University of Delaware | Cooperative Extension
COLLEGE OF AGRICULTURE & NATURAL RESOURCES

Estate and Succession Planning for Delaware Farm Families

Note: This publication is intended to provide general information about legal issues and should not be construed as providing legal advice. It should not be cited or relied upon as legal authority. State and federal laws vary and no attempt is made to discuss laws of states other than Delaware. For advice about how these issues might apply to your individual situation, consult an attorney.

Introduction

The goal of passing on the farm to the next generation requires careful thought, communication, and planning. Estate and succession plans help farm families think through the transfer process. Most people do not want to think about death, however, and do not develop a succession or estate plan until it is too late. A lack of planning and communication could mean the loss of farm assets or even the end of the farm business altogether.

This fact sheet describes tools farm families can use to develop succession and estate plans. Before digging into the legal tools, families need to set goals, determine their future and present needs, develop a list of farm assets, and calculate the farm's net worth (see Maryland Fact Sheet 414: Estate Planning: Goals, Net Worth and Final Instructions). Then the family can work on a plan to achieve their goals. Succession and estate planning requires multiple steps and tools such as a writing a will or creating a business entity to transfer property ownership. Other legal tools for farm succession and estate plans include trusts, deeds, conservation easements, life insurance, and selling or giving away farm property.

While this fact sheet includes some of the tools for successful farm transitions, other tools could also be used. Each farm and family's situation is different. Farmers and their families should seek professional advice from an attorney, accountant, and/ or financial advisor. This fact sheet will help prepare you for a meeting with one or all of these professionals.

Determining Your Goals and Assets

The first step of succession and estate planning requires setting personal and family goals for the farm operation. These goals can focus on topics such as where your future income will come from or who will receive certain pieces of property. Examples of succession and estate plan goals include:

1. To ensure the farm operation is a source of income for future generations;
2. To provide retirement income for yourself and your spouse;
3. To provide an income stream for dependents such as minor children or elderly parents;
4. To distribute your assets in a fair manner between your children and grandchildren;
5. To prevent your children and other family members from fighting over the property;
6. To eliminate or reduce estate taxes; and
7. To reduce the costs of transferring your property to the next generation.

Once you set your goals, you can then begin to consider what legal tools will further these goals.

Communication with family and other possible successors is also a necessary step when setting goals. You need to have a discussion with your entire family to ensure the goals are realistic and everyone is in agreement. For example, who is willing to take over the farm? Could the farm property be sold to the highest bidder? Who will make sure the farm continues to operate if you become sick or disabled? Without a strong plan, some family members may be forced to sell a significant amount of farm property in order to buy out heirs who do not plan to stay on the farm. Asking these tough questions now can help prevent problems or family conflicts that could arise later on, regardless of what legal tools are used.

After setting goals, you can then begin to list out each piece of property you intend to pass on to the next generation. The property you list should include all real property and personal property. Your real property would be the land and anything attached to it, including your house, a barn, or a grain storage bin. Your personal property would include cars, bank accounts, stocks and bonds, livestock, and farm equipment. Once you have listed each piece of property, gather all legal documents for this property including titles, loan documents, and contracts. Gathering a complete list for your accountant or attorney will help them to determine the best legal tools for your estate and succession plans.

What Happens If There Is No Estate or Succession Plan?

If you die without any legal tools in place to transfer your property, Delaware law will decide where your property goes.[i] Your spouse will receive your entire estate if you have no children, grandchildren, etc. or parents still living. If there are children (or if no children, your parents) still living, your spouse will receive $50,000 plus one-half of the remaining estate. Your spouse will also receive a life estate interest in the estate, which allows your spouse to access and use the property, but not sell or transfer it until his or her death. If your deceased spouse has a child from a previous marriage, the estate will be split equally between you and the step-child. All other family members, such as your brothers and sisters, nieces and nephews, etc. will not receive any of the estate if your spouse, children, grandchildren, greatgrandchildren, or parents are still alive. If there are no living relatives, your estate will go to the State of Delaware.

