shall have the right to select a second appraiser, and the two appraisers shall appraise the assets, and the average of the two appraised values shall be the value utilized. The purchase price may be paid in the form of an installment sale or promissory note, bearing interest at the applicable federal rate in effect under the Internal Revenue Code, which note shall provide for level amortization of the balance of principal and interest over a period of ten (10) years, fifteen (15) years, or twenty (20) years based on monthly, quarterly, or yearly payments, and will be payable in equal shares to each beneficiary trust share created under this Trust Agreement.*

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[105] I.R.C. § 2032A(2017); I.R.C. § 6166 (2017).

Our Trustee shall give written notice to HEIR within sixty (60) days of the Surviving Settlor's death concerning this option to purchase, the essential terms, and the purchase price.

If, within a reasonable time (but no longer than three months) after receiving written notice of this option from our Trustee, HEIR does not exercise such option in writing and does not complete the purchase of such property within one hundred and twenty (120) days of such exercise of this option, our Trustee shall extend this option to our surviving children in the priority of their birth order. Each surviving child shall have the option to purchase with priority given to the eldest, and so forth and so on.

In purchasing this property, any child may offset the amount or amounts that are due to him or her as specific or residual legacies under our Trust against the purchase price, thereby waiving their receipt of such legacies in consideration of such price reduction.

If, at the first anniversary of the death of the surviving Settlor, none of the above-named children have exercised this option, and completed the purchase of such property, under the terms specified, then the real estate shall be sold and the proceeds distributed under the residual provisions of our Trust. If the farm must be sold, it is our desire that our Trustee give primary consideration to those bona fide purchasers that will continue to farm our land as our family has.

2. Management of Farm LLC to On-Farm Heir & Ownership of Family Farm, LLC to All Heirs Equally at Death

Placing farmland into a limited liability company provides life and death benefits. During life, the LLC provides a limited liability shield for non-farm creditors and predators, as well as a clear management succession in the event the active farmer becomes incapacitated or disabled. At death, the LLC can be continued for the benefit of the non-farming spouse, while compensating the on-farm heir for serving as manager. Further, upon the death of all farm owners, the LLC may help satisfy the competing goals of the patriarch and matriarch (i.e., continue farm vs. treat all children equally), by passing management rights to the successor farmer and LLC ownership rights to all of the heirs equally.

As Manager, the on-farm heir will continue the farming operation, and effectively control the assets of the LLC and farming operation. By requiring unanimous consent of the members to remove or appoint the Manager, the off-farm members are severely limited. The on-farm heir will be able to lease the farmland from the LLC so long as the operating agreement alters the manager's fiduciary duties under Wis.

Stat. § 183.0402, namely, waives the duty of loyalty, thus allowing him to enter into contracts with himself.[106]

An on-farm heir's activities, although not rising to the level of a breach of fiduciary duty, may still result in oppression of the off-farm heirs. For example, when the entire farm operation is within the Farm Family LLC, including the land, farm products, and equipment, the on-farm heir may use all of the profits to invest in new machinery, buildings, land, etc. This may substantially limit or eliminate cash flow to the off-farm heir members. If this is a concern, the LLC could be limited to the leasing of farmland only. This would require the on-farm heir to develop their farm operation and lease the farmland from the LLC. Alternatively, or in addition, the operating agreement could require majority, super majority or unanimous consent of the members prior to the Manager purchasing additional land with LLC cash.

It may also be beneficial to include a Call Option in the operating agreement that is personal to the on-farm heir. The call option would allow the on-farm heir to elect to purchase for cash all of the membership interests of the LLC owned by any other member. The terms should include language specifying how the election is exercised by the on-farm heir, and how the purchase price is determined.

If creating multiple LLCs at the outset, i.e., Farmland LLC and Farm Operations LLC, the farm owners could devise the Farm Operations LLC to the on-farm heir at the death of the survivor (if not already transferred by gift or sale during life).

A FAMILY FARM EXAMPLE:

Clients' Story & Asset Details:

Clients, both 72, have been married for 50 years, and have 5 children together. The youngest son, age 40, is the on-farm heir. The father and son had already created a corporation together 7 years ago which held the farm machinery and crops. The clients have a close knit family, but realize that their "oral" understandings need to be made certain. They wanted their son to be able to continue the farm upon their death or incapacity, but knew he couldn't buy the land without sacrificing the permanent profitability of the farm. In light of their basis in the property and interests of their four other children, they knew gifting was not an option. They thought there was no way their son could

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[106] WIS. STAT. ANN. § 183.0402 (2017).

continue to farm while all of their children equally owned the farm at their death.