Lack of a plan could result in family conflicts that leave the farm business in disarray. A forced sale of the farm could occur if one of your children wants to sell the farm, even if another child wanted to continue on with the farm operation. Without a plan in place, you have no say in what will happen with your farm operation after your death.

"For example, if Marge and Bill die at the same time without leaving a will, their three children, Jane, Tom, and Mark, will inherit the property equally. If both Jane and Tom want to farm the property but cannot agree on a partnership, they may end up splitting the land into parcels. In addition, they must be able to purchase Mark's share in the land. A bank may not be willing to lend Jane or Tom enough money to buy out Mark, and even if they get the loan, Jane and Tom will begin farming with a heavy debt load. Marge and Bill could have made a will leaving the land to Jane and Tom and other assets to Mark, or set up an alternative arrangement that is fair although not equal to all the children and that will help to ensure the continuity and cash flow situation of the farm." (Maryland Fact Sheet 972: Estate Planning for Maryland Farm Families.)

Calculating Your Net Worth and Estate Tax Considerations

You may have concerns that estate taxes will end up reducing your estate to the point where your family will have to sell farm property to pay for these taxes. Most farm estates, however, will not trigger estate and other death tax exclusion amounts. If your estate's net worth is significantly less than $11.2 million for 2018 (or as a married couple, $22.4 million), your estate will not pay any federal estate taxes. Delaware farmers also do not have to worry about state estate taxes beginning in 2018.[ii] Before choosing legal tools that can reduce estate taxes, you should first determine whether or not your estate will even be required to pay these taxes.

You can estimate your estate's net worth to determine if your estate will even come close to meeting the estate tax exclusion amount. Your estate's net worth is all assets and taxable gifts minus any liabilities and allowable deductions. The first step to calculating your estate's net worth is to list the fair market value of each piece of property you own. This will calculate your estate's assets; it includes any equipment, buildings, homes, livestock, money, stocks and bonds, retirement savings, the value of a life insurance policy, shares in a business entity, cars, tools, or other property you own. These assets can also include significant pieces of property you have already gifted above the annual gift tax exclusion amount. Then, calculate all of your liabilities and allowable deductions. Liabilities include any debts owed, mortgages, policy premiums, bills, charge accounts, any income and property taxes for that year, etc. Allowable deductions are funeral costs, medical costs, gifts to spouse, cost of administering your estate, and charitable deductions, among others. For more information on calculating net worth, see University of Maryland Extension Fact Sheet Number 414.

Table 1 provides an example of how to calculate your assets and taxable gifts. For example, all of Jane's assets equal $11,586,000. In 2017, when the gift tax exclusion amount was $14,000,[iii] Jane gifted her son $100,000 worth of farm equipment. The $14,000 will not be included in her estate, but the remaining $86,000 will be added to her estate's total worth.

Table 1. Calculating Your Total Worth

Assets	Amount
Land and Buildings	$9,500,000
Machinery	$500,000
Livestock	$500,000
Crop Inventory	$250,000
Feed and Supplies	$50,000
Life Insurance	$500,000
Bank Balance	$200,000
Gift to Son	$86,000
Total	$11,586,000

Then you add up all expenses and deductions, as shown in Table 2. For this example, the total for all expenses and deductions is $220,000.

Table 2. Allowable Expenses and Deductions for a Farm Estate	
Funeral Expenses	$10,000
Estate Administration Fees	$40,000
Donation to Church	$50,000
Bank Loan	$100,000
Feed Store Account	$20,000
Total	$220,000

Jane's estate's net worth total will end up being $11,586,000- $220,000 = $11,366,000. She should consult her attorney about the legal tools she can use to reduce her estate's net worth because she is slightly above the $11.2 million estate tax exclusion amount.

Two other major parts of federal estate tax law may help you calculate your estate's worth: 1) the special use valuation for farmland; and 2) the special use valuation for conservation easements. When calculating the worth of your land, see these sections below to determine whether or not they apply to your situation.

Finally, once you have determined the value of your estate by subtracting liabilities and allowable deductions from your assets and taxable gifts, check the exclusion amount to see if your estate will even come close to paying estate taxes. The estate tax exclusion amount increases each year. For 2018, if your estate is over or close to $11.2 million or $22.4 million if you are married, you may end up paying federal estate taxes. As you plan ahead, however, note that under current law, after 2025, the estate tax exclusion amount will be cut in half.[iv] Therefore, it is important to plan ahead to ensure your estate will not meet the exclusion amount if you pass away after 2025. Consult an accountant and attorney to reduce your estate tax liability.

Another relevant estate tax item farm families cannot forget: you and your spouse can double your estate tax exclusion amount. To receive your deceased spouse's unused estate tax exclusion, you must fill out an estate tax return Form 706 within a certain amount of time after their death (you can request extensions).

Special Use Valuation for Farmland Under IRC 2032A

Federal law allows farmland to be valued at a significantly lower amount for estate tax purposes. Several requirements must be met, however, for a family to receive this special use valuation for farmland:

- First, the family members who inherit the farm must be qualified heirs: a blood relative, your spouse, or the spouse of one of your blood relatives.
- Second, the qualified heir must farm the property for at least 10 years after your death. If your heirs stop farming within 10 years after your death, they will probably have to pay the estate tax, plus interest.
- Third, the qualified heir must materially participate in the farm operation. This means the heir must have some financial risk in the operation and actively participate in management decisions. Courts have ruled that a cash rent agreement does **not** qualify as material participation.
- Fourth, at least half of the estate must be farm property (land, equipment, buildings, etc.).
- Fifth, at least 25% of the estate must be real property, or farmland and the buildings attached to it.
- Sixth, the original owner or a family member must have actively worked the property for farming purposes 5 of the 8 years before the owner's death.
- Finally, the special use valuation must be elected by 9 months after the owner's death.

This special use valuation allows farmers to significantly reduce the land's worth for estate tax purposes by up to $1,120,000 (plus an additional deduction for your spouse, which doubles the reduction amount) from their gross estate in 2017. This amount increases each year, as determined by the IRS. The land "is valued by the five-year average of the county cash rent for land of this soil quality minus the applicable property taxes, then divided by an interest rate (the federal land bank loan rate). In the case where a county cash rent amount cannot be found, the IRS may use the state agricultural assessment values or comparable sales of farmland. For example, if the cash rent on average for the past five years has been $80 per acre, property taxes have been on average $20 per acre for the past five years, and the average loan rate at the federal land bank is 4.25%, then the special use valuation calculation would be as follows:

($80 - $20)/.0425 = $1,412 per acre in special land use value.” (Maryland Fact Sheet 972: Estate Planning for Maryland Farm Families.)

One concern with the special use valuation election is that the heir will not receive a step-up in the basis of the farm property. “Often the original purchase price of the farm is much lower than its actual market value, resulting in significant capital gains taxes being owed if one sells some of the land or other assets. The family can increase the basis of the farm if the farm is inherited at the current market value of the estate. If the original purchase price of the farm was $500 per acre and now the farm is worth $4,200 per acre, the family can use the new value from the estate tax calculation as the basis, avoiding the capital gain tax on the difference in the sale price and purchase price of $3,700 per acre. This stepped up basis is beneficial if the family is planning to sell the property.” (Maryland Fact Sheet 972: Estate Planning for Maryland Farm Families.) Thus, families should consider whether or not they need to elect the special use valuation, and if so, if it will be a stronger benefit than a step-up in basis.

Special Use Valuation for Conservation Easement Property

Federal law also allows a reduction in the value of land in a conservation easement by up to $500,000. For more information, see Maryland Fact Sheet: Estate Planning and Conservation Easements.