-Cattle (beef) and cash crop farmers.
-300 acres of farmland values @ $2M
-Land contract to on-farm heir conveying 40 acres containing the Home and Farm Buildings valued @ $250K
-50% interest in Farm, Inc. (machinery and crops) valued @ $150K.
-Personal Residence value @ 300K
-Other assets (bank accounts/CDs/IRAs) totaling $1M

They wanted guidance to accomplish the following goals:

Summary of the Clients' Goals:
Create a comprehensive estate plan that would avoid guardianship upon incapacity and probate upon death, and preserve the privacy of your family's affairs.
Minimize taxes, estate and income tax issues for heir., and unnecessary administrative costs.
Create a farm continuation plan to ensure the on-farm heir can continue to farm and support his family, while fairly and equitably distributing assets to all five children if the on-farm heir stops farming.
Protect farm from a beneficiary's divorce or creditor issue.
Facilitate family understanding of the planning now and minimize family disagreement later.

Summary of the Farm Continuation Plan

1. Estate Planning Aspects of Plan

In addition to powers of attorney for finances and health, the clients created a revocable living-trust centered estate plan with "spousal choice" disclaimer planning[107] upon the first death, and asset protected trust shares for children upon the second death. We funded all assets into the trust now, during their life, in order to facilitate efficient management of assets upon a grantor's incapacity.

If there is a disclaimer, an asset protected family trust will be created for any assets disclaimed by the trustee (the spouse if able and willing to serve). The spouse will receive all income from the family trust annually, with distributions of trust principal for "H.E.M.S."[108]

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[107] If there is no disclaimer the revocable living trust will continue for the benefit of the surviving, without probate.
[108] Health, Education, Maintenance, and Support.

Upon the surviving spouse's death, separate asset protected beneficiary trusts will be created for each child to ensure the protection of any inheritance. Once created, these separate trusts will distribute income to your children at least annually. The children will be able to receive trust principal for H.E.M.S., and may appoint an independent trustee to make discretionary distributions to ensure asset protection.

The land comprising the Family Farm will be transferred into the LLC. The trust becomes the sole member of the LLC after assignment of the membership interests by the farm parents. The operating agreement spells out the succession of managers.[109] Upon the death of both farm parents, the Trust will distribute the LLC interests to all children equally in trust. During the administration of the trust, the on-farm heir is given an Option to Purchase/Right of First Refusal to Purchase the LLC interests with any inheritance he receives, and then proportionately from each member. However, this is not required.

Given the importance of Farm, Inc. to the on-farm heir's current farm operations, the balance of the corporation's shares held by the Trust will be given to the on-farm heir as a specific distribution following the survivor's death.

2. Business Planning Aspects of Plan

The Farm LLC holding the farmland was set up as a manager-managed LLC owned by mom and dad, then assigned to the trust. Farm Inc., an S. Corp. owned by dad and son, owns farm operations, and will continue as is. The corporate shares are assigned to the trust and handled as setout under the trust at death. During the farm parents' life, the Farm LLC will lease farmland to Farm Inc. Under the LLC, the Manager has sole discretion to continue the lease agreement indefinitely, or enter into new lease agreements. Upon the death or disability of both mom and dad, the on-farm heir will succeed as manager of the Farm LLC. Under the operating agreement, self-dealing is waived for "named" managers.

To summarize, in the farm-business planning context it was important to:

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[109] Alternatively, the initial manager could have been the Trustee of the trust. In the event of incapacity, the successor trustee provisions of the trust would apply. However, here, the on-farm heir was the successor manager upon the farm parents' death, and the off-farm heir was the successor trustee upon the farm parents' death.

1. Waive any conflict of interest stemming from the lease agreement between Farm LLC and Farm Inc., regardless of whether the dad or son was serving as Manager. But only extend the waiver to family member Managers.
2. Avoid additional contributions from any future members (the off-farm heirs) in the event the lease terms were too favorable to the on-farm heir, and therefore created a deficiency where the maintenance costs and real estate taxes could not be satisfied from the rental proceeds.
3. Prohibit any Manager from selling LLC land to itself without Member approval.
4. Clearly delineate the roles, duties and rights between the manager and member to mute the non-farmer peanut gallery.
5. Ensure that the on-farm heir was not permanently shackled to the farm but could hire other professional farm managers or rent the farm if he personally wanted to retire or stop farming.
6. Ensure that the farm stayed in the family, but no unnecessarily so.
7. All other matters relevant and personal to the farm and the farm family dynamics.

SHAYNA W. BORAKOVE, ESQ.[110]

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Growing up on a Missouri Dairy Farm prepared Shayna to serve the needs of families and businesses alike. In all aspects of her practice, she values including her clients' trusted advisors in the planning process, assuring the most comprehensive plan possible. Attorney Borakove's practice is concentrated in the areas of foundational and advanced estate planning, business planning, tax planning, and asset protection, with an emphasis on estate and business succession planning for individuals, closely-held business owners, and family-owned farms. Shayna also maintains an active estate administration practice, and assists executors, fiduciaries and corporate trustees with probate and trust administration matters.

Shayna is a member of the Madison Estate Council, WealthCounsel, LLC, and the Real Property, Probate and Trust Law Section of the State Bar of Wisconsin. Shayna serves her community as a Board Member of the Middleton Endowment Board, and as a member of the Middleton Chamber of Commerce.