Estate and Succession Planning Tools

A number of legal tools can preserve a farm for the next generation. Typically, a will is the most common form of an estate planning tool, but there are a number of other tools that can transfer the farm business as well. A will is a single document that only transfers a person’s property when he or she dies. Other tools can help transfer property and teach the next generation how to run the farm operation while the current owner is still alive. What tools you decide to use should reflect your personal goals of not only distributing property to certain people, but also your own plans to continue on the family farm. These tools can also help prevent problems for the farm business by designating who will be in charge of the business and even your health decisions if you become ill or disabled. Some examples of these legal tools include:

1. A will;
2. Business entities, such as a limited liability company (LLC), partnership, or corporation;
3. Trusts;
4. Gifting and selling property;

5. Titling of property and deeds;

6. Life insurance;

7. Durable power of attorney, health care proxy, and living wills; and

8. Retirement planning.

Durable powers of attorney and health care proxies appoint a representative that can make decisions for a person if he or she becomes incapacitated. A living will describes the type of medical care and treatments a person would and would not like to receive. Retirement planning is an important tool for providing sufficient family income to finance intergenerational transfers.

“For example, Bill runs a farming operation, his adult son Tom works for him, and Bill’s wife has predeceased Bill. One day while working on the farm, Bill is severely injured and falls into a coma. If Bill has a durable power of attorney naming Tom as his agent, then Tom will be able to step into Bill’s shoes in the farming operation and make decisions as if he is Bill. If Bill has named Tom as his health care proxy, then Tom would be able to step in and make those medical decisions necessary to keep his dad alive. Finally, with a living will Bill would be able to specify the medical care he would like to receive or not to receive. Bill may have decided to forgo the use of a ventilator or respirator in certain situations, for example.” (Maryland Fact Sheet 972: Estate Planning for Maryland Farm Families.)

Other aspects of durable powers of attorney, health care proxies, living wills, and retirement plans will not be discussed in this fact sheet.

Wills

A will is a legal document stating who will receive your property when you die. All of your property can be transferred through a will, except for certain property-like life insurance proceeds or property you hold as a joint tenant. A person must be 18 years old or older and mentally competent to write a will. The will must be in writing and signed and dated with two witnesses present.

All property in a will must go through probate. A will must be filed with the registrar of wills, and the court will then begin to pay estate debts and distribute any remaining property. The probate process is public, and all of the estate assets become public information.

Business Entities

Farm property can be placed into a business entity, of which there are several different types. According to the 2012 Census of Agriculture, around 78% of all farms in Delaware are sole proprietorships, which are operated and owned by one person. A sole proprietorship is formed simply by entering into business activities; there is no paperwork or filing requirements. When the owner dies, the business ceases to exist. A sole proprietorship does not transfer the business property to the next generation. In contrast, several other types of business entities could be used as a succession or estate planning tool, including:

1. Partnership – when two or more people operate a business together. This type of entity can be created by a formal agreement or by simply operating a business with more than one person. Partners are liable for all business losses equally and share business profits equally unless the partnership agreement states otherwise. The partnership will cease to exist if one partner dies.

2. Limited Partnership – the same as a partnership, but providing liability protections for limited partners who provide financial support to the business but do not make any management decisions. Limited partners can only lose the amount of money they put into the business. Other partners, or general partners, can lose not only the money they put into the business, but all of their other property as well.

3. Corporation – an entity formally created through state law and filings with the appropriate state agency. A corporation is separate from its owners, protecting those owners from liability. A corporation can continue on forever, whether or not an owner dies.

4. Limited Liability Company (LLC) – an entity formed under state law which can continue on indefinitely; it has similarities to both a partnership and a corporation.

Some business entities are great succession and estate planning tools because they will continue on after the original owner's death. Farm property can be transferred to the business entity and multiple entities can even be used to create a succession plan. For example, one business entity may hold most of the farm assets and another entity may hold just the farmland. You can retain complete ownership of the entity, which holds the land, and lease that farmland to the other business entity. If a child or heir eventually gains majority ownership in the farm business entity, the farm business entity could rent the land from the entity holding the land. This way the land is still protected until you are comfortable handing over the farmland business entity.

Using a business entity as a succession and estate planning tool allows parents to gift shares of the farm business to any heir each year. This can allow parents to reduce the worth of their estate while still retaining control of the farm business.

Trusts

A trust is another tool that can be used in farm succession and estate plans. A trust transfers property from the owner, the trustor, to the trust. The trustor can create specific instructions on how the trust property is distributed. A trustee will manage the property and distribute it according to the trustor's instructions. You can appoint yourself as trustee and another individual as your successor trustee who will maintain the trust after your death. There are several different kinds of trusts. Testamentary trusts are created through a will. Living trusts are created during the trustor's lifetime. If assets are placed into an irrevocable trust, the trustor will not be able to change who receives that property or retain any rights to that property; the property will no longer be the trustor's. A revocable living trust would allow the owner to modify and change the trust instructions or even dissolve the trust at any time.

A trust may be a useful tool for your succession and estate plan but are expensive to create and maintain. A living trust is beneficial because all property in the trust avoids the probate process. An irrevocable trust might reduce your estate tax burdens. The property in the trust is also protected from your heirs' creditors.

Gifting and Selling

For 2018, an individual can give up to $15,000 a year to a recipient. Any amount beyond that will be subtracted from your estate tax exclusion amount mentioned above, and you will have to file a gift

tax return on the gift. For estates concerned about estate taxes, gifting property to your heirs each year under the annual gift tax exclusion amount can help reduce the size of your estate. For example, Jane knew her two children planned to take over the family farm operation. Jane began to gift shares under the annual gift tax exclusion amount each year. For 2018 she gave each child $15,000. These gifts will not be counted against Jane's lifetime estate tax exclusion amount. If Jane were to give each child $50,000 in 2018, however, only $15,000 of the gift to each child would not count against her total lifetime estate tax exclusion amount. In 2018, $30,000 of her $100,000 total gifts would fall under the gift tax exclusion amount. The remaining $70,000 would be subtracted from her $11.2 million estate tax exclusion amount. Now, Jane can gift only $11.13 million to others before her estate will trigger estate taxes.

Another note to bear in mind: once the property is given to another, you cannot get it back. If you still need an asset for income or other reasons, consider alternative options which will still allow you to retain ownership rights in the property.

Selling pieces of farm property slowly to the next generation is another option. Once a child or another heir is financially stable enough, they could begin slowly purchasing pieces of the farm, such as a tract of land or a combine. While you may have to pay income tax on the sale proceeds, the rate for capital gains taxes is usually lower than regular income taxes.

Titling of Property and Deeds

Farmers can also re-title their real property (the land and buildings attached to it) to transfer property to the next generation. This can be done by executing a new deed. There are ways to title your property in a deed to ensure a quick and easy transfer of the land.

One option for titling your property is through a joint tenancy, where two or more co-owners have a right to all co-owners' property rights upon the death of a co-owner. For example, if you and your spouse own property as joint tenants, when one of you passes away the property will automatically go to the other. Your children or stepchildren will have no rights to that property. The property is also automatically transferred to the surviving spouse without the need of legal assistance and documents. Even so, each joint tenant has the option to sell their percentage of the property at any time, which then destroys the joint tenancy.

Another option that may work for your succession and estate plans is a life estate deed. A life estate deed allows you to transfer your property interest to another, while still retaining most of your ownership rights to the property. If you give yourself a life estate you will still be able to live on the property and keep the income from the property. You will not be able to re-gift the property to another person, however, if you change your mind later on. You also should make sure the deed specifies what rights you have, including whether or not you have the right to still sell the property.

Life Insurance

Life insurance can also be a useful estate planning tool, providing heirs with the money to pay for any probate process, taxes, debts, and funeral costs. Life insurance can also help treat all heirs equally. For example, if one child plans to take on the farm business and the other child does not, the essential farm business assets can go to the on-farm heir and the off farm heir can receive all of the life insurance proceeds. Each heir can receive close to equal amounts of inheritance, which could help prevent future family conflicts. The proceeds will be considered part of your gross estate if you are the owner of the life insurance policy. There is no income tax on life insurance proceeds.

Consider Updates

You should reevaluate your estate and farm succession plan every couple of years. Changes may occur that could cause problems for future heirs. A child's death or the birth of a new child or grandchild could alter your goals and plans. To accomplish each goal set, you may need to change your plan. Making the necessary plans in advance will ensure you do not have to deal with decision making during what could be a stressful and grief-ridden time.

Document prepared by: Kelly Nuckolls, Extension Legal Specialist, Agriculture Law Education Initiative, University of Delaware Cooperative Extension & Department of Agricultural & Resource Economics, University of Maryland.

This fact sheet was developed from the Estate Planning for Maryland Farm Families Extension Fact Sheet authored by Lori Lynch, Paul Goeringer, and Wesley Musser.

This fact sheet was reviewed by Paul Goeringer, Extension Legal Specialist, Agricultural and Resource Economics, Agriculture Law Education Initiative, University of Maryland, & Laurie G. Wolinski Extension Educator, University of Delaware Cooperative Extension.

Publication Date: February 2018.

References

26 U.S.C. § 2010 (2012).

26 U.S.C. § 2505 (2012).

Del. Code Ann. tit. 12, §§ 201-202 (2017).

Federal Estate Taxes, U.S. Department of Agriculture, Economic Research Service. https://www.ers.usda.gov/topics/farm-economy/federal-tax-issues/federal-estate-taxes/ (updated Mar. 15, 2017).

Ferrell, Shannon L. et al., Farm Transitions, http://agecon.okstate.edu/farmtransitions/files/farm-transitions-workbook.pdf (last visited Nov. 21, 2017).

H.B. 16, 2018 Gen. Assemb., Reg. Sess. (Del. 2018), http://delcode.delaware.gov/sessionlaws/ga149/chp052.pdf.

Internal Revenue Service, Highlights of 2008 Tax Changes, Publication 553, June 2009.

Internal Revenue Service, Introduction to Estate and Gift Taxes, Publication 950, Rev. Oct. 2011.

Internal Revenue Service, "Instructions for Form 706: United States Estate (and Generation-Skipping Transfer) Tax Return," Aug. 2011.

Lynch, Lori, Paul Goeringer, and Wesley Musser. Estate Planning for Maryland Farm Families, University of Maryland Extension, 2014, https://drum.lib.umd.edu/bitstream/handle/1903/15582/FS%20972%20Estate%20Planning%20Updated%202014.pdf?sequence=1.

Rumley, Rusty W., "An Overview of Special Use Valuation Under 26 U.S.C.A. § 2032A," National Agricultural Law Center, Jan. 2011.

Tax Cuts and Jobs Act, Pub. L. No. 115-466, § 11061 (2017), https://www.congress.gov/115/crpt/hrpt466/CRPT-115hrpt466.pdf.

Goeringer, Paul, Property Ownership and Transferring are Important Features of Your Farm Succession Plan, University of Maryland Extension, 2017, https://drum.lib.umd.edu/bitstream/handle/1903/19589/FS1056%20property%20ownership.pdf?sequence=1&isAllowed=y.

Stephenson, Mary J., Estate Planning: Writing Wills in Maryland, Maryland Cooperative Extension Fact Sheet 382, 1996.

Tengel, Patricia M., Estate Planning: Goals, Net Worth, and Final Instructions, Maryland Cooperative Extension Fact Sheet 414, 1996.

---

[i] This process is known as "intestacy." Intestacy is simply defined as dying without a valid will. All states have a process for intestacy distribution of a deceased property which varies from state to state.

[ii] Delaware repealed its estate tax beginning in 2018. Before 2018, the Delaware estate tax exclusion amount was the same as the federal exclusion amount.

[iii] The gift tax exclusion amount for 2018 is $15,000.

[iv] The tax bill passed at the end of 2017 doubled the estate tax exclusion amount until 2025. Beginning in 2026, the estate tax exclusion amount will go back to the old law, reducing the exclusion amount by half.